Attenuated Democracy

Attenuated Democracy

A Critical Introduction to U.S. Government and Politics

DAVID HUBERT

Contents

Part 4: The Presidency

Part 5: The Supreme Court

Part 6: The Federal Bureaucracy

Part 7: Linkage Institutions

Part 8: Electoral Politics and Public Opinion

Part 9: Individual Political Behavior

Part 10: Civil Rights and Civil Liberties

Foreword

Attenuated Democracy is an Open Educational Resource (OER) intended for introductory U.S. government and politics courses. You may use it in its entirety or individual chapters.

Instructors adopting or reviewing this text are encouraged to record their use on this form. This helps the author to better understand this open textbook's impact.

Students who have been assigned to read *Attenuated Democracy* should start with the Introductory Letter to Students before moving on to Part 1.

Introduction: Letter to Students

"The ideological disease that cripples the United States is the belief that society does not exist beyond its commercial activity."

—Dave Masciotra (1)

Dear Students,

I hope you enjoy this free textbook on the U. S. political system. Use it well.

Why is this textbook free? Textbook prices are too high. The barriers to higher education are many—cost being a major one—and this is my own small assault on those barriers. I also like the ideal that knowledge should be free from commercialization. I'm paid enough in my day job to keep a roof over my head; I don't need to be padding my income at the expense of students. In addition, standard textbooks tend to be boring and unnecessarily academic, so I've tried to counter that with a writing style that is down-to-earth and accessible for students who may not know anything about politics. Even the research supporting this text is approachable: most of the sources are available either at a decent public library or through a simple Internet search. That was intentional. Finally, traditional textbooks contain way more material than any sane professor can cover in one semester. In this text, I focus only on content that I think every educated person should know, and I don't waste time shoving every possible concept at you.

Between you and me, we should be clear that this text has a distinct perspective on American politics. Please know that all textbooks on the subject have a perspective, but students don't often notice because the perspective is reflected in what is not covered in the text or because the authors take a subtle celebratory approach to U.S. government that echoes what students received in high school. However, some texts depart from that approach. When I was a student, I benefited greatly from Michael Parenti's text *Democracy for the Few*. I have also used William Hudson's *American Democracy in Peril* to great effect with students. Both offer a perspective like the one employed in *Attenuated Democracy*.

What is the perspective of this text? The U.S. political system suffers from endemic design flaws and is notable for the way that a small subset of Americans—whose interests often don't align with those of the vast majority of the population—wields disproportionate power. Absent organized and persistent action on the part of ordinary Americans, the system tends to serve the already powerful. That's why this text is called *Attenuated Democracy*. To attenuate something is to make it weak or thin. Democracy in America has been thin from the beginning and continues to be so despite some notable progress in ballot access for previously excluded groups. As political scientists Benjamin Page and Martin Gilens wrote, "The essence of democracy is not just having reasonably satisfactory policies; the essence of democracy is popular control of government, with each citizen having an equal voice." (1) Since this is likely to be your only college-level course on the American political system, it is important to point out the structural weaknesses of our system and the thin nature of our democracy. Doing so is educational and patriotic. Whenever you get the chance—in the voting booth, in your job, perhaps if you hold elected office—I encourage you to do something about America's attenuated democracy.

The perspective in this text represents a value judgment. I agree with political philosopher Danielle Allen when she wrote, "If we do not address the corrosion of our democracy itself, we will have lost the essence of the American experiment. Nothing else will matter." (3) The good news for you is that your grade in your course is in no way dependent on whether you agree with the textbook's perspective. The bolded terms and phrases throughout the book focus your attention on the same kinds of basic knowledge that you'd be expected to know in any U.S. government course, and hopefully your course's discussions and assignments allow you to make arguments of your own that challenge what you read in this text.

All nation-states face choices with respect to their political trajectories. The United States faces a similar choice. We want to be careful about presenting a false dilemma here, but it does appear that America's demographics and economic inequality are in conflict with its founding principles in a way that demands a resolution. The kind

of attenuated democracy we've long experienced cannot sustain itself without increasing contradictions and repression of the aspirations of ordinary Americans. That is not a path down which we want to venture. Instead, we could choose to cultivate a robust democracy that permeates our political and economic arrangements. This is a vision of a multi-racial, less economically stratified society in which the voices of ordinary Americans are heard and acted upon in national policy, in their workplaces, and in the way their communities are made safe–all while respecting minority rights and the values of liberty, justice, and equal opportunity. This is a vision of a society in which not everyone gets what they want, but in which we deliberate and act together to promote the general welfare.

One more thing. I'm saving you a pretty penny because you don't have to buy a textbook for your U. S. government course. Consider spending some of your savings by taking a loved one to lunch, or donating to a charity, or contributing to your favorite political organization that fights for policies in the public interest. Pay it forward.

David Hubert, PhD.

Associate Provost for Learning Advancement
Salt Lake Community College

References

1. Dave Masciotra, "It's Time to Reject the Gods of Commerce: America is a Society—Not an 'Economy,'" *Salon.* May 2, 2020.
2. Benjamin I. Page and Martin Gilens, *Democracy in America? What Has Gone Wrong and What We Can Do About It*. Chicago: The University of Chicago Press, 2017. Page 69.
3. Danielle Allen, "The Road FromSerfdom," *The Atlantic*. December, 2019.

Media Attributions

PART 1: THINKING LIKE A POLITICAL SCIENTIST

Chapter 1: What is Politics

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

–American Philosopher John Dewey (1)

The Definition of Politics

Political scientists study politics in its many forms. One of my professors told me that politics is everywhere except for heaven and hell and other perfect dictatorships. That may be true. If it is, it requires political scientists to cover considerable ground. However, they tend not to concern themselves with things like office politics, family politics, or student-government politics. Generally speaking, political scientists are interested in political matters of consequence at the city, state, national, or international level.

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

Who in this definition can refer to any member of a **polity**—a political organization that includes actors such as individuals, groups, corporations, unions, and politicians.

What in the definition might refer to government programs, societal resources, access to rights and privileges, or something as banal as tax breaks.

When in the definition refers to timing. Let's not forget that often the timing of a thing can be as important as the thing itself. Quoting a distinguished jurist, Martin Luther King, Jr. wrote in his *Letter from Birmingham Jail* in 1963, "Justice too long delayed is justice denied."

How is very important. Political scientists are keenly interested in the processes through which someone gets something in a polity, whether it be democratic or undemocratic, open or closed, fair or unfair; or which institutional arrangements are involved, such as constitutions, regulations, and laws; or which practices are employed, such as voting, lobbying, demonstrating, and decision making.

Lasswell's definition is a good starting point, but we want to be a bit clearer about the definition of politics that underlies the content in this text. The word we haven't yet accentuated in Lasswell's simple definition is ***gets*****,** and yet this is an important word because it implies that someone has to make a choice among competing interests, that resources or benefits have to be allocated among potential recipients. At this point, it is important to make a distinction between political issues that are **zero sum** and those that are **win-win** situations. In a zero sum situation, a benefit for a particular political actor equates to a loss for other political actors. Budgets are often a good example of this—assuming a government is unwilling to go into debt. A dollar spent on military spending or subsidizing corporate profits is a dollar that cannot be spent on medical care or developing pedestrian and bicycle infrastructure. On the other hand, many political situations are win-win in nature. If I have the right to speak freely, it does not diminish your right to also speak freely. If I can marry the consenting adult of my choice, it does not affect your marriage.

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

This is the definition we'll use in this text. It implies all that is in Lasswell's definition, but it more precisely

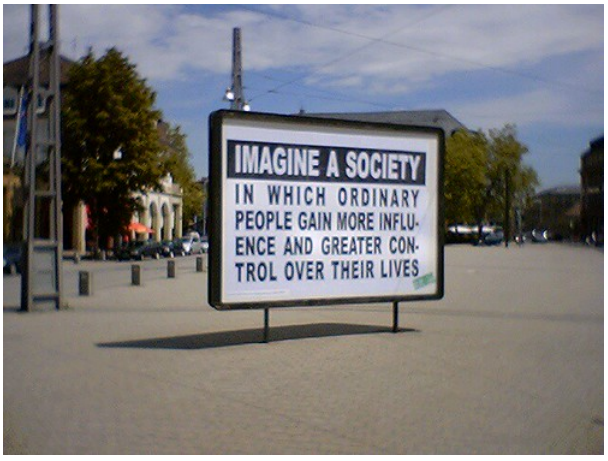
defines our analysis. For instance, we will be concerning ourselves with the commonly understood practice of authoritatively and legitimately allocating resources—i.e., of who gets what. Of course, these are loaded terms, because one person's view of authoritative and legitimate struggles over allocating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

We also want to highlight the word *struggle* in this definition. Too often, students are introduced to U. S. government as though it were some sort of frictionless machine that makes decisions rationally, with an eye toward the greatest good for the greatest number of people. The fact is that politics in the United States is often a chaotic and painful clash of entrenched interests. Sometimes, a reasonable accommodation can be reached that satisfies all, but often the solution grossly favors one set of interests over others. As we'll see—and as hinted at in John Dewey's quote above—the struggle is often an unfair one, as those with the most resources and the most persistence have clear advantages in getting what they want out of the political system.

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

Note that our definition broadens the traditional scope of politics to include the economy and society in addition to specifically governmental matters. Politics exists not only in legislative votes, Supreme Court nominations, and the voting behavior of citizens. Politics exists in other contexts as well, and these other contexts are important considerations for this course. For example, how have historical developments preconditioned certain outcomes in today's political world? Are economic and social considerations such as race, gender, and class relevant in allocating resources or accessing rights and privileges? Should people have a say in all major decisions that affect them? At work? In school? In church? If people do not have the ability to be full-fledged political actors in those settings, what impact would that have on their behavior and approach to traditional political campaigns, legislative debates, political news, and elections?

Political Imagination



Imagine a Different Society

Beyond understanding this definition of politics, you should also exercise your political imagination while you read this textbook. It takes no imagination to leave decisions to the already rich and powerful. **Political imagination** is our ability to envision new and creative ways to make the political system work for ordinary people and to ask "what if" questions: What if being informed about political issues and being registered to vote were a high school graduation requirement? What if we got rid of the nomination process and chose our candidates by lottery instead of primaries and caucuses? (By the way, selecting decision makers by lottery is an idea as old as the ancient Greeks.) What if every person were given an equal amount of money by the government each year to donate to a

political cause and that money was the only money allowed to be spent on politics? What if we required that four of the nine Supreme Court justices could *not* possess a law degree? Asking these kinds of questions gets us into two habits: 1) Envisioning a different and potentially better future, and 2) Realizing that our future is up to us. All the good things in our country like national parks, public libraries, and public transportation—and all the bad things like homelessness, suburban sprawl, and payday loan sharks—are the result of political decisions that our polity made sometime in the past. We don't have to accept our predecessors' bad political decisions. We can make new, hopefully better decisions. It just takes imagination, organization, and action.

The sociologist Matthew Desmond embraced the power of political imagination when he wrote, "Even in the darkest moments, we should allow ourselves to imagine, to marvel over, a new social contract, because doing so expresses both our discontent with, and the impermanence of, the current one." He quotes the theologian Walter Brueggemann, who wrote "We need to ask not whether it is realistic or practical or viable but whether it is *imaginable*. We need to need to ask if our consciousness and imagination have been so assaulted and coopted that we have been robbed of the courage or power to think an alternative thought." (3)

The environmentalist Rob Hopkins wrote a great book about political imagination called *From What Is to What If*. I encourage you to read it. Hopkins wrote that "we need to be able to imagine positive, feasible, delightful versions of the future before we can create them." (3) This textbook takes a cue from Hopkins' work and occasionally prompts you to ask or respond to "**What if"** questions. Your answers and questions will make great conversation topics with your classmates, family, and friends. The key to a better polity is our ability to transcend the *status quo* and to envision a system that consistently serves us all.

References

1. John Dewey, *The Later Works of John Dewey, 1925 – 1953*. Carbondale: Southern Illinois University Press,2008. Page 163.
2. Harold D. Lasswell, *Politics: Who Gets What, When, and How*. New York: McGraw-Hill, 1938.
3. Matthew Desmond, *Poverty, By America*. New York: Crown Publishers, 2023. Pages 135-36.
4. Rob Hopkins, *From What Is to What If: Unleashing the Power of Imagination to Create the Future We Want*. White River Junction, VT: Chelsea Green Publishing, 2019. Page 29.

Media Attributions

Chapter 2: The Nature of Political Power

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

–Journalist Robert Caro (1)

A common element of all definitions of politics is the struggle over resources, rights, or privileges. Lasswell's shorthand for this struggle is who gets what. This struggle requires us to understand the nature of power, which is a very important concept in political science. At the most basic level, **power** is the ability to prevail in struggles over resources, rights, or privileges. This is an important political concept because power is not evenly distributed in a polity. Some members of a polity are more likely to succeed in their struggle than are others. When some actors have a historical track record of prevailing in political struggles, it can warp the very system itself in ways that allow those actors to continue to prevail. In this text, we'll focus on three dimensions of power.

The First Dimension of Power: Formal Decision Making

The First Dimension of Power is Visible in Formal Votes.

Early twentieth century political and social theorists who analyzed power usually focused on the results of ***formal decision-making*****,** which we will call **the first dimension of power**. Political theorist **Robert Dahl** analyzed power relationships in New Haven, Connecticut, in the 1950s. In his 1961 book *Who Governs*, he argued that local elites from a variety of interests compete with each other for decision-making power and that these elites often compromised in their decision-making to reach a result. Dahl's focus was on outcomes: which decision was eventually reached on each issue? In an earlier journal article, Dahl argued that "A has power over B to the extent that he can get B to do something that he would not otherwise do." (2) Dahl's statement is a good place to start with respect to understanding the nature of power. This definition would also apply if A could prevent B from doing something that B wanted to do. For example, Congress (A) might get the president (B) to refrain from vetoing a bill that the president (B) disliked if it appeared very likely that Congress (A) would override the president's (B) veto. The advantage of the first dimension of power as an analytical tool is that it focuses on observable outcomes, making it easier for political scientists to analyze a given situation. But this advantage is also a disadvantage, for it compels us to focus on the obvious at the expense of more subtle manifestations of power.

The Second Dimension of Power: Mobilization of Bias

The second dimension of power is often called the ***mobilization of bias***. In 1962, political scientists **Peter Bachrach** and **Morton S. Baratz** made an important contribution to our understanding of the nature of power. In their "Two Faces of Power" essay, they note that power is exercised in ways other than that described by Dahl. They argue that before we can look at the results of formal decision-making, we first need to look at what they call the mobilization of bias existing in the political system being analyzed. In other words, we should look at "the dominant values, the myths, and the established political procedures and rules of the game" as well as look at "which persons or groups . . . gain from the existing bias and which . . . are handicapped by it." (3) For example, Bachrach and Baratz describe that A can obviously force B to do something, but "power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences." (4)

Mobilization of bias can occur in a myriad of different ways. Powerful participants can set the agenda of what is considered an "important" political issue, or they can structure political institutions in ways that preserve their own interests or power, or they can arrange procedural rules to make it difficult for others to challenge the system. Ensuring that a decision is not reached is another powerful manifestation of mobilization of bias because A can prevent B from obtaining what B wants through no apparent act at all. If A can stack the rules of the political game so that B's issues never get addressed, then A has won without ever having to make a decision openly. Issues that are never or only weakly raised, claims to resources that are never or only weakly made, decisions that are not reached—these are also important scenarios to consider in determining who has political power.

The Third Dimension of Power: Preference Shaping

Formal decision-making as described by Dahl is the **first dimension of power** and the *mobilization of bias* described by Bachrach and Baratz is the **second dimension of power**. Political and social theorist **Steven Lukes** put forward a **third dimension of power** that we'll call *preference shaping*. In his *Power: A Radical View*, which was originally published in 1974, Lukes acknowledges that Bachrach and Baratz contributed immensely to our understanding of power with their mobilization of bias idea, but he argues that power has yet one more dimension to it. Lukes starts with the observation that both of the first two dimensions of power are based on the assumption of conflict, where A and B have different preferences on key issues. In the first dimension of power, A's preferences win over B's preferences in a formal decision-making setting—a city council vote, an executive decision, or a court ruling. In the second dimension, the rules of the game are arranged in such a way that A's preferences either get preferential treatment in the decision-making process or B's preferences never get heard in the first place.

But what if, Lukes argues, A and B actually have the same preferences and that very fact is evidence of A's power over B? What if B has real interests and preferences that differ from A's, but B is not even conscious of their own interests because of A's power? This may occur because B has internalized A's values as their own. Perhaps A controls the media to such an extent that B assumes that what is good for A is also good for B. Maybe A has so structured the educational system that B cannot conceive of the world being any different than the *status quo*, with A on top and B on the bottom of the class structure. Maybe B has been powerless for so long, that B has internalized the idea that they don't deserve to get what they want. As Lukes asks,

"[I]s it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?" (5)

Analyzing an Issue Using the Three Dimensions of Power

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

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

What about the third dimension of power? Have preferences been shaped by elites on this issue? It's clear that if one compares political debates from the early part of the twentieth century to that of today, you can see that wealthy interests have been able to get inordinate numbers of middle class and poor people to stand up against the estate tax, because their perception has been shaped to believe it is a **"death tax"** that might affect them. This is an erroneous belief, because most people are light years away from leaving assets anywhere close to $10 million to their heirs. The false notion that the estate tax will affect ordinary people is also intentionally cultivated by elites, and gives senators cover to vote against increasing the estate tax. (6)

A Guide to Spotting the Three Dimensions of Power

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

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

Second Dimension of Power—Look for biases in the rules of the game and for procedures that favor one side over another. Do the rules of politics affect the struggle such that one side has higher hurdles to overcome? Look for people or groups whose stories are told by others, for those stories tend to be self-serving. The novelist Chimamanda Adichie says that "power is the ability not just to tell the story of another person, but to make it the definitive story of that person."(7) Look for situations where one actor gets to tell the story of another actor. Look also for societal values and myths, the existence of which stacks the political deck in favor of particular interests

Third Dimension of Power—Look for people who have had the wool pulled over their eyes, who are apparently acting against their own interests, or who take on the viewpoint of others. Look for people who possess resources and access to media or educational tools with which to manipulate attitudes and

opinions. Are they able to use those resources or that access to shape the political preferences of other actors in the polity?

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

References

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

2. Robert A. Dahl, "The Concept of Power," *Behavioral Science*2, 1957. 201-15; quoted in Patrick Bernhagen, "Power: Making Sense of an Elusive Concept," an unpublished manuscript. March 2002.

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

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

5. Steven Lukes, *Power: A Radical View*. 2nd Edition. Ebbw Vale, Wales: Palgrave Macmillan. 2005. Page 28.

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

7. Chimamanda Adichie, "The Danger of a Single Story," TED Global. July 2009.

Media Attributions

- Committee Voting © The Lutheran World Federation is licensed under a CC BY-NC-ND (Attribution NonCommercial NoDerivatives) license

Chapter 3: Who Has Power in U. S. Politics?

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

— Martin Gilens and Benjamin Page (1)

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

–Matt Taibbi (2)

Theories About American Politics

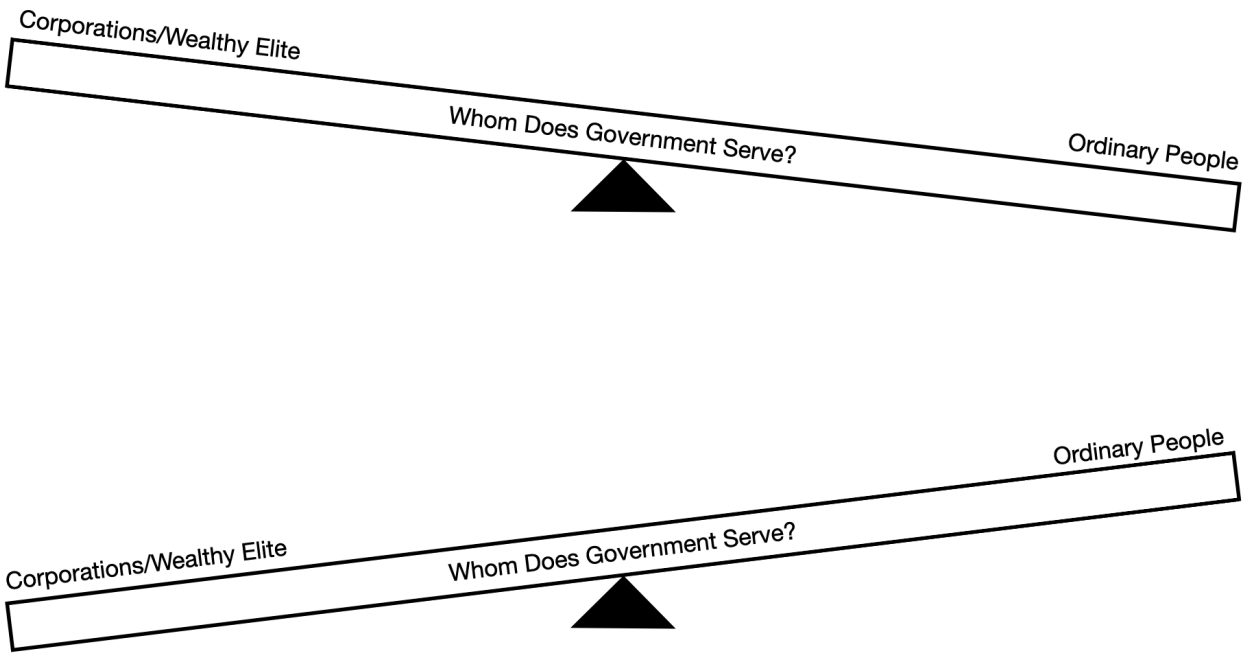
Over the years, political analysts have tended to split over how the American political system operates. This split involves three theoretical systems: pluralism, hyper-pluralism, and the power elite. Political scientists and others who take one of these perspectives disagree with each other about which theory best describes what is really going on in American politics.

Pluralism, the first branch in this debate, is well represented by French aristocrat **Alexis de Tocqueville's** insights into the vitality of early American politics. Convinced that France was moving towards social equality similar to American democracy, de Tocqueville toured the United States in the 1830s to analyze democracy as a political potential. There, he was struck by how well developed the *principle of association*—a proto form of pluralism—was among average Americans. At the time, American politics was marked by a rich diversity of organized associations and interest groups vying with each other to see that their respective wishes were translated into government policy. (3) **Pluralism** is a theoretical approach that emphasizes how ordinary Americans are free to start or join any of these groups and that organized interests struggle with each other on a level playing field. In other words, no one set of interests is likely to dominate public policy—at least not for very long, because the many losers will temporarily put aside their differences to collaborate to influence policy. The pluralist argument is bolstered by the number and variety of interest groups and by the fact that interests in one category—business, for example—often struggle with each other and fail to put up a monolithic front *vis a vis* labor or environmental groups.

The second theoretical approach, hyper-pluralism, argues that America was at some point characterized by pluralism, but over time it transformed into something less healthy: an out-of-control hyper-pluralist polity. This approach is voiced by those political scientists who argue that **hyper-pluralism** suggests that the government has essentially been captured by the demands of interest groups. And rather than arbitrating the struggle between organized interests, the government tries to put into effect the wishes of them *all* to the detriment of the country. Political scientist Theodore Lowi called this pathological process *interest-group liberalism*, which is

often used interchangeably with the hyper-pluralism label. (4) These theorists point to the contradictory nature of government policy—for example, spending money to subsidize fossil fuel extraction while at the same time passing regulations to limit carbon emissions—as evidence that there isn't really a competition going on as envisioned by pluralism. The hyper-pluralism system more closely resembles a free-for-all.

The third approach is called **elite theory**, which is the theoretical perspective used in this text. Elite theorists hold that the many-interests-on-a-level-playing-field vision of the pluralists and the interest-group-chaos scenario of the hyper-pluralists fail to accurately show what is really going on: that a relatively small and wealthy class of individuals—the **power elite**—largely gets its way. (5) According to this theory, the power elite are either the decision-makers or they so influence the decision-makers that the elites get their way most of the time. Elite theory highlights the power of organized business and military interests combined with society's affluent strata and points to many government policies that lavish benefits onto them. Moreover, business interests create interlocking and overlapping connections that reinforce their position and allow them to control the political system—witness the exclusive and overlapping memberships of corporate boards, foundation boards, trustee positions for public and private universities, as well as corporate media ownership. The fact that elites have disproportionate power and seek to continue their dominance is not new. As political essayist Noam Chomsky wrote, "Right through American history, there's been an ongoing clash between pressure for more freedom and democracy coming from below and efforts at elite control and domination coming from above." (6)



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

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

represented here by the teeter totter on the bottom of the image, holds that government primarily operates in the interest of corporations and the wealthy elite. Even though there are far fewer people on the elite side of the teeter totter, they weigh more in the deliberations of government than do the interests of the majority of the population. The aim of democratic engagement should be to better balance the teeter totter and see government serve the broad interests that ordinary Americans have for true equality of opportunity, healthcare, education, and an economy that provides a decent life for all. This aspiration is not for absolute equality, but for a political and economic system that ensures human dignity regardless of whether one is a banker or a busboy.

Applying the Three Dimensions of Power

Why does this text employ an elite theory perspective? What would we expect to see in the American political system to feel confident that this theoretical lens is a useful one? We'd expect to see public policy—the results of decision making—tilted toward the interests of the elite. This is the first dimension of power. With respect to the second dimension of power, we'd expect the rules of the game to be tilted in favor of elites getting what they want while hindering what ordinary people want. Lastly, through the third dimension of power, we would expect to see ordinary people taking on the viewpoints of the elites against their own interests.

Let's look at the **first dimension of power** and the results of decision making. Political scientist Michael Parenti highlighted that "every year the federal government doles out huge sums in corporate welfare in the form of tax breaks, price supports, loan guarantees, bailouts, payments-in-kind, subsidized insurance rates, marketing services, export subsidies, irrigation and reclamation programs, and research and development grants." (7) The public cost of corporate welfare is enormous, and we should be clear about its two immediate effects. First, the welfare that corporations receive is rarely translated into lower prices for consumers. Instead, it translates into better dividends for stockholders and higher salaries for their upper-level employees, who are already in the upper 10 percent of wage earners. Secondly, corporate welfare translates into ordinary people making up for the lost revenues from corporate tax giveaways. For instance, according to political scientist and professor Robert Reich, "Every year, Americans spend an estimated $153 billion in taxes and on programs to subsidize McDonald's and Walmart's low-wage workers." (8) In other words, while these corporations benefit from the federal government's generous treatment, they pay their workers too little to stay off public assistance, and the rest of the population pays for food assistance, Medicaid, etc. In addition to corporate subsidies, public policy is tilted to the elite in other ways as well. The investment billionaire Warren Buffett once famously noted that he pays a lower tax rate than his secretary when taken as a percentage of their respective incomes. The tax code is littered with loopholes and deductions available to upper-income earners. The marginal tax rate for capital gains—passive forms of income like stocks, real estate, and artwork from which the wealthy benefit disproportionately—has dropped significantly and is now lower than that for income from wages.

Political scientist Martin Gilens examined peoples' public policy preferences in surveys. He then subdivided the people by income and checked *that* data against actual public policy changes. Gilens found that "when preferences between the well-off and the poor diverge, government policy bears absolutely no relationship to the degree of support or opposition among the poor." Further, he found that "government policy appears to be fairly responsive to the well-off and virtually unrelated to the desires of low- and middle-income citizens." (9) Gilens found that when the poor and middle classes got what they wanted from the political system, it was only because the affluent wanted it as well. When the poor and middle classes wanted policies that the rich did not want, they didn't get them even though the lower and middle classes constitute the majority of people in the United States. It's almost as if the wealthy have a veto on popular policies if they do not benefit the top 5 or 10 percent of society.

We won't spend much time on the **second dimension of power** here. Throughout this text you will see how

the rules of the game benefit elites. The constitutional system is stacked in favor of elites being able to stop action. Because the American electoral system runs on money, "both major parties tend to be corrupted—and pushed away from satisfying the needs and wishes of ordinary Americans—by their reliance on wealthy contributors." (10) We'll note how Congress frequently tends to avoid passing the very legislation that majorities of people want. We'll see how the structure and operation of the U. S. Senate is especially undemocratic. America's corporate media system ensures that progressive ideas have a more difficult time getting heard. The system of organized interest groups in the United States is heavily stacked in favor of business groups and the wealthy. We'll also see how the Supreme Court has a history of primarily "comforting the comfortable and afflicting the afflicted." (11) And we'll see how corporations capture federal regulatory agencies.

It's also easy to see how well elites do on the **third dimension of power**. We've already mentioned the neat trick of getting poor and middle-class people to fight against the estate tax. But the list goes on and on: working people have been marshaled by elites to support other tax breaks, limitations on unions, free-trade agreements, and cuts to the social safety net. As political journalist Thomas Frank famously once observed, "people getting their fundamental interests wrong is what American political life is all about." (12) Elites "**manufacture consent**," in the telling phrase coined by economist Edward Herman and Noam Chomsky. (13) They argued that just like consumer demand for products is manufactured by the public relations industry, political consent is similarly manufactured through election campaigns that focus on superficial considerations. Consent is also manufactured by frightening people or by getting them angry. Want to cut public assistance for the poor? Get people upset about "welfare queens." Want to invade a country? Talk about that country's leader being "worse than Hitler," and posing an existential threat to the United States. Want to gin up gun sales and defeat attempts to regulate firearms? Talk about crime. It works just as well when crime is at record lows as when crime is high. All these measures have been successful. These measures only require that you control the media, decide what issues get addressed, and how those issues are framed. Elites have that kind of control.

How else do elites exploit the third dimension of power? Myths. Going back at least as far as the nineteenth century Horatio Alger stories, Americans have been fed a steady diet of "rugged individualism" and "pull yourself up by your bootstraps" myths. Objectively, we know that the economic success of individuals who truly do rise from rags to riches is a function of social investments in schools, roads, legal systems, monetary systems, and so on. But elites thrive on the myth that they did it on their own. They gain power from that myth, for it assumes that nothing needs to change about the status quo. According to the corollary to this myth, if you're poor, hungry, and without healthcare, it's your own damned fault.

Even the partisan stalemate in Washington—which is not a myth, but has taken on mythic proportions—plays into the hands of the elites because it creates a sense of futility among many people, a feeling that "politicians are all the same" or "it doesn't matter who wins elections, so I might as well not vote." The political demobilization of ordinary people is perhaps the best tool the wealthy and corporations have to achieve their aims. As South African anti-apartheid activist Steve Biko said, "The most potent weapon in the hands of the oppressor is the mind of the oppressed." (14) If the governed can be made to feel that they are powerless to effect change, then indeed they are powerless.

Perhaps the best illustration of elites' use of the third dimension of power is their ability to convince many Americans that democratic government is bad and that undemocratic, unregulated markets are good. President Ronald Reagan famously said in his 1981 inaugural address that "government is not the solution to our problem, government is the problem." Reagan was articulating the view that predominates in the United States—that government should scale back and step out of the way so that corporations operating largely without regulation could better serve the needs of individuals and the broader society alike. The fact that so many Americans of all political stripes take this view is the result of a centuries long propaganda effort

in schools, the media, academia, churches, and politics. It is the reason that ordinary people—who would benefit from a more progressive tax structure, better public transit, or less government welfare for upper-class homeowners and corporations—often vote for politicians who are opposed to those very things. Even though unregulated markets repeatedly fail Americans in ways that require government intervention (e.g., bank failures, pollution externalities, the climate crisis, and predatory check cashing operations), many of us keep looking to markets and corporations for our solutions. This exercise of the third dimension of power, or what the late anthropologist Eric R. Wolf called structural power, makes meaningful policy alternatives disappear from our political system. (15)

The People and the Elites

The last observation above leads us to an important caveat. The people have numbers. And votes. The question is whether the people have the will and organization to counteract elite power. At times in American history, popular will has translated into public policies that benefited average men and women over the elites. People have risen up and demanded protection from monopoly corporate power. People have demanded a minimum wage, worker safety laws, and laws against child labor. Women and men together demanded that women be able to vote. People of all races demanded that we have civil rights laws guaranteeing voting privileges, the right to equality in the workplace, the right to go to neighborhood schools, and freedom from sexual harassment. People demanded that the impoverishment of the elderly be ameliorated—and it was through programs like Social Security and Medicare. People demanded that America's rivers no longer catch on fire due to their high levels of pollution. The message of this text is that elites have the most power in the American system. But the message is also to hopefully get you to acknowledge that this situation can change if the majority organizes itself to act in the interest of the public good.

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

"A proper role of government—nearly forgotten today, but the overriding concern of the Founders—is finding ways to prevent undue concentrations of power wherever they occur. Power tends toward self-perpetuation; where it is left undisturbed, it will draw further advantages to itself, shut out rivals, and mete out ever-bolder forms of injustice." (16)

What if . . . ?

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

References

1. Martin Gilensand Benjamin Page, “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens,” *Perspectives on Politics*. Fall 2014.
2. Matt Taibbi, “Deval Patrick’s Candidacy is Another Chapter in the Democrats’ 2020 Clown Car Disaster,” *Rolling Stone*. November 14, 2019.
3. Classic texts in the pluralist tradition include David B. Truman, *The Governmental Process*, 2nd edition. New York: Knopf, 1971; and Robert Dahl, *Pluralist Democracy in the United States*. Chicago: Rand-McNally, 1967.
4. Theodore J. Lowi, *The End of Liberalism*, 2nd edition. New York: Norton: 1979.
5. See C. Wright Mills, *The Power Elite*. New York: Oxford University Press, 1956; and Ralph Miliband, *The State in Capitalist Society*. New York: Basic Books, 1969.
6. Noam Chomsky, *Requiem for the American Dream. The 10 Principles of Concentration of Wealth and Power*. New York: Seven Stories Press, 2017. Page 1.
7. Michael Parenti, *Democracy for the Few*. 9thedition. Boston: Wadsworth, 2011. Page 60.
8. Robert Reich, “How Corporate Welfare Hurts You,” *The American Prospect*. July 23, 2019.
9. Martin Gilens, *Affluence & Influence: Economic Inequality and Political Power in America.*Princeton: Princeton University Press, 2012. Page 81.
10. Benjamin I. Page and Martin Gilens, *Democracy in America? What Has Gone Wrong and What We Can Do About It*. Chicago: The University of Chicago Press, 2017. Page 111.
11. Ian Millhiser, *Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted*. New York: Nation Books, 2015.
12. Thomas Frank, *What’s the Matter With Kansas?*New York: Metropolitan Books, 2004. Page 1.
13. Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media*. New York: Pantheon, 2012.
14. Takudzwa Hillary Chiwanza, *The African Exponent*. September 12, 2017.
15. Eric R. Wolf, *Pathways of Power: Building and Anthropology of the Modern World*. Los Angeles: University of California Press, 2001. Page 385. Naomi Oreskes and Erik M. Conway, *The Big Myth: How American Business Taught Us to Loathe Government and Love the Free Market*. New York: Bloomsbury Publishing, 2023.
16. Danielle Allen, “The Road From Serfdom,” *The Atlantic*. December2019.

Media Attributions

Chapter 4: Political Science as a Social Science

"Science is extraordinarily effective at rooting out rubbish."

–David J. Helfand (1)

The discipline called "political science" is a branch of the social sciences, which includes sociology, psychology, anthropology, and economics. Social scientists study individual and social behavior. They explore questions that often come from established **theoretical perspectives** consisting of concepts, definitions, and a body of scholarly literature developed over time. As you engage in this political science class, make sure you pay attention to the various theoretical perspectives that exist in the discipline. Recall that this text approaches political science from a modified version of **elite theory**, which takes the perspective that a struggle exists between elites who use their money, access, and influence over political institutions and processes to consistently push government to serve their interests and ordinary people who use their votes to inconsistently push government to serve their interests. We will use this lens through which to better understand *how* the political system in the United States works and *for whom* it works.

Political scientists describe and explain political behavior. In doing so, they often look for patterns and relationships in what may appear to be a blizzard of random events. They know that while the political world is not as predictable as the physical world studied by chemists and physicists, they can study it systematically if they know where and how to look. Political scientists attempt to make empirical or *verifiable* statements about how the world of politics works. They carefully observe phenomena such as voting, political opinions, legislative decisions, campaign finance disclosures, presidential vetoes, Supreme Court decisions, and so forth.

The Scientific Method

Many social scientists employ the scientific method in the same ways that natural scientists do—although studying people instead of natural phenomena adds layers of complexity to the task. Other social scientists eschew using the formal scientific method in favor of rigorous interpretations, analyses, or in-depth case studies. They may do so because historical events and contemporary social phenomena are too complex for simple causal models to address or because people are too self-aware to be measured and studied without distorting results. Nevertheless, all social scientists adhere to empirical, formalized methodologies. The difficulty social scientists have is detaching themselves from their ideological or normative understandings of how they want the political world to work versus how it actually works. Science historian and philosopher Lee McIntyre argues that "the challenge in social science is to find a way to preserve our values without letting them interfere with empirical investigation. We need to understand the world before we can change it." (2)

The phrase scientific method is a bit misleading in that it is an idealized process with a clear order of steps used to describe the often messy work that scientists actually do. You might have learned these steps in elementary school:

- Ask a question

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

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

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

Hypotheses, Concepts, and Variables

Aside from making careful and patient observations, the scientific method requires that we formulate hypotheses, conceptualize complex phenomena, and analyze constantly changing variables. Political scientists generate a **hypothesis** by asking a research question—an inquiry that asks how the political world operates or why it works the way it does. The hypothesis posits an answer to the research question that you then test by conducting studies or experiments. The kinds of *why* or *how* questions that make good hypotheses are distinct from questions that elicit factual answers. For example, questions such as "What interests or organizations contribute the most money to political campaigns?" or "How many Supreme Court justices have been women?" are important—indeed, they are foundational to political science, so we will concern ourselves with many of them in this course. But they are the kinds of questions that typically elicit straightforward answers. Rather, here are some examples of large research questions in political science that make good hypotheses:

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

words, shifts in public opinion caused the success of conservative politicians.

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

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

Null hypothesis: This essentially asserts that there is *n*o relationship between two variables. Often political scientists will refute the null hypothesis to make sure there is something interesting going on before they undertake more sophisticated analysis. On the question of money and incumbent reelection rates, for example, the null hypothesis would be that there is no relationship between campaign budgets and chances of succeeding in an election.

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

Directional hypotheses: Correlative hypotheses are not especially powerful, so we tend to construct particular kinds of correlative hypotheses. As you might guess, directional hypotheses posit a direction to the relationship in question. For example, I could say that as religious fundamentalism increases, acts of terrorism increase as well. This is called a **positive relationship**—the value of one variable increasing along with the value of another variable. A **negative relationship** involves the value of one variable decreasing as the value of the other variable increases. For example, we might hypothesize that as personal income increases, willingness to support public transit decreases.

Causal hypothesis: This goes one step further by positing that at least some of the variance in one variable is being caused by the variance in the other variable. In all the other hypotheses, the two variables do not need to connect, but in a causal hypothesis, they do. Causation is extremely difficult to establish. For example, let's say that we could somehow measure the rise and fall of religious fundamentalism in the world and also that we have an accurate count of terrorist incidents over time. To establish causation, we would have to show a statistical relationship between the changing values for each variable *and* convince our readers of a valid link between the two variables—a link that cannot be explained in a better way. On top of this difficulty is the problem of social complexity. Rarely can a complex phenomenon such as terrorism be explained by one variable, which brings to mind the admonition, beware of mono-causal explanations. Political scientists are much more likely to say that a certain percentage of the variance in terrorism can be explained by the variance in religious fundamentalism than they are to say that fundamentalism causes terrorism.

Hypotheses require the political scientist to conceptualize certain terms. Earlier, we posed a research question about the conservative movement's growth from 1964 to 2000. What exactly do we mean by "the conservative movement"? A **concept** is a word or phrase that stands for something more complex or abstract. Political science is often concerned with big concepts such as liberty, democracy, power, justice, equality, war and peace, and representation. But there are many mid-level concepts in the discipline such as political development, political legitimacy, electoral realignment, or globalization. In addition, terms related to political ideologies—liberal, conservative, socialist, fascist, feminist, libertarian, and so forth—are also key concepts. We must be clear about our key concept definitions. If I mean one thing by the concept "conservative movement" and you mean another, then it becomes difficult for us to have a productive academic dialogue about that topic.

In turn, researchers need to define or operationalize fuzzy concepts into measurable concrete **variables**. For example, earlier we hypothesized that as people's income increases, their tendency to support public transit

programs would decrease. How are we going to operationalize "income" as a variable that we can use in our analysis? We could ask a sample of people to tell us their income and then ask them questions about public transit. But, let's say we wanted to rely on more concrete income records, assuming we could get them. We'll still have questions to consider: gross income before taxes? Only wage income? Family income or individual income? As you can see, operationalizing concepts into measurable variables is not always easy.

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

Experiments

Scientists often employ experiments to test their hypotheses, and political scientists do as well. Experiments come in two flavors: controlled and natural. A **controlled experiment** is one that is carefully set up by the scientist to control the variables that might affect the outcome, thereby isolating and evaluating the variable in which they are most interested. For example, let's imagine we are interested in how conservatives and liberals respond to new information about health policy. We could gather two groups of 100 people, one conservative and one liberal, and bring them into our office for the experiment. We would need to be sure that the conservatives were conservative to the same degree as the liberals were liberal. We would also want two groups that matched each other in important demographic variables such as race, income, and sex. Once we have assured ourselves that the two groups differed only in their political ideology, we could then provide individuals in each group with the same new information about health policy. Then, we would need to develop an instrument to gauge the responses of conservatives and liberals. That instrument might be a knowledge questionnaire, a survey, or a behavior observation, depending on our hypothesis. Note that we have controlled the variables to such an extent that we can be confident that any difference we see between the groups is related to their different ideologies.

A **natural experiment** is an observational study in the real world where the scientist does not control the variables, but where natural processes or social events provide an opportunity for them to see the effect of a variable in action. Natural experiments are messier than controlled experiments, and therefore the conclusions that can be drawn from them are necessarily more tentative. Nevertheless, natural experiments are often compelling because they happen in the world around us rather than in a laboratory setting. For example, the Affordable Care Act—ACA or Obamacare—unintentionally created a natural experiment. The ACA required states to expand Medicaid to a larger percentage of poor people and funded them to do so. However, the Supreme Court struck down the mandate in 2012, thereby allowing states to choose whether or not to expand Medicaid. As it happens, states controlled by Republicans generally chose not to expand Medicaid, while states controlled by Democrats or that had a Democratic-Republic balance tended to expand Medicaid. Over a four-year period, researchers found that states that had expanded Medicaid reduced their mean annual mortality rate by 9.3 percent. Effectively, what this meant was that the 14 states that did *not* take advantage of the ACA to expand Medicaid had 15,600 people die who would not have died had the states expanded

Medicaid. (3) Aside from the obvious conclusion that the decisions of the Supreme Court, state governors and legislatures caused the premature deaths of nearly 16,000 Americans, this natural experiment allowed us to see the variable's impact at the state level—was Medicaid expansion a net positive or negative on people's health?

Falsifiability and Professional Responsibilities

Snarky Demonstrators in Favor of Science.

Science's emphasis on empiricism, conceptual clarity, variables, hypotheses, and experiments underscores another characteristic that we want to highlight here: falsifiability. **Falsifiability**—also known as testability—refers to the fact that scientific knowledge claims are subject to being proven wrong. Science philosopher Karl Popper argued that falsifiability is central to differentiating science from nonscience. "A system," he wrote, "is to be considered as scientific only if it makes assertions which may clash with observations: and a system is, in fact, tested by attempts to produce such clashes; that is to say, by attempts to refute it." (4) Scientists make claims about the natural or social worlds and how they work. Those claims are so carefully documented that another scientist can either replicate the original study or marshal another set of observations with the explicit goal of testing whether or not the first scientist's claim was correct. Systematically falsifying incorrect claims makes science progress toward greater understanding. If someone claims that providing welfare causes people to avoid work, we should be able to gather data to shed light on the claim. How would we do that? Could we compare unemployment figures from countries with more and less generous welfare systems? Could we do a pre- and post-study centered around a state or country instituting a new welfare system? Whatever we do, we are empirically testing a claim that can either be refuted or confirmed.

What does an **untestable claim** look like? Namely, it is a theory that cannot be refuted. The paleontologist Donald Prothero provided a great example by citing the case of Philip Henry Gosse, a nineteenth-century English naturalist and member of the puritanical Plymouth Brethren. A couple of years before Charles Darwin published *On the Origin of Species by Natural Selection* in 1859, Gosse published a book called *Omphalos: An Attempt to Untie the Geological Knot*. Like Darwin, Gosse was trying to explain the increasing evidence that life had evolved over time. But Darwin used careful observations to explicate his theory of natural selection—a theory that was eminently falsifiable. Gosse, on the other hand, put forward a theory that God had created the currently existing plants and animals as well as fossils to *look* like evolution had taken place over a long period, but that in fact, God had created all life relatively recently, just as Gosse's *Bible* told him. He reconciled his religious beliefs with empirical observations by developing a theory that could not be refuted. When Darwin came along and wrote—in one of his many examples—that finches on the Galapagos Islands had, through natural selection over time, modified their morphology to suit the kinds of things they ate on the various island ecosystems, Gosse's adherents could simply say, "God just made the finches look that way." Gosse's claim is not falsifiable through any observation or experiment, whereas the theory of natural selection has passed literally thousands of tests for over 160 years. (5)

Scientists of all stripes engage in common behaviors that support their work and to better understand each discipline's study. Two particularly noteworthy behaviors are **attending professional conferences** and

publishing in peer-reviewed journals. At **professional conferences, scientists present their findings to their peers**. There, they challenge each other, share new ideas and data sets, and develop common research interests around which they can collaborate. While professional conferences are not particularly exciting for someone who is not a member of that disciplinary community, its members greatly enjoy the give and take around poster sessions, panel discussions, and workshops. **Scientists** also **publish their findings in peer-reviewed journals**. A peer-reviewed journal is a magazine that publishes only peer-reviewed articles. Peer-review is an extremely important and often overlooked feature of science. If a political scientist sends a manuscript to *International Studies Quarterly* or any of dozens of political science journals, that manuscript will be farmed out to at least two other political scientists who have published in that field. They will review the manuscript and make comments on the methodology, the data, and the conclusions it offers. They will tell the editors of *International Studies Quarterly* whether the manuscript should be published, rejected, or sent back to the author for revisions. This is a blind process—the author of the manuscript does not know who is reviewing it, and the reviewers do not know who wrote the manuscript. The peer-review process is not foolproof, but it is a very robust way of ensuring credibility.

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

What if . . . ?

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

References

1. David J. Helfand, *A Survival Guide to the Misinformation Age. Scientific Habits of Mind*. New York: Columbia University Press, 2016. Page 22.
2. Lee McIntyre, *The Scientific Attitude. Defending Science from Denial, Fraud, and Pseudoscience*. Cambridge, MA: The MIT Press, 2019. Pages 193-194.
3. Sarah Miller, Sean Altekruse, Norman Johnson, Laura R. Wherry, "Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data," Working Paper No. 26081. The National Bureau of Economic Research. July 2019.
4. Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge*.London: Routledge, 2002. Page 345.
5. Donald R. Prothero, *Evolution. What the Fossils Say and Why It Matters*. New York: Columbia University Press, 2007, Page 9.

Media Attributions

Chapter 5: Common Fallacies in Argumentation

"Forget the politicians. The politicians are put there to give you the idea you have freedom of choice. You don't. You have no choice. You have owners. They own you. They own everything. They own all the important land; they own and control the corporations that've long since bought and paid for the senate, the congress, the state houses, the city halls; they got the judges in their back pocket, and they own all the big media companies, so they control just about all of the news and the information you get to hear. They've got you by the balls. They spend billions of dollars every year lobbying to get what they want. Well, we know what they want. They want more for themselves and less for everybody else. But I'll tell you what they don't want. They don't want a population of citizens capable of critical thinking. They don't want well-informed, well-educated people capable of critical thinking. They're not interested in that. That doesn't help them."

–Part of George Carlin's "Owners" stand-up comedy

Common Fallacies

A key skill for any critical thinker is bullshit detection. (1) Comedian George Carlin was particularly good at seeing through bullshit, and we should take seriously his warning that some interests in society would prefer to see less rather than more critical thinking. An important component of bullshit detection is the ability to spot common fallacies. Whether you are making arguments or evaluating them in public discourse, you should be familiar with common fallacies. A **fallacy** is an argument that is faulty, logically invalid, or deceptive. They can be quite persuasive, but you should not use them. As entrepreneur and author Michael Boylen puts it, "When we consciously choose to use fallacy to persuade others, we degrade ourselves. When we negligently allow ourselves to be duped by logical fallacy, we similarly degrade ourselves." (2) There are many more fallacies than are listed here, but make sure you know the following:

Ad hominem—Although *ad hominem* means *"against the man,"* it would apply to any person. *Ad hominem* fallacies usually happen when we attack the person who made the argument in an attempt to discredit what they said or wrote, instead of attacking the argument on its merits. If convicted former Enron CEO Jeffrey Skilling makes an argument about how the United States could be more energy efficient by relying on ethanol, I would commit the *ad hominem* fallacy if I were to say, "Why should we believe anything this ethically-challenged guy says?" I haven't addressed his argument on its merits; I've merely tried to discredit it for my audience by casting aspersions on Skilling. *Ad hominem* critiques can be directed at individuals, religious sects, races, ethnic groups, and even nations. (3)

Reductive fallacy—We commit this fallacy when we try to address complex issues with simple solutions. Someone might say that the key to solving poverty is to "make lazy people work." Or, to end terrorism, we should "bomb the Middle East back to the Stone Age." Or, to have a world-class public education system, we just need to "get back to the basics." Issues like poverty, terrorism, and educational achievement gaps are tremendously complicated, and we are not likely to *solve* them with the public policy equivalents of bumper sticker slogans.

Post hoc ergo propter hoc—This fallacy literally means "after this, therefore because of this." We make this error when we assert that A caused B simply because A preceded B. If the Ajax Corporation makes a donation to Senator Jones' campaign fund, and a week later Senator Jones votes for a tax code bill that benefits the Ajax

Corporation, we might be tempted to conclude that the campaign donation caused Jones to vote for the bill. If we were to do so, we would be guilty of committing the post hoc fallacy. The two actions may indeed be related in some way, but there is no way to know for certain without other evidence. Here's a more basic example: You accidentally drop a large book on the floor, and an earthquake starts immediately afterwards. It's certainly an odd coincidence, but you did not cause the earthquake by dropping your book.

Non sequitur—This means "it does not follow," and refers to an argument whose evidence and conclusion don't match the original claim. For example, let's say a defendant has been accused of child abuse and the prosecutor's case can be boiled down to the following points: Child abuse is an awful crime; the victim in this case has suffered horribly; therefore, the defendant is guilty of child abuse. (4) Such a tactic might appeal to the emotions of the jurors, but the prosecutor has not actually presented any evidence to support a guilty claim.

Appeal to majority—It is a fallacy to say that when many people believe a claim to be true, it is evidence of its truth. Actually, an idea's popularity says nothing about its validity, otherwise we might still believe that the earth is the center of the solar system and the universe. The majority can be wrong. Indeed, it often is.

Straw man—The straw man tactic involves distorting an opponent's position by stating it in an oversimplified or extreme form, and then refuting the distorted position instead of the real one. Unfortunately, this happens frequently in political debate. For example, critics of President Bush's No Child Left Behind Act derided it as simply no child left untested because it emphasized standardized testing. Of course, the legislation was more complicated than that, but it was easier to boil the initiative down to one of its high-profile parts.

Red herring—Similar to the straw man, invoking a red herring is when someone brings up a non-related issue to make their case. For example, if Jack is making an argument that gay marriage should be constitutional under the Equal Protection Clause of the Fourteenth Amendment, Jane might try to counter-argue by saying that we must preserve eroding family values. Jane's counter argument does not address Jack's constitutional point but diverts the discussion into a separate issue. Apparently, the term red herring comes from the fact that herring turns red when it rots, and a rotten fish has such a strong smell that dragging it across a game trail can throw the dogs off the scent. (5)

Begging the question—When we beg the question, we use evidence that is essentially the same as the claim. We also refer to begging the question as *a* ***circular argument***. As Ted Talk speaker David Kelley reminds us, "The point of reasoning is to throw light on the truth or falsity of a proposition…by relating it to other propositions…that we already have some basis for believing to be true. If our reasoning does nothing more than relate [the proposition] to itself, then it hasn't gained us anything."

For example, says Kelley, a circular argument might run like this: "Society has an obligation to support the needy, because people who cannot provide for themselves have a right to the resources of the community." Everything in that sentence after the "because" is simply a restatement—in different form—of the proposition that society has an obligation to support the needy. (6) Another example: I say God exists. Why? Because the Bible says so. Why should you believe that source? I say that you should believe it because the Bible is the word of God. A convenient, anti-intellectual circle.

Black/white thinking—Black/white thinking goes by many names, the most common of which are false dichotomy and false dilemma. When we commit this fallacy, we shrink the world of possibilities down to two choices—one of which we favor—and insist that everyone must choose between them. Invariably, the other choice is some extreme or disastrous possibility that no one in their right mind would choose. Some examples: You either support our policies or you support the terrorists; America—love it or leave it; if we don't execute murderers, they'll be running free and killing more people. Such thinking is fallacious because it eliminates

reasonable alternatives, distorts reality, and tries to stampede people into choosing a course without fully examining all possibilities.

Ecological fallacy—This is an easy fallacy to commit. It refers to making conclusions about a person based on aggregate data that is relevant to that person. Aggregate data is information compiled into summaries for public reporting and cannot be used to make definitive statements about an individual. Here's a great example: "Imagine two small towns, each with only one hundred people. Town A has ninety-nine people earning $80,000 a year and one super-wealthy person who struck oil on their property, earning $5,000,000 a year. Town B has fifty people earning $100,000 a year and fifty people earning $140,000. The mean income of Town A is $129,200, and the mean income of Town B is $120,000. Although Town A has a higher mean income, in ninety-nine out of one hundred cases, any individual you select randomly from Town B will have a higher income than an individual selected randomly from Town A. The ecological fallacy is thinking that if you select someone at random from the group with the higher mean, that individual is likely to have a higher income." (7)

References

1. Harry G. Frankfurt, *On Bullshit*. Princeton, NJ: Princeton University Press, 2005.
2. Michael Boylen, *Critical Inquiry. The Process of Argument*. Boulder, Colorado: Westview Press, 2010. Page 38.
3. Loren J. Thompson, *Habits of the Mind. Critical Thinking in the Classroom*. New York: University Press of America, 1995. Pages 112-114.
4. David Kelley, *The Art of Reasoning*. New York: W. W. Norton, 1988. Page 131.
5. Kelley, *The Art of Reasoning*. Page 132.
6. Kelley, *The Art of Reasoning*. Page 123.
7. Daniel J. Levitin, *A Field Guide to Lies. Critical Thinking in the Information Age*. New York: Dutton, 2016. Pages 18-19.

Chapter 6: Making Strong Arguments

"What annoys me most is a lazy argument."

–Christopher Hitchens (1)

Because political scientists are members of a branch of the social sciences, they often make arguments about political institutions and behavior. As citizens of a purported democracy, we all are called upon to make arguments about public policy, political campaigns, and even about the nature of reality—for example, does widespread gun ownership deter crime or cause it?

What Is an Argument?

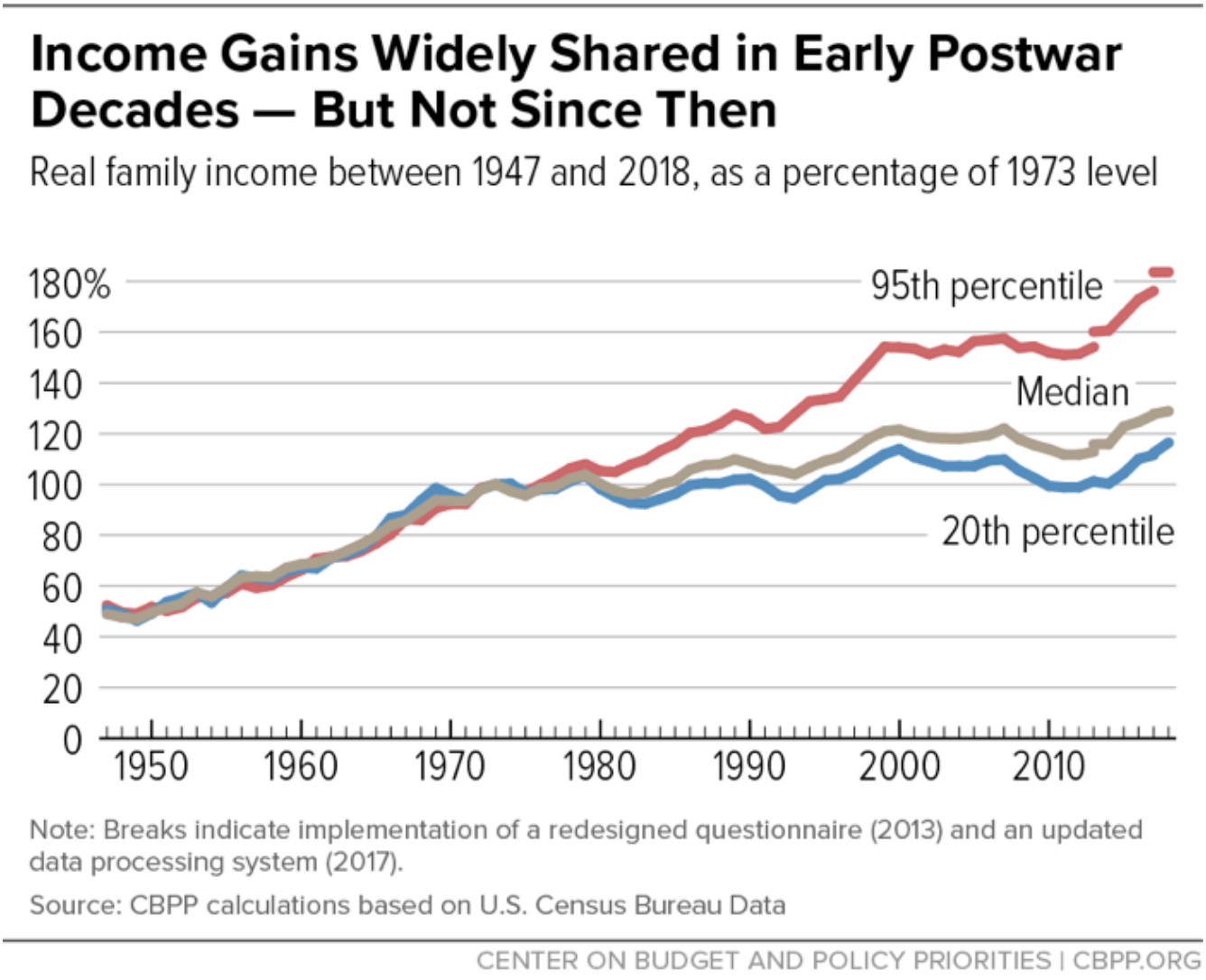
We should be clear about what an argument is and what it is not, about an argument's key components, and about why we should be making arguments. When my friend says that Donald Trump ranks as the worst president in U. S. history, they are making an assertion or a claim—not an argument. If, instead, she says that Donald Trump is the worst president in U. S. history because . . . followed by sufficient evidence leading to a conclusion about Trump's failings relative to other American presidents, then she has made an argument.

We will define an **argument** as a claim plus evidence leading to a conclusion. The fundamental underlying question linking claim and evidence is why. Why should I believe this claim? And the immediate follow-up: What evidence would lead me to that conclusion?

Evidence in Argumentation

What passes for evidence in an argument? Much depends on the argument's claim, but almost anything can be used effectively as evidence. Political scientists are fond of using both quantitative and qualitative evidence. **Quantitative evidence** refers to numbers: voting statistics, campaign finance figures, public opinion survey results, government revenue and spending, economic data, and so forth. **Qualitative evidence** refers to words. A political scientist might use political speeches, national constitutions, journalists' and commentators' writings, interviews with average people, behavior observations, historical events, and so forth. Regardless of the evidence's nature and strength, we should always be careful about an argument's *proof*. Instead of saying, "This evidence proves that...," we could say, "This evidence suggests that...," or "This evidence leads us to conclude that...." It's part of the tentative nature of scientific claims, particularly in the social sciences.

Let's say, for example, that we want to make an argument about how well our economic system is serving the needs of ordinary Americans. We could gather qualitative evidence in the form of interviews with a variety of people and sort their answers by a simple scheme in which the person either does or does not believe the economic system is serving them well. We could also gather quantitative evidence of income growth over time. The Center on Budget and Policy Priorities has done this, and we might conclude that this evidence suggests that the economy used to serve all Americans, but stopped doing so in the late 1970s.



Once we have a claim supported by quantitative or qualitative evidence pointing to a conclusion, we are faced with the question of **warranted inference**—under what conditions are we warranted or justified in accepting a conclusion or inference? Warranted inference requires that we meet two conditions:

- The reasons/evidence must be true.
- The conclusion must follow from the reasons/evidence. That is, it must follow truth-preserving reasoning. This is known as *validity* in classical argument. (2)

These two conditions for warranted inference provide a road map for anyone who wants to attack a particular argument. They can attack the evidence presented or present counter evidence that calls into question the original claim's supporting evidence. Or, they might demonstrate that even if the evidence is true, it does not merit their opponent's conclusion.

Another strategic attack might be to undermine the argument's assumptions. Arguments are often based upon one or more assumptions. Assumptions are unstated premises that the person making the argument is taking for granted or asking you to take for granted. For example, Democrats and Republicans may make

different arguments about the best way to grow the economy, but both are making an assumption about the merits of a capitalist economic system, and both are making an assumption about the need for economic growth. An argument may include significant evidence but is nevertheless weak if it is based on shaky assumptions.

When making extensive arguments—as opposed to short, quick arguments—it is often a good idea to anticipate and deal with counterarguments. When preparing to make an argument, find evidence that supports your viewpoint, but also scout the arguments made on the debate's other side. What are the evidentiary weaknesses in those arguments? How have others countered them? Once you can answer those two questions, you can paraphrase counterarguments to your position and shoot them down in ways that illustrate your own argument's strength.

Also, to create an effective argument, you must define its critical terms. If we consider the Democratic and Republican argument over the best way to stimulate economic growth, we would want both sides to define economic growth. Does it mean increase in the *gross domestic product* (GDP)—the total value of all goods and services produced over a specified time period? Or maybe it means increase in the gross domestic product per capita over that time period? Or maybe one of the arguments rests on an economic growth definition that replaces the outdated notion of GDP with the more people-friendly *genuine progress indicator* (GPI), which adds the goods and services value but subtracts for expenses like crime and ecological destruction. In any case, arguments without well-defined terms are often a waste of time.

Why Do We Make Arguments?

In large part, we make arguments because of a foundational philosophy that author Connie Missimer called **progressivism**, which holds that the truth in human affairs is real and that we are on a never-ending journey towards it. (3) Don't confuse this with political progressivism, which we'll talk about in a later chapter. According to this philosophical brand of progressivism, we will never reach the truth. But through careful argumentation, we can reject various falsehoods and begin to glean a better understanding of reality. Let's contrast the progressivist tradition with two anti-intellectual perspectives that many people unfortunately find attractive: dogmatism and relativism.

Dogmatism is a philosophy that says we have already arrived at the truth, so no new claims or evidence need to be entertained. Revealed religious teachings are almost always dogmatic, therefore, anti-intellectual in nature. This is not to say that such teachings have no value to individuals as personal comforts, but they have no place in rational argument. Similarly, dogmatism often accompanies the arguments of political ideologues. Under Vladimir Lenin and subsequent leaders, the Soviet Union's Communist Party would not deviate from the established party line. Proponents of religious and ideological dogma proceed from the assumption that their world view is complete in and of itself.

In fleeing dogmatism's obvious constraints, some people run right past progressivism and settle on **relativism**. Relativism posits that there is no ultimate truth, so there is no basis to reject one argument in favor of another. Under relativism, truth becomes a personal possession: "What is true for me may not be true for you," or "Objective reality is always filtered through the individual observer's context and situation, so everything we might say about it is suspect." There is some validity to these statements, but taking them seriously means that every bit of an argument's supporting evidence is contestable due to its context. What would be the point of arguing? Cultural relativism is a common manifestation of this philosophy, where people refuse to pass judgment on the cultural practices of other ethnic or religious groups. Relativism manifests itself in many other ways as well and is a constituent part of what author Susan Jacoby labels "junk thought." She writes that "the

real power of junk thought lies in its status as a centrist phenomenon, fueled by the American credo of tolerance that places all opinions on an equal footing and makes little effort to separate fact from opinion." (4) We know, however, that not all opinions or arguments are equally worthy.

Other Considerations When Making and Responding to Arguments

We've already talked a bit about logical fallacies. We should keep in mind several other considerations when making and responding to arguments. These are not fallacies *per* se but are elements of argumentation that are frequently abused.

Correlation Does Not, Necessarily, Equal Causation—As we saw in the *post hoc* fallacy, the fact that A happens before B does not mean that A caused B. We should always be careful about making claims that suggest movement in one variable is causing movement in another or that one condition occurring with another condition means that one caused the other.

Variables can be correlated with each other in several ways, only one of which is a causal relationship. Let's say that variables A and B are correlated. One possibility is that A might in fact be causing B, or vice versa. Another possibility is that a third variable, C, is simultaneously causing A and B, without there being a direct relationship between A and B. Also, maybe A is actually causing C, which is then causing B, in which case C is called an intermediate variable. Finally, A and B may be correlated, but there is actually no relationship between them.

Appealing to Authority—Appealing to authority can be a fallacy if the authority in question lacks credibility. We commit this fallacy when we make arguments and use evidence from sources who are not qualified in a given area, for example, religious texts or authorities who cannot be questioned or whose motivation comes into question because of partisan or financial conflicts of interest. If I make an argument that my state should open more charter schools, and I quote a state legislator who is also on the board of a company that builds charter schools, I would have committed this fallacy. I'm expecting that my state legislator's authority will convince my audience, but I have used a person whose "expertise" is questionable. However, appealing to authority has many legitimate uses. In fact, in making effective arguments, it is a common and totally valid strategy since the authority being cited may be more knowledgeable in a given area. This seems like a good time to defer to the wisdom of two philosophy professors and critical-rethinking authorities, Robert Fogelin and Walter Sinnott-Armstrong, who wrote,

"Since some people stand in a better position to know things than others, there is nothing wrong with citing them as authorities. In fact, an appeal to experts and authorities is essential if we are to make up our minds on subjects outside our own range of competence." (5)

Thus, appealing to credible authority frequently strengthens an argument.

Argument by Analogy—People often use analogies when they make an argument. An analogy is linking or comparing two things, typically to explain or clarify. The first President Bush said that Saddam Hussein was "worse than Hitler." John Dean, President Nixon's White House counsel, wrote a book arguing that the skullduggery in the George W. Bush administration was "worse than Watergate." Gay rights advocates argue that bans against gay marriage are akin to the bans against interracial marriage, which existed well into the 1960s.

Are these analogies helpful or not? Using a false or distorted analogy is clearly a fallacy and really should belong in the fallacies list above. But using a well-crafted analogy in arguments can be very effective. To judge an analogy's usefulness in linking A with B, we need to follow a few simple criteria:

- Note the number of similarities between A and B.
- Are A and B's similarities relevant?
- Are there differences between A and B?
- Are A and B's differences relevant? (6)

This is a judgment call. When you are making or responding to an analogy in an argument, go through this quick checklist to see if the analogy is fallacious or not.

Slippery Slope—As with analogies, using slippery-slope arguments improperly can be fallacious. A slippery-slope argument occurs when a person suggests that if we take one action, it will lead to a chain of disastrous events. A common slippery-slope argument said that if we legalized gay marriage, we'd have to legalize polygamy, and then pedophilia, incest, and bestiality. During the Cold War, the domino theory was a popular political argument and a form of the slippery-slope argument used to justify America's involvement in the Vietnam War: "If we don't stop the commies there, then Laos and Cambodia will go Red, followed by Thailand, Australia…and then we'll be fighting the communists on the beaches of California, or at least the communists will be in a position to strangle us without actually invading." Of course, South Vietnam fell in 1975, but the subsequent cascade of dominoes failed to happen. Slippery-slope arguments *can* be effective if the arguer clearly lays out the progression down the slope. For example, if a white Southerner in the 1940s argued that any cracks in segregation's bedrock will lead to its complete collapse, namely, the end of segregated schools, the end of interracial-marriage bans, the end of employment discrimination, etc., they would have been predicting exactly what happened.

Generalization, Hasty Generalization, and Over Generalization—Perhaps the trickiest part of sophisticated argumentation is making generalizations versus over generalizations. We are often counseled against making generalizations, particularly if they involve stereotyping people based on their race, gender, religion, national origin, and so forth. This is good advice, for such stereotypes are often as wrong as they are accurate, so it's better to treat people as individuals rather than representatives of some larger group. Making a generalization from an atypical example is a fallacy called *hasty generalization*.

However, we should also keep in mind that very little social science analysis could take place without some well-considered and carefully stated generalizations. If we gather and analyze data that falls into certain patterns, we would be remiss as political scientists if we failed to point that out. Therefore, I am on safe ground if I make the generalization that older Americans tend to vote at higher rates than do younger Americans, because that's the story the data tell after every election. Notice that I phrased the generalization in a nuanced way using the word "tend," instead of distorting reality by saying, "Old people vote, and young people don't."

What if . . . ?

What if you were the superintendent of a public school system and you wanted to make sure that students graduated high school with the ability to recognize fallacious arguments and the ability to make strong arguments of their own? How would you change the curriculum to accomplish that? How early would you start? What would you have students do?

References

1. Original source unknown. This quote is attributed to author Christopher Hitchens all over the Web: "There

are all kinds of stupid people that annoy me but what annoys me most is a lazy argument." I'm not a fan of references to "stupid people," so I cut that part of the quote.

2. Connie Missimer, *Good Arguments. An Introduction to Critical Thinking*. Englewood Cliffs, NJ: Prentice-Hall, 1990. Page 61.
3. Missimer, *Good Arguments*. Pages 40-42.
4. Susan Jacoby, *The Age of American Unreason*. New York: Pantheon Books, 2008. Page 211.
5. Robert J. Fogelinand Walter Sinnott-Armstrong, *Understanding Arguments. An Introduction to Informal Logic*. San Diego: Harcourt-Brace Jovanovich, 1991. Page 117.
6. Loren J. Thompson, *Habits of the Mind: Critical Thinking in the Classroom*. New York: University Press of America, 1995. Page 123.

Media Attributions

- Income Over Time © Center on Budget and Policy Priorities is licensed under a All Rights Reserved license

Chapter 7: Basic Political Analysis

"The median black family, with just over $3,500, owns just 2 percent of the wealth of the nearly $147,000 the median white family owns. The median Latino family, with just over $6,500, owns just 4 percent of the wealth of the median white family. Put differently, the median white family has 41 times more wealth than the median black family and 22 times more wealth than the median Latino family."

—Inequalty.org (1)

Calculating Percentages

Political scientists use basic and sophisticated quantitative and qualitative research methods in their work. Reviewing those methods is beyond the scope of this introductory text. Still, you should be familiar with the following basic analytical techniques.

One of the most basic operations we can do in quantitative analysis is to sort things into categories and count how many instances fit into each category. Another is to translate raw numbers into percentages. Let's look at a subtle yet important change in the United States that is reflected in the number of associate's and bachelor's degrees conferred in the United States between 1970 and 2000. The National Center for Education Statistics has the following data for college degree attainment in those years. (2) Check out these facts:

- In 1970, colleges and universities conferred 206,000 associate's degrees, of which 117,000 were to men and 89,000 were to women. In 2000, colleges and universities conferred 565,000 associate's degrees, of which 225,000 were to men and 340,000 were to women.
- In 1970, colleges and universities conferred 792,000 bachelor's degrees, of which 451,000 were to men and 341,000 were to women. In 2000, colleges and universities conferred 1,238,000 bachelor's degrees, of which 530,000 were to men and 708,000 were to women.

Overall, we can see the growing popularity of higher education for both sexes in the United States. The number of associate's degrees more than tripled during those three decades, while the number of bachelor's degrees nearly doubled. But the really interesting story has to do with the proportion of degrees women and men received. Can you see it? If you look carefully you can. The difficulty in seeing what is happening is a common one with frequency distributions. Because the total number of degrees in each category changes year by year, it is not always easy to see patterns in the blizzard of raw numbers. What if we standardize the numbers by presenting degrees earned by men and women as percentages of the total number of degrees?

- In 1970, 57% of associate's degrees were earned by men and 43% by women. By 2000, only 40% of associate's degrees were earned by men and 60% by women.
- In 1970, 57% of bachelor's degrees were earned by men and 43% by women. By 2000, only 43% of bachelor's degrees were earned by men and 57% by women.

By converting the raw numbers to percentages, we gain better understanding of what happened in that period. We can clearly see that at both the associate's and bachelor's level, the percentage of degrees earned by women has grown since 1970 while the percentage earned by men has slipped. Even simple quantitative analysis such as this can be very powerful and can prompt political scientists and sociologists to dig deeper. What caused

this shift? What political, social, and economic impacts did this shift produce? Can we find evidence of those impacts today?

It's easier for the brain to figure out what's happening here if we translate the raw numbers into percentages, because doing so highlights the actual proportion of degrees received by type per year. In this course, you absolutely, positively must be able to figure percentages.

The first thing to learn is **calculating percentages that are less than 100%**. An easy way to remind yourself how to do that is to remember the simple phrase, "part over total, times one hundred, equals percent." Let's look at a few examples. A class has 35 students; 13 are wearing sandals. We can find the percentage of students who are wearing sandals by dividing the part—13 sandal-wearing students, by the total—35 students in the class, and multiplying by 100. So, the equation is as follows:

13/35 x 100 or .37 x 100 equals 37 percent

Another example: If 10,458 of a college's total enrollment of 18,145 students register to vote, what percentage of the student body is registered to vote? Again, we find the answer by dividing the part—10,458 students registered—by the entire student-body total, which is 18,145, and multiplying by 100. The equation is as follows:

10,458/18,145 x 100 or .58 x 100 equals 58 percent

The next thing to learn is **calculating percentages that are greater than 100%**. When dealing with percentages, the part can be a larger number than the *t*otal if we are figuring percentages larger than 100 percent. Let's go back to the data for degree attainment. For 1970, the total associate's degrees conferred was 206,000, and the total bachelor's degrees conferred was 792,000. The numbers of both degrees increased by the year 2000, but what if we wanted to know whether the associate's degree numbers increased proportionally more than the bachelor's degree numbers from 1970 to 2000? We would proceed like this: Put the 2000 associate's degree number over the 1970 associate's degree number and multiply by 100. Do the same thing for the bachelor's degree numbers and compare.

- Associate's degrees: 565,000/206,000 x 100 equals 274 percent
- Bachelor's degrees: 1,238,000/792,000 x 100 equals 156 percent

If we want to say the percentage by which these figures increased, we have to discount the original base figure by subtracting 100 percentage points. Thus, the number of bachelor's degrees earned increased by 56 percent from 1970 to 2000, and the number of associate's degrees earned increased even more—fully 174 percent in the same time period.

Indexing Data to Population

Political units like states and countries often vary greatly in the number of people they contain. This can create confusion when looking at raw data if one doesn't index that data to the different populations in question. One common way this is done is to index the data directly to each person by using **per capita** figures. In Latin, *capita* is the plural of *caput*, meaning an individual person. Let's talk about gross domestic product (GDP), which is the total value of goods and services produced in a country. What if we have economic data indicating that India's (GDP) is $2.72 trillion and Italy's GDP is $2.07 trillion. We may be tempted to say that India's is a more robust economy. Before we do, however, we might want to index the overall size of the two countries' economies by the number of people in each place. Let's say India's population is 1,415,000,000 people and Italy's population is

60,250,000 people. We calculate GDP per capita by dividing the GDP by the number of people in the country. Thus:

- India–$2,720,000,000,000/1,415,000,000 people = $1,922/capita
- Italy–$2,070,000,000,000/60,250,000 people = $34,357/capita

Are you still willing to say that India's is the more robust economy? It makes a big difference when you standardize economic data by population, doesn't it?

Often, indexing to population doesn't make sense because the resulting number wouldn't make sense because it was some crazy decimal like .0034. Therefore, social scientists will index to some proportion of population that will result in a number that does makes sense. For example, let's look at homicides. Everyone knows that a liberal state like California with its large urban centers is a more dangerous place to live than a conservative, rural state like Arkansas, right? After all, according to the Federal Bureau of Investigation, California had 2,203 murders in 2020 while Arkansas only had 321 that year. It's not looking good for California. But wait. With a population of 39,538,223, California also has far more people than does Arkansas, with a population of 3,011,524. Let's compare the homicide rates of California and Arkansas by indexing the number of murders in each state to every 100,000 people who live there. To do this, we would set up an equation like this:

- Arkansas–321 homicides/3,011,524 people = X/100,000 and we would solve for X.
- California–2,203 homicides/39,538,223 people = X/100,000 and we would solve for X.

When we do this, we see that in 2020 there were 10.7 homicides for every 100,000 people in Arkansas, but only 5.6 homicides for every 100,000 people in California. Statistically, you are much more likely to be killed in Arkansas than California, and we figured that out by indexing the number of murders to population in a way that would produce an intuitive number for comparison.

Measures of Central Tendency

For many kinds of variables, we can go beyond frequency distributions and percentages and calculate simple measures of central tendency. What we are trying to do here is to describe the typical value among all those in our data sample. The two most useful measures of central tendency are the mean and median. The **mean** is the average of a group of numbers. The **median** is the middle value of a range of numbers, meaning half the data set is higher and half is lower in value.

You calculate the mean by adding up all the variables' values and divide by the number of values in the set. In this example, the variable is salaries, and there are six values in the set. Let's calculate a group's mean or average salary.

1. Mojdeh makes $45,000
2. David makes $36,000
3. Ahmed makes $37,500
4. Kendra makes $47,600
5. Aidan makes $28,000
6. Takashi makes $29,000

Step 1: Add up all of the salaries, which in this case is $223,100.

Step 2: Count the number of values you have, which in this case is six. There are six salaries in the data set.

Step 3: Divide $223,100 by six, resulting in a mean or average salary of $37,183.

We might also be interested in the value that falls right in the middle of our salary data distribution. This is called

the median. Specifically, the median is defined as the value that has the same number of values above it as it has below it. Here's how you would calculate the median value of the same data set.

1. Kendra makes $47,600
2. Mojdeh makes $45,000
3. Ahmed makes $37,500
4. David makes $36,000
5. Takashi makes $29,000
6. Aidan makes $28,000

Step 1: Organize the data points in ascending or descending order.

Step 2: If the total number of values is an odd number, the mean is the value right in the middle. If Aidan wasn't in our sample, Ahmed's $37,500 salary would be the median.

Step 3: If the total number of values is an even number, as in our sample, the median is the average of the two middle numbers. Our two middle numbers are $36,000 and $37,500, and the mean or average of those two numbers is $36,750. That's the median.

When data conform more or less to a normal distribution curve, the median and the mean are usually close together. There is one circumstance when the median and mean differ considerably, and that's when the data are skewed to one side or the other—often by a few outlying data values. Let's assume that a new person joins our group. She is paid considerably more than the others.

1. Louisa makes $5,000,000
2. Kendra makes $47,600
3. Mojdeh makes $45,000
4. Ahmed makes $37,500
5. David makes $36,000
6. Takashi makes $29,000
7. Aidan makes $28,000

Differences Between the Mean and the Median

Mean = $746,157—total salaries divided by 7

Median = $37,500—Ahmed's salary, which is in the middle of the set.

When Louisa walks into the room, suddenly the mean salary jumps up to three-quarters of a million dollars, while the median only bumps up to $37,500. Which is a more accurate economic descriptor of how well these people are doing? In this case, the median is more useful than the mean.

Content Analysis

Many researchers in a variety of disciplines use content analysis to gain insight into textual or mass media sources. Content analysis can be defined as "a systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding." (3) Content analysis often involves something as simple as counting the frequency of particular words in a text. It may entail categorizing the people quoted and the photographs used, or it may involve measuring sentence length, vocabulary, and so on.

An effective content analysis must be done carefully. The researcher must first specify the media universe that they are going to analyze, as well as the sample from that universe. She also must be very specific about the analytical rules for counting and categorizing aspects of the text or media. Then she must rigorously follow those rules so there is no ambiguity about the findings. This last part has become much easier with the advent of computer programs that can do much of the work, sparing the researcher many hours and strained eyes.

Content analysis can yield very informative results. What if we examined all the presidential State of the Union speeches and looked for religious references? Would the frequency of those references change over time? Would they be related to the policies pursued by each administration? What if we examined all local television news programs for a given time period and analyzed all references to our state's congressional delegation? Are

the references in a positive, negative, or neutral light? Do they fluctuate over the election cycle? What if we did a content analysis of two different news sites' editorials and looked for ideological differences between them?

Survey Research

Surveying individuals has been a very popular analytical form in political science, sociology, marketing, psychology, and communications studies. If you want to know about people or about their opinions and knowledge, often the best thing to do is to ask them. Surveys can take several forms—from telephone interviews to in-person interviews, from controlled-environment questionnaires to mail-in questionnaires. Sometimes, a researcher wants to survey a discrete group of people—say, former Secretaries of State—in which case they will contact all the group's members and ask them questions relevant to the research project. In other instances, the researcher is interested in surveying a large population. Because it is not feasible to survey large populations, the researcher instead selects a random sample out of the larger population and gives them the survey. Using statistical techniques, the researcher can state with much confidence that the answers given by the random sample are representative of the entire population.

Survey research is a complicated field that we can't do justice to here, but you should be aware of the major types of questions found in surveys.

Dichotomous Questions. These questions have only two possible answers. Questions that require a yes or no answer are dichotomous, as are questions that ask you to put yourself into one of two categories, like whether you are a citizen or not.

Multiple-Choice Questions. These questions offer three or more defined choices from which the respondent can choose. Such a question might ask for the respondent's ethnicity, for example, or for them to choose their favorite from a list of presidential candidates. A common type of multiple-choice question is to probe the respondent's opinion using a Likert response scale.

Likert-Response Scale. For these questions, the respondent is probed for his or her agreement level with a statement. For example: "The death penalty is justifiable in some circumstances—strongly disagree; disagree; neutral; agree; strongly agree."

Thermometer-Scale Questions. Very often these are called "feeling thermometers" because they are usually used to probe the respondent's affect toward a certain subject or person. In an in-person setting, the respondent is presented with a thermometer that runs from 0 to 100 and is asked to point at the thermometer to reflect their positive or negative feeling. For example, we might show photos of political candidates to the subjects, who would then point to 89 for one candidate, 14 for another candidate, 67 for a third candidate, and so forth.

Ranking-List Questions. These questions present the respondent with a list of items and asks him or her to rate the item's importance. For example, we might do this with a list of issues facing the country. The respondent gives the most important issue a 1, the second most important issue a 2, and so on.

Open-Ended Questions. These questions provide the respondent with much freedom to structure the answer for themselves. Instead of ranking issues facing the country, the survey might simply ask the person: "What do you think is the most important issue facing the United States?" Or, the researcher can follow a multiple-choice question about which candidate the respondent supports with an open-ended question, such as, "Why do you support that candidate?"

Survey research results are heavily dependent on question wording. When you see public opinion polls cited in the media, and t*he question's exact wording is not published*, you should be suspicious and look for the original survey so that you can check the wording. How questions are worded can have major impacts on major issues like, how much government spending people support. For example, consider the following two versions of a question:

- Are we spending too much, too little, or about the right amount on welfare?
- Are we spending too much, too little, or about the right amount on assistance to the poor?

One study found that the public was about 41 percentage points more likely to support more "assistance to the poor" than it was to support "welfare." (4)

The other thing to look for is whether the poll is a legitimate attempt to gauge the public's opinion or if it's a push poll. A push poll combines a survey with biased information designed to get the results the sponsoring organization or candidate is looking for. Push polls have been denounced by all legitimate survey research organizations. (5) In a push poll, the pollster tells subjects things like (made-up example) "Representative Jones wants to give tax breaks to yacht owners and wants to end all women's bodily autonomy," and then the pollster poses a question like, "Should representative Jones be re-elected?" When the mostly negative results come back, the sponsoring organization or opposing candidate will try to feed the media information about Representative Jones being unpopular with his constituents.

Typologies

A smart beginning to conducting any political analysis is to organize information into a typology. A typology is a visual device that allows you to systematically classify types that have common characteristics. All sorts of political events, things, and people can be sorted in a typology. Use a basic typology to sort things by how they score on two important dimensions. Over two thousand years ago, Aristotle created a typology of different types of governing systems. Aristotle's two dimensions were *who* ruled and *in whose interest* they ruled, producing a typology that looks like this:

In Whose Interest?	**Who Rules?**		
	The One	*The Few*	*The Many*
Common Good	Monarchy	Aristocracy	Polity
Private Good	Tyranny	Oligarchy	Democracy

Aristotle's Typology of Political Systems

The first thing to notice is that terminology has changed since Aristotle's time. He equated democracy with mob rule—the masses ruling in their own selfish and short-sighted interest. He also makes a different distinction than we do between aristocracy and oligarchy as though the main difference was in whose interest the few ruled. Today, we tend to see aristocracies as ruling in their selfish interest just like we do oligarchies. The

main takeaway is that Aristotle thoughtfully tried to apply what he knew about political regimes in a systematic way. You can do the same thing with presidential vetoes, elections, congressional bills, political demonstrations, or just about any political phenomenon in which you have enough cases to categorize. One important rule of typologies is that the interior cells must be mutually exclusive—that is, the things that you are categorizing must fit in one—and only one—box. A political system cannot be both a polity and a monarchy in Aristotle's typology.

References

1. Inequality.org
2. National Center for Education Statistics
3. Steve Stemler, "An Introduction to Content Analysis," ERIC. June 2001.
4. Kenneth A. Rasinski, "The Effect of Question Wording on Public Support for Government Spending," *Public Opinion Quarterly*. 53(3): Autumn, 1989. Pages 388-394.
5. Marjorie Connelly, "Push Polls, Defined," *The New York Times*. June 18, 2014.

Media Attributions

Chapter 8: Six Very Powerful Questions

"Once you have learned how to ask questions—relevant and appropriate and substantial questions—you have learned how to learn, and no one can keep you from learning whatever you want or need to know."

–Neil Postman and Charles Weingartner (1)

"What if we started asking better questions?"

–Rob Hopkins (2)

Respond to Your World with Questions

Educated people—whether they are political scientists or not—assume a critical mindset with respect to the world. This is not to say that they are always criticizing everything and everyone, or that they are cynical. A critical mindset means that we refuse to automatically accept what we are told or what we read. We may eventually do so, but only after careful consideration and reflection. Also, we should be critical about challenging and seeking to improve the *status quo* in politics and society. ***Status quo*** basically means "the situation as it is now" in any given realm. A good education frees the mind from superstition, magical thinking, tribalism, knee-jerk reactions, and baseless deference. It empowers us with knowledge about history, art, politics, literature, and the varieties of human experience. A good education enables us to participate in the vigorous debates that sustain and enrich a republic. It allows us to recognize the limitations of the *status quo* and make things better.

Above all, an educated person is one who asks questions. Too often, people start out with a critical mindset—think of the questions asked by young children—but then seem to have it socialized out of them. Why is that? It's not as though the world becomes less interesting as you grow up. Some blame a mind-numbing mass schooling system that extinguishes genuine curiosity. (3) Others suggest that dogmatic churches snuff out inquiry because religion proclaims to have the Truth. (4) Still others argue that a critical mindset can't flourish in a society that exalts amusement the way ours does. (5) It is not this course's purpose to get to the bottom of that problem, although it's an interesting conundrum. In all likelihood, many factors work together to condition people *not* to think critically and *not* to question. However, we must resist that tendency. In this text, we are concerned that you become students of the American political system, that you read widely, that you think deeply, and that you ask questions.

What kinds of questions should we ask? Any will do, really, but a basic toolkit includes the following six very powerful questions:

How Was This Decision Reached?

As we noted earlier, politics involves people making decisions, or non-decisions, about allocating limited resources or rights and privileges within the context of government, the economy, and society. Whenever one of those decisions is made—or not made, in the case of non-decisions—an educated person is as interested in *the decision-making process* as they are in the actual decision itself. Who made the decision? Were the people

most affected by the decision able to participate in the process? Were they able to do so on an equal basis? If not, is there a good reason for the inequality of input? Upon what information was the decision made? Did the decision follow established rules and procedures, or did it deviate from them? Were all the decision's possible ramifications given ample consideration? Did the decision need to be made at this time?

Qui Bono? or Who Benefits?

There are inevitably winners and losers in the struggle over resources, rights, and privileges. One of the most fundamental questions a political scientist asks is *qui bono*, which is Latin for "who benefits." In some ways, this is an addition to our question above about decision-making. Who benefits if a decision is made this way? Who benefits if it is decided another way? Who benefits if no decision is made? Who benefits from the *status quo*? Does one set of interests consistently benefit at another's expense? Are the rules of the game stacked so that one set of interests is more likely to benefit? Who benefits if certain beliefs, myths, or ideas are prevalent in society?

Who Has Power?

Asking "who benefits?" is a great jumping off point when asking questions about who has power—either generally or in each policy realm. We are particularly interested when certain people or groups tend to benefit more than others or when they benefit consistently over time. To discover who has power, we can work backwards from a decision or action to see how the winners deployed resources, strategies, and tactics in ways that pushed political decision-makers to act in their favor. Working backwards helps us to see how the political process might have been preferentially structured in the winners' favor before the struggle even started. Think about who benefits and who has power when you ask the following policy questions: What is the minimum wage? How much of our national resources should go to the military and national security? Should we aggressively respond to the climate crisis? How should we educate our children?

What Is the Evidence?

Assertions should not be taken at face value. You should get in the habit of asking for evidence when someone makes an assertion. If you are reading someone's argument, always be scanning for sufficient evidence to warrant the author's inferences. When a politician is claiming that they would be a good representative, senator, or president, you should be asking yourself "what evidence is there to support the claim that this person would be good in that position? Is there any counter evidence?" In most cases, you'll need to do a little research before you come to a judgment, but don't let that daunt you. Democracy requires much from its citizens, and one requirement is that we do not simply accept claims on faith.

Of What is *This* an Example?

In politics, as in life, many things are happening all the time. It is easy to get disoriented by the many political events that seem to occur in a blur—sort of like watching fence posts whiz by your side window when you're driving on a country road. But the political world is not as complicated as it initially appears, especially if you

get in the habit of asking, "Of what is *this* an example?" Events repeat themselves throughout history, although they may manifest themselves differently each time. Still, by sorting and categorizing events, we can begin to generalize and systematically analyze how similar events manifest themselves somewhat differently each time. Is event A behaving like all those other events in that category? If not, what is different about it?

Take something as basic as an election, for example. Elections come and go, and many people see them as individually distinct events that are entirely new each time—new election year, new candidates, new attack ads, new results. But if you analyze them more carefully, elections fall into patterns as well—e.g., elections with an incumbent defending their seat versus open-seat elections; elections in good economic times versus elections during economic downturns; elections before the invention of the Internet versus elections since; and elections during presidential years versus mid-term elections.

By first asking ourselves "Of what is *this* an example?" and doing some careful sorting, perhaps in a typology, we can begin to generate interesting research questions, such as "Why is voter turnout so much higher in presidential elections than it is in mid-term elections?"

How Is *This* Related to *That*?

Of course, we are not just concerned with distinct events. We are interested in political, social and economic relationships in all their multiple dimensions. How is this event related to that one? How is this politician related to that decision? How are underlying characteristics such as gender, race, or class related to key economic or political outcomes? How is low voter turnout related to whether certain issues are discussed, let alone how they are resolved? Often, the answer to our question will be that there is no relationship, or at least that there is insufficient evidence to support the conclusion that there is a relationship. In many other cases, though, we can be confident in our claims about relationships. By asking, "How is *this* related to *that*?" we can open another door in our search for ways in which to make sense of our world.

References

1. Neil Postman and Charles Weingartner, *Teaching as a Subversive Activity*. New York: Delacorte, 1969. Page 23.
2. Rob Hopkins, *From What Is to What If: Unleashing the Power of Imagination to Create the Future We Want*. White River Junction, VT: Chelsea Green Publishing, 2019. Page 121.
3. John Taylor Gatto, *Weapons of Mass Instruction: A Schoolteacher's Journey Through the Dark World of Compulsory Schooling*. Gabriola Island, British Columbia: New Society Publishers, 2009.
4. Wendy Kaminer, et al., *The Harm Done by Religion*. Inquiry Press, 2016. Christopher Hitchens, *God is Not Great: How Religion Poisons Everything*. New York: Twelve, 2007.
5. Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*. New York: The Penguin Group, 1985.

Chapter 9: Critical Reading and Reflection

"Reflection is a systematic, rigorous, disciplined way of thinking."

–Carol Rogers (1)

Political scientists share with other social scientists—indeed, with all well-educated people—a talent for critical reading. Doing so requires a great deal of practice. Critical reading involves developing certain intellectual and behavioral habits. If you apply a systematic approach to reading texts, you will achieve deeper understanding than if you just read superficially. The critical reading guidelines below constitute a blend of the advice offered by Salisbury University, the University of Minnesota, Harvard University, and Empire State College. You should use these guidelines in this course and in other situations where you encounter texts. Texts might be articles, primary source documents, speeches, etc.—in which the author attempts to explain a political situation, to convince the audience to reach a conclusion, or to take a specific action.

What Should You Do When You Encounter a Text?

Set the Context—It is important for you to be clear about the key components of a rhetorical context: An author puts forth a text—a form of communication with a specific purpose in mind that can be written or verbal—to an audience. For any text, you should be able to answer these questions:

- Who is the author?
- What is the author's purpose? Who is the primary, secondary, and tertiary audience?
- How does the audience shape the author's messaging and word choice?
- What is the occasion or situation for the communication?
- What qualifies the author to speak or write on the topic?
- From what political perspective does the author approach the topic? What is the context in which the author writes? What has happened in the past—and what has been happening recently—with respect to the topic?
- Why is the author communicating now, in this manner? What is the author hoping will happen as a result of his communication? Who benefits if their perspective is widely adopted?

Can you answer all these questions just by looking at the text itself? Probably not. You will need to research the author's background and the topic to answer them.

Annotate—There are certain notes you should make as you read the text. If you have a hard copy, you can make annotations directly on the page. Follow a standard form of annotation, or come up with your own short-hand notation: an asterisk (*) in the margin might indicate the author's thesis; a check mark (√) might indicate an effective phrase; a question mark (?) might mean a word or phrase you don't understand, etc. It is often helpful to make a few written notes in the margin to remind yourself later what exactly you wanted to remember about that section. Otherwise, you can read the text online and make notations on a separate form or piece of paper. After reading the text a few times, you should highlight the following:

The text's thesis or main point. The text's title will hint at the thesis or main point, but that is not always the case. Sometimes, the thesis or main point is encapsulated in one sentence early in the piece, and sometimes it is more difficult to identify because its full expression might come later. In some cases, it might be spread out over several sentences that are not connected.

The evidence and/or reasoning that support the thesis or main point. This is easy enough to identify in short texts like opinion pieces or blog posts, as the support tends to stand out prominently. Often in longer texts, the evidence is a bit overwhelming. One good strategy is to highlight individual sentences that contain the most effective supporting evidence or reasoning.

Particularly powerful or illustrative phrases. Note when the author says or writes something that resonates with you or that you imagine must resonate with their primary audience. Note also phrases that illustrate a particular style or rhetorical appeal (see appeals below).

Words and phrases that you don't understand. Authors often use words or phrases with which readers are not familiar. Circle them or rewrite them on a separate page and find out what they mean. Sometimes, learning these new words will expand your vocabulary to include words that educated people use, but sometimes—particularly with primary source documents—it means learning a phrase or specialized lingo that was popular during a given historical period or that refers to a certain subculture to which the author belongs.

Outline and Summarize—This is an interesting challenge. In your own words, boil down the text into one paragraph. Alternatively, distill the text into an outline that fits on one page. You should be able to perform one of these tasks with any text. Doing so helps you develop an overall picture of the author's purpose.

Describe the Text's Rhetorical Appeals—Either consciously or unconsciously, authors employ the rhetorical appeals ethos, logos, pathos, and kairos in the text. These appeals help the audience understand the author's perspective. Note that texts often use multiple appeals. As you read a text, try to identify sentences or sections—or even the text's whole character—that might apply to one of the following appeals:

- **Ethos**—This rhetorical appeal centers around the author's credibility or trustworthiness. Such credibility—or lack thereof—can be vested inside the words the author uses; this is called *intrinsic ethos* and refers to the author's character and integrity. You've all met or seen people who enjoy credibility with their audiences because they speak with a sophisticated vocabulary and fluency. The same goes for written arguments. *Extrinsic ethos* refers to credibility that resides outside the author's text, and usually centers around the author's credentials, reputation, or history with the subject, but can also depend on the author's vested interest in the subject. For example, if a climatologist comes from a knowledgeable scientific community in which peers review each other's work for appropriate methodology and evidentiary support, this scientist has considerably more extrinsic ethos than does someone who doesn't write for peer-reviewed publications and/or who is being paid by the fossil fuel industry to create arguments favoring that industry.
- **Logos**—The appeal to logos has to do with the logic, evidence, or factual data that is used to persuade the audience. The first thing to look for here is whether the author is using fallacious arguments. Are they employing the straw man fallacy to make her point? Are they engaged in an *ad hominem* attack? After examining the text's logic, the next thing you should do is look at the overall relationship between the author's thesis/argument and the evidence they are using to support that point. Does the evidence support the thesis, or is the evidence tangential material that doesn't really lead one to the conclusion the author would like you to reach? Finally, check the evidence itself. Is it actually evidence or just an unsubstantiated assertion? Does the evidence come from a credible source? Is the author excluding obvious contradictory evidence?
- **Pathos**—The English Department at the University of Missouri—Kansas City refers to pathos as the

author's appeal to the "audience's sense of identity, their self-interest, and their emotions." Speakers and writers employ many techniques to create a bond with their readers. For example, authors may refer to "everyman" tropes about working hard, providing for one's children, going to church, and so on. They also appeal to their audience's self-interest. For example, an author might tell an audience that they should care about the environmental destruction because it is the world in which their children or grandchildren must live. Appeals to pathos are most commonly thought of as appeals to emotion. Authors can stir up fear or patriotism or hope or any emotion to bring the audience around to their perspective. Be on the lookout for ways in which authors attempt to appeal to their audience's sense of identity, their self-interest, or their emotions.

- **Kairos**–The Writing Commons describes kairos as "taking advantage of or even creating a perfect moment to deliver a particular message," in the sense of "saying (or writing) the right thing at the right time." For example, addressing disaster preparedness at an annual meeting of the city council is a different situation than addressing the same topic to a crowd of angry, cold, wet, and recently homeless people who have just survived the failure of an old dam that the local city council failed to fix. If I'm rhetorically sophisticated, I will tailor my language and tone to best match the differing audiences and circumstances. I also have an ethical responsibility to my audience and the situation. I can, for example, achieve my aims by manipulating or deceiving or preying upon people's irrational fears, but this is at the expense of ever objectively and appropriately reaching kairos. As you encounter a text, examine the author's modality and language. Does it fit or not fit the given situation? Is the author treating their audience fairly?

Reflect—If you've read through a text several times to annotate it and understand its rhetorical appeals, and if you've done some background research to establish its context, you're now in a good place to reflect upon it. Examine your own thinking as you consider the piece.

- Did it challenge your assumptions or expand your understanding?
- Has your thinking been stretched by encountering this text?
- How does the text connect to other things you've read, to the broader world, or to your own situation?
- How would you describe the piece's impact in a way that would excite other people to experience it as well?

Write about any or all of those things—and for goodness sake, don't be afraid to be vulnerable or to elaborate!

Reflective Writing

Reflective writing is different than academic writing. Let me illustrate and be a little vulnerable myself by sharing two reflections that I wrote when I led a London study abroad trip. I completed the same broad assignment that I gave to students, which was to create a reflective ePortfolio that documented the political, historical, and cultural venues we visited. One ePortfolio assignment was dedicated to artwork that the students found particularly impactful. I advised students to choose their own art topic on which to reflect and urged them to think of each art piece as a text.

Here are two examples of reflection from my ePortfolio. I've annotated my responses [in blue brackets] to call attention to what I'm doing. Note how I answer some of my own questions from the previous paragraph.

Richard Long—Small White Pebble Circle (1987)

Richard Long is a living British artist (b. 1945) whose work has been exhibited in galleries and museums around the world. This particular piece—a large set of five concentric circles made of small white stones, arranged on the concrete floor of the Tate Modern Art Museum—doesn't really do justice to his other work (more about that later) and gives rise to a common reaction to modern art: "My kid could do that!" [Note that I'm setting the context here—where I am, what I'm looking at, and my initial reaction.]

Pretentious. Facile. Ridiculous. Those were some of the adjectives that went through my head when I first saw what looked like a target made of pebbles. "Come on," I said aloud. "That's not art." According to Long, his work is "a balance between patterns of nature and the formalism of human abstract ideas, like lines and circles." When I read this explanation on the information plaque, I tried to change my point of view to understand the piece as it might have been intended. When I shifted my perspective, it occurred to me that the piece might represent a stylized set of waves—as though a single white pebble had been dropped into a pool of liquid concrete. From that perspective, it looked like the industrialization of ripples in a mountain pond. [This paragraph shows how my assumptions were challenged by Long's piece.]

The evening after our visit to the Tate Modern, I googled Richard Long and looked at his official site. I found that, in my opinion, his best work consists of natural installations set out in the wilderness. Check out this piece in Scotland, or this one in the mountains of California, or this one in India. "That's more like it. These kinds of installations really appeal to me," I thought. What do I see when I look at them? I see mankind's primordial markings on the natural landscape. At some point in our evolution, we began to make lasting marks on the earth, tentative at first, but more substantial with time—such as the mysterious monument at Stonehenge that we visited. Eventually, our marks became highways, buildings, canals, and even alterations to the world's atmospheric chemistry. Long's works strike me as an attempt to visualize the beginnings of this tragic transformation from man-in-nature to man-apart-from-nature. At least, that's what I take away from them, whether he intended so or not. These works, more than the piece I saw in the Tate Modern, speak to me. They are like warning beacons come too late. [I'm making connections here—first to other pieces by Long, and then to the larger issue of mankind's impact of on the natural world. I'm coming to a new understanding that's different and more sophisticated than my initial gut reaction to Long's work.]

Erich Heckel—Seated Nude: Egyptian Girl (1909)

What's the difference between art and pornography? That's the question that flashed through my mind when I saw Seated Nude by Erich Heckel in the Courtauld Gallery. Is "acceptable nudity" considered art while "unacceptable nudity" is just porn? According to the information plaque at the Courtauld, Heckel's portrait of a nude adolescent girl "was a deliberate attack on the moral and artistic taboos" of his era. I can certainly imagine that the painting was absolutely scandalous in 1909. Even today, most Americans would dismiss it as perverted and without merit. If Heckel's intent was to use the painting as a social critique on the holdovers of Victorian morality, that political bent to the piece would clearly put it outside the Supreme Court's definition of "obscenity." But is that enough to justify the painting's place in a prestigious London art museum? Surely, the painting signifies the kind of objectification that one associates with prurience. [Again, I've set the context—where I am, what I'm looking at—and I lead off with a question to the reader and to myself.]

The painting doesn't strike me as intentionally sexual per se, but the girl's pose— isolated on a bed, facing the viewer with her legs parted—looks like exploitative kiddie porn. In fact, I got a little self-conscious just as I was snapping a picture of the painting, wondering if other people in the room were glancing at the perv with the camera. Then, instead of continuing to look at the painting itself, I parked myself across the room and watched people as they approached the piece. As a rule, men gave it a side glance and moved on quickly, probably trying to not be seen as too interested in the painting. Women tended to look at it more intently. Maybe they were asking themselves the same art/porn question that had gone through my mind. [Deeper reflection and analysis here. I'm thinking about my thinking and asking whether I am the only one who is troubled by the piece.]

The painting's ability to make people uncomfortable 100 years after it was created strikes me as a testament to the piece's ability to challenge our puritanical impulses. It's as though Heckel is saying, "Get over it, already!" He's placing the burden of our discomfort squarely on our own shoulders, because the girl is going to continue gazing back at us whether we are blushing or not. [I'm challenging my initial assumption: Maybe the piece isn't about the girl in the painting, but about the viewers.]

References

1. Carol Rogers, "Defining Reflection: Another Look at John Dewey and Reflective Thinking," *Teachers College Record*, 104(4). Page 845.

Media Attributions

Chapter 10: The Context of U. S. Government and Politics

"I want to point out that people who seem to have no power, whether working people, people of color, or women—once they organize and protest and create movements—have a voice no government can suppress."

–Howard Zinn (1)

Just as you should familiarize yourself with a text's context before you can fully understand it, the same applies to our examination of the U. S. political system. This context is the water that our political system drinks and the air that it breathes. The contextual features we want to highlight are basic historical facts that might be uncomfortable to acknowledge but that have impacted American politics for centuries and continue to do so. Put another way, any student who wants to understand the American political system would be well served if they acknowledge the following four contextual features that define much of the landscape in which our political system operates.

Troubled Race Relations

America's race relations have been marked by slavery, theft, discrimination, segregation, violence, and inequality. (2) Notwithstanding the many fine personal, familial, and work relationships ordinary Americans develop across racial and ethnic lines, American society has always been fraught with racial and ethnic bigotry, racialized politics, and racialized economic opportunities. Of course, the entire American Experiment is built on land from which indigenous peoples were removed by disease, conflict, trickery, and force. America is the artifact of the British colonial empire that, in turn, continued the colonization until there was nothing left of indigenous peoples but marginal land and population remnants.

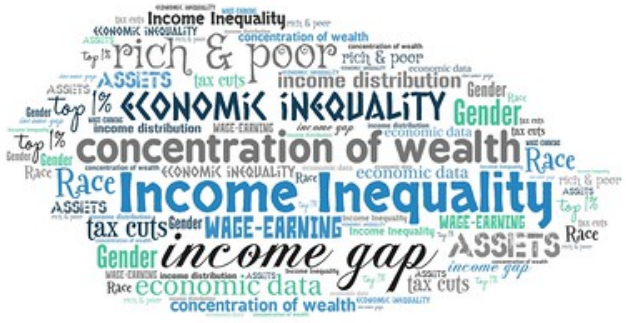
Protesters in Minneapolis.

Try thinking of all the generic means by which one group of people can assault and dehumanize another group of people, and then consider that they have probably been done by some Americans to other Americans. We can start with the **foundational sins**: the near extermination of Native American peoples and 250 years of institutionalized slavery inflicted upon people abducted from Africa and their decedents. The mind reels at the challenge of adding up the stolen potential and the transferred wealth inherent in these sins. If we go beyond the foundational sins, the list of barbarisms is remarkable. Consider America's many race riots in which Whites targeted Blacks, (3) or the number of violent uprisings caused by brutality and ill treatment of Blacks by police and local authorities. (4) Ponder the 120,000 Japanese Americans incarcerated in detention camps during World War II. (5) Keep in mind the decades of lynchings that killed thousands of mostly African Americans and that served to "police" the behavior of all those who were not directly affected. (6) Think of church burnings, voter suppression, segregation, and militarized police violence that falls disproportionately on people of color. Consider America's incarceration culture. Imagine a cross burned on your front lawn by an organization that for decades could freely march down the streets of any city in America without censure or repercussion.

The legacy of racial violence and ill will continues to reverberate through American society. It takes the form of disparities between Whites and Blacks on fundamental indicators such as income, wealth, educational attainment, and health. It also poisons our politics. In 2008, Barack Obama became the first African American president. For his entire presidency, he endured allegations that he wasn't an American citizen and that he had allegiances to radical Islamic terrorists, which is a pretty good indication of how a portion of American society sees Blacks as illegitimate political actors. And while majorities of Whites and Blacks both acknowledge America's troubled race relations, strong majorities of Blacks think that America has not gone far enough to ensure equal rights, while strong majorities of Whites think it has. (7) These feelings are remarkably resistant to change and may remain politically relevant long into the future, manifesting themselves in different ways in different contexts.

Crushing Inequality Marked by Attempts to Moderate It

While it is certainly true that the American colonies were blessed with relative economic equality and class fluidity compared to aristocratic European countries of the time—at least among free Whites—the United States has been marked by enormous income and wealth gaps through most of its history. Starting from relative equality in the colonial period, economists have found that "a long steep rise in US inequality took place between 1800 and 1860." (8) In antebellum America—that is, pre-Civil War— public records document considerable wealth disparity of land, goods, and slaves. (9) The situation only got worse after the Civil War when we entered a long period of robber baron capitalism, and American inequality peaked in the late 1920s just before the stock market crash and the onset of the Great Depression. In response to the Great Depression, New Deal policies encouraged unions, regulated the financial sector, provided Social Security and other safety net programs, and put people to work on government projects. Those policies combined with the economic stimulation from World War II to create what is known as the Great Compression—the period from 1937 to the early 1970s when middle- and lower-income people gained more from economic growth than did the rich. The Great Compression essentially made the United States into a broadly middle-class society. However, corporations and the wealthy fought to eradicate the domestic policies that benefited the middle and lower classes. In foreign policy, globalization and "free trade" agreements put American workers in direct competition with their poorly paid counterparts in countries that lacked America's union protections, worker-safety regulations, and environmental regulations.



Inequality Word Cloud.

Beginning in the 1960s and accelerating thereafter, Democrats and Republicans alike pursued policies designed to make the rich even more comfortable. Corporate tax rates and the marginal tax rates on wealthy individuals dropped like a stone. Most of the New Deal's financial regulations were dropped in favor of deregulating financial institutions and the confusing "products" they developed, such as collateralized debt obligations. Ordinary Americans, in an attempt to maintain their lifestyle despite stagnant wages, job offshoring, less state support for education, and generally fewer economic opportunities, floated an increasing amount of debt: house mortgages with nothing down, student loans, credit cards, increasingly longer-term car loans, etc. In turn, this financialization of the economy made bankers and financiers even more wealthy. The 2008 Great Recession was the inevitable result. America's political system responded—not by helping ordinary Americans—but by bailing out the bankers and the con artists who crashed the system with their irresponsibility. This is one of the

most salient facts about the context of contemporary American politics, especially given that inequality has reached a new peak to rival the one that existed in the 1920s. The middle class in America has been hollowed out by wage stagnation, increased debt, and federal policies that benefit upper income families and corporations. The richest 1 percent of families in America possess more wealth than the entire middle class combined. (10)

Economic inequality is not simply a fact about the economy, for economic power translates into political power. Money buys legitimacy for ideas that otherwise would not be popular. Money pre-selects viable politicians before voters ever get a chance to weigh in. Money structures the media in ways so that some issues and policy options receive more coverage than do others. Money buys direct access to politicians and decision makers. As Lawrence Lessig once said, speaking of elected politicians, "A world where you have to spend half your time raising money means there's this small number of people on whom you're dependent and they have a huge influence." (11)

America is an Immigrant Society that Often Vilifies Its Immigrants

The United States is an immigrant society. North and South America were initially settled by nomadic peoples who crossed from the Eurasian continent when sea levels were low during the last Ice Age. Following "discovery" by Europeans, North America was colonized by the British, French, Spanish, and other people from Western Europe. In 1619, they brought slaves to what later became Virginia, and probably earlier to Spanish Florida. In the nineteenth and twentieth centuries, the United States continued to attract immigrants, especially from Ireland, Germany, various places in eastern and southern Europe, China, and Japan. In the 1920s, the United States placed national origin quotas on immigration that benefited immigrants from northern and western Europe. These quotas were dropped in 1965. According to the Census Bureau, the number of foreign-born Americans peaked at 14.8 percent of the total population in 1890, dropped to a low of 4.7 percent in 1970, and reached a mini-peak of 12.9 percent in 2010.

Americans often pride themselves on their immigrant ancestors and on immigration's role in American identity. We see ourselves defined by our common belief in American ideals of liberty, equality, and democracy rather than by our ethnicity or national origin. We see ourselves as a melting pot. Indeed, consider the Statue of Liberty, which features poet and immigrant-activist Emma Lazarus' ode to America's immigrants:

The New Colossus

Not like the brazen giant of Greek fame,
With conquering limbs astride from land to land;
Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome; her mild eyes command
The air-bridged harbor that twin cities frame.
"Keep, ancient lands, your storied pomp!" cries she
With silent lips. "Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!"

—Emma Lazarus, 1883

Statue of Liberty

At the same time, America has witnessed tremendous conflict over immigration, and immigrants have been targeted by nativist and xenophobic groups throughout much of American history. Xenophobia is a fear of foreigners, while nativism is a more organized political philosophy opposed to immigration; it favors limiting the power of and opportunities for immigrants. In the 1850s, an entire U.S. political party—the nativist American Party, more popularly known as the Know Nothing Party—took over the state legislature in Massachusetts, elected the mayor of Chicago, captured 40 percent of the vote in Pennsylvania, and had short-term successes elsewhere. The Know Nothings directed their hatred particularly at Catholic immigrants. The party fragmented over slavery, with the pro-slavery Know Nothings tending to end up in the Democratic party and the anti-slavery Know Nothings aligning with the Republicans.

The spirit of the Know Nothings lived on, however, in various movements such as the anti-Catholic American Protective Association and the Ku Klux Klan. Nativists argue for strict limits or bans on immigration and limits on immigrants' ability to become citizens, vote, or hold office. American immigration laws have been shaped by nativist sentiment. In 1882, for example, Congress passed the Chinese Exclusion Act that banned immigration from China. In the 1920s, the resurgent Ku Klux Klan targeted Jews and Catholic immigrants as well as Blacks. John F. Kennedy's bid for the presidency in 1960 stimulated some anti-Catholic agitation, but not enough to derail his candidacy. President Donald Trump, when announcing his bid for the White House in 2015, denounced Mexicans crossing the U. S. border as "bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Nativism today has more to do with whites fearing brown immigrants than the nativism of years past when Protestant whites feared other whites such as Catholic Irish, Catholic and Jewish Germans, and Catholic and Eastern Orthodox people from eastern and southern Europe. But nativism is not a philosophy reserved for Whites; it can also be found among people of color who fear that immigration will create unwanted economic competition or associative stigma.

Corporate Personhood and Privilege

"Corporations are people, my friend," said Mitt Romney to a heckler when he was running for president in 2012. "No, they're not!" shouted someone else from the crowd. (12) That small exchange illustrates not only a fault line in American politics, but a defining feature of it. When the founders began the United States Constitution with "We the people of the United States," they were talking about living, breathing, mortal human beings gathering together to create "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." They had no idea that corporations and other artificial entities would, over time and with the help of politicians and judges, establish themselves as people in our political system.

Corporate Greed is Deadly.

Corporations are artificial legal entities sanctioned by governments to accomplish specific economic tasks. Over the history of the American republic, corporations have come to be regarded by courts and the law as persons, and they have taken on many of the political rights once reserved only for human beings. Corporations even hijacked the Fourteenth Amendment's language that "no state 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." That language was originally intended to protect actual people—particularly African Americans in the wake of slavery's demise—from abuse by state authorities, but has since been used by conservatives and business lawyers to expand corporate rights. According to James Nelson, a retired Montana state supreme court justice, the idea "that corporations are constitutional persons is the Supreme Court's bastard child that can never prove its legitimacy." (13)

While corporations cannot cast ballots on election day, the list of corporate rights is breathtaking. Corporate charters are contracts that cannot be altered by governments. Corporations have due process and equal protection via the Fourteenth Amendment. Corporations have Fifth Amendment protections against being deprived of "life, liberty, or property, without due process of law," just compensation for private property loss, and protection against double jeopardy. Corporations are covered by the Fourth Amendment's protections against "unreasonable searches and seizures." They have the right to jury trials in criminal and civil cases. Corporations have First Amendment freedom of speech protections for their commercial speech, and they can spend unlimited amounts of money advocating political causes and supporting candidates as an exercise of their freedom of speech. And private corporations have religious freedom protections, meaning they can limit employees' privileges based on the corporation owner's religious convictions. (14) They have a megaphone like none other in American politics. Senator Sheldon Whitehouse described it this way: "Never in my life have I seen such a complex web of front groups sowing deliberate deceit to create public confusion about issues that should be clear. The corporate propaganda machinery is of unprecedented size and sophistication." (15)

Not only are corporations considered people under the American political system, they are more vocal, more tenacious, longer lived, and possess better access to political decision makers than do ordinary individuals. This is an inherently corrosive situation for a democratic republic, because corporations are, by definition, amoral entities that pathologically pursue profit and growth with little heed for democracy. (16) Large corporations—and that's really what we're talking about here rather than mom and pop operations and other small businesses—have the resources and the persistence to shape public policies to create monopoly power, suppress wages, and put up barriers to competition. This fact, combined with the power of wealthy individuals, may be one of the main reasons why most ordinary people have little faith in the way democracy works in America. (17) People notice when they are losing power. Ben Jealous, former president of the National Association for the Advancement of Colored People (NAACP) put the imbalance clearly: "We are facing a dual attack on our democracy. Everyday voters are being disenfranchised, while corporations are being hyper-enfranchised." (18)

Conclusion

These, then, are the four contextual landmarks that help define the American political system. It is not anti-American or unpatriotic to acknowledge them. Think about this chapter in these terms: For individuals, a mark of maturity is the ability to acknowledge one's mistakes, learn from them, and move forward. The contextual landmarks described here are mistakes that America has made and continues to make. They deeply affect the nature of our politics. Not only do they help us understand our political system, they are markers for whether we can become a mature political system that faces up to its past, learns from its mistakes, and moves forward in ways that improve the lives of ordinary Americans.

Acknowledging these mistakes does not lead us to specific policy recommendations. To see the current peak of inequality in America does not mean that we must advocate strict equality for everyone. We can accept that a certain amount of inequality may be healthy for a society, even if we reject the clearly unhealthy level of inequality now. Progressive policies to reduce inequality may very well be called for. To see the obvious legacies of slavery and the colonization of North America, as well as contemporary injustices, does not necessarily lead to the conclusion that formal reparations are required–although one might easily argue for them. However, past and present injustices do demand policies that promote social justice and truly equal opportunity that rewards merit and effort. A mature democracy can address difficult issues like these by using imagination and building consensus. An attenuated democracy cannot.

What if . . . ?

What if you were writing this textbook? The four contextual features discussed above—race relations, inequality, immigration, and corporate personhood—aren't the only prominent landmarks that define American politics. If you were writing this book, what other contextual features would you want to highlight? Why? How do they affect politics in the United States?

References and Notes

1. Howard Zinn, "Introduction," in Howard Zinn and Anthony Arnove, *Voices of a People's History of the United States*. New York: Seven Stories Press, 2004. Page 28.
2. That's a heavy charge, but it's probably the first thing space alien scientists would note about the United States. If you are doubtful, here's a short reading list: Ibram X. Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America*. New York: Nation Books, 2016. Edward E. Baptist, *The Half has Never Been Told: Slavery and the Making of American Capitalism*. New York: Basic Books, 2014. Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. New York: Anchor Books, 2009. Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States*. Boston: Beacon Press, 2014. David E. Stannard, *American Holocaust: The Conquest of the New World*. Oxford: Oxford University Press, 1992. Ronald Takaki, *A Different Mirror: A History of Multicultural America*. New York: Back Bay Books, 2008.
3. A partial list of white-black conflict includes the New York City Draft Riots in 1863 and the racial turn they took; New Orleans in 1866; Wilmington in 1898; Atlanta in 1906; Omaha in 1919; Chicago in 1919; Tulsa in 1921.
4. A partial list of riots and uprisings includes Detroit in 1967; Newark in 1967; Miami in 1980; Los Angeles in 1992; Cincinnati in 2001; Ferguson in 2014; Baltimore in 2015; BLM in 2020. The best book on this subject is

Elizabeth Hinton, *America On Fire: The Untold History of Police Violence and Black Rebellion Since the 1960s*. New York: Liveright Publishing Company, 2021.
5. Richard Reeves, *Infamy: The Shocking Story of the Japanese Internment in World War II*. New York: Henry Holt and Company, 2015. Lawson Fusao Inada, editor, *Only What We Could Carry: The Japanese American Internment Experience*. Berkley, CA: Heyday Books, 2000.
6. Philip Dray, *At the Hands of Persons Unknown: The Lynching of Black America*. New York: Random House, 2002. Ralph Ginzburg, *100 Years of Lynchings*. Baltimore: Black Classic Press, 1962.
7. Juliana Menasce Horowitz, Anna Brown, and Kiana Cox, "Race in America 2019," The Pew Research Center. April 9, 2019.
8. Peter Lindert and Jeffrey Williamson, "Unequal Gains: American Growth and Inequality Since 1700," *CEPR Policy Portal*. June 16, 2016.
9. Gloria L. Main, "Inequality in Early America: The Evidence from Probate Records of Massachusetts and Maryland," *Journal of Interdisciplinary History*. 7(4): Spring 1977. Pages 559-581.
10. Anne Helen Petersen, "America's Hollow Middle Class," *Vox*. December 15, 2020. Dani Alexis Ryskamp, "The Life in The Simpsons is No Longer Attainable." *The Atlantic*. December 29, 2020. Wealth figures come from the Federal Reserve, *Distribution of Household Wealth in the U.S. Since 1989*. Updated October 1, 2021.
11. Quoted in Maggie Koerth-Baker, "Everyone Knows Money Influences Politics … Except Scientists," *fivethirtyeight.com*.June 4, 2019.
12. Philip Rucker, "Mitt Romney Says 'Corporations are People'," *The Washington Post.*August 11, 2011.
13. The history of how corporations became vested with the political rights intended for natural persons (i.e., actual human beings) is too long and detailed to present here. See Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights. New York: Liveright Publishing Corporation*, 2018. Jeffrey D. Clements, *Corporations Are Not People: Why They Have More Rights Than You Do and What You Can Do About It*. San Francisco: Berrett-Koehler Publishers, 2012. Doug Hammerstrom, *The Hijacking of the Fourteenth Amendment*. Published by ReclaimDemocracy.org. Adam Winkler "'Corporations Are People' is Built on an Incredible 19th Century Lie," *The Atlantic*. March 5, 2018. James C. Nelson, "There's No More Activist Court Than the US Supreme Court," *Counterpunch*. February 3, 2022.
14. Aside from the sources cited above, see also Jan Edwards, et al., *Timeline of Personhood Rights and Powers* created by Move to Amend. William Meyers, *The Santa Clara Blues: Corporate Personhood Versus Democracy*. III Publishing, 2000. Alex Park, "10 Supreme Court Rulings—Before Hobby Lobby—That Turned Corporations into People," *Mother Jones*. July 10, 2014.
15. Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy*. New York: The New Press, 2021. Page xviii.
16. Joel Baken, *The Corporation: The Pathological Pursuit of Profit and Power*. New York: Free Press, 2004. Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism*. New York: Henry Holt and Company, 2007.
17. David Kent, "The Countries Where People are Most Dissatisfied with how Democracy is Working," The Pew Research Center. May 31, 2019.
18. Quoted in Ari Berman, *Minority Rule: The Right-Wing Attack on the Will of the People—and the Fight to Resist It*. New York: Farrar, Straus, and Gioux, 2024. Page 24.

Media Attributions

- BLM White Silence © Andy Witchger is licensed under a CC BY (Attribution) license
- 48612612772_8b98f1e883_w © Epictop10 is licensed under a CC BY (Attribution) license
- DSC_0065.JPG © David Hubert is licensed under a CC BY (Attribution) license
- Corporate Greed © a.mina is licensed under a CC BY (Attribution) license

PART 2: CONSTITUTIONAL FOUNDATIONS

Chapter 11: Deism, the Indigenous Critique, Natural Rights, and the Declaration of Independence

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

—Giordano Bruno [1548-1600] (1)

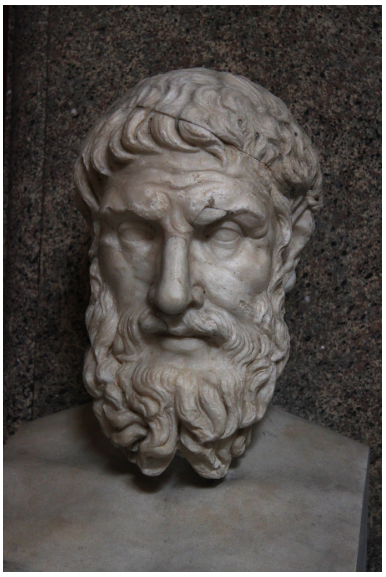
"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a god; because, if there be one, he must more approve of the homage of reason than that of blindfolded fear."

—Thomas Jefferson (2)

Ideas are important—even if they initially appear strange and radical. The foundations of the current American political system originally came from ideas espoused by various seventeenth- and eighteenth-century European philosophers who thought deeply about the proper ordering of a political system. These philosophers, in turn, were (in part) responding to a critique of European societies by indigenous thinkers whose names have mostly been lost to history. Additionally, the ideas central to the American founding were grounded in philosophical understandings of matter, the universe, and God that the Christian church saw as heretical. As a student of American politics, it is important for you to have insight into the ideas and reasoning that shaped the Declaration of Independence and understand the following philosophical systems that helped shape American ideals. Let's take this story in chronological order and start with the development of materialism into deism.

Deism

Materialism is a category of ancient Greek thinking that held that nothing exists except matter, its movements, and modifications—matter is all that there is in the universe. Matter is composed of atoms that have always existed. It cannot be destroyed but is continually transformed and recycled into different forms throughout an infinite universe. Democritus (c.460–c.370 BC) is most commonly referred to as an early proponent of philosophical atomism and materialism. Similarly, the Greek philosopher **Epicurus** (341-270 BCE) espoused atomism, materialism, and an understanding of the gods that differed from the established view. If you've ever read ancient Greek myths, you know that traditionally they thought of the gods as directly intervening in human existence—tricking people, fathering children with people, and so forth. Seeing the material universe as infinite, Epicurus understood the gods to be detached from the experiences of humans. He also taught that man can attain the greatest good and a tranquil state, free from fear and pain, through reasoned and virtuous action.



Bust of Epicurus

Why is materialism important? Materialism contrasts with **Spiritualism**, which is the belief that a spiritual realm exists and is distinct from matter. Spiritualists argue that the spiritual world governs the material and is essentially unknowable except through faith and revelation—which means that the material world does not really follow any laws that humans can discern through their own reason. Philosophical spiritualism forms the impetus behind all the Western religions, and it should be fairly clear that philosophical materialism necessarily challenges any religion predicated on revealed truth from the spiritual realm. Atheist and Deist approaches differ from Spiritualism, which sees a distinction between the material world and the spiritual one. People like Jefferson recoiled at that notion of spiritualism. Instead, they embraced secularism, Deism, and the Enlightenment's emphasis on reason.

An important step in the intellectual history of these ideas was the publication of *On the Nature of Things* in the first century BCE by **Lucretius** (99-55 BCE), a Roman poet and philosopher. Lucretius put forward familiar epicurean themes: The universe consists of matter and nothing else; the universe has no creator or designer, nor was it created for humans; humans have free will and can, through study, discern how the universe works; organized religions are superstitious and cruel delusions; the highest goal of human life is the enhancement of pleasure (not hedonistic pleasure, but "real" pleasure) and the reduction of pain; the exercise of reason is accessible to everyone.

What does all this have to do with the American *Declaration of Independence*? The short answer is that during the centuries between Epicurus and Thomas Jefferson, materialism gave rise to Deism. You may have read that many—but certainly not all—of the American founders were Deists. Indeed, eighteenth century Deism strikes one as an updated version of Epicurus' heretical understanding of the Greek gods. **Deism** is the belief in a supreme being or creator—Nature's God—who does not intervene in the universe or interact with humankind, but who disappears into the natural rules that govern all matter. Just as Epicurus and Lucretius thought that the gods did not intervene in human affairs, Deists saw the Judeo-Christian-Islamic god as similarly removed from human experience—a state of affairs that requires humans to develop workable ethical and political codes themselves rather than receive them through revelation.

The American philosopher Matthew Stewart referred to this legacy when he coined the phrase **Epicurus's dangerous idea** to refer to the notion attributed to Epicurus that talking about nature and talking about God are just two ways of talking about the same thing. This conclusion has tremendous theological and political implications. If the universe is infinite and has always existed, there is no role for an entity outside of matter and causation to play the role of a prime mover. No need for God in the Judeo-Christian-Islamic sense. Indeed, many people in the Epicurean-Lucretian tradition were persecuted and/or killed by Christian authorities for being atheists or for being Deists. Even the Jewish philosopher Baruch Spinoza was banned from the Amsterdam synagogue in 1656 for this kind of naturalistic view of God. Note the references in the *Declaration of Independence* to "the Laws of Nature and Nature's God" and to "their Creator." (3) These all fit with a Deist's understanding of the universe.

The *Declaration of Independence* was the political embodiment of the Epicurean-Lucretian philosophical tradition. When asked about his philosophy of life, Jefferson wrote that he was "an Epicurean." Lucretius' *On the Nature of Things* was one of his favorite books and he owned at leave five Latin editions of it. (4) The *Declaration* gave only a rhetorical nod to spiritualism, but a full-throated endorsement of reason marshalled to promote the common good and the general happiness of the American people.

The Indigenous Critique

The intellectual line from Epicurus' materialism to Thomas Jefferson's Deism is an important precondition for the ideas of the Declaration of Independence to flower in the late eighteenth century. Let's talk about another important intellectual tradition—one with which you are probably even less familiar. First, a bit of history.

From 1534 to 1763, France explored and colonized what is now northeastern Canada and the American Great Lakes region. French colonial leaders and Jesuit missionaries had many conversations and debates with leaders from the Huron and Iroquoian nations around the Great Lakes and northeastern Canada. Some of these conversations took place in France, while most took place in the Americas. We have some notes of these conversations from the Jesuit missionaries. The most famous of these conversations was with a Wendat (Huron) statesman named **Kandiaronk** (1649-1701), a famed debater and orator who spoke in Paris and who also debated Hector de Callière, the Governor of Montreal, in the Americas. The Jesuit historian, Charlevoix, said no Native American he had met "ever possessed greater merit, a finer mind, more valor, prudence or discernment in understanding those with whom he had to deal." (4) Much of what we know about Kandiaronk comes from the journals of Baron Louis-Armand Lahontan (1666-1716), which were published in 1703 as *New Voyages to North America*.

The **Indigenous Critique** refers to the stance of indigenous people like Kandiaronk—and others whose names are unfortunately lost to history—with respect to how best to organize a society and a political system. The Huron and Iroquoian intellectuals developed a sophisticated understanding of European society and did not like what they saw. They saw European society characterized by competitiveness, greed, selfishness, gross inequality, and hostility to true freedom. The Montagnais-Nskapi people of Labrador thought most French people were slaves because of their constant fear of violent punishment by their superiors. The Native Americans also noted the inequality of the sexes in Europe and the lack of sexual freedom.

Meanwhile, the Jesuit missionaries and the colonial leaders who gained an understanding of indigenous societies were similarly shocked. They could not understand the communitarian societies they encountered, replete with sexual freedom, relative equality of the sexes, leaders who gained their positions through respect rather than violence or inheritance, no incarceration for lawbreaking, no corporal punishment for children, and no real way for people to translate differences in individual wealth into political power. The indigenous people they encountered were vastly freer than almost all Europeans.

The contrasts between the freedom of indigenous people in North America and the lack of freedom in Europe was intellectually explosive. The anthropologist David Graeber and the archaeologist David Wengrow, in their book *The Dawn of Everything: A New History of Humanity*, make a compelling case that the Indigenous Critique had a tremendous impact on what we call the European Enlightenment. It stimulated thoughts about "the state of nature" and the "natural rights" people might have had prior to mankind getting "stuck" with bureaucratic government, wage labor, despotic rulers, and economic and political hierarchies. (5)

Natural Rights

Let's talk about the third intellectual tradition that comes together with Deism and the Indigenous Critique to form the basis for the Declaration of Independence. The Enlightenment overtook Europe in the seventeenth and eighteenth centuries and constituted the intellectual fertilizer in which American independence grew. Responding to both the Indigenous Critique and Epicurus' dangerous idea, Enlightenment thinkers argued that the laws of nature were subject to discovery, and the human condition could be improved through reason.

In the area of political philosophy, people like **Thomas Hobbes** (1588-1679) and **John Locke** (1632-1704) were known as social contract theorists. They imagined how people might live in a state of nature that would allow mankind absolute freedom, where there is no authority to limit individual behavior. Not having seen indigenous societies for themselves, they envisioned the state of nature as essentially an anarchical condition in which there was no government, and thus no authority to limit individual behavior. While anarchy is appealing to some philosophers, it definitely was not to Hobbes and Locke. Hobbes argued in *Leviathan* that the state of nature would result in a war of all against all, and that people's lives would be "solitary, poore, nasty, brutish, and short." He concluded that a strong state—the Leviathan—was necessary to provide order and at least a measure of freedom. (6) Locke did not have as pessimistic view, but he was worried that people would continually get into disputes with each other with no state or laws (as he understood them from his European point of view) to regulate conflicts. Another European philosopher, **Jean Jacques Rousseau** (1712-1778), saw the state of nature as a paradise, but one that we can never get back to because civilization and property resulted in our downfall and resulted in us being "in chains." Rousseau's best hope for us was to construct a governing system in which "the general will" would prevail.

What these philosophers had in common was the idea that we could escape from the state of nature, with its unlimited freedoms that give rise to all sorts of conflicts, by setting up a government through a **social contract**, where the people agree to certain government-enforced restrictions on their liberties in exchange for a measure of security. Consequently, one is not entirely free in a civil society to do as one pleases with respect to others. George Washington put it eloquently in his letter transmitting the proposed Constitution to the Confederation Congress: "Individuals entering into society, must give up a share of liberty to preserve the rest.... It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved." (7)

One way to draw the line to which Washington referred is to say that people retain their natural rights under the social contract. **Natural rights** are those rights that stem from the state of nature, and thus pre-date the government established by the social contract. Philosophers have tended to say that natural rights are granted by nature's God, or by virtue of being born. The important thing to remember is that government does not give you your natural rights, as when it establishes a bill of rights. The bill of rights merely recognizes, and perhaps specifies, your preexisting natural rights. Locke's classic statement of natural rights went as follows: "...the state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being the workmanship of one omnipotent, and infinitely wise maker..." (8)

A contemporary listing of natural rights follows Locke's lead and includes equality, life, liberty, and property. In the *Declaration of Independence*, **Thomas Jefferson**, acting as a scribe for the committee whose most vocal members were John Adams and Benjamin Franklin, substituted "pursuit of happiness" for "property," which is an intriguing turn of phrase that appears to have its proximate origin in Locke and its ultimate origin in Epicurus. In his *Essay Concerning Human Understanding*, Locke wrote that "the highest perfection of intellectual nature lies in a careful and constant pursuit of true and solid happiness," and we know how closely Jefferson read Locke. We also know that Jefferson ascribed to Epicurean philosophy which—aside from its materialism—held that it is only through reasoned and virtuous action that man can achieve true happiness. Perhaps the immediate source of the *Declaration's* reference to the pursuit of happiness was his colleague John Adams, who wrote in his *Thoughts on Government* (1776) that "the form of government which communicates ease, comfort, security, or, in one word, happiness, to the greatest number of persons, and in the greatest degree, is the best."

Those who believed in natural rights came to a conclusion that frightened monarchs throughout Europe: that

if government is not upholding the natural rights of citizens, and instead is consistently undermining them, the people are entirely justified in taking up arms against their rulers. American revolutionaries had exactly this so-called right-of-revolution in mind as they expressed their growing dissatisfaction with British rule after the end of the French and Indian War in 1763. Therefore, when you read the *Declaration of Independence*, keep in mind that it is not only a ringing statement of natural rights philosophy—"We hold these truths to be self-evident: that all men are created equal…"—but is also a careful dissolution of the social contract between Americans and the British Crown. The American revolutionaries felt that being taxed without representation, having troops violate people's property without warrants, and being subject to arbitrary and capricious governance over a period of time were grievances sufficient to warrant a revolution. Indeed, in the words of the *Declaration*, it is the "duty" of the people under those circumstances, "to throw off such government, and to provide new guards for their future security." The goal of the revolution was not to go back to the state of nature, but to reconstitute the social contract in a form more amenable to Americans preserving their natural rights, safety, and collective happiness.

It's a long road from Epicurus through Kandiaronk and the Enlightenment philosophers to the *Declaration of Independence*. Ideas are indeed important, for they can help us get unstuck from the arrangements that oppress us. In *The Dawn of Everything*, Graeber and Wengrow remind us that people throughout human history and pre-history have tried in numerous ways to live freely, to envision societies without oppression, to prevent the wealthy from translating their wealth into political power, and to avoid having "to surrender their basic freedoms and submit to the rule of faceless administrators, stern priests, paternalistic kings, or warrior-politicians." (9) Few of these attempts at emancipation are as celebrated as is the American *Declaration of Independence*.

The Declaration of Independence

In Congress, July 4, 1776.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For Quartering large bodies of armed troops among us:

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

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

For imposing Taxes on us without our Consent:

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

For transporting us beyond Seas to be tried for pretended offences

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary

government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

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

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

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

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

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

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

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

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

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

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

References

1. Quoted in Matthew Stewart, *Nature's God. The Heretical Origins of the American Republic*. New York: W. W. Norton and Company, 2014. Page 151.

2. Thomas Jefferson writing to his nephew Peter Carr on August 10, 1787.
3. Jefferson's original draft of the *Declaration of Independence* was so secular it had no references to the Creator, God, or the Supreme Judge of the World. Those were all added in the editing process done by the Continental Congress. A good description of this editing process is in Danielle Allen, *Our Declaration. A Reading of the Declaration of Independence in Defense of Equality*. New York: W. W. Norton, 2014. Pages 72-78.
4. Stephen Greenblatt, *The Swerve: How the World Became Modern*. New York: W. W. Norton and Company, 2011. Pages 262-263.
5. Dan Allosso, *U.S. History and Primary Source Anthology, Volume 1*. Chapter 48 on Kandiaronk.
6. David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity*. New York: Farrar, Strauss, and Giroux, 2021. See especially pages 5-95 and 473-525.
7. Thomas Hobbes, *Leviathan* (1651). Chapter 13.
8. Quoted in Thomas G. West, "The Declaration of Independence, the U.S. Constitution, and the Bill of Rights," in Scott Douglas Gerber, editor, *The Declaration of Independence. Origins and Impact*. Washington, DC: CQ Press. 2002. Page 72.
9. John Locke, *Second Treatise of Government*, (1690). Chapter 2, No. 6.
10. Graeber and Wengrow, *The Dawn of Everything*. Page 515.

Media Attributions

- Epicurus © Hans Zwitzer is licensed under a CC BY-NC-SA (Attribution NonCommercial ShareAlike) license

Chapter 12: Articles of Confederation, Shays' Rebellion and the Road to the Constitution

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

–Rowland L. Young (1)

Many Americans do not realize that the United States has had more than one constitution in its history. They take pride in the current U.S. Constitution written in 1787 but forget the Articles of Confederation written in 1776 and 1777. However, there is much to be learned from our first constitution. Before we look at the details, let us make sure we familiarize ourselves with confederal government and how it differs from other forms. This is especially important given our history: when the Southern states seceded from the Union beginning in 1860, they formed themselves into a confederacy, so there must be something attractive about the confederal form to Americans.

Confederal, Federal, and Unitary Governments

Political scientists often classify governmental systems into one of three types: confederal, federal, and unitary. Governments are placed into one of these categories based on the relative power distribution between the central government and whatever the subordinate governments are called. We call these subunits states, while other countries might refer to them as provinces, cantons, departments, laender, or something else. In a **confederal system,** the states are very powerful relative to the weak central government. Indeed, the central government usually only carries out those functions that the states deem can be more efficiently run from one point. The states retain all other powers. Currently, there are no individual countries that have confederal governments. Some people see the European Union, a collection of European countries, as some form of confederacy, but it is a collection of sovereign nation-states. Historically, confederacies tend not to survive—either because they are defeated by external enemies or because they fragment internally. A **unitary system** is the opposite of a confederal system, in that the central government is very powerful relative to the states. Often, the states exist merely as central government administrative units with little autonomy to conduct their own policies. The majority of the world's governments are unitary. England, France, Israel, Sweden, and Japan are countries with unitary governments. In a **federal system** there is more of a power balance between the central government and the states, although in practice, the balance is often tilted in favor of the center. Under our current Constitution, the United States is one of several federal governments around the world: Canada, Mexico, Brazil, Germany, India, and Nigeria come to mind. As a rule, large diverse countries tend to have federal governments.

The Articles of Confederation

Protest Sign Referencing the Articles of Confederation

The idea of unifying the American colonies is older than most people imagine. In 1697, William Penn proposed just such a union. In 1754, Benjamin Franklin put forward his Albany Plan of Union, which proposed a national legislature to raise a military when needed, to make decisions on war and peace in North America, to deal with disputed western lands, and to levy taxes on the colonies. Franklin's proposal was not accepted. When Franklin joined the Second Continental Congress in 1775, he put forward yet another proposal for an Articles of Confederation and Perpetual Union, which was not taken up. After the Declaration of Independence, however, Congress appointed a committee to draft a document for a confederation and chose John Dickinson to lead it. Dickinson would later become known as "the penman of the Revolution." That committee used Franklin's proposal as a starting point but produced a document that gave the states much more power than Franklin had originally proposed. (2)

Dickinson's committee wrote the Articles of Confederation on the assumption that the best way to preserve individual liberty was to fragment political power among the thirteen states. Congress submitted the Articles to the states to ratify in 1777, but disputes over western land claims delayed it being formally adopted. Finally, in 1781, Maryland became the thirteenth state to ratify it. These Articles remained in effect until superseded by the Constitution in 1789.

At the national level, the government under the Articles of Confederation had no president or supreme court, as we understand them today. The central institution was a **unicameral**—one chambered—Congress in which each state had one vote. Nine of the thirteen states needed to consent for most congressional actions, and amendments to the Articles required unanimous approval in Congress.

Under the **Articles of Confederation,** the central government's limited power and weakness caused many problems for the new country, which is perhaps the most important thing to know about the U.S. under the Articles. Specifically, **Congress could not perform the following**:

Tax people directly—Under a requisition system, the central government relied on the states to collect taxes and forward the money to Congress. The requisition system did not work. The states gave Congress less than one-third of the tax revenue they were obligated to pay. This revenue deficiency required Congress to keep floating more debt, which adversely affected Congress's ability to pay off those debts. By 1786, according to lawyer and historian George William Van Cleeve, "the Confederation's financial position was unsustainable." (3)

Raise a sufficient military force—The Confederation's financial situation naturally impacted its ability to fight the Revolutionary War. About one-third of all free men served in the Continental army or the state militias. In addition, about 5,000 African Americans served—free and slave. And Van Cleeve noted that "at least twenty-thousand women worked to support the Continental army." The central government was constantly short of money to pay for the Continental Army. The war itself caused economic disruption, causing the states to be

even more reluctant to fulfill their fiscal responsibilities to the national government. Soldiers received "virtually nothing" in compensation during 1781-82, instead, receiving IOU's. Farmers who supplied the military were in the same situation.

Regulate interstate or foreign commerce—The United States could not formulate a consistent trade policy with other countries. In 1784, Spain closed the Mississippi River to American craft. France stopped allowing American wheat and flour to be imported to the French Caribbean. Pirates actively raided American ships. Domestically, the situation was no better. In order to raise revenue and protect domestic business interests, states started taxing goods coming from other states and from British shippers. They also sometimes banned importing specific goods outright. Massachusetts banned fifty-eight items. Pennsylvania instituted protections for its refined iron, ship building, and joinery industries. During this time, there were several proposals to increase Congress' power to regulate trade, but they were all defeated. Congress called the Annapolis Convention in 1786 to further discuss trade issues, but those at the meeting could only agree to call for a convention in Philadelphia in 1787.

Establish a sound money system—Ostensibly, Congress could regulate coinage. However, there were so many different foreign coins circulating that it was practically impossible to regulate their value. Furthermore, each state was free to print its own money, which they did at different rates. The paper money that both Congress and the individual states issued depreciated rapidly during the Confederacy.

Enforce treaties—Without enforcement power, the central government could not require states to abide by national treaties. For example, the 1783 Treaty of Peace between the United States and Britain required that America *not* restrict the British from collecting private prewar debts that Americans owed to them. However, Massachusetts, Pennsylvania, South Carolina, and Virginia did just that, and there was no way for Congress to force Americans to repay their debts to the British.

The Impact of the Confederal System

Under the Articles of Confederation, the national government's main legislative accomplishment was the **Northwest Ordinance** of 1787. The Northwest Ordinance concerned the territories located in the Old Northwest—what is today north of the Ohio River and east of the Mississippi River. It allowed territories to enter the Union as states on the same equal legal footing as the original thirteen states. In the territories that became Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, the Northwest Ordinance also prohibited slavery and provided public education.

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

The largest such rebellion was **Shays' Rebellion (1786-87)** in Massachusetts. Unable to make payments on their property and bitter that they were faced with increased taxes and scarce money due to the state legislature's policies in Boston, farmers did what they were supposed to in a republic: they peacefully petitioned the state legislature for redress. After the legislature refused to respond to their petitions, the farmers turned to mob violence in the summer of 1786 to prevent debt hearings and their property being seized for non-payment. The governor sent out a state militia, and Daniel Shays, who had been a captain in the Revolutionary War, organized

a rebellion that was not put down until February of the following year. Shays' Rebellion was important not only because it was the biggest of these farmers' rebellions, but for two other reasons as well. It seemed to point out many of the deficiencies of the Articles of Confederation, and it was the topic of the day as a convention convened in Philadelphia. Unfortunately for the rebels, their actions ended up promoting the very thing they opposed. As historian Joseph Ellis has written, "The ultimate irony of Shays' Rebellion is that what began as a rural protest against centralized government actually ended up strengthening the advocates for a new U.S. Constitution, which consolidated political power at the federal level, in precisely the fashion that the rebels regarded as a betrayal of the American Revolution." (4)

The Constitutional Convention

Largely due to the efforts of people like Alexander Hamilton and James Madison—and because of the turmoil under the Articles of Confederation—Congress called on the states to send delegates to Philadelphia in May 1787. The delegates were to gather there "for the sole and express purpose of revising the Articles of Confederation." Every state except Rhode Island sent delegates to what we now know as the **Constitutional Convention**. Madison and Hamilton attended, as did George Washington, Benjamin Franklin, Roger Sherman, Robert Morris, Charles Pinckney, and others. **Thomas Jefferson** and **John Adams** did not attend, because they were representing the United States in Paris and London, respectively. Patrick Henry did not participate because he "smelt a rat," and opposed the Constitution once it was written. (5)

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

References

1. Rowland L. Young, "The Articles of Confederation and Perpetual Union," *American Bar Association Journal*. November, 1977. Page 1575.
2. Thomas Wendel, "The Articles of Confederation," *National Review*. July 10, 1981. Page 769.
3. George William Van Cleve, *We Have Not a Government: The Articles of Confederation and the Road to the Constitution*. Chicago: The University of Chicago Press, 2017. Page 54. All details in the next four paragraphs come from this source.
4. Joseph J. Ellis, "Dispelling the Myths Surrounding Shays Rebellion," *Commonwealth: Nonprofit Journal of Politics, Ideas, & Civic Life*. December 1, 2002.
5. Christopher Collier and James Lincoln Collier, *Decision in Philadelphia*. New York: Ballantine Books, 1986. P. 74.

Media Attributions

Chapter 13: Key Features of the U. S. Constitution

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

–Thomas Paine (1)

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

Unless you happen to be one of those lawyers or political scientists who specialize in constitutional interpretation, you are not expected to know all the details of the U.S. Constitution. However, every citizen and resident of America should be familiar with the key features described in this section.

Balancing Large and Small States

One of the initial disputes among delegates at the 1787 Constitutional Convention in Philadelphia involved the relative weight of the individual states in the new government. Two competing proposals, the Virginia Plan and the New Jersey Plan, agreed on the need for a stronger central government but differed on how the states would be represented. The Virginia Plan proposed that the more populous states would have more seats in Congress than the smaller states. The New Jersey Plan proposed that they retain the scheme represented in the Articles of Confederation, with each state having one vote in Congress regardless of the state's population. Another notable difference between the two plans: The Virginia Plan proposed a bicameral legislature—a Congress with two chambers—while the New Jersey Plan proposed a unicameral legislature. This dispute was contentious enough that it threatened to bring the convention to an end. James Madison was especially interested in creating a strong central government, which he felt could not legitimately be done if each state was represented equally without regard to its population. "In all cases," he said, "where the General Government is to act on the people, let the people be represented and the votes be proportional" to state population. (3) However, delegates from small states were not happy unless their states got equal representation, which threatened to derail the Constitutional Convention.

On July 5, 1787, a committee dedicated to the state representation issue led by Roger Sherman of Connecticut proposed a solution that is now known as the **Connecticut** or **Great Compromise**. The Compromise called for a **bicameral** legislature and a different representational scheme for each chamber. In the House of Representatives, each state would have seats proportional to its population. The original formula was one representative for every 30,000 people. The Senate would have two senators from each state, regardless of population. Representatives would be elected by popular vote, while senators would be chosen by state legislatures. The Compromise narrowly passed the convention on July 16. It was a monumental decision that solved the dispute at hand, but with its passage, delegates sacrificed the basic democratic notion that one vote should weigh as much as another. The Connecticut compromise gave disproportionate power to smaller,

rural, and less populous states, particularly after the Seventeenth Amendment passed when senators became elected directly by the people.

The Infamous Three-Fifths Compromise

A second dispute occurred related to state representation: If a state's population determined its seats in the House of Representatives, the question whether to count slaves or not became an important issue. While slavery was dying in most Northern states, the Southern economy was becoming increasingly dependent on slaves, and counting them in the census would add to Southern political power. The Northern states objected, and the convention settled the dispute via a mechanism eventually called the infamous **Three-fifths Compromise,** which resolved the dispute to the South's advantage. Essentially, one slave would be counted as three-fifths of a person. Article I, section 2 of the Constitution states, "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a term of Years, and excluding Indians not taxed, three-fifths of all other Persons." This is one of several places where slaves are mentioned in euphemistic ways in the Constitution. The terms "slave" and "slavery" do not actually appear in the document.

By counting three-fifths of the slave population in the census, Southern states were allocated additional seats in the House of Representatives—twenty-five more than they deserved in 1833, for instance—and additional electors in the Electoral College. This extra representation had enormous consequences. As Paul Finkelman, law and public policy professor at Albany Law School, put it: "Southerners were able to block federal legislation hostile to slavery and get the House to pass numerous laws that protected slavery. The three-fifths clause allowed the extra pro-slavery representatives in the House to pass the following laws: the Missouri Compromise of 1820, which brought Missouri in as a slave state; Texas was annexed in 1845, which was described at the time as an 'empire for slavery'; the Fugitive Slave Act passed in 1850; the law allowing slavery in Utah and New Mexico passed; and the Kansas-Nebraska Act passed in 1854, which opened the Great Plains and Rocky Mountain territories to slavery. None of these laws could have been passed without the additional twenty-five pro-slavery representatives that were created by counting slaves under the three-fifths clause." (4) The Three-fifths Compromise, as it applied to slaves, was nullified when post-Civil War Amendments to the Constitution were passed.

Power to the Central Government

The U.S. Constitution

Compared to the Articles of Confederation, the Constitution's central government maintains more power than the states. Central government's legislative power is vested in the legislative branch. The Founding Fathers drew on a burgeoning philosophical tradition that held that the government's legislative aspect is the most important. In his Second Treatise on Government, John Locke argued that the legislative was "the supreme power in every commonwealth." In *Federalist #51*, James Madison wrote, "In republican government, the legislative authority necessarily predominates." You should be familiar with the major powers given to Congress in **Article I, section 8** of the Constitution. These include the power to tax, borrow money, raise armies and navies, establish lower federal courts, regulate the money supply, regulate interstate and foreign commerce, and declare war. These are called the **enumerated powers** of Congress because they are formally listed in the Constitution. When Congress exercises enumerated powers, they are relatively undisputed, although arguments have erupted over the years about definitional boundaries—like what activities fall under the phrase "interstate commerce"? We should be clear, however, that even when Congress is attempting to exercise an enumerated power, it cannot do so while violating another part of the Constitution. For example, law professor Kim Wehle notes that while Congress has the power to tax, it would violate the Fourteenth Amendment's Equal Protection Clause if it tried to tax only white people. (5)

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

Constraining the States

The Constitution clearly reduces the power of the states. For example, in **Article I, section 10**, the states would no longer have the kind of autonomy they enjoyed under the Articles of Confederation. They could not conduct their own foreign policy, coin money, tax each other, impair contracts, or pass *ex post facto* laws. If there were any doubts that the power balance in the new federal system would be tilted in the central government's favor, one need only to read the **supremacy clause in Article VI:** *"This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound*

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Using this clause and the precedent-setting *McCulloch v. Maryland (1819)*, the Supreme Court has repeatedly struck down state laws that conflicted with federal laws, treaties, or the Constitution. In such disputes between a state law and a federal law, the state's only real chance of winning is to show that the federal law violates the U.S. Constitution. A current example that has not yet erupted into a legal battle centers on state initiatives that allow doctors to prescribe or recommend marijuana to their patients. These state laws are in direct violation of federal laws that consider marijuana so dangerous that doctors could not prescribe it, or even—for many years—study whether it was medicinally useful. Could states prove in court that such federal laws are unconstitutional? This and many other issues hint at the "messiness" of federal systems, which can cause people a great deal of confusion because issues are often decided in multiple political venues.

Since we've mentioned the importance of *McCulloch v. Maryland* (1819) twice now, perhaps we should pause a minute and make sure we understand that important early Supreme Court case. In 1816, the federal government chartered the Second Bank of the United States. The states did not like the Bank of the United States competing with state-chartered banks. So, the state government of Maryland placed a prohibitive tax on "any bank not chartered within the state" in an attempt to drive the Bank of the United States out since it was the only bank operating in Maryland that had not been chartered there. Instructed by his superiors, James McCulloch, Bank of the United States Baltimore branch cashier, refused to pay the tax. Maryland brought the case to tax to a state court and won—and even won on appeal—but lost when McCulloch appealed those lower decisions up to the Supreme Court. Two important issues were contested in ***McCulloch v. Maryland* (1819)**:

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

Regarding *McCulloch v. Maryland* (1819), Chief Justice **John Marshall**, clarified for a unanimous Court the Necessary and Proper Clause's meaning and its relationship to the enumerated powers. He wrote "let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." In other words, **if** Congress can legitimately tie its new exercise of power to one of the enumerated powers and **if** the new exercise of power is not expressly forbidden in the Constitution, then it is constitutional. Thus, it was constitutional for Congress to establish a Bank of the United States. Then Marshall went on to write that the "power to tax is the power to destroy," and that the **Supremacy *Clause*** meant that the states could not nullify and destroy legitimate exercise of federal authority. Maryland lost, and both the Necessary and Proper Clause and the Supremacy Clause were clarified in ways that expanded the central government *vis-a-vis* the states.

Separation of Powers and Checks and Balances

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

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

federal courts

Note that the Constitution does not set up a hierarchy with the president at the top, nor does it give a president "the right to do whatever I want," as President Trump once famously claimed. (6) The Congress, the Presidency, and the Supreme Court are coequal branches of the federal government. A central tenet of good governance is to structure the political institutions so that different people from different constituencies would perform the legislative, executive, and judicial functions. The American founders expressly agreed with this approach to governance. On November 15, 1775, **John Adams** wrote this to Richard Henry Lee: *"A Legislative, an Executive and a Judicial power, comprehend [encompass] the whole of what is meant and understood by Government. It is by balancing each one of these Powers against the other two, that the Effort in human Nature towards Tyranny can alone be checked and restrained and any degree of Freedom preserved in the Constitution."* (7)

According to its advocates, **separation of powers** provides **two benefits**. **First**, it tends to slow legislation down, because of the squabbling between the naturally egotistic people who occupy legislative, executive, and judicial positions. Democracy requires time for deliberation, argumentation, and compromise. Legislative speed is a virtue only in rare crisis situations. **The second advantage of separation of powers** is that it helps avoid tyranny. Much like *R.M.S. Titanic*, which was supposed to be unsinkable due to its compartmentalization, a government of separated powers can stay afloat even though tyrannical leaders take over one branch. Presumably, the other two institutions would stand up for liberty. Of course, as the *Titanic's* maiden voyage demonstrated, any ship will sink if you poke enough holes in it. Moreover, the United States has only three compartments, and they are functionally related. A dictator wannabe as president is bad enough, but presumably they would have partisan supporters in Congress and would be able to lace the federal courts with judges who are keen to secure and expand his tyrannical powers.

Separation of powers is not without its detractors. In fact, most other economically developed countries that purport to be democracies have rejected separation of powers in favor of parliamentary systems that dispense with bicameral legislatures and meld executive and legislative powers. This typically takes the form of a prime minister who is simultaneously a sitting member of the legislature and also head of what we in the United States would call the executive branch. As political scientist Douglas Amy argues effectively, the main problem with separation of powers is the frequency of paralyzing **gridlock** that undermines the power of ordinary people and serves the interests of corporations and the wealthy who want to block government initiatives. (8) Even when gridlock can be overcome, the resulting policies are inevitably compromises that are weaker more fragmented than they should be. Professor Amy suggests that America's fragmented and weak anti-poverty measures are a classic example of separation of powers at work. We might also add America's convoluted and overly expensive healthcare system as a casualty of separation of powers.

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

- Congress passes legislation, but the president can veto it.
- Congress can override the president's veto with a super majority in both chambers.
- Legislation passed by Congress and signed by the president can be declared unconstitutional by the Supreme Court.
- Presidential or executive branch actions can be declared unconstitutional by the Supreme Court.
- Supreme Court decisions can be undone if Congress and the states pass a constitutional amendment.
- Presidential appointments to the judicial and executive branches require Senate approval.
- Treaties signed by the president require Senate approval.

- The president can pardon those convicted by the federal courts.
- Congress can impeach and remove executive officials and federal judges from office who violate the law.

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

What if . . . ?

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

References

1. Thomas Paine, *Common Sense*. 1776.
2. Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress*. 1775.
3. David Brian Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking*. New York: Oxford University Press, 2013. Page 104.
4. Gary Wills, "Negro President." *Jefferson and Slave Power*. Boston: Houghton Mifflin, 2003. pages 1-13. Paul Finkelman, "Three-Fifths Clause: Why Its Taint Persists," *The Root*. February 26, 2013.
5. Kim Wehle, *How to Read the Constitution and Why*. New York: HarperCollins, 2019. Page 64.
6. Christina Zhao, "'Article 2' Trends after Trump Falsely Claims It Grants Him Unlimited Powers as President: I can 'Do Whatever I Want'," *Newsweek*. August 24, 2019.
7. Quoted in Danielle Allen, *Our Declaration. A Reading of the Declaration of Independence in Defense of Equality*. New York: W. W. Norton, 2014. Page 58.

Media Attributions

Chapter 14: The Battle for Ratification and the Bill of Rights

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

—Pauline Maier (1)

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

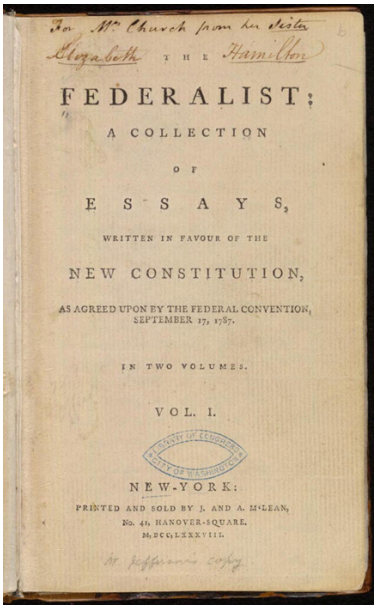
–Virginia Declaration of Rights, 1776

Nine States to Ratify

The delegates to the Constitutional Convention finished their work on September 17, 1787. Knowing that neither the Congress nor the state legislatures would approve the new Constitution, they created a ratification process in which each state would hold a special convention on the Constitution. The delegates agreed that if nine out of the thirteen states voted to ratify, that would be sufficient to implement the Constitution. The new Constitution was presented to Congress. But first, Congress debated for two days whether to censure the delegates for having gone beyond their mandate. Congress chose not to censure, instead, it directed state legislatures to hold elections for state ratifying conventions, as called for in Article VII of the new document.

The period from 1787 to 1790 was a unique one in world political history because the people of the United States engaged in a serious debate about the best form of government for a free people. Delaware was the first state to ratify the Constitution on December 7, 1787. Rhode Island initially rejected the Constitution in a popular referendum in March of 1788. New Hampshire became the necessary ninth state to ratify the Constitution in June of that year, but it was vitally important that the large states of New York and Virginia join the project. They both narrowly did so later that summer. North Carolina ratified the Constitution after Congress proposed a Bill of Rights in 1789, and Rhode Island held a ratifying convention in 1790 to unanimously approve the new government.

Federalists and Anti-Federalists



First Collection of the Federalist Papers.

Those who supported the Constitution called themselves **Federalists**, while opponents have come to be known as **Anti-Federalists**—although that was a label put on them. It was a bitter and acrimonious debate. Their arguments took the form of newspaper editorials, pamphlets, letters, disagreements in pubs and churches, and debates at ratification conventions. The most famous documents in this debate came out of New York, where Alexander Hamilton recruited James Madison and John Jay to help him write a series of eighty-five essays from 1787 into 1788 in favor of the Constitution. These essays, published serially in newspapers under the pseudonym Publius, have since been published together as the **Federalist Papers**. They do constitute a brilliant defense of the Constitution, but keep in mind that many Federalists in other parts of the country were also writing their own works, and the *Federalist Papers* didn't achieve their fame and influence until well after the Battle for Ratification was over. (2)

We tend to forget that many prominent people opposed the Constitution, including Samuel Adams, Richard Henry Lee, George Mason, Robert Yates, Patrick Henry, Elbridge Gerry, Edmund Randolph, James Monroe, and George Clinton. The Anti-Federalists worried that the new government would be too powerful, resulting in a tyranny the states would be powerless to stop. (3) The Anti-Federalists had a large list of Constitutional features to which they objected. They saw the "necessary and proper" clause as giving the central government too much power. They saw the vice president as giving too much power to the state from which he hailed. They feared the president's pardon power. They were suspicious of the president and the Senate's ability to coordinate together to negotiate and ratify treaties that might damage particular states or regions because neither were elected by the people. They feared the supremacy clause.

The Anti-Federalists supported stronger state governments and a weaker national one because they feared that a national government would become tyrannical. An anonymous Anti-Federalist writing in the Virginia press under the name Philanthropus concluded that "The new constitution in its present form is calculated to produce despotism, thraldom [a state of subjugation or bondage] and confusion, and if the United States do swallow it, they will find it a bolus [drug], that will create convulsions to their utmost extremities." (4)

The Bill of Rights

Even though they ultimately lost the argument, and the Constitution was ratified, the Anti-Federalists made an important contribution by stressing the Constitution's major deficit: it lacked a **Bill of Rights** to protect the people. It is clear that their agitation in the ratifying conventions contributed to winning the argument to add a list of rights to the Constitution. (5) Interestingly, the Bill of Rights is said to have been fathered by two men—one Federalist and one Anti-Federalist. Anti-Federalist **George Mason** is sometimes called the father of the Bill of Rights because he wrote the Virginia Declaration of Rights in 1776 and constantly criticized the U.S. Constitution for omitting this important feature. In his "Objections to the Constitution," published on November 19, 1787, in the *Virginia Journal* and the *Alexandria Advertiser*, Mason decried the fact that "there is no declaration of rights," and that the federal government's supremacy over the states would mean that "the declarations of rights in the separate States are no security" for the people's freedom. He was not the only Anti-Federalist to protest the lack of a Bill of Rights. After the Pennsylvania convention approved the Constitution,

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

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

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

Source Material for the Bill of Rights

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

Additionally, in the **1628 Petition of Right** against Charles I, Parliament prohibited quartering soldiers in civilian households against the civilian's will. The **English Bill of Rights of 1689**—a document forced upon William and Mary as they were invited to replace James II after the Glorious Revolution—first addressed the right of subjects to petition the King and stated that "Protestants may have arms for their defence suitable to their conditions and as allowed by law." In all, seven specific protections in the U.S. Bill of Rights trace their heritage to English precedents. **The majority of the Bill of Rights language**—free speech, free exercise of religion, prohibitions against illegal searches, freedom of assembly, the right to counsel, etc.—**came from the American colonial context**. There are two possible sources to note: delegates at state ratifying conventions proposed amendments and assertions of rights that had already been written into state constitutions. The assertions of rights were particularly important. As political theorist Donald Lutz has clearly documented, "The states' constitutions and their respective bills of rights, not the amendments proposed by state ratifying conventions, are the immediate source from which Madison derived what became the U.S. Bill of Rights." (10) Interestingly, in those early state constitutions, the assertions of rights were included as prefaces that began

those documents, whereas the U. S. Bill of Rights was appended at the end of the U. S. Constitution. For example, the Virginia state constitution of 1776 began this way: (11)

Virginia Declaration of Rights

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

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

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

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

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

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

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

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

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

X *That general warrants, whereby any officer or messenger may be commanded to search suspected places*

without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.

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

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

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

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

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

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

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

Important Features of the Bill of Rights

We should highlight several features of the Bill of Rights. First, as noted above, unlike several state constitutions of the day, the **federal Constitution does not begin with a declaration of rights**. Instead, the first ten amendments—and subsequent amendments over the years—are grafted onto the end of the Constitution to modify or add to the original text. The next thing to note is **how absolute the guarantees are in the Bill of Rights** compared to its historical and contemporary antecedents. With respect to individual liberties, previous documents often used words like "ought" and "should." For example, note how in the Virginia Declaration of Rights, the right to trial by jury "ought to be held sacred," and excessive bail and cruel and unusual punishments "ought" not to be imposed. The Bill of Rights is much more direct and prohibitive, using language like "shall make no law" and "shall not be violated" and "shall be preserved." In other words, the **Bill of Rights** went further than any previous document had in vigorously articulating individual liberties and freedom from an oppressive government. In that sense, the Bill of Rights is a ringing pronouncement that abstract concepts like natural rights have real meaning in our lives and that government needs to respect them.

Having said that, however, we should also note that **the liberties enunciated in the Bill of Rights are not, in fact, absolute**. It is fair to say that all these liberties are subject to legislation. A person cannot threaten to assassinate a political leader and hide behind the First Amendment's freedom of speech. Your neighbors cannot start a toxic waste dump in their back yard and hide behind the Fifth Amendment's property rights. A person's right not to be searched does not protect them against lawfully issued warrants, and it does not protect them in situations where authorities do not have a warrant but have probable cause that a crime has been

committed. You may not start a religion that sacrifices a virgin to your god on the summer solstice and claim that such an atrocity is ok because you are freely exercising your religion.

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

The Bill of Rights

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

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

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

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

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

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

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

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

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

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

References

1. Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*. New York: Simon and Schuster, 2010. Page 467.
2. Pauline Maier, *Ratification.* Pages 84-85.
3. For a short, readable treatment of the Anti-Federalists, see Herbert J. Storing, *What the Anti-Federalists Were For*. Chicago: University of Chicago Press. 1981.
4. Philanthropos, "Adoption of the Constitution Will Lead to Civil War," The Virginia *Journal* and Alexandria *Advertiser*, December 6, 1787. Archived on the Constitution Society site at constitution.org.
5. Carol Berkin, *The Bill of Rights: The Fight to Secure America's Liberties*. New York: Simon & Schuster, 2015. Gerard N. Magliocca, *The Heart of the Constitution: How the Bill of Rights Became the Bill of Rights*. New York: Oxford University Press, 2018. Pages 23-36.
6. "The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," in Ralph Ketcham, editor, *The Anti-Federalist Papers and the Constitutional Convention Debates*. New York: New American Library, 1986. Page 247.
7. James Madison to Thomas Jefferson on October 17,1788.
8. Paul Finkelman, "James Madison and the Bill of Rights: A Reluctant Paternity." The Supreme Court Review. 1990. Pages 301-347.
9. Akhil Reed Amar, *The Bill of Rights.* New Haven: Yale University, 1998. Pages 3-19.
10. Donald S. Lutz, "The State Constitutional Pedigree of the U. S. Bill of Rights." Publius. 22(2): Spring, 1992. Page 29.
11. The Avalon Project of The Yale Law School.

Media Attributions

Chapter 15: A Federal Republic

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

–Heather K. Gerkin (1)

A Federal Republic is Fairly Uncommon

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

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

Struggles Over Federalism at the Constitutional Convention

The U.S. Constitution created the first modern federal system. Up until 1787, the political philosophy of **shared sovereignty**—the federal ideal that states and the central government would share authority over the same territory—hadn't really been considered. And, even if they had wanted to, it wasn't practical or politically feasible for the Constitution's writers to make the move from the Articles of Confederation all the way to a unitary system with the central government as the sole sovereign. For one thing, the transportation and communication systems of 1787 were simply inadequate to support a unitary political system that stretched from Maine to Georgia. And regional differences were too great, anyway, for one set of laws to fit all matters affecting so large a territory. Moreover, there was no support among the delegates or the population to drastically reduce state power and create a unitary government. As we saw from the ratification debates, the Constitution as written was viewed by the Anti-Federalists—no small part of the population—as a document that went too far in centralizing power.

The delegates at the Constitutional Convention may not have wanted to establish a unitary system, but they agreed that the weak central government under the Articles of Confederation needed to be strengthened. Almost all the delegates to the convention ended up being federalists—that is, they supported the Constitution—but they differed on how much power to give to the central government. Political scientist David Brian Robertson distinguishes between the narrow nationalists and the broad nationalists. **Narrow nationalists** included people like Roger Sherman, Oliver Ellsworth and most of the delegates from the small states like Connecticut, Delaware, Maryland, and New Jersey. They wanted to give

the national government limited and well-defined powers. **Broad nationalists** like James Madison, Alexander Hamilton, James Wilson, and Gouverneur Morris wanted to give the national government more expansive powers. (2) For example, Madison and the broad nationalists proposed that the national government have a legislative veto over state laws. This would mean that majority votes in Congress would allow the national government to nullify state public policies—not because they were unconstitutional, *per se*, but because the national legislators thought them unwise. That proposal was defeated. In the end, the broad and the narrow nationalists compromised on modern federalism: shared sovereignty between the central government and the states, central government's enumerated powers, powers reserved to the states, limits on state power, and the Supremacy Clause combined with the Supreme Court, which implied that state laws could be struck down on constitutional rather than policy grounds.

Balancing Federal and State Power

Ever since 1787, the states and the central government have struggled over a proper balance of power. The Anti-Federalists may have lost the debate over ratification, but echoes of the Federalist/Anti-Federalist argument can be heard all the time in contemporary American politics as clashes over power continue. And what is even more interesting, the arguments often defy ideological categories. One would think that conservatives would consistently *oppose* central government's power while progressives—aka liberals—would consistently *support* it. This has often been the case. For example, in response to the 1950s and 60s civil rights movement, both Democrat and Republican conservatives—don't get hung up on party labels, because conservatism has a place in both parties—opposed the central government exerting authority, while progressives embraced it. On the other hand, conservatives have moved to increase the central government's power to tap phone calls and internet activity, to dictate educational policy, and to define the terms of marriage, a power that had always been a state responsibility. Of course, the Supreme Court struck down the conservative-inspired federal definition of marriage that discriminated against gay couples. Moreover, conservatives have wanted to empower states to control environmental regulations, knowing that large multi-national corporations can more easily sway most state legislatures into setting lower standards. Sometimes that backfires, such as when California led several states to evade the Trump administration's attempt to weaken automobile emission standards. (3)

The Supreme Court case ***McCulloch v. Maryland* (1819)** was a tremendously important case because it set the stage for central government to expand power. Much of what the central government does is tied to its ability to use the Necessary and Proper Clause to extend the reach of one of its enumerated powers. This is especially true in government regulation, justified under Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Thanks to *McCulloch v. Maryland* (1819), Congress has often used the Commerce Clause in conjunction with the Necessary and Proper Clause to expand central government power. Recently, however, the Supreme Court has been unwilling to extend federal power tied to the Commerce Clause. For instance, the Court struck down the Violence Against Women Act in 2000 because the majority felt that the central government was unjustifiably intruding into the states' prerogatives and that the Commerce Clause did not entitle the federal government to allow women to sue in federal court for gender related violence. (4) We are likely to see similar future rulings because the Court's conservative majority is more likely to endorse limiting central government's authority regarding social welfare or environmental regulation.

How States Interact under the Constitution

An important part of our federal system is the way in which the Constitution manages how states interact with each other. Four provisions of the Constitution are important here, although one became irrelevant when slavery was abolished.

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

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

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

Runaway Slaves—Finally, Article IV, section 2 says that "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to who such Service or Labour may be due." This is one of three places in the Constitution that refers to slaves and slavery without using those exact words. This clause not only forbid Northern states from freeing a slave who had fled from the South, it pledged to give the slave back to his/her master if the master came to claim the slave.

The Advantages of Federalism

Federalism is reputed to have several advantages. One of the most famous is the **laboratories of democracy** idea put forth by Supreme Court justice Louis Brandeis in 1932. He wrote that "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."(7) States have experimented with welfare policies, pollution control policies, laws against child labor, laws allowing doctor-assisted euthanasia, legalizing marijuana, capital punishment, and so forth. Many states and local governments have begun to

act on climate change because of what they see as Washington obstructing this issue. Some of these state experiments eventually get translated into national policy, such as Wisconsin's 1932 initiative on unemployment compensation, three years before the national government implemented it. The COVID-19 pandemic illustrated how different states responded to the public health challenge and the possibilities for re-opening their economies following the quarantines that most had put in place.

In a related idea, federalism also allows for regional differences in a country as large and diverse as the United States. Without federalism, policies in Connecticut, Louisiana, and Kansas would essentially be the same. Large, diverse nation-states tend to find federalism attractive precisely because it allows regional political subcultures to develop that reflect the local population's desires. One state may want to execute murderers, while another may not. One state might want to make access to abortion very difficult, while another might not.

Another possible advantage of federalism is that the states often serve as training grounds for national-level politicians. Many representatives, senators, and presidents develop expertise and networks at the state level before moving on to federal government positions. Because the states have dual sovereignty with the central government, state and local politicians don't just implement policies decided by Washington. Thus, they often bring a wealth of experience with respect to how central government policies impact states.

Finally, federalism brings government closer to the people and gives them ample opportunities to participate. Important decisions get made at the state and local levels, which are often more accessible and responsive to local pressure groups. New parties have an easier time starting at the local level. Reformers who want to take existing parties in new directions can also begin that process at the local level.

The Disadvantages of Federalism

Despite the above advantages, federalism is also problematic. Chief among the disadvantages is how politics fragment in a federal system. When you count the total number of discrete governments in this country—including the central government, states, cities and towns, counties, school districts, and a myriad of special districts—there are nearly 88,000 of them! Critics rightly ask, Who is responsible for what in this mess? How can any citizen keep up with issues at multiple levels? Can they cast informed votes in presidential, congressional, gubernatorial, state legislative, city, county, school district, and water district elections? This doesn't even count those places where judges are elected, which adds a whole different twist to the confusion.

In federal systems, state and local governments' purported closeness and accessibility is often a mirage. For one thing—perhaps due to the issue just raised above—turnout rates in state and local elections are often considerably lower than in national races. State and local governments also tend to listen intently to local economic interests that may or may not have local people's interests in mind. And because state and local politics gets very little media attention, policies are more likely to be passed there without being properly scrutinized and considered. This is especially true in states that have partisan gerrymandering that guarantees many safe seats in the state legislature.

Political scientists are finding that Louis Brandeis' vision of states as laboratories of democracy is often inaccurate. David Pepper, a professor of election law and former chair of the Ohio Democratic Party, argues that federalism has devolved into a situation where states are **laboratories of autocracy**. When he looks across the country, Pepper sees state legislatures that "have atrophied as broadly representative bodies and become easily captive to narrow interests," which means they respond to "twisted, perverse incentives that reward serving private, often corrupt, ends while undermining public outcomes." (8) Similarly, political scientist Jacob Grumbach refers to many states as **laboratories against democracy**. Grumbach's work is fascinating.

He created a state democracy index with over 60 indicators such as restrictions on voter registration drives, gerrymandering, voter registrations rejected, and whether a state allows no-fault absentee voting. Applying the state democracy index over the 2000-2018 time period he found no real change in democratic performance in Democratically led states or states where control of state government was relatively split between the parties. However, he came to a "remarkably clear" conclusion that "Republican control of state government reduces democratic performance. The magnitude of democratic contraction from Republican control is surprisingly large." (9)

The federal nature of the U.S. system also allows large economic interests to play states off against each other. Very often, corporations will announce that they plan to build a new factory somewhere in the United States. They invite states to compete against each other, then states offer the company incentive packages that may include reduced taxes, free land, or developed infrastructure. The company chooses the best offer, which means that the "winning" state pays dearly for whatever new jobs are created. It's often a fool's bargain because taxes are increased or services are cut on ordinary people to keep the corporations happy. (9)

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

Federal Grants and Mandates

The federal government (10) provides a tremendous amount of money to state and local governments. According to 2021 official records, this amount totaled over $1.2 trillion. (11) Federal money comes to states in two basic forms.

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

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

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

References and Notes

1. Quoted in Conor Friedersdorf, "Federalism is Dead. Long Live Federalism," *The Atlantic*. June 28, 2017.
2. David Brian Robertson, *The Original Compromise. What the Constitution's Framers Were Really Thinking*. New York: Oxford University Press, 2013. Pages 15-17 and Chapter 13.
3. Lysette Voytko, "Here's How California Derailed Trump's Auto Emissions Rollbacks," *Forbes*. August 20, 2019.
4. *United States v. Morrison (2000).*
5. Akhil Reed Amar, *America's Constitution: A Biography*. New York: Random House, 2005. Page 253.
6. *McBurney v. Young (2013)* discussed in *Harvard Law Review*. November 2013. Volume 127, Issue 1. Pages 208-217.
7. Justice Louis Brandeis in *New State Ice Company v. Liebmann (1932)*.
8. David Pepper, *Laboratories of Autocracy: A Wake-Up Call From Behind the Lines*. Cincinnati, OH: St. Helena Press, 2021. Page 8 and 143.
9. Jacob M. Grumbach, *Laboratories Against Democracy: How National Parties Transformed State Politics*. Princeton, New Jersey: Princeton University Press, 2022. Page 177.
10. Bryce Covert, "The Enduring Scam of Corporate Tax Breaks," *The New Republic*. September 28, 2018. Here.
11. Normally, when someone says "the federal government," they mean the central government based in Washington, D. C. That is how the phrase is used in this text.
12. Office of Management and Budget. Historical Tables, table 12.2. Here.

Chapter 16: The Historical Development of Federalism

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

—President Richard Nixon (1)

The Definitional Period of American Federalism

A truism about federal systems around the world is that political power is never equally balanced between the central government and the states. The central government ends up being stronger than the states. This generalization is true in the United States as well. However, as the first modern federal governing system, the United States has experimented inordinately with federalism and has gone through several historical stages.

The first stage doesn't have an official name, but it was marked by states challenging federal authority, which ultimately gave way to officially recognizing federal supremacy. Let's call it the **Definitional Period of American Federalism**. The country went through wrenching—and ultimately deadly—struggles over federal versus state power. This period is easy to date—from 1789 to 1865. We can think of this period in another way: states went from sovereign powers under the Articles of Confederation to subordinate units under the Constitution practically overnight, and then it took 76 years for that fact to sink in. This period was marked by several key struggles, all of which resolved in favor of central government power.

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

***Gibbons v. Ogden* (1824)**—This case centered on interpreting Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," which is also known as the commerce clause. In the early nineteenth century, New York state gave Robert Fulton and Robert Livingston a monopoly on steam navigation, which they in turn licensed out to Aaron Ogden to operate steam powered ferries between New York and New Jersey. At the same time, the federal government gave Thomas Gibbons a license to operate ferries in interstate waters. Gibbons' route competed with Ogden's route. Ogden sued Gibbons. Ogden won the suit in the New York state courts, but Gibbons appealed up to the Supreme Court and won. The Court made several important decisions. First, it defined "commerce" broadly to include not just the literal shipment of goods, but any "commercial intercourse" between states. The Court said that while Congress could not regulate business activity that solely took place within a state's boundaries, it could regulate commerce if part transcended state boundaries. Finally, the Court said that the federal law granting Gibbons a commercial license trumped New York's attempt to give Ogden exclusive right to carry goods and people between New York and New Jersey.

The Nullification Crises—The perilous and unsettled nature of federal and state relations during this era was exemplified by state attempts to nullify federal laws. States effectively said, "We do not recognize this federal

law as operable on us." In 1798, Congress passed, and President John Adams signed the Alien and Sedition Acts. Kentucky and Virginia both passed resolutions nullifying the law in their states and asserted the right to disregard the federal laws with which they disagreed. The Kentucky resolution, secretly written by Thomas Jefferson, said that since the Constitution was created by the states, each state has "the unquestionable right to judge of its infraction," which is a way to say that Kentuckians get to determine whether a law is unconstitutional. (2) This nullification crisis didn't boil over because the Democratic-Republican/Jeffersonian victory in the 1800 election resulted in states repealing the offending federal legislation.

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

The Civil War—As you learned in your history class, the North and the South became increasingly divided over the slavery issue and the political question of whether additional states would be admitted to the United States as slave or free—thereby determining the political balance in Congress. There is no space here to recount America's slide into the meat grinder that was the Civil War, but Republican Abraham Lincoln's presidential election was the final straw for white southerners who benefitted economically, culturally, and psychologically from slavery. Even though Lincoln asserted on many occasions that he did not believe in the inherent equality of blacks and whites, he did say things like, "There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness." (4) South Carolina repealed its ratification of the Constitution on December 20, 1860 and six states met in Montgomery, Alabama, on February 4, 1861 to form the Confederate States of America. Ultimately, eleven states joined the Confederacy, and the war between them and the Union killed at least 670,000 soldiers and civilians, freed 3.5 million people from slavery, and crushed the most serious challenge to federal authority in American history.

The Civil War was also a decisive victory for those who held that while the official name of this country is The United States of America, the states are merely administrative units of the people in whose name government operates. The Constitution begins with "We the People," not "We the states." Chief Justice Marshall, writing in *McCulloch v. Maryland* (1819), said the "government of the Union. . . is, emphatically and truly, a government of the people." During the Civil War, Abraham Lincoln gave the **Gettysburg Address** to dedicate a cemetery on the site of a great battle between North and South in Pennsylvania. Students in elementary schools across America learn it by heart, but often they recite the final line like this: "that government *of* the people, *by* the people, and *for* the people, shall not perish from the earth." In light of our conversation about federalism here, that passage is best articulated in a way that emphasizes that government is for people and not states: "that government of *the people*, by *the people,* and for *the people*, shall not perish from the earth."

Dual Federalism

Following the Civil War, the United States entered a period that political scientists call **Dual Federalism**, which is commonly called Layer Cake Federalism. Both names inadequately characterize what was happening. This period runs from 1865 to the election of Franklin Roosevelt in 1932. Despite the outcome of the Civil War, states

continued to assert their prerogatives to govern exclusively in important public policy areas, and they were aided by Supreme Court rulings to that effect. The idea of dual federalism is that there are public policies over which the federal government predominates, such as foreign policy, tariffs, monetary policy, national defense, interstate commerce, and the mail. States took the lead in other areas of governmental responsibility like public safety, education, elections, business licensing, family and morals policy, inheritance and property laws, and commerce within state boundaries, including wages and working conditions. Note that state responsibilities more directly impinged on how people lived their day-to-day lives.

The legacy of the dual federalism era is not a pretty one for people who advocate for human dignity, and it is an embarrassing era even for those who argue today for states' rights. The notion that vast swaths of public policy directly affecting people's lives were off limits to federal intervention meant that during America's industrial explosion, state legislatures could empower corporations at the expense of people and could embolden white supremacists and nativists just when whole new former slave and immigrant populations were struggling to establish themselves as equals in America. This was the era of state Jim Crow legislation limiting political and economic freedom for African Americans, the era of unregulated child labor, the era of unchecked corporate malfeasance, and the era of morals legislation used to keep women in their place.

Two Girls Working in a Textile Factory in 1909.

Let's highlight one example—the issue of child labor. Congress passed the Keating-Owen Act in 1916, regulating commerce involving goods produced by children. It was mild legislation from our perspective. It banned interstate sale of goods made by children under the age of fourteen and by children under sixteen if they were working more than sixty hours a week. However, in the case of ***Hammer v. Dagenhart*** **(1918)**, the Supreme Court struck down the federal law as unconstitutional. Writing for the Court, Justice William Day said that manufacturing itself was not interstate commerce. Since the children were only involved in manufacturing—in this case, cotton—but not involved in transporting the goods once they were manufactured, the federal government had no power to legislate. The Tenth Amendment, said Day, reserved states' powers, and that among these was the power to regulate manufacturing, even if the goods were intended to be shipped across state lines. (5) Thus, the federal government was powerless to ban or regulate child labor. It was the same story with federal actions to break up monopolies—*U.S. v. E.C. Knight Co.* (1895); federal laws to protect Blacks against violence—*U.S. v. Cruikshank* (1876)*;* and federal laws to provide for full and equal access to public accommodations regardless of race—*The Civil Rights Cases* (1883). In all these cases, the Court said essentially that the Constitution was off the table as a possible help to make people's lives better. The Supreme Court's restriction on federal power also extended to states whenever they tried to limit business' power to operate freely. For instance, in *Lochner v. New York* (1905), the Court struck down a New York state law that limited baker's hours to sixty per week. The majority argued that state infringement on the right-of-contract between the bakers and their employer violated the individual's liberty to engage in commerce. Corporations, in other words, should be free to exploit workers because said workers were free to go find another job.

Cooperative Federalism

Dual federalism gave way in the 1930s to what is known as Cooperative Federalism, which lasted until the

late 1960s. Again, this is not a particularly good name. The twin disruptions of the Great Depression and World War II—and the response led by Democratic presidents—created an era that was marked by increased federal power. The Democrats in Congress combined with the Roosevelt administration and passed economic regulations and instituted social welfare policies that had never been seen at the U.S. national level. Under the **New Deal**, the national government regulated the banking industry, supported agricultural prices, set the first federal minimum wage, created unemployment insurance, established social security for the elderly, supported the right of workers to unionize and collectively bargain, and put people to work building schools, hospitals, and roads.

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

The second important development in this period is that the Supreme Court finally acceded to government regulating the economy and protecting civil rights and liberties. Initially, the Court struck down Roosevelt's initiatives such as the National Industrial Recovery Act and the Agricultural Adjustment Act. Roosevelt grew so frustrated that he proposed a **court packing plan** that would allow him to nominate new justices and expand the total number of justices on the Court. (6) Beginning in 1937, the Court abandoned its weird interstate commerce ruling found in *Hammer v Dagenhart* (1918) and began to treat America's economic system as a truly national one. No longer would the law differentiate commerce into manufacturing regulated by states because it takes place within a state's boundaries, or shipping regulated by the federal government because it was interstate commerce, or distribution regulated by states because it takes place within a state's boundaries. Now, it's *all* interstate commerce. A person digging coal in Kentucky is engaged in interstate commerce, even if they have never left the state, because the coal is likely headed to power plants in other states.

New Federalism

Beginning in the late 1960s, American federalism entered a **New Federalism** period, which is also sometimes called the Era of Devolution because of the ways that governmental power seems—in part—to have devolved back on to states. It's confusing, if only because these different periods are clouded by so many contradictory events. A defining factor in the modern period is that in the thirteen presidential elections held between 1968 and 2016, Republicans have "won" eight of them. Two of those victories—Bush in 2000 and Trump in 2016—were solely the result of the electoral college giving the presidency to the popular vote *loser*. Nevertheless, the disproportionate number of Republican presidents in this period have been able to load up the Supreme Court and the federal courts with a disproportionate number of appointees who would be very comfortable if the United States were to go back to days of dual federalism and have the national government be powerless to act in many areas of public policy—particularly economic, worker safety, and environmental regulation. For example, four Supreme Court justices were ready to strike down the Affordable Care Act's individual mandate as an unconstitutional extension of Congressional power, and it was only Chief Justice John Roberts' decision–uncharacteristic for a conservative–not to join them that saved the law in 2012. (7) Earlier, in 1995, the Court ruled that the interstate commerce clause could not be stretched far enough by the elastic

clause to constitutionally cover Congress' attempt to pass a Gun Free Schools Act and ban handguns near schools. (8)

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

Conclusion

The United States has a conflicted history of political power in part because of the federal structure built into the Constitution. Struggles over the overall balance of power will continue, as will fights about specific legislation and whether it vests decision-making power with the federal government or the states. Keeping in mind the theme of this textbook, you should look at struggles over federalism as arenas for conflict between corporations and the rich and the broader population's desire to have effective government regardless of which level provides it. The corporate and financial elite may prefer some policies to be administered by the federal government and others by the states, depending on the benefits they can derive or the regulations they can avoid. The public's need for good governance, regardless of level, is ever-present.

References and Notes

1. Quoted in Bruce Katz, "Nixon's New Federalism 45 Years Later," *Brookings*. August 11, 2014.
2. The Kentucky Resolution. Approved December 3, 1798. Archive in the Library of Congress as part of the Thomas Jefferson Papers, Series 1: General Correspondence.
3. Interestingly, nullification was not an exclusively Southern phenomenon. In 1854, the state of Wisconsin nullified the Fugitive Slave Act that Congress passed in 1850, which required free states to return slaves who fled to free states back to their owners. The Supreme Court struck down Wisconsin's action as unconstitutional, an action which Wisconsin officially refused to recognize.
4. Abraham Lincoln in a debate with Stephen Douglas in Ottawa, Illinois on August 21, 1858. Quoted in Jill Lepore, *These Truths. A History of the United States*. New York: W. W. Norton and Company. Pages 277-278.
5. Hugh D. Hindman, *Child Labor: An American History*. Armonk, NY: M. E. Sharpe, 2002. Pages 64-70.
6. Officially, the court packing plan took the form of the Judicial Procedures Reform Bill of 1937, which would allow the president to appoint a new justice for every existing justice who was over the age of 70 and who had 10 years of federal judicial service.
7. *National Federation of Independent Business v. Sebelius* (2012).
8. *United States v. Lopez* (1995).

Media Attributions

- Federalism Child Labor © Lewis Hine is licensed under a Public Domain license

Chapter 17: A Secular Republic

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

–Thomas Jefferson (1)

"And I have no doubt that every new example will succeed, as every past one has done, in shewing that Religion & Govt. will both exist in greater purity, the less they are mixed together."

–James Madison (2)

What is a Secular Republic?

Many Americans are familiar with the federal system established by the Constitution. What is less familiar is the extent to which the founders went to create a secular republic as well as a federal one. Indeed, one could argue that the United States was the world's first secular republic. Secularism is a misunderstood word, especially by people with strong religious opinions who assume it means "opposition to religion." Part of this misunderstanding is reasonable, as some secularists have expressed their opposition to religion, but we ought not to let that distract us from the real issue here. Just because some Republicans advocate polygamy doesn't mean we should conclude that such advocacy is a key feature of the Republican party's belief system.

A secular republic is one that is characterized by a separation between government and religion. Above all, it means to avoid the trappings of theocracy in all its variations. (3) In a **secular republic**, people are free to practice religion or non-religion in peace; church and state are separated; people of differing faiths are treated equally before the law; and religious tests and oaths are not required to vote or hold office.

The European Roots of American Secularism

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

The Constitution reflected the Enlightenment views of many of the leading lights of the founding generation. They were, as the author Susan Jacoby has described them, some of the first in a long line of freethinkers with respect to religion in public life. (5) This personal characteristic made them revolutionaries in more than one

sense. Thomas Jefferson was most proud of three of his accomplishments: The Declaration of Independence, founding the University of Virginia, and writing and passing the Virginia Statute of Religious Liberty in 1786. Under his design, the University of Virginia did not have a church on school grounds, and he forbade teaching theology. When the Virginia Statute of Religious Liberty passed, Jefferson declared that there would be "freedom for the Jew and the Gentile, the Christian and the Mohammeden, the Hindu and infidel of every denomination." (6) James Madison thought that the presence of chaplains in Congress or the army was unconstitutional and warned against "the danger of a direct mixture of Religion and Civil Government." (7) John Adams had contempt for any priests commingling with governmental affairs. "Nothing is more dreaded," he wrote in 1812, "than the national government meddling with religion." (8) George Washington, too, was steeped in Enlightenment Deism, and declined to ask for an Episcopal clergyman at his deathbed. He wrote thousands of letters that rarely mention Jesus Christ or Christianity, instead, preferring Deist phrases such as Providence, the Supreme Being, and the Great Ruler of Events. He attended church about once a month and conspicuously left before communion. (9) Dr. Thomas Young, one of Boston's leading revolutionaries and the man who first publicly advocated throwing the British East India Company's tea into the harbor in 1773, was a life-long Deist. At the age of twenty-five, Young was tried and convicted for the charge that he "did. . . speak and publish these Wicked false and Blasphemous Words concerning the said Christian religion (to wit) Jesus Christ was a knave and a fool." (10)

Secularism in the U.S. Constitution

Street Sign: Intersection of Church and State.

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

Aside from banning religious tests, the Constitution also distinctively failed to invoke God. This again departed from most state constitutions of the day. The Articles of Confederation referred to "the Great Governor of the World," and the Declaration of Independence made its Deist reference to "the Creator," by which it meant a God ensconced in Nature and subject to natural laws. But the Constitution explicitly and intentionally failed to mention God, the Creator, the Great Governor, the Supreme Being, or any other such reference. Before entering office, the president is required to make an oath or affirmation pledging to protect and defend the U.S. Constitution, but the oath does not have to be on a Bible, nor is "so help me God" a part of the affirmation.

When the Constitutional Convention's work became publicly known, the document's secular character elicited widespread criticism from those who felt it was a godless Constitution. At the Massachusetts ratifying convention, one critic said that without a religious test for the president, "a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist, may be President of the United States." On March 7, 1788, a writer for the

Massachusetts Gazette criticized the Constitution for failing to invoke God, by writing that "it is more difficult to build an elegant house without tools to work with, than it is to establish a durable government without the publick protection of religion." (12) In the North Carolina ratification debate, Reverend David Caldwell disapprovingly said that the secular nature of the Constitution was "an invitation for Jews and pagans of every kind to come among us. At some future period this might endanger the character of the United States." (13) This criticism contrasted markedly with the Federalists' defenses of the Constitution. When political philosopher Donald Lutz examined the sources the Federalists drew upon in their writings, he found that exactly zero percent of them came from the Bible. He concluded that "the Federalists' inclination to Enlightenment rationalism is most evident here in their failure to consider the Bible relevant" in defending the Constitution. (14)

During the ratification debates, critics made numerous attempts to amend the Constitution to add religious tests and/or to add references to God. One such attempt came in Connecticut's ratifying convention, where delegate William Williams proposed to replace the Constitution's preamble with his longer version below:

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

Williams' suggested preamble:
"We the people of the United States in a firm belief of the being and perfection of the one living and true God, the creator and supreme Governor of the World, in His universal providence and the authority of His laws: that He will require of all moral agents an account of their conduct, that all rightful powers among men are ordained of, and mediately derived from God, therefore in a dependence on His blessing and acknowledgment of His efficient protection in establishing our Independence, whereby it is become necessary to agree upon and settle a Constitution of federal government for ourselves, and in order to form a more perfect union, etc., as it is expressed in the present introduction, do ordain, etc."

The Connecticut delegates voted it down. In Virginia, an attempt was made to replace the "no religious test" language of Article VI with "no other religious test shall ever be required than a belief in the one and only true God, who is the rewarder of the good, and the punisher of evil." That wasn't accepted at the Virginia convention. In fact, all attempts to inject God and religious tests into the Constitution were defeated. (15)

During the Civil War, Protestant fundamentalists and other religiously-minded people created the National Reform Association, which pushed for a Constitutional Amendment to reword the preamble to the Constitution as follows:

"Recognizing Almighty God as the source of all authority and power in civil government, and acknowledging the Lord Jesus Christ as the Governor among the nations, His revealed will as the supreme law of the land, in order to constitute a Christian government. . ."

President Abraham Lincoln—who spoke frequently of "God's purpose" even though he was never a member of any church and was outspoken in his religious skepticism in his 20's—offered no support for the amendment. Similarly, Congress made no serious effort to pass the amendment. We should note, however, that in 1864 Congress added the motto "In God We Trust" to U.S. currency. The National Reform Association continued to advocate in vain for the Christian amendment until the organization dissolved in 1945. (16)

The Cold War saw additional attempts to undercut secularism in America. Despite the fact that President Truman was a lifelong Baptist, an additional attempt to pass a Christian amendment to the Constitution during his presidency was, according to scholar Dianne Kirby, "easily defeated." (17) With President Eisenhower's encouragement, in 1954 Congress added the phrase "under God" to the Pledge of Allegiance—clearly a product

of the McCarthy-era's fear of godless communism. Note that the motto "In God We Trust" and the phrase "under God" were added to money and the Pledge of Allegiance, respectively, and are not part of America's secular Constitution. Note, also, that America's first unofficial motto—*E pluribus unum*, or "Out of many, one"—is still on the Great Seal of the United States and more properly reflects the religious and ethnic diversity of the American experiment even though it originally referred to the unity of the 13 diverse colonies.

The Advantages of Secularism

Why a secular republic? Several **advantages of secularism** come to mind. Secularism promotes order and peace between different religions, because of what Jacques Berlinerblau refers to as the **secular compact**, which is the understanding that the state guarantees people freedom to believe or not believe whatever they want in an orderly society, and in exchange, all citizens agree to limit their religious practices to those that do not violate the law or disrupt society. In essence, one can believe whatever one wants but can only act on those beliefs that don't hurt others or destabilize society.

Another advantage is that religion, atheism, and agnosticism all tend to thrive in secular republics, perhaps because secularism separates state authority from not only the dominant religion, but from all sects equally. As Berlinerblau put it, "Secularism is a fierce and principled defender of religious liberty—perhaps civilization's best defender of it." (18) Secularism defends freedom of conscience, which is a bedrock of democracy. A society in which individuals cannot articulate spiritual truths for themselves is not likely to allow people much freedom to publicize and advocate for any of their worldly beliefs either—especially if they differ from those who hold the reins of power.

References and Notes

1. Quoted in Robert W. Tracinski, "America: The Secular Republic," *Capitalism Magazine*. July 1, 2002.
2. James Madison to Edward Livingston, July 10, 1822. *The Writings of James Madison*. National Archives Founders Online.
3. A theocracy is rule by religious authorities and divine guidance.
4. Quoted in Isaac Kramnick and R. Laurence Moore, *The Godless Constitution. A Moral Defense of the Secular State*. New York: W. W. Norton, 2005. Page 83.
5. Susan Jacoby,*Freethinkers. A History of American Secularism*. New York: Henry Holt and Co., 2004. Notice that this is different than saying they were anti-religious. Many were quite religious, others were Diests, and a few like Paine were distinctly anti-clerical.
6. Quoted by Brooke Allen, "Our Godless Constitution," *The Nation*, February 25, 2005. Online edition.
7. See Robin Morgan, "Fighting Words for a Secular America," in Dennis Loy Johnson and Valerie Merians, *What We Do Now*. Hoboken, NJ: Melville House Publishing, 2004. Page 127.
8. Kramnick and Moore, *The Godless Constitution*. Page 102.
9. David L. Holmes, *Faiths of the Founding Fathers*. Oxford: Oxford University Press, 2006. Pages 59-71.
10. Matthew Stuart, *Nature's God. The Heretical Origins of the American Republic*. New York: W. W. Norton, 2014. Page 56.
11. Kramnick and Moore, *The Godless Constitution*. Page 29-30.
12. Jacoby, *Freethinkers*. Pages 29-30.
13. Morton Borden, "The Christian Amendment," *Civil War History*. Volume 25 (2). June 1979. Page 157.
14. Donald S. Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political

Thought," *The American Political Science Review*. Vol. 78, No. 1. March, 1984. Pages 189-197. Quote from 194.
15. See Kramnick and Moore, *The Godless Constitution*. Pages 34-37.
16. Morton Borden, "The Christian Amendment," *Civil War History*. Volume 25 (2). June 1979. Pages 156-167.
17. Dianne Kirby, "The Cold War and American Religion," *Oxford Research Encyclopedias*. May 24, 2017. Page 8 of 29. Retrieved July 19, 2021.
18. Jacques Berlinerblau, *How to Be Secular: A Call to Arms for Religious Freedom*. New York: Houghton Mifflin, 2012. Page 17.

Media Attributions

- Church and State © Chuck Coker is licensed under a CC BY-ND (Attribution NoDerivatives) license

Chapter 18: Amending the Constitution

"If we take seriously the democratic principle of ratification that the phrase 'We the People' suggests, then nothing can make another generation's fundamental law count as ours except our consenting to it. In American constitutional law, silence—the fact that we have not amended the Constitution—counts as consent. But because amending the Constitution is nearly impossible, our silence is compelled, then laundered into consent."

–Law Professor Jedediah Britton-Purdy (1)

The Comparative Difficulty of Amending the Constitution

Article V provides several possibilities to amend the Constitution. The American founders were far-sighted in this regard, for it makes eminent sense that a foundational document might need to be updated as the decades—now centuries—pass and society changes. Since the American founding, it is commonplace that written constitutions around the world have provisions whereby they can be amended. However, the U.S. Constitution stands apart from other written constitutions in one important regard: **It is particularly difficult to amend**. Law professor Richard Albert has established that "The United States Constitution is extraordinarily difficult to formally amend, in contrast to most other less-rigid democratic constitutions." (2) Since 1789, America has amended the Constitution only twenty-seven times, even though there have been over eleven thousand amendments proposed in our history. By contrast, the Basic Law of the Federal Republic of Germany has been amended more than fifty-five times since it went into effect in 1949. Similarly, France has amended its constitution two dozen times since 1958. Between 1982 and 2015, Canada amended its constitution eleven times. Moreover, amending the U.S. Constitution appears to have become politically more difficult over time—so much so that Albert wrote that the Constitution almost seems to be "amendable in theory alone." (3) The last time the Constitution was amended was in 1992, when the 27th Amendment passed that affects compensation for Representatives and Senators. The last consequential amendment affecting the lives of ordinary Americans was in 1971 (!) when the 26th Amendment set the national voting age at 18 years.

There are several ways to think about the U.S. Constitution's resistance to alteration. It's entirely possible that the founders essentially "got it right" when they wrote the document, meaning that there hasn't really been much need for change. The eleven thousand plus amendment proposals suggest that this is not the case. Obviously, people from a wide variety of political perspectives have thought that the Constitution needed updating. Another way to think about it is that there may have been an extraordinary number of ill-advised proposals to amend the Constitution, and these proposals were justly defeated. That's a matter of political perspective. What isn't really debatable is that the difficulty in amending the Constitution puts the United States in the unenviable position of being stuck with a founding document that reflects pre-modern understandings of how to organize a society. Even if we ascribe genius to the founders, they were still people who did not have our modern understandings of democracy and equal rights. That's a problem. A final perspective to consider is that, by being so bloody difficult to amend, the Constitution stands as an obstacle to improving the lives of ordinary Americans.

Amending the Constitution

The process for amending the Constitution puts up many obstacles. Basically, there are four amendment possibilities situated in two pathways, all of which are spelled out in Article V of the Constitution. One pathway starts in the Congress and the other with the states. Both pathways need sufficient states to ratify the amendment for it to go into effect.

Congressional Initiation

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

State Initiation

3. Two-thirds of the states (34 of the 50 states) petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to pass by a simple majority of 50 percent, plus one vote, in three-quarters of the state legislatures (38 of the 50 state legislatures) for it to go into effect.
4. Two-thirds of the states (34 of the 50 states) petition Congress to call for a national convention, which passes the amendment. If that happens, then the amendment needs to be accepted at state-level conventions in three-quarters (38 of the 50 state conventions) to go into effect.

If we look at the history of amending the Constitution, we see that the first pathway is by far the most common. All but one amendment has traveled that path. One amendment—the Twenty-first Amendment, which repealed Prohibition—was accomplished with pathway #2 above. Pathways #3 and #4 have never been used to pass an amendment, and it's not for lack of trying. From 1789 to 1993 there were almost 400 proposals from some states for Congress to call a convention to amend the Constitution. (4) In 2018, conservative interests came within six states of successfully calling for a constitutional convention that they hoped would constitutionally enshrine their values. These efforts were funded and pushed by wealthy people such as the Mercer family and the Koch brothers. (5) Progressives have had less success pushing the same kind of agenda. Legal scholars and jurists from both the Left and the Right worry about a second constitutional convention running amok and radically altering America's constitutional order. As University of Maryland law professor Richard Boldt put it, "The lack of clear rules of the road, either in the text of the Constitution itself or in historical or legal precedent, makes the selection of the convention mechanism a choice whose risks dramatically outweigh any potential benefits." (6)

Looking at the four pathways above, it is now clear why the U.S. Constitution has not been amended much. It is very difficult to get an amendment to pass both the House and Senate with a two-thirds majority, and then there is the high hurdle of getting thirty-eight states to approve it. Consider the fate of the Equal Rights Amendment (ERA), which was initially proposed in 1923. It finally passed Congress in 1972, only to fall three states short of ratification. Then, many years later, Nevada ratified the ERA, followed by Illinois in 2018. After Democrats took over Virginia's state government in 2019, Virginia became the necessary thirty-eighth state to ratify the amendment. One might think that would be the end of the story. However, the text of the amendment passed by Congress in 1972 had language saying that it had to be ratified by March 22, 1979–a date that was later extended to June 30, 1982. The Democrats have passed bills in the House to remove the

ratification deadline altogether, but Republicans in the Senate have let such bills die without debate. In 2020, the Justice Department's Office of Legal Counsel issued an opinion that, because Virginia's ratification came well after the deadline, the amendment could not be added to the Constitution. The United States Archivist is following that advice, so the Equal Rights Amendment has not been successful. (7) That's a heck of a long time and much effort in an ultimately futile attempt to codify the equal rights of women. This story illustrates the frustration people have that "the system" can serve ordinary people. Still, ordinary people's ability to organize and press for a Constitutional amendment is what has enabled women (19th Amendment) and people of color (15th Amendment) to vote, and holds the promise of steering the ship of state in more humane and democratic directions in the future.

Jedediah Britton-Purdy, law professor at Duke University, argued for changing Article V itself. "There is something to be said," he wrote, "for an open, fully democratic effort to put a change to Article V directly onto a national ballot, to stand or fall with the choice of the living majority." He suggested that Article V be amended to require a "constitutional convention every generation, staffed by a blend of specially elected delegates, senior public officials, and, perhaps, citizens selected jury-style to represent everyday experiences." After all, he wrote, "the Constitution doesn't have to be something we merely inherit; it could be something we can change ourselves—starting with rewriting the too-stringent rules for making such changes." (8)

What if . . . ?

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

References

1. Jedediah Britton-Purdy, "The Constitutional Flaw That's Killing American Democracy," *The Atlantic*. August 28, 2022.
2. Richard Albert, "American Exceptionalism in Constitutional Amendment," *Arkansas Law Review*. 69(2), 2016. Page 220.
3. Richard Albert, "American Exceptionalism in Constitutional Amendment," *Arkansas Law Review*. 69(2), 2016. Page 221.
4. James Kenneth Rogers, "The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process," *The Harvard Journal of Law & Public Policy*. 30(3), Summer 2007.
5. Jay Riestenberg, "U.S. Constitution Threatened as Article V Convention Movement Nears Success," *Common Cause*. March 21, 2018.
6. Richard Boldt, "Citizens United is Bad. A Constitutional Convention to Overturn it Would be Worse," *The Baltimore Sun*. March 26, 2018.
7. Steven A. Engel, "Ratification of the Equal Rights Amendment," Department of Justice Office of Legal Counsel. January 6, 2020.

Chapter 19: How Democratic is the U. S. Constitution?

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

–Howard Zinn (1)

"Designed in a pre-democratic era, the U.S. Constitution allows partisan minorities to routinely thwart majorities, and sometimes even to govern them."

–Steven Levitsky and Daniel Ziblatt (2)

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

Democracy Road Sign

The Constitution in Broad Perspective

Let's start with the Constitution and the first ten amendments—treating them as one document even though we know that's not quite true—and judge them from the point of view of the late eighteenth century. Conduct a mental exercise and transport yourself back to the period between 1787 when the Constitutional Convention opened in Philadelphia and 1791 when the Bill of Rights was officially added to the Constitution. Float around the United States eastern seaboard and get a feel for the nature of the government that was being created there. Then, allow yourself to roam around the rest of the world, examining the governments of all the countries, kingdoms, principalities, empires, and tribal societies that existed at the time. From this perspective, author Catherine Drinker Bowen was on to something when she titled her book on the Constitutional Convention *Miracle at Philadelphia*. (3) As she pointed out, the founders themselves thought it was a miracle. We should not let go of that sense of the miraculous. The men who wrote the Constitution were remarkably steeped in cutting-edge political philosophy and displayed a thoughtful kind of genius with respect to laying out—for the first time, mind you—a written constitution for a large republic based on popular rule. One can hardly overstate how important a step forward the U.S. Constitution was for all of humankind. There was nothing like it anywhere. Given the social norms of the time, it is difficult to imagine how the founders could have produced a document that was *more* democratic than the Constitution and Bill of Rights.

Still, the founders were not angels. Nor were they divinely inspired. Nor could they divorce themselves from the time in which they lived. They were flesh and blood people with several obvious and relevant characteristics,

and they represented interests not widely shared by the rest of the population. We can start with the fact that all the founders were men. Further, they shared a world view in which women's interests were only channeled into the public sphere through husbands, fathers, and brothers. The founders were also White and were not concerned about the interests of slaves, free Blacks, Native Americans, or other people not White. As propertied men, the founders did not represent the interests of even the majority of White men—those who did not have enough property to vote or hold office.

In 1913, the historian **Charles Beard** wrote one of the most famous and contentious books on the Constitution called *An Economic Interpretation of the Constitution of the United States*. He asserted that the founders consisted overwhelmingly of merchants, people who had money on loan to others, and people who owned public bonds, and that they pushed the Constitution at the expense of farmers and debtors. Subsequent research revealed some limitations of Beard's book, but his work forever changed the way we understand the American founding. (4) No longer would we ignore the obvious fact that the small group of men who wrote the Constitution had economic interests and that they preferred a central government strong enough to protect those interests, but not one empowered by popular majority to carry out radical economic policies that would damage their own elite interests.

The Founders' Understanding of Democracy

For most students coming to college straight out of high school, it is somewhat of a shock to realize that the American founders were not fond of democracy, a term they understood to mean direct democracy unmediated by representative bodies. Indeed, they equated the term *democracy* with mob rule. As the historian Richard Hofstadter wrote of the founders, "In their minds, liberty was linked not to democracy but to property." And when we talk of property, we are talking about people who owned a great deal of it. Further, Hofstadter argued that the founders were interested in negative liberties—the freedom of propertied interests from "fiscal uncertainty and irregularities in the currency, from trade wars among the states, from economic discrimination by more powerful foreign governments, from attacks on the creditor class or on property, from popular insurrection." (5) It's easy to see from the founder's own words that this was the case. James Madison argued that "Democracies have ever been spectacles of turbulence and contention," and that they are incompatible with "the rights of property." Indeed, he was concerned that those "without property" and "debtors," which constitute the majority of the population, would use their power to "kindle a flame" for "wicked projects" like "abolition of debts" and "an equal division of property." (6) Similarly, Alexander Hamilton looked down his nose at "the idea of an actual representation of all classes of people," and instead argued that the merchant class should be "more equal" than the others. (7)

Instead of a "democracy," most founders wanted to establish "popular government" or a "republican" form of government. (8) They wanted government to be founded on the will of the people but to be mediated by social customs and elite-dominated representative institutions that would ensure that their interests would not be jeopardized. Women's interests would be represented by their brothers, fathers, and husbands. Poor White men's interests would be represented by their betters in the merchant and creditor classes. Slaves' interests were not really considered separate from those of their owners. Madison wrote—again, in *Federalist #10*—that "The public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves." Moreover, the "wisdom" of these leaders would "best discern the true interest of their country, and [because of their] patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." This is nonsense, of course, for we know definitively from American history that representatives, senators, presidents, and Supreme Court justices have repeatedly demonstrated

a self-interested understanding of justice and an unwillingness to act in the public interest unless faced with organized majorities of ordinary people demanding that they do the right thing.

What are we to conclude about the founders and democracy? They abhorred the idea of direct democracy. They wanted to establish a republic, which is what we would call a representative democracy—although their understanding of whose voices should count was necessarily much more limited than ours. Still, the founders supported the idea that the will of the majority should be regularly translated into public policy as long as the rights of the minority were not trampled in the process. James Wilson, a prominent member of the Constitutional Convention and later a Supreme Court justice, wrote that "the majority of the people wherever found ought in all questions to govern the minority." Indeed, Wilson was the only delegate at the Constitutional Convention who wanted truly democratic election of the House, the Senate, and the President. When James Madison referred in *Federalist #10* to "the republican principle," he was referring to the majority overruling the minority when the latter was attempting to go against the public good or violate the rights of the people. And in a letter to Madison, Thomas Jefferson wrote that "It is my principle that the will of the majority should always prevail." (9) These sentiments are important to remember, for if the founders were alive today and had our broad understanding of who gets to count as members of the body politic, they would argue that our attenuated democracy needs to be strengthened. And yet we still live with the results of their privileged position in 1787 and their fears of direct democracy, both of which are used by contemporary interests who want to limit the voices of ordinary people. An interesting paradox, no?

Constitutional Features Limiting Popular Rule

The Constitution is full of features designed to limit direct popular rule. The House of Representatives was the only popularly elected body. The franchise (10) to elect representatives was left to the states and was very limited as we'll see later in this textbook. So, from our perspective in time, we can say that the House was a somewhat democratic feature of the Constitution. The rest of the document is a minefield of features designed to thwart majority will and to protect the interests of elites. Consider the following:

Separation of Powers—The separation of powers slows government down and makes it structurally unresponsive to large, sudden changes in popular will. Under the original, un-amended Constitution, such public mood swings need to be sustained over a long time to elect enough representatives to the House and to ensure that enough senators get selected by states to serve in Congress. There is the added burden of needing a president who would agree with the policy the people support. Finally, the whole project could be shot down by Supreme Court justices when the new policy is challenged in court. In addition to this separation-of-powers problem, it is undemocratic in the sense that it hinders the peoples' ability to hold leaders accountable—even after constitutional amendments designed to make the U.S. more of a democracy. Political scientist William Hudson has written that "The logic of separation of powers—shared responsibility for policy making, combined with accountability through separate elections—makes holding officials accountable for policy failure extremely difficult." (11)

The Senate—In the original Constitution, senators were not popularly elected. Instead, the founders wanted senators chosen by their respective state legislatures. Thus, the Senate was doubly insulated from the popular will. This defect was remedied in 1913 when the Seventeenth Amendment was ratified, which said that senators would henceforth be "elected by the people" of each state. Even now, however, the Senate is a profoundly undemocratic body. We'll talk more about this later, but keep in mind that each state is allotted two senators, regardless of the state's population. This empowers voters in smaller, rural states, which happen to be whiter than the overall U.S. population and hobbles the influence of people living in larger, more populous, more

diverse states. Even worse, as noted by Noah Feldman, "The Constitution was designed precisely so that no one would be able to do anything about the undemocratic Senate." (12)

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

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

No Positive Right to Vote—The original Constitution never articulated an affirmative right to vote to anyone, and instead left the vote-granting privileges to states. Initially, of course, states granted voting privileges to the minority of property-owning White men. Through amendments to the Constitution, we have extended the "right to vote" to people of color, to women, and to people who are eighteen years and older. However, as Garrett Epps has written, our courts still see voting as a privilege: "The 'privilege' over the years has been made dependent on literacy, or long residency in a community, or ability to prove identity, or lack of a criminal past. None of these conditions would be allowed to restrict free speech, or freedom from 'unreasonable' searches, or the right to counsel," but they have been used to keep people from voting. (13) A truly democratic constitution would positively assert the right of all adult citizens to vote and place the burden of registering people to vote on the government rather than the individual.

The Amendment Process—We've just talked about this, so we don't need to belabor the point here. Suffice it to say that the Constitution is remarkably difficult to amend. Thomas Jefferson once wrote to James Madison that "The earth belongs...to the living...the dead have neither powers nor rights over it." (14) And yet, because the Constitution is so difficult to amend, we are governed by a slightly modified document written by a small number of slave-owning, wealthy White men who did not have the benefit of all we know about the world nor the appreciation we have for the dignity of all people.

The political scientist Robert Dahl, whose quote leads off this chapter, looked carefully at this question of how democratic the Constitution was and is. Two things stand out in his review of the subject. First, the Constitution we have is a creature of its time—and its time was not a particularly democratic one from our perspective over two centuries later. Had the Constitution been written in the 1830s or the 1960s or yesterday, it would undoubtedly be far more democratic in nature. It would have had, in other words, an expanded understanding of "the people" on whose authority government rests, and it would have placed fewer barriers to translating majority opinion into public policy. The second takeaway from Dahl's work is that the Constitution *should* be more democratic. He wrote, "For my part, I believe that the legitimacy of the constitution ought to derive solely from its utility as an instrument of democratic government—nothing more, nothing less." (15)

What if . . . ?

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

References and Notes

1. Howard Zinn, *A People's History of the United States 1492-Present*. New York: Harper Collins, 2003. Page 98.
2. Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority: Why American Democracy Reached the Breaking Point*. New York: Crown Publishing, 2023. Page 10.
3. Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787*. Boston: Little Brown, 1986. Originally published in 1966.
4. Charles Beard, *An Economic Interpretation of the Constitution of the United States*. New York: The Free Press, 2012. Originally published in 1913. Robert E. Brown, *Charles Beard and the Constitution. A Critical Analysis of "An Economic Interpretation of the Constitution."*Princeton: Princeton University Press, 1956.
5. Richard Hofstadter, *The American Political Tradition and the Men Who Made It*. New York: Vintage Books, 1948. Pages 10 and 11.
6. James Madison, *Federalist #10*.
7. Alexander Hamilton, *Federalist #35*.
8. One could argue that Jefferson, who was not present at the Constitutional Convention, would have argued for more trust in the people.
9. Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*. New York: W. W. Norton and Company, 2021. Page 22. Ari Berman, *Minority Rule: The Right-Wing Attack on the Will of the People—and the Fight to Resist It*. New York: Farrar, Straus and Giroux, 2024. Page 49.
10. The franchise refers to the eligibility to vote.
11. William E. Hudson, *American Democracy in Peril*. 6thedition. Washington, D.C.: CQ Press, 2010. Page 42.
12. Noah Feldman, "Revamping the Senate is a Fantasy," *Bloomberg*. October 10, 2018.
13. Garrett Epps, "What Does the Constitution Actually Say About Voting Rights?" *The Atlantic.*August 19, 2013.
14. Quoted in William E. Hudson, *American Democracy in Peril*. 6thedition. Washington, D.C.: CQ Press, 2010. Page 86.
15. Robert A. Dahl, *How Democratic is the American Constitution*? 2ndedition. New Haven: Yale University Press, 2003. Page 39.

Media Attributions

- democracy © Alpha Stock Images is licensed under a CC BY-SA (Attribution ShareAlike) license

PART 3: CONGRESS

Chapter 20: Who are Our Members of Congress and Whom Do They Represent?

"Poverty is the feeling that your government is against you, not for you; that your country was designed to serve other people and that you are fated to be managed and processed, roughed up and handcuffed."

— Matthew Desmond (1)

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

–Michael Parenti (2)

Who Are Our Members of Congress?

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

The United States Congress is composed of 435 representatives and 100 senators. The representatives are elected to two-year terms, and the entire body is up for re-election every two years. Senators have six-year terms, with one-third of them up for re-election every two years. Under the original Constitution, senators were chosen by state legislatures rather than by popular vote, but they have been popularly elected since the Seventeenth Amendment passed in 1913. There are no term limits for either representatives or senators. It almost goes without saying that House districts are more uniformly populated than are the states—except in cases like Wyoming where the House district is also the state boundary. The average House district has between 700,000 and 800,000 residents, but states range in population, for example, about 40 million for California to less than 600,000 for Wyoming. Note that the least populous states, like Wyoming, are guaranteed one representative and two senators regardless of their population.

We have, then, 535 people whose job ostensibly is to represent the people of the United States —or do they just represent the voters? In 1776, when states were writing new constitutions to replace state charters, John Adams wrote a treatise that he hoped would guide their efforts. In it, he wrote that a legislature "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." (3) How does our Congress measure up to this standard? It is clear that congressional members, in several respects, do not represent average Americans. Note the following discrepancies between congressional members and the American population:

Occupation—Lawyers constitute .6 percent of the American workforce—and even less of the overall

population—yet over 40 percent of congressmen were lawyers before entering Congress. Around another 22 percent of congressmen list business/banking as their occupation prior to Congress.

Sex—Approximately 51 percent of the U.S. population is female, while women constitute only 27 percent of the representatives and senators. Note that this is the largest percentage of women *ever* in Congress. As recently as the 1970s, less than 4 percent of congressional seats were held by women. From the beginning of the republic to 2020, only 2.9 percent of all members of Congress were women.

Race—Whites comprise 63 percent of the U.S. population, but 76 percent of Congress and 94 percent of the Republicans in Congress are White. Note that the current Congress is the most diverse it has ever been. For example, in 1945 people of color accounted for 1 percent of Congress while they account for 24 percent now.

Age—The median age of Americans is slightly over thirty-eight years. The median age of House members is fifty-eight years and for senators it is sixty-one years.

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

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

Wealth—This is more difficult to know because members of Congress don't have to disclose their wealth in exact terms. We do know that twelve members have a net worth of over $50 million; 34 have a net worth of $10-50 million; 157 have a net worth of $1-10 million; and 155 have a net worth of $100,000-1 million. The median net worth of Americans aged 55-64 is about $164,000. Thus, we can confidently say that the majority of the 535 congressional members possess considerably more wealth than the average American.

Religiosity—In the general public, 23 percent of people identify as atheist, agnostic, or "nothing in particular." In fact, *nonreligious* is the fastest growing group of people in the United States. In Congress, however, virtually all representatives and senators claim to belong to a church, and 88 percent belong to a Christian denomination. (4)

Now that we know these disparities between Congress and the American people, we are better prepared to ask some probing questions about how our representatives and senators should be representing us. Our questions can be grouped under two conceptually distinct ways to understand how we are represented, which are called descriptive representation and substantive representation.

Whom Do Members of Congress Represent?

Descriptive representation—The statistics above directly address what political scientists call **descriptive representation**, which concerns "the extent to which a representative resembles those being represented." (5) Collectively, we would ask: to what extent do our representatives resemble the population being represented, and does it matter if they don't? Historically speaking, Congress has been very good at descriptively representing wealthy, educated, White males. It is, however, slowly becoming more diverse with respect to race and gender, but not with respect to wealth and education. Is a legislature populated disproportionately by men qualified to legislate on women's access to abortion and reproductive health services? What are we to think about a legislature deliberating health insurance policy when the overwhelming majority of its members have never gone a day without health insurance? Ditto for a legislature full of wealthy individuals debating

whether or not to increase the minimum wage. What are people of color to think about a predominantly White legislature's ability to fully address civil rights?

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

Substantive Representation—We can also ask questions about what political scientists call **substantive representation**, which concerns whether representatives "advance the policy preferences that serve the interests of the represented." (6) Again, representation turns the collective's decision-making powers over to a subset of people who are supposed to make wise, far-seeing decisions in the interests of those they represent. In this textbook, we are particularly concerned that the interests of ordinary Americans are served by Congress, the presidency, the executive branch agencies, and the Supreme Court. In many ways, Congress is the beginning point, for it can fulfill its function to represent ordinary Americans only if it passes legislation that the public wants and that serves the public's broad interest in promoting the general welfare, facilitating justice, and securing the blessings of liberty. As political scientists Benjamin Page and Martin Gilens wrote, "It seems obvious to us that in a democracy, the government should pay attention to what policies its citizens want." (7)

Congress' substantive representation track record is not very good. Looking back on the chapter about how democratic the U.S. Constitution is, we note that this may very well be a design flaw built into the system. Consider the following policy options, public support for each, and the legislative outcome. (8)

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

The table above seems to indicate that the majority of Americans would like Congress to pass laws that address

specific issues affecting broad swaths of the populace. They would like, in other words, to have Congress use our collective resources to make the lives of ordinary Americans better. Congress seems unable to substantively represent the interests of ordinary Americans, but does appear able to deliver on the wishes of corporations and the rich. For example, in the 2008 Great Recession, Congress bailed out banks and other financial institutions without providing corresponding help for the millions of people who lost their homes. In another example, Congress passed a tax reform act in 2017. Analyses of the change indicate that by 2027, 83 percent of the tax reduction benefits will go to the top 1 percent of wage earners. (9) Even worse, the tax cut ballooned the federal deficit and did not stimulate the economy as promised. This begs the question: What is the purpose of Congress if it typically does not act in accord with public opinion? And another: Could the lack of substantive representation be a key reason why Congress' public-approval rate typically hovers between only 20 and 25 percent? Discuss among your classmates, friends, and family.

Congress *has* acted in the interests of ordinary Americans and *will* do so in the future only if enough representatives and senators are sufficiently afraid of the one real source of power that people have—their votes. For example, outside of the South, solid majority support for civil rights legislation combined with various legal, public relations, and civil disobedience strategies by civil rights groups put enough pressure on Congress to pass the Civil Rights Act of 1964—even though a majority of Whites was still uncomfortable with integration then. (10) Similarly, growing environmentalism among the public and the first Earth Day celebration were instrumental in convincing President Nixon and enough representatives and senators to establish the Environmental Protection Agency, to pass the Clean Water Act, and to enhance the Clean Air Act.

What if . . . ?

What if we did away with elections for Congressional members? What if we chose representatives and senators by lottery—representatives for one six-year, non-renewable term and senators for one nine-year, non-renewable term? What would be the advantages and disadvantages of selecting our legislators this way? Would you put qualifications in place regarding who is eligible for the congressional lottery? What if we did a lottery for nominations, and picked two people for each congressional election, who would then debate each other, put out platforms, and face the voters? Would that better preserve popular choice?

References

1. Matthew Desmond, *Poverty, By America*. New York: Crown Publishing. 2023. Page 19.
2. Michael Parenti, *Democracy for the Few*. 9thedition. Boston: Wadsworth. Page 198.
3. Quoted in Michael Waldman, *The Fight to Vote*. New York: Simon and Schuster. 2016. Page 11.
4. A. W. Geiger, Kristen Bialik, and John Gramlich, "The Changing Face of Congress in 6 Charts," Pew Research Center. February 15, 2019. Will Tucker, "Personal wealth: a nation of extremes, and a Congress, too," Opensecrets.org. November 17, 2015. Aleksandra Sandstrom, "5 Facts About the Religious Makeup of the 116thCongress," Pew Research Center. January 3, 2019. Randy Leonard and Paul V. Fontelo, "Every Member of Congress' Wealth in One Chart," Roll Call. March 2, 2018. Jim Wang, "How Does Your Net Worth Compare to the Average American?" Wallethacks. May 21, 2019. Carrie Blazina and Drew Desilver, "A Record Number of Women are Serving in the 117th Congress," Pew Research Center. January 15, 2021. Katherine Schaeffer, "Racial, Ethnic Diversity Increases Yet Again With the 117th Congress," Pew Research Center. January 28, 2021.
5. Suzanne Dovi, "Political Representation," *Stanford Encyclopedia of Philosophy*. August 29, 2018.

6. Suzanne Dovi, “Political Representation,” *Stanford Encyclopedia of Philosophy*. August 29, 2018.
7. Benjamin I. Page and Martin Gilens, *Democracy in America? What Has Gone Wrong and What We Can Do About It*. Chicago: The University of Chicago Press, 2017. Page 53.
8. Kenneth R. Peres, “These 7 Charts Show How Legalized Political Corruption is so Much Bigger Than Trump,” *Alternet*. October 16, 2019. Steve Liesman, “Majority of Americans Support Progressive Policies Such as Higher Minimum Wage, Free College,” *CNBC*. March 27, 2019. No author, “New SPLC Poll: Two-Thirds of Voters Support the ‘For the People Act’” Southern Poverty Law Center. May 6, 2021.
9. Tax Policy Center, “Distributional Analysis of the Conference Agreement for the Tax Cuts and Jobs Act.” December 18, 2017.
10. Roper Center for Public Opinion Research, “Public Opinion on Civil Rights: Reflections on the Civil Rights Act of 1964.” July 2, 2014.

Media Attributions

- US_House_Committee © U.S. Congress is licensed under a Public Domain license

Chapter 21: Congressional Roles

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

–Will Rogers (1)

Legislation

Being a senator or representative is a complicated job; they fulfill several roles at the same time. One obvious role is **legislative**, *or law writing*. Congress is typically fairly active in this regard, notwithstanding protestations of a "do-nothing Congress." People who track Congress' productivity make a distinction between substantive laws and ceremonial laws. **Substantive laws** are those that make a change in federal law or that authorize spending taxpayer dollars. **Ceremonial laws** are those that do relatively trivial things like rename federal buildings, award medals, or designate special days. In the past twenty years, Congress has passed between 200-450 substantive laws per session and between 50 and 250 ceremonial laws per session. (2) Sitting congressmen run for reelection based on their legislative records: What "good" bills did they push, and what "bad" bills did they oppose? They campaign on their legislative abilities, and local media report on the status of a candidate's important legislation. The theory of representative democracy rests on the rather large assumption that voters assess legislation and reward those politicians who have voted "correctly" on the issues that matter to voters.

Representation

Representation is closely related to the legislative role. Congressmen are elected to represent their constituents' interests. This is not as straightforward as it sounds. Elections often do not convey the voters' wishes clearly to the politician. If a politician wins with 53 percent of the vote, they cannot be certain from those results what the voters want them to do. That is why politicians are fond of polls and focus groups conducted by survey-research organizations. In addition, congressmen can access other information sources by reading local newspapers, conversing with lobbyists, talking to elites in the district, and soliciting constituent views during town meetings. Also, the representative's role is to decide what kind of representation is best. Should the politician be a **delegate**, who is bound to vote the way constituents want? We saw before in our substantive representation discussion that ordinary people want Congress to act in their interest. But what if constituents advocate a policy that their representative or their senator considers unwise? The other possibility is to be a **trustee**, a representative who is directed by their own judgment rather than their constituents' views. This can be politically risky if the politician votes in direct opposition to what the majority of his or her constituents want. But this is what James Madison was counting on when, in *Federalist #10*, he endorsed representation in a large republic. He wrote that such representatives "may best discern the true interest of their country," and that their "patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." What do you think? Should a member of Congress be a delegate or a trustee? Who is more likely to assume the delegate roll—representatives or senators?

Constituent Service

Another important congressional role is to perform **constituent service**, which is often referred to as casework. Are your veteran's benefits caught up in red tape? Did you fail to receive the cost-of-living adjustment in your social security check? Did your community theater federal grant application get lost? Call your senator or representative's office—staff people are there to help you if they can. Constituent service is a way for a congressman to garner good favor and positive news coverage in their district. Also, casework can serve to educate congressmen, particularly with respect to legislation and oversight. As one member of Congress put it: "You learn more about the job by doing constituent service work than anything else. . .It tells you whether or not the legislation is doing what it is supposed to do." (3) Constituent service can also become controversial, however, especially when politicians are seen to be doing the bidding of well-heeled citizens or corporations, both of whom donate money to congressional campaigns and seem to have better access to congressmen than do ordinary citizens.

Oversight

A final important congressional role is performing executive-agency **oversight**. Congress is interested to see how programs and regulations are actually working and what impacts federal laws have once they go into effect. So, standing committees and their subcommittees hold hearings to inquire into the operations of those executive agencies. Congressmen sometimes have an interest in serving the American public by exposing waste, fraud, and abuse in the executive branch. Often, those agencies' heads are called to testify before a committee or subcommittee, and experts from the General Accounting Office—which is the investigative arm of Congress—testify about their investigations into a particular agency.

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

References

1. Quoted in Robert G. Kaiser, *Act of Congress. How America's Essential Institution Works, and How It Doesn't*. New York: Alfred A. Knopf, 2013. Page xii.
2. Drew Desilver, "A Productivity Scorecard for the 115thCongress: More Laws Than Before, But Not More Substance," Pew Research Center. January 25, 2019.
3. Sarah J. Eckman, *Constituent Services: Overview and Resources*. Congressional Research Service. January 5, 2017. Page 1.

Chapter 22: How Congress Passes Legislation

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

–Trevor Corning, et al (1)

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

–Michael Parenti (2)

U.S. Capitol Building

What follows is the textbook version of how a bill becomes a law. Please keep in mind that not only is this a simplified view of the process, but there are many occasions when important decisions affecting your life are made in a fashion that does not resemble the idealized version below. Indeed, the process is often so convoluted that political scientist Michael Parenti referred to it as "the legislative labyrinth."

Party Leadership

Before we get to the actual bill-passing process, we should note that in each chamber, party leadership shapes the whole legislative labyrinth. The party with the most seats in each chamber gains considerable power—not just from their numerical majority—but also from their ability to select the **leadership positions** in each chamber. In the House of Representatives, the **Speaker of the House** is the preeminent leadership position. The Speaker of the House is elected by the majority party and serves as both the House's partisan and administrative leader. Even though the Speaker typically does not vote, engage in debate, or sit on standing committees, it is the House's most powerful position. The Speaker articulates and pushes the majority party's political agenda. They manage the House's floor business and makes parliamentary decisions—typically to the majority party's advantage. They are also the House's business manager, handling everything from procurement to calendaring. The **Senate Majority Leader** is elected by the majority party and schedules and manages all the Senate's business. These leadership positions are very powerful, which is why parties are so keen to gain the most votes in each chamber. In addition to having majority votes to pass legislation, if all the members hang together, they get to elect the Speaker and the Senate Majority Leader who can use their powers to their party's advantage.

The leadership positions described above represent the top of party leadership in the House and Senate, but there are other important positions as well. In the House of Representatives, the majority party selects a Majority Leader and a Majority Whip, and the minority party selects a Minority Leader and a Minority Whip. These positions serve as floor leadership and try to ensure party unity on important upcoming votes. Parties in the

Senate also have Whip positions—both majority and minority whips—that serve similar roles as their House counterparts, and the minority party is led by a Minority Leader.

Standing Committees

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

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

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

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

Before getting too far along in describing the legislation process, we should stop here and talk a little bit about getting seats on these standing committees. Congressional members have two main priorities with respect to committee assignments: Generally speaking, they want to be on the more powerful and visible committees, but they also have an interest in being on committees that are most relevant to their states or districts. If a military base is in their district, it would be in a congressman's interest to be on the House Armed Services Committee or the Defense Subcommittee of the Appropriations Committee. The taxation, appropriations, and budget committees are all-purpose powerful committees. But it costs to get a plumb committee assignment. Joseph Califano, former Defense Department lawyer, as well as Secretary of Health, Education, and Welfare, notes that both the Democratic and the Republican congressional leadership essentially charge "dues" to their congressional members to get committee assignments—the better the assignment, the more money the congressman needs to raise for their respective party re-election committee—the Democratic Congressional Campaign Committee or the National Republican Congressional Committee. Members are advised to spend four hours per day on the phone to raise money to pay these committee-assignment party dues, as well as for their own re-election efforts. (3)

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

House Rules Committee

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

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

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

The Senate Floor

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

If the Senate does not pass a unanimous consent agreement to limit the debate, some senators might **filibuster** a bill to kill it or to gain concessions. A filibuster prevents a bill from passing by dragging out the

debate—if the debate does not end, there can be no vote, and without a vote, the bill cannot pass. The filibuster can be when a senator continuously speaks, although this is rare now. The record for a single filibuster is held by South Carolina's Strom Thurmond, who filibustered the 1957 Civil Rights Act for twenty-four hours and eighteen minutes. A filibuster can also be stopped by a **motion of cloture,** which is a motion to place a time limit on the filibuster. At least sixty senators must agree to the cloture, and then debate ends and a vote happens on the bill.

Due to filibuster reforms in the 1970s as well as later changes in Senate processes, cloture motions–and thus, filibusters–became routine in the Senate. (5) In the 1940s and 50s, each Congress experienced about five filibusters in a two-year term. But a 2002 study indicated that by that time "roughly half of all major bills encounter[ed] filibuster difficulties, often resulting in either defeat or substantial concessions." (6) As political scientist Sara Binder stated before the Senate, "From roughly 1920 to 1970, filibusters averaged *one* a year. In stark contrast, in 2005-2006, there were an average of thirty-four cloture motions filed to end filibusters, and in the 2007-08 Congress there were 139 cloture motions filed, roughly *seventy* a year." (7) Now, the mere threat of a filibuster can derail a bill or stymie a presidential nomination. Indeed, legal scholar Josh Chafetz, who argues that the filibuster is unconstitutional, points out how undemocratic the situation has become by writing that "a measure that cannot command the support of sixty Senators is unlikely even to be introduced onto the Senate floor." (8)

Early in the 113th Congress (2013-14), Democratic senators Tom Harkin, Jeff Merkley, and Tom Udall attempted—but failed—to push through significant filibuster reforms that would have limited the minorities' ability to stop the will of the Senate majority. (9) In 2013, after Republicans refused to allow President Obama to fill empty seats on the D.C. Circuit Court, Democrats pushed through an end to the filibuster for lower federal court nominations. Then, in 2017, after Democrats filibustered President Trump's nomination of Neil Gorsuch to fill a Supreme Court seat that Republicans had earlier refused to allow President Obama to fill, Republicans killed the filibuster for Supreme Court nominations as well. As of this writing, the filibuster continues to be a tool of the minority party in the Senate to impede the will of the majority.

Conference Committees

After debate has ended, each chamber takes a floor vote. At this point, an interesting problem can develop. If the House's version of the bill differs from the Senate's version, the bill cannot be sent to the president. One of three things can happen: 1) One chamber can just agree to adopt the version of the bill that passed in the other chamber. 2) The two chambers can send the different versions to each other to attempt to get to a compromise. *3)* The two bill versions can be melded into one in a **conference committee** called specifically for that purpose. Conference committees—so important that they are sometimes called the third house of Congress—are composed of both representatives and senators who are chosen by the bill mark-up committee(s) chair and senior leader of the minority party. Conference committees have ranged in size from seven to over 250 members, and there does not have to be an equal number of representatives and senators. If the conference-committee members cannot compromise with each other, the bill is stuck. If a majority can agree, then the conference report, as it is known, is voted on directly in the House and the Senate, with no floor amendments allowed from either chamber. If the conference report fails to pass both chambers, the conference committee can be reconvened. Once both chambers accept the conference report, it can be sent on to the president.

References

1. Trevor Corning, Reema Dodin, and Kyle Nevins, *Inside Congress: A Guide for Navigating the Politics of the House and Senate Floors*. Washington, DC: The Brookings Institution, 2017. Page 11.
2. Michael Parenti, *Democracy for the Few*. 9thedition. Boston: Wadsworth, 2011. Page 210.
3. Joseph A. Califano, Jr., *Our Damaged Democracy*. New York: Touchstone, 2018. Pages 52-56.
4. This discussion of the Rules Committee draws from Trevor Corning, Reema Dodin, and Kyle Nevins, *Inside Congress: A Guide for Navigating the Politics of the House and Senate Floors*. Washington, DC: The Brookings Institution, 2017. Pages 24-30.
5. In the early 1970s Senate Majority Leader Mike Mansfield introduced "tracks" in the Senate, allowing a filibuster to stop only the bill in question, not all of the Senate's business. Then in 1975 motions of cloture were dropped from 67 to 60 votes, and requirements to physically speak and occupy the floor were dropped as well.
6. The study is Barbara Sinclair, "The '60-vote Senate,'" in Bruce I. Oppenheimer, ed., *U.S. Senate Exceptionalism*. Columbus, Ohio: Ohio State University Press, 2002. This is cited in Eric Schickler, "Institutional Development of Congress," in Paul J. Quirk and Sarah A. Binder, eds., *The Legislative Branch*. Oxford: Oxford University Press, 2005. Page 55.
7. Testimony of Sarah Binder, Senior Fellow, Brookings Institution, before the Committee on Rules, U.S. Senate, April 22, 2010. Available here: http://www.citizensforethics.org/policy/entry/filibuster-reform.
8. Josh Chafetz, "The Unconstitutionality of the Filibuster," Connecticut Law Review. 43(4): May 2011. Available here.
9. David A. Graham, "How Senate Graybeards Killed Real Filibuster Reform," *The Atlantic*. January 24, 2013.

Media Attributions

Chapter 23: Pathologies of Congressional Behavior

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

–Historian John Lukacs (1)

The legislative process is much more detailed than described in the previous chapter. The process is susceptible to several pathologies, meaning that it can be manipulated in ways that grossly distort the textbook version of how a bill becomes a law.

Log Rolling

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

Pork Barrel Spending

Cartoon of a Pork Barrel in 1849

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

According to the watchdog group Citizens Against Government Waste (CAGW), in 2022 Congress spent $18.9 billion on what it defines as pork barrel projects. The organization's *Pork Hall of Shame* documents the worst abuses, including funding for local museums and recreation facilities, upgrades to military equipment that the Pentagon didn't request, and targeted research funds that go to particular universities. (2) Critics say that these projects do not serve the national interest and therefore should not be funded by national taxpayer dollars.

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

Corruption

The legislative process is also occasionally subject to outright **corruption** and illegal behavior. This sometimes takes the form of bribery, in which special interests provide tangible benefits for congressmen in exchange for congressmen providing favors. Other forms of corruption are more mundane. In 1994, Representative Dan Rostenkowski (D-IL) lost his seat and later served fifteen months in federal prison for misusing payroll and office expense money. In 2002, Representative James Traficant (D-OH) was convicted of racketeering, tax evasion, and bribery. He was one of the House's few members to be formally expelled by his colleagues. In 2005, Representative Randall "Duke" Cunningham (R-CA) pled guilty to a variety of offenses including bribery and mail fraud involving his relationship with defense contractors Mitchell Wade and Brent Wilkes and co-conspirators. In exchange for earmarks, government contracts, and other favors, the contractors provided Cunningham with a yacht on which to live and bought a California house from him for $700,000 above market value, among other favors. In 2009, Representative William Jefferson (D-LA) was convicted of bribery and money laundering. The FBI raided Jefferson's home and discovered $90,000 in cash stashed in the freezer. The

money was part of a bribe Jefferson received in exchange for help with a Nigerian business deal. A number of congressmen—Representative Tom DeLay (R-TX), Senator Conrad Burns (R-MT), Representative Roy Blunt (R-MO), Representative Bob Ney (R-OH), and others—were implicated in the corrupt web surrounding the disgraced and convicted lobbyist Jack Abramoff. Representative Ney pled guilty to taking money and gifts in exchange for doing work on behalf of Abramoff, and then Ney resigned from Congress in October 2006. The scandal resulted in two Bush administration White House officials and congressional staff members going to jail. In 2019 Representative Duncan Hunter (R-CA) pleaded guilty to misusing hundreds of thousands of dollars of campaign donations. He was sentenced to prison and served a few months when President Donald Trump pardoned him.

Another form of corruption that sometimes ensnares congressional members is **insider trading**. It is against federal law to use information not available to the public when executing securities trades. This used to be more common among congressional members before the STOCK Act passed in 2012, which explicitly said that representatives, senators, and their staff, "are not exempt from the insider trading prohibitions arising under the securities laws." But cases still do arise. In 2019, Representative Chris Collins (R-NY), one of Congress' wealthiest members at the time, pleaded guilty to insider trading and conspiracy—part of which involved a phone call to his son Cameron Collins made from the White House lawn to give him inside information on a biotech company's failed drug trial. (3) President Donald Trump pardoned Collins. In 2020, several members of Congress were accused of dumping stocks after they found out via classified briefings that the coronavirus pandemic was going to be severe. (4)

Gridlock

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

References

1. Quoted in Andrew J. Bacevitch, "America Has Passed a Point of No Return," *Truthdig*. July 24, 2019.
2. See the organization's *Pig Book*and the *Pork Hall of Shame* at www.cagw.org.
3. Devin Breuninger, "Former GOP Rep. Chris Collins Pleads Guilty in Insider Trading Case," *CNBC.*October 1, 2019.
4. Jack Kelly, "Senators Accused of Insider Trading, Dumping Stocks After Coronavirus Briefing," *Forbes*. March 20, 2020.

Media Attributions

- Pork_barrel_cartoon © The Independent is licensed under a Public Domain license

Chapter 24: The Undemocratic Senate

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

–Eric Orts (1)

The Senate as an Affront to Democratic Principles

Any proper understanding of the United States legislative branch must deal with an issue that doesn't get as much attention as it should: The United States Senate is not an especially democratic representative body. Indeed, journalist and former congressional candidate Norman Solomon wrote that "today, the U.S. Senate is the most undemocratic elected body in the nation." (2) Of course, the Senate was never designed to be a democratic body—remember that the Senate was initially chosen by state legislators rather than the people. Journalist and author George Packer puts it this way:

> *The Senate was designed, as part of the separation of powers, to check the impulses of the House and the popular will. For some Federalists, it also had an aristocratic purpose: to collect knowledge and experience, and to guard against a leveling spirit that might overtake the majority. (3)*

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

Senate of the 111th Congress

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

The Senate's unrepresentative structure—being based on states rather than on population—has real-world

political consequences. For one thing, the senators from the twenty-six smallest states hold the most Senate seats even though they represent only 17 percent of the U.S. population. They can refuse to pass legislation desired by the majority of the population, the House, and the president. Small states and rural interests gain disproportionate power in this scheme. So do Whites: the list of states with the least population correlates fairly well with the list of states with greatest percentage of White people.

Many of the founders saw the Senate as a bulwark against unruly democratic majorities. Criminology and criminal justice professor Richard Rosenfeld summed up the situation, "The United States Senate stands today as a grotesque monument to that antidemocratic legacy; it remains largely a preserve of wealthy white male aristocrats drawn from an entirely different economic class than the people they purport to represent." (5) Today, however, the situation is even worse. The voting rights journalist Ari Berman sums it up best, so it's worth quoting him at length:

> *"The level of inequality in the Senate right now—by far the worst among any advanced democracy—would have shocked the likes of Madison. When the founders reluctantly decided to give each state the same number of senators regardless of population, the 1790 census showed that the country's most populous state, Virginia, had twelve times as many people as its least populous, Delaware. Today, California has sixty-eight times the population of Wyoming. Fifteen small states with 38 million people combined routinely elect thirty GOP [Republican] senators; California, with 40 million residents, is represented by two Democrats. This imbalance is getting worse: by 2040, roughly 70 percent of Americans will live in fifteen states with thirty senators, while the other 30 percent, who are whiter, older, and more rural than the country as a whole, will elect seventy senators."* (6)

The Senate apportionment problem is compounded by the **filibuster**, for it only takes forty-one senators to defeat a cloture motion and prevent a bill from being voted on. If the forty-one senators sustaining a filibuster happened to come from the least populous states, it would mean that the senators representing less than 12 percent of the population are inhibiting legislation that the vast majority of the population wants. The situation is so obviously undemocratic, that many people have argued that the filibuster is unconstitutional. The group Common Cause even tried to sue to get a federal court to declare the filibuster unconstitutional, but the suit was thrown out because the judge said the group didn't have standing to sue. Adam Winkler, responding to Senator Rand Paul's thirteen-hour filibuster to protest the Obama administration's unconstitutional drone attacks, notes that the filibuster is not mentioned in the Constitution and that the first filibuster didn't take place until 1841. The Constitution requires only a simple majority vote to pass legislation, and it carefully spells out the few situations that require a different rule—for example, a two-thirds Senate vote to remove someone who has been impeached by the House or a two-thirds Senate vote to support a treaty. (7)

While both parties routinely use the filibuster, it has more often been used to frustrate progressive changes endorsed by the majority of Americans. Southern Democrats used the filibuster for decades to block civil rights legislation. More recently, Republicans and conservative Democrats have used the filibuster to block a paycheck protection bill to equalize pay between men and women, the DREAM Act for the children of undocumented immigrants, campaign finance bills that would force the disclosure of dark money, a bill that would close corporate tax loopholes that incentivize sending jobs overseas, an expansion of Social Security benefits, and the For the People Act, which would have set national standards for voting, taken steps to reduce partisan gerrymandering, and better ensured the security of elections. Additionally, victims of the filibuster also include a public option in the Affordable Care Act and a cap-and-trade bill intended to fight climate change. All were blocked by filibuster or the threat of filibuster. Ari Berman sums up the situation when he writes that "due to the filibuster, which is not in the Constitution, forty-one Republican senators representing just 21 percent of the population have been able to block bills supported by huge majorities of Americans on issues like gun control, abortion, and voting rights. (8)

What Could be Done About the Undemocratic Senate?

The U.S. Senate's undemocratic nature has become so odious that people often entertain possible ways to fix the problem. One way would be to leave the apportionment system alone but break up large states so that each new state would have its own two senators. California, for instance, could be broken up into six or eight states. (9) This is actually a modest proposal, given that the city of Los Angeles has nearly seven times the population of the entire state of Wyoming. John Dingell, one of the longest serving Representatives in U.S. history, argued that the Senate's apportionment imbalance "has become the primary cause of our national legislative paralysis." His solution is that we should simply abolish the Senate by constitutional amendment. (10) Wharton legal studies professor Eric Orts has argued that we should expand the Senate to 110 seats, give one seat to each state, and then give additional seats to states according to population. Wyoming would end up with one senator while California would have twelve. Moreover, he argued that such a move would only require legislation rather than a Constitutional amendment. Why? Because in cases like *Reynolds v Sims* (1964) and even *Bush v. Gore* (2000), the Supreme Court has already firmly established the constitutional principle of one-man one-vote, and the Congress is already empowered through amendments like the Fourteenth, Fifteenth, and the Nineteenth to uphold American citizens' privileges and immunities—of which voting is one. (11)

What if . . . ?

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

References

1. Eric W. Orts, "The Path to Give California 12 Senators and Vermont Just One," *The Atlantic*. January 12, 2019.
2. Norman Solomon, "All Eyes are on the Senate—But What is It?" Fairness and Accuracy in Reporting. December 30, 1998.
3. George Packer, "The Empty Chamber," *The New Yorker*. August 9, 2010.
4. *Reynolds v. Sims (1964)*.
5. Richard N. Rosenfeld, "What Democracy? The Case for Abolishing the United States Senate," *Harper's Magazine*. May, 2004.
6. Ari Berman, *Minority Rule: The Right-Wing Attack on the Will of the People—and the Fight to Resist It*. New York: Farrar, Straus, and Gioux, 2024. Page 11.
7. Adam Winkler, "Is the Filibuster Unconstitutional?" *The New Republic*. March 7, 2013.
8. Adam Jentleson, *Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy*. New York: W. W. Norton and Co. 2021. Pages 244-45. Devan Cole, Aileen Graef, and Daniella Diaz, "Manchin Defends Bucking Voting Rights Bill and Digs In Against Eliminating the Filibuster," *CNN*. June 7, 2021. Ari Berman, *Minority Rule: The Right-Wing Attack on the Will of the People—and the Fight to Resist It*. New York: Farrar, Straus, and Gioux, 2024. Page 11.
9. Burt Neuborne, "Divide States to Democratize the Senate," *Wall Street Journal*. November 19, 2018. David

Faris, *It's Time to Fight Dirty*. New York: Melville House Publishing, 2018.
10. John D. Dingell, "I Served in the Congress Longer Than Anyone. Here's How to Fix It," The Atlantic. December 4, 2018.
11. Eric W. Orts, "The Path to Give California 12 Senators and Vermont Just One," *The Atlantic*. January 12, 2019.

Media Attributions

- Senate © United States Senate is licensed under a Public Domain license

PART 4: THE PRESIDENCY

Chapter 25: The President as Person and Institution

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

—Richard Hofstadter (1)

"Here is Joe Biden's legacy: He beat back America's first authoritarian attempt. And when he realized that he could not do it a second time, he stepped away so someone else could.

This is enough to make him—already, today, on July 21, 2024—our greatest living president.

—Jonathan V. Last (2)

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

The President as Person

President Donald Trump

Fewer people have served as President of the United States as have served in any given year in the United States Senate. Presidents serve a four-year term and can be re-elected for one more term before they must leave office. The original Constitution placed no limits on the number of consecutive terms a president could serve. Franklin Roosevelt was elected in 1932, 1936, 1940, and 1944. In 1951, the **Twenty-second Amendment** came into effect. It states that "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." Thomas Jefferson would have liked the Twenty-second Amendment, for he wrote to James Madison from Paris after reading a copy of the Constitution and complained that it lacked what he called "rotation in office, and most particularly in the case of the President." He worried that if we didn't have term limits for the president, other nations would interfere in our political processes to keep someone in the presidency who served their interests rather than those of the American people. (3)

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

When referring to the president, the Constitution uses "he" throughout and places few requirements on who can serve. At the time the Constitution was adopted, it said the president must be "a natural born citizen, or a citizen of the United States"; the president must have been a resident of the United States for at least fourteen years before assuming office; and the president must be at least thirty-five-years-old. When William McKinley was assassinated, Theodore Roosevelt became the youngest president at only forty-two-years-old, and John F. Kennedy was the youngest elected president at forty-three-years-old.

Section 3 of the Fourteenth Amendment also says that no person can hold "any office" if they have previously taken an oath to "support the Constitution of the United States" and then "have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability." Essentially, the writers of the Fourteenth Amendment did not want insurrectionists to hold the presidency or any other office, but they also wanted to allow Congress by supermajority to waive the prohibition. When the state of Colorado adjudicated Donald Trump an insurrectionist due to his support for the unlawful overturning of his reelection loss, it deemed that the insurrection clause applied to him and ordered that he not appear on primary ballots in 2024. However, the Supreme Court ruled in *Trump v. Anderson* (2024) that while states can keep people off the ballot for state offices if they are insurrectionists, they "have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency." Therefore, the prohibition of insurrectionists holding the

presidency still stands, but the Court placed the enforcement of that provision with Congress rather than the states.

The Institutional Presidency

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

The Cabinet

At the 1787 Constitutional Convention and during the ratification debates, George Mason advocated that the president be ensconced in what he called "a constitutional council" composed of the president, two members from New England, two from the mid-Atlantic states, and two from the Southern states. (4) Mason's proposal did not make it into the document. Instead, the Constitution says that the president "may require the opinion, in writing, of the principal officer in each of the executive departments." From that prerogative, the **cabinet** evolved, the main role of which is to advise the president. Originally, the cabinet was composed of the Secretary of War, the Secretary of State, the Secretary of the Treasury, and the Attorney General. Think of the cabinet as the major executive agencies' leaders and anyone else designated by the president to sit with that group. With the exception of the Vice President, cabinet members are approved by the Senate. In modern times, presidents typically do not gather all of their cabinet members at once and have real deliberations over policy—photo ops, maybe, but not true deliberations. Instead, presidents will gather some cabinet members as needed to discuss particular policy issues. As of this writing, the cabinet consists of the following offices:

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

The Executive Office of the President

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

The White House Staff—The **Chief of Staff** manages the White House staff operations and often controls access to the president. The White House staff comprises key aides and support personnel who do not require Senate approval. Among these are the president's secretarial staff, who are responsible for correspondence and calendaring; the White House Legal Counsel, who advises the president on what he can and cannot do with respect to constitutional and statutory powers; the White House Press Secretary, who is responsible for all communications with the news media; the National Security Advisor, who coordinates security policy and the various agencies involved with those matters; the Office of Legislative Affairs, which is concerned with getting the president's agenda through Congress; plus a variety of other offices dedicated to presidential trips, intergovernmental affairs, communication, economic policy, domestic policy, and so forth. Presidents typically have not had family members play roles on the White House staff, but there have been exceptions. President Clinton had his wife, Hillary Rodham Clinton, chair the National Commission on Health Care Reform. President Trump added his daughter, Ivanka Trump, to his staff as an Advisor to the President and his son-in-law, Jared Kushner, as an Assistant to the President and Senior Advisor. Neither were paid a salary for their services. The couple were reportedly "exasperated" with John Kelly, President Trump's second Chief of Staff, and they both may have played a role in his leaving the administration. (5)

Important Support Agencies—The Executive Office of the President also contains a number of important support agencies. We won't mention them all, but the following are most likely to be in the news:

- **Office of Management and Budget**. Originally created in 1921 as the Bureau of the Budget in the Treasury Department, President Franklin Roosevelt moved it into the White House in 1939, and President Richard Nixon reorganized it and renamed it the Office of Management and Budget (OMB) in 1970. The OMB is a powerful agency within the executive branch. According to the White House, the OMB assists the president with the following:
    - Developing and executing the budget.
    - Managing agency performance and oversight, human capital, federal procurement, financial management, and information technology.
    - Coordinating and reviewing all significant executive agencies' federal regulations policy.
    - Coordinating the Legislative branch and providing them clearance.
    - Coordinating Executive Orders and Presidential Memoranda. (6)

- **National Security Council**. The National Security Council (NSC) was established in 1947 by the National Security Act. Its responsibility is to advise the president and coordinate American security and foreign policy. Its disposition reflects the highly militarized way in which the United States views its foreign policy. In addition to the President, Vice President, and the National Security Advisor, the NSC's principle members are the Secretary of Defense, the Chairman of the Joint Chiefs of Staff of the military, the Secretary of State, the Director of National Intelligence, the Secretary of Energy, and the Secretary of the Treasury.
- **Council of Economic Advisors**. Established by Congress in the Employment Act of 1946, the Council of Economic Advisors is charged with providing the president helpful domestic and international economic

policy analysis and guidance. The Council is composed of three prominent presidential appointed economists, one of whom is designated as the chairman, and a variety of other consulting economists who specialize in fields like international economics, housing economics, or healthcare economics. The people appointed to the Council of Economic Advisors share the president's approach to economics and are often used by presidents to justify their actions regarding domestic and international economic policy.

- **Office of the United States Trade Representative**. Established by Congress with the Trade Expansion Act of 1962, the Office of the United States Trade Representative is responsible for coordinating U.S. trade policy and negotiating international trade agreements. In its role, the U.S. Trade Representative has pursued a heavily pro-corporate agenda, opening up foreign markets to American capital, negotiating agreements that open up American markets to imports, promoting offshoring American jobs, and putting American workers in direct competition with lower-paid international workers who have fewer rights to organize and who typically don't have as robust safety and environmental protections as U.S. workers. (7)

What if . . . ?

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

References

1. Richard Hofstadter, *Anti-Intellectualism in American Life*. New York: Vintage Books, 1962. Page 211.
2. Jonathan V. Last, "Joe Biden is Our Greatest Living President," *The Bulwark*. July 22, 2024.
3. Thomas Jefferson letter to James Madison. December 20, 1787. The National Archives.
4. George Mason, *Objections to the Constitution*. In the *Virginia Journal*and the *Alexandria Advertiser.* November 19, 1787. Library of Virginia.
5. Jessica Kwong, "Ivanka Trump and Jared Kushner Must 'Be Dealt With,' John Kelly Says While Praising Melania Trump as a 'Wonderful Person,'" *Newsweek*. May 8, 2019.
6. The White House website.
7. For an understanding of this perspective on globalization and the role of U.S. policy, see Joseph E. Stiglitz, *Globalization and Its Discontents Revisited*. New York: W. W. Norton & Company, 2018. Ian Bremmer, *Us Versus Them: The Failure of Globalization*. New York: Penguin, 2018.

Media Attributions

- Donald_Trump_official_portrait © Shalaeh Craighead is licensed under a Public Domain license

Chapter 26: The Vice President and Presidential Succession

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

–George Mason (1)

The Vice President

Vice President J. D. Vance

Today, presidents and vice presidents run on a ticket together. The **Twelfth Amendment** altered the way electors cast ballots for the two offices. In the original Constitution, electors cast two ballots, and the person who got the most votes became president while the person with the next most votes became the vice president. That procedure resulted in two potential issues, both of which manifested themselves early on. In the 1796 election, the electors chose Federalist John Adams for president and Democratic-Republican Thomas Jefferson for vice president, which created all sorts of problems. In the 1800 election, the electoral college votes tied for Jefferson and Aaron Burr, both of whom were from the same party. That election was thrown into the House of Representatives, which took thirty-six ballots to finally elect Jefferson as president. Now, with the Twelfth Amendment, the electors cast separate ballots for president and vice president and we avoid both of those problems.

George Mason's concerns about the dangers of the vice president have not come to pass. With the exception of Dick Cheney in the George W. Bush administration, most vice presidents have not been especially powerful—although some, such as Lyndon Johnson in the John F. Kennedy administration, were fairly useful to the president's agenda. Vice presidents don't have many formal powers. One, as Mason mentioned above, is **President of the Senate**, but that is mostly a formality, and the vice president isn't even allowed to participate in Senate debates. As President of the Senate, vice presidents only have two formal Senate roles that are meaningful. Vice presidents preside over the electoral college vote-counting, which takes place in a joint session of Congress. The vice president also has the ability to cast a tie-breaking vote if one is needed in the Senate. During the Obama administration, Vice President Joe Biden cast zero tie-breaking votes. During the first year of the Clinton administration, Vice President Al Gore cast the tie-breaking vote on a budget that set the U.S. back on the course of balanced budgets after the deficit-ridden Reagan and George W. Bush years. Early in the Trump administration, Vice President Mike Pence cast a tie-breaking vote to ensure that nominee Betsy DeVos became Secretary of Education—a controversial choice, as DeVos never attended a public school, never worked at one, did not send her children to public schools, and never served on a public board of education. With an evenly divided Senate in the first half of the Biden presidency, Vice President Kamala Harris

was called upon to cast a record number of tie-breaking votes, including voting to pass the Inflation Reduction Act of 2022, COVID economic relief in 2021, and numerous votes to confirm President Biden's appointments.

Beyond their few formal powers, vice presidents are nevertheless important in American politics. They are often chosen by presidential candidates to **"balance the ticket"** either geographically or politically. In 1960, Massachusetts liberal John F. Kennedy needed someone like Texan Lyndon Johnson to help him win the presidency. In 2012, Mitt Romney—who had expressed pro-choice values and had pushed RomneyCare through in Massachusetts—needed someone with strong conservative credentials like Paul Ryan from Wisconsin. In 2016, the irreligious and by all accounts debauched New Yorker Donald Trump needed someone pious and influential with white Christians like Mike Pence from Indiana. The need to balance the ticket seemed not to apply in 2024, when Donald Trump chose Senator J. D. Vance from Ohio. Once in office, vice presidents are used by presidents in many ways. They might be relied upon for political advice. They might be put in charge of special initiatives. They often represent the president at ceremonies and functions domestically and around the world.

Presidential Succession

If the president resigns or dies in office, they are succeeded by the vice president. In 1841 William Henry Harrison died thirty-one days into his first term, and John Tyler became the first vice president to succeed to the presidency. Tyler asserted himself as president—not acting president—and established the precedent that when a Vice President becomes President, he does so fully and without qualification. Lyndon Johnson became president in 1963 when John F. Kennedy was assassinated in Dallas, Texas. In 1974 Gerald Ford became president when Richard Nixon resigned due to his role in the Watergate scandal. When a sitting vice president becomes president, they nominate someone to be vice president, and according to the **Twenty-fifth Amendment**, that nominee needs majority approval from both the House and the Senate.

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

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

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

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

References

1. George Mason, *Objections to the Constitution*. In the *Virginia Journal*and the *Alexandria Advertiser.* November 19, 1787. Library of Virginia.
2. Maureen Groppe, "What to Know About the 25thAmendment: It's Never Been Used, But Ex-FBI Head Says Officials Thought About It," *USA Today*. February 4, 2019.

Media Attributions

- Vance_official_portrait._118th_Congress © United States Congress

Chapter 27: The President's Domestic Powers

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

–George Washington (1)

American presidents have a wide range of formal powers, but the founders were, as Garrett Epps has written, "artfully vague about the extent and limits" of those powers. (2) Put another way, "the Constitution permits either an active or a passive executive." (3) Several factors determine the extent to which a president can successfully exercise domestic political power. These include their margin of victory, Congress' partisan power balance, and the president's own understanding of how to act while in office. One important situation to consider is whether we are in a **divided government**, which is when the president and at least one congressional chamber are from different parties. Such a situation does not necessarily have to lead to gridlock, but it does make it difficult for a president to accomplish their policy goals.

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

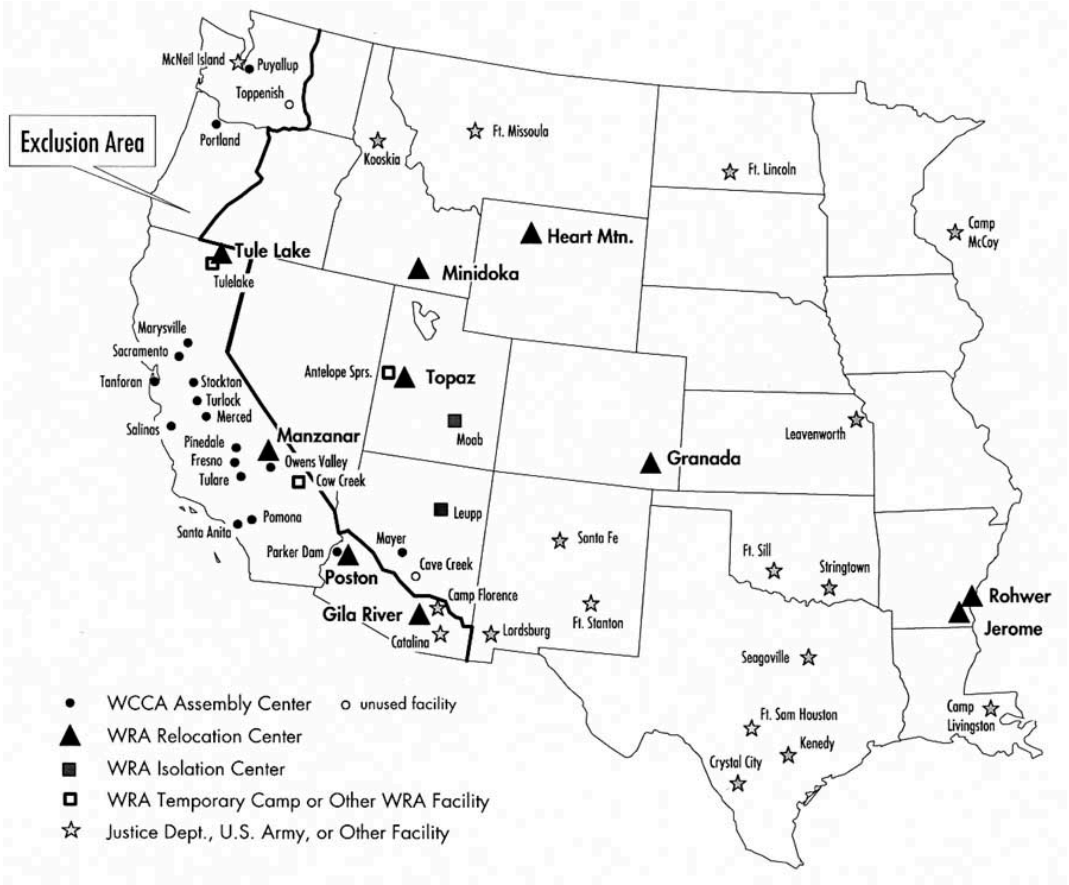
Veto Power

High on the list is the president's ability to veto bills passed by Congress. The word "**veto**" is Latin for "I refuse." The president has two kinds of veto, both of which you should know: a **regular veto** and a **pocket veto**. When Congress sends a bill to the president, they can handle it in several different ways. If they sign the bill, usually in a ceremony, the bill becomes law. If they do not sign the bill, it will become law anyway after ten working days. The president's third option is to veto the bill by sending it back to Congress with a veto message about why they feel the bill should not become law. This is called a **regular veto**. Congress can override a regular veto with a two-thirds vote in both chambers, but the chances of a successful override are not good. Of the 1,517 regular vetoes issued from 1789 through the end of the Trump administration in 2021, only 111 were successfully overridden. (4) That pattern continued during the Trump administration. Of Trump's nine vetoes, Congress only successfully overrode one. If Congress happens to adjourn in the ten-day period, the president must consider the bill. If the president does not sign the bill, this is called a **pocket veto**. One important difference between a regular veto and a pocket veto is that Congress cannot override a pocket veto.

Executive Orders

Another presidential power is issuing **executive orders** to executive branch members. By issuing an executive order, the president can direct executive branch members to do many things, so long as those actions lie within the law and so long as they do not entail appropriating new federal money. Congress can overturn an

executive order if there are enough votes to do so—which would require a simple majority in both chambers, or a simple majority in the House and 60 votes to end a filibuster in the Senate if the president's party wished to defend their use of power. An incoming president can issue an executive order countermanding an executive order issued by a previous president. Rarely do executive orders get more than a passing reference in newspapers. Presidential critics from both parties often claim that executive orders constitute a "power grab" by the president who is issuing them. However, William Howell, a political science professor at the University of Chicago, argues that "it just doesn't match up with the facts on the ground. It's not all power grabs. A lot of it is clearly trivial stuff." (5) Still, it's always a good idea to be vigilant about presidents acting on their own without legislative mandate.



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

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

- **Executive Order #9066**, issued February 1942—President Franklin Roosevelt authorized the Secretary of War "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion…" (6) The U.S. military then detained and removed against their will over 100,000 Japanese Americans living in California, Oregon, Washington, and Arizona. These people, most of whom were U.S. citizens, were placed in prison camps for the war's duration because they constituted a security risk, even though no evidence was ever presented to that effect. In 1988 Congress issued a public apology and gave $20,000 in restitution to each of the

60,000 surviving internees.

- **Executive Order #9981**, issued July 1948—President Harry Truman directed "that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." (7) This order effectively desegregated the U.S. military and officially ended a long-standing practice of assigning less desirable duties to racial minorities.
- **Executive Order #13228**, issued October 8, 2001—President George W. Bush **created the Office of Homeland Security.** This executive order directed that the new Office of Homeland Security "identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States." (8) Rather quickly, this order transformed into legislation creating the Department of Homeland Security, charged with preventing terrorist attacks and minimizing damage from potential terrorist attacks and natural disasters.
- **Executive Order #14156,** issued by President Donald Trump on January 20, 2025: "It is the policy of the United States that no department or agency of the United States government shall issue documents recognizing United States citizenship, or accept documents issued by State, local, or other governments or authorities purporting to recognize United States citizenship, to persons: (1) when that person's mother was unlawfully present in the United States and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth, or (2) when that person's mother's presence in the United States was lawful but temporary, and the person's father was not a United States citizen or lawful permanent resident at the time of said person's birth." (9) This is significant because Trump is essentially interpreting the 14th Amendment's birthright citizenship clause—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—and executive orders cannot interpret the Constitution. Essentially, Trump is establishing the conditions for cases to go the Supreme Court for its re-evaluation of *United States v. Wong Kim Ark* (1898), the precedent that the Court had set which said that the children of undocumented immigrants were citizens by virtue of being born in the United States. (10) It will be interesting to see what the Court does with the longstanding precedent of birthright citizenship.

Executive Branch Appointments

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

At the president's direction, executive branch appointees use their congressionally granted statutory authority to put the president's program into effect. Much of the statute's language is either open to interpretation or allows executives discretion in how exactly to enforce the law. Law professor Kim Wehle points out that Article

II's provision that the president "shall take care that the laws be faithfully executed, and shall commission all the officers of the United States" still allows the president and their appointees a fair amount of discretion in applying the law. The Obama administration, for example, was within its powers to defer action on children who were brought to the United States by their undocumented parents, as was the Trump administration to end that program. (12)

The State of the Union Address and the Bully Pulpit

The constitutional provision that the president "shall from time to time give to Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," has given rise to the annual **State of the Union Address**. Before a national television audience, the president addresses a joint session of Congress in January or February, accentuates his administration's accomplishments, and argues for measures he would like Congress to pass. Thomas Jefferson preferred to send Congress a letter, and the traditional annual personal visit to Congress to give an address did not develop until Woodrow Wilson started the trend in 1913. The State of the Union's effectiveness depends heavily on the level of public support the president enjoys at the time. More broadly, presidents are able to use their rhetorical abilities and media attention to force the country to at least consider specific policy proposals. President **Theodore Roosevelt** recognized and used these abilities, coining the term **bully pulpit** to refer to his ability to push an agenda. Today, we generally refer to a bully pulpit to mean any position which gives the holder the positional and rhetorical context with which to strongly advocate a position. Note that the word "bully" in this context doesn't mean to bully people. Instead, President Roosevelt simply meant that his office was a "wonderful" or "awesome" pulpit from which to preach his views.

Pardons and Reprieves

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

However, you should be familiar with the **controversial presidential pardons that have occurred in modern history**. Note that the presidential pardon power is absolute in the sense that neither Congress nor the Supreme Court can countermand a presidential pardon. If, however, a president was to use their pardon power in a way that abused their office, they could be subject to impeachment and removed.

- In 1974, President Gerald Ford pardoned Richard Nixon for any crimes committed while in office. Nixon therefore avoided prison, even though people who carried out his orders ended up in jail. This action may have caused Ford to lose the 1976 election.

- In 1979, President Jimmy Carter granted a blanket amnesty to all Vietnam-era draft evaders. Carter intended to help the nation heal its Vietnam wounds, but the result was to momentarily re-animate the acrimonious debate about that war.
- In 1992, President George H. W. Bush issued controversial pardons to several high Reagan administration officials who had been involved in the Iran-Contra Scandal where they circumvented Congress and sold arms to Iran, using the proceeds to illegally fund the Contra rebels in Nicaragua. Bush pardoned Secretary of Defense Casper Weinberger, who allegedly lied to the independent counsel investigating the scandal, and six others who were involved in the scheme. Perhaps most significantly, Bush pardoned Weinberger before his trial, at which President Bush was expected to be called as a witness.
- In 2001, President Bill Clinton pardoned billionaire financier Marc Rich, who fled the country in 1983 before he was indicted for allegedly evading taxes, committing fraud, and illegally participating in oil deals with Iran. While he was out of the country, Marc Rich's ex-wife, Denise, donated roughly $1 million to the Democratic Party and gave money to Hillary Clinton's successful Senate campaign. (13)
- In 2017, President Barack Obama created controversy when he used the pardon power to commute Chelsea Manning's remaining sentence. Manning, an American activist, whistle blower, and former U.S. Army soldier, had served seven of 35 years for stealing and releasing to the media diplomatic and military cables that proved embarrassing to the United States.
- President Donald Trump issued more controversial pardons than any president. In his first use of this power, Trump pardoned Sheriff Joe Arpaio, who had been found guilty of defying a judge's order to stop detaining and harassing Latinx residents of Maricopa County, Arizona. (14) In 2019, Trump pardoned an Army officer and a Navy SEAL who had been convicted of committing war crimes—one for murder and obstruction of justice and the other for posing with the corpse of an enemy combatant. He also pardoned another Army officer who was awaiting trial for murdering a detainee in Afghanistan. Trump's pardons disregarded the recommendations of the Pentagon leaders, who felt that they would undermine military leadership's ability to maintain proper order. (15) At the end of his administration Trump pardoned Roger Stone and Paul Manafort, two people who were intimately involved in campaign's outreach to Russia for help in the 2016 election and convicted by federal juries for crimes ranging from lying to the FBI, obstructing Congress, and threatening a witness. Trump pardoned Charles Kushner, father of his son in law Jared Kushner, who had been convicted of tax evasion, witness tampering, and illegal campaign contributions. In one of his final acts in office, Trump pardoned his former chief strategist Steve Bannon, who had been charged with defrauding donors to a We Build the Wall non-profit. (16)

Emergency Powers

President Trump declared a national emergency at the U.S. border with Mexico as a way to divert funds to support building a wall between the two countries, which Congress did not approve. Congress passed a joint resolution denouncing the move, but Trump vetoed it. Several lawsuits followed, but ultimately a 5-4 Supreme Court majority refused to stop the president. (17) This case highlights the importance of the president's emergency powers.

When a president declares an emergency, the **National Emergencies Act of 1976** and other statutory provisions open up all sorts of new presidential powers. The Brennan Center for Justice catalogued 136 emergency powers available to a president, fully ninety-six of which "require nothing more than [the president's] signature on the emergency declaration" to go into effect. (18) And the powers available to a president in an emergency are breathtaking. For instance, the president can "shut down many kinds of electronic communications inside the United States or freeze American's bank accounts." Emergency declarations under the statute are supposed to last less than one year, but emergency declarations are often renewed "for years on end." Even beyond

the National Emergencies Act, "other laws permit the executive branch to take extraordinary action under specified conditions, such as war and domestic upheaval, regardless of whether a national emergency has been declared." (19) Presidents declare national emergencies with a disturbing frequency—dozens of times since the National Emergencies Act was passed.

Many Americans incorrectly think that the Posse Comitatus Act of 1878 means that the U.S. military cannot undertake domestic policing functions. In fact, the law merely requires that Congress authorize such military use, which it did in the **1807 Insurrection Act**. The Insurrection Act was used by President Eisenhower in 1957 to send federal troops to desegregate Little Rock High School and by President George H. W. Bush in 1992 to send the military in to quell the Los Angeles riots that erupted after Los Angeles police officers were acquitted for beating Rodney King. The Insurrection Act is impressive in its scope. Elizabeth Goitein describes it this way:

"As amended over the years, [the 1807 Insurrection Act] allows the president to deploy troops upon the request of a state's governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it 'impracticable' to enforce federal law through regular means, or because he deems it necessary to suppress 'insurrection, domestic violence, unlawful combination, or conspiracy' (terms not defined in the statute) that hinders the rights of a class of people or 'impedes the course of justice.'" (20)

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

What if . . . ?

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

References

1. George Washington, *Farewell Address*. September 19, 1796. Our Documents.
2. Garrett Epps, "The Founders' Great Mistake," *The Atlantic*. January/February 2009.
3. David. J. Bodenhamer, *The U. S. Constitution. A Very Short Introduction*. New York: Oxford University Press, 2018. Page 40.
4. The Presidency Project. http://www.presidency.ucsb.edu/data/vetoes.php
5. Quoted in Gregory Korte, "Obama's Executive Orders You Never Hear About," *USA Today*. April 11, 2016.
6. Franklin Roosevelt, *Executive Order Authorizing the Secretary of War to Prescribe Military Areas*. Our Documents. February 18, 1942.
7. Harry Truman, *Executive Order Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services*. The Harry S. Truman Library and Museum. July 26, 1948.
8. George W. Bush, *Executive Order Establishing Office of Homeland Security*.

9. Donald J. Trump, Executive Order *Protecting the Meaning and Value of American Citizenship*.
10. *United States v. Wong Kim Art* (1898).
11. Of course, as we'll see later in the text, presidents also nominate federal judges, most of whom are on the bench affecting policy long after the president is out of office. For this section, we'll stick to talking about executive branch appointments.
12. Kim Wehle, *How to Read the Constitution. And Why*. New York: Harper. Pages 82-85.
13. Jonathan Rauch, "Forget the Marc Rich Pardon. Worry About the Scandal," *The Atlantic*. March 1, 2001.
14. Matt Ford, "President Trump Pardons Former Sheriff Joe Arpaio," *The Atlantic*. August 25, 2017.
15. Zeeshan Aleem, "Trump Just Issued Multiple War Crime Pardons. Experts Think It's a Bad Idea," *Vox*. November 16, 2019.
16. Pamela Brown, Paul LeBlanc, Katelyn Polantz, and Kevin Liptak, "Trump Issues 26 New Pardons, Including for Stone, Manafort, and Charles Kushner," *CNN*. December 23, 2020. Pamela Brown, Paul LeBlanc, and Kaitlan Collins, "Trump Pardons Steve Bannon as One of his Final Acts in Office," *CNN*. January 20, 2021.
17. Richard Wolf, "Supreme Court Allows Border Wall Spending in Battle Between President Donald Trump and Liberal Opponents," *USA Today*. July 26, 2019.
18. The Brennan Center for Justice, *A Guide to Emergency Powers and Their Use*. September 4, 2019.
19. Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *The Atlantic*. January/February, 2019.
20. Elizabeth Goitein, "The Alarming Scope of the President's Emergency Powers," *The Atlantic*. January/February, 2019.

Media Attributions

- Internment Camps © National Park Service is licensed under a Public Domain license

Chapter 28: The President's Foreign Policy Powers

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

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

Commander in Chief

The president is **commander in chief** of U.S. military forces. This means that the president is a civilian in charge of the U.S. military. Generals and admirals must take orders from the president. Indeed, recent presidents have become quite involved in managing the armed forces. **You should know these examples**:

- President Harry Truman, without a congressional declaration of war, ordered American troops into battle on June 30, 1950 to defend South Korea. When General Douglas MacArthur, commander of U.S. troops in Korea, made reckless statements about bombing China and spoke to congressmen about Truman's poor strategy, Truman relieved the general of his command. This was a gutsy move, as MacArthur was very popular in the United States—he came home to a ticker-tape parade, but most people recognized the president's constitutional right to make that decision.
- During the Vietnam War, an undeclared war from 1964 to 1973, both Presidents Lyndon Johnson and Richard Nixon involved themselves heavily in the day-to-day tactics of our fighting forces. In fact, both men spent considerable time discussing troop levels and bombing targets with generals.
- With congressional authorization—although not a formal declaration of war—President George H. W. Bush launched an invasion of Iraq in response to Iraq invading Kuwait. Bush also then unilaterally made the decision to halt the war's ground phase before Iraqi President Saddam Hussein was ousted.
- Following the 9/11 attacks, President George W. Bush's administration decided to invade Iraq even though that country had nothing to do with the attacks. The Bush administration had previously invaded Afghanistan, whose Taliban regime had sheltered Osama bin Laden and the al-Qaeda network. Without a declaration of war, although with congressional support, President George W. Bush initiated a pre-emptive war on Iraq in 2003 that removed Saddam Hussein from power.

Congress has tried to restrain presidential commander in chief powers, but these efforts have not been successful. For instance, Congress passed the **War Powers Resolution** in 1973 over President Nixon's veto. The Resolution stipulates that 1) presidents consult with Congress when possible before committing U.S. military forces to action, 2) forces be withdrawn after sixty days unless Congress either declares war or grants a use-of-force extension, and 3) Congress can pass a concurrent resolution ending American use-of-force at any time. All presidents of both parties have considered the resolution to be unconstitutional, but it has never come before the Supreme Court. Presidents have largely ignored the Resolution's provisions, or at best given them lip service and went ahead and used the military however they wanted. Sometimes, these presidential dodges require ridiculously interpreting the Resolution's language. In 2011, President Obama said his use of U.S. forces in Libya to bomb Libyan targets as part of a NATO intervention did not constitute "hostilities" and therefore the Resolution did not apply. (2) By and large, Congress has not been able to muster the political will to challenge

presidents on war issues. When it does, it runs into constitutional limitations. For example, in 2019 Congress passed a bipartisan resolution to end America's support for Saudi Arabia's war in Yemen. President Donald Trump vetoed the resolution, and America continued to assist Saudi Arabia. (3)

Diplomatic Powers

President Donald Trump and Chairman Kim Jong Un

In foreign affairs, the president has **treaty power**, or the ability to negotiate and sign formal agreements with other countries. President-signed treaties require ratification by a two-thirds Senate vote. Although most treaties that the president submits are ratified, there have been notable instances in which the president has failed to convince enough senators. The Treaty of Versailles, negotiated and signed by President Woodrow Wilson in 1919, officially ended World War I and created the League of Nations. The Senate refused to ratify the treaty, and Wilson suffered a stroke while trying to rally public support for it. The United States never did join the League of Nations. In 1999, President Bill Clinton could not round up enough Senate votes to ratify the Comprehensive Test Ban Treaty, which would have banned all nuclear weapons testing. The year before, Clinton also signed the Kyoto Protocol on climate change, but did not even submit it to the Senate because he knew it would not be ratified.

Because the formal treaty process is so onerous, presidents have more frequently turned to creating **executive agreements**, which are agreements with at least one other country's head of state. While they are in effect, executive agreements have the same force as treaties. They do not require Senate approval, but an incoming president can stop honoring or can renegotiate executive agreements entered into by previous presidents. For example, in 2019 President Donald Trump formally announced that the U.S. was withdrawing from the Paris Climate Agreement, whose goal was to limit global temperature increases to below 2 degrees Celsius from the preindustrial average. Overall, both congressional houses are actually more involved in executive agreements, although with simple majority approval. As political science professors Glen Krutz and Jeffrey Peake put it, "In most cases, an executive agreement is pursuant to a statutory grant of power to the president or requires ex post congressional approval (through joint resolution) before the agreement enters into force." (4) The North American Free Trade Agreement between Canada, the United States, and Mexico is another famous example of an executive agreement. As commander in chief, the president often negotiates **status of force agreements**—a type of executive agreement—with other heads of state in countries where the U.S. has stationed military personnel.

Another foreign policy power is the president's ability, spelled out in the Constitution, to "receive ambassadors and other public ministers." This means that the president, acting without Congress' approval, has **diplomatic-recognition** power. When the United States "receives" the ambassador from Germany, and our ambassador presents themself to Germany's president, then in international-law parlance, Germany and the United States have diplomatically recognized each other. The United States diplomatically recognizes most countries of the world. President Clinton re-established diplomatic relations with the People's Democratic Republic of Vietnam in 1995 and sent Pete Peterson, a former North Vietnam POW, as our first ambassador. After Fidel Castro's revolution in Cuba, the United States withheld diplomatic recognition from 1961 to 2015. The United States does not diplomatically recognize North Korea, although the two countries have been negotiating for years over

Korean peninsula security matters. The United States does not diplomatically recognize Bhutan, which has a long-running border dispute with the People's Republic of China.

References

1. Lyndon Johnson speechto the nation. August 4, 1965.
2. Charlie Savage, "2 Top Lawyers Lost to Obama in Libya War Policy Debate," *New York Times*. June 17, 2011.
3. Ed Pilkington, "Dismay as Trump Vetoes Bill to End US Support for War in Yemen," *The Guardian*. April 17, 2019.
4. Glen S. Krutz and Jeffrey S. Peake, *Treaty Politics and the Rise of Executive Agreements. International Commitments in a System of Shared Powers*. The University of Michigan Press, 2009. Page 30.

Media Attributions

- Trump and Kim © Shealah Craighead is licensed under a Public Domain license

Chapter 29: Contemporary Issues of Presidential Power

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

–James Madison in *Federalist #47*

The Problem of Executive Power

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

Executive power is always a tricky political problem. The founders were especially cognizant of what history had to teach about checking executive power. Democratic republics are fragile, as the demise of Athenian democracy and the Roman republic demonstrate. It was a long time before anything resembling popular democracy returned to the West. In 1215, King John of England—after disastrous foreign policy mistakes and domestic abuses of power—was forced to accept the **Magna Carta**, or Great Charter. The Magna Carta limited the king's power vis a vis the nobility and the clergy. Later, in 1649, Parliament executed **Charles I**. During his rule, he levied taxes without Parliament's approval, disbanded Parliament for eleven years, forced people to loan money to the government, and sent an armed force into Parliament to arrest members. After a Commonwealth period in which Oliver Cromwell ruled a fractious England as "Lord Protector," the monarchy was restored in 1660 when Charles II, son of Charles I, was invited to be king. A later king, James II, was forced from power in the **Glorious Revolution** when Anglicans feared that his son's birth would establish a Catholic dynasty in England. Instead, they asked his Protestant daughter, Mary, and her husband, William of Orange, to rule. **William and Mary** were forced to accept the **1689 Bill of Rights**, which guaranteed, among other things, the right not to be taxed without Parliament's approval, the right to petition the King, the right for Protestants to bear arms for self-defense, freedom from cruel and unusual punishments, freedom from excessive bail, freedom of speech in Parliament, and guarantees of a trial before having to pay fines. This background and the American colonists' belief that both Parliament and King George III denied to them the "rights of Englishmen" underscore our own struggles with executive power.

In his classic book, *The Imperial Presidency*, **Arthur Schlesinger, Jr.,** warned that the growth of presidential power threatened to warp the country's constitutional fabric. It was a prescient warning. Informed citizens should be familiar with four key issues regarding executive power in the United States. Keep in mind that the issues are all interrelated, even though they are treated separately here.

Executive Privilege

Since the American republic's beginning, presidents have exerted a right to executive privilege, even though

this right is nowhere mentioned explicitly in the Constitution. Aside from not being in the Constitution, the problem with executive privilege is that its definition rests almost entirely on the collective judgments of courts over the years. As constitutional law professor Jonathan Shaub puts it, "the term *executive privilege* has no legal content. There is no law governing executive privilege." (1) Basically, **executive privilege** asserts that the separation of powers built into the Constitution gives presidents a certain amount of discretion when responding to the legislative and judicial branches' orders and information requests. (2) Specifically, presidents have argued that they are entitled to withhold from Congress, the courts, and the public certain executive branch documents and the transcripts of deliberations within executive agencies. Executive privilege is not absolute. This is contested ground, of course, because unitary executive theory advocates would say that there should be no limits (described below). However, mainstream opinion among scholars and lawyers is that this particular presidential prerogative is limited. The consensus is that **executive privilege cannot do the following**:

- Protect the president when he is acting in his personal capacity.
- Shield information related to presidential decisions once they have been made.
- Hide communications related to committing a crime.
- Block information Congress requires in an impeachment proceeding.
- Protect communications that the president or his office never received.
- Provide absolute immunity to congressional subpoenas.
- Be exerted by a former president over the objections of the sitting president. (3)

George Washington was the first president to assert executive privilege, but the stakes have become more significant in recent cases. Presidents of both parties have tried to push the envelope and get around the limitations that courts have placed on executive privilege. During the Watergate scandal, President Nixon invoked executive privilege and refused to turn over White House tape recordings and written documents to special prosecutor Leon Jaworski. The Supreme Court ruled against Nixon—a decision that sealed his presidency's fate because the tapes were damning—but it also appeared to give some credence to the executive-privilege idea. In its opinion in ***United States v. Nixon*** **(1974)**, the Court recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," and that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process." Presidents of both parties have used and sometimes abused executive privilege.

Unitary Executive Theory

Republican administration members and their supporters have been the strongest proponents of what is known as the **unitary executive theory**. This theory has been circulating among conservative legal scholars for years, but it finally reached the public consciousness when it became known that George W. Bush had relied on this theory to authorize the National Security Agency to wiretap phone calls in the United States without a warrant as required by the Foreign Intelligence Surveillance Act. Even before that, however, the Bush administration relied on the unitary executive theory in its War on Terror. Bush and his defenders asserted that the unitary executive idea allowed the executive branch to hold what it called "enemy combatants" in a state of legal limbo where they were not criminal defendants, nor prisoners of war, nor covered by the Geneva Convention, nor able to talk with lawyers, nor able to see any of the evidence against them. (4)

The **unitary executive theory** argues that the White House's occupant has broad inherent powers that are

implied by the Constitution's executive authority vestment with the presidency. The president, these theorists argue, can act without legislative authorization and is virtually without check in the realm of national security

The unitary executive theory has important implications for the rule of law in the United States. **The rule of law** refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures. During Donald Trump's presidency, the president and his Attorney General William Barr, acted together to ensure that the law fell lightly on the president's friends and heavily on the president's detractors. (5)

The National Security State

F-18 on the USS John C. Stennis

Much of the growth in the president's power can be attributed to what scholars and critics refer to as the **rise of the national security state**. This concept suggests that the exigencies of protecting the United States from real or imagined external enemies inflates the power of the military, the intelligence agencies, and the internal security agencies—all of which are directed by the president. The founders feared this sort of development because it inevitably eroded democracy and the civil liberties they cherished, and they continually warned against a large standing army in peacetime. James Madison wrote to Thomas Jefferson in 1798 that "perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretend, from abroad." (6)

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

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

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence – economic, political, even spiritual – is felt in every city, every Statehouse, every office of the Federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

In the councils of government, we must guard against the acquisition of unwarranted influence, whether

sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. (7)

This is no less true today, say critics of the national security state, because of the **War on Terror** declared by President George W. Bush following the events of September 11, 2001. Spending on the military and other security operations increased, intelligence and law enforcement operations of the CIA, the NSA, and the FBI became more aggressive, and President Bush asserted broad executive authority in the name of national security. Subsequent presidents have continued to rely on the exigencies of national security to expand their powers.

Trump v. United States (2024)

Issues of executive privilege, the unitary executive theory and the national security state are all child's play next to *Trump v. United States* (2024). Seeking to escape his many legal troubles after he left office, Donald Trump pushed a case to the Supreme Court in which he claimed absolute immunity from prosecution for his actions while he was president. While most legal scholars ridiculed the argument, the conservative members of the Court—three of whom were Trump's own appointees—granted Trump most of what he had asked. In so doing, the Court upended the American constitutional order.

In a 6-3 decision, the Court ruled that presidents have "absolute immunity from criminal prosecution for acts within the scope of [their] exclusive constitutional authority." This provision of the decision refers to such presidential powers as pardons and ordering executive officials to act. The Court also ruled that presidents have "presumptive immunity from criminal prosecution for . . . acts within the outer perimeter of his official responsibility." This would include situations where the president shares power with Congress. Beyond that set of circumstances, what else lies in the outer perimeter of presidential responsibility? The Court is simultaneously expansive and vague on this point. The majority opinion extends the presumption of immunity to cover a wide range of actions "so long as they are 'not manifestly or palpably beyond [his] authority.'"

What does all this mean? Imagine a president ordering officials or even friends to commit illegal acts. Prior to leaving office, presidents can simply pardon their associates for their illegal acts. Upon leaving office, the presidents themselves cannot be held to account in any court so long as their actions are interpreted as falling under their official acts. Imagine a president declaring a state of emergency the month before an election to affect the outcome of the vote. *Trump v. United States* has justly been described as a "blueprint for dictatorship" and a recipe for putting the president above the rule of law. (8) It seems that the Court feels that the only real checks on the president are impeachment and removal by Congress—a check that partisanship has rendered a dead letter—and the ethical sensibilities of the presidents we elect going forward.

What if . . . ?

Can you articulate a one-paragraph vision for the president's proper role in the American republic? What should be the presidential role when it comes to enforcing laws passed by Congress and signed by the president? What should and should not the president be doing? What amount of discretion and leeway should they have? Do you think presidents should be immune from prosecution for all their acts? Some of them? None of them?

References

1. David Frum, “The Secrets Flynn Was Desperate to Conceal,” *The Atlantic.* May 8, 2020.
2. Jonathan Shaub, “Executive Privilege is Lawless,” *The Atlantic*. January 20, 2022.
3. Michael C. Dorf, “A Brief History of Executive Privilege, From George Washington Through Dick Cheney,” *Findlaw Legal News and Commentary*. February 6, 2002.
4. Adam Kasfeld, “No Tax Return Privilege or Blanket Immunity, DA Tells Trump,” Courthousenews.com. September 23, 2019.
5. Scott R. Anderson, “What to Make of Trump’s NDAA Signing Statement,” *Lawfare*. August 23, 2018.
6. Ian Millhiser, “How Justice Scalia Paved the Way for Trump’s Assault on the Rule of Law,” *Vox*. February 14, 2014. Savannah Behrmann and Kristine Phillips, “More Than 1,100 Ex-DOJ Employees Call for Attorney General Barr’s Resignation,” *USA Today*. February 16, 2020.
7. President Eisenhower’s Farewell Address on January 17, 1961. National Archives.
8. Adam Serwer, “The Supreme Court Puts Trump Above the Law,” *The Atlantic*. July 1, 2024. Ian Millhiser, “The Court’s Disasterous Trump Immunity Decision, Explained,” *Vox*. July 1, 2024.

Media Attributions

- F-18 © Photographer's Mate 3rd Class Jayme Pastoric is licensed under a Public Domain license

Chapter 30: Impeachment and Removal of the President

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

–George Mason (1)

Before we begin talking about the process of impeaching and removing a sitting president, please keep in mind that other executive and judicial branch officials can be impeached and removed in a similar fashion. Executive branch officials who get into trouble tend to resign, or the president removes them from office, which has led to very few of them being impeached. (2) In 1804, the House impeached sitting Supreme Court Justice Samuel Chase, but he survived the trial in the Senate. In 1969, Supreme Court Justice Abe Fortas resigned under threat of impeachment for financial improprieties. Eight federal judges have been impeached and removed from office. An additional three federal judges have been impeached and resigned before they completed their Senate trials. The charges against these judges ranged from sexual assault to bribery and perjury. (3) But it is the prospect of a president being **impeached and removed** that is the most interesting and historically significant possibility that we will examine here. The founders were aware that neither ancient Grecian or Roman societies had figured out how to peacefully remove a chief executive who was abusing their office—often assassination or uprisings were the only remedy. Thus far, no American president has been impeached by the House *and* removed by the Senate.

Impeachment Power

The founders were very familiar with impeachment in British and Colonial American history. Beginning in 1376, the House of Commons "prosecuted powerful offenders before the House of Lords." (4) Frequently, this process—called impeachment, a term with which American colonists were very familiar—involved executive ministers and was a way for Parliament members to exert influence over the Crown by proxy. Even though the British monarch could not be impeached, the House of Commons proclaimed that impeachment was a principal instrument to hold royal power accountable. In the American colonies—particularly after 1755 and then intensifying in the 1770s—colonial assemblies "came to see impeachment as the mechanism by which the people could begin the process of ousting official wrongdoers, understood as those who betrayed republican principles, above all by abusing their authority through corruption or misusing power." (5) After independence, several states put impeachment provisions in their state constitutions.

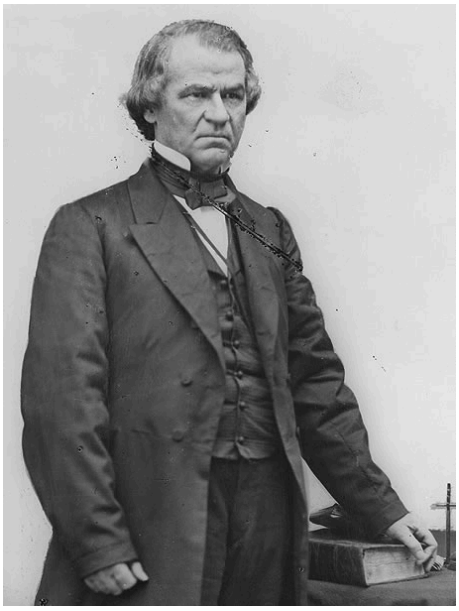
The founders created an impeachment provision in the U.S. Constitution and were anxious that it be applied to any future president who had, in the words of Benjamin Franklin, "rendered himself obnoxious" to the Constitutional order and the rule of law. The president, vice president, and other civil U.S.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

crimes and misdemeanors," which had precedent in English law going back to 1642. What did they mean by that odd phrase? They were particularly concerned about presidents who fraudulently achieved office, who might be under the influence of—or conspire with—foreign powers, who improperly enriched themselves, who undermined the rule of law, or who became incapacitated. (6) As put by constitutional scholars Lawrence Tribe and Joshua Matz, "In creating the impeachment power, the Framers worried most of all about election fraud, bribery, traitorous acts, and foreign intrusion. Willful conspiracy with a hostile foreign power to influence the outcome of a presidential election directly evokes all of these concerns." (7) It is clear that the president's offenses need not be law violations and could instead be technically legal assaults against the common good or the public trust. For example, Alan Hirsch argues that it is perfectly legal for a president to pardon all members of his own party for any federal offenses, but such action would be reasonable grounds to impeach and remove that president. (8)

The impeachment process is a fairly straightforward one, albeit one full of political dangers for everyone involved. At its most basic, constitutionally removing a president is a two-step process: The House impeaches and the Senate holds a trial to either remove the president or allow them to stay in office. Let's suppose the president is accused of committing a criminal act, abusing their office, or undermining the rule of law. The impeachment process begins in the House of Representatives, where one or more members introduces a bill to impeach. This bill will be referred to the House Judiciary Committee, which will hold hearings and vote whether to report out **articles of impeachment** to the full House. Other relevant House committees may hold hearings as well. Articles of impeachment are essentially the specific charges against the president. The full House debates the articles of impeachment and votes; **a successful majority vote on one of the charges means that the president has been impeached**. Then the process moves to the Senate, where the president is put on **trial** and the senators determine whether the president is "guilty" of the offenses spelled out in the articles of impeachment. Members of the House Judiciary Committee come over to the Senate to present the case against the president, while the president's lawyers mount a defense. The **Chief Justice** of the Supreme Court comes into the Senate to preside over the trial. **The Constitution requires a two-thirds vote in the Senate to convict and remove the president.**

Congress has never gone through the whole process and successfully removed a sitting president. However, there have been four notable cases in American history that you should know:

Andrew Johnson



President Andrew Johnson

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

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

Richard Nixon

President Richard Nixon and Advisors

On June 17, 1972, agents of President Richard Nixon's Committee for the Re-Election of the President (CREEP) were caught breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Nixon immediately tried to cover up the incident by ordering hush money payments and telling the Federal Bureau of Investigation to not look into it. The cover-up ultimately did not work, and the revelations that followed constituted a shock to the American public that reverberated for decades. Nixon did everything he could to forestall the inevitable. In the famous **Saturday Night Massacre**, Nixon ordered Attorney General Elliot Richardson to fire Archibald Cox, who was serving as the independent special prosecutor in the case. Richardson resigned rather than carry out the order. Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused to do it and resigned instead. Then Nixon asked Solicitor General Robert Bork to fire Cox, and Bork complied.

The scandal that started with the Watergate break-in expanded to reveal shocking corruption in the Nixon administration. Nixon and his subordinates were responsible for, among other things, extorting money from rich individuals and corporations; spying on American citizens because they disagreed with the president's policies; trying to use the Internal Revenue Service to destroy "enemies" of the president; selling government favors in exchange for campaign contributions; seriously contemplating the murder of a journalist; and breaking into psychiatrists' offices looking for dirt on opponents. (10)

Nixon had a taping system in the White House that recorded his conversations with everyone who came into his office. Nixon refused to turn over the tapes in the face of a congressional subpoena until forced by a unanimous Supreme Court decision. *The case,* ***The United States v. Nixon (1974),*** established that while the president had the right to confidentially record conversations with his advisors, executive privilege did not extend to refusing to turn over records pertinent to a criminal proceeding. Apparently, Nixon contemplated refusing to turn over the tapes and pardoning the burglers and those in his administration who had already been convicted and indicted, but in the end decided to comply with the Supreme Court's order. (11) The tapes revealed the cover-up's "smoking gun": Nixon suggested to his chief of staff that the FBI be told by the CIA to stay out of the Watergate investigation because it dealt with national security issues—an assertion that was not true and that clearly indicated obstruction of justice. Nixon resigned the presidency on August 9, 1974, just before the full House had a chance to vote on accepting three articles of impeachment. By resigning before he was actually impeached by the House, Nixon was then eligible to be pardoned by Gerald Ford, who assumed the presidency after Nixon's resignation.

Bill Clinton

President Bill Clinton and Monica Lewinsky

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

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

The House passed two articles of impeachment against Clinton that centered on his perjury under oath and his obstruction of justice by encouraging others to perjure and conceal evidence. The case's facts were not really in dispute: Clinton did what the House alleged. When the impeachment case reached the Senate, Clinton survived by a comfortable margin, with only fifty of the required sixty-seven senators voting to convict. Very few people outside of the president's staunchest political allies argued that Clinton's testimony did not constitute perjury—he clearly gave false statements under oath in a federal case. **The debate in the Clinton impeachment revolved around two issues**: 1) Did lying under oath in court about an embarrassing extramarital affair constitute a serious enough offense to remove the president? and 2) How much damage did the Clinton scandal—with its salacious details—do to the presidency's moral authority? In the end, the broad national consensus was that Republican efforts to impeach and remove Clinton amounted to an overly moralistic and politically opportunistic overreaction to a scandal that in no way threatened the Constitutional order.

Donald Trump's First Impeachment

President Donald Trump with Ukrainian President Volodymyr Zalensky

In hindsight, it should not have surprised anyone that Donald Trump became the third president to be impeached by the House of Representatives. As a businessman who inherited wealth from a father who flouted the law, Trump's conduct before taking up his position in the White House allegedly included tax fraud, running a fraudulent foundation, running a fraudulent university, bilking subcontractors, posing as a publicist and praising himself to a reporter, and engaging in sexual harassment and assault. (14) During the 2016 campaign, Trump flouted post-Nixon custom and refused to release his tax returns. He also paid off at least two women to keep their adulterous sex stories out of the news during the campaign.

Once in office, President Trump engaged in numerous potentially impeachable offenses that included violating the Constitution's emoluments clause by accepting money from foreign governments; obstructing justice by firing FBI Director James Comey when he opened up an investigation into Russian ties to the Trump campaign; obstructing justice with respect to Special Counsel Robert Mueller's Russian ties to the Trump campaign investigation; violating his duty to see that laws are executed by advocating violence perpetrated by various supporters and law enforcement personnel; abusing his pardon power in the cases of Joe Arpaio and the pardons for war crimes, thereby undermining the rule of law; committing crimes against humanity for separating children from their parents at the U.S. border, placing them in inhumane conditions and having no plan to reunite them when their cases were adjudicated; and violating campaign finance laws while he was president by reimbursing his personal lawyer Michael Cohen and by discussing sexual-affair hush money payments in the Oval Office. (15) Trump was not impeached for any of those possible offenses.

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

Ultimately, the House passed two articles of impeachment:

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

Donald Trump's Senate trial was a true low point in American political history. Republican senators blocked all

attempts to request relevant documents and interview eyewitnesses to Trump's alleged abuse of power. It was the first impeachment trial that heard from no witnesses and introduced no documents into the record. As far as the Republican senators were concerned, "facts and evidence—reality—were viewed as grave threats, which is why they had to be buried." (16) Many aspects of the trial lent a kangaroo court character to the proceedings. Trump's defense team didn't attempt to present counter evidence—instead, they sought to rationalize the president's actions—and Republican senators acknowledged that the president did what was alleged in the articles of impeachment. (17) One Republican senator attempted to get Chief Justice John Roberts to reveal the name of the whistleblower, but Roberts refused. While the trial was going on, new information came out in the media from one participant in the scheme—Lev Parnas—and one opponent of it—National Security Advisor John Bolton—who tried to shut it down because he knew it was illegal, but such evidence was not allowed to be heard in the trial. The Government Accountability Office confirmed during the trial that the president's actions violated the Impoundment Control Act. (18) During the trial, Bolton's upcoming book manuscript alleged that Pat Cipollone, the White House Counsel and part of Trump's legal team, participated in the criminal conspiracy. (19) In the end, all Republicans except for Senator Mitt Romney (R-UT) voted "not guilty" on both articles of impeachment, and all Democrats voted "guilty" on both articles of impeachment—a result that fell far short of the two-thirds vote needed to remove Trump from office. Senator Romney voted "yes" on the abuse of power charge and "no" on the obstruction of Congress charge.

Two legacies of Trump's first impeachment are likely to have long-term consequences. The first centers on the Trump administration getting away with blanket obstruction of a congressional inquiry. Republican senators seemed not to care about Congress' institutional need to have Trump or any future president honor its subpoenas for documents and testimony. An executive whose actions cannot be investigated by Congress and who has a compliant Justice Department is more like an all-powerful monarch than an American president. That's a frightening precedent for the Senate to set. The second concerns an especially pernicious legal argument put forward by Trump's defense. Alan Dershowitz, one of Trump's lawyers, said on the floor of the Senate that "Every public official that I know believes that his election is in the public interest. If a president does something which he believes will help him get elected in the public interest, that cannot be the kind of *quid pro quo* that results in impeachment." This was an astounding argument that lacked any support in the scholarly or judicial record. (20) According to this line of thinking, a president could exercise his legal authority to declassify national security secrets for another country in exchange for that country's help with his re-election. It is a way of thinking that subsumes the national interest of the United States underneath the personal political interest of the president.

Donald Trump's Second Impeachment

At the close of President Trump's first impeachment trial, Representative Adam Schiff made the following prophetic warning to the Senate: "He has not changed. He will not change. A man without character or ethical compass will never find his way. He has done it before and he will do it again. What are the odds if he is left in office that he will continue to try to cheat? I will tell you: 100%. He will continue to try to cheat in the election until he succeeds. Then what shall you say?" (21) Less than one year later, the U.S. House of Representatives was forced to impeach Trump for "incitement of insurrection," which "followed his prior efforts to subvert and obstruct the certification of the results of the 2020 Presidential election." (22)

The precipitating event for this second impeachment of Trump was the January 6, 2021 insurrection in which Trump supporters and allied domestic terrorists invaded the U.S. Capitol while Congress and the Vice President were gathered to carry out their Constitutional duty to certify the official Electoral College vote for Joe Biden and Kamala Harris—the Democratic ticket that won the popular vote by 7 million votes and the Electoral

College vote by 306 to 232. The insurrectionists overwhelmed the outnumbered police forces that were protecting the Capitol and beat one of those police officers to death and injured at least 70 others. (23) They also appeared to be intent on capturing and possibly assassinating members of Congress and the Vice President. The rioters damaged parts of the building, defecated in its public spaces, and stole laptops and other material from Congressional offices. The January 6 insurrection marked the first violent presidential transition of power since the American Civil War that resulted from the secession of Southern states following the election of Abraham Lincoln.

Normally, politicians are not held accountable for the rash acts of their supporters. Trump, however, was not a normal politician and bore direct responsibility for this outrage. Consider the following sequence:

- Trump endorsed violence throughout his political life and often excused or ignored violence committed by his supporters. (24) He stirred up people in Michigan to "liberate" their state from duly elected officials, and then watched passively as armed citizens disrupted the state legislature. Nor did he issue a condemnation when a group of Michiganders were caught plotting to kidnap the state's governor. In fact, he tweeted that the governor had done a "terrible job" and that she insufficiently thanked him for his non-existent role in catching the domestic terrorists. (25) When he discovered that some of his followers harassed a Biden campaign bus while it was traveling on an interstate highway in Texas, Trump tweeted "I love Texas!" (26) During a debate, when pressed about his support from domestic terrorist groups like the Proud Boys, Trump told groups like them to "stand back and stand by." Members of those groups later participated in the January 6 insurrection.
- Trump was the first American president to declare before an election (twice, in fact, for 2016 and 2020) that he would not accept the results unless he won. If he didn't win, that would be evidence in his mind—and in the minds of many of his supporters—that the process was rigged. (27)
- Months before the 2020 election, Trump claimed without evidence that it was going to be fraudulent and that mail-in ballots in particular were problematic. In fact, the 2020 election was the cleanest and most secure in modern American history. This fact was upheld by cyber-security analysts as well as (predominantly Republican) state and local officials and (predominantly Republican appointed) state and federal judges. (28)
- After the election, Trump and his associates pressured state and local officials in Arizona, Michigan, Pennsylvania, and Georgia to find ways to either decertify the election results or change those results. In the case of Georgia, Trump told the Georgia Secretary of State, "Look, all I want to do is this: I just want to find 11,780 votes." Trump had lost the popular vote in that state by 11,779 votes, so if the Secretary of State could actually "find" 11,779 + 1 extra Trump votes in that state, all of Georgia's electors would have gone to Trump. (29)
- Long after the election had been called for Biden and Harris by all major news outlets including Fox News, Trump and his associates promulgated The Big Lie that he had won a "landslide" victory that the Democrats "stole" from him. He repeated The Big Lie and told his followers to come to Washington on January 6 to "fight like hell" and "fight to the death" or "you're not going to have a country anymore." He promised it would be "wild." During the January 6 rally–when Trump already knew that attendees were armed and could not make it through the metal detectors surrounding his podium–he directed the crowd toward the Capitol building, saying they needed to "fight much harder," "stop the steal," and "take back our country." (30) He also said that he would join the marchers, attempted to do so, but was not allowed to by his Secret Service detail.
- After the melee began on the Capitol steps, after the battering of the Capitol police, after the forced suspension of Congressional work, and after knowing that the chants of "hang Mike Pence" by the insurrectionists forced the Vice President's security detail to rush him from the building, President Trump did not tweet to his followers to stop the violence. Instead, he tweeted "Mike Pence didn't have the

> courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!" Nor did he proactively call out the D.C. National Guard, which reports to the president. (31)

During the Senate trial, Trump's lawyers largely did not dispute the facts of the case but made two substantial arguments and several minor ones. We'll focus on the substantial ones. (32) Their first argument was that it was unconstitutional for the Senate to try Trump now that he was out of office, since the point of impeachment and trial is to remove the offender from office. In fact, the Constitution provides for an additional penalty upon conviction after an impeachment: "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." The argument that an impeachment trial cannot proceed once the alleged offender has left office would, if accepted, give presidents a free pass to violate the public trust in their final months in office. In fact, constitutional scholars overwhelmingly rejected Trump's lawyers' argument and argued that the Founders wanted the Senate to hold a trial in exactly these circumstances. (33)

The second argument put forward by Trump's lawyers was that the president's words and actions were protected by the First Amendment's freedom of speech. They relied on *Brandenburg v. Ohio* (1969), in which the Supreme Court said Clarence Brandenburg could not be prosecuted for incitement to riot for his inflammatory speech given at a Ku Klux Klan rally. Again, constitutional scholars roundly rejected this defense for a sitting president stoking up his followers with lies, telling them they must act outside the law, and aiming them at the Congress and his own vice president. On the face of it, Trump's lawyers made an important point: a president can tell Blacks to "go back to Africa" (akin to one of Brandenburg's statements), or burn a flag at a rally, or deny the Holocaust while marching past a synagogue. Despicable as they are, all of these are technically protected forms of political speech, but that does not prevent Congress from impeaching and removing from office such a president for gross dereliction of duty, abuse of his office, and failure to preserve, protect, and defend the Constitution. The First Amendment, in other words, might protect Trump in any criminal or civil cases he faced as a result of his actions, but they do not restrain Congress when it comes to impeachment. (34) Remember, an impeachment article need not strictly be a violation of federal law.

Despite Trump's weak defense in the Senate trial, he was quickly acquitted. It was the most bipartisan vote in presidential impeachment history, with seven Republican senators voting to convict. Still, the 57-43 majority vote was insufficient to meet the 2/3 threshold for conviction. In a head-scratching coda to the trial, Senate Minority Leader Mitch McConnell (R-KY), who voted to acquit the president, also made this clear statement: "Fellow Americans beat and bloodied our own police. They stormed the Senate floor. They tried to hunt down the Speaker of the House. They built a gallows and chanted about murdering the Vice President. They did this because they had been fed wild falsehoods by the most powerful man on Earth — because he was angry he'd lost an election. Former President Trump's actions preceding the riot were a disgraceful dereliction of duty." (35)

In terms of its overall impact for an attenuated democracy like ours, Trump's acquittal on his second impeachment confirmed the lessons of his first acquittal and served as yet another warning that politicians and institutions lose all credibility when they don't stand up to tyranny. It's interesting to step outside the realm of partisan politics and listen to the voices of principled conservatives on this one. Charles Sykes, a commentator with impeccable conservative credentials, argued that under Trump's leadership the Republican party had shown a "willingness to accept—or at least ignore—lies, racism, and xenophobia. But now [following the impeachment vote] it is a party that is also willing to acquiesce to sedition, extremism, and anti-democratic authoritarianism." (36) Focusing his attention on the institutional failure of the Senate, conservative writer Jim Swift said the majority of its Republicans let the country down through sheer "partisan cowardice": "Donald Trump incited an insurrection; the case against him was not refuted; and history will look back upon his acquittal with confusion and shame." (37)

References

1. As recorded in James Madison's notes on July 20, 1787. Yale Law School's Avalon Project.
2. Keith Whittington, "The Power to Impeach Executive Officers," *Lawfare*. August 4, 2017.
3. Elizabeth Nix, "Has a U.S. Supreme Court justice ever been impeached?" *History.com*. December 2, 2016.
4. Laurence Tribe and Joshua Matz, *To End a Presidency. The Power of Impeachment*. New York: Basic Books, 2018. Page 2. The Benjamin Franklin quote comes from page 1.
5. Cass R. Sunstein, *Impeachment. A Citizen's Guide*. Cambridge, Massachusetts: Harvard University Press, 2017. Page 39.
6. Note that the 25th Amendment later set up a formal process outside of impeachment to remove a president who is incapacitated.
7. Tribe and Matz, *To End a Presidency*. Page 59.
8. Alan Hirsch, *Impeaching the President: Past, Present, and Future*. San Francisco: City Lights Books, 2018. Page 23.
9. Jon Meacham, "Andrew Johnson," in Jeffrey Engel, Jon Meacham, Timothy Naftali, and Peter Baker, *Impeachment. An American History*. New York: Modern Library, 2018. Page 49.
10. Jerry Zeifman, *Without Honor: Crimes of Camelot and the Impeachment of Richard Nixon*. New York: Thunder's Mouth Press, 1996. Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon*. New York: Simon & Schuster, 1995.
11. Timothy Naftali, "Richard Nixon," in Jeffrey Engel, Jon Meacham, Timothy Naftali, and Peter Baker, *Impeachment. An American History*. New York: Modern Library, 2018. Pages 144-145.
12. Eric Lichtblau and Allan C. Miller, "House Democrats Push for an Investigation of Starr's Office," *Los Angeles Times*. February 11, 1999.
13. Washington Post, *The Starr Report: The Findings of Independent Counsel Kenneth W. Starr on President Clinton and the Monica Lewinsky Affair*. Public Affairs Reports, 1998.
14. David Cay Johnston, *The Making of Donald Trump*. Brooklyn, NY: Melville House, 2017. Michael Kranish and Marc Fisher, *Trump Revealed. The Definitive Biography of the 45thPresident*. New York: Scribner, 2017. Steve Reilly, "Hundreds Allege Donald Trump Doesn't Pay His Bills," *USA Today*. June 9, 2016.
15. Ron Fein, John Bonifaz, and Ben Clementz, *The Legal Case for a Congressional Investigation on Whether to Impeach President Donald J. Trump*. Free Speech for People. December 6, 2017. *Trump's 10 Impeachable Offenses*. Need to Impeach.
16. Peter Wehner, "The Downfall of the Republican Party," *The Atlantic*. February 2, 2019.
17. Christal Hayes, "'He Shouldn't Have Done It.' GOP Senator Who Scolded Trump on Ukraine Explains Why He Backs Acquittal." *USA Today*. February 1, 2020. Chris Cillizza, "Marco Rubio's Mind-Blowing Explanation of His Impeachment Vote," *CNN*. February 1, 2020.
18. Dareh Gregorian, "Trump Administration Violated the Law by Withholding Ukraine Aid, Government Accountability Office Says," *CBS News*. January 16, 2020.
19. Travis Gettys, "'Holy Crap!' Bolton 'Directly Implicated' Pat Cipollone as a 'Fact Witness' in Trump Impeachment Trial," *Rawstory*. January 31, 2020.
20. Dershowitz quoted by Allan Lichtman in "What Will the History Books Say About This Impeachment?" *Politico*. February 5, 2020.
21. Adam Schiff quoted in Tom McCarthy, "Trump Impeachment Trial: Democrats Warn that Trump 'Will Do It Again' if Acquitted," *The Guardian*. February 3, 2020.
22. Res. 24 of the 117th Congress. January 13, 2021.
23. Jacob Fenston, "'January 6 Forever Changed This Department,' Capitol Police Chief Says, One Month After Attack," *DCist.com*. February 6, 2021.

24. Fabiola Cineas, “Donald Trump is the Accelerant,” *Vox*. January 29, 2021.
25. Craig Mauger, “President Trump Tweets on Kidnap Plot, Criticizes Gov. Whitmer,” *The Detroit News*. October 8, 2020.
26. Kate McGee and Jeremy Schwartz, “President Trump Tweets I LOVE TEXAS! Along With Video of Trucks Surrounding Biden Bus,” *CBSAustin*. November 1, 2020.
27. Jeremy Diamond, “Donald Trump: ‘I Will Totally Accept’ Election Results ‘If I Win,’” *CNN*. October 20, 2016. Sanya Mansoor, “‘I Have to See.’ President Trump Refuses to Say If He Will Accept the 2020 Election Results,” *Time*. July 19, 2020.
28. No author, “It’s Official: The Election Was Secure,” The Brennan Center for Justice. December 11, 2020.
29. Jamie Raskin, et al., *Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of Donald J. Trump*. February 2, 2021.
30. Josh Wingrove and Margaret Newkirk, “Trump Urged Georgia Officials to Find Votes, Flip State to Him,” *Bloomberg*. January 3, 2021. Anita Kumar and Gabby Orr, “Inside Trump’s Pressure Campaign to Overturn the Election,” *Politico*. December 21, 2020.
31. Robert Farley, “Timeline of National Guard Deployment to Capitol,” FactCheck.org. January 13, 2021.
32. Dana Farrington, “Trump’s Impeachment Defense Brief,” *NPR*. February 8, 2021.
33. Multi-authored public statement, *Constitutional Law Scholars on Impeaching Former Officers*. January 21, 2021. Jed Handelsman Shugerman, “Impeach an Ex-President? The Founders Were Clear: That’s How They Wanted It,” *Politico*. February 11, 2021. Stephen Vladeck, “Why Trump Can Be Convicted Even as an Ex-President,” *New York Times*. January 14, 2021. Keith Whittington, “Can a Former President Be Impeached and Convicted?” *Lawfare*. January 15, 2021.
34. Peter Keisler and Richard D. Bernstein, “Freedom of Speech Doesn’t Mean What Trump’s Lawyers Want it to Mean,” *The Atlantic*. February 8, 2021. Ian Millhiser, “Trump’s False Claim That Impeachment Violates the First Amendment, Explained,” *Vox*. February 12, 2021.
35. No author, “Read McConnell’s Remarks on the Senate Floor Following Trump’s Acquittal,” *CNN*. February 13, 2021.
36. Charlie Sykes, “Trump’s Party, But Worse: Acquitted But Not Exonerated,” *The Bulwark*. February 15, 2021.
37. Jim Swift, “Trump’s Acquittal is an Ignominious Failure,” *The Bulwark*. February 13, 2021.

Media Attributions

- Impeachment Johnson © Library of Congress is licensed under a Public Domain license
- Impeachment Nixon © Hartmann is licensed under a Public Domain license
- Impeachment Clinton © White House Photograph Office is licensed under a Public Domain license
- Impeachment Trump © Shealah Craighead is licensed under a Public Domain license

PART 5: THE SUPREME COURT

Chapter 31: Purpose and Operation of the Supreme Court

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

–Alexander Hamilton (1)

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

–Paul Street (2)

The Supreme Court—Unbiased Umpire or Crooked Referee?

In the quotes above, Alexander Hamilton and Paul Street come to dramatically different conclusions about the federal judiciary's power and impact. In *Federalist #78*, Hamilton argued that the legislative branch was powerful because it "commands the purse," meaning that it taxes and spends. He also wrote that the legislative passes laws whereby it "prescribes the rules by which the duties and rights of every citizen are to be regulated." The executive branch enforces law, which Hamilton metaphorically describes as "hold[ing] the sword of the community." The judicial branch, on the other hand, was to be less feared because it "has no influence over either the sword or the purse," but merely has judgment. Street would say that Hamilton vastly underestimated the federal judiciary's power—especially the Supreme Court—to use the Constitution to recognize rights for some and deny them to others. Moreover, Hamilton seems to be saying that the Court is just like an unbiased baseball umpire who calls balls and strikes, while Street would say that the Court acts like a biased basketball referee who, by calling fouls, unfairly decides who wins the game.

Given the Supreme Court's conservative bias (see chapter 35), one would think that only progressives would complain that the Supreme Court is an all-powerful, crooked referee. However, conservatives have at times also bitterly resented particular Court decisions. Indeed, complaining about Supreme Court decisions has long been a national pastime for both conservatives and progressives alike. Still, things feel differently now. With frequent gridlock between Congress and the President and strong popular support for the kinds of progressive economic and social policies enjoyed by other wealthy democracies but not in the United States, Supreme Court has positioned itself as the unelected arbiter of rights, privileges, immunities, and political success or failure. The conservative constitutional scholar Kimberly Wehle best summarized the situation: "By its own maneuvering, the modern Supreme Court has made itself the most powerful branch of government. Superior to Congress. Superior to the president. Superior to the states. Superior to precedent, procedure, and norms. In effect, superior to the people." (3)

What are we to make of these different interpretations of the Supreme Court's power and political role? Before we explore that question, let's set some context by discussing the Court's purpose and establishing some basics about how it operates.

Purpose of the Supreme Court

United States Supreme Court

The United States strives to be a country governed by the rule of law, and this goal, ultimately, requires an arbiter who can review legal decisions as objectively as is humanly possible. As this arbiter, the Supreme Court serves two purposes. One is to serve as the **final court of appeal** for lower courts—there is no appeal if someone loses in the Supreme Court. The second function is to exercise **judicial review**, which refers to examining the actions of Congress, the executive branch, and the states to determine whether or not they are constitutional. But early in our government's history, there was some controversy about judicial review. While the supremacy clause implies that the Supreme Court can strike down state actions, the Constitution never explicitly stated whether congressional and executive branch actions could be ruled unconstitutional as well. This matter was settled by ***Marbury v. Madison* (1803)**, wherein for the first time, the Supreme Court voided a congressional law. (4)

Marbury v. Madison (1803) is an important case that you should know because of its role in establishing judicial review. The 1800 presidential election was a particularly important one in American history, because it marked our first peaceful power shift when Democratic-Republican candidate Thomas Jefferson defeated the incumbent Federalist, President John Adams. With Jefferson's win, the Federalists also lost their congressional majority. In those days, the new administration started the March after the election, instead of January after the election, as they do now. During the four lame-duck months between November and March, the Federalists, who were still in charge of Congress, passed a Judiciary Act that President Adams signed into law in February 1801. The Judiciary Act created twenty-six new federal district and circuit court judgeships. The Adams administration then rushed to name Federalists to all those new positions, and the Federalist Senate rushed to confirm them all. Of course, the Democratic-Republicans decried the Federalist attempt to pack the federal courts with "midnight judges" of the Federalist persuasion. Remarkably, Secretary of State John Marshall failed to deliver the official commissions to all the judges before Jefferson was sworn in as president on March 4, 1801. Jefferson ordered his new Secretary of State, James Madison, to deliver only some of the commissions that were still on Marshall's desk.

One of the undelivered judgeship commissions was addressed to **William Marbury**, who filed suit straight in the Supreme Court and asked it to issue a writ of *mandamus*—basically an order to Secretary of State Madison to deliver the commission so he could take his place as a federal judge. It took two years before the Supreme Court took the case, and guess what? The same **John Marshall,** who had failed to deliver the commissions, had been appointed by President Adams to be Supreme Court Chief Justice! It would appear that Marbury had a good case—he was nominated by Adams and confirmed by the Senate. His judicial commission was properly signed by the Secretary of State—it just wasn't delivered. **Writs of *mandamus*** were well established in English common law, allowing courts to order government officials to do their jobs. Moreover, section 13 of the Judiciary Act of 1789 specifically gave the Supreme Court the ability to issue such writs. However, the last thing the Democratic-Republicans wanted was to have the federal courts packed with additional Federalist judges. Marshall was in a jam. If he ruled in Marbury's favor, he risked having the Jefferson administration ignore the ruling, thereby permanently weakening the Supreme Court.

To get out of his jam, Marshall resorted to legalistic sleight-of-hand. Article III of the Constitution gave the Supreme Court original jurisdiction (more about this in the next section of the text) over a limited set of

circumstances, and issuing writs of *mandamus* wasn't on that list. This would mean that Marbury made a mistake bringing his case straight to the Supreme Court instead of appealing from a lower court. Thus, Marshall said that due to this legal technicality, he couldn't help Marbury. But Marshall went further and declared that section 13 of the Judiciary Act of 1789 violated the Constitution and therefore was void. This was exactly the remedy the Democratic-Republicans wanted, so they went along with Marshall in exerting Supreme Court power to strike down congressional legislation that had been passed and signed into law by the president. Marshall, a Federalist, thought the decision would set the Court up to be a check on future Democratic-Republican policies. In his majority opinion, Marshall wrote that "it is emphatically the province and duty of the judicial department to say what the law is," and that arguments that "courts must close their eyes on the Constitution, and see only the law would subvert the very foundation of all written constitutions." *Marbury v. Madison* (1803) is considered one of the most important Supreme Court cases because since it was decided, no one has seriously questioned the Court's power of judicial review. (5)

The Supreme Court's power stems from the way our legal system is structured. Even though the Supreme Court decides relatively few cases per year, those decisions carry weight due to the principle of ***stare decisis***, which literally means "to stand by that which is decided." Courts—particularly those lower than the Supreme Court—must make decisions that are consistent with past decisions on similar cases. Garrett Epps, University of Baltimore constitutional law professor, very aptly described *stare decisis* this way: "cases, once decided, are not to be overturned simply because new judges come on the Court, or new parties win elections, or newly tenured law professors think they were wrong; the radical step of voiding precedent is saved for cases that have been proven unworkable or unjust in the years since they were decided." (6) The pressure of *stare decisis* is exerted downward from the Supreme Court to lower courts. In other words, when the Supreme Court makes a definitive ruling on a matter of law, that decision sets a **precedent** for other courts to follow in subsequent cases.

Two caveats apply to the power of precedent in lower court decisions: 1) The case at hand must be similar enough to the one that set the precedent. 2) A later Supreme Court can always decide to change precedent by overturning a previous Supreme Court's decision. Sometimes, it takes decades for the Court's membership or societal changes to allow it to overturn precedent, and other times it happens fairly quickly. Here's a good example of a midrange precedent change: In *Bowers v. Hardwick* (1986), the Court upheld a Georgia law that banned oral and anal sex between consenting adults. Then, only seventeen years later, the Court decided *Lawrence v. Texas* (2003), reversing its precedent set previously in *Bowers*. In addition, when the Court decided *Lawrence*, it struck down a similar Texas law that specifically targeted same-sex partners. A future Court, if given the right case and a sufficiently conservative membership, could decide to overturn *Lawrence* and take the country back to the days when the right to privacy did not include consensual sexual acts between same sex or heterosexual partners. Of course, such a decision would have tremendous ramifications for all sorts of other matters of law. The Supreme Court rarely overturns its own precedents. David Schultz, a professor Political Science at Hamline University, has done the research and found that in the history of the Court, "it has only overturned its own constitutional precedents 145 times—this is barely one-half of one-percent of all its decisions." (7) One of the most important recent examples of the Supreme Court overturning precedent occurred in the *Dobbs v. Jackson Women's Health Organization* (2022) case, where the Court stripped from women the Constitutional right to choose to terminate a pregnancy as articulated in the *Roe v. Wade* decision from 1973.

Operation of the Supreme Court

Most Supreme Court cases come on appeal, but the Court is under no obligation to hear all appealed cases. In fact, the Court refuses to hear the vast majority of the thousands of appeals that it receives. What happens then?

The next lower court's decision stands. For example, widower Walter Daniel, whose wife died while giving birth in a military hospital, tried to get the Supreme Court to carve out an exception to *Feres v. United States* (1950). In this precedent-setting case, the Court said that military personnel cannot sue the United States "for injuries to members of the armed forces arising from activities incident to military service." Daniel argued that even though his wife was in the military, her labor and delivery were far removed from the battlefield or even her position's duties, and thus his wife's case ought not to be covered by *Feres*. Daniels wanted to sue for malpractice damages, holding the negligent military hospital responsible for his wife's death. Daniel lost in the Ninth Circuit Court of Appeals, which followed the *Feres* precedent, and the Supreme Court refused to take the case. Therefore, Walter Daniel was left with the Ninth Circuit's decision against him. (8)

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

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

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

Oral arguments can be found online. Here is the oral argument in *Trump v. Vance* (2020), in which President Trump's lawyers argued that the sitting president could not be criminally investigated. The president's lawyers go first, followed by the respondent's lawyers. Listen to how the justices ask questions.

One or more interactive elements has been excluded from this version of the text. You can view them online here: https://slcc.pressbooks.pub/attenuateddemocracy/?p=209#audio-209-1

Shortly after a case's oral argument, the Chief Justice presides over the justices in a **conference meeting** where they reach a preliminary decision on the case. The Chief Justice speaks first, followed by the other justices in the order of their seniority on the Court. This conference meeting is very private, with only the justices allowed in the room. The justice with the least seniority "acts as 'doorkeeper,' sending for reference material, for instance, and receiving it at the door." (9) Their deliberation's outcome is made public, but their conversations are private and largely the subject of speculation.

The Supreme Court operates by majority vote, so decisions can be 9-0, 8-1, 7-2, 6-3, or 5-4. The decision's legal validity does not depend on the margin of victory, but the political weight of the decision is affected by it. Politically, a there is a world of difference between a 5-4 decision and a 9-0 decision. Someone in the winning majority writes a **majority opinion**, which explains the Court's decision in terms of its compelling legal precedent. If the Chief Justice is in the majority, they will assign who writes it; if the Chief Justice is not in the majority, the most senior justice voting with the majority will assign the majority opinion. Someone in the minority writes a **dissenting opinion**, which explains why the minority feels the majority erred in applying precedent or constitutional principle. Assigning the dissenting opinion operates just like that of the majority opinion. Majority opinions carry legal weight in the form of precedent, and they also instruct legislators about how acceptable the proposed legislation is. Dissenting opinions do neither of those things, but they do become important if the Supreme Court decides later to reverse itself. Perhaps because they lack legal importance, dissenting opinions are usually more fun to read than majority opinions. Sometimes, justices agree with each other enough to create a majority vote but may do so for different legal reasons. In this case, a justice may write a **concurring opinion** explaining their unique legal reasoning for voting with the majority.

This has been a very quick tour of the Supreme Court's purpose and operation. The Court has taken on immense significance in American life. It has, at times, validated horrific policies like slavery and segregation. On other occasions, it has confirmed shifts in public opinion, such as its decision to strike down bans against same-sex marriages. While Alexander Hamilton was correct that the Court possesses neither the "sword or the purse," it is far from being a lesser branch of government.

What if . . . ?

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

References

1. Alexander Hamilton, *Federalist Papers #78*.
2. Paul Street, "The Real Constitutional Crisis: The Constitution," *Counterpunch*. November 8, 2019.
3. Kimberly Wehle, "The Supreme Court Just Keeps Deciding It Should Be Even More Powerful," *The Atlantic*. March 13, 2023.
4. Joel B. Grossman and Richard S. Wells, *Constitutional Law and Judicial Policy Making*, Second edition.

New York: Wiley and Sons, 1980. Page 87. The authors of this classic text note briefly that in 1851, scholars discovered an unreported opinion from 1794 in which the Court had declared a federal law unconstitutional. Thus, Marbury remains the first case of any political importance.
5. This entire discussion of *Marbury v. Madison* (1803) draws on the recounting in Peter Irons, *A People's History of the Supreme Court*. New York: Penguin Books, 2000. Pages 103-107.
6. Garrett Epps, "When the Supreme Court Doesn't Care About Facts," *The Atlantic*. February 27, 2018.
7. David Schultz, "The Supreme Court and the Coming End of Abortion Rights," *Counterpunch*. October 1, 2021.
8. James Clark, "Supreme Court Refuses to Hear Yet Another Challenge to the Controversial Feres Doctrine on Military Medical Malpractice," *Task & Purpose*. May 20, 2019.
9. No Author, "The Justice's Conference," The Supreme Court Historical Society.

Media Attributions

- Supreme Court © U.S. Department of State is licensed under a CC BY-NC (Attribution NonCommercial) license

Chapter 32: Paths to the Supreme Court

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

–U.S. Constitution, Article III

Federalism in America's Court System

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

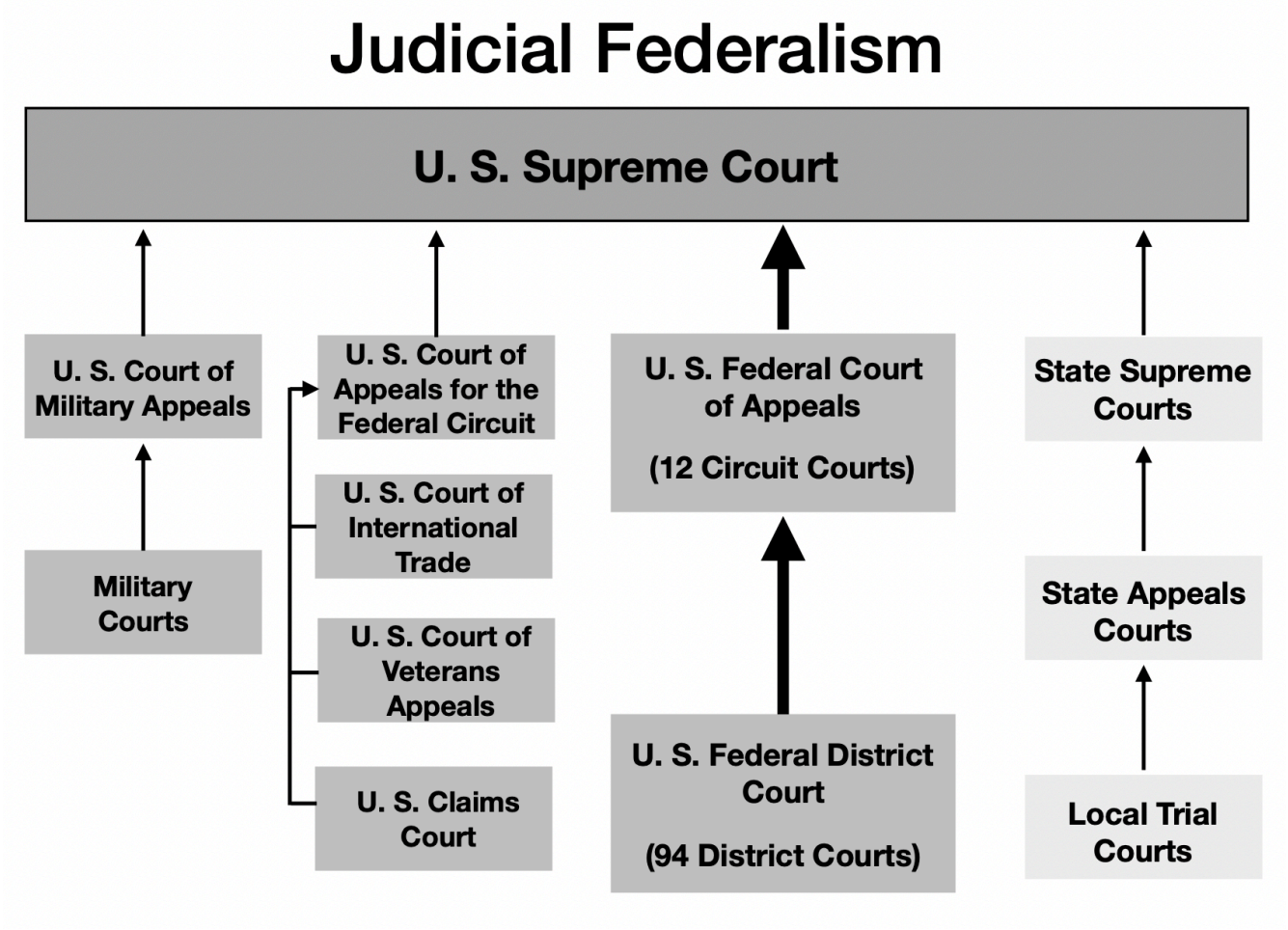


Diagram of Judicial Federalism

Paths to the Supreme Court

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

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

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

Supreme Court Jurisdiction

The paths to the Supreme Court are conditioned by its jurisdiction. Jurisdiction refers to the scope or mandate of a court. *What* kinds of cases can it hear, and *how* does it hear them? The Supreme Court has the broadest jurisdiction of any federal court, but its mandate is divided into its original and appellate jurisdictions. **Original jurisdiction** refers to those cases that are heard first in the Supreme Court. According to Article III of the Constitution and federal statute, the Supreme Court has original jurisdiction in the following kinds of cases:

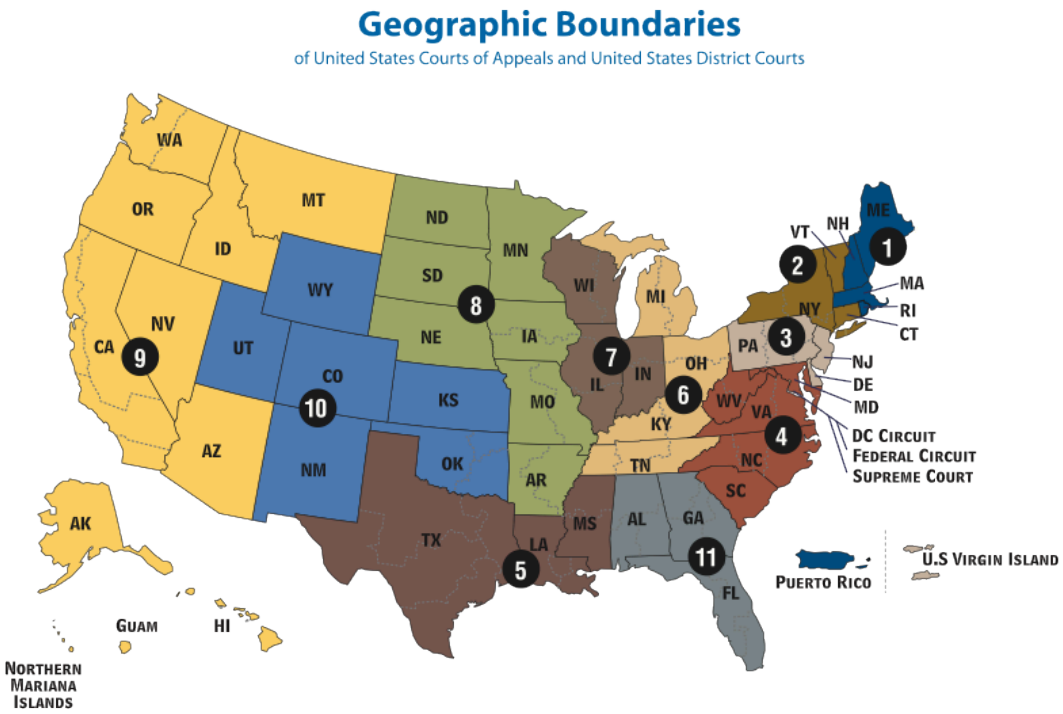
- Controversies between states.
- All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.
- All controversies between the United States and a state.
- All actions or proceedings by a state against the citizens of another state or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

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

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

there is a split between those cases that work their way through the federal courts and those that began in state courts. In a given year, about two-thirds of the Supreme Court's caseload comes on appeal through the federal courts, and about one-third comes from state courts, with few to no original jurisdiction cases.

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



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

References

1. Article III of the Constitution and the Cornell Law School Legal Information Institute.
2. Specific caseloads can be found at the U.S. Courts website.
3. Map taken from the websiteof the Federal Bar Association.

Media Attributions

Chapter 33: Appointing and Confirming Supreme Court Justices

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

–Ian Millhiser (1)

"The authors of America's constitution created the Supreme Court to provide a check on the danger that political evolution might lead Congress to pass laws threatening oligarchic rule."

—Michael Hudson (2)

The Supreme Court Justices

The U.S. Supreme Court currently has nine justices. The Constitution does not specify the number. In the **Judiciary Act of 1789,** Congress initially established a six-member Supreme Court, with a Chief Justice and five associate justices. Between then and the Civil War, Congress gradually expanded the number of justices to ten. Then, in an attempt to limit President Johnson's powers, Congress reduced the number of justices through retirement down to seven. In 1869, Congress raised the number of justices to nine, where it has stayed ever since. In 1937, President Franklin Roosevelt proposed to expand the number of justices by adding one for every sitting justice who was seventy- and one-half-years-old and who didn't retire. Potentially, this move could have increased the number of justices to fifteen. Roosevelt was frustrated that the Court was thwarting his New Deal policies, which were targeted at ameliorating the effects of the Great Depression. His **court packing plan** was not approved by Congress, but the Court nevertheless became more amenable to an activist federal government. (3) When the Court changed and begin endorsing Roosevelt's policies, it became popularly known as "the switch in time that saved nine."

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

Formal group photograph of the Supreme Court as it was been comprised on June 30, 2022 after Justice Ketanji Brown Jackson joined the Court.

Who are our current Supreme Court justices? Although few Americans can name them, you should know who they are and something about their perspectives. You can always check the Supreme Court's website for the current membership. Talk about the Supreme Court justices with your professor, classmates, family, and friends. What do you know about who appointed them and their ideological perspectives? Here are some interesting facts about the history of justices who sit on the Supreme Court. Up through mid-2020, 114 people have served as Supreme Court justices. More than 97 percent have been White, and more than 96 percent have been men. (4) Of all the Supreme Court justices who have served since the Civil War, more than 65 percent have been nominated by Republican presidents.

Controversies Surrounding Some Court Nominations

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

and makes new appointments, you should be aware of the following controversies because they either will, or probably have, been mentioned in the news:

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

Clarence Thomas—In 1991, President George H. W. Bush appointed Clarence Thomas to replace Thurgood Marshall, who had retired from the Supreme Court due to his failing health. An important point to note is that while both justices are African-American, Marshall was a prominent liberal with an historically long progressive interpretation of the Constitution. Thomas was an up and coming conservative originalist. Thomas' Senate confirmation hearings became a national television event. Anita Hill, who had worked for Thomas when he led the Equal Employment Opportunity Commission (EEOC), accused him of pestering her for dates, sexually harassing her, and creating a hostile workplace environment replete with crude references to sex and pornography. Keep in mind that the EEOC is charged with investing federal sexual harassment cases. In one of his worst public acts, Senator Joe Biden, Democratic chair of the all-male, all-white Senate Judiciary Committee that was holding the hearings, allowed Thomas to testify before and after Hill and refused to bring in other witnesses who would have corroborated Hill's account of Thomas' behavior. The Republican Senators who went after Hill in the hearing—Arlen Specter, Orrin Hatch, Strom Thurmond, Alan Simpson, and John Danforth are a few who stand out—showed how out of touch they were on sexual harassment issues. Thomas was approved by a 52-48 vote. Perhaps the only good things to come out of this tragedy is that a few more women were subsequently elected to the Senate, and EEOC workplace sexual harassment reports more than doubled. (6)

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

Brett Kavanaugh—When justice Anthony Kennedy announced his retirement in 2018, it afforded President Trump an opportunity to replace a swing-voting centrist with a solid conservative, thus tilting the court even more to the right. Trump appointed conservative Brett Kavanaugh. During the confirmation process, Kavanaugh's high school classmate Christine Blasey Ford came forward with sexual assault allegations that had

allegedly happened when the two were in school together. Blasey Ford was, by all accounts, a credible witness. Kavanaugh vehemently denied the allegations and launched partisan invective at the Democratic senators on the Judiciary Committee. Classmates who knew Kavanaugh at Yale University made similar allegations, but they were not heard at the hearings, and the FBI did a superficial job of investigating them. (8) Moreover, Kavanaugh's opponents raised credible allegations during the confirmation process that he had perjured himself on multiple topics. (9) Nevertheless, the Republicans were not of a mind to seriously probe those allegations. Kavanaugh was approved by a vote of 50-48.

Amy Coney Barrett—Remember Merrick Garland from 2016? At the time, Republicans said that President Obama should not be able to seat a new Supreme Court justice in an election year. That was February of 2016, a full eight months before the election. When justice Ruth Bader Ginsburg died in September of 2020, less than two months before the election, the Republicans set aside their earlier stand and rushed through the nomination of Amy Coney Barrett to sit on the Court. Hypocrisy aside, this move swapped a progressive voice like Ginsburg for a conservative one like Barrett. Every Democratic senator voted against Barrett's nomination, but it was passed 52-48. Barrett's confirmation solidified a 6-3 conservative majority on the Court that appears to be committed to weakening the voices of ordinary Americans through its endorsement of gerrymandering, barriers to voting, and unfettered money in the electoral process. (10)

Staffing the Rest of the Federal Judiciary

Before we leave the topic of appointing and confirming Supreme Court justices, we should also take a look at recent developments regarding other federal judgeships. Speaking plainly, the federal judiciary has become politicized to a remarkable degree. This has occurred in the past as well, but you should know about **politicized partisanship:** we are in a **highly politicized time with respect to the federal judiciary**. Congressional partisanship has not only led to contested nominations, but it has spilled over into the judiciary, such that battles lost in Congress manifest themselves as wars in the federal courts. It is also clear that **Republicans have been particularly aggressive and successful in packing the courts with conservative judges**. How have they accomplished this? Via the following three mechanisms:

Creating a conservative judicial strategy—In recent decades Republicans have been far more unified and strategic with their approach to the federal judiciary than have Democrats. They saw in the 1950s, 60s, and 70s that a centrist federal court system was amenable to civil rights, female bodily integrity, economic regulations, and environmental regulations. They developed a strategy to turn that tide. The **Federalist Society** has been key to that strategy. Founded in 1982, the Federalist Society supports and cultivates conservative law students and jurists. It has been funded with tens of millions of dollars by a who's who of deep-pocketed conservatives, including the Koch brothers—oil, chemicals, commodities, fertilizer; the Scaife family—oil, aluminum, banking; the Templeton Foundation—Wall Street investments; the Searle Foundation—pharmaceuticals; Exxon—oil; Chevron—oil; Google—Internet search and advertising; Verizon—telecommunications; and the U.S. Chamber of Commerce—business interests. (11) The Federalist Society "educates" law students and early career jurists to cut federal regulations, take an originalist approach to Constitutional interpretation, defend corporate personhood, and embrace a social-Darwinian approach to the question of whether government policies should help improve ordinary peoples' lives. Young lawyers know that the best way to advance their career is to tow the Federalist Society line. The Federalist Society is comfortable enough in its role that it regularly hosts fundraisers in which big donors have access to Supreme Court justices like Antonin Scalia, Clarence Thomas, and Samuel Alito. (12) The liberal alternative to the Federalist Society is the American Constitutional Society, which doesn't have nearly as large a stable of billionaire and corporate

donors. Moreover, Democratic presidents have thus far not been particularly strategic in their federal judiciary nominations.

Stalling judicial nominations during the Obama administration—When Barack Obama became president following the 2008 elections, Senate Republicans were determined to deny as many of his judicial appointments as possible. We've already mentioned the Merrick Garland Supreme Court nomination that they blocked altogether, but their obstruction extended to lower federal bench seats as well. While Republicans were in the minority, they used the filibuster, requiring a cloture motion to end it. According to the nonprofit, PolitiFact, "cloture was filed on thirty-six judicial nominations during the first five years of Obama's presidency, the same total as the previous forty years combined." (13) Frustrated by the obstruction, Democrats changed the Senate rules to no longer allow lower court nominations to be filibustered. When Republicans regained the majority in the Senate following the 2014 elections, they were in a position to significantly hamper Obama's nominations, which they certainly did. Consider that majority Democrats approved 68 of Republican George W. Bush's court nominees in the final two years of his presidency, while the majority Republicans approved just twenty of Democrat Barack Obama's nominees. As a result, Obama left office with an astonishing 107 federal court seat vacancies—twice as many as when Bush left office. (14)

Rushing nominations through during the Trump administration—Once President Trump took office, Senator McConnell and his fellow Republicans ramped up the judicial approval process to get as many young conservatives on the federal bench as possible. Their fevered pace was such that McConnell bragged at a campaign rally that he and Trump were "changing the federal courts forever." (15) Of Trump's first eighty-seven judicial nominations, 92 percent were white, and the Trump administration placed a strong emphasis on getting originalists and textualists on the federal judiciary. (16) Equally disturbing, more than twenty of Trump's appointees refused to say whether the unanimous *Brown v Board of Education* (1954) decision against segregated schools was correctly decided. (17) The Trump administration essentially turned over its vetting federal judicial nominations to the Federalist Society. According to Amanda Hollis-Brusky, author of *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution,* "When you look at [Trump's] list of judges and the people that he's put on the bench, it's been entirely controlled by the Federalist Society." (18)

From a strictly political science point of view, it will be interesting to see how the most recent phase of judiciary politicization will play out. Control of the Senate is key, and the Biden administration maintained Democratic control of the Senate throughout his first term. A federal judiciary that hews to originalism, textualism, and conservative values will undercut the ability of progressives to implement the kinds of federal programs that they argue would benefit ordinary people. More about those values in upcoming chapters.

What if . . . ?

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

References

1. Ian Millhiser, "What Trump has Done to the Courts, Explained," *Vox*. December 9, 2019.
2. Michael Hudson, "Should There Be a Supreme Court? Its Role has Always Been Anti-Democratic." *Counterpunch*. July 7, 2023.

3. Lesley Kennedy, "This is How FDR Tried to Pack the Supreme Court," *History.com*. October 28, 2018.
4. Only Thurgood Marshall, Clarence Thomas, and Sonia Sotomayor are people of color. Only Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan are female.
5. Sarah Pruitt, "How Robert Bork's Failed Nomination Led to a Changed Court," *History.com*. October 28, 2018.
6. David A. Kaplan, "Anatomy of a Debacle," *Newsweek*. October 20, 1991. Julia Carpenter, "How Anita Hill Forever Changed the Way We Talk About Sexual Harassment," *CNN Money*. November 9, 2017. See also various videos here, here, and here.
7. Rebecca J. Rosen, "Neal Katyal: Senate's Obstruction of Merrick Garland 'Was Unforgivable,'" *The Atlantic*. June 27, 2017. Ron Elving, "What Happened with Merrick Garland in 2016 and Why It Matters Now," *NPR*. June 29, 2018.
8. Mimi Rocah, "Confirmed: Powerful Men Ignored Women in Short-Circuited Brett Kavanaugh Investigation," *USA Today*. September 17, 2019. Robin Pogrebin and Kate Kelly, *The Education of Brett Kavanaugh: An Investigation*. New York: Penguin, 2019.
9. Tara Golshan, "Did Brett Kavanaugh Perjure Himself? The Debate, Explained," *Vox*. October 2, 2018.
10. Jane Chong, "The Amy Coney Barrett Hearings Were a Failure," *The Atlantic*. October 16, 2020.
11. See Sourcewatch, and Polluterwatch.
12. Stephen Spaulding, "Federalist Society Big Donors Land Very Special Place at Justice Thomas' Table," Common Cause. December 5, 2013.
13. Allison Graves, "Did Senate Republicans Filibuster Obama Court Nominees More Than All Others Combined?" *PolitiFact*. April 9, 2017.
14. David G. Savage, "This Congress Filled the Fewest Judgeships Since 1952. That Leaves a Big Opening for Trump." *Los Angeles Times*. December 31, 2016.
15. Jake Johnson, "McConnell Brags He and Trump are 'Changing the Federal Courts Forever' With Extreme Right-Wing Judges," *Common Dreams*. November 5, 2019.
16. Richard Wolf, "Trump's 87 Picks to be Federal Judges are 92% White With Just One Black and One Hispanic Nominee," *USA Today*. February 13, 2018.
17. "Trump Judicial Nominees and Brown V. Board of Education," *Weekend Edition Sunday*. NPR. May 19, 2019.
18. "What is the Federalist Society and How Does it Affect Supreme Court Picks?" *All Things Considered*. NPR. June 28, 2018. Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution.* Oxford: Oxford University Press, 2019.

Media Attributions

- The Roberts Court, October 2022 © Fred Schilling is licensed under a Public Domain license

Chapter 34: The Interpretive Work of the Supreme Court

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

–Edwin Meese (1)

"Conservative justices use originalism when it justifies conservative decisions, but they become non-originalist when doing so serves their ideological agenda. This undermines any claim that originalism actually constrains judging and suggests instead that it is not a theory of judging at all but only a rhetorical ploy to make it appear that decisions are based on something other than political ideology."

–Erwin Chemerinsky (2)

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

Statutory Interpretation

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

How do justices go about interpreting federal statutes? There are several rules or conventions that justices apply as they interpret federal statutes, but we'll focus on just two. They compete with as well as complement each other. One of them is called textualism. Justice Oliver Wendell Holmes once famously wrote that "We do not inquire what the legislature meant; we ask only what the statute means." (5) **Textualism** refers to the desire to rely on the plain meaning of words when interpreting federal law. Textualism puts a burden on the legislature

to be clear when writing bills so that there will be no ambiguity when that statute is actually applied by the executive branch. Textualism is attractive to a justice, for it allows them to say that they are just acting like a baseball umpire, calling balls and strikes, using the statute's plain language. The justices apply what is known as the **plain meaning rule**, which is simply to say that if the statutory language is plain and unambiguous, it must be followed and applied to the case at hand. (6)

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

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

When Congress passed the Clean Air Act in 1970, it empowered the brand-new Environmental Protection Agency (EPA) to regulate air "pollutants," by which it meant things like particulates and sulfur dioxide coming out of tail pipes and smokestacks. What is a pollutant? Something that pollutes. And what does that mean? According to the *Cambridge English Dictionary*, to pollute means "to make air, water, or earth dirty or harmful to people, animals, and plants, especially by adding harmful chemicals or waste." (8) In 1970, congressional members were not thinking about the climate emergency, so the statute did not have carbon dioxide, methane, and other greenhouse gasses in mind when it charged the EPA with regulating pollutants. Under the Obama administration, the EPA began to regulate greenhouse gases as part of the United States response to the climate emergency. Now, imagine yourself as a Supreme Court justice, and litigants like the Chamber of Commerce, the state of Texas, and the American Chemistry Council are challenging the EPA's ability to regulate carbon dioxide. What was the legislative intent? What is the plain meaning of the word pollutant? In a series of complicated decisions along ideological lines, the Court has ruled that the EPA does, indeed, have authority to regulate greenhouse gases under the Clean Air Act provisions, but the Court does not agree that the EPA has unlimited freedom to act. (9)

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

Title 7 of the Civil Rights Act forbids an employer from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Originally passed in 1964, the Civil Rights Act's reference to "sex" was limited to differences between men and women, particularly with respect to women's ability to become pregnant and deliver children. Nevertheless, the Court interpreted the meaning of 'sex' broadly enough to encompass sexual harassment. Thus, both broad categories of sexual harassment—*quid pro quo* and hostile workplace environment—are violations of the victim's civil rights, regardless of whether the victim is male or female. More recently, the Court was called upon once again to interpret the meaning of "sex" in cases involving gay and transgender individuals. Gerald Bostock came out as gay and was fired from his child welfare coordinator job with Clayton County, Georgia. Aimee Stephens, after working for six years as a male funeral director, informed her employer that she was transgender and would thenceforth be coming to work as a woman. She was fired. In 2019, Bostock and Stephens both sued, hanging their cases on a broad interpretation of sex discrimination. During the case's oral argument, conservative justices fell back on textualism and expressed their concern that in 1964, congressional members did not intend to protect gay and transgender employees. Progressive justices, on the other hand, asked questions in oral argument that indicated their comfort with a broad interpretation because the intent of the Civil Rights Act was to prevent invidious discrimination. (10) In the end, the Trump administration reversed the Obama administration's position and argued against the LGBTQ employees in the Supreme Court, but the Court ruled 6-3 in *Bostock v. Clayton County* (2020) that the Civil Rights Act's reference to "sex" protected gay and transgendered employees.

Constitutional Interpretation

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

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

What are the purported advantages of originalism as an interpretive framework? For one thing—and this is a big appeal for conservatives—originalism fixes the meaning of constitutional language in the eighteenth century, unless there are subsequent constitutional amendments passed specifically to update that language.

Conservatives argue that originalism provides stability to the structure of the legal system. Another argument made in favor of originalism is that it keeps the judicial branch out of the business of legislating from the bench. According to this view, the Court's role is simply to interpret current laws in light of constitutional meanings that were fixed in 1787, not to legislate from the bench. Finally, originalism's advocates say that it keeps current judges from imposing their values on the law.

Originalism's critics point to numerous flaws. First, the Constitution's language is often unclear, calling into question the entire project of following the founders' "original intent." In fact, many phrases in the Constitution were intentionally broadly written, because a narrowly written document would not serve any republic for long. As Chief Justice Marshall wrote in *McCulloch v. Maryland* (1819), "We must never forget that it is a Constitution we are expounding," a Constitution "meant to be adapted and endure for ages to come." The founders themselves disagreed on many small and large matters before, during, and immediately after the Philadelphia Convention. Consider George Mason, who stayed for the entire convention and became a fierce opponent of the Constitution–because of its lack of a bill of rights, of the way the executive branch was constituted, of the pardon power, of the elastic clause, of the supremacy clause, and other provisions. (13)

We might add that important words used in the Constitution have dramatically changed their meaning in the intervening centuries. Are we locked into the meaning of "cruel and unusual punishment" from 1787? What about "equality?" What would the founders have thought about "unreasonable" searches if they had known about GPS trackers, infrared cameras, and other enhanced means of gathering information about a person? Given what we know about how tremendously difficult it is to formally amend the Constitution, an originalist's approach to constitutional interpretation effectively ties the political system's hands as it tries to adapt to ever-changing social norms and economic conditions.

An additional argument against originalism is that even its advocates only apply it selectively. Originalist justices have turned the Second Amendment into an almost unfettered individual right for anyone to own massively destructive weapons, when most jurists and historians believe it was intended to be a collective right to preserve state militias from federal encroachment. Originalist justices have also granted corporations—which aren't even mentioned in the Constitution—the right to free speech, and they have defined free speech such that it allows corporations to support political candidates. There is no support in the text of the Constitution or the historical record that the founders wanted huge corporations funding our politicians. Originalism, then, has become a convenient fiction that conservative justices employ when it is useful, but disregard when it is not.

Given the difficulty of knowing what certain phrases meant in 1787, the changing meaning of words over time, and the justices' tendency to cherry pick language and historical conditions they like while ignoring those they don't, originalism does not prevent justices from imposing their values. Indeed, originalism is largely a ruse whereby conservative justices legislate their values from the bench and pretend that they are not doing so. The implications of this are profound, as the Supreme Court and lower federal courts follow the rabbit hole of conservative originalism, which results in loss of bodily autonomy for women, the intertwining of religion and government, the inability of government to effectively protect people from environmental dangers, and the proliferation of guns throughout society. Indeed, speaking of the originalist argument on the Second Amendment, attorney and professor Madiba Dennie argues that "by its very nature, originalism threatens women and other minority groups who were disempowered at the time of the Constitution's adoption." (14)

A final argument against originalism comes from **legal realism**, which is a political science and legal school-of-thought, arguing that justices use contrivances such as originalism, textualism, intentionalism, and other interpretive methods to support their own policy preferences. As law professor and author Eric Segall put it, "justices' decisions are driven primarily by their personal values." (15) Originalists do not have some special power that allows them to divine the founders' "original intent" or the "plain textual meaning" of the Constitution's words.

If we take legal realism seriously, we have to conclude that the justices' interpretive work is highly shaped by their political values. Value choices are inevitable when cases get to the Supreme Court. The obvious next question becomes: What values should guide a justice when interpreting the Constitution? Conveniently—and this is one of the geniuses of the document—the Constitution does a wonderful job of articulating its values. Legal scholar Erwin Chemerinsky argues that the **Constitution articulates five important core values**. Four of these are right in the Constitution's preamble*:*

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

Chemerinsky argues that we should rely on the preamble to guide us toward four important values:

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

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

- **Equality**—We the people chose to add the Fourteenth Amendment to the Constitution, which contains the equal protection clause: No state shall "deny to any person within its jurisdiction the equal protection of the laws." The Court then chose to apply that principle to the federal government as well as the states, for it makes no sense to hold the states to a standard not applicable to the federal government. (16)

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

References

1. Speech by Attorney General Edwin Meese III before the American Bar Association on July 9, 1985.
2. Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism*. New Haven: Yale University Press, 2022. Page 139.
3. The rules and conventions of statutory interpretation are similar to those used when the Court interprets regulations issued by executive branch agencies, but we'll focus here only on statutory and constitutional interpretation.
4. Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*. Congressional Research

Service. September 24, 2014. Page 1.
5. Quoted in Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*. Saint Paul: Thomson/West, 2012. Page 29. Original source is Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harvard Law Review. 417, 419 (1899).
6. Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*. Congressional Research Service. September 24, 2014. Page 3.
7. Quoted in James D. Zirin, *Supremely Partisan. How Raw Politics Tips the Scales in the United States Supreme Court*. Lanham, MD: Rowman & Littlefield. Page 233. Original source is *Giuseppi. V. Walling*, 144 F2d 608, 624 (2ndCir. 1944).
8. Cambridge English Dictionary online.
9. Erica Martinson, "SCOTUS Nibbles at EPA Powers," Politico.com. June 23, 2014.
10. Nina Totenberg, "Supreme Court Hears Arguments on LGBTQ Employment Rights Case," National Public Radio *All Things Considered*. October 8, 2019.
11. Quoted in Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*. Saint Paul: Thomson/West, 2012. Page 81.
12. Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*. Saint Paul: Thomson/West, 2012. Page 82.
13. See George Mason, *Objections to the Constitution of Government Formed by the Convention*. September, 1787.
14. Madiba Dennie, "Originalism is Going to Get Women Killed," *The Atlantic*. February 9, 2023.
15. Eric J. Segall, *Originalism as Faith*. Cambridge: Cambridge University Press, 2018. Page 4.
16. Erwin Chemerinsky, *We the People. A Progressive Reading of the Constitution for the Twenty-First Century*. New York: Picador, 2018. Pages 53-81.

Media Attributions

- Bostock © Elvert Barnes is licensed under a CC BY-SA (Attribution ShareAlike) license

Chapter 35: The Supreme Court as an Ideological Actor

"In class background and political proclivity, the justices (and federal judges at other levels) have more commonly identified with the landed interests than with the landless, the slave owners rather than the slaves, the industrialists rather than the workers, the exponents of Herbert Spencer rather than of Karl Marx."

–Michael Parenti (1)

It is clear from previous chapters that the Supreme Court—indeed, the federal judiciary broadly—is a political actor and that we are currently in a period in which the composition of the federal courts is a highly politicized issue. There is strong evidence, for example, that Court votes have increasingly split between justices appointed by Republican versus Democratic presidents. (2) In this chapter, we want to see if we can make some generalizations about the Supreme Court as an ideological actor. Litigants who come before the Court represent particular interests, and it would be helpful for us to know which interests tend to win before the Court more often than other interests. Those patterns reveal the Court's fairly clear ideological tenor illustrated by Parenti's quote above, although we can certainly identify exceptions to the rule.

Ideological Terminology

As this might be your first, but hopefully not only, political science course, you might be confused by the terms used to describe political ideologies. There's a good reason for that: they're confusing! American ideologies are, as a group of legal scholars wrote, "imperfectly overlapping." (3) Nevertheless, we can try to group ideological terminology in somewhat coherent ways. The terms associated with the two predominant ideologies in America group together like this:

The terms conservatism, neo-liberalism, classical liberalism, and cultural conservatism all hang together even though those group's adherents don't necessarily agree with each other. For example, a cultural conservative might want to ban all forms of what they would call pornography, but neo-liberals don't get up in the morning wanting to ban pornography. And classical liberals would positively recoil at a government powerful enough to dictate what materials adults could access. We should also keep in mind that the impulses of cultural conservatism, neo-liberalism, and classical liberalism can coexist inside the head of an individual conservative. Humans are complicated. Nevertheless, for our purposes here, we are going to refer to the people in this entire category as conservatives and lump all of these impulses together under the conservatism label.

The terms liberalism, progressivism, social-welfare liberalism, and democratic-socialism all hang together even though those group's adherents don't necessarily agree with each other. For example, there is a fairly strong wing of liberals who have no interest in promoting the kind of single-payer healthcare system that really gets progressives and democratic-socialists excited. In fact, many on the left side of this grouping would say that what they call corporate or Wall Street liberals are really just conservatives. Just as with conservatism, individuals on the left side of the American political spectrum can have liberal, progressive, and democratic-socialist impulses coexisting in their brains at the same time. For our purposes here, we are going to refer to people in this entire category as progressives and the ideology as progressivism. We should be clear, though,

that this large tent of people includes democratic socialists but does not include true socialists whose aim is to dismantle capitalism.

Conservatism and Progressivism

If there is one thing that unites conservatives, it is defending existing privilege and power. **Hierarchy**—or a "chain of subordination," as Edmund Burke famously put it when criticizing the French Revolution—is very important to conservatives. Conservative defenses of monarchy gave way in the wake of the French Revolution to a more principled set of arguments that adapted to the particular set of privileges and power that conservatives sought to defend. Conservatives believe that some people are fit to rule others in the political sphere as well as private spheres of families, farms, factories, and offices. Political scientist Corey Robin nicely summarizes conservatism's primary aim: "Conservatism is the theoretical voice of . . . animus against the agency of the subordinate classes. It provides the most consistent and profound argument as to why the lower orders should not be allowed to exercise their independent will, why they should not be allowed to govern themselves or the polity. Submission is their first duty, and agency the prerogative of the elite." (4) What does this mean in practice? Conservatives opposed granting women and minorities the right to vote; they opposed civil rights legislation designed to protect people from discrimination; they oppose workers' ability to organize; they oppose women's ability to control their bodies; they oppose corporation and bank regulations; they oppose national health insurance that would empower people *vis a vis* their employers; they oppose campaign finance regulations and disclosure laws; they support expanding police power in poor neighborhoods while limiting it for white-collar criminals. As the demands of progressive movements have changed over time, conservatism has risen to defend the prerogatives of those who stood to lose power or privilege.

If there is one thing that unites progressives, it is the belief in using government power to help people live full lives, solve social problems, and counter the power of business interests. In the twentieth and twenty-first centuries, progressives have made the case that the traditional political rights of voting, freedom from unreasonable searches and seizures, free speech, etc. only guarantee negative freedom—freedom from government intrusion—and that they ought to be supplemented by positive social and economic rights. If we can guarantee people freedom of speech, can't we also guarantee them health care, adequate housing, and a living wage? In 1945, Franklin Roosevelt gave his last state of the union speech in which he called for a **Second Bill of Rights** that would have guaranteed employment with a living wage, adequate housing, medical care, social security, and a good education. Some of those provisions have been enacted at either the federal or state level, but others have not. In addition to the Social Security system, the United States added programs such as Medicare, Medicaid, subsidized school meals, taxpayer-financed public education, and a variety of social welfare programs aimed at providing people a safety net. By the latter half of the nineteenth century, it became increasingly clear to many progressives that most people had less to fear from government tyranny than they did from corporate predation. Large corporations are able to control peoples' social and economic lives to a great extent. Progressive critics argue that corporations distort democracy in many ways. Finally, progressives have been at the forefront of ensuring equal rights for people regardless of race, sex, national origin, and religion.

The Historical Behavior of the Supreme Court

Given this quick background in political ideologies, what conclusions can we reach about the Supreme Court as an ideological actor? Perhaps the best thing for us to do is to review the Court's actions over the course

of American history with an eye toward the ideological distinctions made above. The Supreme Court's history shows that it fits firmly in the conservative ideological tradition, although it has at times acted progressively on issues such as civil rights and the rights of the accused. As journalist and Harvard Law School graduate Adam Cohen states, "The conservative majority has been on a campaign for the past 50 years to shift the law in ways that lift up businesses and wealthy individuals and push down the middle class and the poor, and it has had great success." (5)

Let's look at three specific areas:

The Supreme Court as Enforcer of Corporate Hegemony

Of By and For the Corporations

The Court reveals its ideological character most strongly in its friendship to corporate America at the expense of working people. Even though corporations are not mentioned in the Constitution, the Court has worked hard to ensure that corporate prerogatives are enshrined in the law of the land and woven throughout the very core of daily life. States began chartering corporations in the late eighteenth and early nineteenth centuries. As early as 1819, the Court recognized that a corporate charter—in this case one granted by the King of England before there was a United States—constituted a contract that states could not revoke or even change. (6) After the United States adopted the Fourteenth Amendment in 1868 with its protections for the life, liberty, property, due process and equal protection of the laws for "persons," the Court moved quickly to break down the long-established distinction between **artificial persons**—i.e., corporations and other organizations allowed to exist by state charter—and **natural persons**—actual living, breathing human beings. The railroad companies led the charge and the Court complied: even before argument had been heard, Chief Justice Waite announced that "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." (7) In fact, there was no legal precedent for erasing the distinction between artificial and natural persons, and it was clear from the congressional deliberations over the Fourteenth Amendment that senators and representatives were not thinking about corporations when they wrote it. Retired Montana state supreme court justice James Nelson nicely summarized the constitutional case against corporate personhood:

"If you read the original federal Constitution and Bill of Rights, you will find there are no rights given to any non-human legal entity–corporations, associations, partnerships, for example. Not a single, solitary right. Indeed, the Constitution and Bill of Rights do not even contain the word corporation. And with good reason. The Framers did not trust big business." (8)

Thus unleashed, corporations were able to use federal and state courts to thwart democratic control, as courts struck down child labor laws, maximum hours laws, and a bevy of regulations designed to make working life bearable. For instance, the Supreme Court has ruled several times that corporate rights under the Fourth Amendment prevent authorities from random and unannounced inspections. This makes it rather difficult to enforce environmental, safety, or health regulations. (9) Similarly, corporate commercial speech has become

extremely difficult to regulate because of the way the Supreme Court has interpreted the First Amendment in favor of corporations. The Court, for example, forbade conservation laws that banned electric utilities from promoting electricity use and struck down laws requiring that advertised health claims be backed up by scientific evidence. (10) The Court ruled in the *Citizens United* case (2010) that the First Amendment means that corporations can spend unlimited amounts of money on "electioneering communication." According to Senator Sheldon Whitehouse, "After *Citizens United*, if you are in America's corporate elite, you have been given a super-powered voice and pocketbook to put to work in politics, on top of your own," a power that the Founders never imagined nor would have wanted. (11)

The Court ruled in *Americans for Prosperity v. Bonta* (2021) that the First Amendment's freedom of association forbids states from requiring the disclosure of wealthy donors to non-profit organizations that influence politics. In *West Virginia v. Environmental Protection Agency* (2022), the Court went out of its way in a case that had become moot to limit the EPA's ability to regulate the energy sector. The *Hobby Lobby* case (2014) allowed for-profit corporations the right to exercise religious freedoms that are protected by the First Amendment. Enabled by an earlier hijacking of the Fourteenth Amendment's protections for "persons," Harvard Law School professor John Coates, IV, comments in a broader historical and political context on the Court using the First Amendment to empower corporations:

"The corporate takeover of the First Amendment represents a pure redistribution of power over law with no efficiency gain. . . That power is taken from ordinary individuals with identities and interests as voters, owners and employees, and transferred to corporate bureaucrats pursuing narrowly framed goals with other people's money. This is as radical a break from Anglo-American business and legal traditions as one could find in U.S. history." (12)

Overall, how well do business interests fare before the Supreme Court? Beginning in the late 1960s, businesses became more aggressive about pushing cases to the Supreme Court. Republican appointed justices are more pro-business than Democratic appointees, but even Democratic appointees have become more pro-business over time. According to one study, the proportion of pro-business Supreme Court decisions roughly tripled from the late 1960s to the early 2000s. According to another study, the Court ruled in favor of the U.S. Chamber of Commerce's position 43 percent of the time from 1981-86, 56 percent of the time from 1986-2006, and 70 percent of the time from 2006-22.(13) According to Empirical SCOTUS, over several years the Court ruled in a pro-business fashion between 57 percent and 81 percent of the time. (14) In other words, since the early 1980's, business interests have gone from having roughly a 50/50 shot at winning at the Supreme Court to now being the odds-on favorites to prevail.

Let's quickly illustrate the pro-business tilt of the Court in a quick story. In its *Chevron v. Natural Resources Defense Council* (1984) decision, the Court instituted the **Chevron Doctrine** by giving the Environmental Protection Agency the latitude to lessen emissions regulations that affected the Chevron corporation. That decision allowed a Republican administration to serve businesses with lenient policies. Then, in 2024 during a Democratic administration, when conservatives were worried about government agencies interpreting laws aggressively to protect people from pollution, protect the environment from excessive carbon emissions, and protect the oceans from overfishing, the Court reversed the Chevron Doctrine. In *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo,* the Court ruled that executive agencies did not need to receive deference from federal judges in the interpretation of vague laws passed by Congress. These decisions put federal judges, who lack expertise on the technical matters with which agencies deal, squarely in the driver's seat. This is a decidedly pro-corporate legal development.

Before we leave the issue of the Court's privileging corporations in the American social hierarchy, we should pause to note the Court's antipathy to workers' interests. In *Lochner v. New York* (1906), the Court struck down state laws limiting the hours that employers could force employees to work, saying it was a violation

of the freedom of contract. As we noted before, the Court came around after Roosevelt's court-packing plan to endorse many regulations. However, in the modern era, justices have been on a spree when it comes to privileging corporations over their workers. They undercut public service unions in 2018 by forbidding them from making all employees pay fees to defray the costs of negotiating agreements, even if all the employees are covered by those wage and working condition agreements. (15)

The Supreme Court and Democratic Governance

Standing in Line to Vote

Robert Kaplan, the former legal affairs editor for *Newsweek*, argues forcefully that America's continual deference to "nine unaccountable judges" constitutes "a disdain for democracy." (16) Kaplan is correct, even though the Court occasionally acts to uphold democratic principles. For instance, the Court famously struck down legislative districts that were grossly unequal in population as a violation of the one-man, one-vote principle. (17) If you live in a district with 30,000 voters, and I live in one with 100,000 voters, your vote for representative is more determinative of who wins than is mine, and your representative has fewer constituents to represent. To its credit, the Court disallowed such disparities. The Court also applied that principle when striking down conservative efforts to count only eligible voters for the purposes of drawing legislative boundaries. The Constitution is clear that legislative districts are based on the number of persons, not eligible voters. (18)

Still, the Court has acted in remarkably undemocratic ways at key moments in American history. The Court has, in the words of constitutional scholar Erwin Chemerinsky, "enforce[ed] the Constitution against the will of the majority" when it should be protecting "the rights of minorities who cannot rely on the political process and. . .uphold[ing] the Constitution in the face of any repressive desires of political majorities." The Court has, says Chemerinsky, "often failed where and when it has been most needed." (19) Let's quickly review four prominent examples:

Partisan Gerrymandering—We'll talk in more detail about gerrymandering in a later section on electoral politics. Basically, it refers to willfully drawing election district boundaries to achieve a political end. The Court has ruled that drawing such boundaries to disadvantage a particular race is unconstitutional because it violates the one-man, one-vote principle in a way that exhibits racial animus. (20) But there are other forms of gerrymandering. Once geo-mapping and big data technology became easily available to state parties and legislators, they used these technologies to engage in **partisan gerrymandering**, which is when the majority party in a state draws legislative districts to make it difficult for the opposition party to win seats in the state legislature or U.S. House of Representatives. As we'll see later, such practices are obviously unfair assaults on the very nature of American democracy. However, the conservative majority on the Supreme Court declined to do anything about partisan gerrymandering, even when the results effectively disenfranchise millions of American voters. The majority said the issue was a "political question" for state legislatures to resolve. (21) Of course, it is primarily majority parties in state legislatures that are causing the problem, so the Court's decision amounts to giving a pass to continue this particular anti-democratic practice.

The 2000 Presidential Election—***Bush v. Gore* (2000)** illustrates the Court's animus toward democracy and its willingness to set aside its own precedents when given a chance to hand the presidency to their preferred

Republican candidate who was lagging behind in both the popular and electoral college vote. On election night, it was clear that Democrat Al Gore was ahead of Republican George W. Bush in the national popular vote as well as the electoral college vote. In Florida, however, Bush was ahead by .061 of 1 percent in the initial vote tally. As per state law, Gore asked for a recount. Florida's Secretary of State, Katherine Harris, who was also Bush's state campaign manager, abused her office by trying to shut down the recount. The Florida Supreme Court ordered the recount to continue. The U.S. Supreme Court, at Bush's request, stepped into the case while Harris refused to extend deadlines for recounts, and the Florida Elections Canvassing Commission certified Bush as the winner with 537 more votes than Gore. On Friday, December 8, the Florida Supreme Court again ruled in Gore's favor and ordered Florida's Supervisor of Elections and the Canvassing Board to continue with manual vote recounts.

The U.S. Supreme Court heard arguments in *Bush v. Gore* on December 7 and then again on December 11. In a 5-4 decision, the U.S. Supreme Court decided along ideological lines to overturn the Florida Supreme Court's actions. Specifically, the Court said that the Florida Supreme Court's decision failed to specify how all counties should do the recount and therefore violated the Fourteenth Amendment's equal protection clause, even though the Florida Supreme Court had designated a single judge to hear all disputes, thus guaranteeing a single standard. Even worse, the majority opinion specifically said that the U.S. Supreme Court's particular interpretation of the equal protection clause was a one-off and should not be precedent setting. As the dissenting justices mentioned, the solution to the Court's ruling was simply to remand the case back to the Florida State Supreme Court and ask it to establish clear standards for the recount. Instead, the conservatives on the U.S. Supreme Court stopped the recount altogether, thus handing a 537 vote margin and the Florida victory to Bush, which allowed him to squeak by in the electoral college by one vote.

Constitutional scholar Erwin Chemerinsky, who does not believe the five conservative justices acted in a partisan way, nevertheless puts *Bush v Gore* "among the worst decisions in history." The Court stepped into a case that "it had no business hearing and deciding." For one thing, there was an established state process for resolving the issue, and the Court should never have taken the case. For another, the Court assumed prematurely that Bush had already suffered a wrong that it could address, when in fact it was unknown whether Bush or Gore would have prevailed in the recount. (22)

The Voting Rights Act—One section of the **Voting Rights Act** that was passed in 1965 required that states with a documented history of voting discrimination—mostly Southern states that had worked overtime for nearly a century to deny voting rights to African Americans—receive "**preclearance**" from the Justice Department or the United States District Court in Washington, DC, before implementing changes to their election laws. The purpose of preclearance was to ensure that states would not revert to election practices that overtly discriminated or that had discriminatory effects. The Voting Rights Act has been tremendously successful. In 1956, Black turnout was about fifty percentage points below that for Whites, whereas now, voting rates are roughly equal for both Whites and Blacks. Further, in 1965, there were only about 1,000 African Americans in elected office around the country, whereas by 2015, that number surpassed 10,000 office holders. (23)

In 2006, Congress reauthorized the Voting Rights Act, including the preclearance provision, for an additional twenty-five years. It passed unanimously in the Senate and with only thirty-three "nay" votes in the House. Between 1982 and 2006, the Justice Department had blocked over 700 voting changes, which is an indication that the preclearance states were still inclined to pass discriminatory voting practices. (24) Shelby County, Alabama, sued the U.S. Attorney General, arguing that the preclearance provision was unconstitutional. In a 5-4 decision, the conservative justices on the Court agreed with Shelby County in ***Shelby County v. Holder* (2013)** and said that the preclearance provision was out of date and unconstitutional. Combined with the Court's disinterest in the negative effects of restrictive state voting laws, *Shelby County* has signaled that the Court will allow a variety of attempts to reduce the number of minorities, college students, and poor

people from exercising their voting privileges. A study by the Brennan Center for Justice found that since the Shelby County decision, the voting gap between Whites and people of color has grown. This is particularly true in areas that had previously been required to preclear their changes to voting laws. They purged voters from voting rolls at twice the rate of areas not originally covered by preclearance. Those purged were disproportionally people of color. (25) In a separate study of the impact of the Shelby County decision, scholars found that "the largest declines in turnout are in counties with above median shares of Black and Hispanic residents; that is true regardless of county partisan composition." (26)

During the 2020 Coronavirus pandemic, the Court repeatedly acted to make it more difficult for people to vote. In the Wisconsin primary that year, the conservative majority blocked a lower court order that extended the period to return absentee ballots. This forced voters to stand in long lines during a pandemic to ensure that their votes counted. The conservative majority also blocked a lower court order in Alabama that would have made it easier for Alabamians to use absentee ballots rather than stand in lines. The Court refused to hear a challenge to a Texas law that makes it easy for older voters to use absentee ballots, but not those under the age of 65. (27)

Most recently, the conservative majority on the Court overturned a district court finding that two Arizona laws violated section 2 of the Voting Rights Act, which prohibits state election practice that "results in a denial or abridgement of the right. . .to vote on account of race or color." One of the Arizona laws forbade anyone but family members or a postal worker from collecting ballots from voters to deliver to polling places—a provision that disproportionately affects Native American living in tribal lands that do not have reliable mail services and that are far removed from polling places. The second Arizona law invalidated the entire ballot of anyone who accidentally votes in the wrong precinct, even though votes for governor, U.S. senator, and president aren't specific to precincts. Since Arizona officials tend to frequently change precinct boundaries, the lower court accepted that this would have a disproportionate impact on voters of color. The Supreme Court thought otherwise and sustained the Arizona laws, sending a strong signal to conservative state legislators that they can pass a range of election laws whose impact is to make the voting process more difficult for targeted populations. (28) In so doing, the Court further weakened the Voting Rights Act as a tool to promote democratic equality.

The most telling feature of the Court's approach to democratic governance is its willingness to violate basic principles to accomplish what appears to be a goal of limiting the voice of ordinary people. It refrains from acting in some cases like the *Rucho* one on gerrymandering, citing its unwillingness to decide a "political question." However, in other cases like *Shelby County* and *Brnovich* on the Voting Rights Act, the Court goes out of its way to gut the obvious intent of Congress to prevent voting discrimination by states–and does so using standards that are not in the Voting Rights Act. As the Campaign Legal Center concluded, because "it is difficult to pinpoint any principled and legitimate through-line in these decisions," the Court's decisions "have done, and continue to do, damage to voters, American democracy generally, and to the legitimacy of the Supreme Court itself." (29)

The Major Questions Doctrine—Once firmly established in the majority on the Court, conservatives invented what they call the **major question doctrine** and have used it to undermine the will of the majority as expressed in Congress. The major questions doctrine holds that the Court may cancel any action of a federal agency if they deem it of "vast 'economic and political significance,'" and if they feel that Congress's grant of authority to the federal agency was not clear and specific enough. (30) Consider the following examples of the Court short-circuiting democracy:

- During the COVID-19 pandemic, the Biden administration used the Heroes Act to forgive up to $20,000 in student debt. It relied on the Heroes Act, which was passed unanimously by Congress in 2002 and signed by President George W. Bush. The Heroes Act allows the secretary of education to "waive or modify any

statutory or regulatory provision applicable to the student financial assistance programs. . .as the Secretary deems necessary in connection with a war or other military operation or national emergency." The pandemic was a national emergency. The legislation appears clear, but the Court ruled 6-3 in *Biden v. Nebraska (2023)* that such action by the Biden administration was unconstitutional.

- In *West Virginia v. Environmental Protection Agency (2022),* the Court went out of its way to use the major questions doctrine to strike down the Obama-era EPA regulations that required many electric power generators to hit emissions reductions targets by 2030. As it turns out, the power generation industry met those targets by 2019—not because of the regulations but because it was in its economic interest to close older, dirtier (and expensive) plants and shift generation to newer, cleaner, and cheaper plants. The Obama-era regulations were clearly not of "vast economic and political significance" anymore, but the conservatives wanted to lay down a marker to say that the EPA did not have full authority to fight climate change via emissions reductions.

In the words of Ian Millhiser, the major questions doctrine is "breathtaking" in its implications and "makes the Supreme Court the final word on any policy question that Congress has delegated to an executive branch agency—effectively giving the unelected justices the power to override both elected branches of the federal government." (31) One seems on solid ground in assuming that the conservatives on the Court know that the conservatives in Congress—even if they are a minority—will be able to block specific and clear grants of authority to executive agencies to fight climate change, protect wetlands, improve workers' lives, and regulate financial institutions. Absent specific and clear grants of authority, the Court will be in the driver's seat when it comes to deciding what actions federal agencies can undertake to follow through on their Congressionally mandated missions.

The Supreme Court's Treatment of Women and Racial Minorities

Through much of its history, the exclusively White and male Supreme Court justices acted as though a key part of their charge was to maintain a social order in which women and people of color were relegated to second class status. It has only been through progressive changes in the law and the evolution of social norms that the Court was forced to embrace civil rights. Even then, the Court appears ever ready to look for opportunities to restrict the full emancipation of women and people of color.

Segregated Drinking Fountain Outside of a North Carolina Courthouse in 1938

From the beginning of the American republic until the 1950s, the Supreme Court acted as a strong enforcer of White supremacy. The Court held that people of African descent were "beings of an inferior order, and altogether unfit to associate with the white race" and that the rights of White people were not intended to apply to Black people. (30) It overturned the civil rights conviction of White men who killed African Americans. (31) The justices allowed segregation and discrimination on the part of hotels, restaurants, theaters, and other private businesses that served the public. (32) The Court upheld state laws banning interracial marriage. (33) The Court sanctioned state-mandated train segregation, which then applied to all sorts of public facilities like public schools and swimming pools. (34) This animus was not restricted to African Americans: the justices endorsed local authorities as they prevented a Chinese American girl from attending her local Whites-only school. (35) The

Court allowed the federal government to detain and put Japanese Americans–most of whom were citizens–into camps, absent any individual or collective evidence that Japanese Americans posed a security threat during World War II even though they should have had the "equal protection of the laws" afforded by the Fourteenth Amendment. (36)

Beginning in the 1950s, the Court began to support equal rights for racial and ethnic minorities. This change was caused and reinforced by societal changes and strong civil rights laws that Congress managed to pass over the objections of Southern Democrats. We'll talk more about those laws and court cases when we get to the section of the text that talks about civil rights. Suffice it to say that society forced the Court to end segregated education, segregated housing, bans on interracial marriages, voter discrimination, and employment discrimination based on race and ethnicity. However, as recently as *Abbott v. Perez* (2018), the Court upheld as legal a redistricting scheme that a lower court had determined was drawn to disenfranchise Black and Hispanic citizens. And in *Husted v. A. Philip Randolph Institute* (2018), the Court upheld a state voter purge law that had a disproportionate impact on people of color.

Interestingly, the Court needed to play less of a role enforcing gender hierarchy than it did for White supremacy for the simple reason that women's second-class citizenship was so taken for granted that women had difficulty pushing their issues to the highest court. Note that women's constitutional right to vote came fifty years after it did for Black men. Justices ruled 8-1 in 1873 that Illinois did not violate the Fourteenth Amendment's equal protection or privileges and immunities clauses when it would not allow women to be licensed to practice law. The Illinois court ruling that the Supreme Court upheld, said this: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth." (37) The Court allowed states to place limits on women's working hours when the Court, three years previously, had not allowed such limits on men's working hours. (38) The justices sanctioned the forced sterilization of women deemed to be mentally disabled. (39)

Beginning in the mid-1960s, the Court was finally forced to confront women as equals to men within the context of civil rights laws and changing social norms. To its credit, the Court endorsed access to contraception for both married and unmarried couples as well. (40) The Court legalized abortion on a progressively more restrictive trimester basis in its ***Roe v. Wade* (1973)** decision. The Court made it illegal to post job announcements that specified gender requirements. (41) It ruled that sexual harassment is a violation of Title VII of the 1964 Civil Rights Act. (42) Recently, however, the Court withdrew from women a constitutional right for the first time. In ***Dobbs v. Jackson Women's Health Organization* (2022)**, the conservative majority said that "the Constitution does not confer a right to an abortion" because it is not explicitly enumerated in the document and because the right to an abortion is not "rooted in the nation's history and tradition."

We can say with a fair degree of confidence that since the 1950s, with respect to race, and since the 1960s, with respect to sex, the Supreme Court has been forced by collective action and shifting societal norms to redeem itself. Only the public's vigilance with respect to federal statutes and a keen eye toward the kinds of justices that get appointed to the Court will ensure that the Court acts to uphold ordinary Americans' rights. Absent that vigilance, empowered elites will be inclined to push the Court to its historical pattern, which legal scholar Ian Millhiser so deftly summarizes:

> *"The justices. . .have routinely committed two complementary sins against the Constitution. They've embraced extra-constitutional limits on the government's ability to protect the most vulnerable Americans, while simultaneously refusing to enforce rights that are explicitly enshrined in the Constitution's text. And they paved a trail of misery as a result. Few institutions have inflicted greater suffering on more Americans than the Supreme Court of the United States."* (43)

In their book *Justice Deferred* the historian Orville Burton and the civil rights lawyer Armand Derfner see the

Court in a similar way. There is a dividing line on the Court, they argue, with progressive justices interpreting the Constitution and civil rights statutes "to mean the *most* they can mean," while conservative justices interpreting the Constitution and civil rights statutes "to mean the *least* they have to mean." The fact that conservatives have dominated the judicial branch through most of American history means that the Court has primarily acted as a conservative force in America, using its power to enforce a hierarchy in which subordinated classes and racial minorities have difficulty achieving agency and equality. (44)

What if . . . ?

What if the Supreme Court were a force for democracy and agency among ordinary people? What would be required for that to happen? Changes in the language of the Constitution? Changes in the kinds of people sitting on the Supreme Court? A revitalization of the importance of the Constitution's preamble in the adjudication of disputes?

References

1. Michael Parenti, *Democracy for the Few*, 9th edition. Boston: Wadsworth, 2011. Pages 249-250.
2. Lee Epstein and Eric Posner, "If the Supreme Court is Nakedly Political, Can it be Just?" *New York Times*. July 9, 2018.
3. Lee Epstein, William M. Landes, and Richard A. Posner, "How Business Fares in the Supreme Court." *Minnesota Law Review*. 97:1431. April 16, 2013. Page 1433
4. Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump*. 2nd edition. New York: Oxford University Press, 2018. Pages 7-8.
5. Adam Cohen, "Justice Breyer's Legacy-Defining Decision," *The Atlantic*. June 12, 2021.
6. *Dartmouth College v. Woodward*(1819).
7. *Santa Clara County v. Southern Pacific Railroad Company*(1886). Justice Waite quoted in William Myers, *The Santa Clara Blues: Corporate Personhood Versus Democracy*. III Publishing, 2000. Page 6.
8. Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights. New York: Liveright Publishing Corporation*, 2018. James C. Nelson, "There's No More Activist Court Than the US Supreme Court," *Counterpunch*. February 3, 2022.
9. William Myers, *The Santa Clara Blues: Corporate Personhood Versus Democracy*. III Publishing, 2000. Page 6. Refer to *See v. City of Seattle*(1967) and *Marshall v. Barlow's, Inc.*(1978).
10. Just two of many examples: *Central Hudson Gas & Electric Corp v. Public Service Commission of New York*(1980) and *POM Wonderful LLC v. Coca-Cola Co*. (2014).
11. Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy*. New York: The New Press, 2021. Page 94.
12. John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*. February 27, 2015. Page 31. Pdf available here.
13. Lee Epstein, William M. Landes, and Richard A. Posner, "How Business Fares in the Supreme Court." *Minnesota Law Review*. 97:1431. April 16, 2013. No Author, "Corporations and the Supreme Court," Constitutional Accountability Center. No date, but retrieved on August 15, 2022.
14. Adam Feldman, "The Big Business Court," *Empirical SCOTUS*. August 8, 2018.
15. *Janus v. AFSCME*(2018).

16. David A. Kaplan, *The Most Dangerous Branch. Inside the Supreme Court's Assault on the Constitution*. New York: Crown, 2018.
17. *Reynolds v. Sims*(1964).
18. *Evenwel v. Abbott*(2016). Richard Wolf, "Supreme Court Upholds 'One-Person, One-Vote,'" *USA Today*. April 4, 2016.
19. Erwin Chemerinsky, *The Case Against the Supreme Court*. New York: Viking, 2014. Pages 9-11.
20. We should note, however, that the Court sometimes sets the bar very high when it comes to cases of racial gerrymandering. In *Abbott v. Perez*(2018) the Court upheld as legal a redistricting scheme that a lower court had established was drawn to disenfranchise black and Hispanic citizens.
21. Ariane de Vogue and Devan Cole, "Supreme Court Allows Severe Partisan Gerrymandering to Continue," *CNN*. June 27, 2019.
22. Erwin Chemerinsky, *The Case Against the Supreme Court*. New York: Viking, 2014. Pages 234-249.
23. Niraj Chokshi, "Where Black Voters Stand 50 Years After the Voting Rights Act was Passed," *The Washington Post*. March 3, 2015.
24. James D. Zirin, *Supremely Partisan. How Raw Politics Tips the Scales in the United States Supreme Court*. Lanham, Maryland: Rowman & Littlefield, 2016. Page 176.
25. Kevin Morris, and Coryn Grange, "Growing Racial Disparities in Voter Turnout, 2008-2022," Brennan Center for Justice. March 2, 2024. See also *Husted v. A. Philip Randolph Institute* (2018)
26. Stephen B. Billings, et al., "Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout," *Journal of Public Economics*. Volume 230. February 2024.
27. Ian Millhiser, "The Supreme Court Just Handed Down Dome Truly Awful News for Voting Rights," *Vox*. July 3, 2020. Josh Gerstein, "Liberals Recoil at SCOTUS' Wisconsin Primary Decision," *Politico*. April 7, 2020.
28. Ian Millhiser, "The Supreme Court Leaves the Voting Rights Act Alive—But Only Barely," *Vox*. July 1, 2021. Omeed Alerasool, "A Primer on Brnovich v. DNC: The Supreme Court's Latest Voting Rights Case," The Equal Democracy Project at Harvard Law School. March 7, 2021.
29. No Author, *The Supreme Court's Role in Undermining U.S. Democracy*. Campaign Legal Center. July 13, 2022.
30. Kate R. Bowers and Daniel J. Sheffner, *The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments*. Congressional Research Service. May 17, 2022. Page 1.
31. Ian Millhiser, "How the Supreme Court Put Itself in Charge of the Executive Branch," *Vox*. July 17, 2023.
32. *Dred Scott v. Sanford* (1857)
33. *United States v. Cruikshank* (1876)
34. *The Civil Rights Cases* (1883)
35. *Pace v. Alabama* (1883)
36. *Plessy v. Ferguson* (1896)
37. *Lum v. Rice* (1927)
38. *Korematsu v. United States* (1944)
39. *Bradwell v. State of Illinois* (1873)
40. *Muller v. Oregon* (1908)
41. *Buck v. Bell* (1927)
42. *Griswold v. Connecticut*(1965) and *Eisenstadt v. Baird* (1972)
43. *Pittsburgh Press Co. v. Pittsburgh Commission on Human*Relations (1973)
44. *Meritor Savings Bank v. Vinson*(1986)
45. Ian Millhiser, *Injustices: The Supreme Court's History of Comforting the Comfortable and Afflicting the Afflicted*. New York: Nation Books, 2015. Page xiii.
46. Orville Vernon Burton and Armand Derfner, Justice Deferred: Race and the Supreme Court. Cambridge, Massachusetts: Harvard University Press, 2021. Page 338.

Media Attributions

- Flag Design 1 © Alexa Hubert is licensed under a CC BY-NC-SA (Attribution NonCommercial ShareAlike) license
- Voting Line © Elisbrown is licensed under a CC BY-NC (Attribution NonCommercial) license
- Segregation Drinking Fountain © John Vachon is licensed under a Public Domain license

PART 6: THE FEDERAL BUREAUCRACY

Chapter 36: Government is Good

Anonymous Citizen: *"Keep your government hands off my Medicare."*

Representative Robert Inglis (R-SC): *"Actually, sir, your health care is being provided by the government."* (1)

Government and the Common Good

The idea for this chapter comes directly from Douglas J. Amy, Professor of Politics at Mount Holyoke College, who many years ago put together the Government is Good web project as "an unapologetic defense of a vital institution." Please visit Amy's site and explore his information about the war on government, why government is good, and how to revitalize democracy.

Because this textbook takes a critical approach to the topic of U.S. government and politics, you might be under the false impression that it advocates a negative view of the government. Nothing could be farther from the truth. To be sure, the federal government has done some truly awful things in our history and will probably do some despicable things in the future. Government too often caters to the needs of corporations and the wealthy elite, especially when ordinary people do not organize themselves and effectively pressure government to serve the common good. Nevertheless, the federal government is on balance a force for the good and a positive influence in our individual lives, especially when it supports and complements the cooperative work of people in their local communities and neighborhoods.

The Anti-Government Impulse

The United States contains within it a very prominent and well-funded network of people and organizations that is doing all it can to ensure that government is so small and ineffective that the broader population will just give up on it. Indeed, Grover Norquist, long-time conservative activist and president of the corporate-funded Americans for Tax Reform, is famous for once saying that his goal was to reduce government "down to the size where we can drown it in the bathtub." (2) Norquist's statement fairly summarizes the anti-government impulse that is financed by billionaires and corporations. If government is too small and powerless to help people, that's a good thing as far as they are concerned. If government is so gridlocked that it can't act, that's also good. If government policy can be made so arcane and convoluted that it frustrates people—think of our healthcare system that is so byzantine that people in other countries shake their heads in disbelief—that's good as well. Sometimes, this impulse is housed in portions of the Democratic party and sometimes it resides in the Republican party, which is where it currently lives. The Libertarians are always on board. And in a 2020 *New Yorker* article, award-winning journalist Jane Mayer documents the most recent organized effort to go after government, which clearly centers around the steady feeding of dark money to Republican candidates. (3)

The anti-government impulse relies on a number of tactics to convince ordinary people that government can't and shouldn't help them, such as encouraging political gridlock regarding bills that serve the broader public, promoting unrestricted campaign financing, and failing to enforce campaign finance laws, but we won't talk about these tactics here. Instead, we'll focus on the following:

Anti-Tax Crusades—There are precious few people who enjoy paying taxes, but we all understand that taxes are the primary way that we pool our resources for the collective good. Without taxes, we don't have public roads, schools, better regulation of financial institutions, law enforcement, national defense, Social Security, and myriad other public goods. Anti-government crusaders want to "starve the beast" by denying government the funds it needs to accomplish what the public wants from the government. It plays upon the public's dislike of paying taxes. "It's our money!" they shout. "We are overtaxed!" In fact, it's very well documented that Americans have a lower tax burden than most other advanced countries' citizens, but our tax system is one of the most complicated and frustrating. (4)

Calls to reduce taxes are almost always a bait and switch proposition. The goal is to get ordinary people to say, "Yes, we want our taxes reduced," but then provide little tax relief to them while lavishing tax breaks and loopholes on wealthy people and corporations. The 2017 Tax Cuts and Jobs Act was a classic example. Candidate Donald Trump talked about cutting taxes, "especially [for] the middle class." (5) The Center for Public Integrity, the Center for Popular Democracy, and the Economic Policy Institute documented behind-the-scenes lobbying efforts that ensued during the 2017 tax debates. Lobbyists pushed for and got larger-than-dreamed-possible tax cuts for corporations, lower taxes for rich individuals and families, and sweet deals especially for multinational corporations. The Act afforded token tax relief for middle class families, added $1.5 trillion to the federal deficit in ten years, didn't significantly add to economic growth, didn't result in wage growth for workers, and didn't boost investment. (6) People get frustrated that their situations haven't improved. Politicians start wooing voters with a middle-class tax cut, and a whole new round of the scam starts again. Corporations and the rich make out like bandits, while the federal government is starved of revenue.

Deficit Scaremongering—Deficit scaremongering works hand in glove with anti-tax crusades. Once the federal government is shorted the tax revenue it should be getting from the wealthy and corporations, it's time for the anti-government network to frighten people over the growing annual federal deficit and overall debt. Note that in 1950, corporate income taxes provided 26 percent of the federal government's revenue, but by 2018 it was down to 6 percent of revenue. (7) To be sure, we have reason to be concerned about the government chronically running deficits and building up debt. Interest paid on that debt, for example, is tax money that goes to debt holders rather than serving an actual public need. Still, a clear pattern is that deficit scaremongering is most commonly heard in the corporate-owned media, when progressives are trying to do things like provide health care, shore up Social Security, and improve access to higher education. The message in opposition to social spending is always some version of, "We can't pay for that. Look at the deficit!" Somehow, when the project is intended to pump up military spending or provide tax cuts to people and corporations who don't really need them, one hears very little deficit scaremongering in the media.

The other interesting pattern we've seen since the 1970s is that Republican administrations have been the most fiscally irresponsible, adding more to the debt than Democratic administrations. Consider these facts: (8)

- The Republican Reagan and Bush administrations from 1981-1993 ran deficits every year and added considerably to the overall debt.
- The Democratic Clinton administration from 1993-2001 turned things around and actually produced budget surpluses.
- The Republican George W. Bush administration from 2001 to 2009 added more deficits.
- The Democratic Obama administration from 2009-2017 reduced deficits even while dealing with the Great Recession that started under Bush.
- The Republican Trump administration reinforced the pattern from 2017-2021 by adding significantly to the debt with ever-greater annual deficits.

Anti-Government Cynicism—Another billionaire-funded anti-government strategy is to promote anti-

government cynicism. There are two basic messages here. One is that government can't do anything right. With any enterprise as large and complex as the U.S. federal government, it's always easy to find instances of outright incompetence. "You want a single-payer national health system? Hell, the government can't even deliver the mail!" Notwithstanding that the U.S. Postal Service has a tremendously good record, someone always finds counterexamples and plays them up in the media. The second message is that government programs are rife with abuse, particularly those designed to help people. Recall the term "welfare queen" popularized by then-candidate Ronald Reagan who used it as a racialized dog whistle to alert White voters that social welfare programs were being abused by people of color. In fact, people who receive social welfare match the demographics of the nation, and the overwhelming majority of them do not abuse or defraud the system (9) In any case, the proper response to welfare-abuse cases would be to tighten the system to prevent additional abuse rather than to scrap or reduce the program, which does nothing but hurt people who are living on the edge. If current anti-government cynicism is strong enough, voters can be convinced that it's largely a waste of money to entrust government with important social tasks.

The Myth of Rugged Individual Freedom—The final strategy we want to highlight here is propagating the myth of rugged individual freedom. It is especially strong in the United States, perhaps because of the mythologized and false history we tell ourselves of rugged individuals taming a vast wilderness continent, even though for thousands of years before Europeans arrived, Native Americans had already established vast communities and trading networks. To believe this myth, we have to conveniently ignore all evidence that the European colonization of the North American continent was a cooperative, often government-led operation in which people acted in groups to achieve a common goal. Some frontier towns even had strict, community-enforced gun control. (10) When the U.S. government provided free land to railroad companies, it allowed Western miners, ranchers, and farmers to get their raw materials to markets and, in turn, allowed them access to finished products.

The anti-government network of billionaire-financed libertarians and their think tanks, media outlets, and lobbying firms would like people to think of themselves as some sort of suburban Clint Eastwood, pulling themselves up by their own bootstraps with no help from any government handouts or services. Anybody violating that image must be "dependent upon government, [and] believe that they are victims," and we'll "never convince them that they should take personal responsibility and care for their lives." (11) This idea is, in one word, nonsense. As we'll see in more detail, everyone in the country benefits from past and present government actions. Let's take me, the author of this text, as an example: White, male, heterosexual, and middle class; I did not receive any government welfare assistance when growing up, nor have I received any as an adult. No food stamps, no assistance for needy families, no Medicaid, etc. I worked hard in school and in the various jobs I've held. Am I a "maker" instead of a "taker", to use Republican Senator and presidential candidate Mitt Romney's language? No. I am, as are all of us, a maker *and* a taker. While I did not receive welfare designed for poor people, I nevertheless received all sorts of government benefits. As a child, my healthcare was funded by taxpayers through my father's military service. My public schools were generally good, paid for by taxpayers. I made full use of my local public library and earned minimum wage there in my first job. I learned to drive on locally and nationally financed roads and highways. I attended a public university where my tuition was subsidized by taxpayers. I breathed clean air and drank clean water, thanks to government regulations. I benefited from local, state, and national law enforcement agencies as well as the governmentally created legal and economic infrastructure that makes the "free market" possible.

Take a step back from the "rugged individual freedom" myth to see the broader agenda at work behind it. In any given society, the institutions historically most responsible for controlling individual behavior are churches, concentrated economic power, and government. For the past 600 years in the West, churches have gradually lost the power they once had, and governments have increased their ability to control individual behavior—sometimes for ill, but, on balance, for good. The anti-government network is really the voice of

concentrated economic power, and we can think of its attack on government in two ways. If we take their argument on its own terms, we could conclude that if government were weaker, we all would have more individual freedom. Maybe, but doubtful. The other way to think about it is this: If corporations and the wealthy elite can knock the legs out from under government or otherwise dominate it, we will simply have traded one master that we can control through democratic processes for one that we cannot. If government screws up or fails to serve our interests, we have recourse by putting in new officeholders. When corporations and the wealthy run roughshod over people or kill them in pursuit of profit, they pay a tiny fine and move on the to the next exploitative or murderous adventure. We don't get to vote on who leads the company or that it should spend a little more on worker or consumer safety and a little less on shareholder dividends.

The Federal Government Promotes the Common Good

Let's spend a little time talking about the good that government does. There's really too much to cover adequately here, so let's concentrate on a few government activities from which we all have benefitted. We're going to skip civil rights as an important category only because we're going to talk about that in more detail in another textbook section. Suffice it to say that we all have benefitted because, through organized action by many people, the federal government is now, on balance, a force that ensures we are treated equally regardless of our race, sex, religion, and national origin. For now, though, we'll concentrate on these three categories of federal government activity that promote the common good:

Establishing Our Economic Infrastructure—Any free market that is more sophisticated than familial or tribal barter is the result of government action. The value of money has to be regulated for a free market to work. Note that this power was given to Congress in Article I of the Constitution and that government was empowered to punish counterfeiting because that practice undermines people's faith in the money supply. Free markets also need a legal infrastructure—laws, courts, and police powers—so that disputes can be settled peacefully, businesses can be incorporated, investors can be secure in their investments, contracts can be honored, and people can plan for the future knowing that there is an infrastructure they can count on. Without these things, a "free market" economy cannot even be established, let alone operate well.

The federal government regulates the money supply and interest rates through the Treasury Department and the Federal Reserve System. The banking system is regulated—perhaps not as well as it should be—and people benefit from federal deposit insurance on their money. The United States has a well-developed legal system at both the federal and state levels that governs corporate formation, contracts, investments, and so forth. We have fairly robust laws against investor fraud. We have the Consumer Product Safety Commission that can force companies to recall defective products, and we have a court system that allows injured parties to sue for damages. The National Weather Service provides weather data and forecasting used by everyone from ski areas to commercial fishermen, from trucking companies to farmers. The Small Business Administration helps entrepreneurs start new businesses and access funding. The federal government has supplied most basic research funding for life-saving drugs, GPS devices, the Internet, medical devices, and a whole host of other economically invaluable things.

The federal government performs two other really important economic functions that we shouldn't forget. First, its counter-cyclical spending helps lessen the negative impacts of economic downturns. When the economy declines, federal welfare and unemployment insurance payments stimulate consumer spending that would otherwise decline, thereby helping people directly and the economy generally. Secondly, the federal government has played a pivotal role in developing the physical infrastructure on which our economy

depends. The National Interstate and Defense Highways Act of 1956 started one of the largest infrastructure projects in American history: the creation of the interstate highway system, benefitting individual people and commercial businesses alike. Before that, the federal government subsidized building the national railroad network, which still transports tons of freight cross country each year.

Working to Ameliorate Poverty—As Professor Amy put it, "Government programs are often one of the most effective ways that we express caring and compassion toward our fellow human beings." (12) The Great Depression in the 1930's taught us that church and local community-based efforts to ameliorate poverty—valuable as they are—can easily be overwhelmed when the economy stalls and they are generally not up to the scale needed to fight the ills that accompany the particular version of capitalism practiced in the United States. During the Great Depression, government programs such as the Civilian Conservation Corps and the Works Progress Administration—the latter of which built the high school I attended—put people to work when the private sector could not.

One of America's great past tragedies is the extent of poverty among elderly people. Poverty used to be more prevalent among America's elderly than other population groups, but it has declined considerably since the 1930's due to federal programs like Social Security and Medicare. America still has a problem today, with hundreds of thousands of elderly people living in poverty, but the situation is far better than it was before the federal government intervened.

The federal government works to ameliorate poverty in other ways as well. Millions of American families are aided every year by the Supplemental Nutrition Assistance Program, formerly the Food Stamp program, which was in place temporarily during World War II and permanently since 1964. The Medicaid program has provided health care to poor people since 1965. The Supplemental Security Income program has been subsidizing disabled adults and children since 1972. Since 1972, the Women Infants and Children (WIC) program has helped treat and feed millions of pregnant women, new mothers, and young children, while the Pell Grant program has allowed millions of young people to go college. Every year since 1975, the Earned Income Tax Credit has helped millions of working poor escape poverty. Poverty is still a scourge in the United States, especially when one considers how comparatively wealthy a country it is, but life in America would be unimaginably worse without federal anti-poverty efforts. We would do well to consider alternative and better ways to fight poverty, but for now, we can know that these programs have undoubtedly made people's lives better than they would have been had they never existed.

Promoting Quality of Life—Federal entities like the Environmental Protection Agency and laws such as the Clean Water Act and the Clean Air Act benefit all of us every day. Since the early 1970s when these laws went into effect, and despite population growth, our waterways and air are cleaner than they would have been without them. This is a lifesaving, quality-of-life enhancing benefit to real people every day. (13) In addition, the Food and Drug Administration ensures that the food we eat is safe and that the pills we take are efficacious and safe. And the 1971 creation of the Occupational Safety and Health Administration has helped the United States experience a dramatic decline in workplace injuries and death. (14)

Air pollution in New York City, 1966. From the New York Times.

Think about the public health improvements that have come as a result of the federal government. Through the National Institutes of Health and other agencies, the federal government funds basic research on everything from cancer to heart disease. Federally funded immunization drives have dramatically reduced our chances of contracting polio, measles, diphtheria, and other diseases. The Centers for Disease Control (CDC) monitors domestic and international disease outbreaks from the flu to the zika virus to the corona virus, helping us prepare for and mitigate outbreaks. Of course, these institutions only work well when presidential administrations support the CDC with funding and staff pandemic early warning units, and when wearing masks is seen by the public as a public health measure rather than an infringement on personal liberty.

Federal support for education makes a real difference in our lives. Through student loans and the Pell Grant program, the federal government supports access to higher education. Title I funding from the Department of Education goes to school districts serving high numbers of students living in poverty to help provide them with equal opportunities. The federal Head Start program works with local agencies to promote school readiness for low income children.

We could go on. Have any of you enjoyed a National Park, a National Forest, or BLM lands? Have you flown on a federally funded world class national airline system or used your local mass-transit system? Have you used GPS technology to find a good restaurant or the most efficient way to get around a traffic accident? Have you benefitted from federal safety standards for automobiles and tires? Have you benefitted from federal law enforcement disrupting domestic and international terrorist groups?

The federal government, imperfect as it is—as are all human institutions—is a net positive part of our lives. Those who promote nonstop government criticism want you to forget that government has benefitted ordinary people and that it continues to do so. They want you to doubt that government could improve itself, offer new programs, and serve the general welfare. They want government to fail.

What if . . . ?

What if we replaced the Presidents' Day holiday with a Good Government holiday? Government workers could have that day off, and the news would be filled with stories of how our government is a positive force in our lives. Kids would get that day off from school as well, but the weeks surrounding that holiday could be filled with lessons about what government does, the dedication of government employees, and field trips to see government in action. Writing in the middle of the COVID-19 pandemic, William Burns argued that "If America has any chance to recover, let alone rescue a semblance of unity from the rubble of our polarized politics, we have to heed the admirable examples of [government workers] and seize this moment to end the war on government, revive our institutions, and shape a new era of public service." (15) What if we heeded Burns' advice and revitalized a public-minded sense of service to America?

References

1. Bob Cesca, “Keep Your Goddamn Government Hands Off My Medicare!” *Huffington Post*. December 6, 2017.
2. Quoted in Bob Dreyfuss, “Grover Norquist: ‘Field Marshall’ of the Bush Plan,” *The Nation*. April 26, 2001.
3. Jane Mayer, *Dark Money. The Hidden History of the Billionaires Behind the Rise of the Radical Right*. New York: Penguin Random House, 2017.
4. Beverly Bird, “How Do U. S. Taxes Compare to Other Countries?” *The Balance*. November 20, 2019. See also the information at the Tax Policy Center.
5. Jesse Byrnes, “Trump: ‘Everybody is Getting a Tax Cut,’” *The Hill*. May 9, 2016.
6. Peter Cary and Allan Holmes, “The Secret Saga of Trump’s Tax Cuts,” Center for Public Integrity. April 30, 2019. Maggie Corser, Josh Bivens, and Hunter Blair, *Still Terrible at Two. The Trump Tax Act Delivered Big Benefits to the Rich and Corporations But Nearly None for Working Families*. The Center for Popular Democracy and the Economic Policy Institute. December 2019.
7. Federal figures from the Tax Policy Center.
8. Steve Benen, “Despite His Promises, Trump Pushes Deficit Past $1 Trillion Mark,” *MSNBC*. September 13, 2019.
9. Gene Demby, “The Truth Behind the Lies of the Original ‘Welfare Queen,’” *NPR All Things Considered*. December 20, 2013.
10. Matt Jancer, “Gun Control is as Old as the Old West,” *Smithsonian Magazine*. February 5, 2018. Donald J. Campbell, *America’s Gun Wars: A Cultural History of Gun Control in the United States*. Santa Barbara, CA: ABC-CLIO, 2019. Pages 24-26.
11. Candidate Mitt Romney. John Christofferson, “Romney’s ‘47%’ Chosen as Year’s Best Quote,” *USA Today*. December 9, 2012.
12. Douglas J. Amy, Government is Good.
13. Paul Greenberg, “The Clean Water Act at 40: There’s Still Much Left to Do,” *Yale Environment 360*. May 21, 2012. Kristie Ross, James F. Chmiel, and Thomas Ferkol, “The Impact of the Clean Air Act,” *The Journal of Pediatrics*.Volume 161, Issue 5. November 2012. Pages 781-786.
14. United States Department of Labor data.
15. William J. Burns, “America Needs a Rebirth of Public Service,” *The Atlantic*.May 4, 2020.

Media Attributions

Chapter 37: The Scope and Size of the Federal Government

"Paleontologist Robert Gay's quest to find the fossilized remains of an ancient phytosaur, a primitive ancestor to crocodiles, turned into something much larger last summer when he came upon a major trove of Triassic fossils on public lands recently stripped from Utah's Bears Ears National Monument."

–Brian Maffly (1)

"While a discovery of this magnitude certainly is a welcome surprise, protecting such resources was the very purpose of Bears Ears National Monument."

–Scott Miller (2)

The federal government is quite large in both scope and size. It spends trillions of dollars each year. Its operations span from providing Social Security to protecting fossils and archaeological sites on public lands, from engaging with other countries diplomatically to funding mass transit projects. It wasn't always thus. Let's address the federal government's scope and size to understand how and why it evolved into its present state.

Scope of the Federal Government

When we refer to the federal government's **scope**, we are talking about the range of things that it does. People categorize federal government's activities in numerous different ways. This is one way of looking at them:

Social Welfare—This government activity encompasses programs such as Social Security, Medicare, Medicaid, and the Supplemental Nutrition Assistance Program, among others. Social welfare programs are located throughout the federal bureaucracy.

War-Making—This activity, which is now under the auspices of the Department of Defense—we used to call it the Department of War—encompasses the branches of the armed services (e.g., Army, Navy, Air Force) and represents the United States' ability to project armed destruction around the globe. It is also responsible for the more than 700 military bases that the Defense Department maintains in the United States and around the world.

Diplomacy—The Department of State is responsible for diplomacy and for carrying out America's non-military foreign policy.

Justice and Law Enforcement—The Department of Justice handles all federal criminal prosecutions and civil suits in which the U.S. government has an interest. It also contains within it the Federal Bureau of Investigation (FBI); the Drug Enforcement Agency (DEA); the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); and the U.S. Marshalls Service. Also included in this category is the Department of Homeland Security, which

includes the Coast Guard; Immigration and Customs Enforcement (ICE); Customs and Border Protection; and the Federal Emergency Management Agency (FEMA); among many others.

Commerce—A number of federal agencies exist to promote commerce of one sort or another: The Commerce Department, the Department of Agriculture, and the Department of the Interior are the most prominent.

Fiscal and Monetary Issues—The Treasury Department manages the federal government's finances, manages tax collection through the Internal Revenue Service (IRS), services the federal debt, supervises financial institutions, and goes after counterfeiters. The Federal Reserve System, a quasi-public, quasi-private central banking system for the United States, is charged with stabilizing prices and maximizing employment—two functions that can be at loggerheads. It accomplishes these tasks by adjusting interest rates.

Infrastructure—The Department of Transportation promotes and regulates transportation, including the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), and the National Highway Traffic Safety Administration (NHTSA). We can also include in this category the Department of Energy which, among other things, regulates nuclear power stations and the country's national electricity grids. Finally, the Department of Housing and Urban Development (HUD) belongs in this category.

Human Services—The Department of Health and Human Services contains, among many others, the Centers for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), and the Food and Drug Administration (FDA). It administers Medicare and Medicaid. We can also put the Department of Education and the Environmental Protection Agency in the Human Services category. We can put the Department of Veterans Affairs here as well, although some would argue that it fits better in the War-Making category because its expenses are a direct result of our war-making and our preparations for war-making. The Department of Labor deals with worker safety, compensation, and working conditions.

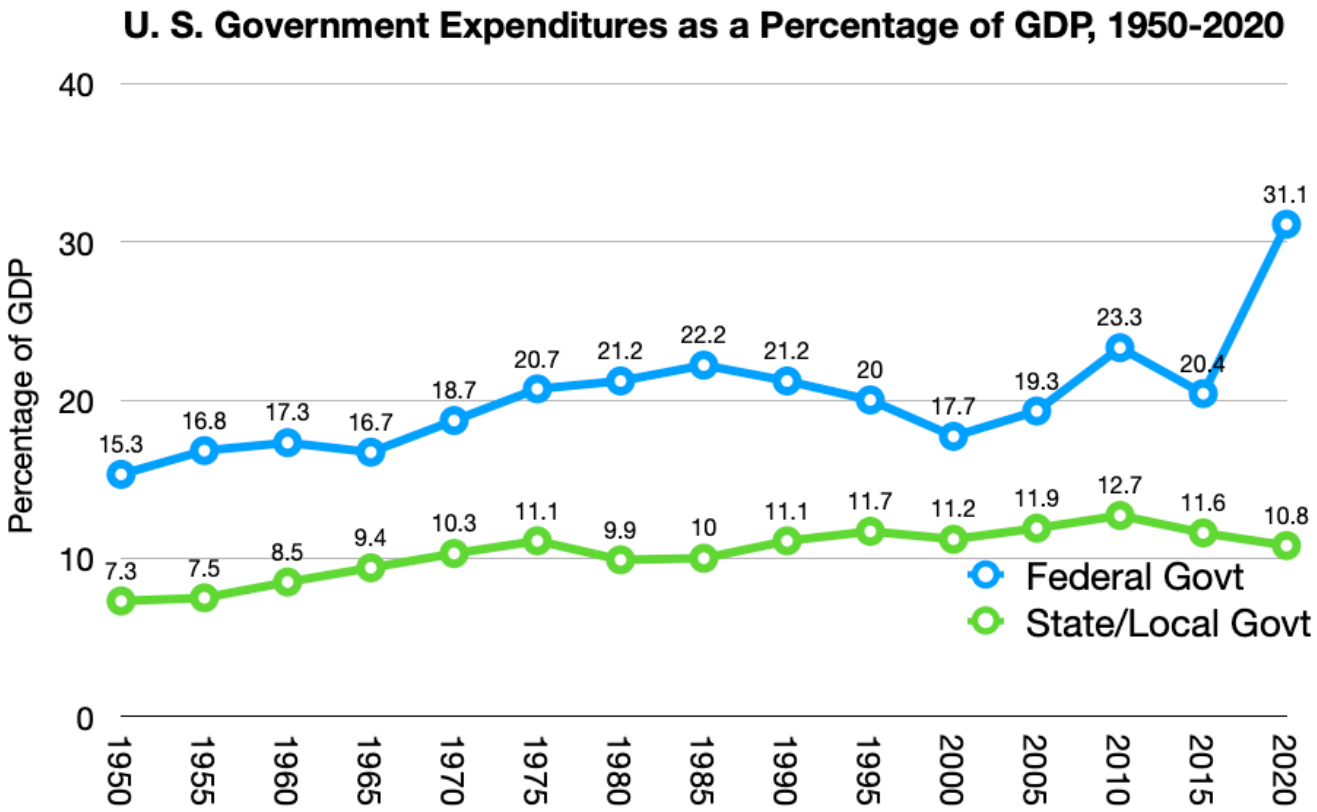
Another way to understand the federal government's scope and size is through an historical lens—by looking at the year in which cabinet-level departments were created. (3)

Department	Year Established
State	1789
Treasury	1789
Justice	1789
War/Defense	1789/1949
Interior	1849
Agriculture	1889
Commerce	1913
Labor	1913
Health and Human Services	1953
Housing and Urban Development	1965
Transportation	1966
Energy	1967
Environmental Protection Agency	1970 (elevated to cabinet level in 1990)
Education	1979
Veterans Affairs	1987
Homeland Security	2002

Size of the Federal Government

We can understand the size of the federal government by asking a few basic questions.

How much does the federal government spend? According to the Treasury Department, in 2021, the federal government spent about $6.8 trillion and took in about $4 trillion in revenue. (4) The first thing we should notice is that the **annual deficit**—the shortfall between revenue and spending—is more than two trillion dollars. The next thing to notice is that $6.8 trillion dollars is a great deal of money. One way to put the federal government's size in perspective is to see how much it spends relative to the overall size of the American economy, and also how its spending compares to that of state governments.



As you can see from the chart, since the late 1970s, federal government spending has hovered between 20-24 percent of **Gross Domestic Product** (GDP)—the total value of goods and services produced in the United States in one year. The year 2020 was an outlier due to massive government spending during the COVID-19 pandemic. State and local government expenditures have stayed between 10-12 percent of GDP. (5) Another way to look at this is by doing an international comparison. Looking at combined federal and state government spending as a percentage of GDP across the Organization for Economic Cooperation and Development (OECD) members, we can see that the United States government is relatively small as a percentage of the American economy, especially when compared to other countries' governments.

Total Government Spending as Percentage of GDP (Source: OECD data)

Low (40% of GDP or less)		Medium (41-50% of GDP)		High (50% of GDP or more)
Japan	Switzerland	Hungary	Germany	France
Estonia	Costa Rica	Sweden	Spain	Finland
Israel	Columbia	Norway	United Kingdom	Denmark
Latvia	Ireland	Portugal	Czech Republic	Greece
United States	Chile	Slovenia	Poland	Austria
Australia		Slovak Republic	Luxembourg	Italy
Lithuania		Netherlands	Iceland	

How many people does the federal government employ? As with many such questions, the answer depends on who you want to count. According to the Office of Personnel Management, as reported by the Congressional Research Service, there are about 2.1 million federal government civilian employees. (6) There are an additional 1.3 million active duty military and Coast Guard employees. (7) Add those two figures together and we have about 3.4 million federal government employees, but that's not the whole picture. The federal government conducts much work using private contractors—employing people as diverse as private sector soldiers engaged in war zones and janitors hired to maintain federal buildings. Paul Light, New York University public service professor, estimates that the federal government employs some 3.7 million private contractors, plus nearly 500,000 Postal Service employees who are not counted in our federal civilian employee tally. (8) Add them all up, and we can safely say that between 7 and 8 million people directly owe their livelihoods to a federal government paycheck—out of a population of over 330 million people.

What is the size and impact of federal regulations? Another way to understand the federal government's size is to understand how many regulations it issues and what impacts they have. According to the Federal Register, the federal regulations code totaled 9,745 pages in 1950 and had grown to 185,484 pages by 2018. (9) These regulations range from the Fair Labor Standards Act requirement for companies to pay overtime for nonexempt employees who work more than forty hours per week, to the Affordable Care Act's provision banning private health insurance companies from denying coverage to people who have pre-existing medical conditions or from charging them more.

Corporations and the spokespeople they fund inevitably argue that federal regulations are too costly and won't provide benefits worth the costs. This argument is almost always wrong. A Pew Charitable Trusts' analysis concluded that "Historically, compliance costs have been less and benefits greater than industry predictions, and regulation typically poses little challenge to economic competitiveness." (10) Their analysis showed that regulation-compliance costs were always lower than the industries said they would be, for example, for fighting acid rain, mandating seat belts and air bags in cars, mandating emissions changes to cars, banning chlorofluorocarbons that were putting a hole in the earth's ozone, and others. Further, these kinds of regulations pay enormous societal benefits. Mandatory seat belts have saved more than 7,000 lives per year, and the ban on chlorofluorocarbons led to cheaper substitutes that have saved businesses and customers billions of dollars. In a federal regulation costs and benefits review of a single decade, the Office of Management and Budget (OMB) estimated that regulations cost businesses and consumers between $74 and $110 billion but provided between $269 and $872 billion worth of benefits. (11)

The U.S. tax code may be a different matter. If we consider the federal tax code as a form of regulation,

we can say with confidence that this particular regulation is excessively complex and burdensome, especially when compared to other developed countries' tax systems. The American tax code is several thousand pages long and so complex that the Internal Revenue Service Taxpayer Advocate publishes an annual tax system roadmap that is, itself, byzantine. Tax compliance is a multibillion-dollar business in the United States, compared to a country like Japan, whose government collects withholdings so precisely that most workers don't even have to file a tax return. (12) **Tax compliance costs** refer to the time, accountants, software, lawyers and other expenses that individuals, families, nonprofit organizations, and businesses need to complete their taxes. Obviously, low and middle-income families who take the standard deduction aren't spending a great deal in tax compliance costs, but wealthy families and businesses go to considerable lengths to exploit the loopholes built into the tax code. That takes time and the employment of specialists who know the code. In terms of time alone, U.S. tax-system compliance may run as high as 8 billion hours of work, even after the 2017 tax bill's simplifications. (13)

Historical Evolution of the Federal Government

From our perspective, the federal government didn't do much during its first eighty years. It delivered the mail. It fought wars and conducted foreign policy. It created its own bank. It taxed imports, regulated the money supply, and granted patents. It fought amongst itself over the issue of slavery and admitted new states to the union. We can say without being too facetious, that that's about it. It didn't have any environmental regulations. No worker safety, pay, or hours-regulations either. It didn't promote energy efficiency or public health. It didn't smooth out economic downturns through its social welfare programs—because it didn't have any. For even longer than its first eighty years, its peacetime military was miniscule compared to the size of the country. It didn't have a space program or fund inoculations. It didn't defend people's civil rights—again, for much longer than its first eighty years.

Pre-Civil War-era per-capita federal government spending hovered around $30. In the years following World War I, federal government spending had risen to about $129 per person. By 2004, it had reached $7,100 per capita. (14) A back-of-the envelope calculation using OMB and Census information indicates that currently the federal government is spending about $13,800 per person. The federal government generally balanced its budget during peacetime until the 1930s. A balanced budget means that spending matches tax receipts. Since the 1930s, the federal government has generally *not* balanced its budget—except during the Clinton administration—instead, the government finances its annual deficits by selling Treasury notes to domestic and international investors.

The federal government has grown due to four main reasons, with which you should be familiar. One impetus for government expansion has been war. Prosecuting and financing **warfare** were and is an important factor in government growth, from the first city states through the modern world's great power competition. (15) Federal spending spiked during the Civil War, World War I, World War II, the Korean War, the Cold War, the Vietnam War, and the War on Terror. Military equipment had to be built; troops trained, paid, and veterans cared for; and oil had to be purchased so that America could project power to conflict zones—the U.S. military has long been one of the world's largest emitters of greenhouse gases. Government grew during wartime as it curtailed civil liberties and propagandized its own people to maintain civilian morale and to sufficiently demonize the enemy. To finance war, it had to raise taxes and sell war bonds and other financial instruments. During World War I, the United States government established the War Industries Board, the War Finance Corporation, and the National War Labor Board to coordinate industrial production and labor relations—a set of government operations that didn't just fade away after the war ended. (16) Similar government economic regulations ramped up during World War II as well. Cold War competition with the

Soviet Union stimulated everything from atomic weapons and power development to the interstate highway system, commercial airlines, GPS and weather satellites, to the internet.

Another element driving federal government expansion has been **corporate demand**. Many people operate under the myth that government and business are implacable enemies. One does not have to buy into the Marxist idea that government is merely the tool of the capitalist class, to realize that government and businesses are in a symbiotic relationship. While businesses chafe from time to time at "too much" government regulation, on the whole, businesses benefit from the stability and predictability afforded by government regulating the economy. Witness the way that regulation of commercial drones allowed their use in a way that was standardized, predictable, and economically viable. (17) Such was the case with electricity, automobiles, airlines, pharmaceuticals, cellular communications, and every other large, complex industry. On a more basic level, myriad businesses benefit from publicly financed infrastructure—which we can broadly define to include everything from roads and bridges to schools and sanitation systems. Indeed, note that people debilitated by illiteracy or easily preventable diseases tend not to talk on their cell phones while driving their cars to their jobs in the biotech industry. Business leaders know this basic fact, even though they may balk at paying their fair share of the taxes needed to provide the seeds of economic vitality.

Finally, we can talk about direct government intervention that props up businesses and entire industries. Where would the nuclear power industry be without federally subsidized liability insurance? Where would the automobile industry be without federally subsidized highways, access to cheap oil courtesy of the U.S. military, and auto manufacturers post-Great Recession federal bailout? Where would the airlines be without government support for airports, the security and safety provisions that make us feel reasonably safe, and the Federal Aviation Administration's domestic airspace regulations? If the government didn't provide these supports, businesses would quickly go bankrupt trying to fund them.

Popular demand is another significant reason for the federal government's growth. The federal government has grown because the people have demanded that it solve real problems. Political Scientist Douglas Amy put it best:

[B]ig government is not something that has been forced on Americans by liberal elitists and power-hungry bureaucrats. We have it because we ourselves have demanded big government to deal with the many big problems we have faced in our society. We have called for big government programs when it has been obvious that there are serious problems that cannot be solved through individual effort or by the natural workings of the free market. (18)

Think about the various problems that transcend state boundaries that are too large and/or complex for community-based solutions. People have demanded national efforts to clean the water and air; to ensure that people have equal employment opportunity regardless of sex, race, religion, or national origin; to fight the scandal of old-age poverty and ill-health; to counter the monopoly power of railroads, steel companies, and internet platforms; to provide health coverage when the market finds it profitable to let poor people die untreated in the car they happen to be living in; to protect national parks and public lands; to interdict and disrupt domestic and international terrorists. Government is good when it responds to problems articulated by the general population. People can argue about the particular form that the government response takes—whether this healthcare policy is better than that or whether air pollution is best fought via specific regulations or fossil fuel taxes—but they recognize that collective action through government is the best chance we have to avoid the brutal and nasty conditions that are the calling card of anarchy, which is literally the absence of government.

In addition, in the decades after the Civil War, American capitalism grew into a particularly aggressive and socially destructive type—note that capitalism comes in a variety of flavors, some of which are much more

palatable than are others—and this fact engendered public demand for action. As Matt Stoller, Open Markets Institute fellow, writes, "The people organized for their rights against these new private centralizing corporations and an unstable political economy." (19) Americans have used government to struggle against monopolized economic power from the late nineteenth century's Gilded Age until the Obama administration's capitulation in the wake of the Great Recession. Thus, government took on powers to try to deal with the external aspects of America's particular brand of capitalism—the ruined farmers, exploited workers, monopolies' excesses, pollution, bad food, dangerous or worthless drugs, the financial speculation, and the invasions of privacy. Ordinary people simply cannot deal with the predations of America's brand of capitalism without attempting to bring in government, which is the only comparably powerful societal force that can—potentially—stand up to concentrated economic power. In her history of capitalism, historian Joyce Appleby argued that the American founders' preferences for limited government were "undermined" by "the new concentration of power in industrial corporations," but it took until well after the Civil War "for the public to realize the need for a government equipped to monitor and curtail the great industrial enterprises." (20)

The final reason government has expanded in the United States and virtually everywhere is **societal density and complexity**. The earliest political states organized within dense people-groupings who engaged in the radically complex, up to then, practice of growing food and domesticating animals. As political scientist James Scott writes, "The imperative of collecting people, settling them close to the core of power, holding them there, and having them produce a surplus in excess of their own needs animates much of early statecraft." (21) In many ways, settled agricultural society was a step backwards for human freedom and health. (22) However, it certainly became increasingly complex. For thousands of years, government size has reflected the types of societies they governed: While agrarian societies were vastly more socially dense and complex than hunter-gatherer life, they pale in comparison to the scale and complexity of the industrialized and urbanized societies that developed in the latter part of the nineteenth century. In 1880, fully 50 percent of the American population worked on farms, but by 1920, only 25 percent did. Also, by 1920, the majority of Americans lived and worked in urban centers. (23) According to the Census Bureau, the American population exploded from 50 million in 1880 to 106 million in 1920.

Societal density and complexity have real consequences for governance. You've heard the old saying: "Your right to swing your arm ends when it meets my face." In a society with a geographically dispersed population, people simply come into conflict with each other less often, so there is not as much need for police, courts, laws, and regulations. Complexity and social density act together to promote bigger government because of the rising number and scope of individual and group conflicts. As anthropologist Joseph Tainter made clear, complexity in society gives rise to ever more sophisticated and robust problem-solving mechanisms and processes—most of which involve government. (24) Geographer Jared Diamond reiterated Tainter's point by writing that the "prerequisites for communal decision-making become unattainable in much larger communities," and that "a large society must be structured and centralized if it is to reach decisions effectively." (25)

The reasons for growth in the American government—war, corporate demands, popular demands, and social density and complexity—operate on governments all over the world, so the U.S. federal government is not unusual in this respect. To be clear, these factors operate on liberal democracies and authoritarian regimes alike.

References

1. Brian Maffly, "A Search for an Ancient Crocodile in Utah's Bears Ears Leads to a Major Discovery of Triassic Fossils," *The Salt Lake Tribune*. February 24, 2018.
2. Noel Kirkpatrick, "Ancient Fossils Found on Lands Once Part of Bears Ears National Monument," *Mother*

Nature Network. February 26, 2018.
3. Thomas A. Garrett and Russell M. Rhine, "On the Size and Growth of Government," *Federal Reserve Bank of St. Louis Review*. January/February 2006.
4. U.S. Treasury Historical Tables.
5. The Office of Management and Budget.
6. Congressional Research Service, *Federal Workforce Statistics Sources: OPM and OMB*. October 24, 2019. Page 4.
7. The Department of Defense.
8. Paul C. Light, *The True Size of Government*. The Volcker Alliance Issue Paper. October 2017. Page 3.
9. Statistics from the Federal Register.
10. Pew Charitable Trusts, *Government Regulation: Costs Lower, Benefits Greater than Industry Estimates*. May 2015. Page 1.
11. The Office of Management and Budget, *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*.
12. Taxpayer Advocate Service Roadmap. Selena Maranjian, "You Won't Believe How Complex Our Tax System Is—Here's How to Make Sense of It," *The Motley Fool*. July 21, 2019. Demian Brady, "U.S. Tax System Lags in International Comparison," National Taxpayer Union Foundation. May 1, 2017.
13. Demian Brady, "Trump Tax Cuts Eased Complexity and Compliance Burden on American Taxpayers," *Townhall*. April 16, 2019.
14. Thomas A Garrett and Russell M. Rhine, "On the Size and Growth of Government," *Federal Reserve Bank of St. Louis Review*. January/February 2006.
15. James C. Scott, *Against the Grain. A Deep History of the Earliest States*. New Haven, CT: Yale University Press, 2018. Pages 150-182. Paul Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000*. New York: Random House, 1987.
16. Paul Johnson, *A History of the American People*. New York: Harper Collins, 1997. Pages 646-647.
17. Dave Marcontell and Steve Douglas, "Why the Use of Drones Still Faces Big Regulatory Hurdles," *Forbes*. September 10, 2018. Traci Browne, "Police Drones Market Increases with FAA Rules, Test Cases," *Robotics Business Review*. May 8, 2017.
18. Douglas J. Amy, "The Real Reason for Big Government," *Huffington Post*. August 8, 2012.
19. Matt Stoller, *Goliath: The 100-Year War Between Monopoly Power and Democracy*. New York: Simon and Schuster, 2019. Page 9.
20. Joyce Appleby, *The Relentless Revolution. A History of Capitalism*. New York: W. W. Norton & Company. Pages 216-217.
21. James C. Scott, *Against the Grain. A Deep History of the Earliest States*. New Haven, CT: Yale University Press, 2018. Page 151.
22. Richard Manning, *Against the Grain: How Agriculture Has Hijacked Civilization*. New York: North Point Press, 2004.
23. Jill Lepore, *These Truths. A History of the United States*. New York: W. W. Norton & Co. 2018. Page 375.
24. Joseph A. Tainter, *The Collapse of Complex Societies*. Cambridge, UK: Cambridge University Press, 1988. Note that Tainter's thesis is that as complexity increases and resources are stretched thin, there is a diminishing marginal return on increased investments in complexity, leading to societal collapse.
25. Jared Diamond, *Guns, Germs, and Steel. The Fates of Human Societies*. New York: W. W. Norton & Company, 1997. Page 287.

Media Attributions

- Budget GDP 2020a © David

- Spending OECD

Chapter 38: The Work of the Federal Civil Service and Political Appointees

"A characteristic principle of bureaucracy is that it is an expression of a regularized governance with abstract rules. . . [and] regularized governance springs from a desire for 'equality before the law,' and looks at privileges as abominations. . ."

–Max Weber (1)

"The third line of work [for the Trump administration] is deconstruction of the administrative state."

–Steve Bannon (2)

"The real threat to democracy comes not from an imagined deep state, but from a weak state of hollowed-out institutions and battered and belittled public servants."

–William J. Burns (3)

Bureaucrats and the Rule of Law

We have a love-hate relationship with bureaucracy and bureaucrats. We understand from reading history and sociology that bureaucracy develops along with government in response to social density and complexity. Bureaucracy is marked by predictability, rationality, expertise, structure, equal treatment, documentation, and record-keeping. As much as we dislike the impersonal and often inflexible nature of bureaucracy, we should keep in mind a particularly important advantage to bureaucracy: it promotes the rule of law. The **rule of law** refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures. It is a cherished ideal that people around the world have struggled to achieve and one that authoritarian leaders seek to undermine. Bureaucracy insists that we all follow the rules, whether it comes to obtaining a passport or declaring a federal emergency. Bureaucrats don't do *arbitrary* and they don't play favorites—at least, they're not supposed to treat people unequally. This is a good thing, and we should always be wary of political leaders who disparage the bureaucracy when it upholds the rule of law.

Aside from its insistence on following pre-established procedures, bureaucratic agencies promote the rule of law in two other important ways. Effective bureaucracies develop a **merit system**, meaning that people are hired and promoted to ever greater responsibilities due to their qualifications and their capabilities. A merit system contrasts with what is known as a **spoils system**, which is where the winning political party stocks the bureaucracy with their own people. The spoils system used to be commonplace in local, state, and federal bureaucracies. In 1881 President Garfield was assassinated by Charles Guiteau, who didn't receive an expected federal spoils position after Garfield was elected. This shocking event contributed to adopting the **Pendleton Civil Service Act** in 1883, which set the federal government on the path to a merit system. The merit system provides protection to federal civil servants from being fired or punished when a presidential

administration of one party takes power from an administration of a different party. Federal civil servants can only be fired "for cause," meaning that they can be fired for not adequately performing their job, but not for extraneous or political reasons. The Pendleton Act also created the United States Civil Service Commission to oversee the merit system. Through a 1978 reorganization passed by Congress, the Commission's responsibilities were devolved to the Office of Personnel Management, the Merit Systems Protection Board, and the Office of Special Counsel.

The second way that bureaucratic agencies promote the rule of law is to require that federal civil service employees be **apolitical** in their professional capacities. In 1939, Congress passed "An Act to Prevent Pernicious Political Activities," otherwise known as the **Hatch Act of 1939**—so named for Senator Carl Hatch of New Mexico. The Hatch Act has been updated and amended several times over the ensuing decades, but we should be clear about the following two original Hatch Act provisions:

- No person may "intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the Houses of Representatives."
- Federal employees are forbidden from using their "official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives." (4)

The Hatch Act prohibits coercion in federal elections. That's a good thing and is an international standard to help determine whether elections have been conducted freely and fairly. The Hatch Act also forbids federal employees from using their "official authority"—which could be anything from one's title, office funds, or email address—to interfere with or affect a federal election. Due to Hatch Act modifications, federal employees are free in their personal capacity to support political campaigns, but they must resign their federal position if they want to run for federal office. Federal officials run into Hatch Act violations on a fairly steady basis every year, but it doesn't appear to be a big problem.

Organization of a Federal Cabinet Agency

Sonny Perdue, Secretary of Agriculture in 2020. A Political Appointee.

Government agencies are very complicated, and their organizational structures have evolved over time to serve their unique responsibilities. Therefore, it's difficult to generalize about them. However, we can make some useful generalizations about how cabinet-level agencies are structured. Cabinet-level agencies are headed by a Secretary—Secretary of Labor, Secretary of State, Secretary of Defense, and so on—who is a **political appointee**, meaning that they are appointed by the president and confirmed by the Senate and that they are expected to carry out the president's program with respect to the agency. Similarly, the top layer of the agency's leadership's is also composed of political appointees—with titles like Assistant Secretary, Deputy Assistant Secretary, General Counsel, and so forth. The political appointees in a federal agency form a fairly thin layer of political White House control over the agency's work. They are able to do so subject to the laws and regulations that have already been established with respect to that agency's work. Thus, they cannot direct civil servants to violate the law or abrogate established regulations without going through formal processes established by law.

Anonymous Civil Servant in the Forest Service, A Division of the Department of Agriculture.

Below the political appointees are the millions of **civil servants** who perform the work of the federal government. We're referring here to civilians—i.e., not uniform military—who are not appointed by the president to their positions. It's virtually impossible to give an adequate accounting of the wide range of people who work in the federal civil service, but imagine people such as statisticians, park rangers, geologists, epidemiologists, lawyers, tax accountants, demographers, and lead paint abatement administrators all serving to carry out the American people's wishes as reflected in congressional legislation and executive branch regulations. Contrary to what many people may think, most federal civilian employees do not work in the Washington D.C. area. In fact, more than 80 percent of them are spread around the country from Tampa to Seattle, from Boston to San Diego, and all sorts of places in between. (5)

Federal agencies also have an Inspector General's office, the existence of which was established by the Inspector General Act of 1978. The agency's **Inspector General** is "an independent, non-partisan organization established within each executive branch agency assigned to audit the agency's operation in order to discover and investigate cases of misconduct, waste, fraud and other abuse of government procedures occurring within the agency." (6) For cabinet-level agencies, inspectors general are appointed by the president and approved by the Senate. They can be removed by the president. For other federal entities like Amtrak, the Postal Service, and the Federal Reserve, the agency head appoints the inspector general. Inspectors general are supposed to be independent and able to conduct the internal investigations and audits they see fit. The results of those investigations and audits are given to whomever heads the agency and also to Congress within seven

days. While the inspectors general are not congressional employees, the Inspector General Act put them in place "to assist Congress in its oversight role." (7)

Inspectors general often rely on **whistleblowers**, who are people who come forward with information about maladministration, corruption, waste, or abuse of office within the agency. The **Whistleblower Protection Act** of 1989 forbids agency leaders from retaliating against the whistleblower or threatening retaliation. The Intelligence Community Whistleblower Protection Act of 1998 extended similar protections to workers in the intelligence agencies, although these workers are forbidden from taking retaliation cases to court. According to Bradley Moss, an attorney who specializes in whistleblower cases, "The need for whistleblowers to be able to raise their concerns with confidentiality and anonymity is critical." (8)

What Do Federal Agencies Do?

This is a gross oversimplification, but federal agencies perform two important functions that all citizens should know.

The first important task of federal agencies is **rule-making**, which refers to creating new regulations and revising existing regulations. The rule-making process is governed by the Administrative Procedure Act, which was originally passed in 1946, but which has been amended since then. Before we talk about the actual process through which regulations are created or amended, we should make clear that executive agencies are not free agents that act on their own initiative. **They are creations of Congress, and no executive agency can act unsupported by statutory authority**. (9) This means that Congress must first pass a law to create the executive agency and then pass additional laws—called **enabling legislation**—to give that agency the authority to issue particular kinds of regulations to solve defined problems. Since congressional members are not experts in air pollution or highway engineering or medical-device safety, they typically write laws in such a way as to allow the relevant agencies to create the specific regulations based on input from experts and the public alike. However, in 2024 the conservative majority on the Supreme Court threw a wrench into that arrangement in *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*. The Court ruled that agencies are not entitled to deference by federal courts in interpreting unclear federal laws. These decisions represent a large shift in power from executive agencies (where expertise lies) toward federal judges who are experts in law but ignorant about topics like workplace safety, pollution, healthcare, and so on. The decisions are also likely to affect lawmaking, as congressional opponents of federal action need only ensure that laws are vague enough to allow unelected judges to interpret them narrowly.

Once an agency has been given statutory authority to regulate a given issue, the first step is usually **research and data gathering**. What is the current state of the problem, whether it be particulate air pollution or rear-end collisions on American highways? In the case of air pollution, what smokestack and tailpipe regulations would result in what levels of reduced pollution? What kind of scrubbers on smokestacks and emissions-control devices on automobiles will produce what levels of particulate reductions? At what cost? This research and data gathering stage of the rule-making process can take years of careful study before a sound regulation can be written.

Once the research and data gathering stage is finished, the Administrative Procedure Act requires that the following steps be taken:

- **Publish planning documents**. These documents are written and published as a regulatory plan so that the public and other stakeholders are alerted that the agency is writing or rewriting regulations in a particular area.

- **Engage stakeholders**. The agency gathers feedback regarding the regulatory plan. It does so by posting an Advance Notice of Proposed Rulemaking in the Federal Register, which is a publicly available online and printed source that documents federal government behavior. In the case of air pollution, the agency may contact companies that have factories and refineries, automobile companies, and so forth.
- **Write and publish a regulatory proposal**. Agency staff put together a regulation and publish in the Federal Register a Notice of Proposed Rulemaking that summarizes the issue and the regulation at hand, sets a date when the public comment period will end, provides a means for public comment, and includes any other relevant information like important data the agency used and the agency's take on why this rule or regulation will be beneficial.
- **Accept public comment**. During a comment period that usually lasts thirty or sixty days, anyone is allowed to comment on the proposal. The agency may revise the regulatory proposal after the public comment period. It may also repost a new version for an additional comment period.
- **Publish the final rule or regulation**. The agency publishes the final rule or regulation in the Federal Register and stipulates a date for when the regulation goes into effect. (10)

The second important task of federal agencies is **enforcing** congressional statutes as well as their own rules and regulations. It's difficult to make useful generalizations about how federal agencies go about ensuring that laws and regulations are followed. The first thing that might come into your mind when you think about federal government enforcement is the range of agencies that police the federal criminal code. These range from the Federal Bureau of Investigation to the Coast Guard, from the Drug Enforcement Administration to the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Then there are the agencies like Customs and Border Protection as well as Immigration and Customs Enforcement that carry out laws governing who can enter and remain in the United States. But enforcement also covers other agencies like the Environmental Protection Agency that can fine polluters and the Consumer Financial Protection Bureau that can sue financial services companies and use court orders to compensate consumers who have been harmed by fraud or other illegal activities.

When enforcing federal laws and ensuring compliance with federal regulations, agencies have a certain amount of **discretion** in their work. This means that federal agency leaders can make choices about which violators to pursue, what penalties to seek, and on what areas of their responsibilities they want to concentrate their efforts. Enforcement discretion is often a function of agencies being over-worked, understaffed, and operating with limited resources. Choices have to be made. For example, the early years of the Obama administration were marked by a fairly strong approach to enforcing federal laws against marijuana production, distribution, and possession. Marijuana, after all, was still a Schedule 1 drug under the federal Controlled Substances Act. However, after more and more states began to decriminalize medical and recreational marijuana use, the Obama administration eased off. Similarly, the Trump administration said it *could* choose to go after companies and individuals who violate federal marijuana laws as they abide by laws in liberal states, but that it *chose* not to—presumably because such a move would be unpopular. (11)

The really problematic aspect of federal enforcement—the aspect which fits with the attenuated democracy theme of this textbook—is the tendency to prosecute and audit ordinary Americans instead of going after corporate malfeasance and wealthy white-collar criminals. **White-collar crime** has been defined by the Federal Bureau of Investigation (FBI) this way:

Reportedly coined in 1939, the term white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or

violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage. (12)

In an exposé for the *Huff*ington Post, journalist Michael Hobbes and researcher Matt Giles summarized the lack of enforcement against corporate criminals by saying that we are living in the "golden age" of white-collar crime. "It is," they wrote, "impossible to look around the country and not get the feeling that elites are slowly looting it. . . the criminal justice system has given up all pretense that the crimes of the wealthy are worth taking seriously." Further, they argue that "an entrenched, unfettered class of superpredators is wreaking havoc on American society." (13)

The consequence is that corporations and the wealthy are evading taxes, pushing faulty products on consumers, committing fraud, and getting their unqualified kids into elite universities in record numbers. The problem's scale is enormous—elite law breakers are so much less likely to be punished than are ordinary Americans. For example, the Internal Revenue Service audits poor recipients of the Earned Income Tax Credit whose average income is around $20,000 per year at twice the rate of taxpayers with income in the $200,000 to $500,000 range. (14) Tax evasion and corporate fraud cost the U.S. economy far more every year than all of the bank robberies and street crime. And yet, the U.S. goes after street crime with a breathtaking zeal compared to how white-collar crime is treated. In 2018, around 19,000 people were sentenced in federal courts for drug crimes, but only thirty-seven people working at big corporations were federally prosecuted for white-collar crime. (15)

There are **two main reasons why the federal government falls down on the job when it comes to white-collar crime** while heavily enforcing other kinds of criminal activity.

1. **Resource Imbalance**. Federal agencies like the Internal Revenue Service, the Federal Bureau of Investigation, the Security and Exchange Commission, the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Environmental Protection Agency are outspent, outlawyered, and unable to go toe-to-toe with corporations and wealthy individuals who tie up enforcement attempts in legal knots. As a report published by the office of Senator Elizabeth Warren (D-MA) pointed out, the resource imbalance often results in the federal government accepting small settlements from corporate criminals in which they don't even have to admit guilt. (16)
2. **Higher Bar for White-Collar Criminal Liability**. This is one of the worst aspects of America's criminal justice system, because there is often a different standard of criminal liability for white-collar crimes than there is for other crimes. For instance, in federal drug crimes "prosecutors have to prove that a defendant should have known a crime was taking place," but in white-collar criminal cases "prosecutors have to prove that the defendants knew their actions were illegal and did them anyway." (17) Consider the implications of this. If your adult child is caught running an interstate drug ring while living in your basement, you can serve time on federal drug charges and your house can be seized—even if you didn't know this was happening—because you should have known that criminal activity was taking place. On the other hand, if you defraud investors by collecting fees for pushing an investment that was clearly worthless, you can simply claim that you didn't know that it was worthless and, certainly, that you had no intention of violating federal securities fraud statutes. Unless the prosecutors find an email written by you to a co-collaborator in which you admit that you knew your actions constituted a crime, you are likely to escape prosecution.

Federal agencies are charged with preventing corporations and the wealthy from cheating American families, killing people with faulty products, committing fraud, and evading taxes. The fact that they are far less likely to fulfill this charge compared with enforcing laws against bank robbery, drug trafficking, and welfare fraud indicates that the U.S. political system serves the interests of the already powerful.

References

1. Max Weber, *Weber's Rationalism and Modern Society: New Translations on Politics, Bureaucracy, and Social Stratification*. Edited and Translated by Tony Waters and Dagmar Waters. Palgrave MacMillan. Page 49. Retrieved online here on February 8, 2020.

2. Quoted in Charlie Spiering, "Steve Bannon Details Trump Agenda: Deconstruction of the Administrative State," *Breitbart*. February 23, 2017.

3. William J. Burns, "Trump's Bureaucratic Arson," *The Atlantic*. November 17, 2019.

4. Hatch Act Text. Retrieved on February 8, 2020 from https://employment.laws.com/hatch-act-text

5. Darla Cameron, Dan Keating, and Armand Emamdjomeh, "Where Do Federal Workers Live?" *Washington Post*. August 30, 2018.

6. Robert Longley, "About the US Inspectors General," *ThoughtCo*. August 4, 2019.

7. Audie Cornish, "Former NSA Inspector General Comments on Whistleblower Issue," *All Things Considered on NPR*. September 19, 2019.

8. Candice Norwood, "Whistleblower Protection, Explained," *PBS Newshour*. October 2, 2019.

9. This basic fact undercuts the unitary executive theory notion that presidents can block all attempts at congressional oversight of executive branch functions.

10. The Federal Register, *A Guide to the Rulemaking Process*. Retrieved from here on February 8, 2020.

11. Sarah Trumble and Nathan Kasai, "The Past—and Future—of Federal Marijuana Enforcement," Third Way. May 12, 2017. Tom Angell, "Trump Says He Can Ignore Medical Marijuana Protections Passed by Congress," *Forbes*. December 21, 2019.

12. Federal Bureau of Investigation.

13. Michael Hobbes and Matt Giles, "The Golden Age of White Collar Crime," *Huffington Post*. February 10, 2020.

14. Paul Kiel and Jesse Eisinger, "Who's More Likely to be Audited: A Person Making $20,000—or $400,000?" *Propublica*. December 12, 2018.

15. Michael Hobbes and Matt Giles, "The Golden Age of White Collar Crime," *Huffington Post*. February 10, 2020.

16. Office of Senator Elizabeth Warren, *Rigged Justice: How Weak Enforcement Lets Corporate Offenders Off Easy*. 2016.

17. Michael Hobbes and Matt Giles, "The Golden Age of White Collar Crime," *Huffington Post*. February 10, 2020.

Media Attributions

- USDA © Official USDA Photo is licensed under a Public Domain license
- USFS2jpg © Official USFS Photo is licensed under a Public Domain license

Chapter 39: Revolving Doors and Corporate Capture of Federal Agencies

"[H]igh-income individuals and big-profit businesses have rewritten the rules of the economy, "capturing" the regulatory system and using it to squeeze out their competition."

–Annie Lowrey (1)

Federal government agencies are unfortunately plagued by two real dangers that blunt or undercut their ability to serve the interests of ordinary Americans. These two pathologies are related to each other, but we'll treat them individually to make them easier to understand.

The Revolving Door

The American system of governance is characterized by the **government-to-lobbyist revolving door**—often just shortened to the **revolving door**—which is when people move from government positions in the legislative and executive branches to positions within the industries that need to be regulated for the public good. This is a problem with respect to congressional members as well as political appointees and civil servants in executive branch agencies leaving public service to lobby for wealthy industries. Why is this a problem? The consumer advocacy organization Public Citizen nicely summarized the **three ways the government-to-lobbyist revolving door threatens the government's integrity**, so we'll quote its reasons directly:

> *"Public officials may be influenced in official actions by the implicit or explicit promise of a lucrative job in the private sector with an entity seeking a government contract or to shape public policy.*
>
> *Public officials-turned-lobbyists will have access to lawmakers that is not available to others, access that can be sold to the highest bidder among industries seeking to lobby.*
>
> *The special access and inside connections to sitting government officials by former officials-turned-lobbyists comes at a hefty price tag, providing wealthy special interests that can afford hiring such revolvers with a powerful means to influence government unavailable to the rest of the public."* (2)

The practice is quite prevalent. A recent study by Public Citizen found that "nearly two-thirds of recently retired or defeated U.S. lawmakers now working outside politics have landed jobs influencing federal policy." (3) The same is true for people who leave positions in federal agencies for lucrative positions in industry. Professors Zahra Meghani and Jennifer Kuzma point out that "high ranking ex-government workers often secure employment either in the very industries they used to regulate or at firms that provide lobbying or legal services for those businesses." (4) Especially with respect to federal agencies, the revolving door is truly a two-way passage, with people spending a good portion of their careers moving back and forth between government work and work for the industries that those agencies are supposed to regulate. To get a flavor of how the revolving door works, some examples are in order.

One of the most potentially impactful examples of the revolving door involved White House climate change policy under President George W. Bush. Philip Cooney was a lobbyist for the American Petroleum Institute

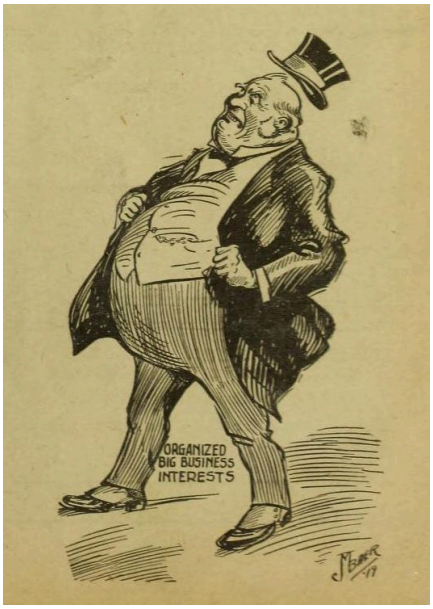
prior to being selected to be the chief of staff of the White House Council on Environmental Quality. Cooney personally watered-down reports on climate change to suggest that the science on the matter was less certain than it actually was. (5) When this was revealed, Cooney resigned his position in the White House and took a job with Exxon Mobil, which has spent at least $8 million funding groups challenging the existence of global warming. (6)

The case of Elizabeth Fowler is another poignant example. Most people don't know that Fowler was the primary architect of President Obama's Affordable Care Act (aka, Obamacare) when she served as an important legislative staff member for Senator Max Baucus (D-MT). Prior to this, Fowler worked as Vice President for Public Affairs for Wellpoint, a very large health insurance company. The Affordable Care Act passed Congress and was signed into law in March of 2010. Fowler was then hired by the Obama administration as Special Assistant to the President for Healthcare and Economic Policy—primarily to oversee implementing the Affordable Care Act. After doing that job for approximately two years, Fowler then jumped back into the healthcare industry as a top administrator at pharmaceutical giant Johnson & Johnson. (7) None of this is coincidental, nor is it coincidental that the Affordable Care Act was extremely friendly to the health insurance and pharmaceutical industries. It broadened health coverage only by forcing Americans to buy a policy from the private health insurance industry at the same time that it prevented people from choosing a viable public health insurance option. Advocates for a single-payer healthcare system were not even allowed to testify before Senator Baucus' committee. (8)

The Trump administration was marked by many examples of the revolving door. Eugene Scalia, who was appointed Secretary of Labor, used to do legal work for corporations seeking to limit worker benefits. For example, Scalia—son of the conservative former Supreme Court justice—"argued on behalf of Wal-Mart against a Maryland law that would have required the retail giant to spend more health care money on its employees." (9) Andrew Wheeler, the head of the Environmental Protection Agency, used to be a lobbyist for the coal, chemical, and uranium industries and has been described by a spokesperson from the Natural Resources Defense Council as "a person who has made a career out of trying to push back against common-sense safeguards to protect the air we breathe from dangerous chemicals like mercury, arsenic and others." (10) Overall, President Trump named more lobbyists to cabinet-level posts in his first three years than did Presidents Obama and Bush in each of their eight years in office. (11)

Rules against the revolving door are fairly weak. With respect to executive branch officials, there is a lifetime ban on switching sides in a "particular matter" involving "identified parties on which the former executive branch employee had worked personally and substantially for the government." There is a one-year "cooling off" period for senior officials from lobbying officials in their former agencies, and other restrictions. There is a cooling off period for legislative branch employees as well. (12) The limitations are easy to steer around—Public Citizen referred to revolving-door restrictions as "sorely inadequate" because the cooling off periods are too short. (13) Once the one-year probation period is over, there are no more restrictions. Indeed, former congressional members retain special access to members-only gymnasiums and restaurants. When survey researchers ask the public, they find strong majority support for a five-year cooling off period and plurality support for banning former public officials for life from lobbying. (14) Both Presidents Obama and Trump signed executive orders to try to limit executive branch revolving doors. Nevertheless, the revolving door is alive and well.

Corporate Capture of Executive Agencies



Cartoon of Organized Big Business Interests in 1919

The second related issue with respect to the federal agency's ability to fully serve the public interest is the phenomenon known as **regulatory capture**, which happens when wealthy corporations, industrial sectors, and financial interests are able to use their close relationships with executive agencies to get them to work for their interests rather than those of ordinary Americans. Obviously, one primary way of doing this is to get corporate lobbyists in government positions, because they will bring with them a pro-corporate ethos and perspective. The revolving door helps large economic interests in this regard. Capture is also facilitated by the fact that the industries being regulated often possess the data and the expertise that executive agencies need to do their work. Moreover, regulated industries cultivate allies in Congress who can put pressure on regulatory agencies to see the industry's point of view on a particular regulatory issue.

What does regulatory capture look like? Here are a couple of recent examples.

The Federal Aviation Administration (FAA). In 2019, the United States trailed forty-two other countries in deciding to ground the Boeing 737 Max, the company's newest version of its venerable 737 passenger jet. The plane had already been involved in two crashes that had killed hundreds of people. The crashes were caused by a problem with the automated flight control system that was detected and ignored during the plane's design and testing phases. How did this happen? Apparently, back in 2005, the FAA made an important decision to turn its safety certification responsibilities over to aircraft manufacturers, a move which was estimated to save the aviation industry $25 billion over the next decade. To be specific, plane safety used to be determined by FAA employees, but that job was now being done by Boeing employees and reported to the FAA. (15) In this particular case, the practice ended in tragedy.

The United States Department of Agriculture (USDA). The USDA has long been an exemplar of regulatory capture. For example, the USDA's National Organic Standard Board (NOSB) is responsible for regulating organic farming—particularly which foods get to be labeled as organic or not. Consumer and environmental advocates argue that regardless of whether Republicans or Democrats are in charge of the White House, appointments to the NSOB are "stacked" with "members from, or friendly to, corporate agribusiness interests" at the expense of small organic farmers who are more likely to hew to "true" organic practices. (16) Under the Trump administration, the Union of Concerned Scientists put forward a litany of USDA regulatory-capture instances, in which the agency deferred to the interests of agribusiness to allow the overuse of antibiotics in meat and poultry production, to loosen standards for school meals, to lessen the regulation of pesticides, to devalue the views of independent scientists over those funded by the industry, and to take the side of agribusiness giants over small farmers. (17)

Both regulatory capture and the revolving door are problems with the way the federal government operates. They undercut the government's ability to serve ordinary Americans, and they inflate the power of concentrated economic interests. Tighter regulations could limit congressional members and executive branch officials' ability to cash-in on their public service. Similarly, an approach to regulation that empowers federal agencies and makes them less dependent on industry-beholden experts might undercut the industry's ability to capture the agencies designed to regulate them.

References

1. Annie Lowry summarizing the argument of Brink Lindsey and Steven Teles in her article “Who Broke the Economy?” The Atlantic. December 11, 2017.
2. Craig Holman and Caralyn Esser, Slowing the Federal Revolving Door. Washington, D.C.: Public Citizen. July 23, 2019. Page 1.
3. Alan Zibel, Revolving Congress: The Revolving Door Class of 2019 Flocks to K Street. Washington, D.C.: Public Citizen. May 30, 2029. Page 1.
4. Zahra Meghani and Jennifer Kuzma, “The ‘Revolving Door’ Between Regulatory Agencies and Industry: A Problem That Requires Conceptualizing Objectivity,” *Journal of Agricultural and Environmental Ethics*. September 17, 2010. Page 579.
5. Andrew C. Revkin, “Bush Aide Softened Greenhouse Gas Links to Global Warming,” *New York Times*. June 8, 2005.
6. “Bush’s Environment Chief: From the Oil Lobby to the White House to Exxon Mobil.” Democracy Now!Radio. June 20, 2005.
7. Glenn Greenwald, “Obamacare Architect Leaves White House for Pharmaceutical Industry Job,” *The Guardian*. December 5, 2012.
8. Stephanie Condon, “Senate Panel Rejects Public Option,” *CBS News*. September 29, 2009.
9. Gabby Orr, Marianne Levine, Anita Kumar, and Ian Kullgren, “Trump Taps Scalia’s Son for Labor Secretary,” *Politico*. July 18, 2019.
10. Rebecca Hersher and Colin Dwyer, “Get to Know Andrew Wheeler, Ex-Coal Lobbyist with Inside Track to Lead EPA,” *All Things Considered*on NPR. July 6, 2018.
11. Richard Lardner, “Trump Outpaces Obama, Bush in Naming Ex-Lobbyists to Cabinet,” *The Associated Press* September 17, 2019.
12. Jack Maskell, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*. Congressional Research Service. January 7, 2014. Page 2.
13. Craig Holman and Caralyn Esser, *Slowing the Federal Revolving Door*. Washington, D.C.: Public Citizen. July 23, 2019. Page 3.
14. Nielsen Scarborough, “Government Reform, Wave 2 Questionnaire,” School of Public Policy, University of Maryland(Oct. 2017).
15. D. Saint Germaine, “The Boeing Debacle is the Latest Example of Regulatory Capture,” *Medium*. March 15, 2019. James E. Hall, “The 737 Max is Grounded, No Thanks to the F.A.A.,” *The New York Times*. March 13, 2019.
16. “Regulatory Capture: USDA’s Organic Governance Board Dominated by Affiliates of Industry’s Corporate Lobby,” *Beyond Pesticides*. January 24, 2019.
17. Betrayal at the USDA. Union of Concerned Scientists. March 30, 2018.

Media Attributions

- Big Business © The Nonpartisan Leader is licensed under a Public Domain license

Chapter 40: American Budget Priorities

"It will be a great day when our schools get all the money they need and the Air Force has to hold a bake sale to buy a bomber."

–Bumper Sticker

Categories of Federal Spending

We can better understand the federal bureaucracy if we understand that it is through those agencies that the United States spends its tax revenue. Where does the money go? There are numerous ways to analyze the federal budget. Perhaps the easiest to understand is to use figures from the Office of Management and Budget (OMB) and break federal spending down into just three categories, with some subcategories therein: (1)

Mandatory Spending—Mandatory spending refers to programmatic spending that is essentially automatic. Congress sets eligibility requirements and benefit formulas. If you meet the eligibility requirements, you are entitled to receive the benefit according to the formula. That's why this category is also referred to as **entitlement spending**. Mandatory spending is the largest overall category of government spending and it has been growing due to factors such as increases in medical costs that affect the budgets for Medicare and Medicaid. Mandatory spending can be broken down into the following buckets:

- **Social Security**—About 24 cents of every federal dollar go to the Social Security program. It is primarily a program to fight poverty among the elderly, although it has other components such as the Supplemental Security Income program to assist the blind and disabled. Through payroll deductions, workers pay into the system to support people who are currently retired—look for something that says FICA on your paycheck. In turn, current workers will be supported by today's children when they enter the workforce.
- **Medicare**—About 15 cents of every federal dollar go to the Medicare program, which provides health insurance for retired people. This is necessary because the American health insurance system primarily relies on employer-based health insurance, which people lose when they retire.
- **Medicaid**—About 9 cents of every federal dollar go to the Medicaid program, which provides health insurance for people who fall below certain income levels.
- **Other**—The United States has many other mandatory spending programs. About 13 cents of every federal dollar go to fund programs like unemployment compensation, military retirement, veterans' benefits, food stamps, and the earned income tax credit.

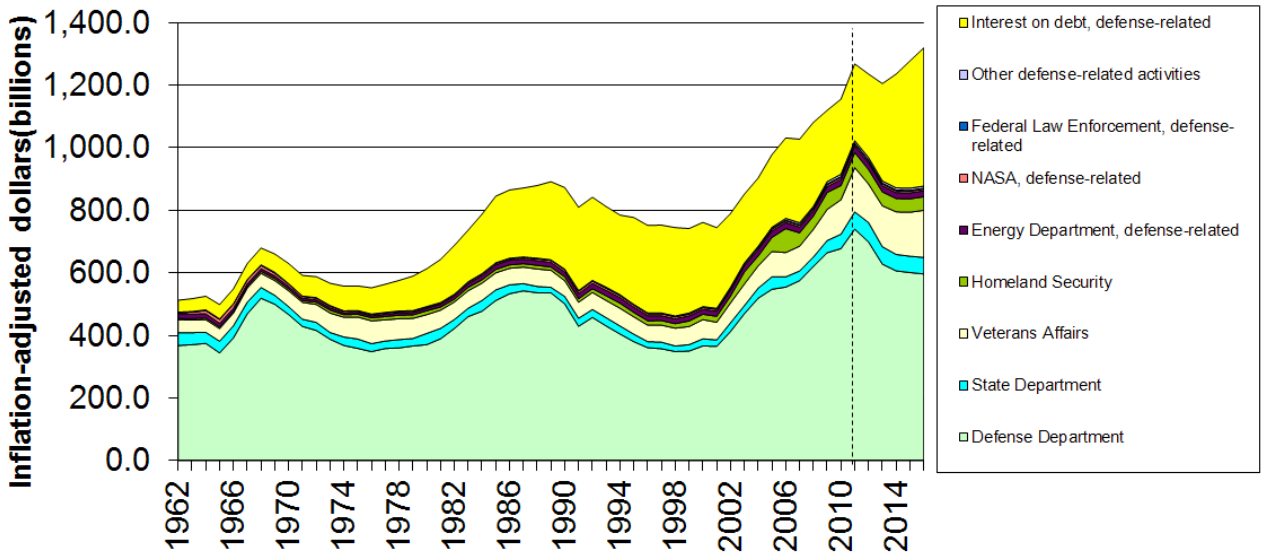
Discretionary Spending—Discretionary spending refers to federal spending that changes year to year as Congress passes appropriation bills funding particular agencies. Presidents make proposals to Congress for what they'd like to see spent, and each congressional chamber has its own budget committees. However, it is widely recognized across the political spectrum that the congressional budget process has been broken for a long time, with Congress routinely passing stopgap measures and continuing resolutions to keep the government open. (2) Given that dysfunctional context, *discretionary spending falls into two categories*:

- **Defense Spending**—About 14 cents of every federal dollar go to fund the Department of Defense. Defense spending is a misleadingly low number for two reasons. First, much defense-related spending is counted as nondefense spending. For example, spending for nuclear weapons development is not counted here

because it occurs under the auspices of the Department of Energy. Similarly, military veteran spending falls into the non-defense category even though it is supporting the American military superstructure. Some spending in the Department of Homeland Security is defense-like but is counted as non-defense spending. Spending on the intelligence agencies is also not counted as defense spending. The second reason that defense spending is not fully accurate is due to the fact that the United States sometimes treats its active war-fighting money as "off budget." For example, the George W. Bush administration took most of the war spending for the Iraq and Afghanistan invasions off budget to make budget deficits look smaller than they actually were and to avoid stirring up opposition to the war. (3) This is also a good place to note that the Department of Defense has never passed an audit, which was required of all federal agencies in 1990. (4)

- **Nondefense Spending**—About 14 cents of every federal dollar go to non-defense spending. When we consider that some of this spending is really defense spending, we realize that non-defense discretionary spending is a surprisingly small portion of federal spending. This money goes to support all of the things that pop into people's heads when we think of government—the National Park Service, the Environmental Protection Agency, the Department of Housing and Urban Development, the Internal Revenue Service, the Department of Education, the Securities and Exchange Commission, the Federal Emergency Management Agency, the National Weather Service, etc. These agencies are often given enormous regulatory and enforcement mandates without the resources they need. For example, the National Taxpayer Advocate report to Congress says that the Internal Revenue Service does not have adequate resources nor does it have the kind of modern and robust IT infrastructure it needs to do its job well. (5) To cite another example, the National Park Service budget has barely increased in the past two decades while visits to national parks have exploded, and deferred maintenance keeps piling up—even as national parks provide an estimated $100 billion in annual benefits to the American people. (6)

Interest on the Debt—Because the federal government fails to take in enough tax revenue to cover its spending, every year we spend hundreds of billions of dollars to service our debt—that is, we pay interest to wealthy people, institutional investors, and banks who lend the U.S. government money by buying Treasury bonds. Interest on the debt accounts for nearly 10 cents of every one dollar the U.S. government spends. Interest on the debt represents an interesting and sad revenue transfer from the middle class to the wealthy. Robert Reich, the former Secretary of Labor and public policy professor, points out that tax rates for wealthy families and corporations used to be higher than they are today, and the government generally did not run a significant deficit. What we've done since the 1950s is to reduce taxes on the wealthy and on corporations and increase the annual deficit, and then we've turned to those very wealthy individuals and corporations to lend the government money, for which they get a safe and secure return on their investment. What's happening, says Reich, is that "the government pays the rich interest on a swelling debt, caused largely by lower taxes on the rich." The middle class is providing a nice subsidy to the wealthy via the interest on the federal debt. (7)



Inflation Adjusted Defense Spending

What If?

What if the government regularly published the true cost of American military and intelligence spending? Would we have different public policy debates in the United States if the public knew that defense spending was really considerably higher? What if, instead of focusing on the 14 cents of every federal dollar that officially goes to the Pentagon, we publicized the fact that the true figure for national security funding is more than double that. (8) What if, every time the budget deficit was discussed by politicians, the news media ran a banner at the bottom of the screen reminding viewers that the Pentagon is the only government agency that cannot pass an audit? What if the news media did more stories comparing the costs of military programs to other possible uses for the funding? For example, the Pentagon will spend about $1.2 trillion developing, purchasing, and maintaining the F-35 stealth fighter over its lifetime. This fact almost never prompts a question in presidential debates about how we're going to pay for it. The F-35 is the world's costliest weapons program. In 2020, one F-35 costs around $80 million for the Pentagon to buy. (9) Wouldn't we be better off as a democracy if the public could debate the benefit of buying two F-35s compared to the presidential proposal in 2020 to cut the budget of the Centers for Disease Control by $175 million? (10) What is the comparative benefit of buying one F-35 versus paying for medical school for doctors who pledge to become general practitioners and serve at least five years in rural areas of the country that are chronically short of physicians? Rarely are these kinds of trade-offs presented to the public. Perhaps they should be. As investigative reporter Dave Lindorff put it, "No progressive change is really possible in this country if we continue to spend upwards of $1.3 trillion a year on wars and preparing for wars, occupation and intervention in the affairs of other nations." (11)

References

1. Office of Management and Budget Fiscal 2019 Budget.

2. For example, Erica Werner, "Senate Passes Stopgap Spending Bill to Keep Government Open through Nov 21, Sending Measure to Trump," *Washington Post*. September 26, 2019. For good diagnoses of the ills of the budget process as well as suggestions to improve it, see the material put out by the Committee for a Responsible Federal Budget.

3. Michael Boyle, "How the U.S. Public Was Defrauded by the Hidden Cost of the Iraq War," *The Guardian*. March 11, 2013.

4. Courtney Bublé, "Defense Department Fails Its Second Audit, Yet is Making Progress," *Government Executive*. November 18, 2019.

5. National Taxpayer Advocate, *Annual Report to Congress 2019*.

6. Linda J. Bilmes and John B. Loomis, editors, *Valuing U.S. National Parks and Programs: America's Best Investment*. New York: Routledge, 2019.

7. Robert Reich, "The Middle Class Pay for the Government. The One Percent Profit From It," *Newsweek*. February 11, 2020.

8. David Cay Johnston, "The True Cost of National Security," *Columbia Journalism Review*. January 31, 2013. William Hartung and Mandy Smithburger, "Boondoggle, Inc.: Making Sense of the $1.25 Trillion National Security State Budget," *Counterpunch*. May 9, 2019.

9. Chris Salcedo, "Stop Overspending on the F-35," *Townhall*. September 9, 2019. Mike Stone, "Pentagon Announces F-35 Jet Prices for Next Three Years," *U.S. News and World Report*. October 29, 2019.

10. FY 2021 Budget Proposal for the Department of Health and Human Services. Budget for CDC on page 43.

11. Dave Lindorff, "Truly Remaking Social Security is the Key to Having a Livable Society in the US," *Counterpunch*. February 19, 2020.

Media Attributions

- InflationAdjustedDefenseSpending © Johnpseudo is licensed under a CC BY (Attribution) license

PART 7: LINKAGE INSTITUTIONS

Chapter 41: What Do Political Parties Do?

"I was no party man myself, and the first wish of my heart was, if parties did exist, to reconcile them."

–George Washington (1)

The Theoretical Context of Political Parties

In 1950, a committee of the American Political Science Association (APSA) published a set of proposals to strengthen political parties in the United States. It rested on the assumption—explicitly stated, in the case of the APSA committee report—of what is known as a **theory of responsible party government**. This theory posits a mechanism fundamental to the operation of a democracy—namely, that public preferences are translated into governing policy and that there is a continual process for the public to hold those policy-makers accountable when their wishes are not followed. How is this to be accomplished? Most political scientists recognize that political parties play a vital role in this mechanism. **The primary goal of a political party** is to determine government policies by having its candidates win elections and become decision makers. The APSA committee report summed up the mechanism this way: "An effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs." (2)

Let's look at that last statement more carefully. Responsible party government needs parties that develop a **political program**, which is a set of policies on the variety of issues facing the country. This program should be prominent and well-publicized, because the theory suggests that voters are rational creatures who vote for the party that best advances their interests. Voters can't do that if the parties are unclear about their political program. The party also has to be strong enough to carry out the program once it is in power. In other words, the party has to be able to control its own politicians sufficiently to guarantee that the program will be translated into bills that can pass the legislature and become policy. When parties have sufficient power and coherence to translate political programs into policy, voters can easily see which party is responsible for what policies—and this is essential information as they head into the voting booths at the next election. They will reward the politicians from the party they support and punish the politicians from the party they oppose.

The theory of responsible government runs into two important limitations. The first is **divided government**, which refers to the state of affairs in American politics where the national-level political institutions are controlled by different parties at the same time. For example, the Republicans might control the White House and the Senate, but the Democrats have a majority in the House of Representatives. Or a Democrat might be president, but the Senate and House are controlled by Republicans. Since the early 1970's, divided government has been the norm. Typically, divided government refers to the elected institutions. However, given that Supreme Court control is a goal for both political parties, we can add it into the mix. The current conservative Court majority means that Democratic victories in congressional and presidential elections can be countered by the life appointments of five conservative justices. What does this mean for responsible party government? Divided government makes it very difficult for American political parties to translate their political programs into public policy. Stalemate frustrates voters' ability to clearly reward one party and punish the other because it's so difficult for them to know why nothing seems to get done in Washington.

The second limitation of the theory of responsible party government centers on the twin assumptions that voters are knowledgeable and rational. Voters are not particularly

knowledgeable. As economist Bryan Caplan famously put it, "The people ultimately in charge—the voters—are doing brain surgery while unable to pass basic anatomy." (3) The theory of responsible party government needs an electorate with particular characteristics. Voters need to understand American history and current public policy choices, which means they need to know fairly complicated things like what a single-payer healthcare system actually entails, how international trade works, how corporate governance is structured, how federal tax brackets and marginal tax rates operate, the complexities of sex and gender, and so forth. There's a great deal to know! Beyond that, voters need to be rational enough to match their interests to the political party system—i.e., which political party best represents my mix of interests? Voters actually display what is known as **bounded rationality**, a concept political science borrowed from behavioral economics, meaning that voters are not fully rational due to the complexity of the decisions they have to reach, their own cognitive limitations, and the limited time and resources they have to devote to understanding politics. (4) Absent full knowledge, voters' ability to actually process all the needed information–in the time needed to do so–results in rational decision-making short cuts.

When we acknowledge the theory of responsible party government and its limitations, we begin to understand a basic dilemma at the heart of politics. We *want* politics to operate on a rational basis in which parties put forward political programs that compete in a marketplace of ideas, and we *want* voters to carefully weigh those programs to reach rational decisions about which party to support. But we *know* that people are, in the words of political scientist Christopher Achen, "doing the best they can. They just don't have a lot of information, and so they substitute guesses and views of the world that make them feel comfortable." (5) This, then, is the context in which political parties operate.

What Do Political Parties Do?

Let's remember that political parties want to have their candidates win elections so they can become the decision-makers who implement public policy. With this in mind, it's fair to say that political parties perform three basic functions.

Representative Alexandria Ocasio-Cortez

Recruit political candidates—The leaders of state and national party organizations use their networking skills to recruit potential candidates for local, state, and federal offices. Obviously, this is very important for offices in which the party does not have an incumbent running for reelection. There is no "perfect" candidate, although it appears from the kinds of candidates the parties typically put forward that there are several **characteristics of attractive candidates**. Name recognition is important, so parties try to recruit people who are already in office to run for higher office, or they recruit prominent business leaders, or people who have been active in the community. Access to money is another important characteristic, meaning candidates who can partially self-fund their campaigns or who have a plethora of connections to people who are in a position to donate to the campaign. Parties also look for candidates with a particularly appealing biography, which might include anything from being a combat veteran to being a successful entrepreneur. Candidates who get recruited by party leaders still have to face the primary or caucus nominating process, which we'll talk about more in the textbook section that deals with elections.

Attempt to win elections—Political parties support their candidates in the election by engaging in four main activities. They engage in **political advertising** for specific candidates, which can involve everything from yard signs to YouTube ads, from radio spots to micro-targeted messages on social media. Parties also conduct **voter registration drives** by helping people from specific neighborhoods or from specific demographic groups register to vote. They also engage in increasingly sophisticated **voter turnout efforts**, meaning that they make sure as many of their partisans as possible actually vote in the election. This may entail organizing party workers to contact potential voters directly or to drive people to the polling stations. Finally, parties **provide candidates with expertise and data**, hooking them up with consultants and making mailing lists and past election results available to them.

Organize governance and opposition—Once elected, a party's candidates organize themselves into party groupings—in Congress, for example, or the state legislature. They elect their own leadership and meet as a group to plan their legislative strategies. They may also discipline party members who don't vote with the group, although American parties are not known for engaging in that kind of discipline too often.

Party Organization

Party organization in the United States reflects the federal nature of our political system. That is, parties exist on the national, state, and local levels. If we look at parties from the top down, **national committees** conduct the party's business in between the quadrennial national conventions and are composed of prominent members of each state's party organizations. The Democratic National Committee's membership and structure are a bit more complicated than that of the Republican National Committee. Each national committee has a chairperson and a variety of other leadership posts. If the party in question has elected the President of the United States, the president typically selects the party chairperson, although the national committee officially votes them into the chair. They are responsible for the party's vitality, its fundraising, outreach, voter registration efforts, and articulating the **party platform**, which is adopted at the national convention. The platform lays out the party's position on various issues of the day.

Also, at the national level are the **Hill committees**—referring to Capitol Hill in Washington, D.C. In the House of Representatives, there are the Republican and Democratic Congressional Committees, composed of each party's various representatives. In the Senate, there are the Republican and Democratic senatorial committees, composed of each party's U.S. senators. While Hill committees have been in existence for many years, the increase in congressional partisanship has elevated their importance. According to Political Scientist Sandy Maisel, "Their role has increased dramatically. Not only do they raise money for candidates, but they play critical roles in setting national campaign priorities." (6)

The larger parties have a **state organization** in each of the fifty states. State party organizations have become more institutionalized, professional organizations in the last several decades. Still, state and local parties rely on countless volunteers to get their work done. Often, state party organizations will offer a few paid positions—like an executive director—who organizes volunteers to work in capacities from treasurer to secretary, from recruitment chair to various caucus chairs. State parties provide the same help to state candidates that national parties do to federal candidates. Indeed, state party organizations "are increasingly becoming service agencies for candidates." (7)

Parties also have local units. For a time, urban political machines were key power centers in American politics, particularly for the Democratic Party. The machine built by Democrat **Richard Daley** helped him rule Chicago from 1955 to 1976. There are still vestiges of the Daley machine in Chicago and Democratic machines in other urban areas. **Tammany Hall** dominated New York City politics for much of the nineteenth century, providing

immigrants with food, coal, patronage jobs, and a decidedly Democratic political orientation. The equivalent of suburban machines—mostly Republican—also existed in places like Nassau and Westchester counties in New York, Delaware and Montgomery counties in Pennsylvania, and DuPage county in Illinois. (8) But across the country, power has shifted from the local level up to state party organizations. Why? In many places, it was simply more efficient to locate party centers at the state level. Reforms that instituted merit systems for hiring city workers undercut the urban machine's ability to use such jobs as patronage rewards. Government-run social welfare programs took away a mechanism for parties to use handouts to cultivate support among poor voters. And regulations requiring fair processes for awarding contracts largely eliminated the machine's ability use those city contracts to garner key supporters.

References

1. George Washington letter to Thomas Jefferson. July 6, 1796. The National Archives.

2. No Author, "Toward a More Responsible Two-Party System," *American Political Science Review*, vol. 44. September, 1950.

3. Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies*. Princeton, NJ: Princeton University Press, 2008. Page 6.

4. Stefano Fiori, "Forms of Bounded Rationality: The Reception and Redefinition of Herbert A. Simon's Perspective," *Review of Political Economy*. Volume 23, Issue 4. October, 2011.

5. Sean Illing, "Two Eminent Political Scientists: The Problem With Democracy is Voters," *Vox*. June 24, 2017. See also Christopher Achen and Larry Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government*. Princeton, NJ: Princeton University Press, 2016.

6. Sandy Maisel, *American Political Parties and Elections. A Very Short Introduction*. New York: Oxford University Press, 2016. Page 65.

7. Jewell and Morehouse, *Political Parties and Elections in American States*. Washington, D.C.: CQ Press, 2001. Page 50.

8. James Reichley, *The Life of the Parties. A History of American Political Parties*. New York: The Free Press, 1992. Page 401.

Media Attributions

- Ocasio Cortez © Unknown is licensed under a CC0 (Creative Commons Zero) license

Chapter 42: The Historical Development of American Political Parties

"Americans want a politics they don't have to hate. And therein lies our hope: Democracies are uniquely open to change, and if citizens want politicians to move beyond false choices, it is in their power to demand it."

–E. J. Dionne, Jr. (1)

Political parties started early in the American republic, despite the fact that many founders—in theory, if not in practice—disparaged the factionalism and corrosive influence of political parties. In his **farewell address**, President **George Washington** warned against political parties, particularly those based on geographic loyalties. He went on to say that partisanship "serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which finds a facilitated access to the government itself through the channels of party passion." (2) Nevertheless, political parties became entrenched in the political system.

In a survey course such as the one you are taking, there really isn't time to go into the full scope of American party development, but you should be familiar with several important developments in the history of the American party system. One thing you should note is that, ideologically speaking, American political parties resemble tectonic plates on the earth's surface that don't stay firmly put in one place. Conservatism and progressivism have at various times found homes in different political parties.

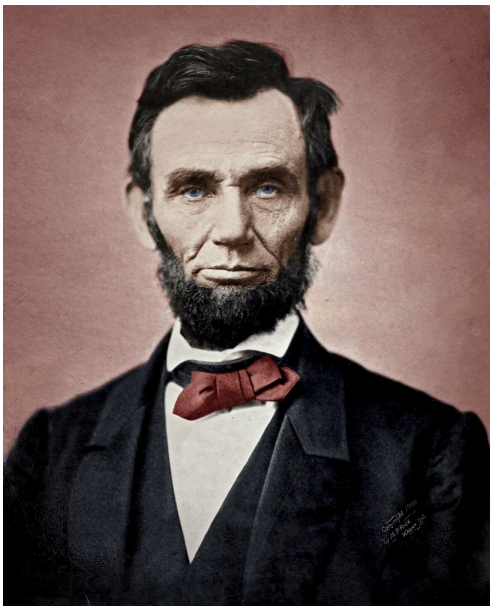
Beginnings of the Party System

Party struggles really began within the Washington administration itself, personified by the political differences between his Secretary of State, Thomas Jefferson, and his Secretary of the Treasury, Alexander Hamilton. Jefferson believed in a less energetic central government than did Hamilton—at least until Jefferson became president later and carried through the Louisiana Purchase without getting clear congressional authority. Hamilton pushed for the United States to develop its manufacturing sector and become a commercial power, while Jefferson envisioned a secure republic made by yeomen farmers with small landholdings. Jeffersonians formed the **Democratic-Republican** party, explicitly aiming to invoke the Revolution's egalitarian principles, while the Hamiltonians formed the **Federalist** party to remind people of the Constitution's triumphal plan. (3) It is somewhat ironic that Jefferson had a hand in founding a political party, because he shared Washington's antipathy for them. He said, "If I could not go to heaven but with a party, I would not go there at all." (4) And James Madison similarly warned against the evils of faction in *Federalist #10*. Despite that, the Democratic-Republican party coalesced around Jefferson and Madison. The Federalists initially had the upper hand in early party competition, selecting John Adams to replace Washington in 1797. But the Democratic-Republicans came charging back with Jefferson's two-term administration beginning in 1801, James Madison's two terms, and James Monroe's two terms ending in 1825. The Federalists quickly faded from the scene.

Democrats and Whigs in the Antebellum Period

With the Federalists fading, the Democratic-Republicans were the only game in town, but then they disagreed among themselves in the 1820s and formed two discrete parties: the **Democrats**, which have continued to the present day, and the National Republicans, which then became the **Whig Party** that eventually dissolved over slavery in the 1850s. Meanwhile, back to the 1830s and 40s: The Democratic Party was the dominant one, electing Andrew Jackson, Martin Van Buren, James Polk, Franklin Pierce, and James Buchanan between 1828 and the beginning of the Civil War. The Whigs managed to elect two ill-fated presidents. The first was William Harrison, who delivered a long inaugural address on a cold and windy day and died of pneumonia about a month into his presidency. (5) Zachary Taylor was the other Whig elected president. After taking office in 1849, he died of acute gastroenteritis sixteen months later. (6) The interesting thing about the antebellum national party system was that it was the Whigs, not the Democrats, who believed in using the central government's power to make "internal improvements" to the country such as roads and canals. The Democrats were the party of the "common man," which is still its reputation, but the Democratic party then was also openly hostile to Blacks, whether slave or free. **John C. Calhoun**, a prominent Democrat from South Carolina who at times served as a representative, a vice president, and senator, once lamented that the phrase in the Declaration of Independence that all men were created equal "has become the most false and dangerous of all political errors. . . We now begin to experience the danger of admitting so great an error to have a place in the declaration of independence." (7)

The Civil War Crisis



President Abraham Lincoln

The American party system was rocked by the crisis over slavery and states' rights that resulted in the Civil War. The Whig party split into a Northern wing that held on to the principles of an active central government, and a Southern wing whose members were concerned that a central government powerful enough to make "internal improvements" was powerful enough to end slavery. The Democrats were split between North and South as well, but that party survived whereas the Whig party completely disintegrated. In the mid-1850s, northern Whigs joined some antislavery Democrats and members of the antislavery Free Soil Party to create the modern **Republican Party**.

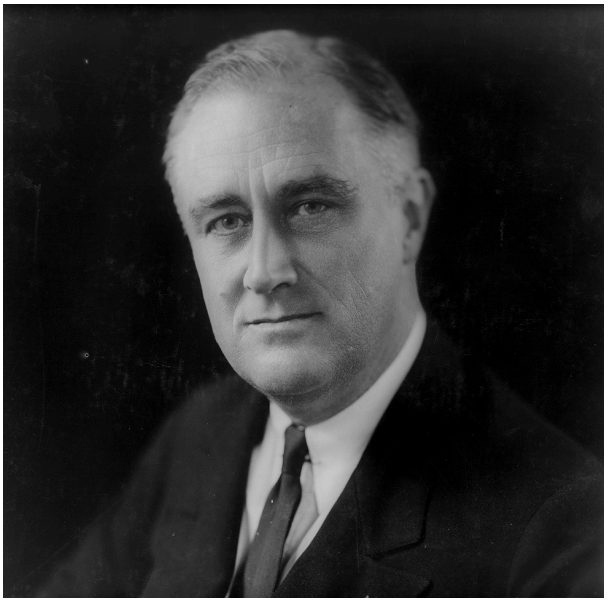
Historian Heather Cox Richardson reminds us that the early Republican Party opposed great wealth accumulation, promoted land distribution, the equal rights of immigrants, and government promotion of a transcontinental railroad. Many early Republicans were so progressive that they were referred to as **Red Republicans**. Were you ever taught that in school? Neither was I. Pledged to fight the "twin relics of barbarism"—slavery and polygamy—early Republicans were mobilized when the Kansas-Nebraska Act passed, which overturned the Missouri Compromise of 1820, and allowed new territories to permit slavery if they wanted. Early Republicans had a vision of America as a land free not only from slavery, but from **wage slavery** as well—meaning the business exploitation of for-hire laborers. They celebrated autonomous workers—primarily independent farmers and the self-employed—and feared the power of capitalists, regardless of whether they were plantation

owners in the South or factory owners in the North. **Alvan Bovay** was one of the people who initiated the push to establish the Republican Party in 1854. He is credited with naming it "republican" to hearken back to the views of Thomas Paine and Thomas Jefferson. He worked on a number of radical causes, including a "vote yourself a farm" campaign, and wrote for George Evans' *Working Man's Advocate* and *Young America* newspapers. **Abraham Lincoln**, the Republican's second presidential candidate, won the very divided election of 1860 with only 40 percent of the popular vote. The land reform that Bovay and Evans advocated in the 1850s was pushed by Lincoln and became the Homestead Act of 1862, which distributed land in the West to settlers who would "improve" it. (8) With the demise of the Whig Party over the slavery issue, the Republicans and Democrats became the pre-eminent political parties in American politics to this day.

Republican Dominance

The era from the Civil War to the Gilded Age was one in which the Republicans dominated the presidency—they elected twelve of fifteen presidents from 1860 to 1929—and often enjoyed Republican majorities in the House and Senate as well. The Republicans dropped any hint of "red republicanism" and evolved into a party that promoted business interests and economic growth, pushed public schools that produced the standardized graduates that business leaders needed, endorsed the gold standard that promoted price stability that business leaders wanted, and supported high tariffs on imports that protected U.S. manufacturers. It was during this period of Republican dominance that wealth and income inequality grew to obscene levels that were fueled by monopoly capitalism. The Democrats maintained a stronghold in the South and strong support among Northern-city Catholic immigrants and small Mid-western farm owners. Later, the South became known as the **Solid South** because Democrats dominated there until after the mid-1960s when Republicans began to rise. Populism gripped the Democratic Party in the late 1890s and it looked like they might break Republican dominance, but in the election of 1896, the Republicans' huge financial advantage and victories in the Electoral College-rich Northeastern states kept the Democrats out of the White House. The spirit of progressivism infected both parties in the early 1900s, but it created the most lasting impression in the Democratic Party. In the 1912 election when Republicans split between William Howard Taft and Theodore Roosevelt, Woodrow Wilson became president, and the Democrats began to embrace many progressive ideals—using government to solve social problems, controlling the power of large business interests, and instituting social reforms such as extending the right to vote and banning child labor. However, the Democratic Party remained a bastion of racism, particularly in the South.

The New Deal Coalition



President Franklin Roosevelt

The period from the 1930s to the 1960s was a period of Democratic party ascendance. The Great Depression began with the stock market crash in October 1929 and marked the death-knell for Republican's long-held dominance of national politics. Many people came to the conclusion that reckless pro-business Republican policies of the 1920s caused the Depression, and also were convinced that **President Herbert Hoover's** conservative response to the crisis was insufficient. The 1932 election brought Democrat **Franklin Roosevelt** to power–the only president to win election four times–and his administration used government's power to alleviate suffering, regulate the economy, and put people back to work. The overall policy, known as the **New Deal**, included such features as Social Security, unemployment insurance, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, the Civilian Conservation Corps, and the Works Progress Administration, among many others. The Democrats dominated national politics from 1933 to the end of the 1960s, largely because of what has become known as the **New Deal Coalition**. They cobbled together a coalition of unionized workers, farmers, Jews, white-collar professionals, African-Americans, and urban immigrants who were predominantly Catholics. The New Deal programs were popular enough that the Republican Eisenhower administration left them in place in the 1950s, and the Democratic Johnson administration built on them somewhat in the 1960s.

Contemporary Party Struggles

Things can change rather quickly in politics, but we can make the following observations about the contemporary party system. The first thing to note is the **demise of the New Deal Coalition**. The success of the Civil Rights Movement, the cultural turmoil of the late 1960s, and the stridency of the Democratic party's anti-Vietnam War wing fractured the New Deal coalition and hurt many Democratic candidates' electoral chances. The New Deal coalition had been built upon the economic interests of the common man regardless of race or religion. By the late 1960s and early 1970s, however, the Republicans became increasingly successful in attracting support from Whites opposed to racial desegregation, from men and women who were disconcerted by women's liberation, from rural voters concerned about gun control, and from voters who disdained the perception of pacifism in American foreign policy. Moreover, the *Roe v. Wade (1973)* decision legalizing abortion and the rise of the gay rights debate handed Republicans two social issues that were instrumental in courting Catholics, evangelical Protestants, and Mormons.

Beginning in the 1960s, Republicans pursued what most people call the **Southern Strategy**—a conscious and largely successful attempt to capture the South by playing on White's fears of the Civil Rights movement. The **Southern Strategy** was really a broader strategy linking the South with suburban and rural areas across the United States, aimed at White fears of racial integration, urban crime, and economic insecurity. In a 1981

interview, Republican strategist Lee Atwater explained that the Southern Strategy rested on stressing race without overtly mentioning it:

You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites.... "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger." (9)

The Republican party also embraced an assault on public schools—relabeled in their vocabulary as "government schools"—at the behest of religious conservatives opposed to school integration and the teaching of evolution. The Southern Strategy was successful. The Democrat's Solid South transformed to become a bastion of Republican office holders instead. Republicans won all but one presidential election from 1968 to 1992, won eight of the thirteen presidential elections from 1968 to 2016, and wrested both congressional chambers from Democrats control. Similarly, Republicans dominated state gubernatorial and legislative elections in 2010, which allowed them to gerrymander district boundary lines to their advantage following the 2010 census. (10) Even when outsider Donald Trump captured the Republican presidential nomination in 2016 against the wishes of party leadership, the Republicans were able to win the White House again with help from the Electoral College even when their candidate lost the popular vote that year. In 2020, President Trump lost his bid for reelection, but the Republican Party maintained control over the majority of state legislatures and regained control of the House of Representatives. Donald Trump won the presidency in 2024, and the Republicans captured both chambers of Congress.

Meanwhile, the Democratic party hewed sharply to the right in the late 1970s in order to compete with the Republicans. The Democrats increasingly turned to the same sources as the Republicans to fund their candidates—corporations and the wealthy—and it pursued policies that were often indistinguishable from the Republicans. Bill and Hillary Clinton led the way in this transformation, aggressively courting Wall Street and corporate money and supporting anti-welfare, pro-finance, tough-on-crime policies designed to win back voters that the party had lost to Republicans. Still socially liberal, the Democratic party became controlled by the New Democrats, who can more properly be called the **Corporate Democrats** because of their connections with and deference to large corporations. (11)

President Obama was solidly in the corporate wing of the Democratic party, and his policies were described by one astute political observer as "crafted by representatives of corporate/financial America, who happen to entirely make up his inner circle." (12) This was particularly true of Obama's tepid response to the Great Recession that was caused by Wall Street's predatory behavior, but also manifested itself in the very corporate friendly Affordable Care Act. (13) Progressive members of the Democratic Party had no place to go until democratic-socialist Bernie Sanders reignited their hopes in his failed attempt to gain the Democratic presidential nomination in 2016. Sanders' candidacy in 2016 and again in 2018 underscored the deep divisions in the Democratic party between its corporate and progressive wings. In 2020 the Democrats nominated Joe Biden as their presidential candidate, a veteran politician solidly in the corporate wing of the party. Once elected, Biden packed his cabinet with corporate leaning politicians and bureaucrats. In July of 2024, Biden withdrew from running and endorsed Kamala Harris, his vice president, and the party nominated her the next month. She lost.

References

1. E. J. Dionne, Jr., *Why Americans Hate Politics*. New York: Simon & Schuster, 1991. Page 373.

2. George Washington, *Farewell Address*, September 19, 1796. The National Archives.
3. Actually, early on Jeffersonians simply called themselves the Republicans before they were called the Democratic-Republicans, and then the Democrats. To avoid confusion with the later and unrelated Republican Party, political scientists usually extend the Democratic-Republican name back in time to encompass Jefferson's Republicans.
4. Paul Johnson, *A History of the American People*. New York: HarperCollins, 1997. Page. 216.
5. He was replaced by John Tyler.
6. He was replaced by Millard Fillmore.
7. Mackubin T. Owens, "The Democratic Party's Legacy of Racism," a publication of the Ashbrook Center for Public Affairs at Ashland University. December 2002.
8. For the progressivism of the early Republican party, see the following: John Nichols, *The "S" Word. A Short History of an American Tradition…Socialism*. 2nd edition. New York: Verso, 2015. Chapters 2 and 3. Heather Cox Richardson, *To Make Men Free: A History of the Republican Party*. New York: Basic Books, 2014. Pages 1-45.
9. Rick Perlstein, "Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy," *The Nation*. November 13, 2012.
10. Vann R. Newkirk II, "How Redistricting Became a Technological Arms Race," *The Atlantic*. October 28, 2017.
11. Lance Selfa, *The Democrats: A Critical History*. Revised and Updated Edition. Chicago: Haymarket Books, 2008. Pages 63-85.
12. Matt Taibbi, "Obama and Jobs: Why I Don't Believe Him Anymore," *Common Dreams*. September 6, 2011.
13. Michael Lewis, *The Big Short: Inside the Doomsday Machine*. New York: W.W. Norton & Company, 2010. Matt Taibbi, *Griftopia: A Story of Bankers, Politicians, and the Most Audacious Power Grab in American History*. New York: Random House, 2010.

Media Attributions

- Lincoln © casually cruel is licensed under a CC BY-NC-ND (Attribution NonCommercial NoDerivatives) license
- Roosevelt © Executive Office of the President is licensed under a Public Domain license

Chapter 43: Policy Preferences of American Political Parties

"The Republican Party is not, as advertised, conservative but radically oligarchical. Programmatically it exists to advance corporate economic and political interests, and to protect and promote inequities of opportunity and wealth."

—Sheldon S. Wolin (1)

"Should Democrats somehow be elected, corporate sponsors make it politically impossible for the new officeholders to alter significantly the direction of society."

—Sheldon S. Wolin (2)

How Political Scientists Analyze Parties

Political parties are complicated beasts, and not at all easy to capture in American Government textbooks. Political scientists tend to break the analytical problem down into three parts. (3)

The party in the electorate refers to the voters who support each party. Even this is difficult, because people may support the Democratic or Republican parties—or one of the third parties—without formally registering as a party affiliate. Indeed, one can say that the largest "party" in the United States are those who either intentionally refuse to commit to one of the parties or who have turned away from partisan politics altogether. However, even these **Independents** tend to favor the political positions of one party over another. Party affiliation tends to wander over time. Generally speaking, Republicans and Democrats each tend to constitute somewhere between 25-33 percent of the population, with Independents making up the rest. (4) Political scientists and survey researchers use the term **party identification** to refer to a voter's self-identification with one party or another, whether or not they are formally party members. Through survey research, political scientists can make statements about the extent to which people who identify with one party support policy A versus policy B.

Two Delegates to a Political Convention

The party organization deals with what we talked about in a previous chapter—i.e., people who hold offices or volunteer positions in a political party at the local, state, or national level. They tend to be quite dedicated, devoting considerable time and effort promoting the party, its policies, and its candidates. This is a finite number of people, and political scientists can study them through both qualitative and quantitative methods. For instance, scholars can study the extent to which the political views of national party convention delegates are similar to or differ from those of rank and file party members. (5)

The party in government refers to elected and appointed public officials who identify with one party or another. As with party organization, this is a relatively well-defined universe of people that can be subdivided into precise groups like members of the House of Representatives or U.S. Senators. The behavior of these groups can be analyzed using quantitative and qualitative measures. For instance, the overall partisanship of Representatives and Senators can be analyzed by looking at the percentage of congressional votes that pit a majority of Democrats on one side voting against a majority of Republicans on the other side. Individual representatives or senators can be given partisanship scores for how closely they adhere to the party line, and those results can be compared to the voters' views. (6)

These modes of analysis tend to accentuate the differences between Democrats and Republicans, regardless of whether we're talking about ordinary voters, people who hold positions in party organizations, or public officeholders. They can tell us, for example, that party identification is remarkably stable over long periods of time. (7) They can also tell us that while a majority of all Americans think there is too much economic inequality, people who identify as Democrats are considerably more likely to think so than are people who identify as Republicans. (8) These analyses are also mentioned prominently in news media accounts of American politics.

A Critical Examination of the Democratic and Republican Parties

If we want to critically examine America's dominant political parties, we should start with the economic context in which they operate. The Democratic and Republican parties contest for political power within a society that has long embraced a variant of capitalism marked by monopolies and oligopolies, by the privileged place of business in the political landscape, by stark economic inequality, and by a devaluation of the public versus the private sphere. (9) In turn, the dominant political parties often act to reify this particular capitalist system. A visitor from outer space who studied American politics would quickly note how the Democratic and Republican parties both seem to behave as though they existed primarily to execute the policies desired by financial institutions, large corporations, real estate developers, and insurance companies. In the famous words of scholar Noam Chomsky, "The United States has essentially a one-party system and the ruling party is the business party." (10) As we'll see in the chapter on campaign finance, almost all candidates from both political parties depend on money from businesses and their top management personnel to fund their campaigns.

Setting this context is necessary to understand the Democratic and Republican parties, but it's not entirely sufficient. We need to keep our eye on another set of variables. As dominant as are the artificial people called corporations in the political party landscape, we have to be mindful that parties are coalitions of actual people as well—and actual people still retain a privilege not yet afforded by the Supreme Court to corporations. People vote, and through their votes they nominate candidates and elect politicians. Furthermore, ordinary Americans' interests do not fully align with the interests of capitalists. To be sure, actual people need the jobs that corporate America provides, which means that workers and their employers are co-invested in a prosperous economy. Beyond that, however, the interests of living, breathing people and the interests of artificial people—i.e., corporations—diverge either somewhat or completely. This fact creates tensions and divisions within America's dominant political parties, because elites and ordinary people contest each other over the policy programs on which political parties campaign. For example, Wall Street firms that give so much money to the Republican party—they give to both parties—don't share the political goals of evangelical Christians, who are currently a significant part of the Republican coalition.

The interest alignment and misalignment between the corporate funders of America's political parties and the coalitions of people who are party members or party identifiers is fertile ground for examining the three dimensions of power. Obviously, the first dimension of power manifests itself as party adherents vote in

primaries and caucuses to nominate candidates to run in general elections. The second dimension of power can be seen clearly when party establishments—party leaders, who tend to be elites most closely tied to corporate sponsors—attempt to put their finger on the scales during the nominating process. This can happen at any level, but it gets the most attention at the presidential level. In 2016, the Republican party establishment was powerless to stop Donald Trump's insurgent campaign to become the Republican presidential nominee. On the Democratic side, however, Bernie Sanders' progressive movement was successfully stymied by party leaders. A secret agreement between the Democratic National Committee and Hillary Clinton's campaign essentially gave Clinton's camp "control (of) the party's finances, strategy, and all the money raised" well before the nomination season had even started. In addition, the Democratic National Committee chairwoman gave Clinton an early look at what was going to be asked at a debate between the two candidates. (11) While it's likely that Clinton would have gotten the nomination anyway for a number of reasons, the whole escapade nicely illustrates the second dimension of power in action. In the 2018 presidential nomination season, corporate leaders and corporate media put on a full-court press against the two progressive candidates, threatening to withhold support, red-baiting Sanders in particular, and hoodwinking ordinary people into thinking that the corporate-backed candidates actually had their interests in mind. (12) It was a classic illustration of the third dimension of power.

The Republican Party, which is the principal vehicle for conservatism in America, is caught in what political scientists Jacob S. Hacker and Paul Pierson refer to as the **conservative dilemma**, which arises "when an economic system that concentrates wealth in the hands of the few coexists with a political system that gives the ballot to the many." Here's the dilemma: how does a party that serves the interests of concentrated wealth win enough votes from ordinary people? The conservative dilemma has plagued conservative parties in many countries, but appears to be particularly acute in the American context where the Republican Party, according to Hacker and Pierson, embraces policies that serve corporations and the economic elites while campaigning to voters using appeals to White grievance, ginned up moral outrage (for example, at "rigged elections," or "critical race theory"), fears of creeping socialism, issues like guns and abortion, and outrage at the very elites Republicans serve with their tax breaks and deregulation agenda. (13).

The analysis above suggests that there is a tug-of-war between ordinary Americans and elites over who is going to be able to capture America's dominant political parties and use them to serve their interests. Sheldon Wolin, the political scientist whose quotes start the chapter, argues that both parties are fully captured by America's corporate elite. This view is shared by historian Howard Zinn as well as writer and theologian Chris Hedges, who argues that corporate dominance of the parties has led many ordinary people to buy into "the con that deindustrialization, deregulation, austerity, bailing out the banks, nearly two decades of constant war, the exporting of jobs overseas, tax cuts for the rich and the impoverishment of the working class were forms of progress." (14) Still, the corporate agenda inherent in both major American parties must live alongside the aspirations of the millions of people who identify as Democrats or Republicans. How does this manifest itself?

Similarities Between the Democratic and Republican Parties

The Democratic and Republican parties show **remarkable similarities** on many policies including mass incarceration, governmental and private sector surveillance of the population, and a campaign finance system that puts corporations and the wealthy in the driver's seat. (15) However, we'll focus here on two related policies upon which the two major parties agree. The fact that both parties have enthusiastically pursued these policies shows the political power of corporations and the elites who staff their upper echelons. It is these very policies that lead to much disillusionment among the rank and file members of both parties. Robert Reich, public policy

professor and a former Secretary of Labor, confirmed this fact through his many interviews with people around the country:

> *"I heard the term 'rigged system' so often I began asking people what they meant by it. They spoke about the bailout of Wall Street, political payoffs, insider deals, CEO pay, and 'crony capitalism.' These came from self-identified Republicans, Democrats, and Independents; white, black, and Latino; union households and non-union. Their only common characteristic was they were middle class and below."* (16)

Judged by their behavior in office, the Democratic and Republican parties agree on these major points:

American Imperialism—Following World War II, the United States was a **superpower**, a nation-state able to project military, economic, and cultural power all across the globe. Its only rival from 1945 to 1991 was the Soviet Union, and the United States under both parties pursued an aggressive policy of trying to contain and push back against perceived communist advances around the world. Even beyond the U.S.-Soviet rivalry, America took on the role of the world's policeman. Some American actions seemed justified like the defense of South Korea when North Korea invaded in 1950. Most, however, were of dubious strategic and moral value. These include intervening against the will of people who wanted leftist governments in places like Iran, Guatemala, and Chile; sponsoring a failed invasion of Cuba to unseat the Castro regime; and invading various places from Grenada to Panama. The most destructive of these interventions was America's futile involvement in the Vietnam War, which did nothing but prolong the unification of the country, kill 58,000 American soldiers, wound another 300,000 American soldiers, and kill an estimated 3.3 million Vietnamese soldiers and civilians. (17)

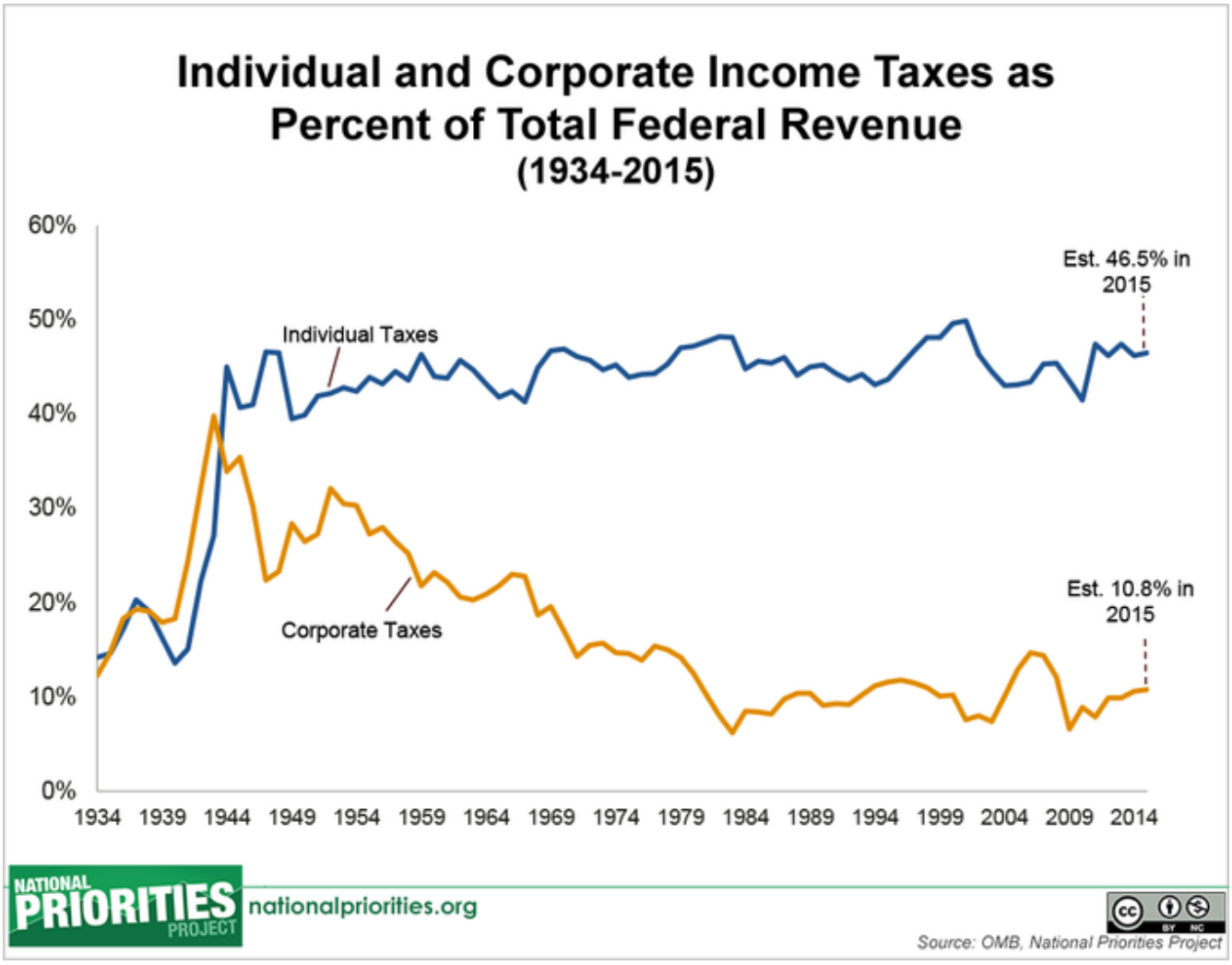
World Trade Center on September 11, 2001

After the Soviet Union's demise, there was no peace dividend for the American people, as new threats—mostly of our own creation—confronted superpower America. The U.S. funded Saddam Hussein's regime in Iraq, and then ended up going to war with Iraq when Hussein misread our commitment to Kuwait. The U.S. also funded fundamentalist Islamic rebels in Afghanistan. The presence of American troops in the Middle East—especially in Saudi Arabia—and the U.S. defending Israel in suppressing Palestinians blew back on the United States. The al Qaeda network retaliated by trying to bring down one of the World Trade Center towers in 1993 with a truck bomb, attacking the *USS Cole* in 2000, and then carrying out the catastrophic terrorist attacks of September 11, 2001 that brought down both World Trade Center towers with commercial airliners, damaged the Pentagon with another jet, and resulted in the crash of one more commercial airliner in Pennsylvania. The U.S. then did exactly what the terrorists hoped for—it got bogged down in invading Afghanistan and Iraq. Meanwhile, American presidents of both parties have become enamored of using military air strikes and drone strikes in places like Libya, Yemen, Pakistan, and Syria.

The tension between the corporate sponsors of the parties and the American people is palpable. The American penchant for drone strikes and invasions to meet its international obligations as a superpower have been very good for the military-industrial complex about which President Eisenhower warned. It has also undoubtedly opened markets for American and other international corporations. However, America's militarism has led the people of the world to conclude that the United States is the greatest danger to the world, a result that can't possibly contribute to overall American security. (18) And yet, after expending all this blood and money, Americans feel less safe with every new military adventure. (19) They seem to want some treasure spent instead

to fix America's infrastructure, to provide health care, to prevent undocumented immigrants from entering the country, to deal with environmental challenges, and to support public schools. (20)

***Laissez-faire* Economic Policy**—While the Republican party has been a little more enthusiastic in this regard, for many decades both political parties have pursued clear ***laissez-faire* economic policies**. *Laissez-faire* is French for "allow to do," and refers to a hands-off approach to economic policy that leaves corporations to do as they please with limited tax and regulatory burdens. This approach is also called neo-liberalism, which is a brand of conservatism that is particularly strong in the United States and reminds us that the original liberals in the seventeenth and eighteenth centuries opposed monarchy and wanted limited government. I know—the term neo-liberalism means conservative? It's confusing. Remember that the wealthy and large corporations are the major funders of American political parties and candidates. They also control the positions government leaders go to when they walk through the revolving door. These two facts—combined with the triumph of laissez-faire/neo-liberal philosophy in America—mean that politicians and leaders of both political parties are predisposed to pursue policies that further the power of corporations and the wealthy.



What policies are we talking about? Congress and presidents of both parties have done the following: Lowered corporate taxes. Weakened insider trading rules. Deregulated banks, savings and loans, and other financial institutions that have used their freedoms in very predatory and reckless ways. Incentivized corporations to

pay executives with stock options and encouraged corporations to buy back their own stock rather than pay workers or invest in new capacities. Put a lid on the federal minimum wage. Allowed anti-trust laws to languish on the books, encouraging monopolies and oligopolies in industries as varied as social media, telecommunications, and pharmaceuticals. (21) Passed trade agreements that put American workers in direct competition with low-paid workers in poorly regulated countries. Encouraged American companies to close factories here and move them abroad. Shaped bankruptcy law to allow corporations to wiggle out of obligations—like worker pay and benefits agreements when things turn south, but then trap average Americans with debts—like college loans—that cannot be escaped. Allowed the predatory payday loan industry to proliferate. Bailed out Wall Street banks for their reckless behavior that led to the 2008 Great Recession while leaving average Americans holding the bag. (22)

Laissez-faire policies have fueled America's growing economic inequality. In other words, they've been great for corporations and those who were already in the top 10 percent income bracket. They have been a disaster for the bottom 60 percent of Americans. Further, they have contributed to the conclusion of many Americans that the establishment wings of both political parties have built this "rigged system" that they want torn down and replaced with a system that works for ordinary people. Neither party wants to do anything meaningful about challenging wealth and income concentration and getting us past *laissez-faire* policies.

Differences Between the Democratic and Republican Parties

The Democratic and Republican parties show **clear differences** on the following policies. Note, however, that what follows are necessarily generalizations. Individual Republicans can and do buck the tendencies described below, and so do individual Democrats. Note also that this is not an exhaustive list of partisan differences.

Taxes—Democrats and Republicans generally subscribe to two different economic policies. Conservatives tend to be advocates of what is known as **supply-side economics**. Supply-siders argue that economic growth is best promoted by lowering tax rates on wealthier individuals and corporations. The primary assumption of supply-side economics is that the recipients of these tax breaks will invest their extra money to expand existing businesses and create new ones. This, in turn, will put more people to work, and the workers will spend their paychecks to purchase goods and services. Democrats tend to come at the issue of economic growth from the bottom up, although **demand-side economics** is not really a term people use like they do supply-side economics. Rather than providing tax incentives for wealthy individuals and corporations, Democrats tend to support tax cuts for middle-class people, policies like increasing the minimum wage, and social programs for poor people. Their assumption is that these people are more likely to go out and spend that money, stimulating demand, and prompting wealthy individuals and companies to invest in businesses to meet that demand.

Civil Rights—It's true that for much of its history, the Democratic party was the place to be for Southern Whites fighting against school integration, voting rights, equal employment opportunities, an end to housing discrimination, and so forth. However, the success of the Republican party's Southern Strategy combined with Roosevelt's New Deal in the 1930s and the Johnson administration's advocacy of civil rights in the 1960s essentially flipped the narrative. It's clear that since the 1970's, the Democratic party has been more welcoming than the Republican party of equal rights regardless of race, sex, and sexual orientation. To be sure, many of the Democratic party's leaders like the Clintons and the Obamas followed the lead of the Democratic rank and file rather than actually taking morally courageous stands on civil rights. Still, it has been the Republican party's leaders as well as its ordinary members who have generally found the civil rights revolution unsettling. In the period from the 1970's forward, the Republican party opposed the Equal Rights Amendment, opposed gay rights and gay marriage, turned a deaf ear to the Black community's concerns about disproportionate police violence, and tried wherever it could to ensure that people used the bathroom that conformed to their birth

certificate rather than their gender expression. The Republican party has been trying to use religious freedom as a tool to blunt the impact of civil rights—allowing, for example, religious people to discriminate against the LGBTQ community on religious grounds.

Female Bodily Autonomy—Although there are exceptions, Republicans tend to want to control women's bodies whereas Democrats tend to defer to women to make intimate procreative decisions. (23) This division reflects the conservative impulse to maintain established social hierarchies and the progressive impulse to tear them down in favor of equality and individual autonomy. It's a basic philosophical difference between ordinary Americans when it comes to this and other issues. Should the law be used to prevent women from terminating pregnancies caused by rape and incest, pregnancies that jeopardize their health, and pregnancies that would trap them in abusive relationships? Republicans are more likely to say yes. Should the government help support women's reproductive services that include abortion? Should health insurance policies cover contraception and abortion? Democrats are more likely to say yes. (24) While Republicans would generally ban all abortions at any stage, Democrats would generally ban abortion late in a pregnancy and allow exceptions for the health and life of the pregnant woman.

Gun Control—The Democratic and Republican parties differ on measures to reduce America's epidemic of gun violence. Americans die by gun violence at four times the rate of people living in war-torn Yemen and Syria. Gun deaths occur in the United States at a rate 74 times that of the United Kingdom and 111 times that of Japan. (25) Democrats tend to favor measures such as universal background checks, waiting periods, bans on assault style weapons, limitations on clip sizes, and gun registries, whereas Republicans tend to oppose them. The Supreme Court has affirmed that the Second Amendment to the Constitution confers an individual right to bear arms, but the Court has also said that regulation of firearms is permitted. In his majority opinion in *District of Columbia v. Heller* (2008), conservative Justice Antonin Scalia wrote "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

The Environment—While Republicans and Democrats tend to agree on a laissez-faire approach to the economy, including fairly relaxed corporate regulations, they do differ somewhat on the environment. This difference has been most notable from the late 1970s onward. The Democratic party has been more supportive of regulations designed to promote clean air and water, stricter protective designations for public lands, increased fuel efficiency standards for vehicles, renewable energy incentives, and measures to fight climate change. The Republican party takes a hands-off approach to environmental regulation and works to blunt or remove environmental regulations that are already in place.

Healthcare—There have long been differences between Democrats and Republicans on healthcare. Republicans have repeatedly teamed up with the healthcare industry to fight Democratic efforts to develop a national healthcare system in which all people would receive equal coverage and treatment. In 1945, Democratic President Truman put forward a national healthcare plan and was defeated by opposition from Republicans, the American Medical Association, and insufficient interest on the part of the voting public. (26) When Democratic President Lyndon Johnson created the Medicare and Medicaid programs, Republicans opposed them by saying they meant the end of freedom in America. (27) Similarly, Republicans opposed Democratic President Barack Obama's Affordable Care Act, even though the program was very pro-corporation and originated in a conservative think tank. (28) The telling historical fact is that even when Republicans held the White House and had both the House and Senate majorities, they did not formulate—let alone pass—a law designed to promote widespread healthcare coverage in the United States. The United States is the only advanced country without a national healthcare system; instead, we've opted for a patchwork one that leaves

millions of people uncovered, results in frequent medical bankruptcy, and costs twice as much per capita as the systems in other countries. (29)

Democracy—With its staunch commitment to supporting economic elites, the Republican Party necessarily must stand against economic policies favored by majorities of Americans. But this tendency became compounded in the twenty-first century by the party's illiberal stances on democratic processes themselves. It is interesting to note that more Republican senators and representatives voted for the Voting Rights Act of 1965, but no Republican senators and representatives supported legislation in 2021 to restore the Voting Rights Act from limitations imposed by the Supreme Court's conservative majority. (30) The Republican nominee for president proclaimed that he would only accept election results if he won. (31) It is primarily red states—i.e., led by Republicans—that have made the voting process as difficult as possible. (32) The Varieties of Democracy Institute (V-Dem Institute) has empirically documented the Republican Party's increasingly authoritarian stance on democracy. The V-Dem Institute uses a multidimensional index to ascertain a political party's commitment to democratic norms. While the index for the Democratic Party has not budged in the twenty-first century, the index for the Republican Party has shifted markedly against support for democracy. So strong has been this shift that the Republican party "is now more similar to autocratic ruling parties such as the Turkish AKP, and Fidesz in Hungary than to typical center-right governing parties in democracies such as the Conservatives in the UK or CDU in Germany." (33) Perhaps it does not need to be said, but a country where one of its two governing political parties has lost its commitment to democratic norms will have a difficult time maintaining even an attenuated democratic system.

The Asymmetrical Nature of American Party Politics

Before we leave the topic of the two dominant political parties in America, we want to make sure that we understand what political scientists refer to as the asymmetric nature of the Democratic and Republican parties. Many political scientists have noted this distinction, but Matt Grossman and David Hopkins put it most authoritatively in their book *Asymmetric Politics*. In the modern era, the Democratic party is best characterized as a relatively non-ideological coalition of distinct groups like women, Blacks, the LGBTQ community, Hispanics, labor unions, environmentalists, and so forth. It's a "big tent" party whose constituent groups sympathize and often support each other, but who have not created a powerful ideology to animate them all. Absent an overarching liberal or progressive ideology, the "Democrats continue to address the concrete agendas of discrete social groups, preferring a governing style of technocratic incrementalism over one guided by a comprehensive value system." (34) This may explain the difficulty that relatively ideological Bernie Sanders had in trying to become the Democratic party presidential nominee in 2016 and 2020.

The Republican party, on the other hand, is one notably characterized by "movement conservatism," an ideology of individual liberty that unites and animates its members. Whenever its candidates lose, the Republican party tends to conclude that the reason for the loss was that its particular candidate in a given race was not ideologically pure enough. The Republican party unites business and religious interests under a conservative banner clearly intended to prevent any cracks in the economic or social hierarchies that have developed in America. The conservative movement has shown "spectacular success in gaining control of the Republican Party." (35) When outsider Trump gained the White House and became the Republican party's *de facto* leader, it's interesting that the two main reactions of conservatives were either to leave the party to maintain ideological purity or try to co-opt the opportunity provided by the Trump presidency to promote conservative ideological values in public policy and federal court nominations.

References

1. Sheldon S. Wolin, *Democracy, Inc.: Managed Democracy and the Specter of Inverted Totalitarianism*. New Edition. Princeton: Princeton University Press, 2017. Page 187.
2. Sheldon S. Wolin, *Democracy, Inc.: Managed Democracy and the Specter of Inverted Totalitarianism*. New Edition. Princeton: Princeton University Press, 2017. Page 201.
3. L. Sandy Maisel, *American Political Parties and Elections. A Very Short Introduction*. Oxford: Oxford University Press, 2016. Pages 77-90.
4. John Laloggia, "6 Facts About U.S. Political Independents," Pew Research Center. May 15, 2019.
5. Examples: Richard Herrera, "Are 'Superdelegates' Super?" *Political Behavior*. Vol, 16, No. 1. 1994. Jeanne Kirkpatrick, "Representation in the American National Conventions: The Case of 1972," *British Journal of Political Science*, Vol. 5, No. 3. July 1975. Ronald Rapoport, Alan I. McGlennon, and John Abramowitz, *The Life of the Parties: Activists in Presidential Politics*. Lexington, Kentucky: University Press of Kentucky, 1986.
6. For example, Logan Dancey and Geoffrey Sheagley, "Partisanship and Perceptions of Party Line Voting in Congress," *Political Research Quarterly*, Vol. 71, No. 1. March 2018.
7. Pew Research Center, "Party Identification Trends," 1992-2017. March 20, 2018.
8. Juliana Menasce Horowitz, Ruth Igielnik, and Rakesh Kochnar, "Most Americans Say There is Too Much Economic Inequality in the U.S., But Fewer Than Half Call It a Top Priority," Pew Research Center. January 9, 2020.
9. Matt Stoller, Goliath: *The 100-Year War Between Monopoly Power and Democracy*. New York: Simon & Schuster, 2019. William Hudson, American Democracy in Peril: Eight Challenges to America's Future. 6thEdition. Washington, D.C.: CQ Press, 2010. Pages 213-249.
10. "Interview With Noam Chomsky," *Der Spiegel*. October 10, 2008.
11. Greg Price, "Hillary Clinton Robbed Bernie Sanders of the Democratic Nomination, According to Donna Brazile," *Newsweek*. November 2, 2017. Amber Jamieson, "DNC Head Leaked Debate Question to Clinton, Podesta Emails Suggest," *The Guardian*. October 31, 2016.
12. Brian Schwartz, "Wall Street Democratic Donors Warn the Party: We'll Sit Out or Back Trump, If You Nominate Elizabeth Warren," *CNBC*. September 26, 2019. Julie Hollar, "Here's the Evidence Corporate Media Say is Missing of WAPO Bias Against Sanders," Fairness and Accuracy in Reporting. August 15, 2019. Dave Lindorff, "The Red-Baiting of Bernie Sanders Has Begun and is Already Becoming Laughable. *Counterpunch*. February 13, 2020.
13. Jacob S. Hacker and Paul Pierson, *Let Them Eat Tweets: How the Right Rules in an Age of Extreme Inequality*. New York: W. W. Norton and Company, 2020. Quote from page 17.
14. Chris Hedges, "US Election 2020: A Circus Then, A Circus Now," *Geopolitics*. January 22, 2020.
15. Chris Hedges, "Class: The Little Word the Elites Want You to Forget," *Truthdig*. March 2, 2020.
16. Robert Reich, "Bernie Sanders is Not George McGovern," *Truthdig*. February 28, 2020.
17. Ronald H. Spector, "Vietnam War," *Encyclopedia Britannica*. February 14, 2020.
18. Eric Zuesse, "Polls: U.S. is the 'Greatest Threat to Peace in the World Today.'" *Gobal Research*. August 9, 2017.
19. ABC News/Ipsos Poll. January 12, 2020.
20. Kim Parker, Rich Morin, and Menasce Horowitz, "Worries, Priorities, and Potential Problem Solvers," Pew Research Center. March 21, 2019.
21. A monopoly is when one company dominates an economic sector. An oligopoly is when a few companies do so. See Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets*. Cambridge, Massachusetts: Harvard University Press, 2019. Philippon estimates that monopolies and oligopolies in America cost Americans an extra $300 per month and short workers about $1.25 trillion a year in wages.
22. Joseph E. Stiglitz, *Rewriting the Rules of the American Economy. An Agenda for Growth and Shared*

Prosperity. New York: W.W. Norton & Company, 2015. Robert B. Reich, *Saving Capitalism: For the Many, Not the Few*. New York: Vintage Books, 2016.
23. I reject the pro-choice/pro-life dichotomy because it obscures more than it illuminates. A better road into this issue is the extent to which the government should be able to control the bodies of women.
24. Katie Watson, *Scarlet A: The Ethics, Law, & Politics of Ordinary Abortion*. New York: Oxford University Press, 2019.
25. Marc Silver, "A Doctor's Insights into Gun Violence and Gun Laws Around the World," *NPR*. August 6, 2019. Nurith Aizenman and Marc Silver, "How the U.S. Compares with Other Countries in Deaths from Gun Violence," *NPR*. August 5, 2019.
26. Howard Markel, "69 Years Ago a President Pitches His Idea for National Healthcare," *PBS Newshour*. November 19, 2014.
27. In 1961 Ronald Reagan said that if Medicare is not stopped, "one of these days you and I are going to spend our sunset years telling our children and our children's children what it once was like in America when men were free." Igor Volsky, "Flashback: Republicans Opposed Medicare in 1960s by Warning of Rationing, 'Socialized Medicine,'" *Thinkprogress*. July 29, 2009.
28. Avik Roy, "The Torturous History of Conservatives and the Individual Mandate," *Forbes*. February 7, 2012.
29. Peter G. Peterson Foundation, "How Does the U.S. Healthcare System Compare to Other Countries?" July 22, 2019.
30. Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority: Why American Democracy Reached the Breaking Point*. New York: Crown Publishing, 2023. Page 93.
31. Jeremy Diamond, "Donald Trump: 'I Will Totally Accept' Election Results 'If I Win,'" *CNN*. October 20, 2016.
32. Jane C. Timm, "19 States Enacted Voting Restrictions in 2021. What's Next?" *NBC News*. December 21, 2021.
33. Anna Lührmann, Juraj Medzihorsky, Garry Hindle, and Staffan I. Lindberg, *New Global Data on Political Parties*. V-Dem Institute Briefing Paper #9. October 26, 2020.
34. Matt Grossman and David A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats*. New York: Oxford University Press, 2016. Page 101.
35. Matt Grossman and David A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats*. New York: Oxford University Press, 2016. Page 79.

Media Attributions

- DSC_0633.JPG © David Hubert is licensed under a CC BY-NC (Attribution NonCommercial) license
- 911 © cattias.photos is licensed under a CC BY-NC-ND (Attribution NonCommercial NoDerivatives) license
- Corporate Taxes © National Priorities Project is licensed under a CC BY-NC (Attribution NonCommercial) license

Chapter 44: Why Do We Have a Two-Party System?

"In our view, the ideal of popular sovereignty plays much the same role in contemporary democratic ideology that the divine right of kings played in the monarchical era. It is . . . a fiction providing legitimacy and stability to political systems whose actual workings are manifestly—and inevitably—rather less than divine."

—Christopher Achen and Larry Bartels (1)

A Two-Party System and Its Alternatives

Since the Republican Party's rise in the 1850s, all American presidents have been either Democrats or Republicans. The vast majority of congressmen since then have been either Democrats or Republicans. Because the two major parties dominate the system, political scientists classify the United States as a **two-party system**, even though we have many political parties. A two-party system is distinct from its alternatives: a **one-party system** in which other parties are either banned or so hobbled that they can't compete with the ruling party, or a **multi-party system**, which features three or more parties with a viable shot of participating in government. Modern history is full of one-party political systems like Nazi Germany and the Soviet Union. Iraq under Saddam Hussein was a one-party system. The People's Republic of China is a one-party system. One-party systems can also be found in North Korea, Vietnam, and Cuba. Multi-party systems exist in many countries like Denmark, France, the United Kingdom, Germany, Australia, and New Zealand. Why is the United States a two-party system as opposed to a multi-party one? It is, after all, a very diverse country that could probably support more than two parties.

Causes of America's Two-Party System

The consensus among political scientists is that two structural features strongly favor a two-party system as opposed to a multi-party system. The first consists of a variety of laws that limit ballot access and otherwise penalize third parties. For instance, congressional rules all favor the Democrats and Republicans. If someone from a third party or a person with no party affiliation is elected to Congress, they must choose to be affiliated with one of the major parties to get assignments to standing committees. Presidential candidates from the major parties can receive public money to run their campaigns. But when a third-party candidate runs for president and wants public funding through the Federal Election Commission, they have to receive that funding after the election is over because the amount is tied to how well they did in the last election.

Third parties complain loudest about **ballot-access restrictions**, which are barriers to getting a candidate on the ballot so voters don't have to write in their name. They argue that were today's ballot-access restrictions in place in the 1850s, the Republican Party never would have risen to become a national party. As political analyst Richard Winger points out, the first ballot-access restrictions began in the late 1880s and became progressively stricter in the 1930s and the 1960s. (2) Natural experiments have shown that when ballot-access restrictions were lowered, the major parties faced significantly increased competition from third party and independent candidates. (3)

Ballot-access restrictions include filing fees, early deadlines to declare candidacy, and signature requirements. The latter is perhaps the most onerous burden on third parties. Many states require independent and third-party candidates to secure enough signatures on petitions in order to get on the ballot. Simply put, "The greater the share of the electorate required to sign nominating petitions, the fewer minor-party and independent candidates appear on the ballot." (4) A third party that wants to run candidates for all the House seats across the country would have to collect millions of signatures. The Democrats and Republicans are relieved of this burden. Collecting these signatures is expensive and time-consuming. Together, filing fees and signature requirements stunt electoral competition, especially in races for the House of Representatives. (5)

The second structural element causing the United States to have a two-party system is our **winner-take-all elections**—which the British refer to as a first-past-the-post system—used in **single-member districts**. In such a system, a single person represents each electoral district for the House or Senate and gets that distinction by receiving the most votes of those cast, even if they did not receive the majority of the votes. So, if Juan receives 546 votes, Mary receives 545 votes, and Tarek receives 544 votes in a U. S. House of Representatives' election, Juan wins even though he received only 33 percent of the vote. He received the most votes short of a majority, called the **plurality** of votes, and he will represent that district. Coming in second gets Mary nothing, and Tarek is similarly out of luck even though he received only 2 votes less than the winner. The tendency for winner-take-all, single-member district systems to promote two parties is sometimes referred to as **Duverger's Law**, after the French political scientist Maurice Duverger.

How does the winner-take-all system help create a two-party system? To answer that, we're going to need a more realistic example. Let's say we have a progressive party that pushes the interests of the common laborer but has also been somewhat environmentally friendly—the Blue Party, and we have a conservative party that pushes the interests of big business and entrepreneurs and is very unfriendly to the environment—the Red Party, and we have a new party that is very concerned about the environment—the Green Party. Let's assume we have three election districts, and the Green party starts strongest in one region. Finally, let's be realistic and say that the Green Party does not have the strength that third-place winner Sam did in our example above. We have an election, and these are the results:

	Election #1		
	Popular Vote %		
Party	District One	District Two	District Three
Blue	45.9%	45%	55%
Red	45.1%	50%	45%
Green	9%	5%	0%

What happened? Blue wins two seats by getting the plurality of votes in District One and the majority of votes in District Three. Red wins one seat in District Two. Green gets nothing, *bupkis*, *nichts*, *nada*. And this is after the Greens have gone through all the work and expense of getting the party started and getting on the ballot. Can the Green devotees keep the party going for two years until the next election? Maybe. Let's assume that not only do they keep it going, they actually do a little better. Here are the results for the next election two years later:

	Election #2		
	Popular Vote %		
Party	District One	District Two	District Three
Blue	40%	40%	50%
Red	46%	50%	45%
Green	14%	10%	5%

Indeed, the Greens did a bit better, but what did it get them? Still nothing. The first lesson from this is that it's very difficult to keep a new party going year after year if all that effort is not producing actual legislative seats. In this case, the Green party saw tremendous gains for a third party. That's often not the case, and so aside from keeping the party going, it becomes difficult to convince citizens to keep voting for a loser that has little chance of gaining seats in Congress. People want to vote for a party that stands at least some chance of winning seats. That's the second lesson. The third lesson is equally important. Look what happened in that second election. Green pulled voters away from Blue, which is the second choice among eco-voters because it is at least somewhat environmentally friendly. By doing so, these voters hurt the Blue party and guaranteed that Red would pick up another seat even though Red's support didn't actually go up. Since the average Green voter despises the Red party program, their support for the Green party in the election booth has led to the perverse result of having helped Red carry out its anti-environment program. In District One during Election #2, the Green candidate was the so-called **spoiler candidate**, who pulled enough votes away from the Blue candidate to ensure that Red won the seat.

What is a Green voter to do? One choice is to keep voting Green with the hope that the Blue party will self-destruct so that the Greens will be the only real alternative to the Reds. Something like that hasn't happened in the United States since the 1850s, so it's not very likely. Still, some people make this choice on principle. Many others, however, tend to stay within the Blue party and work to make it more environmentally friendly, which deprives the Green party of activists and undercuts the distinctive Green party call among the broader electorate.

What If?

What if we required third parties to gain enough signatures in a state once, after which they would be guaranteed ballot access in perpetuity instead of having to do it each election? In addition to that change, what if we also took a different approach to voting? One approach might be ranked choice voting (RCV), which has voters ranking all the candidates—e.g., I prefer Samantha first, José second, Bill third, and Kendra fourth. Votes are then counted in rounds. When RCV is used for single-winner districts, it goes like this: Someone can win an outright majority on the first round, and they are elected. If no candidate wins an outright majority on the first round, the candidate with the fewest votes is eliminated, and that candidate's voters—who picked them as their first choice—will have their second-ranked choice votes allocated. This process continues until someone gets an outright majority of votes. RCV would work in a similar fashion for election districts with more than one winner. (6) RCV could easily be combined with multi-member districts, which might give more people the feeling that they are not wasting their vote.

References

1. Christopher H. Achen and Larry M. Bartels, *Democracy For Realists: Why Elections Do Not Produce Responsive Government*. Princeton: Princeton University Press, 2016. Page 19.
2. See Richard Winger, editor of *Ballot Access News*, "The Importance of Ballot Access," archived here. Richard Winger, "Institutional Obstacles to a Multiparty System," in Paul S. Herrnson and John C. Green, editors, *Multiparty Politics in America*. Lanham, MD: Rowman and Littlefield, 1997.
3. Marcus Drometer and Johannes Rincke, "The Impact of Ballot Access Restrictions on Electoral Competition: Evidence from a Natural Experiment," *Public Choice*. September 25, 2008. Pages 461-474.
4. Barry C. Burden, "Ballot Regulations and Multiparty Politics in the States," *PS: Political Science and Politics*. October, 2007. Page 671.
5. Stephen Ansolabehere and Alan Gerber, "The Effects of Filing Fees and Petition Requirements on U.S. House Elections," *Legislative Studies Quarterly*. 21(2). May 2, 1996.
6. See: Fairvote. Ranked Choice Voting Resource Center.

Media Attributions

Chapter 45: The Universe of Organized Interests

"People brag about the free market. But we have central planning here. It's just not by government. It's by corporations."

—John Ikerd (1)

Theories About the Role of Organized Interests in the Political System

When the French aristocrat Alexis de Tocqueville toured the United States in the 1830s, he was struck by how well developed the "principle of association" was among average Americans. (2) Over the years, political analysts have tended to split over the question of how the American political system operates, and one side in this debate is well represented by de Tocqueville's insights into the vitality of political associations in the young republic. Called **Pluralism**, this theory holds that American politics is marked by a rich diversity of organized interests vying with each other to see that their respective wishes are translated into government policy. (3) Ordinary Americans are free to start or join any of these groups, and the variety of possible interests makes for a more or less level playing field. In other words, no one set of interests is likely to dominate public policy—at least not for very long, because the many losers will temporarily put aside their differences to go after the top dogs. The pluralist argument is bolstered by the number and variety of interest groups, and by the fact that interests in one category—business, for example—often struggle with each other and fail to put up a monolithic front *vis a vis* labor or environmental groups.

Other political scientists argued that if the American system was at some point characterized by pluralism, over time it transformed into something less healthy: an out of control hyper-pluralist polity. **Hyper-Pluralism** suggests that the government has essentially been captured by the demands of interest groups. And rather than being an arbiter of the struggle between organized interests, the government tries to put into effect the wishes of them all to the detriment of the country. Political scientist Theodore Lowi called this pathological process *interest group liberalism*, which is often used interchangeably with the hyper-pluralism label. (4) These theorists point to the contradictory nature of government policy—for example, subsidizing tobacco farming while spending money trying to keep people from smoking—as evidence that there isn't really a competition going on as envisioned by pluralism. The system more closely resembles a compartmentalized free-for-all.

The third branch of disagreement is called **Elite Theory**. Elite theorists hold that the many-interests-on-a-level-playing-field vision of the pluralists and the interest-group-chaos scenario of the hyper-pluralists fail to accurately show what is really going on: that a relatively small and wealthy class of individuals—the **power elite**—largely gets its way regardless of the surface appearance of political conflict. (5) According to this theory, the power elite either are the decision-makers, or they so influence the decision-makers that the elites get their way most of the time. Elite theory highlights the power of business and military interests and points to many government policies that lavish benefits on them. Moreover, business interests create interlocking and overlapping connections that reinforce their position and allow them to control the political system—witness how limited and overlapping are the memberships of corporate boards, foundation boards, and trustee positions for public and private universities, as well as corporate ownership of the media.

When political scientists have looked at actual public policy decisions and their correlation with interest group

action, the opinions of wealthy Americans, and the opinions of middle-income Americans, they found support for the Elite Theory. For example, Martin Gilens from Princeton and Benjamin Page from Northwestern University, found that organized interests were not particularly attuned to the interests of average Americans, and that this was especially true of business interests and some single-issue groups such as those concerning abortion and gun rights. Their public policy analysis indicated that the preferences of ordinary citizens have little to no influence on the course of policy. Instead, elites and organized interests—many of whom are run by elites—have a large impact on public policy making in the United States. Their support is almost essential for a policy change to pass, and their opposition means that a policy change is extremely unlikely to pass. Gilens and Page suggest that those of us interested in seeing the popular will triumph in America might not be satisfied with what they actually found: "Democracy by coincidence, in which ordinary citizens get what they want from government only when they happen to agree with elites or interest groups that are really calling the shots." (6) When a machine learning specialist and a mathematician applied different statistical techniques to the Gilens and Page data set they found the situation was even worse: they could predict public policy with a high degree of accuracy by consulting the opinions of only the wealthiest 10% of Americans and a few powerful interest groups. These scientists concluded that "the US government has significant plutocratic tendencies." (7)

Of By and For the Corporations

An offshoot of Elite Theory centers on how elites achieve their aims through the structures of corporate capitalism. During America's founding period, large corporations were rather new entities that elicited suspicion among many people. Queen Elizabeth granted a corporate charter for the East India Company on December 31, 1600, and British colonization of North America intimately involved the Company and its

personnel. In the 1770s, the East India Company was incensed that American privateers were importing tea on their own or going through the Dutch rather than the English. Beset by these and other problems, the East India Company fell on hard times and prevailed upon Parliament to pass the Tea Act of 1773, which exempted the company from English taxes and enabled it to drive American tea merchants out of business. As historian Ray Raphael puts it, the Boston Tea Party "began with the British government's bailout of a corporation deemed too big to fail." Unlike what I was taught in grade school, the Boston Tea Party did not concern a tax increase. Instead, the rebels who dressed up as Mohawk Indians and dumped the tea into the harbor were upset that the East India Company was being given a tax break and that the Americans had no say in that decision. (8)

Perhaps as a result of this founding shock, many Americans futilely resisted the rise of corporate power. In 1816, Thomas Jefferson wrote, "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country." (9) The powers of corporations in the United States were restricted through the language of their corporate charters, which were governed by state law. The charters limited large corporations' behavior and made them serve the public interest as well as the interests of their shareholders. In the second half of the nineteenth century, the Supreme Court began to treat corporations as legal "people." From 1900 onward, states began to compete with each other to gut the strict provisions of corporate charters, relieving corporations of the need to be accountable to state governments and from the fear of having their corporate charters revoked should they overstep their bounds.

The contemporary situation, according to elite theorists who focus on the role of corporations, is that large corporations effectively rule not only the United States, but the world as well. (10) They have the same free speech rights as individuals with one important exception: unlike real people, "corporate people" have nearly unlimited funds to broadcast their views and support politicians. Corporations have become "too big to fail," and so command politicians to provide taxpayer money to bail them out when they—through incompetence or malfeasance—bring themselves to the brink of economic collapse. And then the corporations and banks and investment houses lobby to defeat legislation that would regulate their incompetence and malfeasance in the future. When large corporations regularly flout worker safety and environmental laws, resulting in damage, injury and death, the corporate coffers pay the requisite fines, and they go about their business as though nothing had happened.

Kinds of Organized Interests

The term **organized interests** refers to political interests that have a specific organizational unit that works to influence public policy in numerous ways short of running actual election candidates. This organizational unit requires money and staff simply to exist, plus additional money to influence policy. We can categorize organized interests as follows.

Category 1: Economic Interests–These are groups that coalesce around the financial interests of their members.

- **Corporations and Business Interests**—Most large corporations actively work to influence public policy. Exxon, General Motors, Microsoft, Walmart, and Verizon all maintain teams of lobbyists and spend considerable money to get what they want. Business interests are also represented by associations like the Chamber of Commerce, the Business Roundtable, and the National Small Business Association. Still others represent specific professions such as the American Medical Association. Then there are the corporate-funded think tanks whose ideas and spokespeople get much play on corporate-owned mainstream media. These include Americans for Prosperity, the Cato Institute, the Heritage Foundation, and the Club

for Growth.

- **Labor Interests**—Organized labor unions also maintain professional staff dedicated to political action. They work to promote unionized workers' interests specifically, and all workers generally. The dominant labor group is the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which is an umbrella organization that encompasses nearly a hundred distinct unions including the American Federation of Teachers, the Airline Pilots Association, and the United Mineworkers of America. Altogether, the AFL-CIO represents more than twelve million workers. Independent labor unions include the Service Employees International Union and the International Brotherhood of Teamsters.

Category 2: Citizen's Groups or Non-Economic Groups—This is a catch-all category that encompasses interests that are not overtly tied to the economic interests of their members.

- **Public Interest Groups**—Also known as good-government groups, they claim to represent the broad interests of all Americans. Many of these groups were started since 1960, although some are older than that. Common Cause is perhaps the most prominent of these. It was founded in 1970 by progressive Republican John Gardner and works on issues such as campaign finance reform, media reform, and making government more open, responsive, and ethical. Other public interest groups include the Center for Public Integrity, Citizens Against Government Waste, Citizens for Responsibility and Ethics in Washington, Public Citizen, and the Center for Responsive Politics.
- **Single-Issue Groups**—These are groups that tend to concentrate on one issue or one area of public policy. They range across the political spectrum from the Sierra Club to the National Rifle Association, from the NARAL Pro-Choice America to the National Right to Life Committee. The narrow focus of these groups tends to attract highly motivated members, which can help the group maintain its power and role in the political system. These active members can be called upon to donate money, write emails to congressmen, and show up at demonstrations.
- **Ideological Groups**—Ideological groups are interested in a variety of issues and have a clear ideological bias that governs the kind of policies the group endorses. There are a number of conservative or libertarian groups that are heavily funded by corporate interests or by religious interests. These include the Christian Coalition, the Family Research Council, Focus on the Family, Americans for Prosperity, the American Conservative Union, and the Eagle Forum. Less prominent are the liberal or progressive groups like United for a Fair Economy, the Economic Policy Institute, MoveOn, and People for the American Way.
- **Demographic Groups**—Some organized interests were created to defend or advance the interests and rights of specific demographic groups. The American Association of Retired Persons (AARP), which is a powerful lobby group with 35 million members, is the classic example of one of these demographic groups. There are others: The National Organization for Women (NOW), the National Association for the Advancement of Colored People (NAACP), the National Council of La Raza, and Black Lives Matter.

Category 3: Government Interests—State, city, and local government interests have coalesced into organized groups. Most states and major cities have paid lobbyists in Washington. They've also formed groups such as the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and the National Governors Association. So much of national government policy affects state and local governments that they organize to try to influence what comes out of Washington.

Corporate Dominance of the Organized Interest Universe

Walmart Store Sign

The political scientist E.E. Schattschneider once famously wrote that "The flaw in the pluralist heaven is the heavenly chorus sings with a strong upper-class accent." (11) We can say with a great deal of confidence that corporations dominate the universe of organized interests in the United States. One study suggested that business interests spent $34 on lobbying for every $1 spent on lobbying by all other interest groups and unions combined, and that over 90 percent of the largest lobbying organizations have been businesses. (12) Nearly three-quarters of the money donated to federal candidates comes from corporate political action committees. (13)

Corporate dominance of American organized interests comes not just from their campaign contributions and their direct lobbying efforts—although those are substantial—but also from other tools at their disposal. They serve as lucrative landing spots for politicians, congressional staffers, and executive branch officials who want to take advantage of the revolving door. As we'll see later in our chapter on the media, they own the news channels that provide us with vital political information. Similarly, corporations buy advertising on media channels, and are able to pull that advertising should they disagree with viewpoints of particular shows. Corporations fund think tanks that argue for laissez-faire economic policies and tax cuts for businesses and the wealthy. Through their control of the news media, media in general, and think tanks, corporations have an upper hand in shaping public opinion. Corporations and the wealthy can also engage in a **capital strike** by withholding capital investment or by moving money elsewhere until they get the government policies they want. A capital strike "might take the form of layoffs, offshoring jobs and money, denying loans, or just a credible threat to do those things, along with a promise to relent once government delivers the desired policy changes." (14)

Corporate dominance operates through **two primary mechanisms**. One is by participating in the political system very much as people do. They are, after all, artificial persons vested with rights by the Supreme Court, although not by the text of the Constitution itself. They lobby; they donate to politicians; they speak through the media that they own and support through advertising; they fund think tanks, and they operate the revolving doors to and from government.

The second mechanism is the cultivation of fear, for fear breeds conservative responses. Fear that I might lose my job, especially if I speak up; fear that my senator or representative feels about the possibility that jobs will be lost in the district on their watch if they cross powerful corporations; fear that the same politician will see their funding sources dry up because of a vote for single-payer healthcare; fear that I cannot switch jobs or start a small business because I risk my family's health coverage; fear of being transferred. Princeton professor Sheldon Wolin captured the fear that is the "constant companion" of ordinary people: "Downsizing, reorganization, bubbles bursting, unions busted, quickly outdated skills, and transfer of jobs abroad create not just fear but an economy of fear, a system of control whose power feeds on uncertainty, yet a system that, according to its analysts, is eminently rational." (15) Neither good government groups, unions, single-interest groups, or ideological groups have this set of tools at their disposal the way corporations and business interests do.

What If?

What if we passed and ratified the We the People Amendment to the Constitution? (16) How would this amendment positively or negatively affect the American political system? Here's the text of the amendment:

Section 1. Artificial Entities Such as Corporations Do Not Have Constitutional Rights

The rights protected by the Constitution of the United States are the rights of natural persons only.

Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law.

The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable.

Section 2. Money is Not Free Speech

Federal, State, and local government shall regulate, limit, or prohibit contributions and expenditures, including a candidate's own contributions and expenditures, to ensure that all citizens, regardless of their economic status, have access to the political process, and that no person gains, as a result of their money, substantially more access or ability to influence in any way the election of any candidate for public office or any ballot measure.

Federal, State, and local government shall require that any permissible contributions and expenditures be publicly disclosed.

The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.

Section 3.

Nothing in this amendment shall be construed to abridge freedom of the press.

References

1. Nick Shaxson, "Rural America Doesn't Have to Starve to Death," *The Nation*. March 2, 2020. Page 17.
2. Alexis de Tocqueville, *Democracy in America*. Volumes 1 and 1, Unabridged. Translated by Henry Reeve. Digireads Publishing, 2016.
3. Classic texts in the Pluralist tradition include David B. Truman, The Governmental Process, 2nd edition. New York: Knopf, 1971; and Robert Dahl, *Pluralist Democracy in the United States*. Chicago: Rand-McNally, 1967.
4. Theodore J. Lowi, *The End of Liberalism*, 2nd edition. New York: Norton: 1979.
5. See C. Wright Mills, *The Power Elite*. New York: Oxford University Press, 1956; and Ralph Miliband, *The State in Capitalist Society*. New York: Basic Books, 1969.
6. Martin Gilens and Benjamin Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics*. Fall 2014.
7. Shawn K. McGuire and Charles B. Delahunt, "Predicting United States Policy Outcomes with Random Forests," *Institute for New Economic Thinking. Working Paper No. 138*. October 27, 2020.
8. Ray Raphael, "Debunking Boston Tea Party Myths," History Net.
9. Quoted in Thom Hartman, *Unequal Protection. The Rise of Corporate Dominance and the Theft of Human*

Rights. Rodale Press, 2002. Page 82.
10. David. C. Korten, *When Corporations Rule the World*. 2nd edition. San Francisco: Berrett-Koehler Publishers, 2001.
11. E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America*. Boston: Wadsworth, 1975. Page 34.
12. Lee Drutman, *The Business of America is Lobbying*. Oxford: Oxford University Press, 2015. Pages 1-21.
13. Karl Evers-Hillstrom, "Why Corporate PACs Have an Advantage," *OpenSecrets*. February 14, 2020.
14. Kevin Young, Michael Schwartz, and Tarun Banerjee, "When Capitalists Go on Strike," *Jacobin*. February 2017.
15. Sheldon S. Wolin, *Democracy, Inc.: Managed Democracy and the Specter of Inverted Totalitarianism*. New Edition. Princeton: Princeton University Press, 2017. Page 67.
16. Move to Amend.

Media Attributions

- Flag Design 1 © Alexa Hubert is licensed under a CC BY-NC-SA (Attribution NonCommercial ShareAlike) license
- Walmart_Store_sign © Mike Mozart Jeepers Media is licensed under a CC BY-SA (Attribution ShareAlike) license

Chapter 46: Strategies of Organized Interests

"Today, most lobbyists are engaged in a system of bribery but it's the legal kind, the kind that runs rampant in the corridors of Washington. It's a system of sycophantic elected leaders expecting a campaign cash flow, and in return, industry, interest groups, and big labor are rewarded with what they want: legislation and rules that favor their constituencies."

—Jimmy Williams (1)

Lobbying

Former U.S. Senator Kay Hagan (D-NC) in the Center, Her Husband Chip, and Heather Podesta, a Lobbyist for Energy, Finance, Healthcare, Retail, Real Estate, Education, Transportation, and Weapons Industries.

All organized interests try to further their members' political interests. They choose among myriad strategies, the most obvious being lobbying. **Lobbying** takes its name from the centuries-old British House of Commons tradition where constituents petition their member of Parliament (MP) in the building's lobby. Since lobbyists cannot participate directly in work on the House or Senate floor, they interact—figuratively speaking—with Representatives and Senators in the Capitol building's lobbies. Lobbying refers to efforts to persuade legislators and executive branch officials to make decisions that favor a particular set of interests over others. In Congress, lobbyists might testify before standing committees on legislation, ply congressmen and their staff with research and other information that favors their point of view, provide congressmen and their staff with draft legislation, or invite congressmen and their staff to events sponsored by the industry or interest they represent. Lobbyists also interact with executive branch officials, providing them with information and language in the rule-making process. Because of the revolving-door phenomenon, lobbyists are often former congressional members, former congressional staff, or former executive branch officials.

Campaign Financing

Another prominent strategy for organized interests is to **donate money** to political campaigns. They form political action committees—known as PACs—which must be registered with the Federal Election Commission. The PACs donate money to political candidates who are likely to support the group's interests. Very often lobbyists concentrate on the incumbent congressional members who sit on the standing committees that write legislation on their key issues or who oversee the executive agencies they deal with most often. And the sums of money are significant. In the 2018 election cycle, PACs in the banking, finance, and insurance

sector contributed over $121 million to political candidates across the country; PACs in the healthcare sector contributed almost $100 million; and organized labor PACs contributed almost $59 million. (2)

What do the organized interests get for their money? Critics of America's campaign finance system argue that if such contributions are not actually buying votes, which would be very hard to prove absent some smoking gun document linking the campaign cash and the vote in a *quid pro quo* arrangement, they are certainly **buying access**. That is, these groups' lobbyists are likely to have the kind of close contact with congressional members and their staff that would not be afforded to other groups that had not donated. Organized interests have complained that they aren't pressuring the politicians for votes, but that politicians are shaking them down for campaign contributions. Rarely is the relationship between lobbying, campaign contributions, and access to politicians made explicit, but sometimes people slip up and let the cat out of the bag. For example, in 2018 Mick Mulvaney, head of the Consumer Finance Protection Bureau—the agency designed to protect financial services consumers—and a former congressional member, said the following about his standard operating procedure: "We had a hierarchy in my office in Congress. If you're a lobbyist who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you." (3) He then added that if someone from his district came to D.C. and sat in his office lobby, he would talk to them regardless of financial contribution. Still, the implication is that of all the organized interests in Washington, he preferred to speak with those who contributed to his campaign war chest. Political science research confirms that money can buy access. In a neat experiment, Joshua Kalla and David Broockman, two Berkley graduate students, found that "Members of Congress were more than three times as likely to meet with individuals when their offices were informed the attendees were donors," and that said meetings were more likely to include senior staff if the individuals were donors. (4)

Going Public

Organized interests often use the **going-public** strategy to further their interests. This is a catch-all category of activities in which the group generates or demonstrates public support for its cause. Examples include **mobilizing the grassroots**, which is getting ordinary people or members of the group to write letters. This can be very effective if it is genuine. That is, if the interest group can really get thousands of people to call, write, or email their congressman all expressing one side of an issue, it tends to get legislators' attention. This works with executive agencies as well. Before government agencies publish regulations in the *Federal Register*, they invite all interested persons to comment, and organized interests are in a favorable position to generate significant volumes of comments. Very often, though, the organized interest will fake a grassroots movement by generating thousands of emails or faxes that only look like they come from ordinary people. Senator Lloyd Bentsen coined the term **astroturf lobbying** to describe this behavior. (5) Narrow economic interests will often employ astroturf lobbying to make it seem like they are representing large numbers of people.

Another form of going public is to run an expensive marketing campaign involving commercials on radio and television as well as advertisements and newspaper editorials. Organized interests might also stage a march or demonstration to show decision makers how numerous and mobilized their members are. Civil rights groups staged the **March on Washington** in 1963, filling the National Mall with some 250,000 peaceful protesters. Famously, it was at that march that Dr. Martin Luther King, Jr., gave his "I Have a Dream" speech. In the spring of 2006, nearly a million people all across the country marched in demonstrations against what they perceived to be harsh anti-immigrant legislation pending in Congress. (6) Another example was the **2017 Women's March on Washington D.C** the day after Donald Trump's presidential inauguration. Beginning as a Facebook post by a Hawaiian grandmother the day after Trump was elected, it ballooned into what was referred to as "one of the largest and significant demonstrations for social justice in America's . . .

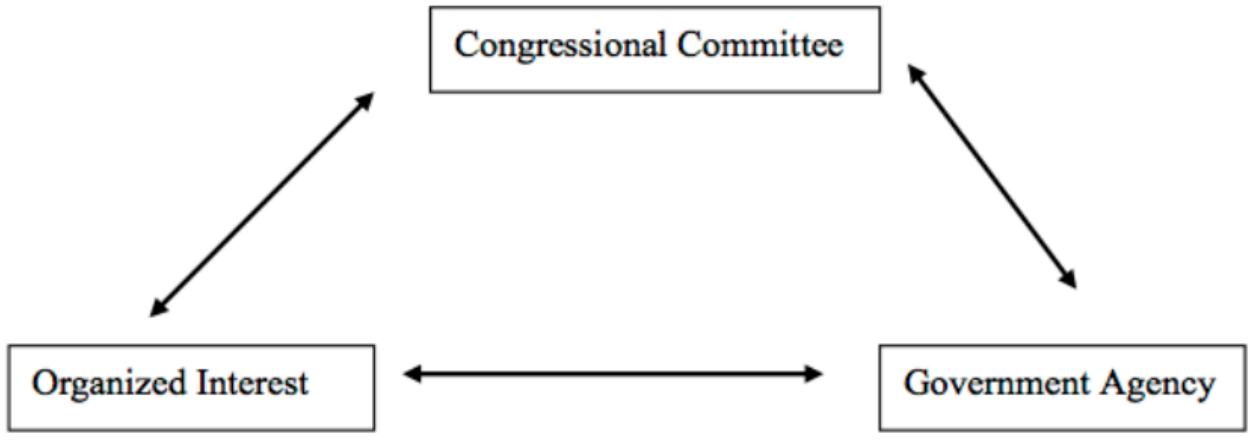
history." The turnout of 500,000 people dwarfed the turnout for Trump's inauguration itself, and altogether 2.6 million people marched in all fifty states and thirty-two countries. (7) The demonstrations in the middle of the 2020 pandemic highlighted the issue of police violence in the wake of cases like the police killings of George Floyd in Minneapolis and Breonna Taylor in Louisville.

Litigation

Organized interests frequently use **litigation**—taking the matter to court—to achieve their ends in addition to lobbying the legislative and executive branches. This can be an expensive strategy but can pay off well if they prevail in court and set precedent in their favor. The organized interest can bring the lawsuit directly, or they can finance lawsuits brought by others, or file *amicus curiae* briefs in favor of one side in another case to which the organized interest is not a direct party. Civil rights groups, led by the NAACP Legal Defense Fund, successfully pursued litigation to strike down discriminatory laws and practices. Environmental groups often sue to halt or modify large projects that they believe violate environmental laws such as the Endangered Species Act or regulations against development in wetlands. Conservative groups have successfully used state legislation combined with litigation to chip away at and eventually overturn *Roe v. Wade* (1973), the Supreme Court decision that legalized abortion.

Iron Triangles

Iron triangles are not an organized-interest strategy. Rather, the term refers to the triangular relationship organized interests form with executive agencies and congressional decision makers. Political scientists refer to this mutually reinforcing relationship as an **iron triangle**, because it often seems impervious to outside influence. The triangle seems to operate as a sub-government unto itself. We can illustrate a generic iron triangle this way.



The double-arrowed lines in the diagram represent two-way supportive relationships. Let's look at each point of the triangle.

The organized interest provides campaign contributions to members of congressional standing committees that deal with the organized interest's issues and concerns. The organized interest also lobbies the government agency and may even provide the governing agency vital information it needs to do its job. This is the case with defense contractors and the Pentagon as well as pharmaceutical companies and the Food and Drug Administration. Through revolving doors, organized interests provide safe and lucrative landing spots for former congressional members and their staff and executive branch officials.

The government agency administers the programs or writes the regulations that the organized interest depends on. For example, if the Pentagon doesn't purchase a new submarine, the company that makes submarines loses business. If the Food and Drug Administration writes overly stringent safety regulations for new drugs, pharmaceutical companies are going to have difficulty bringing new drugs to market. Also, government agency programs can provide important benefits to the relevant congressional committee members. For example, if the Pentagon does build the submarine, that means creating many jobs in the districts those congressmen represent. Agriculture Department subsidies tend to benefit congressional agriculture committee constituents.

Finally, the congressional committee is in a position to act favorably on legislation that benefits organized interests. If the committee decides to build the new submarine, the company that makes it will benefit. If the committee decides to fund subsidies for a certain crop, the crop growers will benefit. It also provides a budget and oversight to the government agency in question. If the committee were to reduce agency funding, the agency would lose power and prestige.

You can see how iron triangles are mutually reinforcing and tend to continue the status quo despite repeated calls to reduce government's size. Pick an area of public policy and see if you can identify the key players and their relationship in an iron triangle.

References

1. Jimmy Williams, "I Was a Lobbyist for More Than 6 Years. I Quit. My Conscience Couldn't Take It Anymore," *Vox*. January 5, 2018. Emphasis in the original.
2. Opensecrets.org.
3. David A. Graham, "Mick Mulvaney Says the Quiet Part Out Loud," *The Atlantic*. April 25, 2018.
4. Joshua L. Kalla and David E. Broockman, "Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment," *American Journal of Political Science*. July 2016. Pages 545-558.
5. Peter Grier, "The Time-Honored Practice of Astroturf Lobbying," *The Christian Science Monitor*. September 3, 2009.
6. Mark Engler and Paul Engler, "The Massive Immigration-Rights Protests of 2006 are Still Changing Politics," *Los Angeles Times*. March 4, 2016.
7. Heidi M. Przybyla and Fredreka Schouten, "At 2.6 Million Strong, Women's Marches Crush Expectations," *USA Today*. January 22, 2017.

Media Attributions

- Lobbying © clif 1066 is licensed under a CC BY (Attribution) license
- Iron Triangles © David Hubert is licensed under a CC BY-NC-SA (Attribution NonCommercial ShareAlike) license

Chapter 47: The Historical Development of the News Media

"The media . . . tend to ignore broad social and economic policy issues because their complexity makes it difficult to simplify and dramatize them."

—William Hudson (1)

The mass media is a truly remarkable thing. It provides us with information and images that range from the ridiculous to the sublime. It is also a far larger beast than we're prepared to deal with here. For the most part, we'll ignore the entertainment side of the mass media, even though we'll keep in the back of our minds the fact that media designed to entertain also has political ramifications. Indeed, the entertainment industry can be overtly political while also covertly reinforcing or challenging established social and political norms and myths. For this part of the course, we're going to concentrate on the link between people, politics, and the news media. We'll use the term *media* to refer to mass communication's whole range, involving newspapers, books, radio, television, movies, recorded music, and the internet. And we'll use the term *news media* to refer to that subset of mass communication that imparts useful information that citizens need in a democratic republic.

A Quick History of the Media in American Politics

The news media has been intimately involved in the American political process right from the beginning. **John Peter Zenger** began publishing the New York *Weekly Journal* in 1733, and almost immediately printed critical articles about William Cosby, the governor of New York colony, accusing him of "schemes of general oppression and pillage, schemes to depreciate or evade the laws, restraints upon liberty and projects for arbitrary will." The paper went on to say that Cosby's rule was so corrupt that the people of New York might soon rise up against the government. Zenger was arrested in 1734 and tried for seditious libel. The jury found him not guilty because the critical stories were factual and so did not constitute libel. Andrew Hamilton, Zenger's lawyer, told the jury that "every man, who prefers freedom to a life of slavery, will bless and honor you, as men who have baffled the attempt of tyranny...exposing and opposing arbitrary power in these parts of the world at least, by speaking and writing truth." (2) The case encouraged a rowdy press in the American colonies and also dissuaded the British from prosecuting writers who criticized them in the run-up to the American Revolution.

At the Constitutional Convention, the delegates adopted a secrecy rule. When someone carelessly left a copy of the Virginia Plan outside the meeting chamber, **George Washington** rose to "entreat the gentlemen to be more careful, least our transactions get into the newspapers and disturb the public repose by premature speculations." (3) At the time of the American Revolution and the Constitutional Convention, the United States possessed a broadly literate population of White men who, for the most part, were able to read the arguments over independence and the debates between the federalists and the anti-federalists because they were published in newspapers, journals, pamphlets, and flyers.

In 1798, Congress passed and President Adams signed the **Sedition Act**, generally considered to be one of the greatest threats to a free press in the United States. This was basically a case of Federalist politicians attempting to stifle the voices of opposition newspapers. Here's the meat of the legislation:

> *That if any person shall write, print, utter or publish…or shall knowingly assist or aid in writing, printing, uttering, or publishing any false scandalous and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States, with intent to defame the said government, or to bring them…into contempt or disrepute; or to excite against them…the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States…then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.* (4)

Although the law seemed to offer protection in the case of one who uttered or printed the truth, it was really directed at people who expressed negative opinions about the Federalist government, and it did not exactly spell out how one would go about establishing the truth of an unfavorable opinion. Twenty-five Americans were arrested under the Sedition Act, and fifteen of them were indicted for trial. The Sedition Act expired the day before President Jefferson took office in 1801, and Jefferson pardoned those who had been convicted under the law. Jefferson went on to bring seditious libel charges against Harry Croswell, a Federalist newspaper editor. Again, the case hinged on whether Croswell had printed the truth when he alleged that Jefferson paid James Callender to slander George Washington, John Adams, and other Federalists. Croswell was initially convicted of seditious libel but was granted a new trial after New York changed its libel laws; he was acquitted in the second trial, but no definitive evidence established the truth of his claims. (5)

It wasn't until the latter half of the nineteenth century that the number of daily newspapers exploded from approximately 250 to over 2,000 by 1900. The increase was partly due simply to the colonization of the American West and the creation of towns and cities that needed their own newspapers. Technology also improved and made it easier to print large runs of a newspaper in one day and then turn around and do it again the next day. Prices decreased as well. After Benjamin Day began the first penny press in New York in 1833, more inexpensive newspapers proliferated. The nineteenth century was also the golden era of the **partisan press**. Most newspapers didn't worry about objectively printing the day's or week's events; they were often openly tied to political parties or movements and tilted the news accordingly. Competition in the business was stiff, and publishers often went for scandal and sensationalism to sell newspapers. This **yellow journalism**, as it was called, was perfected through the rivalry of the New York *World*, published by Joseph Pulitzer, and the New York *Journal*, published by William Randolph Hearst. Both Hearst and Pulitzer stirred up stories of Spanish atrocities in Cuba and implicated Spain in the explosion that destroyed the *U.S.S. Maine* in Havana harbor, which may have helped prime their audiences for America to intervene.

Ida B. Wells, Muckraker Against Lynching

The early twentieth century muckrakers were pioneers of the kind of investigative journalism that continues to challenge the politically and economically powerful. (6) Of course, the term "muckraker" was an epithet coined by President Theodore Roosevelt in 1906 but has become something of a badge of honor among investigative journalists. A **muckraker** is a progressive-minded writer who investigates and reports on abuses of power and on the ways that government serves powerful interests at ordinary people's expense. **Lincoln Steffens** was an editor and writer for *McClure's Magazine*, where he wrote a series of investigative reports called "The Shame of the Cities" and "The Shame of the States," focusing on political corruption and efforts to fight it. **Ida Tarbell** investigated the Standard Oil Trust for *McClure's* and wrote a series of articles in 1902-03 exposing the secret bookkeeping, bribery, sabotage, conspiracy and other machinations of the Standard Oil monopoly. **Upton Sinclair**, a freelance journalist, was commissioned by *Appeal to Reason* to write a series about exploiting factory workers and their hardships. He focused on the meatpacking industry in Chicago and ended up writing a serial novel about it. The novel, published as *The Jungle*, described the life of meatpacking industry workers through the character of Jurgis Rudkos and his family, as they experience corruption, injury on the job, unsanitary work conditions, jail, and homelessness. Sinclair, a Socialist, was disappointed that the public focused on the poor quality and unhealthy meat-packing process instead of on the laborers' poor working and living conditions. The publication of *The Jungle* did add fuel to the movement to pass the Pure Food and Drug Act of 1906. **David Graham Phillips** wrote a nine-installment series called "Treason of the Senate" in 1906 for *Cosmopolitan Magazine*. He documented corporate manipulation and corrupt process of selecting U.S. Senators, which galvanized the reform movement that eventually resulted in ratification of the Seventeenth Amendment in 1913, which mandated that senators be elected directly by the people. **Ida B. Wells**, who was born into slavery and become a journalist and a African-American and women's rights advocate, wrote the pamphlet *Southern Horrors: Lynch Law in All Its Phases*, in which she referred to lynching as "that last relic of barbarism and slavery."

Two early twentieth-century developments changed the news media forever. By the 1920s, newspapers had a competitor. Radio was becoming commonplace and had an immediacy and presence that newspapers couldn't replicate. Politicians could speak directly to people, unmediated by journalists and newspaper editors. The most effective early use of radio was **Franklin Roosevelt's "fireside chats"** that began in 1933 and ran to 1944. These broadcasts helped him explain his policies and decisions directly to millions. For example, in the December 9, 1941 fireside chat he said,

> *"We are now in this war. We are all in it—all the way. Every single man, woman, and child is a partner in the most tremendous undertaking of our American history. We must share together the bad news and the good news, the defeats and the victories—the changing fortunes of the war."* (7)

President Reagan revived the practice of doing a weekly radio broadcast, and presidents George Bush, Bill Clinton, George W. Bush, and Barack Obama continued to do so. President Trump initially started doing weekly broadcasts on YouTube, but then stopped the practice.

The other change to occur in the early 20th Century was the rise of a **journalistic culture of objectivity**. The partisan press of the nineteenth century began to fade, and professional journalism schools graduated

journalists committed to reporting the news without intentionally slanting their coverage to suit party politics or ideology. Thus began a new format to separate newspaper pages between news stories, editorials, columns, and letters to the editor. The news stories were supposed to be objective, while the others were free to express opinions that would come from the author's partisan or ideological preferences. The culture of objectivity continues to characterize most mainstream media outlets. Generally speaking, this is a positive aspect of American journalism. However, critics have pointed out that the culture of objectivity has unfortunately led to **false balance** on some issues. False balance has been defined as "when journalists present opposing view-points as being more equal than the evidence allows. But when the evidence for a position is virtually incontrovertible, it is profoundly mistaken to treat a conflicting view as equal and opposite by default." (8) Indeed, according to these critics, both sides of issues like climate change and the efficacy of vaccines are treated equally in the media, when the science is overwhelmingly one- sided.

Presidential Candidates John F. Kennedy and Richard Nixon in 1960

The emergence of television in the 1950s eroded the preeminence of both radio and newspapers. Political campaigns started marketing their candidates in television commercials that became increasingly more sophisticated over time. Televised presidential debates began in the 1960 election, and it immediately became clear that a candidate benefited from being telegenic. In the first of the four **Nixon-Kennedy presidential debates in 1960**, radio listeners thought that Nixon bested Kennedy, while television viewers came to the opposite conclusion. The reason? The radio listeners couldn't see that with no make-up and sporting a five o'clock shadow, Nixon looked horrible compared to the tanned, make-up-wearing Kennedy. No presidential candidate has ever made Nixon's mistake again. (9)

From 1949 to 1987, communication on public airwaves like radio and television was governed by the **fairness doctrine.** The Federal Communications Commission required licensees to serve the public interest in two ways: 1) devote a "reasonable percentage of their broadcasting time to the discussion of public issues of interest to the community served by their stations," and 2) design programs "so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." (10) Conservatives campaigned against the fairness doctrine, and Republican-appointed FCC commissioners voted to end it in 1987; congressional Democrats objected. Scrapping the fairness doctrine helped give rise to the resurgence of partisan media in the United States. This, in turn, has contributed to the polarization of American politics. As Lawrence Lessig has written, "The general effect of news network polarization is clear: polarized networks make for a more polarized nation—in at least the minimal sense of being more consistently sorted along ideological lines than before." (11) An expanding internet, social media, and customized news channels allows people to read, see, and hear only news and opinion pieces that reinforce their existing political views.

The most recent development in political media's history is the **rise of the partisan conservative media ecosystem**. The demise of the fairness doctrine in 1987 allowed corporations and wealthy libertarians to develop an especially insular media empire centered on conspiracy theories and partisan news. The *Columbia Journalism Review* explains the conservative media ecosystem's meteoric rise after Republicans junked the fairness doctrine:

> *"A remarkable feature of the right-wing media ecosystem is how new it is. Out of all the outlets favored*

by Trump followers, only the New York Post existed when Ronald Reagan was elected president in 1980. By the election of Bill Clinton in 1992, only the Washington Times, Rush Limbaugh, and arguably Sean Hannity had joined the fray. Alex Jones of Infowars started his first outlet on the radio in 1996. Fox News was not founded until 1996. Breitbart was founded in 2007, and most of the other major nodes in the right-wing media system were created even later." (12)

This media ecosystem predominantly exists outside of traditional journalistic outlets; it operates with its own journalistic standards and draws stories from the conspiratorial fringes to the more prominent outlets like Fox News, which is owned by the Australian billionaire Murdoch family. Often immune from facts, this media ecosystem recycles conspiracy theories: the COVID-19 pandemic was a hoax designed to promote government surveillance and control; prominent Democrats were running a child pornography ring out of the (nonexistent) basement of a pizzeria in Washington; Ukraine was behind the theft of Democratic emails, and the server in question was hidden somewhere in that country; millions of illegal immigrants regularly voted in recent American elections; Barack Obama's birth certificate was forged, and he wasn't really born in Hawaii; a Democratic National Committee staffer stole the Democratic emails in 2016—not the Russians, as U.S. intelligence agencies concluded—and then was murdered for it, and so on. (13) This conservative media ecosystem serves as a well of animosity for Democratic politicians and a protective cushion for Republican office holders. Its alternate reality empowers and normalizes what, in the past, were ideas that only existed at the fringes of American political culture. Fox News, and the umbrella of other conservative media outlets like Breitbart, Newsmax, and OAN, promote hatred of progressives and can convince people that the only way to save democracy is to destroy it. Kevin Drum put it this way:

"The Fox pipeline is pretty simple. Fox News stokes a constant sense of outrage among its base of viewers, larely hy highlighting narratives of white resentment and threats to Christianity. This in turn forces Republican politicians to follow suit. It's a positive feedback loop that has no obvious braking system, and it's already radicalized the conservative base so much that most Republicans literally believe that elections are being stolen and democracy is all but dead if they don't take extreme action." (14)

In 2023, facing a sure loss in civil court, Fox News settled with Dominion Voting Systems over its recycling of false allegations during the 2020 election. The news giant paid Dominion $787 million to get out of a lawsuit that was likely to result in double the damages for Fox. While the court case never reached its conclusion, the evidence it revealed was damning: Shows hosted by Maria Bartiromo, Lou Dobbs and Jeannine Pirro spread lies and conspiracy theories about nonexistent fraud associated with Dominion Voting machines. Even as the lies were being broadcast, Fox executives themselves called the material spread by its own personalities "mind-blowingly nuts," "ludicrous," and "crazy." When a reporter fact-checked these crazy allegations, Fox personality Tucker Carlson demanded that she be fired. The most jaw-dropping revelation in the lawsuit was when Bartiromo put Donald Trump lawyer Sidney Powell on her show to claim that Dominion Voting software switched Trump votes to Joe Biden, she knew that the claims were solely based on a memo that Powell received from an unnamed woman who claimed that the wind talked to her and that she received her insights from "time-travel in a semi-conscious state." (15)

Is there a liberal or progressive media ecosystem? Indeed, there is, but by and large it does not dabble in conspiracy theories, and its components–like *The Nation*, *Counterpunch*, and *Raw Story*–don't have the reach of the billionaire Murdoch family's *Fox News*, nor do progressive media outlets have the same kind of hold on the Democratic base as does the conservative media ecosystem on the Republican base. Even without the conspiracy theories, however, the liberal media ecosystem fans the flames of partisan division in the United States.

References

1. William E. Hudson, *American Democracy in Peril. Eight Challenges to America's Future*. Sixth edition. Washington, D.C.: CQ Press, 2010. Page 194.
2. Eric Burns, *Infamous Scribblers. The Founding Fathers and the Rowdy Beginnings of American Journalism*. New York: Public Affairs, 2006. Pages 102-111.
3. Christopher Collier and James Lincoln Collier, *Decision in Philadelphia*. New York: Ballantine Books, 1986. Page 115.
4. Eric Burns, *Infamous Scribblers*. Pages 355-356.
5. John Dickerson, "The Original Attack Dog," *Slate*. August 9, 2016. *The People of the State of New York v. Harry Croswell* (1804).
6. This section relies on Ann Bausum, *Muckrakers. How Ida Tarbell, Upton Sinclair, and Lincoln Steffens Helped Expose Scandal, Inspire Reform, and Invent Investigative Journalism*. Washington: National Geographic. 2007.
7. The fireside chats are available from the Franklin D. Roosevelt Library and Museum.
8. David Robert Grimes, "Impartial Journalism is Laudable. But False Balance in Dangerous," *The Guardian*. November 8, 2016.
9. To be fair, Nixon had recently injured his knee and spent two weeks in the hospital. He was still reportedly weak and twenty pounds underweight the night of that debate.
10. William B. Fisch, "Plurality of Political Opinion and the Concentration of Media in the United States," *The American Journal of Comparative Law*. Volume 58, 2010. Page 514.
11. Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy*. New York: HarperCollins. Page 94.
12. Yochai Benkler, Robert Faris, Hal Roberts, and Ethan Zuckerman, "Breitbart-led Right-Wing Media Ecosystem Altered Broader Media Agenda," *Columbia Journalism Review*. March 3, 2017.
13. David Atkins, "The Conspiracy Theories a Conservative Must Believe Today," *Washington Monthly*. November 10, 2019. David Roberts, "Why Conspiracy Theories Flourish on the Right," *Vox*. September 13, 2016. Oliver Darcy, "Fox News Staffers 'Disgusted' at Network's Promotion of Seth Rich Conspiracy Theory," *CNN Business*. May 22, 2017.
14. Kevin Drum, "The Real Source of America's Rising Rage," *Mother Jones*. September-October, 2021.
15. David Bauder, Randall Chase and Geoff Mulvihill, "Fox, Dominion reach $787M Settlement over Election Claims,"*Associated Press*. April 18, 2023. David Folkenflik, "The 'Whackadoodle' Foundation of Fox News' Election Fraud Claims," *National Public Radio*. February 20, 2023.

Media Attributions

- Wells © Lawson Andrew Scruggs is licensed under a Public Domain license
- Kennedy Nixon © Associate Press is licensed under a Public Domain license

Chapter 48: The Contemporary News Media Ecosystem

"Who wants a revolution? No one who owns a major media outlet."

—Julie Hollar (1)

It is important for you to understand the contemporary news media ecosystem, for it is a critical interface between you and national-level political decision makers. As a student in this class—indeed, as a citizen of the American republic—you should be a smart consumer of political news. You should especially apply the "Of what is this an example?" question to the myriad things you hear and see in the media. To that end, here are some things to look for.

Where Do People Get Their News?

Selling the Chicago Defender in 1942

The acquisition of political information has undergone several transformations in American history. As mentioned above, newspapers used to dominate because they were the only game in town. Radio challenged newspapers as news sources, but it was television—with its combination of audio and video elements, plus the ability to go live—that really dealt newspapers a blow. Newspaper readership stagnated after 1970. Physical newspapers were dealt a nearly mortal blow by the development of the internet. The first dial-up access to the internet started in 1989, and the 1990s saw internet browsers and search engines develop. (2) Newspapers, magazines, and television news channels migrated online, and most people now receive their political news from the internet and cable television. Local newspapers continue to struggle, even in the online setting. (3) People generally get their political news on social media, television, and radio, and newspapers, in that order of importance. (4)

Concentration of Ownership

One of the most obvious characteristics of the contemporary media ecosystem is the concentration of media company ownership. In 1983, 90 percent of American media was owned by fifty companies. By 2012, 90 percent of American media was owned by just six companies: Viacom, News Corporation, Comcast, CBS, Time-Warner, and Disney. (5) Various mergers and acquisitions have occurred since then as the mediasphere has become even more concentrated. We can be very confident that nearly every form of mass media we use is controlled by the few people who run these corporations. We watch the movies these media giants decide to produce, read the books they decide to print, watch the television shows they decide to create on the cable

or satellite systems that they own, read the magazines they decide to publish, watch what they consider to be news, and listen to the music that their musicians create.

Along with the general corporate media consolidation, the news media is quite concentrated as well. Look at the major news sources, whether broadcast, cable, or web: CNN is owned by AT&T's WarnerMedia; ABC News is controlled by Disney; ViacomCBS owns CBS News; Fox News Channel is owned by the News-Corp, a media empire controlled by Australian-born Rupert Murdoch and his family; Comcast owns NBC News and MSNBC. PBS and NPR are owned by the Corporation for Public Broadcasting, for which conservatives have repeatedly tried to cut funds and make ever more reliant on private and corporate donations. (6)

The concentration of the news media ecosystem encompasses local newspapers and radio stations across the country. A 2016 report by University of North Carolina at Chapel Hill's School of Media and Journalism documented local newspapers' travails. Readership is down, many papers have closed or merged, and the number of companies that own newspapers has declined—the largest twenty-five companies own more than half of all daily newspapers in America, and the three largest companies own twice as many newspapers now than they did a decade ago. These companies often have little connection to the communities in which they own and operate newspapers. Many other towns don't have daily newspapers at all, and the internet does not provide local news. The result is that America is pockmarked by **news deserts**, areas that receive little or no substantive public affairs or community-interest news coverage . (7) Do you know who owns the newspapers in your state or city? Overall, radio ownership is less concentrated. Still, the top ten corporations that own radio stations account for nearly half of all radio station advertising revenue. (8) Many of these corporations push a conservative agenda with prominent right-wing talk shows and mandatory "talking points" for radio and TV journalists to read on air. (9) Do you know who owns the radio stations you listen to?

Media ownership concentration has been proceeding apace for some time now, but it was encouraged and further enabled by the **Telecommunications Act of 1996**. The congressmen who voted for this law—and President Clinton, who signed it—promised that it would create more media competition, more diversity, lower prices for things like cable service, and more jobs in the media and telecommunications industries. According to Common Cause, however, the law brought the public "more media concentration, less diversity, and higher prices." The Telecommunications Act did the following:

- Lifted the cap on the number of radio stations any one company could own. This allowed Clear Channel to grow from a relatively small company to one that owns over 1600 radio stations across the country.
- Extended broadcast license terms from five to eight years and made it more difficult for the public to challenge license renewals.
- Deregulated cable rates, resulting in cable cost increases.
- Raised the caps on the number of television stations that any one company could own and the audience that it could reach. Now just five companies control 75 percent of primetime viewing.
- Eased cable system cross ownership. Ninety percent of the top fifty cable stations are owned by the giant companies that also own the media networks.
- Gave away valuable publicly owned digital broadcasting spectrum to the media conglomerates. (10)

The decade following the Telecommunications Act passage witnessed numerous high-profile media mergers, because the new rules allowed for greater concentration. The Federal Communications Commission has subsequently further loosened media ownership regulations.

The political implications of media concentration are obvious. If relatively few large corporations control what we think is news and entertainment, they can shape the political debate. One interesting study of the Telecommunications Act looked at newspaper coverage of that bill as it worked its way through the political process. The study's authors compared the coverage offered by newspapers that were owned by companies

that stood to benefit greatly from loosening television station ownership, verses newspapers who were owned by companies that stood to benefit somewhat, versus newspapers who were owned by companies that were not in the television business. Only 15 percent of stories from those newspapers owned by companies that stood to benefit mentioned any of the proposed bill's negative consequences, while 58 percent of newspaper stories from those papers owned by companies that were not in the television business mentioned negative legislation consequences. The authors concluded, "In short, very different pictures of the likely effects of this legislation were being painted by the different newspapers examined, pictures that served to further the interests of the newspapers' corporate owners rather than the interests of their readers in fair and complete coverage of an important public policy issue." (11) Indeed, it's very difficult to find a story on corporate-owned media channels about the very topic of media concentration and what its negative consequences might be.

On what other issues does media concentration affect the picture we are receiving? Former reporter Tom Fenton argues that corporate news-media dominance and the attendant concentration on the bottom line—has led to the evisceration of foreign reporting. He writes that in the two decades before the terrorist attacks of 9/11/01, American newspapers and television news stations reduced their coverage of foreign news by 70-80 percent. He also says that, "In the three months leading up to September 11, the phrase 'al Qaeda' was never mentioned on any of the three evening news broadcasts—*not once*."(12) Others argue that when it comes to domestic coverage, the corporate news media have a clear pro-business slant. On April 30, 1997, the front page of the *New York Times* trumpeted the following headline: "Markets Surge as Labor Costs Stay in Check." Of course, "labor costs" are the wages and benefits earned by workers, and "stay[ing] in check" is another way of saying that wages and benefits have not grown. Curiously, the article failed to quote any workers, their representatives, or labor activists about this development, but instead described the issue from the point of view of businessmen and financiers. Journalist Norman Solomon provides this example:

> *"At networks owned by multibillion-dollar conglomerates like General Electric, Viacom, and Disney, the news divisions solemnly report every uptick or downturn of the markets. In contrast, when was the last time you heard [television newscaster] Peter Jennings report the latest rates of on-the-job injuries or the average wait times at hospital emergency rooms?"* (13)

Finally, consider the debate over whether to move from our current hodgepodge, largely corporate-run healthcare system to a single-payer healthcare system, which is favored by a majority of ordinary Americans because it would cost less and cover everyone. The organization Fairness and Accuracy in Reporting (FAIR) has documented how corporate media frame the debate. The current healthcare system is referred to as "private health insurance" and its alternative is referred to as "socialized medicine" or "government-run healthcare." The current system is never referred to as "corporate-run healthcare," which would be the appropriate counterpart to the inaccurate epithet "government-run healthcare," but corporate media won't go there. What's wrong with the oft-used phrase "government-run healthcare"? Well, the single-payer proposal would keep the same mix of mostly private doctors, clinics, and hospitals to provide care, but would pool tax revenue to create one public health insurance provider that would be governed by democratic input, unlike the health insurance companies we have now. (14)

The Internet Revolution

The Internet is a network of networks that gives people all over the globe the capability of emailing, webpage browsing, chatting, and file sharing. It grew out of embryonic networks such as the Defense Department's Advanced Research Projects Agency Network (ARPANET) and the National Science Foundation's NSFNet. The **World Wide Web**, the most visible part of the Internet, began when researchers at the European

Organization for Nuclear Research (CERN) created the first few web pages. There are well over 4 billion regular users of the Internet worldwide.

Net Neutrality Demonstrator at Verizon

In the United States, a classic political struggle has been going on over the nature of the Internet. Telecommunication giants such as AT&T, Verizon, and Comcast—who own the "pipelines" through which the emails, videos, files, and web pages flow—would like to be able to discriminate between those who use the Internet and charge premiums to content providers who can pay for high speed and reliability. Those who could not pay for more than a simple connection would be relegated to whatever slow service was available after the large commercial content providers had used—and paid for—their share. As Steven Levy put it, "They would charge big companies like Google and Yahoo big fees to guarantee that their content got to customers at higher speeds. In other words, there'd be an elite toll road alongside a free but crowded interstate." (15) An interesting coalition of consumer's groups, small businesses and ideological groups from the left and the right argued against such a move. They maintained that "**net neutrality**," which has been the norm on the Internet, should remain the standard practice—in other words, internet service providers should charge basic access fees to the Internet but otherwise not discriminate between those who would post web pages, video, or email. President Donald Trump campaigned against net neutrality. Ajit Pai, Trump's pick to chair the Federal Communications Commission, cast the deciding vote in 2018 to kill net neutrality. However, the Biden administration affirmed its commitment to restoring net neutrality.

Meanwhile, the **Internet revolution** has been transforming the face of American politics in the following ways:

Campaign Mobilization and Fundraising—Howard Dean's abortive 2004 run for the Presidency was notable for its pathbreaking use of the Internet to raise large sums of money through many small donations. The Dean campaign used the Internet to organize local meet-ups where supporters in a given locality could meet like-minded Deaniacs, talk about issues and strategies, and donate to the campaign. In the third quarter of 2003, the Dean campaign raised nearly $15 million this way—a record amount of fundraising in one quarter by a Democratic presidential candidate by any method—making him a real threat to frontrunners for the Democratic nomination. (16) In 2008, Barack Obama did especially well raising large amounts of money from a broad base of smaller donors and using social media sites. In 2016, Bernie Sanders concentrated his fundraising on the internet and solicited small donations. His campaign set up a text-to-donate system. His average contribution was $27, but he did quite nicely. In one day, he raised $8 million by asking for small donations. Sanders did equally as well fundraising online in his failed attempt to secure the Democratic nomination for the 2020 election. (17) The internet appears to have broadened the political-fundraising base. Between 1992 and 2016, the percentage of Americans who donated to political candidates doubled. (18)

Political Advertising—The Internet can be used as a cheap way to get the message out for a political candidate or interest group. Every candidate knows that his or her campaign needs a website to promote themselves and raise money. Campaigns generate mass emails to targeted audiences quickly and automatically. Increasingly, candidates are attempting to attract younger voters by releasing web versions of campaign commercials. Candidate and then President Donald Trump effectively used Twitter to speak directly to his supporter base. In 2020, when the coronavirus pandemic forced shutting down traditional campaign rallies, candidates turned to internet versions of fireside chats.

Blogs, Blogs, and More Blogs—Web logs burst onto the political scene in a big way after the 2002 election

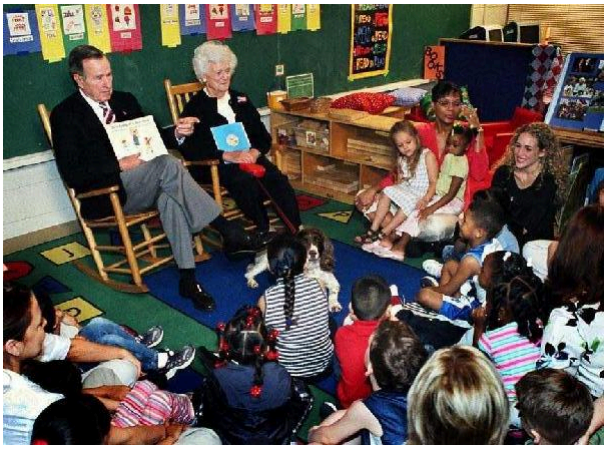
but were in existence before that. Candidates use them to connect to potential voters in more personal ways than they can with static web pages. John Edwards, the Democratic vice-presidential candidate in 2004 and presidential candidate in 2008, dedicated "hours each week videotaping responses to videotaped questions, the entire exchange posted on his blog." (19) Since then, candidates and politicians moved away from blogs to professionally maintained websites. But blogs are still relevant. Partisan or ideological blogs challenge politicians and sometimes hold the mainstream media to account. Often, blogs start rumors or conspiracy theories that are then picked up by corporate media. The location of all this debate and dialogue is often referred to as the **blogosphere**.

Fake News—The blogosphere and the internet revolution have given rise to numerous conspiracy-driven sites that don't adhere to any journalistic standards and that publish stories with no real corroboration. Partisan Americans and other groups—e.g., the Russian government—have a strong interest that these kinds of **Fake News** stories flourish on the internet, where they sow confusion and animosity, and they undercut the news media and government's legitimacy. Did Hilary Clinton and the Democrats run a child sex ring out of a D.C. pizzeria? No. Did a routine military exercise that happened to take place during the Obama administration constitute an attempt to occupy Texas? No. Fake news stories tend to be generated more often by conservatives who target liberal politicians because, as documented in the journal *Psychological Science*, social conservatives are simply more likely to believe unsubstantiated stories that trigger their fears. Fake news stories intended for liberal audiences just don't seem to gain the same kind of traction. (20) So, **fake news** is a real phenomenon—carefully crafted, but unsubstantiated false stories intended to trigger fears, stimulate anger, or spread false information to a target audience—that has infected our political information stream. Unfortunately, the existence of fake news allows politicians to label as "fake news" any legitimate story that they don't like.

Beware of Sound Bites

Unless you happen to be as old as the author of this text, you might not have noticed what is commonly called the **incredible shrinking sound bite** in politics. A **sound bite** is a short selection of what a candidate or sitting politician says in a speech or interview. Media editors use their judgment to select such clips to represent what they believe to be the politician's most important or relevant point. Interestingly, the average sound bite in the 1960s was over forty-two seconds long, but fell to about nine seconds in 1988, and then to just over seven seconds in 2000 and 2004. (21) So, instead of allowing politicians to develop extensive arguments with assertions backed by evidence, the media have progressively been selecting shorter clips that essentially equate to bumper-sticker slogans—"Read My Lips, No New Taxes," "Where's the Beef?" or "Make America Great Again." And because politicians no longer expect to be quoted at length, they now tend to pepper their speeches with these kinds of mindless slogans, knowing that the editors are looking for something catchy to put on the evening news. The result has been a mutually reinforcing process that has impoverished political debate. What is a media consumer to do? Go to the source, for one thing. Go to the candidate's website to see if the full campaign speech text is posted there. Another possibility is to read a reputable news site, which will have much more extensive coverage of a candidate's positions than you'll find in the television news. Another strategy is to listen to public radio or television news shows, which tend to have longer sound bites and more extensive political discussions than network or cable television news.

Pseudo-Events



President George H. W. Bush and First Lady Barbara Bush Reading to School Children

You should also be on the lookout for pseudo-events, which populate the political landscape like mushrooms in a forest. A **pseudo-event** is an event that exists solely to generate media coverage and has little or no substance of its own. The historian Daniel J. Boorstin coined the term pseudo-event in the 1960s in his book, *The Image: A Guide to Pseudo-events in America*. There are several disturbing features of pseudo-events. For one, they are treated as news by the corporate media even though they are not really news. They are "planned" news events that the media find irresistible: a politician speaking about the importance of education just after having been photographed reading to little children or a politician riding in some piece of military hardware before making a speech on the military. Media consumers are lulled into thinking that something significant is happening. A second problem comes from the first. Pseudo-events crowd out real news coverage. Reporters devote time to them, leaving less time to report on real education or military issues. A third problem is that the imagery of pseudo-events can often be in direct contradiction to reality. The politician who poses for the cameras with disabled veterans may actually have voted to cut veteran's benefits.

Political Advertisements

As an informed citizen, you should also cast a skeptical eye on political commercials. Politicians run campaign commercials and organized interests run advertisements designed to push their agendas. You should not rely on these commercials for more than a tiny fraction of your political knowledge. Because of their short format, political commercials do not provide voters the real information they need to understand complex political issues and how the various candidates plan to address them.

Keep an eye out for the following **types of political ads** but remember that these are ideal types. Real advertisements often combine characteristics of the following.

Negative campaign ads seek to associate an opponent with events or actions that are portrayed as horrendous in the extreme. My opponent is soft on crime! My opponent coddles foreign tyrants! My opponent is sleazy! You get the picture. The ads are characterized by unfavorable photos of the opponent paired with a litany of bad things or bad people. They treat issues in an extremely superficial way, often using code words and images to stand in for the issue of concern. Finally, they typically end with a shining photo of the candidate with their family, or smiling community members, or cops, etc., and a tag line about how they will stand strong against crime, against foreign tyrants, and against sleaze.

Backfire ads use the words and images of the opponent against them. Short clips of the opponent are used to show how wrong they were, how out-of-touch they are, how silly they looked, or how they've changed positions over time. They also often feature a sarcastic voice-over to drive the point home, just in case the viewer didn't get it from the opponent's words and images.

Candidate's **biography ads** are sentimental, often sappy, reviews of the candidate's life. They often highlight

how dedicated and capable the candidate is, and how they are firmly in touch with American values. The ads might also feature the candidate's family, usually with the unstated message that they are "normal" because they have a loving spouse and children. A further touch—when possible given the candidate's actual life—is to highlight difficulties over which the candidate has triumphed. Candidates born into poverty or candidates who have a heroic war record often like to highlight those aspects of their lives. These ads are often completely devoid of real issue information—they rarely talk about what the candidate would do about specific issues—but are instead designed to give the viewer a positive feeling about the candidate.

Ads featuring **endorsement** by average folks or celebrities present the viewer with real people who praise and/or endorse the candidate. Ordinary people might talk about his qualities in person-on-the-street interviews. Maybe the candidate is shown interacting with average Americans, or a series of celebrities speak about the candidate. These ads are often used to showcase the populist aspects of the candidate's personality or political program.

Political Spin

You should also remember that politicians, partisans, or ideologues spin much of the information you see or hear about politics. **Spin** refers to the biased portrayal of events that is designed to favor one set of interests over another. Spin happens in any mass communication setting, but we're only concerned with political communication. Political interests are very concerned to place their partisans on radio and television programs and on web sites, so they can offer the most positive spin possible on any given development in the world of politics, society, and the economy. Such partisans are often called spin doctors, which is a derogatory term. A common spin tactic involves cherry-picking evidence—only citing evidence in favor of one's position. Another involves choosing favorable language—is it an "estate tax" or a "death tax", is it "tax relief" or a "tax cuts for the rich"? Yet another tactic spin doctors or politicians use is to employ passive language to defuse responsibility. They might say, "Mistakes have been made" instead of "I made a mistake" or "My party made a mistake." Another tactic is to suppress expectations, which allows them to then exceed expectations when the election or primary happens. Spin is also frequently marked by the kinds of fallacious argumentation we discussed at the beginning of the text.

Issue Framing

Students of the mass media have long noted that news is portrayed through **frames** that embed events in a particular linguistic or situational context. (22) Part of this is a result of the words journalists and editors choose to represent the world. A politician's program might be labeled "Social Security reform" or it might be called "Social Security privatization," and the choice of those labels affects how viewers ultimately perceive the issue. But this linguistic aspect of framing is fairly obvious. Pay attention to the less obvious form of framing involving the broader situational context. Specifically, the news media tends to favor an episodic frame for the news over a thematic frame.

An **episodic frame** emphasizes individual events or cases, one after another with little history or context given to each incident. This frame predominates in television and newspaper news coverage—"Today there was a bombing, a layoff at the local factory, a sex scandal, and a flood." Episodic news often focuses on the story's sensational details at the expense of asking, "Of what is this an example?" or "How is this related to that?" or "What is the broader context for this event?"

A **thematic frame** reverses the emphasis by looking at the broader context of an issue and relationships between the day's or week's happenings. So instead of an episodic story about layoffs at an automobile factory, with the requisite journalistic details about the factory, the numbers of jobs lost, and tearful interviews with a selected worker or two, thematic journalism would start with the context, say, deindustrialization or the effects of globalization, then add other examples of factory closures as well as some details. Indeed, the thematic frame would more likely do stories on the broader themes and then bring into the daily events as examples.

According to political scientist Shanto Iyengar, who has studied framing extensively, the predominance of episodic journalism encourages ordinary people to not make connections, to not place events in broader context, and to not assign responsibility to political elites. (23) If the news does an episodic story about a troubled military veteran who kills twenty people at a county fair, it becomes a sensation piece and the viewers naturally conclude that all responsibility for the event falls on the perpetrator. With thematic reporting, a news outlet might place the incident in the broader context of post-traumatic stress disorder or the extent to which America is flooded with guns. Then the viewers are likely to say that while the perpetrator is responsible for their actions, clearly political leaders have been making decisions with respect to veterans' mental healthcare and gun regulation that have made such events more likely to happen rather than less likely. Read or watch news stories and ask yourself whether episodic or thematic frames predominate.

What If?

What if media literacy was a high school graduation requirement? What if schools from elementary through high school took it as their responsibility to ensure that students were savvy media consumers and critical skeptics of poor political media sources of information? Write curriculum that would accomplish this goal, with sections dedicated to elementary, junior high, and high school students.

References

1. Julie Hollar, "Who Wants a Revolution? No One Who Owns a Major Media Outlet," FAIR. March 16, 2020.
2. Kim Ann Zimmermann and Jesse Emspak, "Internet History Timeline: ARPANET to the World Wide Web," *Livescience*. June 27, 2017.
3. Chris Isidore, "Newspaper Chain McClatchy Files for Bankruptcy," *CNN Business*. February 13, 2020.
4. Pew Research Center. "News Platform Fact Sheet." September 17, 2024.
5. Ashley Lutz, "These 6 Companies Control 90% of the Media in America," *Business Insider*. June 14, 2012.
6. John Nichols, "With His Assault on PBS and NPR, Trump Seeks to Eliminate Real News," *The Nation*. February 14, 2018.
7. Penelope Muse Abernathy, *The Rise of a New Media Baron and the Emerging Threat of News Deserts*. The University of North Carolina School of Media and Journalism. 2016. No author, *Thwarting the Emergence of News Deserts*. The University of North Carolina School of Media and Journalism. 2017.
8. No author, "iHeart Tops Industry Revenue List With $2.6B," *Inside Radio*. July 6, 2016.
9. Mike Rosenberg, "Turmoil Inside KOMO News as Conservative Owner Sinclair Mandates Talking Points," *Seattle Times*. April 3, 2018. Nicole Hemmer, "Sinclair Broadcasting, Not Fox News, is Becoming the Truest Heir to Roger Ailes' Conservative News Legacy," *NBC News*. June 12, 2018.
10. Common Cause, *Unintended Consequences and Lessons Learned. The Fallout from the Telecommunications Act of 1996*. May 9, 2005. Pages 3-5. See also Michael Corcoran, "Democracy in Peril: Twenty Years of Media Consolidation Under the Telecommunications Act," *Truthout*. February 11, 2016.

Downloaded December 28, 2016 from http://www.truth-out.org/news/item/34789-democracy-in-peril-twenty-years-of-media-consolidation-under-the-telecommunications-act.
11. Martin Gilens and Craig Hertzman, "Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act," *Journal of Politics*. 62(2): May 2000. Pages 369-386.
12. Tom Fenton, *Bad News. The Decline of Reporting, the Business of News, and the Danger to Us All*. New York: Regan Books, 2005. Quote on page 4. Emphasis in the original. Earlier reference on page 17.
13. Norman Solomon, "Big Money, Self-Censorship, and Corporate Media," in Elliot D. Cohen, editor, *News Incorporated. Corporate Media Ownership and Its Threat to Democracy*. Amherst, New York: Prometheus Books, 2005. Page 55.
14. Michael Corcoran, "'Government-Run Healthcare' is a Product of Health Industry-Run Media," FAIR. July 1, 2019.
15. Steven Levy, "Celebrating a Web That's Free—For Now," *Newsweek*. October 9, 2006. Page 14.
16. Gary Wolf, "How the Internet Invented Howard Dean," *Wired Magazine*. January 2004. Online version.
17. Clare Foran, "Bernie Sanders's Big Money," *The Atlantic*. March 1, 2016.
18. Adam Hughes, "5 Facts About U.S. Political Donations," *Pew Research Center*. May 17, 2017.
19. Adam Nagourney, "Politics Faces Sweeping Change Via the Web," *New York Times*. April 2, 2006.
20. Daniel M. T. Fessler, Anne C. Pisor, and Colin Holbrook, "Political Orientation Predicts Credulity Regarding Putative Hazards," *Psychological Science*. 28(5) 2017.
21. Kiku Adatto, "The Incredible Shrinking Sound Bite," *The New Republic*. May 28, 1990. Pages 20-23. Center for Media and Public Affairs, *Campaign 2004: The Media Agenda. Part III—The General Election*. Page 7.
22. An early analysis in this vein was Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*. London: Harper and Row, 1974.
23. See, for example, his "Framing Responsibility for Political Issues," *Annals of the American Academy of Political and Social Science*. July, 1996. Pages 59-70.

Media Attributions

- Newsboy © Farm Security Administration is licensed under a Public Domain license
- Net Neutrality Protest © Cyrene Krey is licensed under a CC BY-NC-ND (Attribution NonCommercial NoDerivatives) license
- Bush Reading © George Bush Presidential Library and Museum is licensed under a Public Domain license

PART 8: ELECTORAL POLITICS AND PUBLIC OPINION

Chapter 49: Expanding Voting Eligibility in American History

"Voting is a sacred right."

—League of Women Voters (1)

"Females by the arbitrary rules of society are excluded and debarred from many things which males consider rights and high privileges such as the elective franchise, holding office. No one thinks of sympathizing with them in their deprivation. The negro is surely no better than our wives and children, and should not excite sympathy when they desire the political rights which they are deprived."

—Iowa Journal of the Constitutional Convention, 1857 (2)

Whose Right to Vote?

Voting is the most visible manifestation of democracy. Ostensibly, our system provides you a periodic opportunity to make a meaningful choice among candidates for a variety of offices. The idea that the general public should have the right to choose its leaders is a fairly recent one. Indeed, through much of our history, the majority of the public did not have this fundamental right. You should be familiar with the major steps through which eligibility to vote expanded in American history.

In what is widely considered today to be a colossal mistake, the Constitution does not mention voting qualifications, and it does not even guarantee a right to vote—although it is implied because we have the elected House of Representatives. Instead, the issue of voting qualifications was left to the individual states, and the eligibility to vote itself required various Constitutional amendments to be extended beyond propertied White men. The fact that the Founders did not positively assert a fundamental right to vote has shaped the course of American history and undercut the democratic nature of America's political system.

Property Qualifications and Voting Eligibility

During the colonial period, some states required religious qualifications to vote, but state legislatures abolished those by 1810. Initially under the Constitution, states permitted only White males with property to vote. **Property qualifications** to vote was a practice America inherited from England, where such restrictions had been in place since the Middle Ages. The idea behind these restrictions was that only men who freeheld enough property could be determined to be independent—that is, not dependent on others as women, servants, slaves, free Blacks, children, and others were, and that they simultaneously possessed a stake in society. During the Constitutional Convention, Governor Morris of New York advocated that just such a property restriction be written into the Constitution. Morris said:

> *"Give the votes to people who have no property, and they will sell them to the rich who will be able to*

buy them…The time is not distant when this country will abound with mechanics and manufacturers who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty?" (3)

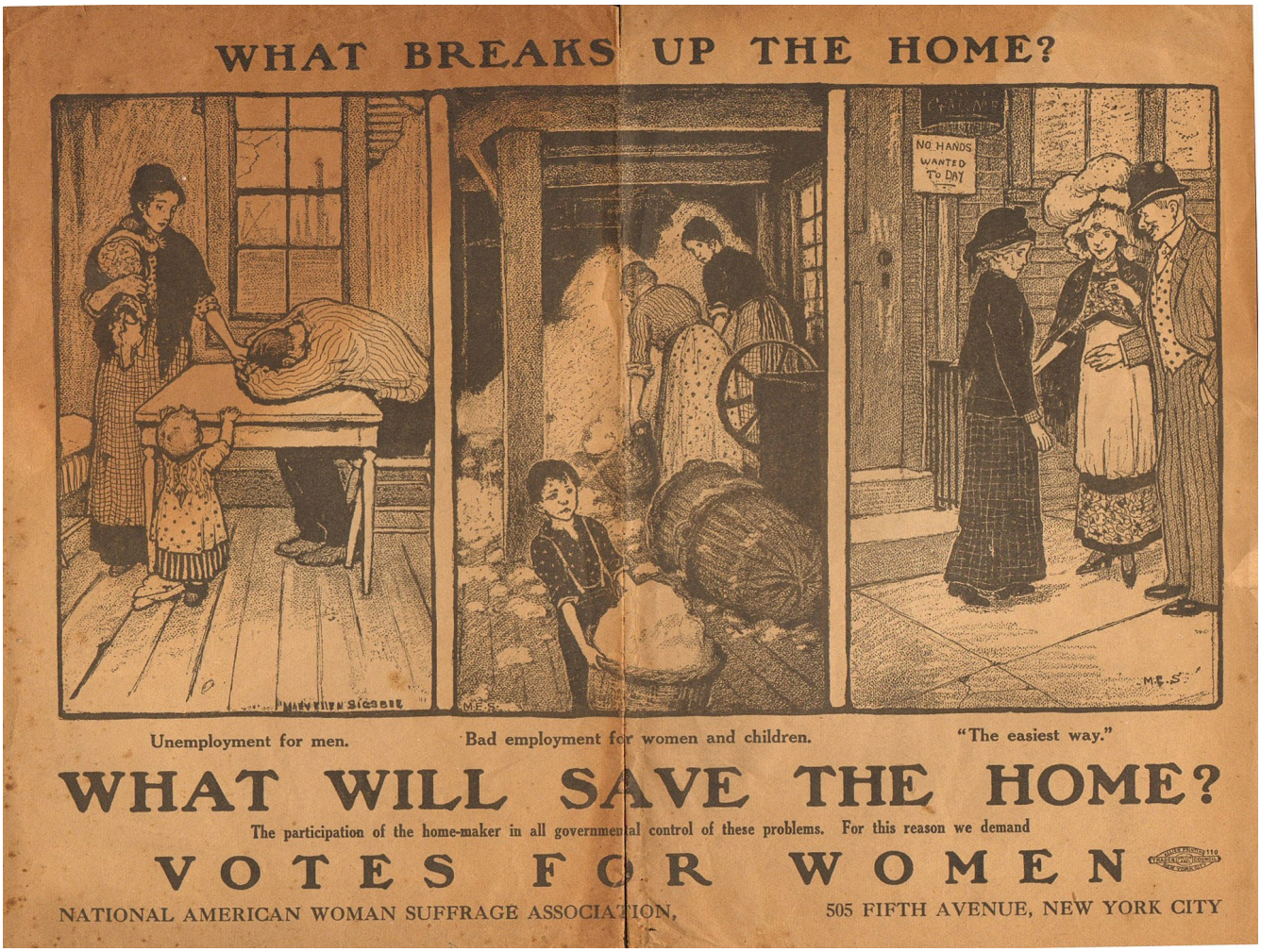
According to Madison's notes, Benjamin Franklin countered Morris, and spoke passionately in favor of the common man. The Constitution did not mandate a property qualification to vote and left it to the states. At America's founding, each state differed in the amount of property a man must own in order to qualify as a voter. In some states, 90 percent of White men were disqualified because they did not own enough property. But the early republic was growing quickly through immigration and natural increase, and there was a spirit that celebrated liberty, extolled the common man, and reveled in partisan struggle. New states like Missouri and Illinois joined the union without voting restrictions on adult White men. Property qualifications for White men to vote were dropped across the board by the 1850s, usually due to parties competing in the state legislatures. Thus, the United States possessed universal White male suffrage by the eve of the Civil War.

Race and Voting Eligibility

The United States fought the Civil War over the issue of slavery and the political struggle over whether slavery could be extended outside the South. Before the war, Abraham Lincoln did not support African-American voting rights. During the war, he changed his mind and favored extending the right to vote to Black soldiers in the Union army and to "very intelligent" Blacks. (4) After the North won that bloody conflict, there was an opportunity to pass an amendment to the Constitution to establish a positive right to vote. Instead, the Republicans in Congress passed the **Fifteenth Amendment** in 1870, which simply established a prohibition on the states without firmly establishing a right to vote. The Fifteenth Amendment says that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude…" Their intention in passing the amendment was to give the vote to newly freed Black men, so they could defend the rights of their families in the political environment after the Civil War. However, since the amendment was written in broad language, it theoretically applied to all non-White males.

Southern Democrats bitterly opposed expanding voting rights to Blacks. Democratic Senator Garrett Davis of Kentucky said that African Americans were "in a condition of brutalized, ferocious, and ignorant barbarism," and could therefore not take their place alongside Whites as citizens empowered with a voice in government. (5) In the decades after passage of the Fifteenth Amendment, Southern Whites took numerous measures–discussed in chapter 68–to ensure that Blacks did not actually vote. Due to that suppression, by the 1950s voter turnout among African Americans in the former Confederacy was approximately 50 percentage points lower than turnout for Whites. That gap was essentially eliminated in the three decades after passage of the **Voting Rights Act of 1965**, which is a testament not only to the efficacy of legislation, but also to the Civil Rights Movement generally. (6)

Sex and Voting Eligibility



Advertisement by the National American Woman Suffrage Association in 1917

While the Fifteenth Amendment was being discussed, feminists argued that the right to vote ought to be extended to women as well, but they lost that fight. Feminists finally won fifty years later when the **Nineteenth Amendment** was ratified in 1920. It was a long, difficult struggle to secure the right to vote for women. The **Seneca Falls Declaration** in 1848 was the first national call for women's suffrage. Organizations like the National American Women Suffrage Association employed tactics such as petitions, marches, speeches, court cases, debates, picketing at the gates of the White House, and prison hunger strikes. The 1917 protest at the White House gates involved over 5,000 women during its two-year run and has been described as "the first high-visibility nonviolent civil disobedience in American history." (7)

Women's suffrage came first in the West. In 1869, Wyoming allowed women to vote, and Utah followed suit the next year. Colorado passed a women's suffrage bill in 1893, and Idaho joined the effort in 1896. There are many reasons why this happened first in Western territories and states. Historian Beverly Beeton emphasizes pragmatic rather than ideological reasons. In Wyoming, for instance, one of many factors was that state legislators thought that enfranchising women would "advertise the territory to potential investors and settlers," because it only had 9,000 residents at the time. (8) Western states and territories were largely being founded

after the Fifteenth Amendment passed, and many people wondered why it made sense to deny educated White women the right to vote when it had just been extended to uneducated former male slaves. Western suffrage movements also benefitted from the work that was being done by East Coast national organizations. The fact that women were able to vote in Western states helped the national suffrage movement, and it did not result in the ills that suffrage opponents claimed, such as the corruption of women by politics, the destruction of relationships with husbands, the neglect of children, and so forth. This is often the case with social change, whether it be gay marriage, racial integration of the military, or women's rights.

Poll Taxes and Access to the Ballot

In 1964, sufficient states ratified the **Twenty-fourth Amendment**, which states that "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." This effectively outlawed **poll taxes**, which Southern states had passed early in the 1900s primarily to suppress poor people from voting. (9) Opposition to the poll tax really began to gel in the 1930s, and it was primarily centered on arguments of class rather than race. But poll taxes were also part of the Southern quiver of arrows used to prevent Blacks from voting. Indeed, the poll tax as applied in Dixie has been referred to as "one of the great symbols of Southern racism." (10) During the 1901 Alabama Constitutional Convention, delegate Henry Fontaine Reese spoke approvingly of the poll tax's racial implications: "When you pay $1.50 for a poll tax, in Dallas County, I believe you disenfranchise 10 Negroes. Give us this $1.50 for educational purposes and for the disenfranchisement of a vicious and useless class." (11) Its abolition via the Twenty-fourth Amendment was a victory for poor people regardless of race, but it's become bound up in our civil rights narrative surrounding race.

Age and Voting Eligibility

The final national-level expansion of the right to vote happened in 1971, when **the Twenty-sixth Amendment** was ratified. This amendment set a national voting age of eighteen years. The Vietnam War was raging, and the campaign for the Twenty-sixth Amendment argued that if people were old enough to fight, they were old enough to vote. When the Twenty-sixth Amendment was submitted to the states, it was ratified in a record 100 days, the fastest of any constitutional amendment. (12) Currently, many groups around the country are trying to lower the voting age to 16 or 17. (13) The National Youth Rights Association advocates for lowering the voting age. (14) All other voting qualifications are still set by the individual states.

Incarceration and Voting Eligibility

A felony conviction and incarceration typically negate your ability to vote in most states. Interestingly, prior felony conviction and incarceration do not abrogate your freedom of speech, freedom of religion, right to join a group, right to marry, etc. According to the National Conference of State Legislatures, only Maine and Vermont allow convicted felons to vote while serving their sentences. For many years, Utah joined Maine and Vermont, but the voters of Utah ended that practice through a ballot initiative in 1998. In sixteen states, felons automatically get their voting privileges reinstated upon release. In eleven states, "felons lose their voting rights indefinitely for some crimes or require a governor's pardon in order for voting rights to be restored, face an additional waiting period after completion of sentence (including parole and probation) or require additional

action before voting rights can be restored." (15) The Brennan Center for Justice refers to disenfranchisement laws as "relics of our Jim Crow past," and that they "send the message that the voices of individuals returning to their communities don't count." (16)

It is interesting to reflect that while the Constitution went into effect in 1789, the United States did not have legally recognized adult suffrage for all men and women, regardless of race, until ratification of the Nineteenth Amendment in 1920, passage of the 1965 Voting Rights Act, and the extension of the right to vote to 18-year-olds in 1971. We might also note that voting is not an inalienable right recognized by the Constitution, as witnessed by the way that we strip the ability to vote from incarcerated men and women. What, then, does democracy mean in America when the most basic democratic act is so tenuously grounded in our law and history?

What If. . . ?

What if we amended the Constitution to establish an affirmative right to vote? Richard Hasen, professor of law and political science at the University of California, Los Angeles, has proposed such an amendment. It reads:

A Constitutional Amendment Affirmatively Protecting the Right to Vote

SECTION 1. Notwithstanding Article II or any other provisions of this Constitution, all citizen, adult, residents of the United States shall have the right to vote in all elections for federal, state, and local offices within their residential areas, including for President and Vice President, and to have each ballot fairly and accurately counted. Provided, however, that the right to vote for President and Vice President shall apply only to residents of the states and the District of Columbia, and the right to vote for Members of the House and Senate shall apply only to residents of the states. Votes for President and Vice President shall count equally toward allocating each state's electors. Votes for President and Vice President shall count equally toward allocating each state's electors.

A state may not deny the right to vote to any otherwise eligible person convicted of a felony who has completed a sentence of incarceration or parole. Failure to pay any fines or fees shall not be grounds for withholding the franchise.

SECTION 2. All votes conducted for federal, state, or local office shall be substantially equally weighted, except for the weighting of electors across states mandated under Article II in choosing the President and Vice President.

SECTION 3. States shall create and maintain a system to automatically register all eligible individuals to vote and shall provide each eligible voter with a unique voter identification number that may be used for voter registration purposes across states. States have the authority by statute to delegate to a federal government agency determined by Congress the responsibility to create and maintain the system of automatic voter registration and voter identification. The agency shall create and maintain the system for all states so delegating. The agency shall create and maintain a system for providing each eligible voter with a unique voter identification number. Voter identification numbers shall be different from a voter's social security number. Automatic voter registration requires the states or agency to take all steps and pay all costs associated with establishing the identity and eligibility of each individual within a state and to register all eligible individuals to vote.

SECTION 4. States must provide equal and not unduly burdensome voting opportunities for all voters to vote in every election for federal, state, and local office, as measured by ease of voting. The burdens of voting shall be substantially equal among the voters of each state. A state must have valid and substantial reasons, backed

by real and significant evidence, for imposing restrictions on or impediments to casting a ballot and the means must go no further than reasonably necessary to satisfy those valid and substantial reasons. Voters shall have standing to enforce all aspects of this Amendment through a lawsuit filed in federal court.

SECTION 5. Voters shall have a fair opportunity to participate in the political process and to elect representatives of their choice regardless of race, ethnicity, or membership in a language minority group. In measuring such opportunities, courts shall examine the effect of laws regulating registration and voting on voters and not require proof of discriminatory intent. Voting rules with a disparate impact on minority voters are presumptively unconstitutional unless justified by overriding state interests in election integrity and sound election administration.

SECTION 6. Congress shall have broad power to protect voting rights under this Amendment and previous Amendments to this Constitution by appropriate legislation. This power is not subject to narrow judicial interpretation and shall be interpreted by courts to broadly favor enfranchisement and equality of voters. Nothing in this Amendment shall be read to lessen the powers given to Congress elsewhere in this Constitution to protect voting rights. *(16)*

References

1. League of Women Voters.
2. *Iowa Journal of the Constitutional Convention*, 1857, State Historical Society of Iowa, Des Moines, Iowa, 241-242; Gallaher, 173-174, 186. Quoted in Libby Jean Cavanaugh, *Opposition to Female Enfranchisement: The Iowa Anti-Suffrage Movement*. Master's Thesis, Iowa State University, 2007. Page 15.
3. Michael Waldman, *The Fight to Vote*. New York: Simon and Schuster. Page 22. This section draws heavily on Waldman's excellent book.
4. Eric Foner, "Freedom's Dream Deferred," *American History*. 50 (4): December, 2015.
5. Allan J. Lichtman, *The Embattled Vote in America. From the Founding to the Present*. Cambridge, Massachusetts: Harvard University Press, 2018. Page 83.
6. Niraj Chokshi, "Where Black Voters Stand 50 Years After the Voting Rights Act was Passed," *The Washington Post*. March 3, 2015.
7. Michael Waldman, *The Fight to Vote*. New York: Simon and Schuster. Page 122.
8. Beverly Beeton, "How the West Was Won for Woman Suffrage," in Marjorie Spruill Wheeler, *One Woman, One Vote. Rediscovering the Woman Suffrage Movement*. Troutdale, OR; Newsage Press. Pages 99-116.
9. Alexander M. Bickel, "Congress and the Poll Tax," *The New Republic*. April 24, 1965.
10. Bruce Ackerman and Jennifer Nou, "Canonizing the Civil Rights Revolution: The People and the Poll Tax," *Northwestern University Law Review*. 103(1): 63-148. Page 65.
11. Quoted in Ari Berman, *Give Us the Ballot. The Modern Struggle for Voting Rights in America*. New York: Farrar, Strus and Giroux, 2015. Page 17.
12. National Museum of American History.
13. Geraldine Sealey, "Too Young to Vote?" abcnews.com. March 10, 2004. Kelsey Piper, "Young People Have a Stake in Our Future. Let Them Vote," *Vox*. September 20, 2019.
14. National Youth Rights Association.
15. National Conference of State Legislatures. October 14, 2019.
16. Richard L. Hasen, *A Real Right to Vote: How a Constitutional Amendment Can Safeguard American Democracy*. Princeton, NJ: Princeton University Press, 2024. Pages 153-155.
17. FairVote.org.

Media Attributions

- Votes Women © Mary Ellen Sigsbee Fischer is licensed under a Public Domain license

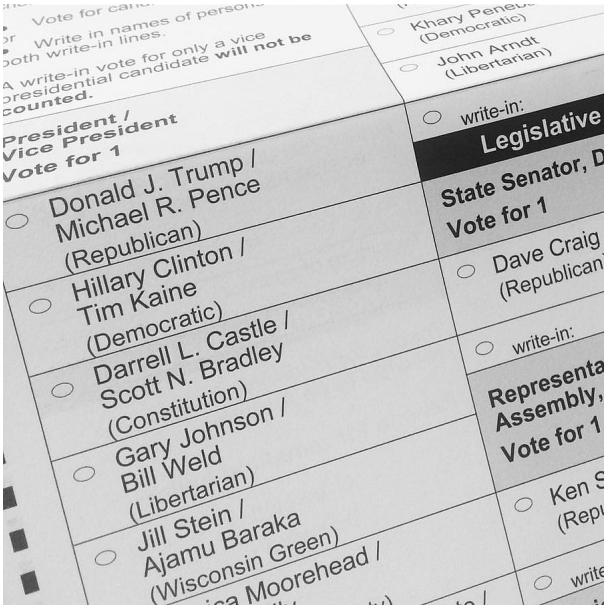
Chapter 50: Early Election Reforms

"The fact is that registration was created to stop black people and American citizen immigrants from voting. That is the real history of registration in the United States."

—Greg Palast (1)

The election system that we have today was greatly shaped by three reforms pushed through at the state level in the latter part of the nineteenth century and the early part of the twentieth century. Because these are state laws, differences exist from one state to another, but we can make some generalizations.

The Australian Ballot



Ballot for 2016 Election

Introduced in Australia in 1855, the **Australian ballot** was the first reform that all U.S. states adopted by 1888. The Australian ballot has three important characteristics. 1) It is printed, distributed, and counted by the state at taxpayer expense. 2) It lists all the candidates for all the offices from all parties. 3) voters complete the ballot in private. While these characteristics of Australian ballots seem rather mundane today, they greatly changed the character of voting in the United States. Prior to the Australian ballot, the most common way to vote in the United States was to use **party ballots**, which were printed by the parties themselves. Upon arriving at the voting place, you were confronted by a literal party—bands playing, dancing, free food, and free booze. When you were ready to vote, you would pick up a ballot that only listed one party's nominees for all the offices and drop it into the ballot box. The party ballots were color-coded, so it was very easy for your neighbors to see which party you supported. In addition, it was much easier to stuff the ballot box at the end of the day with the appropriate colored ballots—and no one would know the difference between a legitimate vote and a fraudulent one. (2) Finally, split-ticket voting was very difficult before the Australian ballot came along. **Split-ticket voting** is when you divide your votes among different parties for different offices. You might vote Democratic for president and Republican for representative. The prevalence of split-ticket voting peaked in the early 1970s and has steadily declined since then as the two major political parties polarized. (3)

Primaries and Caucuses

The second reform was to create primaries and caucuses to nominate candidates to run for office. Instead of having a few party "bigwigs" in the proverbial smoke-filled backrooms deciding which people to run for

office, reformers pushed through mechanisms that allow politically active—but otherwise ordinary—people to make those decisions. A **primary** is an election before the general election in which people vote for one of several possible nominees. A **caucus** is a meeting—or a series of meetings—at which party members gather, deliberate, and choose nominees that they support and where they often choose delegates for state or national political conventions. Most states rely on primaries to nominate party candidates for each office. In a **closed primary**, only people who are registered with a particular party can vote in that party's primary. In a closed primary state, only Republicans vote in the Republican primary, only Democrats in the Democratic primary, and typically those who registered as Independents or unaffiliated can vote in neither primary. In an **open primary**, voters can vote in the party primary of their choice, but not in both. Another version is the **blanket primary**, in which voters can essentially split their ticket within the Democratic and Republican primaries. You could vote in the Republican gubernatorial primary, but then vote in the Democratic primary for senator. Participation in primaries and caucuses tends to be quite low, usually less than 10 percent nationally, which is an incentive for you to get involved, as your individual vote is magnified by the low turnout.

Voter Registration

The final state-level reform that affects today's politics is the requirement that citizens **register to vote** sometime prior to election-day. Registration to vote is a double-edged sword that has both laudatory and pernicious effects. Let's talk first about the benefits of voter registration. In the nineteenth and early twentieth centuries, American elections were often corrupted by people who voted multiple times, people who sold their votes, or by people casting votes on behalf of dead or otherwise fictitious people. According to historian Adam Smith, "The most acute periods of concern about electoral fraud have coincided either with a big influx of immigrants or with an extension of voting rights to African Americans, or both." (4) By having people pre-register to vote, election officials can create an official list of voters and can check your name off the list once you've voted. Most states have a requirement that people register to vote before the election, and this has greatly cleaned up American elections. However, this does place a burden on the citizen to get themself registered before the deadline. Deadlines vary from one state to another. It also opens up opportunities for partisan state officials to purge voter registration lists of people who might disproportionately vote for their opponents. More about that in the chapter on voter suppression.

References

1. Chauncey DeVega, "How Trump Will Cheat in This Election—and How Dems May Bilk Bernie," *Alternet*. February 28, 2020.
2. Jill Lepore, "Rock, Paper, Scissors: How We Used to Vote," *The New Yorker*. October 6, 2008.
3. Ronald Brownstein, "Voters Don't Split Tickets Anymore," *The Atlantic*. September 1, 2016. Geoffrey Skelley, "Split-Ticket Voting Hit a New Low in 2018 in Senate and Governor Races," *FiveThirtyEight*. November 19, 2018.
4. Adam Smith, "A Brief History of 'Election Rigging' in American History," *History Extra*. November 3, 2106.

Media Attributions

- Ballot 2016 © Corey Taratuta is licensed under a CC BY (Attribution) license

Chapter 51: The Electoral College

"The graveyard of constitutional amendments altering the electoral college is the Senate—which, as we have seen, is the citadel of unequal representation."

—Robert Dahl (1)

Why Do We Have an Electoral College?

The **Electoral College** is probably the least understood aspect of American government. As originally conceived at the Constitutional Convention, the Electoral College was to be an esteemed body of men chosen according to state law who would cast votes for the president and vice president. In *Federalist #68*, Alexander Hamilton wrote that the presidency "will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications," because the distinguished electors from each state "possess the information and discernment requisite to such complicated investigations." However, almost from the beginning the Electoral College has not worked like Hamilton envisioned. The electors rather quickly devolved into what Jesse Wegman describes as "obedient partisan hacks, rubber stamps for their party's candidate." (2)

The Electoral College appears to have been a solution to two main concerns—the concern that the general population would be ill suited to cast votes for president, and the concern over sectionalism. Historian Jill Lepore reminds us that during the Constitutional Convention, a motion to allow U.S. citizens to directly elect the president was defeated by a vote of twelve states to one. Lepore writes, "That the people, even given limited suffrage, would elect the president directly was almost inconceivable. Congress electing the president, however, violated the separation of powers. The Electoral College, proposed after the defeat of the direct-election motion, was an ill-begotten compromise." (3) To be fair, not all the Founders felt this way. James Wilson of Pennsylvania, for example, placed a great deal of faith in the common man and envisioned the broader democracy to which America would later aspire. As recorded by James Madison in his *Notes of the Debates in the Federal Convention of 1787*, James Wilson said that "if we are to establish a national government, that government ought to flow from the people at large," and that "the majority of the people, wherever found, ought in all questions to govern the minority."

Political scientist Thomas Schaller illustrates the sectionalism concerns, writing that the founders "expected such a glut of sectional parties that they created the Electoral College—not in order to make any kind of final selection but simply to winnow the choices down to a couple of finalists. They assumed the election would be thrown into the House of Representatives, with the result that an elite institution would pick the ultimate winner."(4) Initially, state legislatures chose the electors, but by the 1820s, most states left selecting the electors up to the voters, and South Carolina became the last state to do so in 1864.

The Electoral College is a classic example of a political kludge–an improvised, crudely designed solution to an immediate problem. For as smart as they were–and despite their individual and collective faults, they were a impressive gathering of men of their time and place–the Founders were clearly stymied when it came to designing a rational way to select the president. James Wilson called for a popular vote for president, and was supported by fellow Pennsylvanian Gouverneur Morris, but that idea was shot down for various reasons: distrust by some delegates for the common man, the inability for ordinary people in that day to be informed about national candidates, or the fear that it would empower the more populous states. The issue was referred to a subset of the delegates known as the Committee on Unfinished Parts, which came back with the idea of

respectable electors from each state voting for president. The number of electors afforded each state would reflect the compromises already reached in allocating senators and representatives–with each state getting electors to equal the number of representatives and senators it had. In the very first presidential election, George Washington received unanimous support from the electors, and no official popular vote was tallied. (5)

How the Electoral College Works

Let's talk about how the Electoral College works. But first, some key terminology. When we refer to the Electoral College vote, we're referring to the votes of the electors who actually vote for president and vice president. When we refer to the popular vote, we're referring to ordinary citizens like you and me who cast our ballots in November for electors pledged to vote for president and vice president. The Electoral College works like this:

- Each state has the same number of electors that it has U.S. representatives and U.S. senators. But keep in mind that the electors are *not* the U.S. representatives and senators. Since Utah has four representatives and two senators, Utah has six electors. Wyoming has three electors because it has one representative and two senators. The four largest elector sources are California (54), Texas (40), Florida (30), and New York (28). The District of Columbia, even though it is not a state, is allotted three electors. The Electoral College has a total of 538 electors.
- Sometime prior to the November election, each party with a presidential candidate on the ballot will select a **slate of electors** who are pledged to vote for that party's nominee. To use Utah as an example, in 2020, the Republicans picked six Republican party members pledged to Donald Trump and his running mate; the Democrats picked six Democratic party members pledged to Joe Biden and his running mate; the Green Party picked six party members committed to Howie Hawkins and his running mate...and so on. The Supreme Court has ruled that electors can be bound by their states to vote for their party's nominees, thus eliminating the "faithless elector" problem. In *Colorado Department of State v. Micheal Baca, et al* (2020) and *Chiafalo, et al v. Washington* (2020), the Supreme Court ruled 9-0 that states can hold electors to their vote pledges.
- On election night in November, we go to the polls and cast our votes. This is where it gets confusing, since most Americans think they are voting directly for president. Technically, we are voting for one of those slates of electors, rather than for the candidate for president. In every state except Maine and Nebraska, electors are awarded according to a **unit rule**, meaning that the candidate whose slate has the most popular votes—even if it is not a majority—gets all of the electors. The unit rule means that in forty-eight states, the Electoral College is a winner-takes-all situation. The winning candidate could have gotten a majority of the popular vote in the state–i.e., 50 percent or more of the popular vote—or the winning candidate could have gotten a plurality of the popular vote, meaning that they received the most votes, even if it is well short of receiving 50 percent of the popular vote. All a candidate needs is one more popular vote that their opponent in most states to win all of that state's electors.
- On the first Monday after the second Wednesday in December, the winning slates of electors gather at their state capitals and cast their votes for president and vice president. These votes are sent to the Senate, where they are counted and certified before a joint congressional session in January. That is the official vote for president.
- A candidate needs 270 or more of the Electoral College votes to win, which is a simple majority. If no candidate gets a majority—which hasn't happened since 1824—then the election is pushed into Congress. The House of Representatives, with each state delegation getting one vote, elects the president, and the Senate elects the vice president.

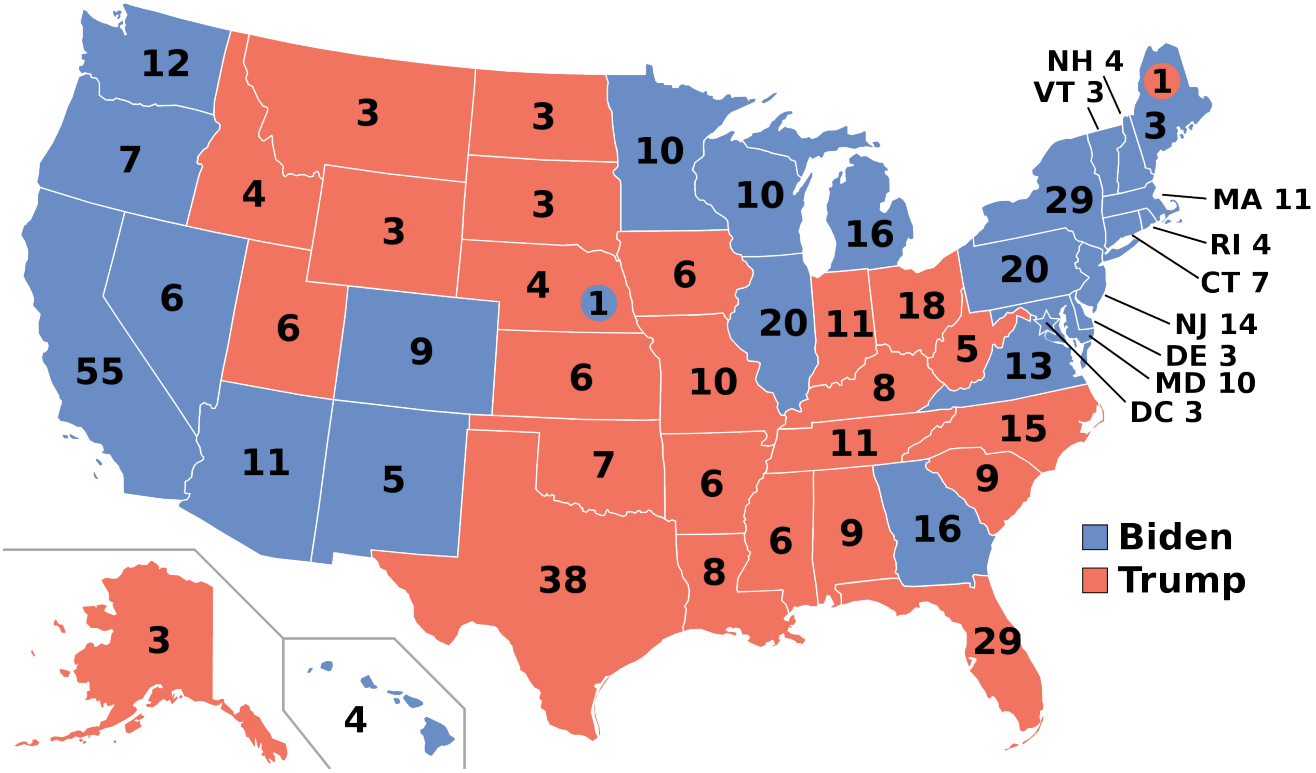
What's Wrong with the Electoral College?

The Electoral College is a vestige of an eighteenth century, slave-holding America in which ordinary people were not fully trusted with political sovereignty. It is fundamentally undemocratic. If you look around the world, the Electoral College is not a constitutional feature that other democratic countries have adopted. We can focus our attention on two main deficiencies of the Electoral College.

The Achilles heel of the Electoral College was revealed for modern generations to see during the 2000 presidential race between George Bush and Al Gore and the 2016 race between Donald Trump and Hillary Clinton. The popular vote for president does not determine who goes to the White House; the elector's votes are decisive. Normally, the Electoral College vote mirrors the popular vote. However, the elections of 1824, 1876, 1888, 2000, and 2016 resulted in the eventual "winner" actually receiving fewer votes from American voters. In 2000 Al Gore received roughly 537,000 more popular votes across the country than did George W. Bush, but Bush won the disputed state of Florida when the Supreme Court stepped in to halt manual recounts. Florida's electoral votes gave Bush a total of 271—just enough to win. The imbalance was even more noticeable in 2016, when Hillary Clinton won the popular vote by nearly 2,865,000 votes but Donald Trump won the Electoral College vote 304 to 227.

The winner-takes-all aspect of the Electoral College also tends to distort our perceptions of the American electorate. It pushes us to talk about red-state voters versus blue-state voters, which is obviously an oversimplification of the partisan divide in the United States. The Electoral College is biased in favor of smaller, more rural states, because they are entitled to proportionally more electors than they would have in a straight popular vote. For example, a voter in Wyoming has nearly four times the weight of a voter in California when it comes to the Electoral College. (6) This reflects the Connecticut Compromise between large and small states at the Constitutional Convention. (7)

The Electoral College forces presidential campaigns to focus on **swing states**, which are states that are narrowly balanced between Republicans and Democrats, so they could go either way. Swing states are competitive states, so they are also referred to as battleground states. The winner-takes-all principle means that it is smart for presidential campaigns to devote considerable resources to getting every possible popular vote in those states, because even a slim victory results in winning all of that state's electors. In 2016, Clinton racked up significant popular vote majorities in solid Democratic states like California, but narrowly lost popular votes—and therefore all of the electors that went with them—in a number of swing states like Michigan, Wisconsin, and Pennsylvania. In 2020, Democratic candidate Joe Biden racked up 7 million more popular votes nationwide than did Republican Donald Trump, but the Electoral College could have overturned the popular vote if just 45,000 people in Georgia, Wisconsin, and Arizona had voted for Trump instead of Biden. (8)



Electoral College Votes by State 2020

The second key problem of the Electoral College is its susceptibility to political manipulation at both the state and federal levels. Federal law requires states to deliver a certified slate of electors to Congress. However, any number of political maneuvers by the state election board, the governor, or the state legislature could cast doubt on the legitimacy of the slate of electors submitted by a given state. Indeed, different entities in a state could send their own slates of electors, each claiming that theirs was the only legitimate one. The 1876 election saw the most prominent example of this when South Carolina, Louisiana, and Florida all sent competing slates of electors. This dispute was resolved in the famous "Corrupt Bargain" of 1877 that allowed the Republican Rutherford Hayes to ascend to the presidency while Southern Democrats were empowered to end Reconstruction—which is why many people also call this the "Great Betrayal" of newly freed African Americans in the South.

Responding to the 1876 election, Congress passed the Electoral Count Act of 1887, which was amended in 1948. This law governs how Congress should deal with Electoral College controversies, but it is widely considered to be inadequate to the task. Indeed, it is clear now that once the Trump campaign realized that it had legitimately lost both the popular and Electoral College vote in 2020, it attempted to exploit weaknesses in the system. Specifically, the Trump campaign attempted to get local Republicans to gin up false controversies in competitive states. Fortunately, those local Republicans refused to do so. (9) Then Trump's lawyer wrote a memo laying out a plan where on January 6, 2021, when he presided over the Congressional session dedicated to counting the electoral votes, Vice President Pence would simply announce that electors from seven states were in dispute. Because of the "disputed electors" in those seven states, Pence would then claim that Donald Trump received the majority of the remaining electors and Pence would declare that Trump was reelected. Even if he could not get away with that scheme, went the memo, then the "disputed" election for President would be thrown to the House of Representatives, where the Republicans held more state delegations than did the Democrats. (10) Vice President Pence refused to steal the election, and Trump attacked his own Vice

President on Twitter and refused to call off the crowd that he and others had stoked and aimed at Congress on January 6, 2021. That is the reason why Vice President Pence had to cower in a loading dock on that day while members of Trump's mob ransacked the Capitol and threatened to hang him. (11) In response to Trump's attempt to exploit weaknesses in the Electoral College process, Congress passed the **Electoral Count Reform Act of 2022**. This law clarified several points:

- The vice president's role is solely to open and count the votes and the vice president cannot solely adjudicate disputed slates of electors.
- Raised the threshold in Congress for objecting to the validity of a state's slate of electors. Whereas previously such an objection only needed one representative and one senator, now it requires one-fifth of the members of the House and the Senate.
- Identifies governors as the state official responsible for submitting the certificate of ascertainment for the state's electors unless the state constitution specifies otherwise.
- Established a speedy process for judicial review of the validity of a state's electors if they are challenged.

What If . . . ?

What if we replaced the Electoral College with a different way of selecting the president? We could pass a constitutional amendment that abolished the Electoral College and replace it with a direct popular vote, perhaps with a run-off of the top two candidates in case the first round did not produce a winner who had received a majority of the popular vote. The problem, as referenced by Robert Dahl in this chapter's opening quote, is that such an amendment would need to pass the U.S. Senate with a two-thirds vote, and senators from small states would not want to diminish the power of their states by moving to a direct popular vote for president. It would be the right thing to do if one were interested in democracy—and perhaps this new generation of politicians will step up—but it is still unlikely.

Another possibility takes the form of the National Popular Vote movement, which began in 2006. (12) This approach would preserve the Electoral College and would not require a constitutional amendment. It is a state-based approach based on a compact or agreement. Since state legislatures are empowered by the Constitution to allocate electors, the National Popular Vote Compact would enlist sufficient states to agree to allocate their electors to the national popular vote winner regardless of the results in individual states. Thus, if candidate A wins the popular vote in Illinois—one of the states that has already signed on to the National Popular Vote Compact—but candidate B wins the national popular vote, the twenty electors from Illinois would be allocated to candidate B. The idea is to get enough states to sign on to the compact to guarantee that the winner of the national popular vote would also win at least 270 Electoral College votes. The Compact would only go into effect when jurisdictions—states and the District of Columbia—representing at least 270 electors sign on. What do you think of this proposal?

Here's the text of the **National Popular Vote Bill**.

Article I—Membership

Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.

Article II—Right of the People in Member States to Vote for President and Vice President

Each member state shall conduct a statewide popular election for President and Vice President of the United States.

Article III—Manner of Appointing Presidential Electors in Member States

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a "national popular vote total" for each presidential slate.

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the "national popular vote winner."

The presidential elector certifying official of each member state shall certify the appointment in that official's own state of the elector slate nominated in that state in association with the national popular vote winner.

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.

The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress.

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.

If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state's number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state's presidential elector certifying official shall certify the appointment of such nominees.

The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.

This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.

Article IV—Other Provisions

This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.

Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

Article V—Definitions

For purposes of this agreement,

"chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;

"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;

"presidential elector" shall mean an elector for President and Vice President of the United States;

"presidential elector certifying official" shall mean the state official or body that is authorized to certify the appointment of the state's presidential electors;

"presidential slate" shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

"state" shall mean a State of the United States and the District of Columbia; and

"statewide popular election" shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

References

1. Robert A. Dahl, *How Democratic is the American Constitution*? Second edition. New Haven: Yale University Press, 2003. Page 87.
2. Jesse Wegman, *Let the People Pick the President: The Case for Abolishing the Electoral College*. New York: St. Martin's Griffin, 2020. Page 5.
3. Jill Lepore, *The Story of America: Essays on Origins*. Princeton: Princeton University Press, 2012. Page 244.
4. Thomas Schaller in a panel discussion "High Noon for the Republican Party," *Harper's Magazine*. July 2008. Page 14.
5. Jesse Wegman, *Let the People Pick the President: The Case for Abolishing the Electoral College*. New York: St. Mrtin's Griffin, 2020. Page 79.
6. There are around 200,000 voters in Wyoming per elector, and around 720,000 voters in California per elector.
7. Andrew E. Busch, "The Development and Democratization of the Electoral College," in Gary L. Gregg, II, ed., *Securing Democracy. Why We Have an Electoral College*. Wilmington, DE: ISI Books, 2001. Pages 27-42.
8. Russell Berman, "The Secret to Beating the Electoral College," *The Atlantic*. December 9, 2020.
9. Bob Christie and Nicholas Riccardi, "GOP Leaders in 4 States Quash Dubious Trump Bid on Electors," *ABCNews*. November 14, 2020.
10. John Eastman, "Privileged and Confidential. January 6 Scenario," *CNN*. September 21, 2021.

11. Brendan Cole, “Mike Pence Hid in ‘Loading Dock’ in Underground Parking Garage During January 6 Riot,” *Newsweek*. November 9, 2021.
12. Miles Park, “Congress Passes Election Reform Designed to Ward Off Another Jan. 6,” *National Public Radio*. December 23, 2022.
13. National Popular Vote.

Media Attributions

- 2020 Electoral College © Kingofthedead is licensed under a Public Domain license

Chapter 52: The Integrity of American Elections

"When I die, I want to be buried in Louisiana, so I can stay active in politics."

—Governor Earl Long (1)

"There are forces in America that are trying to make it harder, more difficult for people to cast a vote. We must not let that happen."

—John Lewis (2)

The politicians and citizens of any democracy need to be vigilant when it comes to the integrity of the voting process. Elections without integrity produce governments without legitimacy in the peoples' eyes. Societies with illegitimate governments are justly prone to uprisings and rebellions. Maintaining the integrity of a society's elections is an investment in social stability and an affirmation that we care about democratic principles. There are many threats to election integrity, but we'll concentrate on these two: voter fraud and election fraud. (3) We'll also look at the issue of legal voter suppression.

Voter Fraud

We'll define **voter fraud** as a voter intentionally corrupting the electoral process in a way that distorts the "one-person, one-vote" principle. This can take several forms. A college student might try to register and vote in both their college town and their hometown. A person who is not a citizen might try to register and vote. A person might try to pose as a person who has recently died but whose name has not yet been purged from the list of registered voters. A person might sell their vote to another. Voter fraud is a federal crime, punishable by heavy fines and the possibility of jail time. (4) Few people are willing to risk such penalties for the marginally impactful practice of casting an extra vote. While voter fraud may have been fairly common in the nineteenth and early twentieth centuries, it is remarkably uncommon now. Most voter-fraud allegations turn out to be clerical errors and bad data matching—like Edward Gomez in one voting district being mistaken for a different Edward Gomez in another district, when in fact they are two different people in two different locations. Voter-fraud allegations are usually based on hearsay, speculation, and poor investigative techniques.

I Voted Sticker

The issue of voter fraud has been studied extensively and has been found to be a marginal problem at best. In 2007, the Brennan Center for Justice studied elections where there were voter-fraud allegations—and credible allegations of voter fraud are themselves rare—and found that there is a greater chance that an American "will be struck by lightning than that he will impersonate another voter at the polls." With respect to the oft-alleged situation of non-citizens voting in American elections, the Brennan Center could not find "any documented cases in which individual non-citizens have either intentionally registered to vote or voted while knowing that they were ineligible." (5) In 2016, a comprehensive study of voter fraud allegations in elections from 2000 to 2012 found exactly ten individual cases of voter impersonation out of the 146,000,000 registered voters in twenty-four federal elections in that time span. (6) When President Trump's much ballyhooed Presidential Advisory Commission on Election Integrity—which appeared from the outset as though it was intended to conclude that voter fraud *was* prevalent—quietly folded in 2018, one of its members had to subpoena the commission's records so that he could unequivocally state that the group "had uncovered no evidence to support claims of widespread voter fraud." (7)

In the wake of his popular and Electoral College defeat in 2020, President Trump based his attempt to overthrow the election on false claims of voter fraud in states he lost. In Georgia, for example, he railed against alleged fraud surrounding mail-in absentee ballots. A state audit of those ballots could not find a single instance of fraud. The story was the same all across the country. In fact, experts on election security held that the 2020 election was "the most secure in American history" and as smooth as they had ever seen, due primarily to expanded audits and more jurisdictions using machines that produced a paper trail. (8) Ironically, the conservative Heritage Foundation found that "In *every* listed indictment and conviction for voter fraud or other malfeasance in connection with the 2020 presidential general election, when the culprit's political affiliation is known he or she turns out to be a Republican or 'unabashed conservative.'" (9)

Election Fraud

We'll define **election fraud** as election officials, campaign staff, advocacy groups, or political candidates intentionally corrupting the electoral process. This happens more often than does voter fraud. According to the Justice Department, "Election fraud usually involves corruption in one of three processes: the obtaining and marking of ballots, the counting and certification of election results, or the registration of voters." (10) The Justice Department lists the following specific activities as prosecutable under federal statutes:

- Paying voters for registering to vote or for voting.
- Conspiring to prevent voters from participating in elections. This might take the form of robocalls falsely informing people that the election was cancelled or its date delayed a week.
- Intimidating voters through physical duress or threats, thereby preventing them from voting or registering to vote. Allegations of this happen in nearly every election.
- Malfeasance by election officials involving diluting valid ballots with invalid ones—e.g., ballot-box

stuffing—rendering false tabulations of votes or preventing valid voter registrations.
- Producing voter registration rolls that qualify alleged voters to vote that the election official knows are incorrect.
- Keeping under one's authority armed persons at any polling place unless said actors are active civilian police or military personnel.

What does this look like in practice? A 2018 fraud case out of North Carolina's Ninth Congressional District election is a good case in point. The race's outcome had Republican Mark Harris defeating Democrat Dan McCready by only 905 votes. However, officials discovered that Harris had hired a Republican operative named Leslie McCrae Dowless to work on voters who requested absentee ballots. Dowless apparently led a scheme in which his co-conspirators showed up at voters' doors and collected absentee ballots—which is illegal under North Carolina law—promising the voters that they would turn them in for them. When Catawba College political science professor Michael Bitzer analyzed absentee ballot results in Bladen County—at the heart of the Ninth District—he found that "registered Republicans submitted just 19 percent of absentee ballots that were accepted by the county, compared with 42 percent for Democrats and 39 percent for unaffiliated voters. Yet Harris won 61 percent of mail-in ballots in the county. In every other county in the district, McCready won the absentee ballot vote by a wide margin." (11) The North Carolina board of elections had to cancel the election and hold a new one. Harris declined to run again, citing health reasons.

Another example? President Donald Trump and his associates unsuccessfully attempted what would have been the most consequential election fraud in American history. Trump personally called the Georgia Secretary of State, Brad Raffensperger, attempted to bully him to endorse any one of several unfounded internet conspiracy theories, and said he needed to "find 11,780 votes" and that "there's nothing wrong with saying, you know, um, that you've recalculated." Raffensberger resisted this attempt at election fraud and told Trump that "Well Mr. President, the challenge that you have is, the data you have is wrong." (12) Trump attempted to corrupt the Department of Justice to serve as his political hammer and investigate false claims of election and voter fraud, declare (falsely) that fraud had taken place in the 2020 election, and tell swing state legislators that they should appoint pro-Trump slates of electors even though Trump had lost the vote in those states. (13)

A worry many people have about election fraud has to do with the voting machines themselves. In particular, they are concerned about these machine's lack of transparency, the privacy of the companies that make them, and the fear that the machines could be hacked or manipulated. When the U.S. regularly used paper ballots that were manually marked by the voter, ballots were typically printed either by state authorities or by private companies whose quality was verified by state authorities. With the advent of electronic voting machines, America turned its election system over to corporations. Just three companies—Election Systems & Software, Dominion Voting Systems, and Hart InterCivic—control the vast majority of the voting machines used all across the United States. (14) Their technology is considered proprietary, and thus not open to scrutiny. The British newspaper *The Guardian* elegantly put the problem like this:

> *"The fact is that democracy in the United States is now largely a secretive and privately-run affair conducted out of the public eye with little oversight. The corporations that run every aspect of American elections, from voter registration to casting and counting votes by machine, are subject to limited state and federal regulation. The companies are privately-owned and closely held, making information about ownership and financial stability difficult to obtain. The software source code and hardware design of their systems are kept as trade secrets and therefore difficult to study or investigate."* (15)

The second issue with respect to electronic voting machines is their vulnerability. Because they are proprietary black boxes, it is unclear whether they could be set up to rig elections by their manufacturers or by outside actors. Computer scientists have repeatedly warned that electronic voting machines are vulnerable to hacking.

(16) In 2016, Russian hackers attacked voter databases and software systems in thirty-nine states. While there is no evidence that any votes were changed, the ultimate aim of the incursions may have been to cast doubts about the election results' validity. (17) Fortunately, the 2020 election was very secure because the federal government improved its efforts, and many state and local jurisdictions demanded electronic voting machines that produced a paper ballot that is amenable to audit after the fact.

A potential election fraud threat is built into the very structure of America's election machinery—namely, the partisan nature of state offices that conduct elections and election boards that certify election results. Ordinary Americans need to be vigilant about this potential threat to the integrity of elections. Each state conducts their elections differently so it's difficult to generalize. However, typically there is an elected position like a lieutenant governor or secretary of state who is responsible for conducting the election. That person is usually either a Democrat or a Republican. Further, state and local election boards are often staffed by members of the two major parties. The potential issue comes if these people substitute their party interests in place of the will of the voters.

Fortunately, in modern American history most state and local election officials have conducted themselves with integrity. However, it appears as though the Republican party has a growing problem in this regard. In Florida in the 2000 election, secretary of state Katherine Harris, who was the state co-chair of Republican George W. Bush's campaign, rushed to declare her preferred candidate the winner. In the 2020 election, Tina Peters, the Republican clerk overseeing elections in Mesa County, Colorado—a person who had twice been accused of incompetently running previous elections—became a loud proponent of Donald Trump's big lie that the election had been stolen from him. Peters went so far as to allow unauthorized people to access Mesa County's election machines and download data– including passwords—which were then circulated on the Internet. (18) Following Trump's 2020 narrow defeat in Georgia, Republicans in control of the state legislature there passed legislation that gives it effective control of Georgia's State Election Board and, in turn, over the local election boards in Democratic strongholds like Fulton County. (19) In Michigan and other states, Republicans replaced local election board members with 2020 "stop the steal" conspiracy theorists and promoted candidates for state election posts with pro-Trump positions. (20) What does this portend for election integrity?

Legal Voter Suppression

Forms of voter suppression exist that are unfortunately legal, unless they can be proven to violate civil rights. These include strict voter identification laws, overly aggressive voter-registration rolls purges, and bureaucratic hurdles to casting a vote.

Allegations of voter fraud—which we've seen is not a real problem—are often used as a reason to implement **strict voter-identification laws**. In principle, there's nothing wrong with ensuring that the person who is casting a vote is 1) the person they say they are, and is 2) eligible to vote. The question is whether the onus is on the person or on the state. For many years, other countries like France and Sweden have used government resources to automatically register people to vote. In 2016, Oregon became the first state to do so, and there are now sixteen states that also have automatic voter registration. (21)

Other states have gone a different way, requiring potential voters to prove their identification. These are almost always states with Republican majorities in state legislatures and/or Republican governors. As late as 2008, no states had voter identification requirements. (22) Since 2010, fifteen states put more restrictive voter-identification laws in place, twelve states made it more difficult to register to vote and stay registered, and ten states made it more difficult to vote early or absentee. Altogether, thirty-five states have some form of voter-identification requirements. (23) Many states face legal challenges over their voter I.D. laws. The reason? Voter

advocacy organizations argue that voter-identification laws are intended to disproportionately hinder groups of voters who are most likely to vote for Democratic candidates: students, poor people, and racial and ethnic minorities. Research has found that "strict ID laws doubled the turnout gap between Whites and Latinos in the general elections and almost doubled the White-Black turnout gap in primary elections." (24) In a survey of voters, three times more Blacks and Hispanics than Whites said they—or someone in their household—lacked the appropriate identification to vote. Similarly, twice as many Blacks and Hispanics reported that they had been told their name did not appear on the list of eligible voters when, in fact, they were registered. (25)

Another concerning practice is **aggressive state-voter-registration-roll purges**. This practice first came to widespread attention during the 2000 presidential race in Florida. When the Supreme Court stopped the recounts, George W. Bush led Al Gore by 537 votes. What most people don't realize is that prior to the election, Florida's Republican Secretary of State Katherine Harris—who also served as Bush's campaign state co-chair—oversaw a purge of Florida's voter rolls that used a company with strong Republican ties and that erroneously removed thousands of Democratic leaning voters. The list of purged voters was so flawed that the Madison County elections supervisor was surprised to find her name on it as a convicted felon. A U.S. Commission on Civil Rights analysis found that the list had at least a 14 percent error rate. (26)

With this successful Florida experience, Republicans turned to purging voter rolls as an election strategy. When it is employed, this strategy always hides under the legitimate interest that states have of keeping their voter rolls accurate. But if the effort is overly aggressive in a way that targets people who are likely to vote Democratic, then it serves an evil purpose. Typically, these efforts go hand in hand with hyped voter-fraud allegations. As political journalist Ari Berman, who has extensively studied this issue, writes, "The 2000 election in Florida forever changed American politics and kicked off a new wave of GOP-led voter disenfranchisement efforts. . . Bush's election empowered a new generation of voting-rights critics, who hyped the threat of voter fraud in order to restrict access to the ballot." (27) Voter purges are often riddled with errors, have disparate partisan and racial impacts, and have devastating political consequences. Take Ohio as an example, since it has the most aggressive voter purge law in the country—a law that the Supreme Court has upheld as constitutional. David Pepper has documented that between 2010 and 2020, the Republican Secretary of State in Ohio has purged some 2 million names from its voter rolls because the people had died, moved out of state, or failed to vote and then failed to return a postcard the state sent them. Unfortunately, as the Secretary of State later admitted, the error rate on these purges was at least 20 percent—meaning that hundreds of thousands of Ohioans were mistakenly kicked off the voting rolls. These people were disproportionally people of color, Democrats, and residents of Ohio's most populous urban counties. Pepper writes that Ohio's voter purges constitute straight-out "voter suppression" and "a brutal attack on Ohio's electorate and democracy." (28)

Many states erect unnecessary bureaucratic hurdles that serve no election security function, but make it difficult for people to cast their ballots. Two important hurdles include shortening the hours when polls are open and closing polling places altogether. After the Supreme Court's *Shelby County v. Holder* (2013) decision to set aside pre-clearance requirements, Southern states closed nearly 1,200 polling places, leaving some counties with only one place to cast a vote. Often, polling places were closed in poorer and more urban areas, resulting in long lines to vote. Having to wait six to ten hours in order to cast a vote is a completely unnecessary hoop that deprives the voter of time they would spend with their families or opportunity to work. As such, it has the functional effect of acting like a poll tax, which the 24th Amendment officially outlawed. (29)

Following the 2020 election, Republican state governments passed a variety of laws designed to make voting more difficult. The Brennan Center tallied 30 such laws in 18 states within 9 months of the election, with particularly aggressive examples in Florida, Georgia, Iowa, Arizona, Arkansas, and Montana. These laws close polling places, limit hours, restrict absentee balloting, curtail registration and voting times, limit ballot drop

boxes, and other measures. Other states, particularly those controlled by Democrats or where the parties are fairly evenly split, passed measures to expand voting access. (30)

What If. . . ?

What if all adult citizens had a positive right to vote? What if the federal government was charged with ensuring that all people were accurately registered to vote in the district in which they lived? What if this responsibility were explicitly given to federal civil servants instead of state-level partisan politicians?

References

1. Justin Levitt, *The Truth About Voter Fraud*. Brennan Center for Justiceat New York University. 2007. Page 3.
2. Ari Berman, *Give us the Ballot. The Modern Struggle for Voting Rights in America*. New York: Farrar, Straus, and Giroux, 2015. Page 269.
3. The definitions below draw on Gail Ablow, "Voter Fraud, Explained," *Bill Moyers*. June 24, 2016.
4. Richard C. Pilger, editor, *Federal Prosecution of Election Offenses*, Eighth Edition. U.S. Department of Justice. December, 2017. Pages 23-26.
5. Justin Levitt, *The Truth About Voter Fraud*. Brennan Center for Justiceat New York University. 2007. Page 4 and page 18.
6. Sami Edge and Sean Holstege, "Voter Fraud is Not a Persistent Problem," *News21*. August 20, 2016.
7. Statementon August 3, 2018, from Maine Secretary of State Matthew Dunlap. Van R. Newkirk II, "The Trump Voter Fraud Commission's Data Problem," *The Atlantic*. September 12, 2017.
8. Mark Niesse, "No Fraud: Georgia Audit Confirms Authenticity of Absentee Ballots," *Atlanta Journal Constitution*. December 29, 2020. Pam Fessler, "Former Election Security Official Says It Will Take 'Years' to Undo Disinformation," *National Public Radio*. December 22, 2020.
9. Dennis Aftergut, "The Pattern of GOP Voter Fraud," *The Bulwark*. November 18, 2021.
10. Richard C. Pilger, editor, *Federal Prosecution of Election Offenses*, Eighth Edition. U.S. Department of Justice. December, 2017. Page 2. List of offenses on pages 23-26.
11. Pema Levy, "Republicans Finally Have an Election Fraud Scandal. And None of Them Want to Talk About It," *Mother Jones*. December 4, 2018.
12. No Author, "Read the Full Transcript and Listen to Trump's Audio Call with Georgia Secretary of State," *CNN*. January 3, 2021.
13. Senate Judiciary Committee, *How the Former President and His Allies Pressured DOJ to Overturn the 2020 Election*. October 7 2021.
14. Pam Fessler and Johnny Kaufman, "Trips to Vegas and Chocolate-Covered Pretzels: Election Vendors Come Under Scrutiny," *NPR's Morning Edition*. May 2, 2019.
15. Jordan Wilkie, "'They Think They're Above the Law': The Firms That Own America's Voting System," *The Guardian*. April 23, 2019.
16. Ben Wofford, "How to Hack an Election in 7 Minutes," *Politico*. August 5, 2016. Alex Hern, "Kids at Hacking Conference Show How Easily US Elections Could Be Sabotaged," *The Guardian*. August 22, 2018. A.J. Vicens, "Researchers Assembled Over 100 Voting Machines. Hackers Broke Into Every Single One," *Mother Jones*. September 27, 2019.
17. Michael Riley and Jordan Robertson, "Russian Hacks on U.S. Voting System Wider Than Previously Known," *Bloomberg News*. June 13, 2017.
18. Bente Birkeland, "Voting Data From a Colorado County Was Leaked Online. Now the Clerk is in Hiding,"

NPR's Morning Edition. September 3, 2021.
19. Tessa Stuart, "Republicans Plot Elections Takeover in One of Georgia's Most Democratic Counties," *Rolling Stone*. September 28, 2021.
20. Sam Levine, "Why are Michigan Republicans Quietly Replacing Key Election Officials?" *The Guardian*. October 14, 2021.
21. Unknown Author, "Automatic Registration, A Summary," Brennan Center for Justiceat New York University. July 10, 2019.
22. Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielsen, "Voter Identification Laws and the Suppression of Minority Votes," unpublished manuscript. Page 5.
23. Unknown Author, "New Voting Restrictions in America," Brennan Center for Justice at New York University. November 18, 2019.
24. Vann R. Newkirk II, "How Voter ID Laws Discriminate," *The Atlantic*. February 18, 2017. See also Issie Lapowsky, "A Dead-Simple Algorithm Reveals the True Toll of Voter ID Laws," *Wired*. January 1, 2018.
25. Robert P. Jones, PhD, Daniel Cox, PhD, Rob Griffin, PhD, Molly Fisch-Friedman and Alex Vandermaas-Peeler. "American Democracy in Crisis: The Challenges of Voter Knowledge, Participation, and Polarization." *PRRI*. 2018. https://www.prri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018
26. Gregory Palast, "Florida's Flawed 'Voter Cleansing' Program," *Salon*. December 4, 2000. Katie Sanders, "Florida Voters Mistakenly Purged in 2000," *Tampa Bay Times*. June 14, 2012. U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*. June, 2001.
27. Ari Berman, "How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement," *The Nation*. July 28, 2015.
28. David Pepper, "LaRose's Smoking Gun on Voter Purging," *Pepperspectives*. June 8, 2024.
29. Andy Sullivan, "Southern U.S. States Have Closed 1,200 Polling Places in Recent Years: Rights Group," *Reuters*. September 9, 2019. Adam Eichen, "Long Voting Lines are a Poll Tax," *Jacobin*. November 3, 2020.
30. No Author, "Voting Laws Roundup, July 2021" The Brennan Center for Justice. July 22, 2021.

Media Attributions

- I voted © steevithak is licensed under a CC BY-SA (Attribution ShareAlike) license

Chapter 53: Gerrymandering

"Redistricting today has become the most insidious practice in American politics—a way . . . for our elected leaders to entrench themselves in 435 impregnable garrisons from which they can maintain political power while avoiding demographic realities."

—Robert Draper (1)

"History has shown that both major parties are perfectly willing to rig the electoral rules to benefit their own, and to draw the lines to punish opposing partisans."

—Justin Levitt (2)

Gerrymandering has long been a problem in American politics. It stems from a few basic historical facts. One is that the Constitution mandates that the number of House seats a state receives be apportioned based on population. Another is the Apportionment Act of 1842, which requires that congressional districts be compact and contiguous, and that states with enough population be split into more than one single-member district. In the Permanent Apportionment Act of 1929, Congress stopped increasing the number of seats in the House of Representatives, legislatively fixing it at 435 seats. In ***Wesberry v. Sanders*** **(1964)** the Supreme Court ruled that House districts grossly unequal in population violated the Fourteenth Amendment's equal protection clause. In 1967, Congress passed the **Uniform Congressional District Act** that mandated single-member House districts. Finally, every ten years the Census figures out how many people are in the United States and where they are living, forcing the **reapportionment** of the 435 House seats. Some states gain seats in the House of Representatives after reapportionment, and some states lose them. Each time that happens, the district boundaries are redrawn.

Gerrymander Cartoon in the Boston Centinel in 1812

In 1812, state legislative supporters of Massachusetts Governor Elbridge Gerry created a salamander-like electoral district that slithered its way from Marblehead through Danvers and Lynnfield and up to Salisbury, Massachusetts. The district was lampooned in local papers as a **gerrymander**, and the name has stuck ever since, referring to any manipulation of election districts to serve the interests of one party or group over others. Specifically, political scientist Nick Seabrook defines gerrymandering as "the manipulation of election districts for partisan and political gain." He further argues that it is a "uniquely American phenomenon," as "virtually every nation that uses districts for its elections has made at least some effort to prevent those in power from manipulating them for partisan gain." (3) Gerrymandering has become a real problem in the House of Representatives in the last few decades, as political parties have been able to combine massive demographic databases with geographic information systems (GIS) software. These tools have

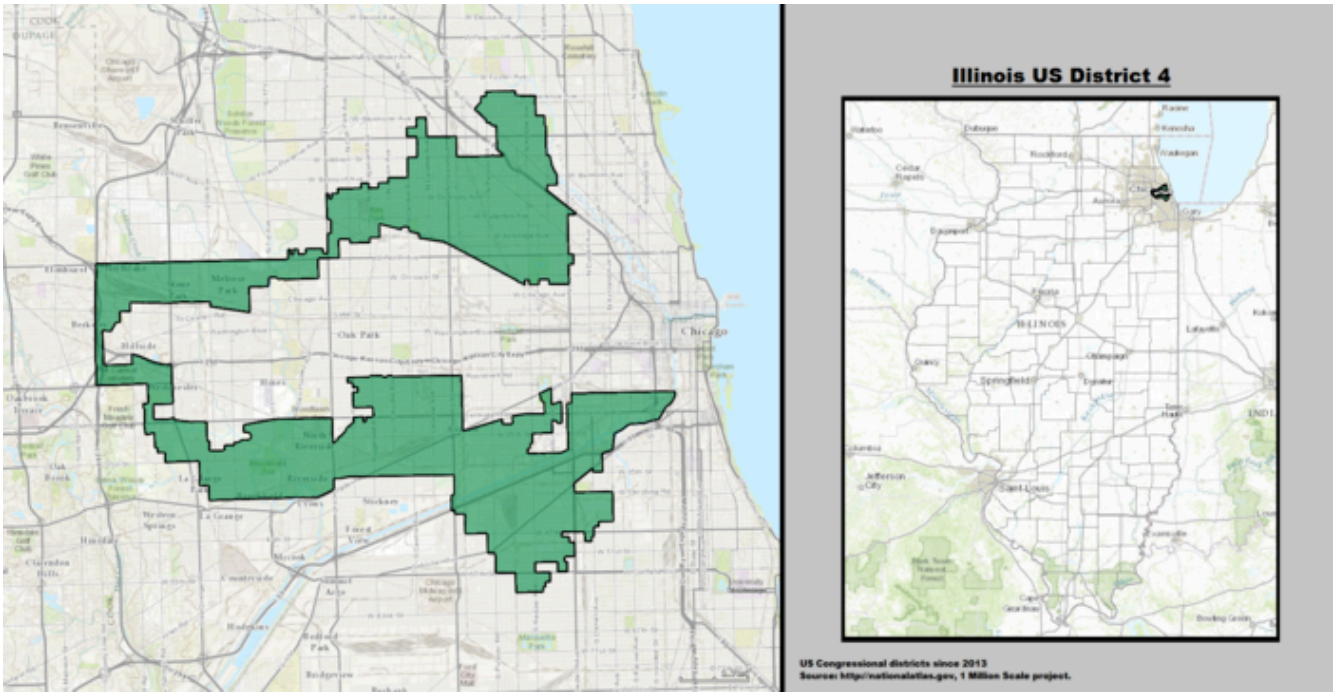
allowed unprecedented levels of slicing and dicing of the electorate to serve partisan political interests. Essentially, what we have in recent House reapportionment schemes are politicians choosing their voters rather than voters choosing their politicians. This has not been a problem in the Senate for the simple reason that Senate district boundaries don't change—they are the state boundaries.

The Mechanics and Politics of Gerrymandering

Successful gerrymandering involves two main moves: packing and cracking. House districts need to be roughly equal in population, and in practice in a given state they tend to fluctuate within 10 percent of each other. Beyond that stipulation, the district's geographic shape is open to all sorts of configurations. Who draws the lines? In most states, the politicians in the state legislature draw the boundaries. If the political majority in the state legislature wants to advantage their party and disadvantage their opponents in federal House races, they will pack and crack voters in just the right ways. **Packing** involves "the practice of drawing particular districts in such a way as to ensure that another party's candidate wins that seat by a tremendous margin." The party doing the gerrymandering wants to concede this district and pack as many of the other party's supporters in there as possible. This will make neighboring districts easier to win for the party doing the gerrymandering. **Cracking** involves "drawing districts in such a way as to divide a concentration of voter-specific types across several districts such that they are a minority in each one, with practically no hope of achieving representation in any of the districts." The party doing the gerrymandering seeks to spread the opposing party's supporters across the remaining districts, hoping to dilute their electoral weight. (4)

Historically, gerrymandering has been a tool used by both political parties in federal House races and state legislative races. Southern Democrats were famous for drawing districts that cracked Black voters into multiple White-dominated districts. After passing the 1965 Voting Rights Act, a number of states practiced "affirmative gerrymandering," or designed districts intended to elect members of racial minorities to the House. In ***Shaw v. Hunt* (1993)** and then ***Miller v. Johnson* (1995)** the Supreme Court decided that race could not be a predominant factor in creating election districts. More recently, the conservative majority on the Court has turned against remedies to gerrymanders that have racial implications, allowing redistricting schemes that lower courts had rejected because they constituted unlawful racial gerrymandering. (5)

Since 2010, Republicans have been at the forefront of gerrymandering schemes, pursuing a concerted plan to use their dominance in state legislatures to draw districts to thwart democracy. (6) Republican operative Thomas Hofeller, known as "the master of the modern gerrymander," made a career out of helping Republicans master demographics and the ever more sophisticated mapping tools that would help them draw state and federal electoral districts to benefit the Republican party. When he died in 2018, his files and emails became public. In one of his most famous consultations, Hofeller helped Republicans in North Carolina draw a House map where the district boundary split the campus of the nation's largest historically black college, guaranteeing that it would be represented by two Republican congressmen. (7)



A Famously Serpentine Congressional District in Chicago

Gerrymandering's impact is decidedly anti-democratic, no matter which party does it. The Center for American Progress studied gerrymandering's impact after the 2010 Census and found that it resulted in the partisan shift of fifty-nine seats in twenty-two states in the 2012, 2014, and 2016 elections, with a net gain of nineteen seats for the Republicans. "The inescapable conclusion," the authors wrote, "is that gerrymandering is effectively disenfranchising millions of Americans." (8) A study of the 2018 election by Data for Progress estimated that due to partisan gerrymandering a net 2.6 percent of Democrats nationwide "ha[d] their votes cancelled out" by the way districts were drawn. (9)

The Supreme Court has thus far decided to sidestep the issue of partisan gerrymandering. In 2019, it reviewed a challenge to a Democratic gerrymander in Maryland and a challenge to a Republican gerrymander in North Carolina. In a narrow decision along ideological lines, the Court ruled that the issue was out of its hands. Writing for the five conservatives on the Court, Chief Justice John Roberts said in ***Rucho v. Common Cause* (2019)** that partisan gerrymandering presents "political questions beyond the reach of federal courts." In her blistering dissenting opinion, Justice Elena Kagan wrote:

> *"The partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. Of all the times to abandon the court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government."* (10)

What if. . . ?

How can we address the issue of gerrymandering? Perhaps we could repeal the part of the Uniform

Congressional District Act that requires single-member districts for the House of Representatives and move to multimember districts in which the top candidates all got elected. Even if we didn't do that, what if we took the power to draw districts out of state legislators' hands and gave it to independent commissions? Many states have already done so. What if all did? And what if those commissions relied primarily on computer algorithms to make the districts as compact and unbiased as possible? (11)

References

1. Robert Draper, "The League of Dangerous Mapmakers," *The Atlantic*. October issue, 2012.
2. Nina Totenberg, et al., "Supreme Court Rules Partisan Gerrymandering is Beyond the Reach of Federal Courts," *NPR's All Things Considered*. June 27, 2019.
3. Nick Seabrook, *One Person, One Vote: A Surprising History of Gerrymandering in America*. New York: Pantheon Books, 2022. Page 6.
4. Malia Jones, "Packing, Cracking and the Art of Gerrymandering Around Milwaukee," *WisContext*. June 8, 2018. Jones references a third gerrymandering technique known as stacking, involving districts that are evenly split between lower-income, less educated minorities and higher-income, more educated whites. What would be the likely outcome in those districts?
5. Robert J. Shapiro, "The Decline and Possible Resurrection of Radical Gerrymandering," *Washington Monthly*. January 4, 2023.
6. Robert Draper, "The League of Dangerous Mapmakers," *The Atlantic*. October issue, 2012. Kevin Drum, "Who Gerrymanders More, Democrats or Republicans?" *Mother Jones*. January 4, 2013.
7. David Daley, "The Secret Files of the Master of Modern Republican Gerrymandering," *The New Yorker*. September 6, 2019.
8. Alex Tausanovitch, "The Impact of Partisan Gerrymandering," *American Progress*. October 1, 2019.
9. Nathan Lazarus, "The Impact of Gerrymandering, Visualized," *Data for Progress*. January 22, 2019.
10. *Rucho, et al v. Common Cause, et al*(2019)
11. Brian Olson, "Engineering Elections Without Bias," *TEDx*.June 22, 2016.

Media Attributions

- Gerrymander © Elkanah Tisdale is licensed under a Public Domain license
- IL-04 © Unknown is licensed under a Public Domain license

Chapter 54: Campaign Finance

"Money, get back
I'm all right, Jack, keep your hands off of my stack
Money, it's a hit
Don't give me that do goody good bullshit
I'm in the high-fidelity first-class traveling set
And I think I need a Learjet"

—Pink Floyd (1)

"The concentration of wealth in America has created an education system in which the super-rich can buy admission to college for their children, a political system in which they can buy Congress and the presidency, a health-care system in which they can buy care that others can't, and a justice system in which they can buy their way out of jail."

—Robert Reich (2)

The Role of Money in American Politics

The American electoral system revolves around money. Its role in American elections is so pervasive that attempts to write about it in detail quickly become outdated. Therefore, it is more helpful if we get an overall impression of how money operates in American elections. Here are some things we can say with confidence.

Money is so central to a person even considering whether they could enter politics that political scientists and journalists often speak about the **money primary**, by which they mean "the competition of candidates for financial resources contributed by partisan elites before the primaries begin." (3) Money is the ticket to success in American politics. You must either have enough to finance your own campaign, come from the elite strata where you have friends, contacts, and supporters with disposable wealth to donate to your campaign, or you must ingratiate yourself to the elites who can fund your campaign.

Money and Politics

Because elections are so expensive, and we don't have publicly financed campaigns, **politicians appear to be in a never-ending race for money**. It typically takes a couple of million dollars to win a race for House of Representatives and anywhere from two to ten times more than that to win a Senate race. In presidential races, the candidates together spent in the billions of dollars—not counting outside spending by organized interests on behalf of one candidate or the other. (4) Congressional members can easily spend half their working time raising money rather than legislating. According to *Newsweek*, "A leaked PowerPoint presentation from the Democratic Congressional Campaign Committee (DCCC) revealed that an ideal daily schedule consists of *four hours* of time spent on the phone" raising money. (5) The need for money has even changed the very nature of congressional leadership. As law professor Lawrence Lessig put it, "If leaders had once been chosen on the basis of ideas, or seniority, or political ties, now, in both parties, leaders were chosen at least in part on their ability to raise campaign cash. Leading fundraisers became the new leaders. Fundraising became the new game." (6)

Most money in American elections comes from corporations and the wealthy. Corporations and wealthy individuals contribute the bulk of the money to federal elections. According to data from the Federal Election Commission, we can safely say that corporations and wealthy individuals contribute at least two-thirds of federal-election money. An analysis in 2010 by *Good Magazine* revealed that .26 percent of the American population made up 68 percent of the money contributed to congressional members. (7) Former U.S. Secretary of Labor Robert Reich reported that while in 1980 the richest .01 percent of Americans accounted for 15 percent of all campaign contributions, by 2016 the richest .01 percent of Americans accounted for 40 percent of all campaign contributions. (8) Some candidates such as Bernie Sanders and Elizabeth Warren did a good job crowd-sourcing their campaigns with large numbers of small donors, but they lost their presidential primary races to other candidates in 2016 and 2018. Wealthy individuals can finance part, most, or all of their own campaigns. Moreover, wealthy people often act as bundlers who organize and collect contributions to one campaign from a variety of other wealthy people. (9) As you can imagine, a candidate from the elite who knows a few other elites who are willing to act as bundlers is in a very good position indeed.

The candidate who spends the most money tends to win. If you were a betting person and the only information you had about a particular race for the House of Representatives or the Senate was the amount of money the candidates were spending, you would be wise to bet on the candidate who was spending the most money. Historically, according to the Center for Responsive Politics, the better financed House candidate wins about 90 percent of the time and the better financed Senate candidate wins about 80 percent of the time. (10) Most congressional races are financially uncompetitive, meaning that one candidate is spending two or more times the money of the other candidate.

Money in American elections pushes politics in a conservative direction. Because corporations and the wealthy are the principal sources of most campaign money, the entire campaign finance system is biased in favor of conservative candidates and against candidates who would like to see real progressive changes. Corporations and the wealthy are beneficiaries of the current system, so it is typically not in their interest to support candidates who would shake up the *status quo*. Back in 1995, political scientist Thomas Ferguson coined the phrase the **investment approach to American party politics**, in which he argued

that ordinary voters cannot afford the costs of paying attention to political issues, researching candidates, watching what they do once elected, and rewarding or punishing them if they don't pursue policies beneficial to those ordinary people. Who can afford those costs? Corporations and wealthy people have the resources to monitor politics, donate to candidates to reward them for good behavior when in office, and punish them if they don't follow the wishes of the elites. Moreover, these individuals and corporations have much to lose if the politicians don't act the way they would like, so they invest in those that will. Corporations and the wealthy are invested in politics in ways that ordinary people cannot match, which pulls the entire system to the Right or conservative side of the ideological spectrum. (11)

The Supreme Court has stricken down many attempts to reign in money in American elections. Consider the track record of the Court:

- ***Buckley v. Valeo* (1976)** Overall campaign spending, personal spending on one's own campaign, and independent expenditures cannot be capped.
- *First National Bank of Boston v. Bellotti* (1978) States may not prohibit banks and corporations from paying for advertisements taking a stance on a ballot initiative on which citizens would be voting.
- *FEC v. Wisconsin Right to Life* (2007) The government cannot stop outside groups from spending on political advertising in the period before an election.
- ***Citizens United v. FEC (2010)*** The government cannot place limits on the amount of outside spending, and corporations can spend directly to support or oppose campaigns.
- *Arizona's Free Enterprise Club's Freedom PAC v.* Bennett (2011) Public financing systems cannot use escalating matching funds.
- *American Tradition Partnership v. Bullock* (2012) The Court struck down Montana's ban on corporate spending on state elections that dated back to 1912.
- ***McCutcheon v. FEC* (2014)** A donor's overall spending on federal campaigns cannot be capped. (12)
- *Americans for Prosperity v. Bonta* (2021) States may not require non-profit organizations that influence politics to disclose their wealthy donors.

Enforcement of federal election laws is weak. America's weak election laws are enforced by a weak agency. The Federal Election Commission (FEC), charged with regulating America's election and campaign finance laws, has long been referred to as "the little agency that can't." (13) Structurally, the nature of the commission produces deadlock because the Democrats and Republicans each have the same number of commissioners. The FEC is under-funded, under-staffed, and has a perpetual backlog of cases so that candidates and organized interests have little fear of being prosecuted for alleged violations. (14) Sometimes, the FEC is given a near impossible task. Take the case of coordination: outside groups are forbidden from coordinating their expenditures with political campaigns. It's extremely difficult to prove, especially for a hobbled agency like the FEC. (15)

Attempting to Regulate Money in American Elections

We have a long history of trying to regulate money in politics. The **Tillman Act of 1907** banned corporations from making direct campaign contributions, and this prohibition was extended to unions in 1943. Over time, laws and court decisions have created a fairly confusing medley of rules and allowances. Generally speaking, we divide campaign finance into hard money and soft money.

Hard money contributions are regulated by the **Federal Election Campaign Act (FECA),** which Congress passed

in 1971 and was significantly amended in 1974. **Hard money** refers to contributions made directly to a political campaign. You should be aware of the following provisions of the Federal Election Campaign Act:

- Created the **Federal Election Commission (FEC)** to enforce federal campaign regulations. However, Congress keeps the FEC chronically under-funded and understaffed, making it difficult to police elections. In many instances, campaign finance-law violators are let off with a slap on the wrist or with a plea bargain arrangement because the FEC does not have the resources to pursue the matter. Moreover, the commission is evenly divided between Republicans and Democrats, which often results in paralysis.
- Limited the amount of money that candidates could give to their own campaigns. Significantly, the Supreme Court struck down this provision in the case of ***Buckley v. Valeo (1976).*** The Court said the limitation of self-contributions was a violation of the candidate's freedom of speech.
- Required campaigns for federal office to report periodically to the FEC all its campaign contributions as well as its expenditures. These reports are a matter of public record, itemizing all contributions and expenditures greater than $200.
- Limited the amount of money that individuals and organized interest groups could donate to federal candidates. Individuals are limited to $2,800 per candidate per election, and political action committees are limited to $5,000 per candidate per election. If a candidate is involved in a primary election and a general election, you may donate the maximum amount to them on both of those occasions.
- Created presidential candidate public financing. This takes the form of a little box on your federal tax forms that allows you to allocate a small amount of your taxes to a presidential election fund. If candidates accept this money, they must abide by limits on their total spending in the presidential race. In 2008, Barack Obama became the first candidate to opt out of public financing in the general election. In 2012, Obama and Mitt Romney both opted out of public financing, and candidates in subsequent presidential elections also opted out.

The only legal way for organized interests to donate money directly to campaigns is for them to create a **political action committee**, or **PAC**, which is an FEC-recognized entity that can legally engage in campaign finance. There are different types of PACs that give directly to campaigns, and you should know two of them. **Traditional PACs** are entities created by organized interests—corporations, unions, and interest groups—as vehicles to raise money and funnel it to candidates. A **leadership PAC** is established or controlled by a political candidate or a person who holds federal office to raise and give money to other politicians. Leadership PACs are separate from the candidate or office holder's election or reelection committee. Congressional members often have leadership PACs to raise money and support candidates or other congressional members with whom they share ideology, party affiliation, or policy positions.

The amount of PAC money in congressional races has more than doubled in the last twenty years. There are more than 4,000 PACs registered with the FEC. PACs give the overwhelming majority of their money to **incumbents**, or those who are in office and are running for reelection, as opposed to challengers. There are **three reasons why PACs favor incumbents**. For one thing, incumbents tend to win. It's a safe bet for an organized interest to give money to an incumbent who already votes favorably to its interests. Incumbents have Washington experience and might sit on important committees. Committee and subcommittee chairmen tend to receive a great deal of PAC money. Finally, incumbents have a voting track record on national issues, so they are often more of a known commodity than are challengers.

Soft money originally referred to contributions to political parties that were supposed to be used for "party building measures," but instead, were used to help elect particular candidates. Technically, the parties were not supposed to use soft money to directly help individual candidates, but in the 1990s, both parties violated the law—especially in presidential races—and used the money for campaign commercials for candidates. Because there are no limits on soft money contributions, corporations especially began to flood the parties with

soft money. **Soft money** now refers to largely unregulated independent expenditures by parties and organized interests to support or oppose candidates. These organizations buy advertisements, establish phone banks, pay for people to go door to door for a candidate, and so forth.

In the spring of 2002, Congress passed the **Bipartisan Campaign Reform Act**, popularly known as the **McCain-Feingold Campaign Finance Reform Bill**, and President Bush signed it into law despite the objections of many in his own party. This law banned soft-money contributions to the national party organizations, doubled the hard money limits of the FECA, and restricted the airing of advocacy ads sixty days before a general election. In 2003, a federal district court struck down key provisions of the law, but the Supreme Court upheld the law in December of that year. Rather quickly, however, the Court decided to revisit organized-interest sponsored advocacy ads. In 2010, the Court ruled in ***Citizens United v. Federal Election Commission*** that key restrictions on corporate or union spending in elections were unconstitutional. Because of this decision, corporations and unions are free to make advocacy ads during the election period and are free to make unlimited independent expenditures in favor of—or opposed to—specific candidates. As the Center for Responsive Politics puts it:

> "[*Citizens United*] *permits corporations and unions to make political expenditures from their treasuries directly and through other organizations, as long as the spending—often in the form of TV ads—is done independently of any candidate. In many cases, the activity takes place without complete or immediate disclosure about who is funding it, preventing voters from understanding who is truly behind many political messages.*"

As a result of the *Citizens United* case and another federal case called *SpeechNow v. FEC* (2010), outside spending has exploded. Looking just at midterm elections from 2010 to 2022, outside spending by billionaires—who represent a tiny fraction of one percent of the population—exploded by nearly 3,000 percent, rising from $32 million in 2010 to nearly $1 billion in 2022. (16) The vehicles for much outside spending are **super PACs**, a new kind of organization that falls under the soft money category. Where traditional and leadership PACs donate money directly to campaigns, super PACs cannot do so, but they can spend unlimited amounts of money on behalf of one candidate or another. They must do so independently of the candidate they are supporting, meaning they cannot coordinate their activities with the campaign they are supporting. They can raise unlimited amounts of money from corporations, unions, and individuals, but they must disclose their donors to the FEC.

A special kind of soft money is called **dark money**. Under sections 501(c)(4) and 501(c)(6) of the tax code, politically active nonprofit organizations can raise unlimited money and spend it to support or oppose candidates. The most interesting thing about these organizations—and the reason they are called "dark"—is that they don't have to disclose the sources of their money. These organizations are supposed to be primarily social-welfare groups rather than overtly political, but neither the IRS nor the FEC has cracked down on them. Now, with the Supreme Court's decision in A*mericans for Prosperity v. Bonta (2021)*, states may not require dark money organizations to disclose their wealthy donors.

Conservative dark money organizations funnel corporate and elite money to promote presidential, congressional, and judicial candidates who fight against increasing the minimum wage, organizing rights for workers, worker safety laws, universal health care, background checks for gun purchases, environmental regulations, policies to fight the climate emergency, and many more. In the first several elections following the *Citizens United* Supreme Court decision, Republican-leaning dark money organizations outspent Democratic-leaning dark money organizations, although dark money groups that support corporate Democratic candidates gained much of that ground back in 2018 and 2020. (17)

It is unlikely that any form of privately donated campaign money—coming as it does primarily from corporations and the top 5 percent of the population—is ever going to support truly progressive candidates.

This is why progressive candidates like Bernie Sanders and Elizabeth Warren tried to rely primarily on small donations from ordinary people. True progressive change that would greatly improve the lives of ordinary people is blocked by monied interests. As professor Lawrence Lessig put it, money "will always block reform, at least so long as the essential element to effecting reform, Congress, remains pathologically dependent upon the campaign cash that those who block reform can deliver." (18)

Summation

Let's end this chapter with the realization that campaign finance can be quite confusing. It's also a bit depressing if we are interested in a government that serves the public interest. Here's a quick chart to help you keep it straight:

Hard Money	**Soft Money**
Regulated contributions made directly to campaigns.	Largely unregulated independent expenditures by parties and organized interests to support or oppose candidates.
Contributions to campaigns by individuals, traditional PACs, and leadership PACs.	Super PACs can raise unlimited money to spend for or against candidates, must report donors to FEC, and cannot coordinate their expenditures with campaigns.
Contributions are limited and must be reported to the FEC.	Dark money groups can raise unlimited money to spend for or against candidates, do not have to report donors to FEC, and cannot coordinate their expenditures with candidates.

The Bottom Line

Regardless of whether it's hard or soft money, the most campaign funding comes from corporations and the wealthy elite and goes to candidates who support their backers' agendas. This dynamic is likely to only be disrupted by organized and mobilized ordinary voters who demand systemic changes in America's campaign finance system.

What If. . . ?

What if in every election cycle, the federal government gave all voting age adults four "democracy vouchers" of $10 each that they could donate to any federal campaign or donate to no one? What if candidates for federal office could decide whether to raise money from corporations, wealthy individuals and PACs, or they could raise money via these democracy vouchers, but not both? (19)

References

1. "Money" written by Roger Waters of Pink Floyd.
2. Robert B. Reich, *The System: Who Rigged It, How We Fix It*. New York: Alfred A. Knopf, 2020. Kindle edition. Page 4 of 198.
3. Randall E. Adkins and Andrew J. Dowdle, "The Money Primary: What Influences the Outcome of Pre-Primary Presidential Nomination Fundraising?" *Presidential Studies Quarterly*. June, 2002. Page 257.
4. See current figures at Center for Responsive Politics website: www.opensecrets.org
5. Stacey Selleck, "Congress Spends More Time Dialing for Dollars Than on Legislative Work," U.S. Term Limits. April 26, 2016. Ryan Bort, "John Oliver Breaks Down the Disturbing Truth of Congressional Fundraising." *Newsweek*. April 4, 2016.
6. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*. New York: Twelve, 2011. Page 94.
7. See current figures at Center for Responsive Politics website: www.opensecrets.org. See the *Good Magazine* infographic here.
8. Robert B. Reich, *The System: Who Rigged It, How We Fix It*. New York: Alfred A. Knopf, 2020. Kindle edition. Page 16 of 198.
9. Peter Overby, "Explainer: What is a Bundler?" *NPR*. September 14, 2007. Maggie Severns, "Biden Reveals Deep Bench of Campaign Bundlers," *Politico*. December 27, 2019.
10. Anonymous Author, "Did Money Win?" Center for Responsive Politics.
11. Thomas Ferguson, *Golden Rule: The Investment Theory of Party Competition and the Logic of Money Driven Political Systems*. Chicago: The University of Chicago Press, 1995. See his quick synopsis of this theory on YouTube.
12. Andrew Prokop, "40 Charts That Explain Money in Politics," *Vox*. July 30, 2014.
13. Benjamin Weiser and Bill McAllister, "The Little Agency That Can't," *The Washington Post*. February 12, 1997.
14. Dave Levinthal, "Another Massive Problem With U.S. Democracy: The FEC is Broken," *The Atlantic*. December 17, 2013. Kelly Ceballos, "Federal Election Commission Must Be Restructured," League of Women Voters. April 14, 2016. Soo Rin Kim, "FEC Left Toothless With Three Empty Seats Heading Into the 2020," *ABC News*. August 27, 2019.
15. Rachael Marcus and John Dunbar, "Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce," Center for Public Integrity. January 13, 2012.16. Center for Responsive Politics. At https://www.opensecrets.org/outsidespending/fes_summ.php
16. William Rice, Zachary Tashman, and Frank Clemente, Billionaire Money in the 2022 Election: Buying Elections and Distorting Democracy. *Americans for Tax Fairness*. November, 2022. Page 6.
17. Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It*. New York: Twelve, 2011. Page 191.
18. Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy*. New York: Harper Collins, 2019. Pages 141-142.

Media Attributions

- Money Politics © Damian Gadal is licensed under a CC BY (Attribution) license
- Campaign Finance Summary © David Hubert is licensed under a CC BY-NC (Attribution NonCommercial) license

Chapter 55: The Advantages of Incumbency

"If solutions within the system are so impossible to find, then maybe we should change the system itself."

—Sixteen-year-old climate activist Greta Thunberg (1)

Congressional Reelection Rates

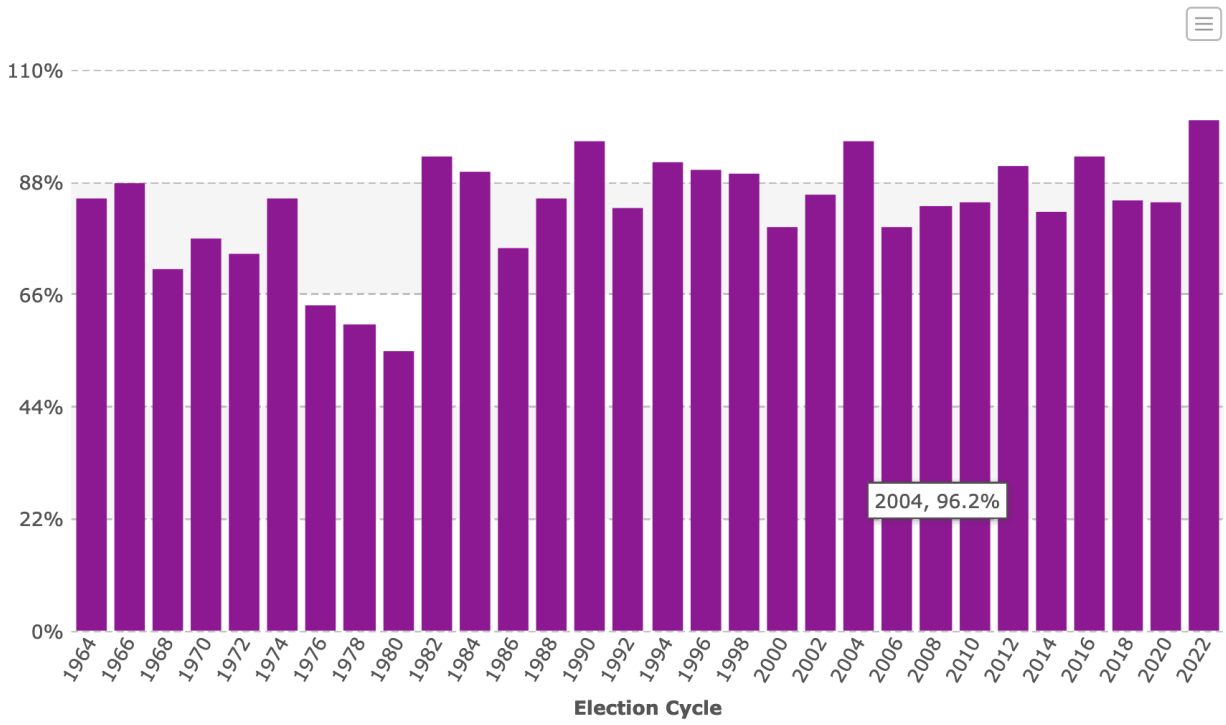
This is a good place in the textbook to delve into the advantages of incumbency in congressional races. Remember, an **incumbent** is a current officeholder who is seeking to be reelected to that office. Incumbent congressmen have excellent odds of being reelected. This is especially true of Representatives. As the Center for Responsive Politics put it, "Few things in life are more predictable than the chances of an incumbent member of the U.S. House of Representatives winning reelection." In the past twenty years, the lowest reelection rate for the House of Representatives was 85 percent, and the mean reelection rate is more than 94 percent. Reelection rates in the U.S. Senate are a bit lower, but still impressive. In the past twenty years, the mean reelection rate for senators is 86 percent. (2) It is difficult to square these high reelection rates with Americans' overall low opinion of Congress. Gallup tracking polls of Americans' opinions of Congress over the past twenty years reveal that rarely do more than 25 percent of Americans approve of Congress and frequently their approval is down in the 14-20 percent range. In one recent Gallup survey, as few as 9 percent of people approved of the way Congress was handling its job. (3)

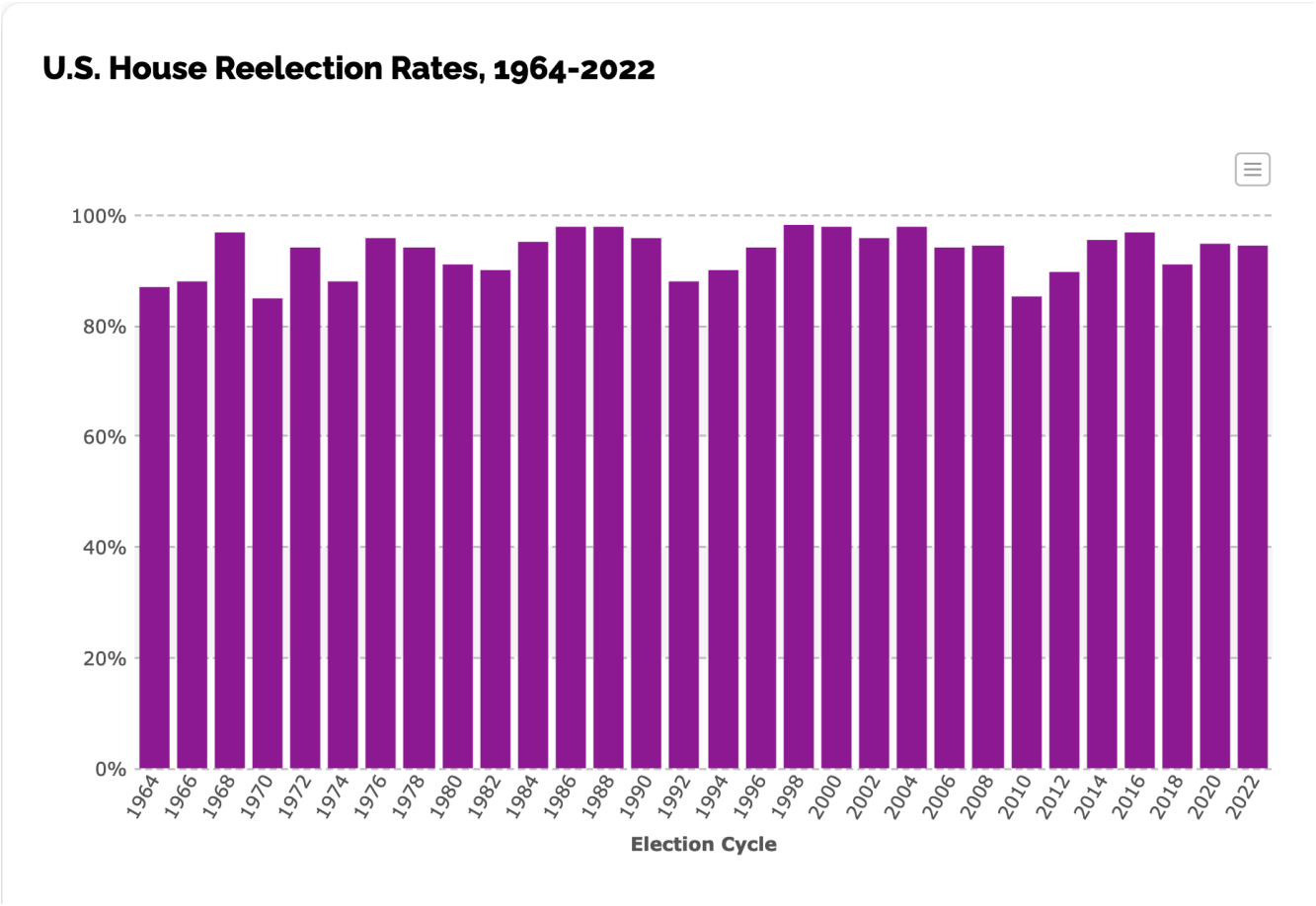
Combined with what we have learned about campaign finance, gerrymandering, and public opinion, the above information about congressional reelection rates raises an interesting set of questions.

1. How can the Congress' approval as an institution be so low compared with the high reelection rate of Representatives and Senators?
2. What does the high reelection rate for congressional members say about the American democracy's health? Is this a good sign or a bad sign?
3. Does the high reelection rate for congressional members indicate that Madison was correct in *Federalist #10*? He wrote that having a large republic with an elected legislature would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."(4)
4. Why is the reelection rate for the House of Representatives normally higher than that of the Senate?

These are good questions to discuss in class or with your friends. Take a look at these visual representations created by OpenSecrets.org of House and Senate reelection rates.

U.S. Senate Reelection Rates, 1964-2022





The Advantages of Incumbency

The high reelection rate for members of Congress may be due to several advantages that incumbents have over their challengers. You should be familiar with these advantages.

As we've seen in the chapter on campaign finance, incumbents often have a significant **financial advantage** over their challengers. Political Action Committees and wealthy individuals have numerous incentives to donate to incumbents. This has enormous implications for how a challenger might mount a campaign, since campaign commercials are expensive to produce, air time is expensive to purchase, effective websites that provide continually updated information and allow people to donate are expensive to set up and maintain, electoral consultants are expensive to hire, and so on. Sheila Krumholz from the Center for Responsive Politics said something in 2006 that is just as sobering when read today: "A challenger who spent less than a million dollars technically had zero chance of winning." (5) More than half of House races feature one candidate spending at least $10 for every $1 spent by the challenger. We call these **financially uncompetitive races**. (6)

Another important factor is the **power of seniority and experience**. Almost invariably in campaigns that feature a congressional veteran against an upstart challenger, the incumbent stresses the importance of their seniority and experience in Washington. This is a powerful argument, for it is certainly true that seniority in Congress results in more power, better committee assignments, and greater ability to get bills passed—or greater ability to stop unfavorable bills. All this can translate into a larger voice for the state or district being represented by the incumbent. In the unlikely event that the challenger wins, they are going to be a freshman with little experience

and no seniority. Of course, all of this assumes that the incumbent's seniority and experience is actually being used to serve their constituents, as opposed to serving the interests of their financial backers. However, most congressional members have little difficulty spotlighting their positive-bills sponsorship—even if they never become law—or the bacon they've brought home to their state.

We've already talked about **gerrymandering** in a previous chapter, so we won't go over the details here. Nevertheless, we need to recognize the role of gerrymandering in promoting the reelection rates of Representatives—but not Senators, for the Senate's districts are fixed by state boundaries. Essentially what we have in recent House reapportionment schemes are majority parties in state legislatures drawing boundaries that favor members of their own party. A direct result of this is the decline of competitive House seats. Many House races are uncompetitive because of the incumbent's financial advantages and because many districts have been gerrymandered to produce safe seats for one party or the other. A **safe seat** is one that is securely in the hands of one party as long as that party puts forward a reasonable candidate. Candidates in safe seats often win with 67 percent or more of the vote in the district. Going into the 2022 congressional elections, just 6 percent of the House races were expected to be competitive. (7)

Incumbents benefit greatly from **name recognition and positive media coverage**. Incumbents usually enjoy a name recognition advantage over their challengers. When this is the case, the challenger has to spend considerable money—which they probably don't have—trying to build up name recognition in the state or district. Any incumbent who manages to stay out of scandal is virtually guaranteed positive coverage in the local media. This is especially true of local television coverage, which tends to focus on staged events at which the incumbent appears at events such as a local conference on aging, a local pro-am golf tournament, or a construction ground-breaking for which the incumbent helped secure the funds. Rarely does local media focus on how incumbents vote on key issues and how those votes affect real people.

Representatives and senators are given allowances every year to cover their expenses. Representatives have a Members' Representational Allowance and Senators have an Office Personnel and Office Expense Account. (8) Generally speaking, these allowances vary from one congressman to the next based on how far their district is from Washington, rent in their district, and so forth. They use this money to hire staff in both their Washington and their local district or state office. Congressional staff spend much time on **constituent service**, which refers to troubleshooting and problem solving for their constituents. By being in a position to solve problems for their constituents, congressional members generate positive feelings that challengers cannot. In addition, constituent-service benefits ripple through many people via word of mouth. This is an advantage for incumbents that most challengers cannot match.

Since the beginning of the republic, members of Congress have enjoyed the **franking privilege**, meaning that they are allowed to send mail for free to their constituents. The first Congress implemented this rule and based it on a practice that had originated in the British Parliament over a hundred years before the American Revolution. Members of Congress are never allowed to use the privilege for overt campaign literature or allowed to send such mail within ninety days of an election, but the simple ability to send direct mail touting the incumbent's congressional activities throughout most of their term is definitely an advantage.

What If. . . ?

The incumbent advantage is not something that can be resolved in our current system. Indeed, it wouldn't even be considered a problem if we could be confident that our Representatives and Senators were acting in the voters' interest instead of serving the corporations and the small sliver of the electorate that can afford to donate

mounds of money to their campaigns. Incumbent congressmen have little incentive to change a system that makes it so easy for them to stay in office.

What if we thought way out of the box when it came to our legislative bodies? Two interesting possibilities come to mind. The first would center on the idea of sortition. Political writer and intellectual David Van Reybrouck spelled out this possibility in his book with the intriguing title *Against Elections: The Case for Democracy*. (9) **Sortition** refers to the drawing of lots—where we get the term lottery—and so would mean selecting our members of Congress by some sort of random process that resembled a lottery. In ancient Athens, magistrates, members of the Boule (council), and jurists were chosen via sortition. Why couldn't we do the same for representatives and senators? Set some basic qualifications, allow people to indicate on their tax forms whether they would like to be eligible for the congressional lottery, and select people to fill nonrenewable terms. It would require a few supplementary changes, one of which would be a change in how congressional staff are chosen, for you'd want nonpartisan staff to help these citizen-legislators craft effective laws. Another recommended change would be to change the legal code to make interfering with the congressional lottery's random nature a form of treason.

The second possibility would feature citizens' assemblies and deliberative democracy. (10) A **citizens' assembly** is just what it sounds like: a group of adult citizens chosen at random. What if every year we established a Citizens' Assembly devoted to each of a few particular issues—e.g., automobile fuel standards, judicial appointments, and immigration reform this year and renewable energy, judicial appointments, and a national healthcare system next year, and so on. With the help of some nonpartisan facilitators, each Citizens' Assembly would practice **deliberative democracy**, which is a nonadversarial, discussion-centric form of decision making that educates the citizens in the assembly and helps them reach decisions. More technically, political scientists Amy Gutmann and Dennis Thompson define deliberative democracy as "a form of government in which free and equal citizens and their representatives, justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future." It has several operating principles:

1. The reason-giving requirement, which means that the assembly's members give reasons for their actions that "should appeal to principles that individuals who are trying to find fair terms of cooperation cannot reasonably reject."
2. The accessibility requirement, which means that "to justify imposing their will on you, your fellow citizens must give reasons that are comprehensible to you."
3. The binding requirement, which means that the assembly is not just an intellectual exercise. It will produce decisions that are binding on their fellow citizens for a period of time.
4. The dynamic requirement, which means that the assembly "keeps open the possibility of a continuing dialogue, one in which citizens can criticize previous decisions and move ahead on the basis of that criticism." (11)

Modern citizens' assemblies seem to have started in British Columbia in 2004. Ireland has a citizens' assembly that numbers among its accomplishments creating referenda in which the entire population voted in 2015 to end the ban on gay marriage and in 2016 to end the ban on abortion. Both referenda passed easily, perhaps because they were discussed and drafted by the Irish Citizens' Assembly. (12) Citizens' assemblies have been used in Scotland, the Netherlands, and Poland. In the United Kingdom Extinction Rebellion called for a citizens' assembly to deal with the climate and ecological emergency. (13)

References

1. Robert B. Reich, *The System: Who Rigged It, How We Fix It*. New York: Alfred A. Knopf, 2020. Kindle edition. Page 5 of 198.
2. No Author, "Reelection Rates Over the Years," Center for Responsive Politics. No date.
3. No Author, "Congress and the Public," Gallup. No date.
4. James Madison, *Federalist #10*. November 23, 1787. The Avalon Projectat Yale Law School.
5. Dan Gilgoff, "A Fake Democracy? (Why House Incumbents Just Don't Lose). *U.S. News and World Report*. May 9, 2006.
6. No Author, "Most Races for Congress Are Not Even Competitive," Center for Responsive Politics. No date.
7. Kenny Stancil, "Just 6% of U.S. House Seats Expected to be Competitive Thanks to Rigged Maps," *Common Dreams*. February 17, 2022.
8. Robert Longley, "Allowances Available to Members of U.S. Congress," *ThoughtCo*. July 3, 2019.
9. David Van Reybrouck, *Against Elections: The Case for Democracy*. London: Penguin Random House, 2013.
10. Rob Hopkins, From *What Is to What If: Unleashing the Power of Imagination to Create the Future We Want*. White River Junction, VT: Chelsea Green Publishing, 2019. Pages 144-148.
11. Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?*Princeton, NJ: Princeton University Press, 2004. Pages 1-63.
12. Rob Hopkins, From *What Is to What If: Unleashing the Power of Imagination to Create the Future We Want*. White River Junction, VT: Chelsea Green Publishing, 2019. Page 147.
13. Extinction Rebellion.

Media Attributions

- Senate Reelection Rates 2022 © OpenSecrets.org is licensed under a All Rights Reserved license
- House Reelection Rates 2022 © OpenSecrets.org is licensed under a All Rights Reserved license

Chapter 56: Public Opinion and Political Socialization

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

—James Madison (1)

What is Public Opinion?

Public opinion refers to the aggregation of individual American's political views. In *Federalist #10* James Madison referred to "popular governments." Today, we are more likely to call them democracies or republics. What Madison meant—and what we mean today—are polities that base the source of their legitimacy and authority on the people rather than some other source like God, and that take into account peoples' aggregate views when making policy. Indeed, if democracy is to mean anything it must refer to a government that periodically turns to the people to either make decisions directly or to select representatives to make decisions. It must also refer to a government whose policies accord with what the public wants it to do.

Measuring Public Opinion

You probably know what your family and friends think about particular political issues. How? You ask them. Similarly, we know quite a bit about public opinion by regularly asking individual Americans what they think in public opinion polls. Political scientists often rely on scientifically rigorous survey research methods in their research. You should be familiar with several issues regarding measuring public opinion. In our discussion, we'll use the terms **public opinion poll**, **public opinion survey**, and **survey research** interchangeably to mean scientifically rigorous solicitations and aggregations of individual political views.

It is very important for you to be able to tell the differences between legitimate versus illegitimate public opinion polls. **A legitimate survey must (must!) follow two simple rules** regarding the samples they take from the population about which they want to make a statement.

1. It must be based on a **random sample** drawn from the population about which you wish to make a statement. Survey researchers go through several practices to ensure that the people they contact are truly random. All people in the population need to have an equal chance of being in the sample. Above all, pollsters want to avoid **selection bias**, which is when some members of the population who have particular characteristics have an increased or decreased chance of being sampled. The most famous case of selection bias occurred in 1936 when a survey conducted by the *Literary Digest* predicted that Republican Alf Landon would beat Democrat Franklin Delano Roosevelt when in fact Roosevelt trounced Landon. Why was the poll wrong? It turns out that it drew its sample from telephone directories and automobile registrations, and in those days, wealthier Americans were much more likely to be on

those lists. The poll had inadvertently weeded out potential Roosevelt supporters from the sample. Selection bias is a constant threat to survey research.

2. The sample must be large enough to make accurate statements. A survey of 100 people will rarely suffice. However, a sample of 1,000 people is large enough to make statements about a very large population if you've satisfied rule number one. Consider something as simple as flipping a coin. Flip a coin 1,000 times and record the results. There is a 95 percent chance that the number of heads will be between 46.9 percent and 53.1 percent. The 3.1 percent variation around the exact fifty-fifty distribution of heads and tails is known as the margin of error. (2) The same principle works for survey research, where the **margin of error** refers to the variability amount that we can expect a poll to have from the true result if we actually surveyed the entire population. It comes with a confidence interval. Thus, "A margin of error of plus or minus 3 percentage points at the 95 percent confidence level means that if we fielded the same survey 100 times, we would expect the result to be within 3 percentage points of the true population value 95 of those times." (3) Always look for polls that publish the margin of error.

The accuracy of polling can sometimes be undermined by **social desirability bias**, which is "the concept that people won't tell pollsters their true intentions for fear of being stigmatized or being politically incorrect." Many political scientists and journalists blame social desirability bias for polls in 2016 that incorrectly showed Donald Trump trailing Hillary Clinton in key battleground states. (4) People will tend to underreport behavior and opinions that they think the pollster will find unacceptable and overreport behavior and opinions that are socially desired. Some survey respondents will tell pollsters that they voted when they didn't, that they support racial or gender equality when they don't, and that they don't use illegal drugs when they do.

When you see polls reported in the news media, pay attention to question wording, or the way that the survey items are phrased. Question wording can have a dramatic effect on the overall results of a survey. Beware especially of **leading questions**, which are questions that are intentionally or unintentionally phrased to elicit a particular response. Let's look at a subtle case of unintentionally leading survey respondents. Consider two ways to ask a question:

Do you support President Bush's decision to send additional troops to Iraq?

Or

Do you favor or oppose sending additional troops to Iraq?

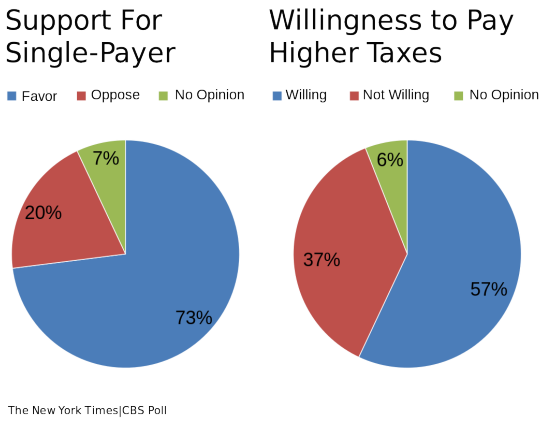
When the first version of the question references an authority figure like the president and only uses the word support, it could unintentionally lead people to say that they support the policy. The second version is more neutral. (5) There are far more egregious examples of leading questions. In 1937, Gallup asked, "Would you vote for a woman for president if she were qualified in every other way?" The implication of the question is that the mere fact of being a woman might be a disqualifying characteristic. (6)

This is a good place to note the role of push polling in American politics. A push poll is not a real attempt to get the opinions of people. Instead, a **push poll** is a form of negative advertising in the guise of a survey. An organization that is either hired by a political campaign or funded by soft money contacts people and tells them that they are doing a survey, but instead they use the opportunity to tell the people potentially negative things about a candidate. For example, when Mitt Romney ran for president, a company called potential voters in Iowa and New Hampshire asked questions like "Did you know Mitt Romney received military deferments from the Vietnam War when he served a church mission in France? Did you know Mormons believe the *Book of Mormon* is better than the *Bible*? Did you know that some people believe the Mormon church is a cult?" It was nomination season, and Romney's Republican opponents denied that they were behind the calls. (7)

Survey research has been complicated by changing technology. In the old days, survey research companies

called people at home. On their land line. Obviously, that has become much more difficult as most people no longer have hard wired phones in their homes. Cellphone surveying is more difficult because of caller screening and because many people who have cellphones are not adults.

Does Public Opinion Influence Policy?



Public Opinion Poll Indicating Support for a Single-Payer Healthcare System in 2009

Going back to the chapter on Political Science as a Social Science, we might say that in a democracy, we hypothesize a causal relationship between public opinion on a particular issue and the public policy that Congress and the president produce. How often does this take place? As we've seen thus far in this textbook, the American political system appears to be fairly non-responsive to ordinary people's wishes. It doesn't appear to be responsive to real world issues at all, even if elites would benefit from them as well. The American political system simply has too many points at which positive change can be defeated. Consider that America does not have a health care system that covers everyone; that America is not addressing the climate crisis—arguably the greatest crisis that has threatened mankind since the dawn of civilization; that America's infrastructure is decrepit compared to its competitors; that America makes access to a quality college education contingent on family income, unless one wants to go into debt; that America has terrible rates of infant mortality, child poverty, hunger, and homelessness compared to its peers; that America can't ensure that people will be paid a living wage or be treated with dignity while on the job; that America doesn't guarantee paid family leave at the birth of a child; that America cannot even marginally address its epidemic of gun deaths; that America cannot stop itself from over spending on its military apparatus while underspending on its public health system; that America cannot ensure the integrity of its elections. What interpretation of "promote the general welfare" does this fit? Or, as Harvard law professor Lawrence Lessig put it, "How much do we suffer because we have a government that cannot govern?" (8)

Recall what political scientists Martin Gilens and Benjamin Page concluded after thoroughly studying the connection between public opinion and public policy. They found "democracy by coincidence, in which ordinary citizens get what they want from government only when they happen to agree with elites or interest groups that are really calling the shots." (9) We should not be surprised at this conclusion, given the constitutional and process barriers to democracy that we've highlighted in this text as well as the gross economic inequalities in American society that translate into vast differences of political power between different classes.

We might ask another–less depressing–question: under what conditions is public opinion more likely to influence public policy? Under the current political system, which is not particularly suited to translating popular will into policy, **four conditions appear to be the most important for allowing ordinary Americans' opinions to influence public policy**. Political scientists Benjamin Page and Robert Shapiro noted three of these conditions. "Policy," they wrote, "tends to move in the same direction as public opinion most often when the opinion change is large and when it is stable—that is, not reversed by fluctuations." Large and stable shifts in public opinion can result in public policy change. "Similarly," wrote Page and Shapiro, "policy

congruence [with public opinion] is higher on salient than on non-salient issues." (10) Issue salience refers to its prominence in the public sphere—are people talking about it, are they writing about it on news sites, is the issue important to many people? A third condition is the intensity with which people hold their opinions. If a significant enough plurality of people holds very intense opinions about an issue—e.g., gun rights, abortion, or civil rights—that translates into letters to Congress, votes on election day, demonstrations, and other forms of political behavior that can move elected officials to act.

The fourth condition that appears to determine whether public opinion can influence policy is whether elites are divided about the issue. We've already seen that if elites are unified on an issue, they appear to have a veto on political change. But things are different when elites are divided on an issue. Political scientist David Hubert, author of this textbook, showed how issue salience combines with elite division to create the ideal conditions for popular opinion to impact foreign policy. He found that when elites are divided on a salient political issue, at least one side of that division has an interest in enlisting public opinion as an argument for why their side of the policy debate should win. (11) This finding accords with political scientist E. E. Schattschneider's assertion that "The role of the people in the political system is determined largely by the conflict system, for it is conflict that involves the people in politics and the nature of conflict determines the nature of the public involvement." (12) If the main combatants—politicians, elites, and corporations—differ on a public policy, they draw in public opinion as a resource in their struggle.

The role of public opinion in affecting policy is limited and conditional. That is unlikely to change unless one of two things happens: 1) large numbers of people unify on a particular policy proposal and have some elite supporters and politicians on board, or 2) large numbers of people organize around significant changes to the political system that would make it more attuned to the wishes of ordinary Americans.

Opinion Leadership

Often, elites go beyond merely enlisting public opinion in their political battles. There is considerable evidence for a phenomenon known as **opinion leadership**, which refers to the ability of political leaders to change the opinions of large numbers of people. The truth is that on many issues, individuals do not have strongly formed opinions. When a pollster asks them a question, they'll give an answer, but often it is an issue about which they haven't devoted much thought. If a political leader that they respect and/or with whom they share party affiliation comes out forcefully in favor of a different approach to that policy, many people will shift their opinion. For instance, after candidate and president Donald Trump and other Republican luminaries such as the leaders of the National Rifle Association took on a much more friendly approach to Russia and its leaders, the opinions of Republicans shifted in the same direction. Between 2014 and 2018, the percentage of Republicans who viewed Russia as an ally or as friendly toward the United States doubled, but the views of Democrats towards Russia actually soured a bit. (13)

Political Socialization

Political scientists and psychologists have long been interested in how people develop their individual approach to politics and political issues. There is no definitive answer, nor is there ever likely to be. Indeed, a mix of influences unique to each individual is likely to be the real source of our ideologies, attitudes, opinions, prejudices, and dispositions. You should be familiar with the prime suspects when it comes to our **political socialization**, by which we mean "the process by which people acquire their political attitudes, beliefs, opinions, and behaviors." (14) There are many candidates, but we'll only focus on four.

There is a growing body of research demonstrating that our political orientation may be in part a hard-wired component of our personality. Just as two siblings born of the same parents and raised in the same household can have vastly different personalities, we may be born with dispositions that affect the political ideologies we develop by the time we are adults. Psychologists and political scientists have found that conservatives and progressives appear to have an innate difference in threat perception, with conservatives more attuned to potential threats. Similarly, conservatives may be more fearful of those threats and want government to respond to them with military or police forces and/or laws. Conservatives have a lower tolerance for ambiguity and a lower tolerance for disorder than do progressives. (15) Psychologist Jonathan Haidt has argued convincingly that conservatives and progressives come from different moral standpoints. For instance, take the issue of fairness. Haidt argues that progressives see fairness as one of access to basic resources, whereas conservatives see fairness as getting what one deserves based on effort expended. In other words, both conservatives and progressives value fairness, but they may have innately different moral understandings of the concept. (16)

Occupation is another obvious candidate to be an influence on our political views. In Federalist #10 James Madison wrote that,

> *"the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views." (17)*

One's occupation is intimately tied to one's vested interests and is therefore likely to have a strong interest on one's political opinions. For example, teachers have different opinions than do members of the general public on issues like teacher pay, vouchers, the impact of teachers' unions, and how often students should be subject to standardized tests. (18) Factory workers are likely to have a different opinion of globalization and offshoring jobs than the people who own the company. Blue-collar workers are likely to have a different opinion of unskilled immigrants than are white-collar workers who don't have to compete with such immigrants for jobs.

We should recognize the roles of family and friends in shaping our political opinions. Children are raised by parents who have more or less well-developed political outlooks and in families with particular moral or ethical values. Parental viewpoints can transfer to children. In one early study, psychologist Eugene Thomas found an average 75 percent congruence rate between college-age students and their parents with respect to political attitudes. Moreover, two aspects of the family dynamic contributed the most to fostering parent-child attitude congruence: the extent to which the parents were dedicated to political causes and the extent to which the parents explicitly tutored children "into an awareness of the political realm." (19) As children grow, they engage with other young people who influence and reinforce their attitudes and behaviors. Sociologist Denise Kandel noted that "adolescents who share certain prior attributes in common tend to associate with each other and tend to influence each other as the result of continued association." (20) What Dr. Kandel described is the importance of **homophily**, which is "the tendency for individuals to associate with similar others," and it is "one of the most persistent findings in social network analysis." (21) We have a tendency to associate with people who are like us in some respect(s), and we then reinforce each other's attitudes and behaviors. Homophily becomes more prominent as children get older and are able to transcend the imperatives of neighborhood geography, extend their potential networks, and go to college.

What about education? Broadly speaking, formal education can play a role in fostering tolerance for people who are racially, ethnically, or religiously different from us—assuming that the school is itself inclusive and promotes those values. Formal education also tends to promote what is known as **political efficacy**, or a

person's belief that they can influence public policy through their political behaviors like voting, demonstrating, donating to candidates, and organizing collectively for action. There is some evidence that more democratic forms of school governance can produce even more gains in political efficacy than traditional—i.e., not-very-democratic—school governance. The famous psychologist Jean Piaget once asked and answered an important question: "How are we to bring children to the spirit of citizenship and humanity which is postulated by democratic societies? By the actual practice of democracy at school." (22)

References

1. James Madison, *Federalist #10*. November 23, 1787. The Avalon Projectat Yale Law School.
2. This example comes from Ginsberg, et al., *We the People*. 12thedition.
3. Andrew Mercer, "5 Things to Know About the Margin of Error in Election Polls," Pew Research Center. September 8, 2016.
4. Tom Bevan, "Pollster Who Got It Right in 2016 Does It Again." *Real Clear Politics*. November 10, 2018.
5. Anonymous author, "Question Wording," American Association for Public Opinion Research. No date.
6. Craig Charney, "The Top 10 Ways to Get Misleading Poll Results," Charney Research. July 9, 2007.
7. Anonymous author, "Push Polling Targets Mitt Romney," *KSL*. November 16, 2007.
8. Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy*. New York: Harper Collins, 2019. Pages 141-142.
9. Martin Gilens and Benjamin Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens," *Perspectives on Politics*. Fall 2014.
10. Benjamin Page and Robert Shapiro, "Effects of Public Opinion on Policy," *The American Political Science Review*. March, 1983. Page 181.
11. David Hubert, *Public Opinion and the Reagan Doctrine: Issue Structure and the Domestic Setting of Foreign Policy*. Doctoral Dissertation at the University of Connecticut. 1995.
12. E. E. Schattschneider, *The Semisovereign People*. Hinsdale, IL: The Dryden Press, 1960. Page 126.
13. R. J. Reinhart, "Republicans More Positive on U.S. Relations With Russia," Gallup. July 13, 2018.
14. Diana Owen, "Political Socialization," *Oxford Bibliographies*. July 20, 2014.
15. Emily Laber-Warren, "Unconscious Reactions Separate Liberals and Conservatives," *Scientific American*. September 1, 2012. Vinita Mehta, "Why Liberals and Conservatives Think So Differently," *Psychology Today*. February 27, 2017.
16. Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion*. New York: Pantheon Books, 2012.
17. James Madison, *Federalist #10*. November 23, 1787. The Avalon Projectat Yale Law School.
18. Paul E. Peterson, Michael Henderson, and Martin R. West, *Teachers Versus the Public: What Americans Think About Schools and How to Fix Them*. Washington, D.C.: The Brookings Institution, 2014.
19. L. Eugene Thomas, "Political Attitude Congruence Between Politically Active Parents and College-Age Children: An Inquiry into Family Political Socialization," *Journal of Marriage and Family*. May, 1971. Page 379.
20. Denise B. Kandel, "Homophily, Selection, and Socialization in Adolescent Friendships," *American Journal of Sociology*. September, 1978. Page 435.
21. Per Block and Thomas Grund, "Multidimensional Homophily in Friendship Networks," *Network Science*. August, 2014. Page 189.
22. Ralph Mosher, Robert Kenny, and Andrew Garrod, *Preparing for Citizenship. Teaching Youth to Live Democratically*. Westport/London: Praeger, 1994. Piaget quoted on page xi.

Media Attributions

- Single Payer © New York Times/CBS News Poll is licensed under a Public Domain license

PART 9: INDIVIDUAL POLITICAL BEHAVIOR

Chapter 57: Voting

"It has been said that democracy is the worst form of government except all those other forms that have been tried from time to time."

—Winston Churchill (1)

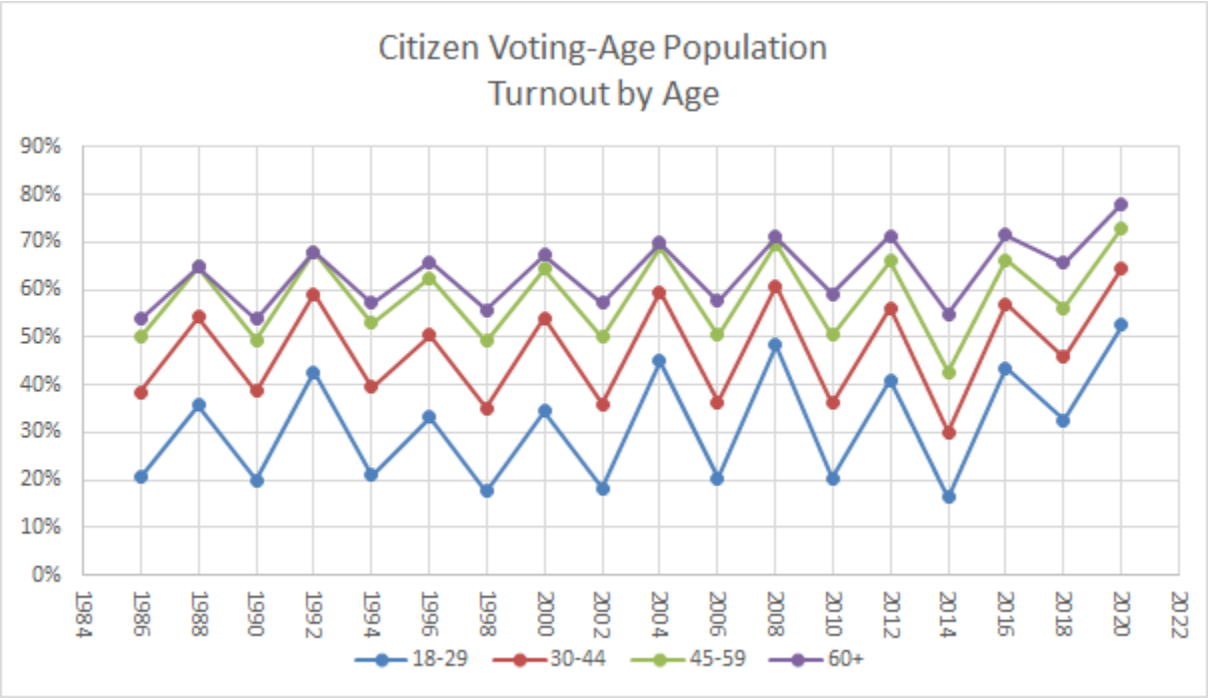
Who Tends to Vote?

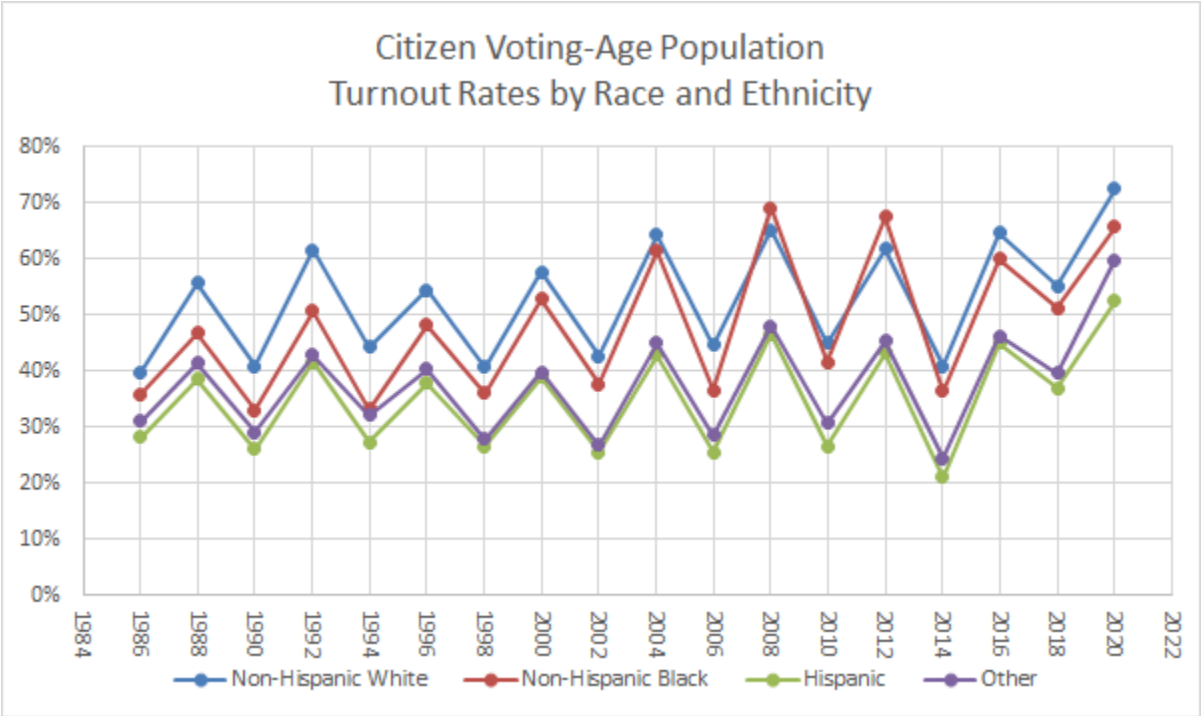
Voting matters, even in an attenuated democracy. Every two years we have a federal election during which we decide who is going to occupy all 435 House seats and one-third of the 100 Senate seats until the next federal election. Obviously, this election has enormous implications for legislation that passes Congress. Every four years, we have a federal election for president and vice president, which has many implications for judicial nominations, the prosecutorial discretion of the Justice Department, and the extent to which the new administration will or will not aggressively implement environmental, worker and consumer safety, and economic regulations, as well as how responsive the federal government is to national emergencies like the COVID-19 pandemic and natural disasters.

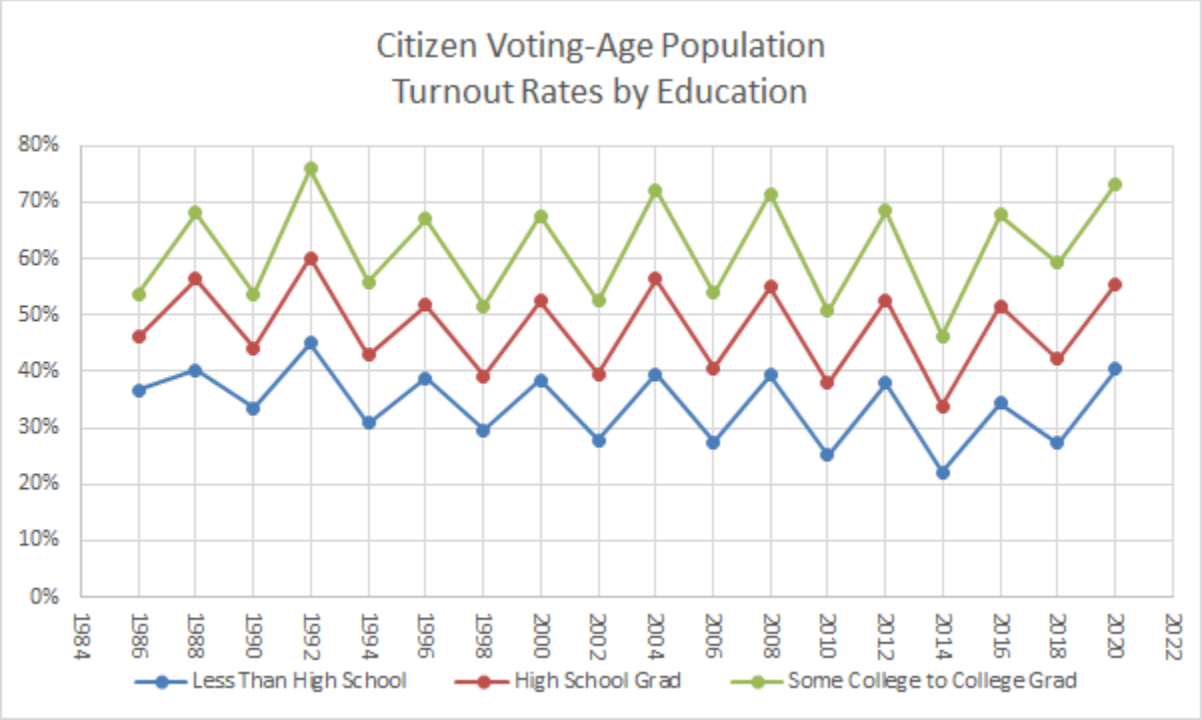
There are a couple of things you should know about voting turnout in the United States. First, American voting turnout is not particularly high. Second, it bounces around depending on whether we're talking about a **presidential election year** or what's known as a **midterm election.** A presidential election year is one in which we elect the president. A midterm election year is one in which presidential candidates—technically, the slates of electors pledged to presidential candidates—are not on the ballot. From 1980 to 2016, voting turnout in presidential election years averaged just shy of 57 percent, meaning that for every 100 people who were of voting age, only 57 did so. From 1982 to 2018, voting turnout in midterm elections averaged just under 41 percent. (2) **By international standards, voter turnout in the United States is lower than most countries to which we'd like to be compared**. While we are very proud of ourselves when turnout in a presidential election year breaks 60 percent, turnout in the most recent elections around the world put America to shame: the UK 63 percent, France 67 percent, Germany 69 percent, New Zealand 76 percent, Denmark 80 percent, and Belgium 87 percent. (3)

Can we make some useful generalizations about the people who *do* tend to turnout in American elections? Yes, there are some informative things we can say, but keep in mind that demographic variables correlate with each other. (4) **Race and ethnicity** appear to be relevant. Consider that in the last presidential election, 65 percent of Whites voted, 60 percent of Blacks voted, and 45 percent of Hispanics voted. That ranking generally holds true over time, although the Black turnout rate did eclipse that of Whites in the 2008 and 2012 presidential elections. It is also true that the Hispanic voting turnout rate has been increasing over time—in 1996 Hispanic turnout was only 38 percent. **Age** is a strong and consistent predictor of voter turnout. As age increases, tendency to vote increases. In the last presidential election, 43 percent of eighteen- to twenty-nine-year-olds voted, 57 percent of thirty- to forty-four-year-olds voted, 66 percent of forty-five- to sixty-four-year-olds voted, and 71 percent of people sixty years and older voted. This age ranking holds true in all recent elections. Finally, we should note that **formal education** correlates with tendency to vote. In the last presidential election, only 31 percent of people without a high school diploma voted, while 85 percent of people with a graduate degree voted. This pattern holds at every increased level of education: high school graduates vote at higher rates than those who didn't finish high school; people with college degrees vote at higher rates than high school graduates, and so

on. Let's look at these relationships over time thanks to Professor Michael P. McDonald and the United States Elections Project at the University of Florida:







Why do these patterns hold? Why would education, age, and race have anything to do with tendency to vote? Discuss this with your classmates or friends. Certainly, political decisions made at the national level are not intrinsically more important to sixty-year-olds than they are to twenty-year-olds. They are not more intrinsically more important to Whites than they are to Hispanics. Nor are people without a high school diploma somehow unaffected by national politics. Think about political efficacy. Think about candidates' race, age, and education levels. Think about the voter-registration burdens we put on people. Think about political alienation. Think about economic reasons why we might see these patterns.

Who Tends to Vote for Which Party?

In this section, we want to make some generalizations about how different demographic groups tend to vote. If there's one thing we know about political preferences in American politics, it is that they change over time. The patterns we'll describe are real—that is, supported by public opinion and exit polling data—but they might not have existed in the past and they might change going forward. Still, understanding voting patterns can help you make sense of contemporary political news. Let's keep another thing in mind as well. These are only tendencies. Each person makes up their own mind how to vote, and there's a chance that they will not conform to the patterns described below. Just because you happen to fall into a demographic group that tends to vote for one political party, it doesn't mean you can't be perfectly happy voting for a different one.

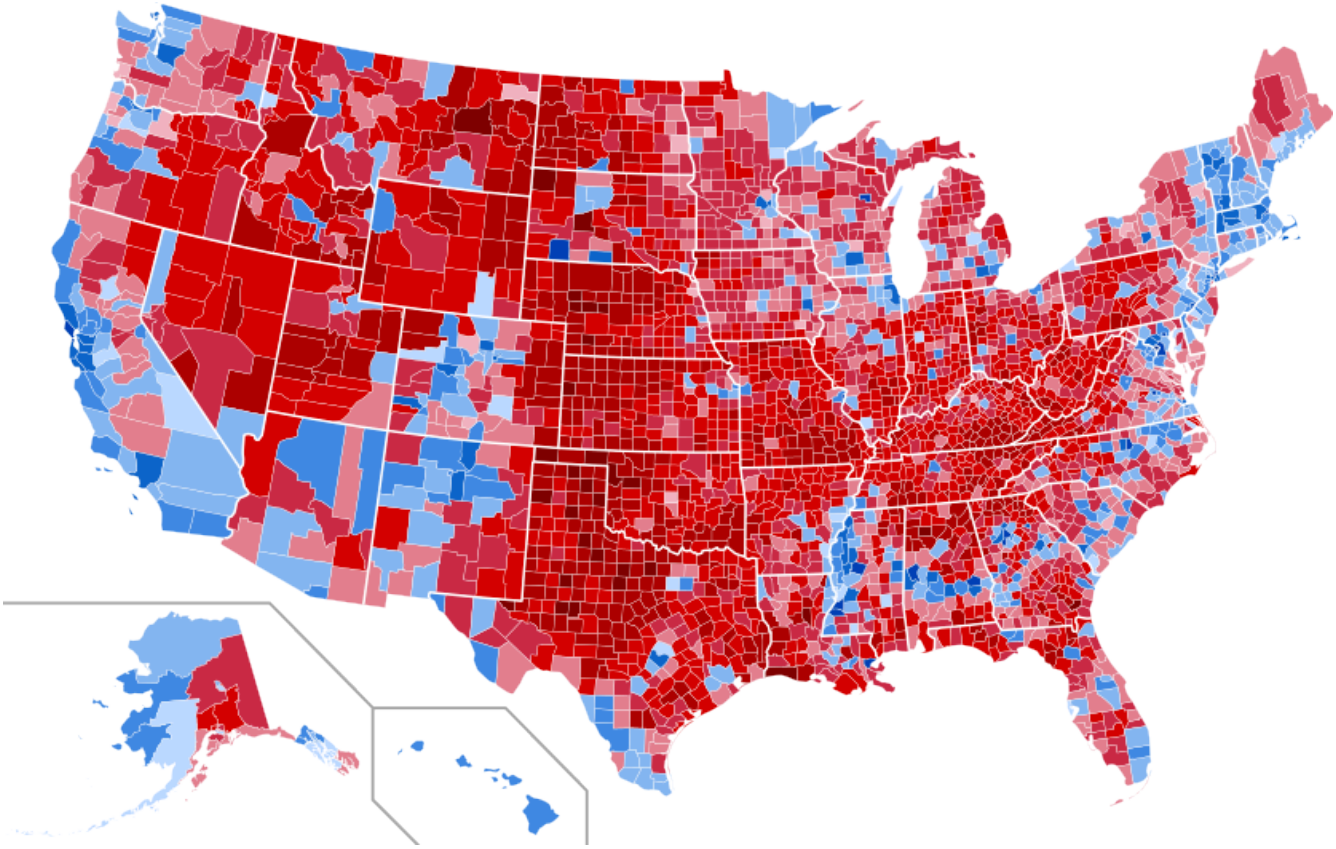
Race and Ethnicity has a clear impact on tendency to vote Republican or Democratic: In general, Whites tend to vote Republican, and ethnic minorities vote Democratic—although there are exceptions and matters of degree. In the 2020 election, according to CNN exit polls, Republican Donald Trump beat Democrat Joe Biden among Whites by 17 percentage points—58 percent to 41 percent. Biden beat Trump among Blacks by a remarkable 75 percentage points—87 percent to 12 percent. Biden beat Trump by 65 percent to 32 percent among Hispanics and by 61 percent to 34 percent among Asian Americans. (5) These results are not surprising, as they track pre-

election party identification. For example, 84 percent of Blacks and 63 percent of Hispanics identified with the Democratic party. Whites were about 8 percentage points more likely to identify as Republican leading up to the 2020 election. (6) One of the most interesting aspects of the Trump years is that the Republican Party saw significant gains among Hispanic voters. (7) Why do we see party identification and voting patterns among racial and ethnic groups in the United States?

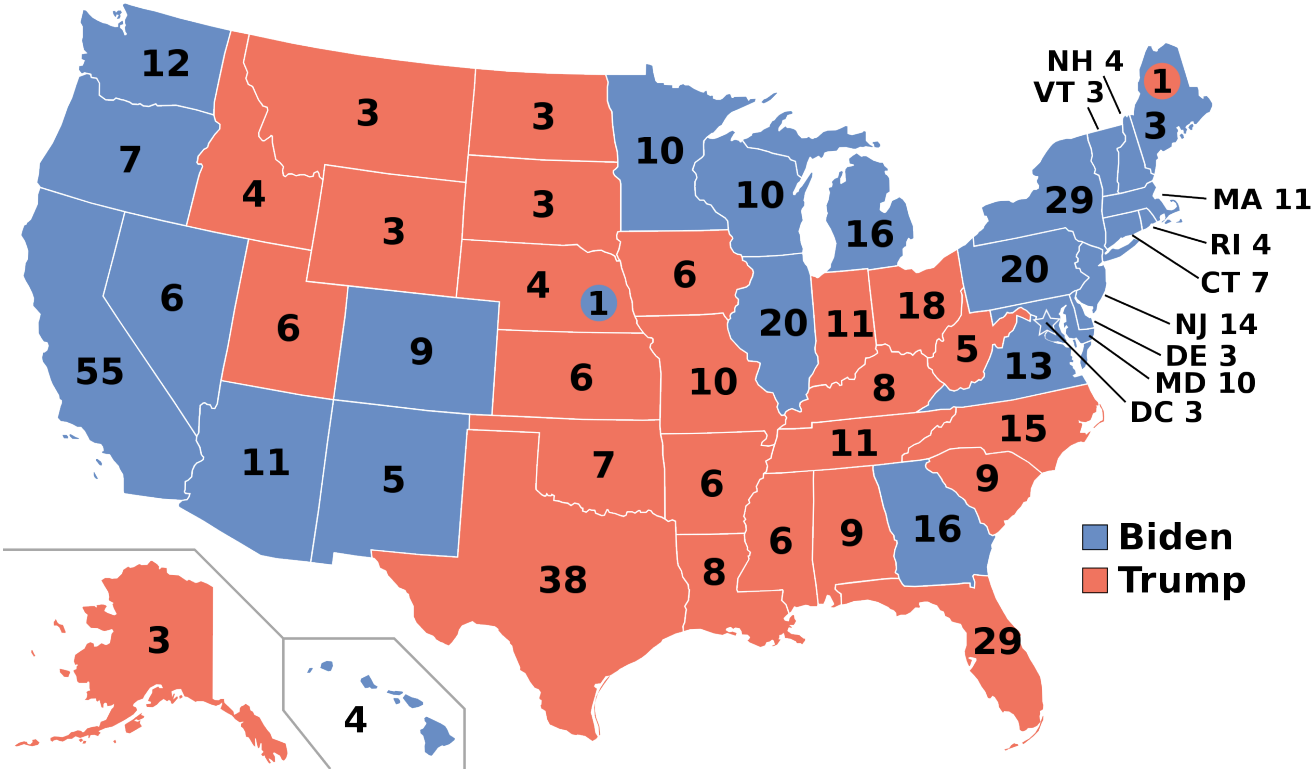
The gender gap is currently one of the most interesting demographically driven voting pattern that gets noticed in the media. The **gender gap** refers to women's tendency to vote for Democratic candidates and men's tendency to vote for Republican candidates. The gender gap didn't used to exist. Women won the right to vote in 1920, and for many decades afterwards there wasn't really a noticeable difference between women and men's voting preferences. Gender-based voting preferences began to change in the 1970s but became fully noticeable with the 1980 election. The gap has grown ever since and continues to fit the pattern of women voting more Democratic and men voting more Republican. There was an 8 percentage point male-female gap in the 1980 presidential race, a 12 percentage point male-female gap in the 2000 presidential race, a 13 percentage point male-female gap in the 2016 presidential race, and a 14 percentage point male-female gap in the 2020 presidential race. (8) Why did the gender gap arise in the 1970s and 80s, and why does it persist? Think about issues on which men and women might differ. Think also about the conservative and progressive tenets described earlier in the text. How long do you think the gender gap will persist in American politics?

Religious denomination and **overall religiosity** are important demographic factors in party identification and voting. Evangelical Christians—those belonging to more fundamentalist, White Protestant denominations—voted 76 percent to 24 percent for Trump over Biden in 2020. Mormons are similarly more likely to vote for Republican presidential candidates. Catholics were fairly evenly split in 2020, with a slight tilt toward Biden, who is Catholic. Jews are more likely to identify as Democrats. Religiosity—the extent to which a person is devout and practices their religion by going to religious services—also plays a role in voting. Christians who regularly attend church services are more likely to identify as Republican. People who say they are religiously unaffiliated are significantly more likely to identify as Democratic. (9) Why do we see these differences in voting and party identity between different religious denominations and religiosity levels? What issues might be relevant to particular denominations, or be perceived differently by those who do and do not regularly attend religious services? What about the relevance of conservative and progressive tenets?

The United States has a pronounced **urban/rural divide** in voting. The generalization to be made here is that urban areas tend to vote Democratic, rural areas tend to vote Republican, and suburban areas are more likely to be battlegrounds that could go either way. Compare the county-level election results in 2020 with the state-level results, and you can see that rural counties tend to vote Republican and urban counties tend to vote Democratic–although there are exceptions like in Alaska and south Texas. According to exit polls in 2020, voters in urban areas supported Democrat Joe Biden by 60 percent to 38 percent, while voters in rural areas supported Republican Donald Trump by 57 percent to 42 percent—almost a mirror image. The suburbs went for Biden by just 2 percentage points. Party identity also mirrors this urban/rural divide. (10) Why do we see these geographic voting-pattern differences in the United States? What issues are perceived differently in urban and rural America? How might a person's geographic identity interact with some of the other demographic variables discussed above?



2020 Presidential Election Results by County



Electoral College Votes by State 2020

What If. . . ?

What if we had nationwide, mail-in balloting for all federal elections? Democrats have introduced legislation in Congress to do just this, but Republicans oppose it. As of this writing, eight states have universal mail-in balloting, but most do not—although many states allow mail-in balloting in certain elections or in certain circumstances such as absentee voting.

David Roberts, who lives in a state that has mail-in balloting, described the process.

> *I got my ballot in the mail several weeks before the election. One night the following week, after dinner, my family gathered around the dining room table. On one side, we had our ballots. On the other, we had Washington state's official voter guide, along with several informal voting guides from some of our favorite publications and people.*
>
> *We went through the ballot vote by vote — president, governor, on down to ballot initiatives on carbon taxes and public transit — discussing the opposing arguments, allowing the boys (11 and 13) to ask questions. Overall, it took about an hour. When we were done, we put our ballots in a special envelope, affixed stamps, and dropped them in the mailbox. That's it.*
>
> *We did this at our leisure, not during proscribed hours. We weren't subject to the vagaries of weather or the idiosyncrasies of polling staff. We didn't have to show any ID or wait in any lines. We had plenty of time to research and mull over each vote.*
>
> *It felt deliberative, civilized, like the way human beings ought to vote.* (11)

References

1. Winston Churchill on the floor of Parliament in November, 1947. Kevin Robillard, "10 Great Quotes About Voting," *Politico*. November 1, 2012.
2. Author's calculations from figures on the University of Florida's United States Elections Project.
3. Drew Desilver, "The U.S. Trails Most Developed Countries in Voter Turnout," Pew Research Center. May 21, 2018.
4. All figures in this paragraph come from the University of Florida's United States Elections Project.
5. Exit Polls, CNN, 2020.
6. No Author, "Trends in Party Affiliation Among Demographic Groups," Pew Research Center. March 20, 2018.
7. Tim Alberta, "Why Democrats are Losing Hispanic Voters," *The Atlantic*. November 3, 2022.
8. Derek Thompson, "Why Men Vote for Republicans, and Women Vote for Democrats," *The Atlantic*. February 9, 2020. Figures from 2020 from CNN exit polls.
9. Exit Polls, CNN, 2020. No Author, "Trends in Party Affiliation Among Demographic Groups," Pew Research Center. March 20, 2018.
10. Exit Polls, CNN, 2020. No Author, "Trends in Party Affiliation Among Demographic Groups," Pew Research Center. March 20, 2018.
11. David Roberts, "Voting by Mail is Fair, Safe, and Easy. Why Don't More States Use It?" *Vox*. May 27, 2017.

Media Attributions

Chapter 58: Beyond Voting

"Our most cherished moment of democratic citizenship comes when we leave the house once in four years to choose between two mediocre white Anglo-Saxon males who have been trundled out by political caucuses, million-dollar primaries and managed conventions for the rigged multiple-choice test we call an election."

—Howard Zinn (1)

Historian Howard Zinn's famous quote from 1976 about voting in America is dripping with sarcasm and frustration. One can hardly blame him, for elections in America are very stage-managed affairs that barely ask Americans to get off their asses to cast a vote for one of two usually uninspiring options. For most voters, elections are passive, momentary experiences—infused with a horserace ethos devoid of real issue substance—and Zinn is right to regret that we hold elections up as vaunted symbols of how democratic we are. And yet, elections do matter. Ask an ordinary Republican if elections matter during a two-term Democratic president's administration. Ask an ordinary Democrat if elections matter after a long run of Republican majority rule in Congress.

Let's assume that you, too, are frustrated with the idea that voting in a federal election every two years is the apotheosis of your political behavior. Good! Let's get a little prescriptive in this chapter. If you want to participate more in the political process, there are a number of things you can do. Let's organize them by ascending effort-level.

Slacktivism

The Internet has allowed the birth of something we never used to have as an option for political participation. It goes by two names and it's difficult to pick between clicktivism and slacktivism, but we'll go with the latter. Slacktivism is a portmanteau. How's that for a word? It means that it is a new word created by smushing together two previously existing words—in this case slacker and activism. The *Cambridge Dictionary* defines **slacktivism** as "activity that uses the Internet to support political or social causes in a way that does not need much effort, for example by creating or signing online petitions." (2) An organization or your friend sends you an online petition for a cause that you support and you click "yes" on it. It doesn't take any effort. In other cases, organizations will solicit your help in a letter-writing campaign. They've prewritten the letter, so all you have to do is click on a link and provide some basic information; the organization then directs thousands of these letters to the targeted politicians. Slacktivism feels good, because you get to add your voice to potentially thousands of other people whom you've never met.

It's unclear whether slacktivism actually produces political change. Part of the problem is that the Internet and social media have sorted people into like-minded groups who speak to each other, share news stories of interest to each other, and serve as the same insular audience for online petitions and boycott drives. Social media algorithms are designed to give you more of what you like, based on the pages you've liked, your searches, with whom you are friends, and what *their* interests are. (3) Thus, there is a preaching to the choir effect in slacktivism, whereby people can sign petitions for issues on which they already have a firm stance and can express outrage over politicians they already dislike. It may feel good, but slacktivism is important only if it results in new action on the part of people who weren't already engaged with a particular issue. Unfortunately, business scholars have suggested that slacktivism "does not lead to increased meaningful support for social causes." (4) What is the point if this sort of action doesn't change minds, get people to the

polls, win elections, or implement policies? This is not an argument for not participating in slacktivism. Rather, it's an argument that slacktivism without further action is pointless.

This is not to argue that social media isn't politically relevant. Indeed, many of the forms of political behavior described here—from demonstrating to organizing—are facilitated by social media tools.

Moderately Active Forms of Political Participation

Old Typewriter

Here's an old but potentially important political act: **write your elected officials**. This is different from clicking on a link so that some organization can send a form letter to a representative or senator or the president. Take the time to write an actual letter. Look at the website for your Congress members and find the contact form, which will allow you to paste your text and submit your letter. To be sure, your letter is unlikely to be read by your congressmen, but staff will read it and may share some samples with their boss. Much more likely is that they will provide the senator or representative with a correspondence summary on particular issues—how many letters received, on what side of the issue, etc.

Tips on writing to an elected official:

- **Keep it brief.** Letters should never be longer than one page and should be limited to one issue. Legislative aides read many letters on many issues in a day, so your letter should be as concise as possible.
- **State Who You Are and What You Want Up Front.** Tell your legislators in the first paragraph that you are a constituent and identify the issue about which you are writing. If your letter pertains to specific legislation, identify the legislation by its bill number, e.g. H.R. ____ or S. _____.
- **Hit your three most important points.** Choose and flesh out the three strongest points that will be most effective in persuading legislators to support your position.
- **Personalize your letter.** Tell your elected official why this legislation matters in their community or state. If you have one, include a personal story that shows how this issue affects you and your family. A constituent's personal story can be the very persuasive as your legislator shapes their position.
- **Personalize your relationship.** Tell your elected official or their staff if you have you ever voted for this elected official or contributed time or money to their campaign. Are you familiar with them through any business or personal relationship? If so, The closer your legislator feels to you, the more powerful your argument is likely to be.
- **Be courteous, to the point, and firm.** Take a firm position. Remember that often your elected official may not know more about the issue than you do. (5)
- **Spell-check your letter before sending it.** The reasons here are obvious**.**

Keep your word processor handy; we're not done with writing. You can also **write for publication** in online news and opinion sites or other political blogs. Writing for publication reaches people across a broader political spectrum than merely sharing with your friends on social media. While competition is stiff, don't be discouraged to submit an op-ed in national publications like *The New York Times*, *The Washington Post*, and *USA Today*, it's very worth trying. But your odds are greater at local and regional newspapers and political sites.

Here are some of Duke University's **tips for effective op-ed pieces**:

- **Keep it short**. Target length is about 750 words.
- **Make one central point.** Don't address several issues in the op-ed. "Be satisfied with making a single point clearly and persuasively. If you cannot explain your message in a sentence or two, you're trying to cover too much."
- **Write one sentence that strongly addresses your central point. Make this be the first sentence or two**. "You have no more than 10 seconds to hook a busy reader, which means you shouldn't 'clear your throat' with a witticism or historical aside. Get to the point and convince the reader that it's worth his or her valuable time to continue."
- **Tell readers why they should care.** "Put yourself in the place of the busy person looking at your article. At the end of every few paragraphs, ask out loud: 'So what? Who cares?' Will your suggestions help reduce readers' taxes? Protect them from disease? Make their children happier? Explain why.
- **Offer *specific* recommendations**. "How exactly should your state protect its environment, or the White House change its foreign policy, or parents choose healthier foods for their children? You'll need to do more than call for 'more research!' or suggest that opposing parties work out their differences."
- **Use the active voice.** "Don't write: 'It is hoped that [or: One would hope that] the government will …' Instead, say 'I hope the government will …' Active voice is nearly always better than passive voice. It's easier to read, and it leaves no doubt about who is doing the hoping, recommending or other action."
- **Showing is better than discussing**. "We humans remember colorful details better than dry facts. When writing an op-ed article, therefore, look for great examples that will bring your argument to life."
- **Acknowledge the other side.** "Op-ed authors sometimes make the mistake of piling on one reason after another why they're right and their opponents are wrong. Opinions that acknowledge the ways in which their opponents are right come across as more credible and balanced. When you see experienced op-ed authors saying 'to be sure,' that's what they're doing."
- **Make your ending a winner.** "In addition to having a strong opening paragraph to hook readers, it's also important to summarize your argument in a strong final paragraph. That's because many casual readers scan the headline, skim the opening, and then read the final paragraph and byline." (6)

Another moderately active form of political participation is to **attend a demonstration** for a cause in which you believe. The effects of political demonstrations range from inconsequential to earth shaking. A good demonstration broadly raises the publics' awareness of a cause, making the news and bringing the issue to people who may never have considered that the issue was even a problem. When thousands or tens of thousands or millions of people gather in one location, or in cities and towns across the country or world, that tells other people and politicians that the issue is salient. For every person who attends the demonstration, typically there are many more who think the same way. Politicians pay attention to that show of support. Consider the historical significance of the 1963 March on Washington, the 1969 Moratorium to End the War in Vietnam, the 1989 Tiananmen Square demonstrations, the 1989 Berlin Wall Protests, the ACT UP AIDS awareness and action demonstrations of the 1980's and 90's, the 2003 Iraq War protests, the 2017 Women's March, and the 2017 People's Climate March.

Another thing you can do is attend local meetings with your U.S. representative and U.S. senators. Meetings with constituent groups can have a significant impact on legislators. Former U.S. congressional staffer Bradford Fitch suggests these effective meeting tips:

- **Go early and connect with staff**. Building relationships with staff in state legislative offices is an important advocacy strategy.
- **Bring talking points**. If you get a turn at the microphone, you want to be ready to make an important point in 30 seconds or less. Be ready to talk about several points, in case someone has already made a good point and you don't want to go over that ground again.

- **Bring a friend or a dozen friends**. It is powerful to see many people all carrying signs and wanting to talk about a salient issue at a local meeting.
- **Be polite**. Being uncivil or rowdy or disrespectful undercuts your message. Why should the politician listen to you? (7)

There are several types of these meetings. A **townhall meeting** is an open forum where lawmakers give a speech and answer questions from the audience. A **tele-townhall meeting** is an online or conference call meeting, usually with more restricted participation. Beware of politicians who only hold tele-townhall meetings, because that's a good sign that they are afraid to fully defend their positions to their constituents. Check your politician's website for information about upcoming meetings or call the staff in the local office. The Townhall Project—whose motto is "Show Up. Speak Out"—does a good job connecting you with these events and keeping track of those members of Congress who are choosing *not* to meet with their constituents. In those cases, the Townhall Project encourages you to organize an **empty chair townhall meeting** and invite your member of Congress to fill that chair. If they don't come, have the meeting anyway and educate the attendees about the congressman's voting record.

Active Forms of Political Participation

A great form of political participation is to **organize, organize, organize**! It's very easy in American society to think of yourself as an isolated individual, powerless in the face of larger forces that have more money and better access than you can imagine. The only way to combat that feeling is to get together with like-minded people and organize yourselves into something that can exert more influence. **Join an already existing organization**. Get to know people in your local or state chapters, and work on meaningful projects. There are a multitude of state and national-level political organizations working to influence public debate, organize protests, lobby legislators, and make life better for millions of Americans. When you have a little extra money, donate some to that organization. If not, give your time. If an organization doesn't exist that specifically addresses your political interest, start a **new organization**. The Internet and social media can be great resources in this regard. This is not slacktivism. This is using the connectivity afforded us by modern technology to organize people and to communicate a common purpose. In 2017, freelance filmmaker Nathan Williams and a small group of organizers and activists started the Townhall Project to help people keep tabs on their elected officials. (8) Katie Fahey, a twenty-six-year-old Michigander and a small group of political novices started Voters Not Politicians, a group that fought gerrymandering in their state. They succeeded in getting a proposal on the ballot to change the state constitution to have a multi-partisan commission draw district lines instead of the legislature. It won with 60 percent of the vote. (9)

Consider how Black Lives Matter started in the wake of police shooting unarmed Michael Brown in Ferguson, Missouri, 2014. Journalist Wesley Lowrey described the spontaneous way in which responses to that outrage sparked a new organization:

> "Across the country, at a time when Twitter had yet to become the primary platform for news consumption, a thirty-one-year-old activist in Oakland named Alicia Garza penned a Facebook status that soon went viral. She called the status 'A love letter to black people.'
>
> *'The sad part is, there's a section of America who is cheering and celebrating right now. and that makes me sick to my stomach. We GOTTA get it together y'all,' she wrote, 'stop saying we are not surprised. That's a damn shame in itself. I continue to be surprised at how little Black lives matter. And I will continue that. stop giving up on black life.'*
> *'Black people. I love you. I love us. Our lives matter,'* she concluded.

> Her friend and fellow activist Patrisse Cullors found poetry in the post, extracted the phrase 'black lives matter' and reposted the status. Soon, the two women reached out to a third activist, Opal Tometi, who set up Tumblr and Twitter accounts under the slogan." (10)

Black Lives Matter became a fully realized organization. It describes itself as "A chapter-based, member-led organization whose mission is to build local power and to intervene in violence inflicted on Black communities by the state and vigilantes." (11) #Black Lives Matter became a rallying cry across the country during the protests against police violence in 2020.

Demonstrators in New York City.

Political scientist Eitan Hersh points out that one important way to become politically engaged is to leave behind what he calls political hobbyism and **get involved with a political party or campaign**. Too many people are failing to take this obvious step. Just before an election, he asked a random sample of 1,000 Americans if they thought the Democratic Party or the Republican Party had the right ideas for improving life in the United States. About 30 percent of the respondents said Republicans, about 30 percent said Democrats, 30 percent said neither, and 10 percent said both. He then asked those who did have a party preference whether they were involved in any volunteer work to help advance those ideas. The result? "83 percent of the Democratic supporters said no, they didn't participate in any volunteering. Ninety percent on the Republican side said no." (12) Out of his sample of 1,000 Americans, only about 81 people were doing volunteer work with a political party or campaign.

Political parties and campaigns have many ways for you to get involved. Don't leave it to others. Parties have numerous volunteer positions, from certifying the accounts to putting up yard signs, from being county-level leaders to people who staff phone banks. Parties are in particular need of developing a cadre of long-term volunteers who can be counted on to volunteer for a variety of projects and initiatives over time. This develops networks and deepens the party's resources. Similarly, campaigns are fairly lean and rely on volunteers, although this need is more seasonal than that for parties. Canvassing door to door with a friend is a great way to spend the day, especially in the evening when you gather with others at a pub to give your tired feet a rest.

Finally, you could **run for political office**. People do it all the time. Why not you? A clerk at my grocery store ran for U.S. Representative. She lost but told me that it was an extremely valuable and empowering experience. Volunteering for a political party or a campaign is a great way to gain experience before you decide to run for office yourself. In addition, there are websites and books that can guide you through the process of running for local, state, or federal office. (13) Thanks to the Internet, you can even crowdsource funding for your campaign.

What If. . . ?

What if you became an elected official and you passed a law that granted all employees twenty-four hours per year of paid time-off for political activity? This time would be in addition to vacation time and would allow people to vote, participate in demonstrations, volunteer for campaigns, and attend political conventions. Americans have less time away from work than workers in most comparably wealthy countries. (14) Ensuring that we can take time off of work for political activity—but not eat away at our vacation time—would send an important message about what we value.

References

1. Howard Zinn, “Beyond Voting,” HowardZinn.org. October 19, 2016. Originally in the *Boston Globe*in 1976.
2. Cambridge Dictionary.
3. Melissa Priebe, “The Social Media Sorting Hat: How Algorithms Drive Your Exposure to News and Politics,” The College of Communication Arts and Sciencesat Michigan State University. August 13, 2019.
4. Kirk Kristofferson, Katherine White, and John Peloza, “The Nature of Slacktivism: How the Social Observability of an Initial Act of Token Support Affects Subsequent Prosocial Action,” *Journal of Consumer Research*. April, 2014. Page 1163.
5. No Author, “Tips on Writing to Your Elected Officials.” aclu.org. No date.
6. No Author, “Writing Effective Op-Eds,” Duke UniversityCommunicator Resources. No date.
7. Bradford Fitch, “How Citizens Can Influence Congress at Townhall Meetings,” *Roll Call*. June 23, 2015.
8. Colby Itkowitz, “Have Something to Say to Your Member of Congress? These Guys are Making It Easier to Find Them,” *Washington Post*. February 17, 2017.
9. Riley Beggin, “Katie Fahey of Voters Not Politicians to Take Michigan Model National,” *Bridge*. March 31, 2019.
10. Wesley Lowry, “Black Lives Matter: Birth of a Movement,” *The Guardian*. January 17, 2017.
11. Black Lives Matter.
12. Eitan Hersh, *Politics is for Power: How to Move Beyond Political Hobbyism, Take Action, and Make Real Change*. New York: Scribner, 2020. Page 141.
13. Runforoffice.org. June Diane Raphael and Kate Black, *Represent: The Women’s Guide to Running for Office and Changing the World*. New York: Workman Publishing, 2019. Amanda Litman, *Run for Something: A Real-Talk Guide to Fixing the System Yourself*. New York: Simon & Schuster, 2017. Miles Parks and Chloee Weiner, “How to Run for Office,” *NPR*. October 17, 2019.
14. G. E. Miller, “The U.S. is the Most Overworked Developed Nation in the World,” 20 Something Finance. January 13, 2020.

Media Attributions

Chapter 59: Civil Disobedience

"This people must cease to hold slaves, and to make war on Mexico, though it cost them their existence as a people."

"If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth . . . but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn."

—Henry David Thoreau (1)

What is Civil Disobedience?

In the mid-nineteenth century, **Henry David Thoreau** coined the term civil disobedience in his essay called *On the Duty of Civil Disobedience*. Political philosopher John Rawls defined **civil disobedience** as "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government." (2) The law being violated does not have to be the law that people find objectionable. Sometimes it is and sometimes it isn't. When the law requires or allows lunch counters in department stores be reserved for Whites only, and African Americans sit there anyway, they are directly violating the objectionable law. They may also stage an unpermitted demonstration on the street outside the department store, in which case they are violating city policies on demonstrations to call attention to the segregation laws surrounding places of public accommodation—in this case, Whites only lunch counters in department stores. Both actions are examples of civil disobedience.

When people practice civil disobedience, they must do so thoughtfully, knowing and accepting the consequences of their actions. When one knowingly and publicly violates the law, one must be prepared to go to jail. Indeed, groups engaging in civil disobedience will sometimes do so with the intent of overtaxing local police and judicial resources, because that very fact serves to highlight the importance of the cause.

Civil Disobedience: Illegally Blocking a Street in New York City

The nonviolent "requirement" for civil disobedience is somewhat controversial in the field of political philosophy and among activists. Nonviolent direct action has a long and celebrated history. (3) Mohandas Gandhi and Martin Luther King, Jr. were famous for advocating and practicing strict nonviolent disobedience. However, others argue that strict nonviolence puts activists in a box. For example, political philosopher Robin Celikates has argued that slavish devotion to nonviolence is an unnecessary addition to the definition of civil disobedience. He argues for legitimate blockades, directly confronting security forces, and sabotaging facilities used for animal experiments or facilities built on disputed lands. In part, Celikates argues that these actions should be considered civil disobedience because state authorities have a tendency to pick and choose among political groups—labeling as violent any

groups with whom they disagree, while not doing so for other groups. "Governments," he writes, "pursue a strategy of divide and rule with regard to protest by portraying and celebrating certain forms of protest as good (good in terms of who protests, how and with what aim) and labeling and repressing other forms of protest – often those of marginalized groups – as violent, uncivil and criminal." (4)

How Does One Decide When Civil Disobedience is Required?

The case for civil disobedience as a legitimate form of political behavior is easiest to make in dictatorships, oligarchies, theocracies, and other authoritarian regimes that don't have institutions and practices intended to translate the will of the people into law and public policy. However, civil disobedience is also legitimate in places like the United States, which is characterized by attenuated democracy and oligarchic tendencies. There is always a tension in democracy between the desire to empower the majority and the classical liberal need to ensure that minority rights are not trampled. Sometimes the majority gets it wrong with respect to law or policy, and the political system is unresponsive to within-system efforts to fix the problem. However, these sorts of situations give rise to several dilemmas. How do we know when law or policy are sufficiently wrong? Who is allowed to make that determination? How do you know when you have sufficiently exhausted legal efforts to address the wrong? How does one decide when civil disobedience is required?

While confined in Birmingham City Jail in 1963 for civil disobedience targeting that city's segregationist policies, **Martin Luther King, Jr**. wrote a letter in response to a letter in local papers from eight local clergy who criticized the actions of the civil rights movement of which King was a leader. In his famous ***Letter from Birmingham Jail***, King argued that unjust laws must be opposed, even if it means breaking the law. (5) He then made arguments regarding **how to recognize just and unjust laws**. He gave the following advice:

- "A just law is a man-made code that squares with the moral law or with the law of God. An unjust law is a code that is out of harmony with the moral law."
- "Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality."
- "An unjust law is a code that a majority inflicts on a minority that is not binding on itself."
- "An unjust law is a code that is inflicted upon a minority which that minority had no part in enacting or creating because they did not have the unhampered right to vote."
- "There are some instances when a law is just on its face and unjust in its application."

What do you think of those arguments? Can you think of concrete examples of what might fit each definition of just and unjust? Do you find them equally applicable? Do you think reasonable people would be able to apply those rules easily, or might they disagree about them?

Martin Luther King, Jr. During the March on Washington in 1963

How long must we live with injustice before we act? Many would argue that we must give organizing, lobbying, voting, and other forms of political engagement a chance to fail before we opt for civil disobedience. Thoreau acknowledged that some forms of injustice can be waited out, giving them time to "wear smooth" in the ordinary course of political development. He was most concerned with laws and policies that turn us into unwilling instruments of oppression or injustice. Those, he argued, merited immediate civil disobedience. King and his colleagues in the civil rights movement were continually berated for pushing for too much change too quickly. He responded in the *Letter from Birmingham Jail* this way:

> *"Frankly, I have never yet engaged in a direct action movement that was 'well timed,' according to the timetable of those who have not suffered unduly from the disease of segregation. For years now I have heard the words 'Wait!' It rings in the ear of every Negro with a piercing familiarity. This 'Wait' has almost always meant 'Never.'"*

Prominent Examples of Civil Disobedience

There are many historically significant examples of civil disobedience, and there's no rational way to decide which ones a college-educated person should know. Should you know about demonstrations blocking clinics that provide abortion services? Should you know about actions freeing animals being used in experiments? Yes, of course. To make matters worse, some prominent examples of civil disobedience don't come from the American experience. Therefore, we're going assert—without a defense—that any college-educated person should be familiar with the following examples of civil disobedience. Knowing these examples will help you situate contemporary examples you read about in the news–or your own actions–in a broader historical context.

Henry David Thoreau—As mentioned above Thoreau coined the term civil disobedience, and his essay *On the Duty of Civil Disobedience* has certainly been one of the most globally influential pieces of political writing by an American who wasn't a politician. Disgusted with slavery and the war with Mexican, which he saw as an unjust attempt to extend slavery to new territory, Thoreau refused to pay his Massachusetts poll tax and spent a night in jail. He said that prison was "the only house in a slave-state in which a free man can abide with honor." His friends paid his tax without his consent and he was released. When his friend Ralph Waldo Emerson asked him why he had gone to jail, Thoreau reportedly replied "Why did you not?" (6)

The White Rose—In the 1930's and 40's, numerous people resisted the Nazi regime in Germany. People rose up in extermination and work camps, committed sabotage, tried to assassinate Adolph Hitler, and helped Jews and others escape persecution. One resistance movement was called the White Rose, which consisted mostly of young people who abhorred the regime's racism and antisemitism as well as the destruction unleashed when Germany invaded western and eastern Europe. Among the leaders of the White Rose were siblings Hans and Sophie Scholl and other college students such as Christoph Probst, Alexander Schmorell, and Willi Graf. Kurt Huber, a Munich University professor, acted as a mentor to the group. The White Rose wrote graffiti on buildings in Munich—e.g., Hitler Mass Murder, Freedom—and printed thousands of leaflets that they secretly left in university buildings and elsewhere. On February 18, 1943, the Scholls were seen distributing leaflets at the university and Nazi authorities rounded up the group's leadership. **Hans Scholl**, **Sophie Scholl**, and **Christoph**

Probst were found guilty of treason four days later and were beheaded. Schmorell, Graf, and Huber were also later executed, and ten other members were sentenced to prison. The British Royal Air Force got ahold of the last leaflet printed by the White Rose and dropped hundreds of thousands of copies of it over Germany. (7)

Gandhi—In 1893, while serving as a lawyer in South Africa, **Mohandas Gandhi** took up the cause of discrimination against Indians. On one occasion, Gandhi refused to move from a first-class railroad car when a White passenger objected. He was thrown off the train at the next stop. After the end of World War I, Gandhi emerged as a leader of India's independence movement against colonial British rule. At the Massacre of Amritsar in 1919, colonial forces opened fire on unarmed demonstrators and killed 400 of them. Gandhi organized marches, boycotts, walkouts and tax protests. Gandhi's most famous act of defiance was the **Salt March of 1930**. The British had imposed laws against Indians collecting or selling salt and had imposed a tax that fell heavily on poor Indians. Gandhi walked for twenty-four days over 240 miles from his home to the coast where he broke the law by gathering salt from evaporated seawater. Gandhi was named *Time* magazine's Man of the Year in 1930. India and Pakistan gained independence in 1947. Gandhi was assassinated in 1948 by Hindu nationalist Nathuram Godse, who did not like Gandhi's tolerance of Muslims. (8)

The American Civil Rights Movement—The civil rights movement engaged in coordinated political, legal, and nonviolent direct-action strategies to overcome housing segregation, educational segregation, voter discrimination, segregation of public accommodations, and a variety of other manifestations of racism. In 1955, **Rosa Parks** refused to move to the "colored section" of a public bus. She was not the first to engage in this kind of protest, but she became the most famous because her action stimulated a city-wide boycott of Montgomery, Alabama's bus system by African Americans. The boycott's organizers elected newcomer Martin Luther King, Jr. to coordinate and lead the effort. In another example, the **Greensboro Four**—Ezell Blair Jr., David Richmond, Franklin McCain, and Joseph McNeil—all of whom were students at North Carolina Agricultural and Technical College, sat down at a segregated lunch counter at a Woolworth's store and refused to leave. Their actions spread to college towns across the South. (9)

Climate Strikes—In 2018, **Greta Thunberg**, a 16-year-old Swedish student, started boycotting school on Fridays to call attention to the climate emergency. Her action blossomed into a worldwide #FridaysForFuture movement. Millions of students in 117 countries have participated in multiple iterations of this form of protest. The goal of the movement is to "Sound the alarm and show our politicians that business as usual is no longer an option." (10) As if to show the students how clueless politicians were, British Prime Minister Theresa May criticized the protesters and said that each demonstration "increases teachers' workloads and wastes lesson time." (11) God forbid we take time away from school lessons to fight something as trivial as a climate crisis that threatens to disrupt human civilization. When she was asked to speak at the United Nations Climate Action Summit in 2019, Thunberg stuck to her values and made the crossing from Sweden to New York by sailboat rather than jet plane.

As you can see, the consequences of civil disobedience can range from missing school to losing one's life. Civil disobedience has achieved many policy and law changes in human history, and it will always be in the political activist's toolkit.

References

1. Henry David Thoreau, *On the Duty of Civil Disobedience*. 1849. Project Gutenburg.
2. John Rawls, *A Theory of Justice*. Cambridge, MA: Harvard University Press, 1971. Pages 364-366.
3. Mark Kurlansky, *Non-Violence: The History of a Dangerous Idea*. New York: Random House, 2008.
4. Robin Celikates, "Democratizing Civil Disobedience," *Philosophy and Social Criticism*. March, 2016. Page 3.

5. Martin Luther King, Jr., *Letter from Birmingham Jail*. April 16, 1963. Stanford UniversityMartin Luther King, Jr. Research and Education Institute.
6. Howard Zinn, *A People's History of the United States*. New York: Harper Collins, 2003. Page 156. Jill Lepore, *These Truths: A History of the United States*. New York: W.W. Norton & Company, 2018. Pages 246-247.
7. Richard J. Evans, *The Third Reich at War*. New York: Penguin Books, 2008. Page 628-629.
8. Rajmohan Gandhi, *Gandhi: The Man, His People, and the Empire*. University of California Press, 2008.
9. No author, "Greensboro Sit-in," History.com. February 4, 2010.
10. Nives Dolsak and Aseem Prakash, "Climate Strikes: What They Accomplish and How They Could Have More Impact," *Forbes*. September 14, 2019. Damian Carrington, "School Climate Strikes: 1.4 Million People Took Part, Say Campaigners," *The Guardian*. March 19, 2019.
11. Alan McGuinness, "Theresa May Criticizes Pupils Missing School to Protest Over Climate Change," *Sky News*. February 15, 2019.

Media Attributions

- Civil Disobedience © Jonathan McIntosh is licensed under a CC BY (Attribution) license
- MLK © U.S. National Archives and Records Administration is licensed under a Public Domain license

Chapter 60: Political Violence

"Black men are about 2.5 times more likely to be killed by police over the life course than are white men . . . American Indian men are between 1.2 and 1.7 times more likely to be killed by police than are white men . . . Latino men are between 1.3 and 1.4 times more likely to be killed by police than are white men . . ."

—Frank Edwards, Hedwig Lee, and Michael Esposito (1)

"Others Take Notice! First and Last Warning!"

—Note pinned to the body of union organizer Frank Little, who was found in 1917 hanging from a railroad trestle in Butte, Montana (2)

Three Forms of Political Violence

A Swedish sociologist named **Johan Galtung** made important contributions to our understanding of political violence. You should be familiar with Galtung's **three forms of violence** that can characterize any political system.

Direct violence is fairly self-explanatory. It refers to a specific destructive act by a definable actor that limits the bodily or mental potential of the persons who are the object of the act. Murder, rape, assault and the like are examples of direct personal violence, as are forms of torture and verbal abuse that have physical as well as mental effects. American history has been rife with direct violence: assassinations, bombings, lynching, riots, military campaigns, and the like. Police violence is direct violence.

Structural violence refers to the same limitations of bodily or mental potential, but that result from the way political, social, or economic systems are organized, instead of via direct action by a specific individual or group. Often, there is no readily definable actor in structural violence, but people are nevertheless being hurt, killed, or mentally anguished. It's called structural violence because violent outcomes appear to be built into the structure of the system; people are hurt *because* the system operates the way it does. Galtung provided some examples of structural violence: "Thus, when one husband beats his wife there is a clear case of personal [direct] violence, but when one million husbands keep one million wives in ignorance, there is structural violence. Correspondingly, in a society where life expectancy is twice as high in the upper class as in the lower classes, violence is exercised even if there are no concrete actors one can point to directly attacking others, as when one person kills another." (3)

Cultural violence refers to "those aspects of culture, the symbolic sphere of our existence," religion, ideology, language, art, and science, "that can be used to justify or legitimize direct or structural violence." (4) The range of possibilities here is very wide, but you might recognize the following examples:

- Media censorship or self-censorship that minimizes the brutality of war by refusing to show certain images or describe certain events. The same can be said of media coverage of mass shootings, with the media

always stopping short of showing bodies riddled with gaping bullet holes.
- The constant association of the words "patriot" and "hero" with military figures, while those terms are almost never associated with anti-war demonstrators, children striking for environmental awareness, or teachers.
- Ideological assertions that poverty and significant inequality are natural.
- Religious exhortations to kill or shun the enemies of God.
- Educational institutions that go out of their way to avoid having students grapple with issues such as capitalism as practiced in the United States, religion, sexual orientation, environmentalism, race, class or gender, thereby blinding students to the realities of direct and structural violence associated with these dimensions of human existence.
- Constantly suppressing alternatives to economic or political realities. Media drumbeat that the *status quo*is really the only way to arrange our businesses, our politics, and our society.
- Media glorification of "tough cops" who use violence.

Galtung referred to direct violence as a discrete *event*, structural violence as a *process*, and cultural violence as a *permanence* that legitimized and rendered acceptable the other two.

The Overall Pattern of Political Violence in American History

The difficulty in understanding political violence in America's past and present is that it seems like random noise. It is not. When we focus our attention on the three forms of violence in American political history, a fairly clear ideological pattern emerges. Remember that in the chapter about the Supreme Court as an ideological actor, we talked about conservatism and progressivism. Conservatism is an ideology that defends existing privilege and power. It's worth repeating political scientist Corey Robin's summation: "Conservatism is the theoretical voice of . . . animus against the agency of the subordinate classes. It provides the most consistent and profound argument as to why the lower orders should not be allowed to exercise their independent will, why they should not be allowed to govern themselves or the polity. Submission is their first duty, and agency the prerogative of the elite." (5) Progressivism, on the other hand, is an ideology that believes in using the power of government to help all people live full lives, solve social problems, and counter the power of business interests. It is an emancipatory ideology in that it hopes to disrupt established hierarchies, promote equal rights and opportunity, and create a society that is less economically and politically unequal. Conservatives and progressives oppose each other because the progressive project is directly opposed to the conservative project.

It's plain from examining America's past and present that political violence is much more frequently used to further conservative aims than progressive ones. Time and time again, those with power who feel their privileges are threatened have gone to drastic lengths to aggressively defend their position. They have repeatedly engaged in direct violence and benefited from structural violence that keeps subordinated people in their place. They have relied on assassination, bombing, lynching, rioting, military or police assault, purging people from their jobs, violence-first policing techniques, and mass incarceration. Progressive groups, on the other hand, are far more likely to march in the streets for civil rights, hold anti-war demonstrations in front of public buildings, tie themselves to the White House gates to protest the lack of women's suffrage, try to peacefully block construction of nuclear power plants, and other similar actions.

To be sure, progressives have sometimes employed violence to further their goals. Consider that some leftist groups like the Weather Underground or the Black Liberation Army bombed ROTC buildings on colleges campuses as well as other buildings they associated with American imperialism and racism. Usually, these groups took pains to detonate their bombs when they thought the buildings were empty, so relatively few

people were killed by the thousands of bombings that took place over several decades. (6) Altogether, this left-wing bombing campaign killed far fewer people than did Timothy McVeigh's one bombing of the federal building in Oklahoma City—an act that was specifically intended to kill many people and start an uprising. It is also true that some environmentalist and animal rights groups have destroyed property to further their causes. David Helvarg argues that such violence has more than been matched by violence directed at environmentalists. (7)

Examples of Direct, Structural and Cultural Violence

Let's review several prominent examples of how direct, structural, and cultural violence interact to maintain privilege and sustain existing power hierarchies. Keep in mind that what follows is necessarily superficial because this is a survey text of American politics that has to cover many topics. These are just a few examples among many we could have explored. Imagine the direct, structural, and cultural violence that for years kept women in subordinate positions to men, and still does, despite centuries of legal, social, and cultural progress. Consider the direct violence inflicted upon children separated from their undocumented parents and put in holding cells, and the structural violence of an economic system that allows agribusinesses to pull low skilled workers into the country in the first place, only to terrorize them with harassment, precarious employment, exposure to toxic chemicals, and the ever-present threat of deportation. (8) Reluctantly setting aside those and many other cases, let's look at three main examples.

White Nationalism

Ku Klux Klan Members in Colorado in 1921

If one were to take a cynical view of American political history, it would be tempting to sum it up as follows: A group of White merchants and plantation owners got together to establish that all men are created equal, and then spent the ensuing centuries proving to people of color that they didn't really mean to include them in their understanding of universal equality. In fact, whenever people of color demanded that we actually live up to our founding principles, Whites in positions of economic and political power acted to violently suppress those demands.

Often, maintaining White power and privilege took the form of direct violence. America's history of lynching is a good example. **Lynching** refers to the extra judicial killing by persons or a mob that is incited to take the law into its own hands. From 1882 to 1968, there were 4,743 documented lynchings in the United States, and nearly 73 percent of them were of Black people. (9) Surely, many more people were lynched in the period from the end of the Civil War to 1882, and there are probably some lynchings in the later period that did not get recorded. Or consider the targeted assassinations and bombings that were directed at civil rights leaders. In 1963, a White supremacist Klansman assassinated **Medgar Evers**, the Mississippi Field Secretary of the National Association for the Advancement of Colored People (NAACP). Evers was ambushed and shot in the back as he walked from his car to his house. He died in front of his two small children. The assassin, Byron De la Beckwith, was twice acquitted by all White juries—the fact that

African Americans were routinely excluded from juries is a great example of structural violence—and congratulated by the state governor. The case was finally reopened 30 years later, and De la Beckwith was convicted of murder in 1994. (10) Let's stay in Mississippi and remember the 1964 killings of **Andrew Goodman**, **James Chaney**, and **Michael Schwerner**, three young men who were working on voter registration, education, and civil rights when they were stopped for speeding and taken to the Neshoba County sheriff's office. They disappeared after that. After six weeks of searching—during which the bodies of nine (!) Black men were found in the nearby woods and swamps—the bodies of Goodman, Chaney, and Schwerner were found buried in an earthen dam. Eighteen White men were indicted, and eventually seven were convicted and served time. (11)

These examples of White supremacist violence are but a small sampling of the broader universe of such actions that range from colonial times to the present. Consider the tragic example of the White coup in Wilmington, North Carolina. White supremacists, fed up that Wilmington had developed into a prominent example of a successful mixed-race community, stormed through the town on November 10, 1898, murdering and beating people, destroying property, and forcing progressive people to flee. All together, the mob of Whites killed at least 60 Black men. (12) And we should not forget that the *threat* of violence can be just as effective. Hateful graffiti; nooses put near houses, dorm rooms, or school lockers; and racist chants by large groups serve to put people of color on notice that they should not venture into spaces and roles that "belong" to Whites.

The effects of direct violence and threats are reinforced through structural violence. The **school to prison pipeline**, for example, affects young people of color more than it does Whites. This pipeline refers to the way in which students are identified as struggling or disruptive in school and funneled out of schools to juvenile detention and criminal justice systems. Facing disproportionately more suspensions, expulsions, and arrests in schools, and often excluded from honors or college-track courses, students of color are more likely to enter juvenile justice systems, which further limits their opportunities, often resulting in their incarceration as adults. (13)

Or consider another example. The United States has a problem with its **militarized approach to policing**, which seems to be a function of three things. America is a heavily armed society, with more personal firearms than there are people to carry them. This means that police have to go into every domestic violence situation, every robbery at a convenience store, and every traffic stop with the knowledge that the person they encounter could very well be armed. The second factor is that war metaphors have taken over our cultural understanding of the relationship between the police and society. Since the late 1960s, our politicians have led us into waging twin wars on crime and drugs, and our movies are rife with scenes of uncivilized criminals kept at bay only through the armed response of police. Finally, America's imperialist and warlike approach to global relations has ensured a steady stream of military equipment and tactics that are made available to police forces around the country. The militarized approach to American policing is a plague that falls on all of us, but disproportionately on people of color. As the writer Mychal Denzel Smith argued in his analysis of a midnight SWAT raid in Detroit in which a seven-year-old girl named Aiyana Stanley-Jones was shot while she slept, "Part of what it means to be Black in America now is watching your neighborhood become the training ground for our increasingly militarized police units." (14) In an interesting study in the *Journal of the National Medical Association*, researchers found that state-level structural racism—as reflected in residential segregation and disparities in incarceration rates, educational attainment, employment, and economic indicators—is directly related to the prevalence of police shootings of unarmed Black suspects. The authors concluded that "For every ten-point increase in the state racism index, the Black-White disparity ratio of police shooting rates of people not known to be armed increased by 24%." (15)

Colonists Over Indigenous Peoples

As noted toward the beginning of this text, America was founded by European colonists who continued the colonial expansion until it consumed the continent. No one knows for sure how many native people inhabited the Americas before the Europeans came. Estimates range from a low of 1.8 million people to a high of more than 100 million people. Prior to 1492, the Americas possessed sophisticated cities, many agricultural settlements, and uncounted nomadic groupings. In a historical blink of an eye, those civilizations and populations were decimated. By 1900, the population of Native Americans had dropped to around half a million. This disaster destroyed more than people. As Charles Mann has written, "Languages, prayers, hopes, habits, and dreams—entire ways of life hissed away like steam." (16)

The majority of this assault came in the form of pandemic disease: Native American populations had scant defenses against smallpox, typhoid, bubonic plague, influenza, mumps, measles, whooping cough, cholera, malaria, and scarlet fever. The remaining assault took the form of direct and structural violence, justified then and now by cultural violence.

As with our discussion of direct violence against civil rights leaders, we can only touch on a couple of illustrative examples here. Regardless of whether you look at New England, the South, the Ohio Valley and the Great Plains, or the West, the time period from the early 1600s to the official closing of the American frontier in 1900 was marked by assaults and treachery on the part of colonial invaders and counter attacks and strategic retreats on the part of indigenous people. The **Indian Removal Act of 1830** must surely go down as one of the most aggressively imperialistic laws in American history. The Act euphemistically sought to "provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi." (17) Many tribes were peacefully removed from their lands within existing states and pushed west, only to face pressures again when the frontier expanded westward. The experience of nations like the Cherokee, the Seminole, and other tribes who opted not to trade their land indicated that the polite language of the Removal Act was a front for naked aggression. According to President Andrew Jackson, the Removal Act promised what Adolph Hitler would later refer to in the context of Nazi Germany as *lebensraum*: Indian removal, he said, "will place a dense and civilized population in large tracts of country now occupied by a few savage hunters." Cherokee leaders addressed the United States and said in no uncertain terms that "We wish to remain on the land of our fathers. We have a perfect and original right to remain without interruption or molestation." In what became known as the **Trail of Tears**, up to 100,000 indigenous people—men, women, and children—were removed from their lands in Tennessee, Georgia, and Alabama and force marched during the winter of 1838-39 to new lands west of the Mississippi River. About half of the Cherokee, Muskogee, and Seminole perished along the way, and about 15 percent of the Chickasaws and Choctaws also died during the march. (18)

A Delegation of Arapaho and Cheyenne Meet with the U.S. Military on Sept. 28, 1864, at Camp Weld, Colo., to Seek Peace on the Plains East of Denver, Almost Two Months Before the Sand Creek Massacre.

The progression of colonial settlement across the continent was marked by a series of massacres and battles. Starting in 1539 with a massacre in what was to become Florida to the Wounded Knee massacre in 1890, European-Americans perpetrated hundreds of attacks on unarmed indigenous people who, in turn, committed atrocities of their own as their territory and way of life disappeared under the colonial onslaught. (19) Consider just two of these events. In November 1864, a group of Arapahoe and Cheyenne camped along Sand Creek in eastern Colorado, thinking they were under the protection of soldiers at Fort Lyon. Instead, Major Scott Anthony and Colonel John Chivington planned an attack on the peaceful encampment. When they learned of the plans, some soldiers such as Captain Silas Soule, Lieutenant Joseph

Cramer, and Lieutenant James Connor protested, saying that "It would be murder in every sense of the word" and a violation of pledges of safety that had been given to the tribes. The **Sand Creek Massacre** was a war crime, pure and simple. The encampment set no watch and was attacked by 700 soldiers at first light while its occupants slept. The cavalry, led by Chivington, killed 133 people, 80 percent of whom were women and children. Many were scalped or otherwise brutalized. (20)

Nearly two years before, the largest massacre of indigenous people occurred in what would later be southern Idaho. The **Bear River Massacre** in January of 1863 had a familiar story. After thousands of predominantly Mormon pioneers entered the area, the prospects of the local Shoshone people looked increasing desperate. Unable to feed themselves, the Shoshone ended up dependent on food donations from Mormon settlers. After a Native American attack on some miners, Colonel Patrick Connor led a group of volunteers from Fort Douglas to an encampment of Shoshone along the Bear River. Colonel Connor appeared to have made his decision to attack the Shoshone absent any definitive proof of their involvement in the attacks and with the full intention of not taking prisoners. The Shoshone had taken some defensive measures, but their weaponry was clearly inferior, and they were desperately short of ammunition. The troops surrounded the encampment and attacked at dawn on January 29. After a four-hour battle, the infantry and cavalry almost completely annihilated the Indian encampment. Connor, who was promoted to General after the battle, estimated that his men had killed between 250 and 300 men, women, and children—the deadliest massacre of Native Americans in U.S. history—and one observer claimed that as many as 265 women and children were among the dead. Visiting the site five years after the massacre, a *Deseret News* reporter wrote that "The bleached skeletons of scores of noble red men still ornament the grounds." (21)

In addition to direct violence, the structural and cultural violence against indigenous Americans has been impressive in its impact. Even without the massacres and battles, it appears that the very machinery of colonization would have doomed them anyway. The colonial mechanism worked like this: Backed by military forces, settlers increasingly pushed into lands claimed and not claimed by the United States. Disputes between settlers and indigenous people inevitably arose and served as evidence that the Native Americans were savages. Sayings such as **General Philip Sheridan's** "The only good Indians I ever saw were dead" typified the culture of the colonists. Pushed to ever marginal lands and reservations, the way of life of one tribe after another changed forever. As the invaders took the lands of Native Americans by theft, deception, and treaty, they also took steps to establish property rights and the rule of law—for themselves and their descendants—in the Wild West. (22) Native children were shipped off to **American Indian boarding schools**, the goal of which was to destroy indigenous language and culture, as kids were taken from their parents and assimilated into Anglo culture. **Colonel Richard Henry Pratt**, director for 25 years of one of these schools, famously said that his goal was to "Kill the Indian, save the man." According to the National Native American Boarding School Healing Coalition, "By 1926, nearly 83 percent of Indian school-age children were attending boarding schools." (23) Meanwhile, communities of indigenous people were starved of capital and broad economic development by the logic of capitalism, condemning many of them to cycles of poverty, crime, ill health, and social dysfunction. Only the courageous and dedicated indigenous people who know this history have saved the remains of their cultural heritage.

Suppression of Working People

Considerable violence has been and continues to be directed at workers who refuse to take on the roles elites want them to play in America's brand of capitalism—which is to say that violence is targeted at workers who want to organize together, demand better pay and working conditions, and who want a greater voice in the economy.

The unremitting direct violence against working men and women in American history is not something typically taught in high school. Indeed, I was not taught much about the nature of the relationship between workers and capital. I was not taught, for example, that a president as revered as **Abraham Lincoln** warned against giving capitalists too much power. In his 1861 State of the Union letter to Congress, Lincoln took time away from addressing the outbreak of the Civil War (!) to make publicly known his fear that capital was threatening to usurp labor as the primary consideration of government. He said "Labor is prior to and independent of capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." He then issued a warning to working men that they should not surrender "a political power which they already possess, and which if surrendered will surely be used to close the door of advancement against such as they and to fix new disabilities and burdens upon them till all of liberty shall be lost." (24) Sociologist James Loewen confirmed in his study of school textbooks that despite the fact that "social class is probably the single most important variable in society," American history textbook "treatments of events in labor history are never anchored in any analysis of social class." (25)

Frank Little. Union Organizer Killed in 1917

The United States had a *de facto* civil war that lasted 100 years between the capitalist class and workers who tried to organize to better defend their interests. Let's look at a couple of examples of direct violence to maintain the interests of elites versus workers. The first is the company tactic of **strike busting** when workers resorted to strikes because corporate owners would not negotiate or would not make concessions on wages or working conditions. In the nineteenth century and early part of the twentieth century, companies often used their own guards or hired outsiders to beat and harass strikers. They hired what striking workers called scabs to break strikes. A **scab** is a worker—often one who was unemployed or who had no prior connection to the company—who is willing to cross a picket line and work. Sometimes strike busting got way out of hand. Consider the **Ludlow Massacre**. In 1913 thousands of Colorado miners went on strike for better wages and working conditions as well as in protest of the feudal conditions they suffered in company-owned towns. When labor organizer Mother Jones came to Colorado to support the miners, she was arrested and deported from the state. Evicted from their shacks by the mining companies, thousands of miners and their families set up shanty towns in the Colorado hills. The largest of these tent settlements was at a place called Ludlow. On the morning of April 20, 1914, the National Guard—called in by Colorado's governor at the behest of the Colorado Fuel & Iron Corporation, which was owned by the Rockefeller family—opened up on the camp with machine guns and then set fire to the tents. Twenty-six people were killed, including eleven children and two women. More violence followed. In total, sixty-six people were killed. No one was ever even indicted for the crime. (26)

You should be aware of two times the federal government stepped in to further the interests of the elites versus the ideological left wing. Elites were terrified at the prospect of a successful social and political revolution in the United States. To thwart this possibility, the government engaged in two Red Scares—one after each world war. We can define a **Red Scare** as a hyped fear of socialists and communists that is used to silence their voices as well as any progressives or leftists. In the three years following the 1917 Russian Revolution, government leaders created a Red Scare and went after socialists of all stripes. Aided by passage of the Espionage and Sedition Acts of 1918, "Hundreds of Socialist leaders and other radicals were convicted of sedition and antiwar activities, and party newspapers across the country were suppressed and barred from the mails." (27) Attorney General Alexander Palmer, fearing insurrection from leftist radicals, directed a series

of raids—called **Palmer Raids**—that rounded up around 10,000 Communists, Socialists, and Anarchists. Over 500 of them were deported. Another Red Scare took place from 1947 to 1957 and is most closely associated with Republican **Senator Joseph McCarthy** from Wisconsin. Earlier, in 1940, Congress had passed the **Smith Act**, which made it a crime to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association." Then, in 1947, Democratic **President Harry Truman** issued **Executive Order 9835**, which established loyalty oaths for government employees. The House Un-American Activities Committee issued subpoenas and hauled people in to testify about their political affiliations or to rat out their co-workers and colleagues. Thousands of people—from blue-collar union workers to Hollywood stars and writers—lost their jobs. McCarthyism had a chilling effect on people advocating leftist ideas such as universal healthcare.

The civil war between capital and labor quieted somewhat after passage of the **National Labor Relations Act in 1935**, which allows workers to organize and prevents unfair practices by corporations against union activity. After World War II ended, corporations lobbied for limitations on union practices, and Congress passed the **Taft-Hartley Act** of 1947, which requires unions to honor existing contracts without striking, forbids unions from secondary strikes, general strikes, and wildcat strikes, and places other restrictions on unions. These two pieces of legislation, more than anything, reduced the temperature of the civil war between corporate owners and workers. Nevertheless, this struggle still bubbles below the surface of media attention. Workers are fired when they try to organize—although the company invariably cites a different reason for terminating the employee—and companies threaten to move production elsewhere unless they get concessions from workers. (28) And then there's **wage theft**, or when "a worker doesn't get fully paid for the work they've done. Often employers pull this off by paying for less than the number of hours worked, not paying for legally required overtime, or stealing tips." Company wage theft against hourly workers happens regularly and *amounts to nearly the value of all other property theft combined each year*. (29)

Occasionally, the media accidentally lets the cat out of the bag and acknowledges that the interests of the elites who own the economy are at odds with the workers who produce the value that gets skimmed off by elites in the form of profits and dividends. One of these accidental revelations occurred during the COVID-19 pandemic. On the April 9, 2020 edition of a CNBC show about the economy, the network accidentally juxtaposed the exuberant title of the segment "The Dow's Best Week Since 1938" with a crawling newsfeed at the bottom of the screen about the news of the day, which said "More than 16 million Americans have lost jobs in 3 weeks." (30) Wall Street was confident that recent stimulus packages heavily tilted to big business and financial institutions, quantitative easing, and low oil prices meant that they would weather the storm nicely. The high-flying investors had already priced the suffering of millions of low paid workers into their investment strategies.

Cultural violence continually justifies our rigged economic system and serves to deflect attention away from its inequities. Have you heard this joke? A wealthy capitalist, a worker, and an immigrant are sitting around a table. The capitalist has a plate in front of them with nine cookies on it. The worker has a plate in front of them with one cookie on it. The immigrant's plate is empty. The capitalist says to the worker, "Be careful, the immigrant is going to try to steal your cookie." Some version of this scenario plays out in America's news media all the time. If workers are poor, the cause must be immigrants, foreigners, technological forces, poor education, people of a different race, or their own character flaws. It couldn't possibly be the result of the particular way that we've set up our version of a market economy that gives ninety percent of the benefits to the top ten percent of families. Because if it were, we could change those rules—and it's important to elites that ordinary Americans think that the way things are currently done is the *only way they could possibly be done*. To cite an example of what they do *not* want you to consider, we couldn't possibly establish incorporation and tax rules that favored worker-owned cooperatives. But, of course we could, and many of us might be better off if we did just that. (31)

Final Thoughts

Political violence is a component of corporate and elite power, but we should recognize that violence has also been used by ordinary Americans who fight for change or who are so frustrated that they lash out. Think about the Donald Trump supporter who was arrested for sending explosive devices to prominent Democrats, or the Bernie Sanders supporter who opened fire on Republican congressmen who were practicing for a baseball game. (32) These are certainly disturbing events, and violence should be condemned whenever it happens regardless of target. The point of this chapter, however, is that the whole toolbox of political violence as described by Galtung is really only available to elites who have the means, motive, and opportunity to employ direct, structural, and cultural violence to achieve political ends. Their particular style of violence has the effect of nullifying direct threats to their rule, fragmenting class consciousness, deflecting attention toward red herrings, extracting income and wealth from ordinary people, and preventing full realization of how rigged the economic system has become.

References

1. Frank Edwards, Hedwig Lee, and Michael Esposito, "Risk of Being Killed by Police Use of Force in the United States, By Age, Race-Ethnicity, and Sex," *Proceedings of the National Academy of Sciences*. August 20, 2019.
2. Rory Carroll, "The Mysterious Lynching of Frank Little: Activist Who Fought Inequality and Lost," *The Guardian*. September 21, 2016.
3. Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research*. 6(3): 1969. Page 171.
4. Johan Galtung, "Cultural Violence," *Journal of Peace Research*. 27(3): August, 1990. Page 291.
5. Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump*. 2nd edition. New York: Oxford University Press, 2018. Pages 7-8.
6. Bryan Burrough, *Days of Rage: America's Radical Underground, the FBI, and the Forgotten Age of Revolutionary Violence*. New York: Penguin Books, 2016.
7. David Helvarg, *The War Against the Greens.* New York: Random House, 1994.
8. Ariel Ramchandani, "There's a Sexual-Harassment Epidemic on America's Farms," *The Atlantic*. January 29, 2018.
9. No author, "History of Lynching," NAACP. No date.
10. No author, "The Medgar Evers Assassination," *PBS Newshour*. April 18, 2002.
11. No author, "Murders in Mississippi," *PBS American Experience*. No date. Stephen Smith, "'Mississippi Burning' Murders Resonate 50 Years Later," *CBS News*. June 20, 2014.
12. David Zucchino, *Wilmington's Lie: The Murderous Coup of 1898 and the Rise of White Supremacy*. New York: Grove Press, 2020.
13. Anthony Nocella, II, Priya Parmar, and David Stovall, editors, *From Education to Incarceration: Dismantling the School to Prison Pipeline*. Second edition. New York: Peter Lang Publishing, 2018. Monique Morris, *Pushout: The Criminalization of Black Girls in Schools*. New York: New Press, 2015. Christopher A. Mallett, *The School to Prison Pipeline: A Comprehensive Assessment*. New York: Springer Publishing, 2015.
14. Mychal Denzel Smith, "Why Aiyana Jones Matters," *The Nation*. June 19, 2013.
15. Michael Siegel, et al., "The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level," *Journal of the National Medical Association*. April, 2018. Pages 106-116.
16. Charles C. Mann, "1491," *The Atlantic*. March, 2002.
17. Text of the Removal Act, dated May 28, 1830. Mount Holyoke College.
18. Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States*. Boston: Beacon Press,

2014. Pages 110-114. Howard Zinn, *A People's History of the United States, 1492-Present*. New York: Harper Collins, 2003. Pages 137-142.

19. William M. Osborne, *The Wild Frontier: Atrocities During the American-Indian War from Jamestown Colony to Wounded Knee*. New York: Random House, 2000. Benjamin Madley, *An American Genocide: The United States and the Californian Indian Catastrophe, 1846-1873*. Yale: Yale University Press, 2016.
20. Roxanne Dunbar-Ortiz, *An Indigenous Peoples' History of the United States*. Boston: Beacon Press, 2014. Pages 137-38. Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West*. New York: Henry Holt and Company, 1970. Pages 83-94.
21. Brigham D. Madsen, *The Shoshoni Frontier and the Bear River Massacre*. Salt Lake City: University *of Utah Press, 1985. Estimate of 265 women and children killed is on pages 189-190. Deseret News*reporter quote on page 194.
22. Terry L. Anderson and Peter J. Hill, *The Not So Wild, Wild West: Property Rights on the Frontier*. Stanford: Stanford University Press, 2004.
23. National Native American Boarding School Healing Coalition. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*. Lawrence, KS: University of Kansas Press, 1995. Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*. San Francisco: City Lights Publishers, 2004.
24. Abraham Lincoln, *State of the Union Address*. December 3, 1861. PresidentialRhetoric.com.
25. James W. Loewen, *Lies My Teacher Told Me: Everything Your American History Textbook Got Wrong*. New York: Simon & Schuster, 1995. Pages 202-203.
26. Howard Zinn, *A People's History of the United States, 1492-Present*. New York: Harper Collins, 2003. Pages 354-357. Scott Martelle, *Blood Passion: The Ludlow Massacre and Class War in the American West*. New Brunswick, NJ: Rutgers University Press, 2008.
27. Seymour Martin Lipset and Gary Wolfe Marks, *It Didn't Happen Here: Why Socialism Failed in the United States*. New York: W. W. Norton, 2001. Page 244.
28. Michael Sainato, "'It's Because We Were Union Members': Boeing Fires Workers Who Organized." *The Guardian*. May 3, 2019. David Welch, "GM Squeezed $118 Million From Its Ohio Workers, Then Closed the Plant," *Forbes*. March 29, 2019.
29. Luke Darby, "Is Your Employer Stealing From You?" *GQ*. November 8, 2019.
30. Sky Palma, "Viral Screenshot of Jim Cramer's 'Mad Money' Shows 'Everything That's Wrong With America,'" *Rawstory*. April 13, 2020.
31. Soheil Saneei, "Worker Cooperatives Popular, Will Move America Forward," Democracy at Work. December 5, 2018. Michelle Chen, "Worker Cooperatives are More Productive Than Normal Corporations," *The Nation*. March 28, 2016.
32. *CBS News*, "Cesar Sayoc, Package Bomb Suspect, is a Florida Trump Supporter," October 27, 2018. Jose Paglieri, "Suspect in Congressional Shooting was Bernie Sanders Supporter, Strongly Anti-Trump." *CNN*. June 15, 2017.

Media Attributions

- KKK © Denver News is licensed under a Public Domain license

- Sand Creek © Denver Public Library is licensed under a Public Domain license
- Frank Little © Unknown is licensed under a Public Domain license

Chapter 61: A Guide to Living in an Attenuated Democracy

"Forget politics as you've come to see it, as electoral contests between Democrats and Republicans. Think power. The underlying contest is between a small minority who have gained power over the system and the vast majority who have little or none."

—Robert Reich (1)

Pay Attention to Social Class

Americans are not used to thinking in terms of social class. There are a couple of reasons for that. For one thing, social class is not a concept about which social scientists agree. **Social class** refers to a group of people in a society with similar levels of income, wealth, education, and type of job. That's a deceptively simple definition that hides a truly messy concept that can be difficult to operationalize. In order to sidestep the mess, we tend to simplify it by dividing the population into income quintiles—the top 20 percent of income earners, the next 20 percent of income earners, and so forth. At the time of this writing, a simple class structure for America looks like this:

- $233,895 Average family income: Upper class—Top 20 percent
- $101,570 Average family income: Upper middle class—Next 20 percent
- $63,572 Average family income: Middle class—Middle 20 percent
- $37,293 Average family income: Lower middle class or working poor—Next 20 percent
- $13,775 Average family income: Lower class, the working poor, or the precariously employed—Bottom 20 percent (2)

Notice the disparity in family income. Even this breakdown of the numbers under-represents the gross disparities in America's class structure, because the top 20 percent category has an astronomical upper end. In 2018, a small group of 211 families—out of 167 million families in the United States—each earned more than $50 million a year. That's just their wages and doesn't count their investment income. (3) The prospects for American families have diverged. The incomes of the top 20 percent of families have grown faster in the past 50 years than have the incomes of all the families below them, and incomes of the top 5 percent of families have grown even faster still. (4)

Another consideration is that our media and schools go out of their way to portray America as a classless society—as if such a thing ever existed. It's a form of capitalist propaganda that is very effective. Richard Reeves has written that America is "a society that likes to think of itself as classless—or, more precisely, one in which everyone likes to think of themselves as middle class." For decades, more than 80 percent of Americans have described themselves as middle class. (5) No matter how far down the economic ladder and no matter how difficult upward mobility is in this country, many Americans see themselves as soon-to-be-rich. The truth is that Americans have much less of a chance of climbing the economic ladder than do people in other wealthy democracies. (6)

Paying attention to social class is important because Robert Reich's quote at the start of this chapter is spot on. The struggle today has become one in which the upper class is accruing wealth and political power at the

expense of the lower classes. Focusing on class also unites Americans across our racial, gender, and religious divisions. Gross inequality of wealth and political power is not a natural phenomenon; it is created by the way we structure our economic and political systems. Outrage at our current state of inequality does not mean that anyone is arguing for complete equality. Such allegations are an example of the reductive fallacy. A vigilant citizen in an attenuated democracy simply argues for less economic inequality and for greater political power for middle- and lower-class Americans who make up the majority of the population.

Uphold Democratic Values

To be a citizen in an attenuated democracy, one must continually uphold democratic values. To begin with, citizens need to be vigilant about two things: All adult citizens should have an equal ability to vote, and all ballots should be counted. Attempts at voter suppression, voter fraud, and election fraud must be resisted any time they occur. But there are other values that are essential to a democratic republic, and citizens need to vigorously defend them. Specifically, citizens should do the following:

Embrace Tolerance Except of Ideas and Practices That are Themselves Intolerant or Destructive—Tolerance is a willingness to accept behavior and beliefs that are different from your own, although you might not agree with or approve of them. In a diverse republic such as the United States, it is commonplace for one group of people to engage in behaviors and espouse ideas that are strange to other people. As long as those behaviors or ideas are not destructive and do not attempt to negate the possibility of others' innocuous behaviors or ideas, they should be tolerated. Sometimes, however, we encounter ideas and behaviors that are themselves intolerant or destructive. Democracies do not need to tolerate people and groups that are intolerant, that preach hatred, or that practice violence.

Uphold science and fact—Defenders of democracy would do well to also defend science. Celebrated science writer Timothy Ferris has argued that the democratic revolution that began in the eighteenth century "was sparked . . . by the scientific revolution, and that science continues to foster political freedom today." He argues that both science and democracy require freedom of speech, travel, and association, and that scientific skepticism is a perfect companion to democracy but is "corrosive to authoritarianism." (7) Science and democracy are equally dependent on facts. Unfortunately, facts are under assault in the United States. The public sphere has intentionally been flooded with so much bullshit and so many conspiracy theories that we face what David Roberts calls an **epistemic crisis**. Epistemology is a branch of philosophy dedicated to understanding "how we know things and what it means for something to be true or false, accurate or inaccurate." An epistemic crisis is when a society cannot agree "who we trust, how we come to know things, and what we believe we know—what we believe exists, is true, has happened and is happening." (8) Not only do we need to believe in facts, but we have to believe in the processes—e.g., science, good journalism, public investigations, testimony, academic debates—that are likely to produce facts. We must also turn away from processes—e.g., talk radio bloviating, people passing as journalists who do not adhere to journalistic standards, pseudoscience, deferring to corporate-funded shills—that are leading us to a new Dark Age.

Defend the Rule of Law—We've talked about the **rule of law**, which refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures. It is essential that citizens demand that elected and appointed office holders as well as government staff uphold the rule of law in all that they do. This is especially important in crisis or heated situations, when people most often argue to set aside the rules. Defenders of the rule of law know that cronyism, favoritism, nepotism, and corruption have no place in a functioning democracy.

Defend Institutions—Democracy and the rule of law require robust, professional institutions upon which

people can depend. This encompasses governmental institutions like Congress, the presidency, the federal courts, and the myriad of federal agencies that do the work of the government. It also includes other societal institutions like colleges and universities, legitimate news media, and churches. A politician who labels news outlets as "enemies of the people" are only doing so because they wish to undermine factual but critical information about them or their administration. They are going after the free press as a vital institution in a democracy. Historian Timothy Snyder suggests that you "choose an institution you care about—a court, a newspaper, a law, a labor union—and take its side." (9)

Take an Interest in Your Congress Members

Remember that your elected officials are public servants. They should be serving the broad public good. Take an interest in them. The first step is to find their websites and bookmark them on your browser. Typically, you can just search for their name and location—e.g., Ben McAdams, House of Representatives—and then make sure you are getting Representative McAdams' official website. The official website of each office holder will have a contact form in which you can paste a letter. Typically, they will also have a calendar of townhall meetings back in their state or district. You should also check the Town Hall Project. The website of the U. S. House of Representatives has a list of representatives. From that site, you can see which representative is sitting on which standing committees. The same thing applies to researching the U. S. Senate and its standing committees. If you want to officially confirm how your representative or senator voted, you can go to the Congress.gov site and look it up. Note, however, that it helps to have some distinctive keywords for the measure that interests you or have the number of the bill, like H.R. 1158 or S. 1332. Another place to look for rollcall votes in Congress is the Govtrack site. You should also see which individuals and organized interests are funding your elected officials' campaigns. The Federal Election Commission collects information such as this, but the Center for Responsive Politics makes it more accessible at its Open Secrets website. From the menu there, you can browse through recent congressional and presidential campaigns and learn a great deal about who finances our politicians.

Inform Yourself

One can always choose to be an uninformed participant in a democratic polity. That would be a shame, for you run a high risk of being misled or worse, acting against your own interests. Your first step is to get a formal education. If you are getting a college degree, make sure that it has a robust general education component that will give you broad knowledge in the **liberal arts and sciences**, by which we mean arts, humanities, social sciences, and natural sciences. When you finish with your college degree—or if you don't have one—you have to continue to educate yourself. Focus on American history, political issues, and the political process. Get in the habit of reading books as well as articles on those topics.

Your second step is to avail yourself of credible media sources that report on politics, history, economics, and society. You should also read well-written political commentary and watch political documentaries. The first thing to note about your possibilities for media sources are that they are distributed along an ideological continuum. The second thing to note is that people disagree about the political leanings of various publications. One recommendation that might help you is to read widely from sources that differ in their ideological positions on issues and events. There's no such thing as "reading too much" when it comes to informing yourself. You can find media bias guides online that will help you understand the general ideological perspectives of major publications. AllSides has one, as does Ad Fontes Media.

Media Bias Chart from AllSides

Understand Political Language

Political language is such a minefield that it's difficult to give cogent advice about how we might approach

it. As citizens of an attenuated democracy, we have to be on guard against powerful people using language to get what they want at the expense of ordinary people. We have to avoid being manipulated into joining their project. Here are four things you should learn to spot in political language:

1. In his essay *Politics and the English Language*, George Orwell wrote that "political speech and writing are largely the defence of the indefensible." (10) People in power often defend the indefensible by using euphemisms when they speak. A **euphemism** is when a person substitutes "an agreeable or inoffensive expression for one that may offend or suggest something unpleasant." (11) During war, the military uses the euphemism "collateral damage," which sounds like maybe a tank accidentally bumped a farmer's shed. In fact, collateral damage typically means that a military strike killed and maimed innocent men, women, and children. Political language on all sides of the ideological spectrum is full of euphemisms. Try to cut through euphemisms so you understand the reality of what people are saying.
2. Beware also of **big lies** and **obvious lies**, repeatedly told. In *Mein Kampf*, **Adolph Hitler** articulated "the sound principle that the magnitude of a lie always contains a certain factor of credibility," and that people "more easily fall victim to a big lie than to a little one." (12) The same can be said of an obvious lie. When a politician tells a big or an obvious lie—particularly when they tell it repeatedly and publicly—some people tend to believe it simply because it is told so openly. *It must be true*, they think, *because why would anyone lie about something so big or so obvious*?
3. Be concerned by political leaders who scapegoat one or more groups. **Scapegoating** refers to improperly placing blame on a person or group for bad things that have or are happening, either to fit a political narrative or to displace blame from the real culprit. For example, saying that crime is caused by undocumented immigrants, or blaming a past administration for a current administration's inability to solve a problem.
4. Pay attention when politicians frequently need to show how strong they are by using **macho, brutal language**. Do they encourage their supporters to assault their political opponents? Do they threaten to bomb other countries back to the stone age? Do they bully their opponents and expect complete submission from their supporters? Do they—like domestic abusers—use a "you made me do it" language style that blames the victims of their abuse or policies? People who are frequent users of that kind of language are unlikely to uphold democratic principles while in office.

Avoid Despair

If you agree with the theme of this text that America's political system represents an attenuated form of democracy, you might be tempted to throw up your hands in despair. That should not be your main takeaway. If you agree with the text that corporations and a small circle of very wealthy families exert disproportionate power over public policy, you might be tempted to conclude that conditions are unlikely to improve for ordinary people. To do so would be a mistake. American politics is a struggle between the oligarchs and the public, between a small minority and the rest of us. As we've seen, the small minority has structural advantages, but the rest of us can use collective action and our votes to effect positive change. We have to be vocal. We have to be active. We have to sustain that pressure for years.

America's history shows us that positive change is possible. Robert Reich nicely summed up this comforting reminder, and it's worth quoting him at length:

> *"In the early twentieth century, progressives reclaimed our economy and democracy from the robber barons of the first Gilded Age. Wisconsin's "Fighting Bob" La Follette instituted the nation's first minimum-wage law. Presidential candidate William Jennings Bryan attacked the big railroads, giant*

banks, and insurance companies. President Theodore Roosevelt busted up the giant trusts. Suffragettes like Susan B. Anthony secured women the right to vote. Reformers like Jane Addams successfully pushed for laws protecting children and the public's health. Organizers like Mary Harris "Mother" Jones spearheaded labor unions. The progressive era welled up because millions of Americans saw that wealth and power at the top were undermining American democracy and stacking the economic deck. Millions of Americans overcame their cynicism and began to mobilize." (13)

Be Active on Two Fronts

Citizens in an attenuated democracy should vote, speak, write, organize, and engage in collective action. They should focus their political engagement on two fronts. The first is to *take decision making power from the elites by electing politicians who are beholden to ordinary people* or by supporting existing politicians who already act on behalf of ordinary people. If there are no such candidates for local, state, or federal office, then become one. The second focus should be to *change the rules of the game so that ordinary people can have a greater voice* in the American political system. Change the way campaigns are financed—perhaps by putting a tax on corporate support for incumbents, the proceeds of which go to challengers. Argue for citizens' councils to address political issues. Push for changes that take away politicians' ability to gerrymander electoral districts for partisan advantage. Change the way elections are conducted and make them less restrictive with respect to which citizens can participate. For example, prioritize vote by mail systems and automatic registration. Amend the Constitution so that corporations are not considered people.

Politics is not a spectator sport. Despite the predominant ethos of the media coverage, elections are not merely horse races between candidates for whom we passively root. They have life and death consequences for us and our neighbors. They determine the future of the republic. Remember political scientist Eitan Hersh's admonitions: "Politics is for power" and "power is derived from serving others." (14) Collectively organize and pool resources to serve neighbors and show them that local action pays immediate dividends and can show the way to larger changes. Be more than a consumer of political news. Be an actor, a person who convinces neighbors and friends and family that collective action can swing the balance of power in American politics away from corporations and the wealthy elite and toward ordinary people.

References

1. Robert B. Reich, *The System: Who Rigged It, How We Fix It*. New York: Alfred A. Knopf, 2020. Kindle edition. Page 6 of 198.
2. Tax Policy Center. March 24, 2020.
3. Jim Wang, "Average Income in America: What Salary in the United States Puts You in the Top 50%, Top 10%, and Top 1%," Wallet Hacks. March 10, 2020.
4. Katherine Schaeffer, "6 Facts About Economic Inequality in the U.S," Pew Research Center. February 7, 2020.
5. Richard Reeves, "The Dangerous Separation of the American Upper Middle Class," Brookings. September 3, 2015.
6. Katie Jones, "Ranked: The Social Mobility of 82 Countries," Visual Capitalist. February 7, 2020.
7. Timothy Ferris, *The Science of Liberty: Democracy, Reason, and the Laws of Nature*. New York: Harper Collins, 2010. Kindle edition. Pages 1-2 of 374.
8. David Roberts, "America is Facing an Epistemic Crisis," *Vox*. November 2, 2017.

9. Timothy Snyder, On Tyranny: Twenty Lessons from the Twentieth Century. Kindle Edition. Crown Publishing, 2017: New York. Page 22 of 128.
10. George Orwell, *Politics and the English Language*.
11. Merriam-Webster Dictionary.
12. Adolf Hitler, *Mein Kampf*. Translated by Ralph Manheim. Boston: Houghton Mifflin, 1971. Page 231. Originally published in 1925, and the quotes are in Volume 1, Chapter 10.
13. Robert B. Reich, *The System: Who Rigged It, How We Fix It*. New York: Alfred A. Knopf, 2020. Kindle edition. Page 95 of 198.
14. Eitan Hersh, *Politics is For Power: How to Move Beyond Political Hobbyism, Take Action, and Make Real Change*. New York: Scribner, 2020. Page 212.

Media Attributions

- AllSidesMediaBiasChart-Version7.1 © AllSides is licensed under a All Rights Reserved license

PART 10: CIVIL RIGHTS AND CIVIL LIBERTIES

Chapter 62: The Difference Between Civil Rights and Civil Liberties

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

—National Woman Suffrage Association in 1876 (1)

Americans are accustomed to using "civil rights" and "civil liberties" interchangeably, as though they mean the same thing. That is acceptable for daily conversation, but you do need to know the difference between these concepts for this class. Part of the confusion is due to the fact that both civil rights and civil liberties ultimately originate from the idea of natural rights, which we discussed at the beginning of the course. We should also note that mankind went through a **civil liberties revolution** between the Medieval period and the nineteenth century. We all continue to benefit from that revolution. What we mean is that our entire frame of reference has changed from one that emphasized the primacy of royal and aristocratic privileges to one centered on individual liberties. It was a slow and difficult revolution, but it happened through the struggles of many people. (2) If you'd like to test this proposition, try this experiment: Get in your time machine and travel back to the year 800 and talk to some European serfs about their individual freedom of religion, speech, conscience, and the like. They would not know what the Hell you were talking about. If you then transported yourself to 1880 and talked with some farmers about the same topics, you would be speaking a language that they understood and embraced.

Civil Liberties

Your **civil liberties** are essentially your natural rights of life, liberty, and property translated into specific guarantees by the United States Constitution, especially the Bill of Rights and the **due process clause** of the **Fourteenth Amendment**, which says that no state may "deprive any person of life, liberty, or property, without due process of law." These guarantees were designed to protect each individual from the potentially abusive power of government, although civil libertarians today are growing increasingly concerned about the ability of large corporations to infringe on individual liberties as well. The bulk of your civil liberty guarantees are in the **Bill of Rights**. These include freedom of speech and the press, freedom of religion, freedom from unreasonable searches and seizures, procedural guarantees if you are accused of a crime, freedom from cruel and unusual punishment, and property rights. Some civil liberties protections are included in the body of the Constitution itself, including the privilege of *habeas corpus*, and prohibitions against bills of attainder, *ex post facto* laws, and the impairment of contracts.

The last Constitutional protections mentioned above are things you should know. ***Habeus corpus*** literally means "you have the body," and refers to a court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration. A **bill of attainder** is when a legislative body acts like a judicial body by passing a law that declares a person or a group guilty of a crime and punishes

them. Congress and state legislatures are forbidden from doing that. *Ex post facto* means "after the fact," so an **ex post facto law** is one that declares an action illegal after it has already happened and subjects the person or group who did it to arrest and trial. It would also refer to a law that increased the penalty for a crime if the legislature tried to apply the stiffer penalty to those who committed the crime before the law was passed. Congress and state legislatures are forbidden from doing that. **Congress and state legislatures are also forbidden from impairing the obligation of contracts**. If I render services to you and you owe me a great deal of money according to the contract that we both signed, you might be tempted to go to your friends in Congress and get them to pass a law saying that you do not have to pay me. That is not allowed.

Civil Rights

In addition to life, liberty, and property, natural rights philosophers were concerned that individuals be treated equally. Of course, those very same philosophers had a fairly limited notion of "the people" for whom they sought equal treatment. The same is true for the Constitution's framers, who did not concern themselves with equal treatment of women, men without property, and non-Whites. Our modern notion of **civil rights**—freedom from discriminatory treatment based on some characteristic—is tied in large part to the **civil rights clause** of the **Fourteenth Amendment**, which says that no state may "deny to any person within its jurisdiction the equal protection of the laws." The verb "to discriminate," in its generic sense, brings to mind someone who is making fine distinctions between two things that are otherwise similar. For instance, a wine connoisseur with a discriminating palate might be able to tell whether a German wine came from the Rhine Valley or the Mosel Valley. In the political arena, **discrimination** occurs when people—who are otherwise quite similar—are not receiving the equal protection of the laws or equal access to liberties based on a characteristic such as their gender, race, religion, national origin, sexual orientation, age, or disability.

Similar to civil liberties, we've gone through a **civil rights revolution**. This revolution happened more recently, between the mid-eighteenth century and now. We used to have no real qualms about parsing out civil liberties on an unequal basis, with the determining factors being sex, race, religion, class, and so forth. We used to take it for granted that some people were freer than were others. We no longer think so, although we do still argue about civil rights. Historian Michael Bellesiles makes the case that the U.S. Constitution only really embraced the Declaration of Independence's call for Equality when it was amended following the Civil War. The civil rights clause of the Fourteenth Amendment, the Thirteenth Amendment's abolition of slavery, and the Fifteenth Amendment's establishment of voting rights regardless of race essentially "invented equality," according to Bellesiles. Without those amendments and the Nineteenth Amendment's grant of voting rights regardless of sex, argues legal writer Elie Mystal, "the Constitution is a violent piece of shit that can be used to justify or allow the legalized supremacy of white men over all others." (3) Those amendments, writes Mystal, at least partially redeemed the Constitution by affording people the ability to fight for their civil rights.

Civil Rights and Civil Liberties Issues

The key contextual clue in determining whether a particular situation is a civil rights or a civil liberties issue is the presence or absence of discrimination. Were a state to pass a law stripping all citizens of the right to possess firearms, that would be regarded as a civil liberties issue. If that same state were instead to pass a law—similar to actual laws that several states used to have—that forbid African Americans from possessing firearms, then that would be a civil rights issue. In the latter case, a person's freedom from government intrusion is contingent upon their race, which is an idea that is no longer constitutionally acceptable in the United States.

References

1. National Woman Suffrage Association, *Declaration of the Rights of Women*. July 4, 1876. In Timothy Patrick McCarthy and John McMillan, *The Radical Reader: A Documentary History of the American Radical Tradition*. New York: The New Press, 2003. Pages 191-195.
2. A. C. Grayling, *Toward the Light of Liberty: The Struggle for Freedom and Rights That Made the Modern World*. New York: Walker & Company, 2007.
3. Michael A. Bellesiles, *Inventing Equality: Reconstructing the Constitution in the Aftermath of the Civil War*. New York: St. Martin's Press, 2020. Elie Mystal, *Allow Me to Retort: A Black Guy's Guide to the Constitution*. New York: The New Press, 2022. Page 128.

Chapter 63: Incorporation or Nationalization of the Bill of Rights

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

—Justice Hugo Black (1)

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

After the Civil War, the Fourteenth Amendment seemed to correct the imbalance defined in *Barron* by saying that no state "shall abridge the privileges and immunities of citizens of the United States." However, the Supreme Court did not interpret the **privileges and immunities clause** as a corrective to *Barron*. Instead, in the late nineteenth century, the Court began **incorporating the Bill of Rights protections** using the Fourteenth Amendment's **due process clause** instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law." Many people see this as an odd way of nationalizing the Bill of Rights and other broad liberties, but there it is. (2) In specific cases, the Court incorporated individual Bill of Rights protections into the due process clause by limiting states' ability to infringe upon them. The Court did this selectively and patiently, waiting for individuals to challenge their state when it infringed on specific civil liberties. The process of **incorporation** lasted into the early twenty-first century as cases came to the Court.

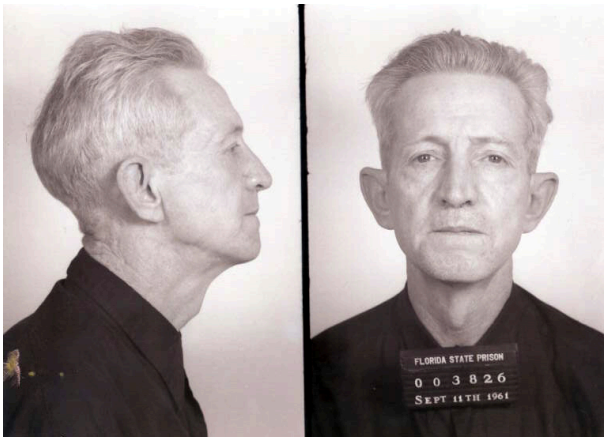
You do not need to know all of the incorporation cases, but you should be familiar with the following three examples. They not only illustrate the concept of incorporation, but also are cases whose impacts are still felt today.

Important Incorporation Cases

***Mapp v. Ohio* (1961)**–This case involved the Fourth Amendment's provision that people be protected from unreasonable searches and seizures. The Amendment says that search warrants need to be issued by judges upon probable cause and that warrants need to be specific rather than general. Under the *Barron* precedent, the Fourth Amendment only protected you against federal officials. State and local officials were regulated by state constitutions, which varied in how much they protected people from unreasonable searches and seizures.

On May 23, 1957, three Cleveland, Ohio police officers came to Ms. Dollree Mapp's house looking for a male suspect whom they believed was related to a bombing incident as well as an illegal gambling outfit. Ms. Mapp called her lawyer and refused to let the officers in because they did not have a warrant. Three hours later, the officers, whose ranks had grown to seven, forcibly entered Mapp's house, roughed her up and handcuffed her, and proceeded to search the house. They did not find the man, bomb-making equipment, or gambling paraphernalia, but they did find that Mapp possessed "obscene materials," for which she was arrested on the spot. Mapp was convicted but appealed her conviction all the way to the Supreme Court, which ruled in her favor and incorporated the Fourth Amendment into the Fourteenth. State and local authorities now face the same obligation that federal officials do to respect the Fourth Amendment. Additionally, the *Mapp* case also applied the **exclusionary rule** to state and local police: any evidence they gather in violation of the Fourth Amendment must be excluded from the defendant's trial.

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



Clarence Earl Gideon in 1961

In 1961 Clarence Earl Gideon was a 51-year old drifter who had been in and out of trouble with the law since he had run away from home at age sixteen. Gideon was arrested in Panama City, Florida for breaking into a poolhall and stealing some money and alcohol. At his trial, he asked the judge for a lawyer to defend himself against the charges but was denied because he was charged with neither federal nor capital offenses. Without a lawyer, he was convicted and sentenced to five years in prison. While incarcerated, Gideon made use of *in forma pauperis*, a Supreme Court procedure that waives the filing fees and other requirements for indigent petitioners. He wrote a letter to the Supreme Court asking them to take his case. The Court granted certiorari and appointed Abe Fortas, a well-respected Constitutional lawyer and future Supreme Court justice himself, to represent him. The majority ruled in Gideon's favor, and remanded the case back to Florida where Gideon was given a retrial with a public defender. Gideon's lawyer was able to show that the state of Florida could not meet its burden of proving beyond a reasonable doubt that Gideon had done the crime, so he was released. The result of the case is that the Sixth Amendment was incorporated into the Fourteenth, and criminal defendants must be appointed lawyers if they cannot afford one. This is extremely important, because approximately 80 percent of all criminal defendants are too poor to hire their own lawyer. (3) Public defenders are clearly overworked and underpaid—earning below minimum wage in some

cases—but defendants without any legal assistance are at a huge disadvantage when faced with state power in a court of law.

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

Meanwhile, in the same year the Supreme Court struck down Washington D.C.'s gun ban in a case known as *The District of Columbia v. Heller* (2008). Despite the language in the Second Amendment clearly predicating the right to bear arms in the context of a "well-regulated militia," the Court narrowly ruled in *Heller* that the Second Amendment confers an individual right to own and carry weapons. However, the *Heller* case did not have immediate implications for other city and state gun laws because of D.C.'s special status as a federal district. In***McDonald v. Chicago*****(2010),** the Supreme Court decided (5-4) in McDonald's favor and incorporated the individual right to bear arms into the Fourteenth Amendment. The ruling, therefore, made it applicable to states and cities across the United States. The Court also said that the individual right to bear arms was subject to regulation. In the D.C case, Justice Antonin Scalia wrote: "Like most rights, the right secured by the Second Amendment is not unlimited. . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." He was also clear that the list of restrictions he just mentioned was not "exhaustive." (4) However, in the case of *New York State Rifle and Pistol Association Inc. vs. Bruen* (2022), the conservative majority on the Court struck down a 109-year-old New York state law requiring people to show cause for why they needed to carry a handgun in public. Effectively, this decision struck down laws in a number of states where a quarter of the U.S. population lives. It also shifted the gun debate to the issue of "sensitive places" where bearing arms could still be restricted. Is a court of law a sensitive place? A legislative chamber? What about a grocery store or a political rally? Due to incorporation, future decisions of the Court on these matters will apply to all states.

References

1. *Gideon v. Wainwright* (1963).
2. Scholar Daniel A. Farber writes, "Picking the Due Process Clause as the home for fundamental rights was something of a historical accident, but not completely ungrounded...The [privileges and immunities clause] and the Ninth Amendment would have given a much stronger basis for protecting fundamental rights from state governments." See his *Retained by the People*. New York: Basic Books, 2007. Pages 76-77.
3. Alexa Van Brundt, "Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them," *The Guardian*. June 17, 2015.
4. *District of Columbia, et al. v. Heller* (2008).

Media Attributions

- Gideon © Florida State Prison is licensed under a Public Domain license

Chapter 64: The Boundaries of Freedom of Speech and the Press

"Pussy Power"

"Our Voices Together Can't Be Silenced"

"Fuck the Electoral College"

—Protest signs during a march in Manhattan on January 21, 2017 (1)

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

Endangering Others

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

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

lawless actions and is likely to incite or produce such action." Essentially the Court said that *advocacy* of violence is not punishable in general, but *inciting* violence is punishable.

Fighting Words and Hate speech

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

Demonstrators from Westboro Baptist Church

Many people argue that the First Amendment shouldn't protect hate speech. The American Library Association says that hate speech doesn't have a formal legal definition, but that it refers to "any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons." (4) Hate speech is disgusting because no one wants to hear people say things that are racist, sexist, anti-Semitic, and otherwise bigoted, but such utterances in a public forum are protected by the First Amendment if they are intended to make a political point. For example, most college campuses have student codes of conduct that discourage hate speech, but most of these restrictions cannot be enforced unless the words in question are targeted at specific people and used to harass or threaten them. A college campus is a public forum—much like a public street, a public square in front of city hall, or even a county cemetery—in which really distasteful things can be injected into the marketplace of political ideas. Hate speech cases are gut wrenching. For example, in ***Snyder v Phelps* (2011)**, the Court ruled in favor of Westboro Baptist Church, whose members picketed funerals of U.S. servicemen and women, carrying signs that said, "You're Going to Hell," "Fag Troops," and "*Semper fi* Fags."

Libel

Libel—written defamation of another person, especially of public figures—is not protected by the First Amendment either, but the Court has set high standards for victims to win libel cases. In ***The New York Times v. Sullivan* (1964)**, the Court announced guidelines that the public figure needs to establish in court if they are to win a libel case. In that case, the *New York Times* was sued in an Alabama court by a police commissioner named Sullivan, who claimed that an advertisement taken out by the Committee to Defend Martin Luther King had libeled him by implication. The Supreme Court ruled in favor of the *New York Times* and said in what is known as the **Sullivan Test** that the victim must show: 1) that the information printed about them was false, 2) that the publisher either knew it was false or the statements "were made with a reckless disregard for the truth," 3) the information was written due to malice, and 4) publication of the information damaged the victim. The Court set the standard high in order to avoid public officials being able to escape public criticism by threatening lawsuits against newspapers and magazines. Later, in ***Hustler Magazine v. Jerry Falwell* (1988),** the Court held that the allegedly libelous statement had to be a statement of fact, and not a joke. *Hustler Magazine* had run

a cartoon ad spoof indicating that Jerry Falwell's first sexual experience was with his mother in an outhouse. Rather than pay Falwell damages for the false, malicious cartoon, *Hustler* publisher Larry Flynt took the case to the Supreme Court and won. This decision protected magazines, websites, and comedy shows that poke fun at public figures.

Obscenity

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

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

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

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

To replace the Communications Decency Act, Congress passed the **Child Online Protection Act of 1998**, which threatened prison and fines for anyone caught placing material that is "harmful to minors" on a Web site available to children under the age of seventeen. The law became the focus of a legal battle for more than a decade until it died a quiet death in 2009 when the Supreme Court declined to review yet another appeal. During the legal battle, most courts were uncomfortable with the broad language of the law. In addition to the vagueness of the phrase "harmful to minors" is the problem that the law applied local community standards to the Internet. Most federal judges and Supreme Court justices were concerned that the law allowed any community—even the most rural and conservative—to define the content of the Internet for everyone in the country. In distinction to this legal morass, the Supreme Court firmly established in 1982 that bans on child pornography are constitutional, so long as the material in question depicted an actual—as opposed to a virtual—child. (5)

Symbolic Speech

Mary Beth Tinker as an Adult

Another controversial area of free speech case law surrounds **symbolic speech**, which we define as nonverbal or nonwritten behavior or symbols that convey a political viewpoint. Since the 1930s, the Court has recognized the right of Americans to engage in symbolic speech. In ***Stromberg v. California* (1931)** the Court struck down a California law that banned displays of red flags that were symbols of socialist and Communist organizations. Later, during the Vietnam War, the Court confronted the issue of symbolic speech again when students in Iowa protested the war by wearing black armbands to school. The students were peaceful and did not disrupt classes, but the school board had banned the wearing of armbands in an effort to head-off the students' protest. Several students–including Mary Beth Tinker–sued when they were suspended for wearing the armbands, and the Court ruled in ***Tinker v. Des Moines School District* (1969)** that such peaceful symbolic speech was protected even for minors. Another aspect of symbolic speech concerns flag burning. At the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was arrested for burning a U.S. flag while making a speech condemning the Reagan administration. He filed suit, claiming his freedom of speech was violated. In a narrow 5-4 decision, the Supreme Court agreed with Johnson in ***Texas v. Johnson* (1989)** and ruled that flag burning is protected by the First Amendment as a form of symbolic speech. Congress repeatedly tried to overturn this decision by passing a Constitutional amendment but came just short of having sufficient votes to do so.

Two Considerations with Respect to News Outlets

This is a good opportunity to make ourselves aware of two important considerations regarding the First Amendment rights of news organizations. The Court has interpreted freedom of the press to mean that government should not be able to engage in what is known as **prior restraint**, which is when the government prevents publication of something that it finds to be objectionable or illegal. The most famous case involving this principle was ***New York Times v. United States* (1971).** During the Vietnam War, **Daniel Ellsberg** stole a copy of a secret history of America's involvement in that conflict. As an employee of the Rand Corporation, Ellsberg had participated in producing this secret report for the Secretary of Defense. Ellsberg gave it to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called ***The Pentagon Papers***. It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and the considerable degree to which the American people were deceived by the government. Even though most of the deception had occurred under Democratic administrations, Republican President Richard Nixon *wanted The Pentagon Papers* suppressed. The government got a federal court to issue an order to the *New York Times* to desist from further publication, arguing that publication violated the Espionage Act's prohibition against willfully communicating information it "knew or had reason to believe. . . could be used to the injury of the United States. . . to persons not entitled to receive such information." In a 6-3 decision, the Court ruled that the government had not met its "heavy burden of showing justification" for prior restraint of *The Pentagon Papers*. (6)

Another important aspect of constitutional interpretation that affects news outlets has to do with the

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

Corporate Speech

We've already talked about the growing power of corporate political speech, so we don't need to spend too much time on it here. The Supreme Court's logic runs like this: People are protected by the First Amendment to express their political opinions. Corporations are people under the law. Therefore, corporations have the same level of First Amendment protection of their right to speak about political issues. In addition, the Court has ruled in cases like *Buckley v. Valeo* (1976) and *Citizens United v. Federal Election Commission* (2010) that spending money is a form of protected free speech. The Court's majority refuses to make a free speech distinction between different types of corporations—e.g., those that are for-profit like oil companies and pharmaceutical companies that lobby governments, and companies that are in the business of reporting on political events. Nor does the majority appreciate or care about the potential for legalized corruption and gross political inequity when it allows deep-pocketed corporations to fund political advocacy and campaigns on an "equal" basis with people like schoolteachers, store clerks, and rideshare drivers.

The Supreme Court has empowered corporations in another respect by taking an increasingly pro-corporate stance on government regulating commercial speech. **Commercial speech** refers to when corporations speak to potential consumers about products and services. This sort of advertising is not political speech. As David Schultz wrote for the First Amendment Encyclopedia, for much of American history corporate commercial speech "had been subject to significant regulation to protect consumers and prevent fraud," and courts had generally upheld such regulations. (8) In ***Valentine v. Chrestensen* (1942),** the Court ruled that unlike with political speech, which is presumptively constitutional and difficult for government to regulate, "the Constitution imposes no such restraint on government as respects purely commercial advertising."

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

1. The government may regulate commercial speech that is fraudulent or misleading.
2. The government's interest in regulating a particular instance of commercial speech must be substantial.
3. The regulation must directly advance the government's asserted interest in regulating the commercial speech.
4. The regulation must be narrowly tailored to advance the government's interest in regulating the commercial speech.

In the time since the *Central Hudson Gas* case, Supreme Court has placed greater limits on government's

ability to regulate commercial speech, and this development is an object lesson on corporate power in modern American politics. The Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted to them by the conservative majority. **Justice Clarence Thomas** firmly asserted in his concurring opinion in ***44 Liquormart, Inc. v. Rhode Island* (1996)** "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Many scholars applaud this view. Writing in the *Northwestern University Law Review*, William French argues that commercial speech "is purely persuasive—most notably, advertisements meant to persuade others to purchase. Such an expression falls in line with other forms of speech that receive unquestioned protection, like political campaigning during an election." (9) Others are quite concerned about the direction being set by the Supreme Court on commercial speech. Law professor Tamara Piety, author of *Brandishing the First Amendment: Commercial Expression in America*, makes this argument about unregulated commercial speech:

> *"Once everything becomes 'expression' then nothing is regulable. It's not like we haven't tried . . . laissez faire before as a country. We had that in the 19th century; it didn't work out so well. That seems to have been the consensus from those who were living during that period and the decades that followed."* (10)

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

References

1. James Miller, *Can Democracy Work? A Short History of a Radical Idea, From Ancient Athens to Our World*. New York: Farrar, Straus and Giroux, 2018. Page 214.
2. Victoria L. Killion, *The First Amendment: Categories of Speech*. Washington, D.C.: Congressional Research Service. January 16, 2019. Page 1.
3. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism.*New York: W.W. Norton, 2004. Pages 192-194.
4. No Author, *Hate Speech and Hate Crime*. American Library Association. December, 2017.
5. *New York v. Ferber*(1982). No Author, "Supreme Court Strikes Down Ban on 'Virtual Child Porn,'" *CNN*. April 18, 2002.
6. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism.*New York: W.W. Norton, 2004. Pages 500-516. Note that the government also tried unsuccessfully to prevent *The Washington Post* from printing this material as well.
7. David Folkenflik, "*Times*Reporter Miller Testifies in Plame Case," *NPR's All Things Considered*. September 30, 2005.
8. David Schultz, "Commercial Speech," *The First Amendment Encyclopedia*. No date.
9. William French, "This Isn't Lochner, It's the First Amendment. Reorienting the Right to Contract and Commercial Speech," *Northwestern University Law Review*. March 1, 2019. Page 502.
10. Elliot Zaret, "Commercial Speech and the Evolution of the First Amendment," *Washington Lawyer*. September 2015.
11. David A. Martin, "Crying Over Spilt Milk: A Closer Look at Required Disclosures and the Organic Milk Industry. International Dairy Foods Association v. Boggs," *Journal of Environmental Sustainability and Law*. Fall 2011.

Media Attributions

- Westboro © JCWilmore is licensed under a CC BY (Attribution) license
- Mary Beth Tinker © Eli Hiller is licensed under a CC BY-SA (Attribution ShareAlike) license

Chapter 65: The Law and Politics of Religious Freedom

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

—Franklin Graham (1)

America's Religious Schizophrenia

On first glance, the words of the First Amendment appear to be clear: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These words, however, have given rise to at least as many arguments as those dealing with freedom of speech. With so many cases, it's difficult to understand what the legal status of religion is in the United States, particularly when it clashes with other values such as civil rights.

Much of the problem stems from America's cultural schizophrenia about religion's place in public life. We seem to have conflicting traditions. While America has a long tradition of people fleeing religious persecution, some of the groups who fled religious persecution moved rather quickly to establish their own "official" religions or to set up theocracies. As Americans, we have a long tradition of opposing religious intolerance. Indeed, Thomas Jefferson advocated for a "wall of separation" between church and state. We also have a long tradition of invoking God's blessing and making other religious displays at public events. We also have a long train of religious and political leaders who, like Christian evangelist Franklin Graham, attribute our misfortunes to God's disapproval of our sinful ways. Simultaneously, we have embraced science and empiricism. Reconciling these often-conflicting traditions has not been easy.

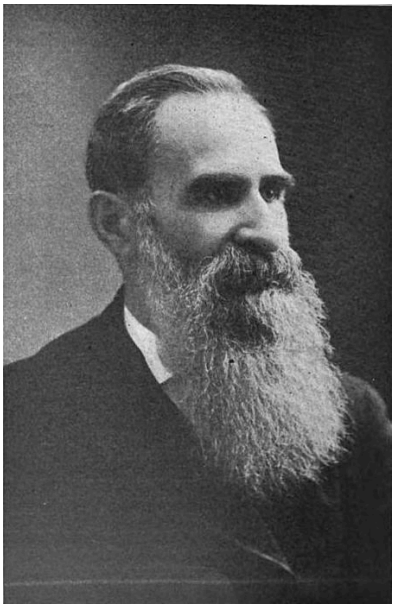
Establishment and Free Exercise of Religion

The First Amendment's treatment of religion consists of two related phrases. One is called the **establishment clause** because it restricts Congress' ability to legislate regarding "an establishment of religion." The second phrase, "or prohibiting the free exercise thereof," is referred to as the **free exercise clause**. What do these phrases mean when taken together? Clearly, the founders did not want America to become a country like England and its Church of England, with an established official religion. Interestingly, the only time religion is mentioned in the Constitution is when it says, "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This forbids the government from requiring that elected or appointed leaders be from a particular religion or even that they believe in God at all.

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

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

Beyond this, the Supreme Court has generally ruled the following: that the government should not show a preference for a particular religion, not support the propagation of religion, and not endorse religious symbols on public facilities unless all other kinds of expression are also supported or unless there is a secular justification for the symbols. The Court has also allowed "incidental" religious displays on public property—think "In God We Trust" on our money—that are unlikely to do much to forward the cause of a particular religious tradition. The court has allowed tax dollars to support students going to religiously affiliated colleges and universities, as well as to support some aspects of elementary and secondary religious school attendance, such as purchasing books and tests and providing transportation.



George Reynolds in 1909

In other areas, the Court has allowed government to restrict religion in some instances, but not in others. In ***Reynolds v. United States* (1878),** the Court upheld a federal law banning polygamy, even though George Reynolds was married to more than one wife because it accorded with his religious beliefs. This case was particularly important because the Court made the distinction between religious beliefs, which the government could not regulate, and religious practices, which the government could regulate. Without this distinction, the Court argued, people could hide all sorts of outrageous and/or dangerous behavior behind the curtain of religion. Then the Court ruled in *Goldman v. Weinberger (1986)* that an Orthodox Jew in the Air Force could be prohibited from wearing a yarmulke. Finally, in *Employment Division v. Smith (1990),* the Court ruled against Native Americans who had been fired and denied state unemployment benefits because they used peyote as part of an off-duty religious ceremony. However, in *West Virginia State Board of Education v. Barnette (1943)*, the Court ruled that a compulsory flag salute law violated the religious rights of Jehovah's Witnesses, whose religious practices prohibit them from worshipping graven images. And in *Wisconsin v. Yoder (1972),* the justices ruled that because of the Amish's religious beliefs, they were not bound by state compulsory school attendance laws.

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

The RFRA continues to be used as a defense against government intruding on religious practices. For example, it was central to a Supreme Court decision forbidding the government from banning the use of sacramental tea that contained schedule 1 illegal drugs. (4) The Supreme Court's conservative majority has looked very favorably on religious expression, even when it conflicts with other values. Consider the Court's recent decisions:

- Since Missouri funds playground construction and maintenance at public schools, it must also fund

playground construction and maintenance at church schools as well. (5)

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

And yet the Court also ruled that. . .

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

Overall, the current Supreme Court is more pro-religion now than it has been in modern memory. For example, professors Lee Epstein and Eric Posner calculated that while the Court ruled in favor of religious interests 58 percent of the time during the period from 1985 to 2005, since then the Court has ruled in favor of religious interests 86 percent of the time. (12) In *Carson v. Makin (2022),* the Court ruled that Maine's private school voucher program must allow parents to use the taxpayer-funded vouchers at religious schools.

Religion in Public Schools

A great example of the First Amendment's establishment clause and the free exercise clause intersecting is the vexing problem of religion in public school. In the 1960s, the Court limited some religious expression that could legally occur in public schools. In ***Engel v. Vitale*** **(1962),** the Court struck down a New York law that required students to recite daily the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Despite the fact that the prayer was nondenominational and that students with permission from parents could opt out of reciting the prayer, the Court ruled that the practice constituted an establishment of religion. The next year, in ***Abington School District v. Schempp*** **(1963),** the Court struck down a Pennsylvania school's daily practice of having a student read the Lord's Prayer and a Bible passage over the school's PA system. In this case, the Schempp's were church-going Unitarians who objected to the practice. At the time of the *Engel* and *Abington* cases, organized prayer in public schools was not as common as many would believe today. Around 70 percent of public schools did *not* have public prayer in the early sixties. (13)

Progressives and conservatives alike have grossly distorted these and other decisions for their own political reasons. Some on the far left have argued, because this is the reality they want to see happen, that the Court has banned prayer from public schools. Similarly, to mobilize conservative voters over a false issue, some on the far right have argued that the Court has indeed banned prayer from public schools. The Supreme Court has not banned prayer or other religious expression from public schools. The table below delineates the **forms of religious expression that are and are not allowed in public schools.** (14)

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

Coach Kennedy Leading Students in Prayer

The above consensus on religion in schools faces an uncertain future now that the Court is dominated by a conservative majority. For instance in ***Kennedy v. Bremerton School District*** **(2022)**, the Court ruled in favor of a high school football coach who prayed on the 50-yard line immediately after every game. Many of his players joined him, and the gatherings took on the character of a public school official leading students in prayer. One parent complained to the school that their son, an atheist, felt "compelled to participate" out of fear that "he wouldn't get to play as much if he didn't participate." Despite these facts, the Court's majority characterized the coach's actions as private religious expression and overturned the *Lemon* case, but didn't replace it with a clear standard for lower courts to follow. In another blockbuster case, the Court struck down Maine's long-standing tuition assistance program that funded parents in remote areas to send their children to public or private schools. The majority struck down the law because it disallowed tuition assistance for sectarian religious schools. By ruling in ***Carson v. Makin*** **(2022)** that Maine's program violated the Free Exercise Clause of the First Amendment, the majority effectively said that in states with such programs, taxpayer funds must go to support sectarian education at religious schools. (15). It makes for a difficult situation for states that do not want, for example, to fund religious schools that teach students to abhor homosexuality or that won't hire gay teachers and staff–practices that are, themselves, against state law.

References

1. Cheryl K. Chumley, “Franklin Graham on Coronavirus Crisis: ‘Man Has Turned His Back on God.’” *Washington Times*. April 6, 2020.
2. *Lemon v. Kurtzman*(1971).
3. *City of Boerne v. Flores*(1997).
4. *Gonzales v. O Centro Espírita Beneficente União do Vegetal* (2006).
5. *Trinity Lutheran Church of Columbia v. Comer*(2017).
6. *Masterpiece Cakeshop v. Colorado Civil Rights Commission*(2018).
7. *Burwell v. Hobby Lobby, Inc.*(2014).
8. *EEOC v. Abercrombie and Fitch Stores, Inc*. (2015).
9. *American Legion v. American Humanist Association*(2019).
10. *Jefferson S. Dunn, Commissioner, Alabama Department of Corrections v. Domineque Hakim Marcelle Ray*(2019).
11. *Trump v Hawaii*(2018).
12. Nina Totenberg, “The Supreme Court is the Most Conservative in 90 Years,” *National Public Radio*. July 5, 2022.
13. Susan Jacoby, *The Age of American Unreason*. New York: Pantheon Books, 2008. Page 184.
14. Developed from: American Jewish Congress, et al,, “Religion in Public Schools: A Joint Statement of Current Law.” April, 1995. No Author, “Religion in the Curriculum,” Anti-Defamation League. No Date. Washington Office of Superintendent of Public Instruction, “Students’ Rights: Religion and Religious Practice,” No date.
15. Ian Millhiser, “The Supreme Court Hands the Religious Right a Big Victory by Lying About the Facts of a Case,” *Vox*. June 27, 2022. Ariane de Vogue, Tierney Sneed, and Chandelis Duster, “Supreme Court Says Maine Cannot Exclude Religious Schools from Tuition Assistance Programs,” *CNN*. June 21, 2022.

Media Attributions

- George Reynolds © Published by 'Young Men's Mutual Improvement Association' is licensed under a Public Domain license
- Coach Kennedy Leading Students in Prayer © Bremerton School District is licensed under a Public Domain license

Chapter 66: The Individual and the Criminal Justice System

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

—Fair Trials International (1)

The power differential between individuals and government is starkly on display when people stand accused of committing a crime. Not only did the founders know this in principle, they were very familiar with the English criminal justice system's historic abuse of the American colonists. So, let's take some time to understand our constitutional protections, those protections' limitations, and subsequent abuses that have been visited upon people.

The Fourth Amendment

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

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

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

March to End Racial Profiling in Stop and Frisk

On the other hand, federal courts have given authorities broad latitude to search people on the street. In ***Terry v. Ohio* (1968),** the Supreme Court ruled that police may stop and frisk people on the street if they have a **reasonable suspicion** that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. Reasonable suspicion is a lower standard than **probable cause**, which is the standard used when judges issue specific warrants or when police operate in what are known as exigent circumstances. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use anything they find in court. As lawyer Taru Taylor argues, the precedent set by *Terry v. Ohio* (1968) completely turned on its head the relationship between policing authorities and ordinary citizens, putting the latter in the same situation the colonists faced before the Revolution. "Ever since *Terry*," he argues, "cops have had the despotic discretion to search or seize any U.S. citizen based on a 'reasonable suspicion' that they are a criminal or are about to commit a crime." The Founders complained in the Declaration of Independence about the general warrants the British used to oppress Americans, but actions of the police backed by the amorphous "reasonable suspicion" standard is an even more oppressive law enforcement tool than general warrants ever were. (5)

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

The Fifth and Sixth Amendments

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

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

The Fifth and Sixth Amendments have many protections for criminal defendants. When the Fifth Amendment says that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," we refer to that as the protection against double jeopardy. **Double jeopardy** "prohibits anyone from being prosecuted twice for substantially the same crime." (6) A notable exception to the double jeopardy protection concerns the **separate sovereigns doctrine**, which means that the federal government and the state governments are separate units under our federal system. Therefore, the state government and the federal government can prosecute you separately for the same crime. (7)

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

The Fifth Amendment provides a person their due process before the government can deprive them of life, liberty, or property. The idea of due process goes back to the **Magna Carta of 1215**. This agreement, which was forced upon England's King John by the aristocracy said that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." (8) Thus, **due process** is "a fundamental, constitutional guarantee that all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. . . [and] a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious." (9) In a lecture to the University of Pennsylvania Law School, Judge Henry Friendly put together a nice list of what procedural due process means:

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

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

The Sixth Amendment provides for the right to counsel. As we've seen, the Supreme Court in ***Gideon v. Wainwright* (1963)** incorporated the Sixth Amendment into the Fourteenth Amendment and required that states also provide counsel to indigent defendants. This is an important procedural guarantee, but one that

often falls short in practice. As Andrew Cohen writes, "There is a vast gulf between the broad premise of the ruling and the grim practice of legal representation for the nation's poorest litigants." He further argues that *Gideon* essentially put an unfunded mandate on the states to provide and pay for lawyers for the 80 percent of defendants who can't afford to pay for their own counsel. (11) Public defenders and lawyers assigned to defendants are chronically overworked, often with caseloads three times higher than national standards. Moreover, nationwide only 2.5 percent of state and local criminal justice budgets go to defend indigents. (12) The result is that indigent defendants often don't get the defense they deserve, and too many settle for plea bargains for reduced sentences because they fear what might happen if they go to trial against the resources of federal or state prosecutor's offices. More than 90 percent of federal and state cases are settled by plea bargain. (13)

The Eighth Amendment

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

Before *Timbs v. Indiana* (2019), people were not being protected by the Eighth Amendment's provision against excessive bail and fines. States and localities got into the practice of requiring both. Given that 40 percent of Americans can't come up with $400 to pay for an unexpected car repair so they can keep going to work, it's no surprise that many Americans can't afford cash bail or fines when they are charged with a crime or when they reluctantly admit guilt in a plea bargain. (14) Cherise Fanno Burdeen writes that "More than 60 percent of people locked up in America's jails have not yet been to trial, and as many as nine in ten of those people are stuck in jail because they can't afford to post bond." (15) Being stuck in jail because you can't pay cash bail makes it impossible to work. Being unable to afford steep fines after you've pled guilty to get a fine instead of jail time, makes for a never-ending engagement with the criminal justice system. Obviously, the burdens of America's criminal justice system fall heaviest on the poor. Finally, and fortunately, in *Timbs v. Indiana* (2019), the Supreme Court indicated in its 9-0 ruling that it does not intend to let states impose excessive fines.

The Florida Electric Chair in 1999

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

Due to the arbitrary and racially biased way that capital punishment was meted out across the United States, the Supreme Court invoked a moratorium on applying capital punishment when it decided ***Furman v. Georgia* (1972)**. Two of the justices—Thurgood Marshall and William Brennan—opined that the death penalty violated the Constitution's prohibition against cruel and unusual punishments, regardless of procedural issues. In any case, states that practiced capital punishment rewrote their statutes, and in ***Gregg v. Georgia* (1977),** the Court upheld capital

punishment again, although justices Marshall and Brennan again argued that it was inherently cruel and unusual punishment that cannot be tolerated under the Eighth Amendment. According to the Death Penalty Information Center, since the Supreme Court re-allowed capital punishment in the *Gregg* case, over 1,500 people have been put to death and there still appears to be racial disparities in how the death penalty is applied. (16)

Qualified Immunity for Police

Congress passed the Ku Klux Klan Act of 1871 to protect newly freed slaves and void the Black Codes that Southern states were using to restrict the ability of Blacks to vote, move about their communities without being assaulted, enter into contracts, and practice a profession. It has this provision:

> *"Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."*

This seems to be a clear statement that any person acting under law (like a law enforcement officer) would be liable if they violated the Constitutional rights of any person in the United States. In 1967, however, amidst a concern about rising crime rates, the Supreme Court invented the doctrine of "qualified immunity" for police officers. The original case—*Pierson v. Ray* (1967)—involved White and Black clergy who were arrested while they were trying to have lunch at a coffee shop in a segregated bus station in Jackson, Mississippi. When the clergy tried to sue the officers for violating their Constitutional rights—as stipulated in the Ku Klux Klan Act—the Supreme Court announced in its majority opinion that police had **qualified immunity** from such lawsuits, meaning that the police cannot be sued unless the plaintiffs can show that the officers should have known that they were violating clearly established law. Note that qualified immunity does not exist in the Constitution or in the Ku Klux Klan Act.

Originally, qualified immunity protected police if they were acting "in good faith," but over the years the Court has strengthened the doctrine to give police broad authority to violate Constitutional rights without much fear of liability. For example, in fatal shootings by police, officers are charged in less than 2 percent of cases and convicted in less than a third of the cases that are charged. Joanna Schwartz, who has studied the issue extensively, writes that "just as George Floyd's murder has come to represent all that is wrong with police violence and overreach, qualified immunity has come to represent all that is wrong with our system of police accountability." (17) Clearly, police need to have the authority to do their jobs, but many on the left and right of the political spectrum believe that the pendulum has swung too far in favor of immunity for police officers.

What if. . . ?

What if we restricted plea bargaining and equalized resources between prosecutors and public defenders? This is actually an old debate in the United States. State circuit court judge Ralph Adam Fine argued back in 1987 that plea bargaining was a double evil: "It encourages crime by weakening the credibility of the system on the one hand and, on the other, it tends to extort guilty pleas from the innocent." (17) Another problematic aspect of

plea bargaining is that it is paired with cash bail or the threat of very high penalties, which really put defendants in a tough spot. As former state prosecutor Melba Pearson says, "If you are in jail because of a cash bail you can't pay, pleas can sound like a great alternative to losing your job, failing to pay rent, and a variety of other negative consequences." (18) The practice of **plea bargaining**—admitting guilt to obtain a reduced sentence—has, in fact, been abandoned in a few jurisdictions in the United States, but is growing around the world. (19)

References

1. Editor, "Plea-Bargains and Fair Trials in the USA," Fair Trials International. May 28, 2014.
2. *United States v. Jones* (2012)
3. *Riley v. California* (2016)
4. *Carpenter v. United States* (2018)
5. *T*aru Taylor, "We Must Overturn SCOTUS Decisions That Effectively Deny Rights to Black People," *Truthout*. March 5, 2023. See also the Heritage Foundation's *Guide to the Constitution*, particularly the section on general warrants as they relate to unreasonable searches and seizures.
6. No Author, "Double Jeopardy," Cornell Law School Legal Information Institute. No date.
7. *Gamble v. United States* (2019).
8. "English Translation of Magna Carta," The British Library. Paragraph 39.
9. "Due Process of Law," The Legal Dictionary.
10. Henry Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review*. Volume 123. 1975. Pages 1267-1317.
11. Andrew Cohen, "How Americans Lost the Right to Counsel, 50 Years After Gideon," *The Atlantic*. March 13, 2013.
12. Kanya Bennett and Ezekiel Edwards, "Our Government Has Failed to Defend the Sixth Amendment," The American Civil Liberties Union. May 16, 2019.
13. Dylan Walsh, "Why the U.S. Criminal Courts Are So Dependent on Plea Bargaining," *The Atlantic*. May 2, 2017.
14. Soo Youn, "40% of Americans Don't Have $400 in the Bank for Emergency Expenses: Federal Reserve," *ABC News*. May 24, 2019.
15. Cherise Fanno Burdeen, "The Dangerous Domino Effect of Not Making Bail," *The Atlantic.*April 12, 2016.
16. Death Penalty Information Center.
17. Joanna Schwartz, "How the Supreme Court Protects Police Officers," *The Atlantic*. January 31, 2023. See also Taru Taylor, "We Must Overturn SCOTUS Decisions That Effectively Deny Rights to Black People," *Truthout*. March 5, 2023.
18. Ralph Adam Fine, "Plea Bargaining: An Unnecessary Evil," *Marquette Law Review*. Summer 1987. Page 615.
19. Christopher Wright Durocher, "The Rise of Plea Bargains and the Fall of the Right to Trial," American Constitution Society Expert Forum. April 4, 2018.
20. The Economist, "The Troubling Spread of Plea Bargaining from America to the Rest of the World," November 9, 2017.

Media Attributions

- Stop and Frisk © longislandwins is licensed under a CC BY (Attribution) license
- Electric Chair © Florida Department of Corrections/Doug Smith is licensed under a Public Domain license

Chapter 67: Threats to Individual Freedom--Government Versus Corporations

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

—Ian Bogost (1)

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

—Tom Spiggle (2)

As citizens of a republic, we have to be on guard against encroachments on our liberty. What are the sources of those potential threats? When we think about the institutions that affect our lives, two stand out as significant threats to our liberty. That is, these two institutions have a track record of undermining freedom and the power to enforce tyrannical policies: governments and corporations.

The Threat from Government

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

Government has a long track record of violating liberty, and we can be very confident that future American governments will act to limit civil liberties. Governments will limit freedom of speech and the press; they will aggressively incarcerate people; they will inflict cruel and unusual punishments; they will seize property without due process or fair compensation. Government has done these things and, in all likelihood, will do these things in the future. We can also safely say that governments are more likely to do these things in times of war or other types of civil unrest or threat.

This textbook has focused on the national government. While it is clear that the federal government has historically committed some very serious violations of civil liberties, we should also understand that our state and local governments pose the more likely threat to our individual liberties. State and local governments largely enforce criminal law, regulate things like marches and demonstrations, make decisions regarding property use and eminent domain, control schools, and enforce morals legislation. It is important to know that while government at all levels can do tremendous damage to our civil liberties, we have recourse available to us. Obviously, we can turn to the courts to right specific wrongs. We can elect new leaders and insist that they change laws that we

find oppressive. In a democratic system—even an attenuated one—the government is our servant, so we can determine the level of freedom we want individuals to have. Do we want parents to be able to deny their children life-saving modern medicine because they have objections to it? Do we want people to be able to flout public health guidelines, even though doing so endangers everyone else and makes the need for those guidelines last longer? To what extent should government decide who can marry? Those are just a couple of the many questions we need to answer as we collectively determine our civil liberties and civil rights.

The Threat from Corporations

When we talk about civil liberties, we typically talk about threats from government action and underestimate the enormous threat posed by corporate power. Sohrab Ahmari put it this way: "The sense that tyranny can only come from the government risks obscuring another, more complicated reality, which is that private actors can tyrannize us." (3) Corporations, particularly those that are large and cross state and country boundaries, are able to dictate much of our lives on a take-it-or-leave-it basis. You want the factory to stay in the United States? You'd better be willing to take a pay or benefits cut. If the company office moves from a high-tax state to a low-tax state, you'll have to uproot your family and move if you want to stay employed. We take this kind of corporate power for granted in the United States because workers are often in a poor bargaining position. Fifty years ago, one- third of workers belonged to a union; now only 7 percent of private-sector workers belong to a union. (4) The United States also doesn't structurally empower workers like some other countries do. Take Germany's **Mitbestimmungsrecht**—or codetermination—requirement, which dates back to the 1920s and says that "depending on the size of a German limited company, a third or even half of the members of its supervisory board are voted in by its employees." (5) This kind of power for workers has helped support German wages, working conditions, and the vitality of Germany's manufacturing sector.

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

Privacy—Privacy is not a liberty enumerated in the Constitution, but the Supreme Court has relied on privacy arguments to, among other things, protect intimate family planning decisions. (6) But the very notion of privacy undermines the insatiable corporate need for our private information, and our political leaders have allowed this to happen. Shoshanna Zuboff describes our predicament as **surveillance capitalism**—"a new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales." (7) Reflect on the fact that your labor is worth something to corporations—they must pay for it if they want to produce value—but almost all of the information about you is freely available to corporations, who buy and sell it between themselves, aggregate it, and compile it to expand their profits. It's odd that the National Rifle Association rails against gun licensing because they don't want government to have a list of gun owners, but fails, apparently, to consider that corporate America knows exactly who owns which guns. Under surveillance capitalism, we traded privacy for convenience and connection. There have been some attempts to claw back some control over our information, most notably in Europe. The European Union implemented a uniform General Data Protection Regulation in 2018 to give Europeans better privacy protections, but nothing similar has passed in the United States.

Free speech—We've talked about the boundaries of free speech protections in the First Amendment. We cherish our ability to speak freely about the issues of the day. We often fail to realize that those protections stop at the office or factory door. As attorney Tom Spiggle writes, "Despite what many employees think, your rights to freedom of speech are fairly limited at work, and it's often perfectly legal for an employer to take action against a worker for something they said or wrote." (8) This is especially true if you work for a private-sector employer. Employees can talk about harassment or fraud or other illegal activities that they see in the workplace, and they

can talk about wages and working conditions, but employers can prevent them from talking about politics. As employment lawyer Daniel Schwartz puts it, "Companies have a right to manage their workplaces as they want. They can prefer one point of view over another if they want." (9)

Neo-feudalism—Almost all people below retirement age are dependent on wages from work they do for companies. Most of them are only one or two paychecks away from financial ruin. (10) Most working-age people are dependent on their job—or their spouse or parent's job—for health insurance. America's economy is characterized by regional booms and busts, and many locations around the country have become, in journalist Chris Hedges' memorable phrase, **sacrifice zones** for America's brand of exploitative capitalism—places where the project of endless exploitation of natural resources and human labor manifests itself in the form of agricultural fields where laborers endure near slave-like conditions to produce cheap food for American tables, fulfillment centers where low-wage workers and robots process cheap goods for American front porches, and abandoned industrial centers where jobs disappeared over the horizon to places with lower wages and fewer regulations. (11)

One does not need to live in a sacrifice zone to feel the effects of corporate tyranny in America. Just-in-time scheduling to minimize labor costs and just-in-time supply lines to reduce inventory costs put tremendous burdens on the ordinary hourly workers who have to structure their lives to fit the corporate demand for efficiency. Trying to raise a family compounds the problem, because your income and your work schedule fluctuates from week to week. Maybe your employer doesn't give you enough bathroom breaks, forcing you to wear an adult diaper to retain some sense of dignity in the workplace. Your employer may very well have a policy allowing them to confiscate and inspect your personal devices if you use them to access corporate systems like payroll (to submit your hours) or email. If you work for a company of any size, a likely condition of your employment is that any dispute you have with your employer must be resolved through individual—not collective—arbitration or mediation in a long, business-controlled process. Maybe you're not even an employee, but a gig worker. In that case your corporate overlord, the entity that allows you to put a roof over your head and feed your children, owes you no benefits beyond your pay and need not respect any rights. (12)

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

When we bring all these ideas together, it's difficult not to come to the same conclusion as a growing number of scholars, that America is increasingly marked by neo-feudalism. **Neo-feudalism** refers to the idea that our society resembles the feudalism that existed in the Medieval period in which most ordinary people had very limited freedom and in which economic, political, and legal structures dictated the aristocracy's privileged position. However, under neo-feudalism, the privileged position in our society is occupied by the wealthy corporate elite. The Supreme Court's jurisprudence, argues law professor Daniel Greenwood, "atavistically recapitulates feudal doctrines limiting the sovereign's authority over the medieval corporations of Aristocracy, Church, guilds, universities, and cities, as if business corporations were fundamental units of our polity. . ." (13) Ordinary people in America don't like to think of themselves as serfs, but consider how controlled people are by corporations and financial institutions. Debt—student debt, home mortgages, car loans, credit card balances, and medical bills—combined with the wage-labor imperative , the reality of sacrifice zones, and the desperation to avoid having one's family fall into the lower classes keeps us in line. We are too busy and too dependent to engage in something like a general strike. We are too afraid to step too far out of line. We are propagandized by corporate media to think that our state of affairs is normal and unchangeable. We are too busy to understand what is really happening to us. The status quo in neo-feudal America is "marked by an economic crisis with no end in sight, by the slow but steady growth of a police state

aimed at the lowest rungs of society, and a political circus which keeps us enraptured long enough that we don't question what's really going on." (14) We can be protected all we want from the predations of government against our civil liberties, but those protections are ultimately meaningless if we are modern-day serfs who owe all to our corporate overlords.

References

1. Ian Bogost, "Welcome to the Age of Privacy Nihilism," *The Atlantic*. August 23, 2018.
2. Tom Spiggle, "Your Free Speech Rights (Mostly) Don't Apply at Work," *Forbes*. September 28, 2018.
3. Sohrab Ahmari, "Conservative Socialism?" *The Gray Area Podcast with Sean Illing*. August 28, 2023.
4. Quoctrung Bui, "50 Years of Shrinking Union Membership in One Map," *Planet Money on NPR*. February 23, 2015.
5. Horst Eidenmüller, "Corporate Co-Determination German-Style as a Model for the UK?" Oxford University School of Law. July 18, 2016.
6. *Griswold v. Connecticut*(1965)
7. Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. Kindle Edition. Public Affairs, 2019. Page 2 of 664.
8. Tom Spiggle, "Your Free Speech Rights (Mostly) Don't Apply at Work," *Forbes*. September 28, 2018.
9. Chris Isidore, "Free Speech on the Job, and What That Means," *CNN Business*. August 8, 2017.
10. Emily Batdorf, "Living Paycheck to Paycheck Statistics 2024," Forbes. April 2, 2024.
11. Chris Hedges, "United States Riddled with Impoverished 'Sacrifice Zones,'" *CCPA Monitor*. July/August, 2013.
12. See Sohrab Ahmari, *Tyranny, Inc.: How Private Power Crushed American Liberty: and What to Do About It*. New York: Forum Books, 2023.
13. Daniel J. H. Greenwood, "Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights," *University of Illinois Law Review*. 2017. Page 166.
14. John W. Whitehead, "The Age of Neo-Feudalism: A Government of the Rich, by the Rich and for the Corporations," *Huffington Post*. March 30, 2013.

Media Attributions

- Mochida Family © Dorothea Lange is licensed under a Public Domain license
- Amazon Protest © Fibonacci Blue is licensed under a CC BY (Attribution) license

Chapter 68: Civil Rights Case Study--Race

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

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

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

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

African Americans are certainly not the only group of Americans to have experienced discrimination at the hands of the government, corporations, or their neighbors. Yet it is true that they have been the victims of broader, more systemic forms of discrimination over longer periods of time than other racial or ethnic groups in the United States. Further, the legal changes that resulted largely from the Black Civil Rights Movement have revolutionized life in the United States for all people. Therefore, we will use this window into American political history to illustrate key developments in civil rights.

Race and Civil Rights Before and After the Civil War

Most Americans are not taught in school how close the country came prior to the Civil War to institutionalizing a race-based (and probably gender-based) republic that very likely would have persisted until today. In his farewell address to Congress in December, 1860, Democratic President James Buchanan proposed to amend the Constitution to allow states to affirm the right to hold slaves, allow slavery in the territories, and recognize the rights of slave owners to recover runaways wherever they fled. Congressman Thomas R. Nelson of Tennessee proposed a Constitutional amendment to forbid anyone from voting "unless he is of the Caucasian race, and of pure, unmixed blood." Most significantly, Senator William H. Seward and Representative Thomas Corwin succeeded in getting both houses of Congress to pass by 2/3 vote an amendment—known as the Corwin Amendment—which said the following: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." Outgoing President Buchanan expressly supported this amendment, and incoming Republican President Abraham Lincoln had "no objection" to it. Maryland and Kentucky had already ratified the Corwin Amendment before South Carolinian militiamen fired on federal forces at Fort Sumter, beginning the Civil War. (3)

Prior to the end of the Civil War, most Blacks were slaves, and the legal position of free Blacks was tenuous. The Supreme Court's decision in ***Dred Scott v. Sanford (1857)*** is particularly instructive in this regard. Dred Scott, a slave from Missouri, sued his owner for freedom based on the fact that his owner had taken him to Illinois, a free state, and to the Wisconsin Territory, a free territory. Chief Justice Roger Taney ruled that Scott did not have standing to sue and summed up free Blacks' precarious position when he answered his own summation question: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as

such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?" The Court answered a resounding "No," which was its way of saying that Blacks—slave or free—could not ever expect to become full and equal members of the American political community.

In 1861, eleven Southern states seceded from the Union to create a slave-owning independent republic. After a bloody Civil War in which 620,000 people were killed, the North defeated the South. In the wake of the North's victory in the Civil War, Congress passed three amendments to the Constitution that we'll refer to as the **Civil War Amendments**. Securing passage of these amendments was difficult. The Thirteenth Amendment abolished slavery, and only barely passed with the necessary two-thirds vote. The Fourteenth Amendment defined citizenship as belonging to all persons born or naturalized in the United States, but its most important component for this chapter is its **civil rights clause**, which mandated that all people receive the "equal protection of the laws." The Fifteenth Amendment provided that citizens shall not be denied voting rights based on "race, color, or previous condition of servitude." Many Democrats were apoplectic over passage of these amendments, arguing that they would lead to racial equality, social disorder, interracial marriage and even to the collapse of Western civilization. (4)

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

The majority of Southern Whites had no intention of allowing Blacks to vote, to be treated equally by the law, or to develop economic independence. In the years immediately after the Civil War, Southern states passed a series of laws that became known as **Black Codes**, which kept as many African American citizens in conditions of servitude as possible. Blacks were forbidden from self-employment, and thereby denied trades like blacksmithing, which they may have learned while they were slaves. More importantly, Black Codes required Blacks to sign "annual labor contracts with plantation, mill, or mine owners. If African Americans refused or could show no proof of gainful employment, they would be charged with vagrancy and put on the auction block, with their labor sold to the highest bidder. . . [If] they left the plantation, lumber camp, or mine, they would be jailed and auctioned off." (5) And, of course, Whites discriminated rampantly by not allowing Blacks to access basic commercial businesses.

Many court cases resulted directly from passing the 1875 Civil Rights Act, as Blacks continued to be refused service on account of their race at inns, hotels, railroads, and theaters around the country. In Tennessee, Sallie J. Robinson purchased a ticket to ride on the Memphis & Charleston Railroad but was removed by the conductor because she was Black. In Missouri, W. H. R. Agee was denied accommodation at the Nichols House Inn because he was Black. Similarly, Bird Gee was not allowed to eat at an inn in Topeka, Kansas because he was Black. In San Francisco, George M. Tyler was not allowed to attend a production at Maguire's Theatre because he was Black. (6) These four cases reached the Supreme Court in 1883 and were decided together as the ***Civil Rights Cases (1883)***. This was an important test of the meaning of civil rights and the Fourteenth Amendment's mandate that no state may deny any person the equal protection of the laws. In a devastating decision for those who believed in equality, eight of the nine Supreme Court justices ruled in favor of private business owners in these cases and overturned the 1875 Civil Rights Act as unconstitutional. How could the Court rule that this Act was unconstitutional—a law designed to guarantee the provisions of the Fourteenth Amendment? The Court ruled that while states must not discriminate, the owners of private businesses were free to discriminate against potential customers on the basis of race. Justice Bradley, writing for the majority, said that "Civil rights, such

as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings."

There was one dissenter in the *Civil Rights Cases*—**Justice John Marshall Harlan**—who argued that the states were complicit in the so-called private discrimination of businessmen. He wrote, the "keeper of an inn is in the exercise of a quasi-public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person." Unfortunately, Harlan was alone among the justices in being many decades ahead of his time. The decision in the *Civil Rights Cases* sent a huge message to businessmen that the United States Constitution would not stand in the way if they wanted to refuse service to Blacks. Many did just that—and this behavior was not limited to the South, nor was it only targeted at African Americans.

The Supreme Court sent an even more disastrous signal in the case ***Plessy v. Ferguson (1896)***. In 1890, the Louisiana legislature passed the Separate Car Act requiring that all trains operating in the state be segregated by race and forbidding people from "going into a coach or compartment to which by race he does not belong." Most train companies resented the costs of putting extra cars on their trains to meet the Separate Car Act requirements. Train companies and a New Orleans civil rights group known as the Committee of Citizens worked with New York lawyer Albion Tourgee to bring suit against the law. This suit was to be a test case, and the Committee needed someone to violate the law, to be punished, and have standing to sue. On June 7, 1892, **Homer Plessy** purchased a first-class ticket on the East Louisiana Railroad's train running from New Orleans to Covington, Louisiana, and took a seat in a car reserved for Whites only. Plessy, a married shoemaker whose heritage was African and French, has been referred to as one-eighth Black. Indeed, press accounts of the time indicate that the train conductor had to ask Plessy his race before he was arrested for being in the "wrong" car. The Committee of Citizens hoped that the Supreme Court would rule in favor of Plessy, for surely this was a violation of the civil rights clause of the Fourteenth Amendment: Here is a state law that mandated segregating train passenger according to race. But the Supreme Court upheld the law as constitutional, arguing that no violation of the civil rights clause had taken place because the passengers were all treated equally, albeit in a segregated fashion. This reasoning became known as the **separate but equal doctrine** and was the rationale to officially sanction segregation for the next six decades. Justice Harlan was again the lone dissenter; he argued that, "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." His argument did not carry the day and the precedent set by *Plessy* allowed separate but equal to characterize American life. (7)

Categories of Racial Discrimination in the Twentieth Century

Discrimination against African Americans took many forms, not all of which can be covered here. However, you should be aware of the following five categories of discrimination:

Segregated Public Accommodations—Using as precedents the *Civil Rights Cases (1883)* and *Plessy v. Ferguson (1896),* states and businessmen freely segregated and excluded Blacks as well as other racial and ethnic group members. Just about any form of public accommodation you can think of was segregated somewhere at some time in the United States—and again, this practice was not restricted to the South. Public accommodations such as trains, buses, drinking fountains, hospitals, cemeteries, parks, beaches, and swimming pools were segregated. Private business owners of gas stations, hotels, inns, theaters, restaurants, lunch counters, and the like were free to refuse service to African Americans and others.

One might be tempted to think of segregated public accommodations as the least objectionable form of discrimination. After all, it does not affect one's overt political equality the way that prohibitions against voting might. One would be wrong in such thinking. Clearly, the victims of segregated public accommodations did not feel this way, and the reasons are obvious. Segregated public accommodations placed an omnipresent badge of civic inferiority on its victims that shrank their universe of social, economic, and political possibilities. This was especially true given that segregation was backed up by actual or threatened violence. A great resource in helping us understand this perspective is *Remembering Jim Crow: African Americans Talk About Life in the Segregated South*. In that book, Ann Pointer, a resident of Macon County, Alabama, described the impact of not having access to public transportation:

"We could not ride the buses although we were paying taxes. But we couldn't ride those buses. Nothing rode the bus but the whites. And they would ride and throw trash, throw rocks and everything at us on the road and whoop and holler, 'nigger, nigger, nigger," all up and down the road. We weren't allowed to say one word to them or throw back or nothing, because if you throw back at them you was going to jail." (8)

Violating the rules and norms of segregated public accommodations was life-threatening for Blacks all across America, albeit with obvious regional and local differences. Traveling for business or family visits took on a very different character for African Americans, as they had to be careful about where they could safely go, where they could find a hotel or restaurant that would serve them, or where they could find a welcoming gas station. In 1937, **Victor H. Green**, a New York City postman, created the first ***Green Book,*** a reference guide to tell Blacks where they could safely go in the New York Metropolitan area. He updated and expanded the Green Books every year, encompassing more and more of the country. The first edition was fifteen pages long, and the final edition in 1967 was ninety-nine pages long. The book even listed private residences who would welcome Black travelers to stay in areas where there were no welcoming hotels. (9)

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

Segregated Housing—There have been many forms of housing discrimination in American history. You should know about three of them. Many cities used **overt city ordinances** that divided the town into racial zones and mandated that residential property in "White" areas be purchased by Whites, while property in "Black" areas be purchased by people of color. In a case out of Louisville, Kentucky, the Supreme Court ruled these kinds of city ordinances unconstitutional in 1917 (*Buchanan v. Warley*), but the practice continued for decades after that decision.

Another form of housing discrimination was **racially or religiously restrictive covenants**, which were agreements entered into between buyer and seller that restricted the future sale of the property to only certain kinds of people. The Court ruled against these kinds of covenants in 1948, when the Shelley family in St. Louis successfully challenged a racial covenant on their home (*Shelley v. Kraemer*), but it was very difficult to enforce the Court's ruling until the Fair Housing Act passed in 1968. Even though they are no longer enforceable in real estate transactions, these kinds of covenants are still on the books across the country because it's actually difficult for individual homeowners to get them removed. What did these covenants look like? Here are but two examples:

"...no part of said property nor any portion thereof shall be for said term of fifty years occupied by any person not of the Caucasian race, it being intended thereby to restrict the use of said property for said period of time against the occupancy of owners or tenants of any portion of said property for residence or other purpose

by people of the Negro or Mongolian race." [Covenant initiated in the Greater Ville neighborhood of St. Louis, Missouri, in 1911]

"That neither said lots nor portions thereof or interest therein shall ever be leased, sold, devised, conveyed to or inherited or be otherwise acquired by or become property of any person other than of the Caucasian race." [Covenant initiated in the El Cerrito neighborhood of San Diego, California, in 1950] (10)

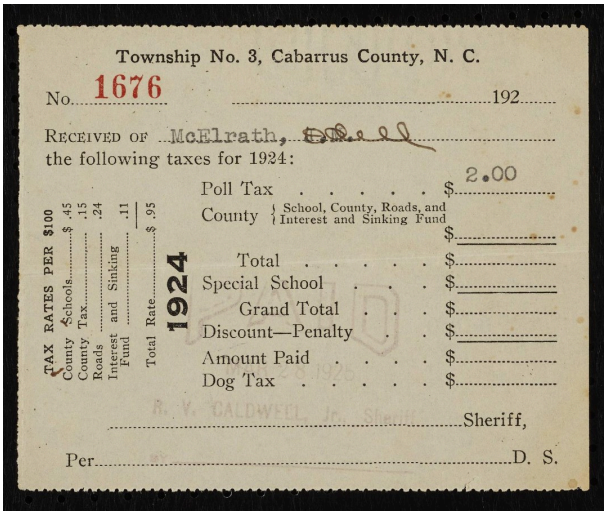
The third form of housing discrimination took the form of **redlining**, which was a practice once encouraged by the federal Home Owner's Loan Corporation in which minority neighborhoods were red lined, meaning that loans would be very difficult to get and/or expensive. This institutionalized discrimination in government-backed mortgages made it difficult for Black families in particular to build home equity, which is the primary way that most families build wealth. (11) These forms of housing discrimination were perpetuated by Whites who did not want to live in integrated neighborhoods and who often committed or threatened violence. The legacy of housing segregation is apparent all over the United States, and it is not an accident. As activist and author Tim Wise explains,

"*The so-called ghetto was created and not accidentally. It was designed as a virtual holding pen—a concentration camp were we to insist upon honest language—within which impoverished persons of color would be contained. It was created by generations of housing discrimination, which limited where its residents could live. It was created by decade after decade of white riots against black people whenever they would move into white neighborhoods. It was created by deindustrialization and the flight of good-paying manufacturing jobs overseas."* (12)

Wise is on to something that we need to remember. The world that we see today is always a legacy of the past, and often that past includes intentional decisions to construct the future that we occupy. In other words, the unequal and somewhat segregated living arrangements that we see today were in large part the result of conscious government policies and decisions that happened before we were born. Richard Rothstein, a Distinguished Fellow of the Economic Policy Institute, outlined this well in his book *The Color of Law: A Forgotten History of How Our Government Segregated America*. "Racial segregation in housing," Rothstein wrote, "was not merely a project of southerners in the former slaveholding Confederacy. It was a nation-wide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders." (13) Rothstein documents in great detail the government policies designed to segregate America: The Federal Housing Administration's bankrolling of segregated housing developments and evading the Supreme Court's ruling striking down racially restrictive covenants; the use of government housing projects to concentrate Black residents while promoting single-family home ownership to Whites; the suppression of Black wages through the lack of federal action until the mid-1960s to enforce anti-discrimination in the workplace; the tacit support of federal agencies for redlining by banks. And, lest we forget, the profession of realtors went to considerable lengths to maintain the right of property owners to discriminate with respect to whom they would sell or rent housing. Famously, Ronald Reagan made the following statement in 1966 in defense of just this kind of discrimination: "If an individual wants to discriminate against Negroes or others in selling or renting his house, he has a right to do so." For much of the 20th Century, the real estate industry actively worked against free market principles in the American housing market and in so doing, "dramatically reshaped the country for all Americans" by constructing segregated neighborhoods north and south, east and west. (14)

Segregated Education—The separate but equal doctrine was applied to education with a vengeance and without any pretense of equality between Black schools and White schools. Almost all school districts in the South were segregated from the late nineteenth century into the 1960s. Some school districts outside of the South were segregated as well, including the schools in the nation's capital. The first legal crack in segregated schools came from California and dealt with Latinx students. In 1946 the 9th Federal Circuit Court struck down separate "Mexican schools" in Orange County, with the Court saying that "A paramount requisite

in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage." (15) The NAACP Legal Defense Fund took up a number of school segregation cases in the 1950s, one of which was that of Linda Brown, who was denied admittance to her neighborhood school and instead had to take a bus to a segregated school. In ***Brown v. Board of Education of Topeka, Kansas (1954)***, the Supreme Court ruled 9-0 that segregated schools were inherently unequal, reversing the *Plessy* doctrine as it applied to education. Thus, *de jure*, by law, segregation is unconstitutional, but *de facto,* in fact, segregation is alive and well in America's schools. (16)


Township No. 3, Cabarrus County, N. C.

No. 1676 192

Received of McElrath, Odell
the following taxes for 1924:

Poll Tax . . . . . $ 2.00

County { School, County, Roads, and Interest and Sinking Fund } $

Total . . . . . $

Special School . . . . $

Grand Total . . . $

Discount—Penalty . . $

Amount Paid . . . . $

Dog Tax . . . . . $

TAX RATES PER $100
County Schools .45
County Tax .15
Roads .24
Interest and Sinking Fund .11
Total Rate .95

1924

R. V. CALDWELL, Jr., Sheriff,

Per D. S.

Poll Tax Receipt for Odell McElrath in 1924

Voter Discrimination—The Fifteenth Amendment guaranteed the right to vote regardless of race, but Southern white elites did not want African Americans to vote. Beginning after Reconstruction ended in 1877, southern Democrats regained control over state legislatures and undertook several measures to keep blacks from voting. One measure was extralegal and consisted of outright **intimidation**. Groups like the Ku Klux Klan lynched Blacks, shot those who were politically active, bombed their houses, got them fired from their jobs, burned crosses to frighten communities, and spied on civil rights organizations. In many southern states, **literacy tests** were used to keep African Americans from registering to vote. Potential voters were required to take an often-subjective "test" of their literacy, their knowledge of the federal or state constitution, or their knowledge of completely arcane bits of information. Literacy tests were combined in some cases with **good character clauses**, in which people needed to be certified as being of good character in order to register. **Grandfather clauses** automatically registered anyone–Whites–whose male ancestors were eligible to vote at some date before the Fifteenth Amendment passed. Southern states instituted **white primaries**, in which people of color were barred from voting. This was important because the South was solidly Democratic at the time, meaning that the primary race was often of greater significance than the general election in November. **Poll taxes** were also used to discourage Blacks from voting. Finally, Southern Whites used **racial gerrymandering** to design election districts that bisected African Americans populations, thereby diluting their numbers should they actually register to vote.

Affirmative Action for Whites—Most White Americans don't realize the extent to which they have benefited first from slavery and second from government policies that privileged Whites. It almost goes without saying that many Whites and White-owned companies benefited directly from the 300 years of labor theft that was slavery—although there is an argument to be made that many poor Southern Whites saw their wages artificially suppressed by slavery's existence. Ira Katznelson, Columbia University political science and history professor, has documented how twentieth-century government policies designed to help all Americans ended up being tailored in ways that disproportionately helped White Americans. This was accomplished primarily due to the powerful Southern Democratic voting bloc that resulted from the Solid South phenomenon. Southern Democrats dominated congressional committees and insisted on certain racist concessions when it came to policy making.

How did this work? Many of the New Deal programs were specifically designed to disadvantage most African Americans. For example, most Southern Blacks at the time were working as domestic maids or farm laborers. Southern politicians insisted that New Deal legislation that promoted labor unions, set minimum wages, set maximum hours, and established Social Security explicitly exclude maids and farm workers. As Florida Representative James Mark Wilcox put it, "You cannot put the Negro and the White man on the same basis and

get away with it." (17) Social Security is a classic example: according to Katznelson, fully 65 percent of Blacks were initially excluded from the program because of concessions to Southern politicians. The same was true of the National Recovery Administration, the National Labor Relations Board, and the Fair Labor Standards Act. Even the GI Bill suffered from Southern meddling. Largely crafted by Representative John Rankin of Mississippi—an avowed racist—the law was written in a way that did not disturb segregation in the South. The GI Bill offered veterans educational grants, subsidized home mortgages and business loans, assistance finding a job, and job training—but all of this was administered at the local rather than federal level. Banks could still red-line Blacks' mortgage applications, colleges could still deny Blacks entrance, and local jobs programs could still discriminate. Thus, the GI Bill was an undoubted boon to White veterans, but often an unfulfilled promise to Black veterans.

Has affirmative action for Whites ended? Mostly, although higher education is a sector that still practices a sneaky form of it. While the Supreme Court struck down the ability of colleges and universities to use race as one of many factors in making admissions decisions, legacy admissions and admissions for the children of donors and faculty at elite public and private schools still skews in favor of Whites. At Harvard, for example, fully 43 percent of White students were admitted using these kinds of preferences–and three-quarters of them would have been rejected had they not been the children of alumni, donors, or faculty, or had they not played particular sports like lacrosse or sailing. (18) Elite public universities also skew disproportionately White by recruiting the children of wealthy people who reside out of state. For example, "places like the University of Alabama give an effective 45 percent bump to the children of the top 1 percent," which happen to be predominantly White. (19)

Important Civil Rights Legislation

Beginning in 1957, the federal government passed several civil rights laws, three of which you need to know in any U.S. Government course. They are the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968.

President Lyndon Johnson Signing the Civil Rights Act of 1964

Civil Rights Act of 1964—Demanded by civil rights leaders for decades, proposed by President John F. Kennedy, and pushed through by President Lyndon Johnson after Kennedy's assassination, the Civil Rights Act of 1964 was a monumental political achievement. It was truly bi-partisan legislation, with a majority of congressional Republicans and Democrats supporting it. However, Southern Democrats and a few Republicans almost unanimously opposed it. Notably, Republican Senator Barry Goldwater opposed the Civil Rights Act. Because Goldwater was the Republican Party's nominee for president that year, it was an indication of the Republican turn against civil rights for decades to come. The Civil Rights Act of 1964 did the following:

- Outlawed discrimination in voter registration, but this section had poor enforcement language.
- Established that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or

national origin."
- Authorized the U.S. Attorney General to sue in cases where people were denied the equal protection of the laws, unequal access to public accommodations, or equal access to public schools and colleges.
- Banned discrimination in programs that receive federal assistance.
- Banned employment discrimination directed at "any individual because of his race, color, religion, sex or national origin." This includes hiring, firing, conditions of employment, and compensation.
- Created the Equal Employment Opportunity Commission (EEOC), which is empowered to make prosecution recommendations to the U. S. Attorney General regarding employment discrimination. (20)

Voting Rights Act of 1965—After the Civil Rights Act passed and after President Lyndon Johnson trounced Barry Goldwater in the 1964 election, Johnson vowed during his 1965 State of the Union address to "eliminate every remaining obstacle to the right and the opportunity to vote." The Voting Rights Act was designed to shore up a weakness of the Civil Rights Act—namely, that it was insufficiently aggressive in defending the right of all people to vote regardless of race. Passed later in 1965—again, over Southern opposition—the Voting Rights Act did the following:

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

Note that in ***Shelby County v. Holder*** **(2012),** the Supreme Court struck down the Voting Rights Act's important "pre-clearance" provision, allowing primarily Southern states to change their voting laws without having them approved ahead of time by the Justice Department. This opened the gates for many Republican-led state legislatures to pass without Justice Department review onerous voter I.D. laws that fell heaviest on the poor, the elderly, and people of color. Writing in dissent, Justice Ginsberg argued that "Throwing out preclearance because it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." (21)

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

- **Indian Civil Rights Act**—This part of the Civil Rights Act of 1968 applied most of the Bill of Rights and Constitutional protections to Native Americans living under the various tribes' jurisdiction. It stipulated that no Indian tribe shall prohibit free exercise of religion, free speech, free press, or the right of people to assemble peaceably and petition for redress of grievances. Further, no Indian tribe can violate the Fourth Amendment's protections against unreasonable and warrantless searches and seizures. Indian tribes were forbidden from conducting unreasonable and warrantless searches and seizures, taking of private

property without just compensation, violating fair trial procedures, and inflicting cruel and unusual punishments.

- **Fair Housing Act**—This part of the Civil Rights Act of 1968 outlawed housing discrimination. The Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Further, it made it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." Another interesting part of the law is that it made it unlawful "to represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

These three laws set the framework for breaking down ***de jure* discrimination**—that is, discrimination written into laws and official policies at the federal, state, local, and company levels. What they did not do was eliminate ***de facto* discrimination**, which is discrimination in everyday life that is unsupported by law or policy. The issues that remain, according to civil rights leaders, are no less significant: dealing with the lasting impact of past *de jure* discrimination, discriminatory policing, social prejudice affecting how people interact in all sorts of settings, and unequal access to economic and educational opportunities. Some of these challenges can be addressed by public policy, while others are difficult to address via government action. For example, Gene Slater, an expert on housing discrimination, writes that "To this day, an estimated four million housing discrimination complaints each year go uninvestigated, and fair housing remains largely unenforced." (22)

References

1. Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. New York: W. W. Norton & Company, 2019. Page 94.

2. No author, "What We Believe," Black Lives Matter. No date.

3. The text of the Corwin Amendment retrieved from the University Maryland. See also Michael A. Bellesiles, *Inventing Equality: Reconstructing the Constitution in the Aftermath of the Civil War*. New York: St. Martin's Press, 2020. Pages 68-70.

4. Michael A. Bellesiles, *Inventing Equality: Reconstructing the Constitution in the Aftermath of the Civil War*. New York: St. Martin's Press, 2020. Pages 111-198.

5. Carol Anderson, *White Rage. The Unspoken Truth of our Racial Divide*. New York: Bloomsbury. 2017. Page 19.

6. Peter Irons, *A People's History of the Supreme Court*. New York: Penguin Books. 1999. Page 212.

7. This account is drawn from Steve Luxenberg, *Separate. The Story of Plessy v. Ferguson, and America's Journey from Slavery to Segregation*. New York: W. W. Norton. 2019.

8. William H. Chafe, Raymond Gavins, and Robert Korstad, editors, *Remembering Jim Crow: African Americans Talk About Life in the Segregated South*. New York: The New Press, 2001. Pages 173-74.

9. Jacinda Townsend, "How the Green Book Helped African American Tourists Navigate a Segregated Nation," *The Smithsonian Magazine*. April, 2016. Available here.

10. Cheryl W. Thompson, et al., “Racial Covenants, a Relic of the Past, are Still on the Books Across the Country,” *National Public Radio Morning Edition*. November 17, 2021.

11. Tracy Jan, “Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today,” The Washington Post. March 28, 2018.

12. Tim Wise, “White America’s Greatest Delusion: ‘They Do Not Know It and They Do Not Want to Know It.’” *Alternet*. May 6, 2015.

13. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: W. W. Norton and Company, 1917. Quote is from page xii.

14. Gene Slater, *Freedom to Discriminate: How Realtors Conspired to Segregate Housing and Divide America*. Berkley, California: Heyday, 2021. Reagan quote is on the front piece and the other quote is from page 8.

15. *Mendez v. Westminster* (1947).

16. Emily Richmond, “Schools Are More Segregated Today Than During the Late 1960s,” *The Atlantic*. June 11, 2012.

17. Ira Katznelson, *When Affirmative Action was White*. New York: W. W. Norton. 2015. Page 60. This whole section draws from this source.

18. Fabiola Cineas, “Affirmative Action for White College Applicants is Still Here,” *Vox*. July 6, 2023.

19. Kevin Carey, “These Schools Also Favor the One Percent,” *The Atlantic*. August 15, 2023.

20. The Civil Rights Act of 1964 at Our Documents.

21. Michael Waldman, *The Fight to Vote*. New York: Simon & Schuster, 2016. Page 233.

22. Gene Slater, *Freedom to Discriminate: How Realtors Conspired to Segregate Housing and Divide America*. Berkley, California: Heyday, 2021. Page 7.

Media Attributions

- Whites Only Housing © Arthur S. Siegel is licensed under a Public Domain license
- Poll Tax Receipt © Levine Museum of the New South is licensed under a Public Domain license
- Civil Rights Act 1964 © Cecil Stoughton, White House Press Office is licensed under a Public Domain license

Chapter 69: Civil Rights Case Study--Sex

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

—Seneca Falls Declaration (1)

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

—Rebecca Walker (2)

The Condition of Women in the Early Nineteenth Century

Before we consider the women's movement in the United States, we should be clear about the conditions that women faced for much of American history. Let's take a snapshot of these conditions in the early part of the nineteenth century. Women could not vote or own property. Women were treated much like children were, in the sense that they could not sign legally binding contracts. Tradition and the laws of marriage held that men ruled over their wives and controlled whatever income they earned. Nor could women easily escape horrible marriages, as a divorce was extremely difficult to obtain. The so-called **Cult of True Womanhood** or the **Cult of Domesticity** held that women should be the moral cultivators of their children, should be devoted to their domestic duties, and should be morally pure, religiously pious, and submissive to men. Institutions of higher education would not admit women until Oberlin College became the first to do so in the 1830s. Even so, educational opportunities for women were limited until after World War Two. Women who worked out of the home were almost always relegated to low-paying factory work, or later, to low-paying office or classroom work. Moreover, they were banned by social custom, educational disadvantage, and professional discrimination from entering higher paying or prestigious professions like law, medicine, and business. Women were banned from religious leadership positions, and in some cases were forbidden even to speak in church. (3)

Overview of the Women's Movement

The women's movement has undergone three waves of activity. The **first wave of feminism** happened in the nineteenth century and early part of the twentieth century, and it focused on attaining the right to vote and other changes in the law. In the **second wave of feminism**, from the early 1960s to the early 1980s, activists worked to change the law, but also saw that *de facto* social discrimination was equally responsible for the oppression of women. The **third wave of feminism** began in the 1980s and appears to be a much more fragmented phenomenon. Third-wave feminists do seem to have in common a willingness to see and make connections between feminists and members of other oppressed groups. For instance, feminists share with many civil rights leaders and scholars their emphasis of **intersectionality**, a term that legal scholar and civil

rights activist Kimberlé Crenshaw coined in 1989. Intersectionality refers to "the complex, cumulative way in which the effects of multiple forms of discrimination—such as racism, sexism, and classism—combine, overlap, or intersect, especially in the experiences of marginalized individuals or groups." (4) Crenshaw wrote, "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated." (5) Third-wave feminism is also concerned about the backlash against women, male violence, and harassment.

Establishing Political Equality

The women's movement began in the late eighteenth century as women began to question the exclusion of half the human population from the principles espoused by natural rights philosophers—i.e., liberty, equality, and property. Perhaps most famously, **Abigail Adams (1744-1826)** wrote her husband, John, in 1776 to "Remember the ladies" in the deliberations over independence from Britain, and also that "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation." John Adams wrote back, with respect to giving more consideration of female interests in the laws of the new country, "I cannot but laugh." In 1792 England, **Mary Wollstonecraft (1759-1797)**—incidentally, mother of Mary Shelley, the author of *Frankenstein*—wrote the extremely influential book, *A Vindication of the Rights of Woman*, as an explicit attack on liberal theories that argued for liberty and equality only among men. She emphasized that women and men were both capable of developing their mental faculties through education, but that women were denied that opportunity. She wrote that, "to render . . . the social compact truly equitable . . . women must be allowed to found their virtue on knowledge, which is scarcely possible unless they be educated by the same pursuits as men. For they are now made so inferior by ignorance and low desires, as not to deserve to be ranked with them." (6)

Elizabeth Cady Stanton

The American feminist movement supported, and received support from, the abolition movement that developed in the 1830s and 40s. Abolitionist leaders such as Frederick Douglass and William Lloyd Garrison spoke out against the second-class status of women. Frederick Douglass, for instance, attended the Seneca Falls meeting that produced the **Seneca Falls Declaration** in 1848. That convention was the creation of **Lucretia Mott (1793-1880)** and **Elizabeth Cady Stanton (1815-1902)**, and the story is an interesting one. Eight years earlier, Mott and Stanton attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations, but the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women had to watch the proceedings from the balcony. That experience helped convince them that women, as well as slaves, were in need of emancipation. The **Seneca Falls Declaration** was modeled after the Declaration of Independence, asserting that, "all men and women are created equal," and leveled a series of charges against men—that they have denied women the right to vote, the right to own property, education, employment opportunity, and that women are held to a different moral standard than men. Other American feminists—some present at Seneca Falls and others not—were also abolitionists. These included Sarah and Angelina Grimke, Margaret Fuller, Lucy Stone, and Sojourner Truth.

After the Civil War, the Republican-dominated Congress passed the **Fifteenth Amendment** to the Constitution, which guaranteed the right to vote regardless of "race, color, or previous condition of servitude." There was some consideration of extending the right to vote to women, but most congressmen dismissed it out of hand. Feminists were outraged when the Fifteenth Amendment left women out, and they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the **National American Woman Suffrage Association** (NAWSA). **Carrie Chapman Catt** (1859-1947), took over leadership of the Association from **Susan B. Anthony** (1820-1906). The struggle for women's suffrage was a long and strident one. Feminists marched in parades, held demonstrations, gave speeches, wrote editorials, chained themselves to the gates of the White House, and went on hunger strikes in prison. The suffragettes were often attacked by angry crowds and suffered daily insults and criticism. They did make progress, however. Some Western states like Wyoming, Utah, Colorado, and Idaho granted women the right to vote before 1900. Between 1906 and 1920, NAWSA membership grew from less than 20,000 to two million, and a whole series of states granted women the right to vote. The **Nineteenth Amendment** to the Constitution, granting the right to vote regardless of sex, passed Congress in 1919 and was ratified by Tennessee in 1920, just barely giving it enough states to put it into effect.

Other Frontiers for Women's Civil Rights

While passing the Nineteenth Amendment was the hallmark achievement of feminism in America, there have been numerous other successes as well. One partial success has been equality in the workplace. In 1890, 19 percent of women worked for pay outside of the home, typically as domestic servants, textile workers, food workers, and other low-paid factory workers. Where they held jobs similar to male workers, they were routinely paid less. Labor unions saw female workers as competitors and their presence in the workforce as suppressing male wages. In 1906, Samuel Gompers, president of the American Federation of Labor, said that "The wife as a wage-earner is a disadvantage economically considered, and socially is unnecessary." (7) Women formed their own unions, such as the Women's Trade Union League and the International Ladies Garment Workers Union. The first major female-led labor strike took place in 1909-1910 among low-paid garment workers in New York City. The strike collapsed when male garment workers went back to work in 1910. The next year, a massive fire broke out at the Triangle Shirtwaist Company. Because management had locked the fire escapes, 146 workers, mostly women, perished in the blaze. The **Triangle Shirtwaist Factory Fire** was a watershed in both the women's movement and the worker-safety movement.

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

Many people argue that the second wave of feminism was launched by the 1963 publication of **Betty Friedan's *The Feminine Mystique***, in which she argued that women—especially educated women—were unfulfilled by the social requirement of subsuming their identities under their domestic duties as wives and mothers. The **Civil Rights Act of 1964** explicitly outlawed employment discrimination, as we've mentioned in a previous chapter. This applied to sexual discrimination as well as racial and religious discrimination,

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

Alice Paul, of the National Women's Party, first proposed an **Equal Rights Amendment** to the Constitution in 1923. It read as follows: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." The proposal languished for decades in the U.S. Congress, despite being reintroduced repeatedly. A later version did pass Congress. It read "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The Equal Rights Amendment was submitted to the states, but it came three states short of the three-quarters it needed to ratify and the deadline ran out in 1982. In 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment, but in the meantime, some states had rescinded their support for the amendment. Democrats in the House of Representatives pushed through a measure to retroactively eliminate the ratification deadline, but as of this writing, Republicans in the Senate refused to take up the measure and the Trump administration did not support it either. (10) If supporters of the Equal Rights Amendment want to see it pass, they may have to start over with Congress resubmitting it to all the states and setting an indeterminate clock for ratification.

All three waves of the feminist movement in the United States have been interested in establishing equality with respect to sexual relations between men and women. In 1876, the New Jersey Supreme Court made a ruling very typical in American history in the case of *English v. English*. The court ruled that Abigail English was not entitled to divorce her husband, John, even though he subjected her to battery and rape when she refused to have sex with him. It wasn't until the 1960s that the feminist movement was successful in starting a serious discussion of marital rape, but as recently as 1975, every state had a marital exception for rape. It wasn't until 1993 that all states finally dropped marital exceptions for rape in their statutory language. (11)

Bodily autonomy and access to contraception are also significant issues for American feminists. **Margaret Sanger** (1879-1966)—a nurse in New York City who ministered in the 1910s to poorly housed, poorly paid women who wanted to regulate their family size—defied the law to educate women about contraception. In 1914, she distributed her pamphlet, *Family Limitation, which* led to an arrest warrant from which she fled to Europe to avoid prosecution. In 1916 after charges were dropped, she returned to continue her work advocating for birth control into the 1950s. The birth-control movement was rejected by the medical establishment. Oral contraceptives were developed in the 1960s, and they revolutionized sexual relationships by giving women greater choices and control over whether and when to have children. States continued to try to limit access to birth control devices.

Pro-Choice Protester in Minnesota

When its membership reached a critical mass of progressives, the Supreme Court helped turn the tide in favor of greater reproductive freedom. The Court ruled in ***Griswold v. Connecticut* (1965)** that married couples had a right to privacy with respect to reproductive issues, thereby striking down a Connecticut law that forbade anyone from selling contraceptive devices or instructing anyone on their use. This finding of a right to privacy was then used in ***Roe v. Wade* (1973)**, which granted a fundamental right to terminate an unwanted pregnancy in the first trimester. The ruling granted progressively greater state power to regulate abortion in the second trimester, and even

more state control in the third trimester. Most feminists defend the "right to choose" as essential to women taking their place alongside men in modern society and fear that a government that is strong enough to force a woman to carry a pregnancy to term against her will is strong enough to intrude itself into any sort of intimate medical or personal decision a woman or a man might want to make.

The resurgence of conservatism on the Court resulted in an about face for women's reproductive freedom. In *Planned Parenthood v. Casey* (1992), the Court reaffirmed the constitutional right to choose abortion before fetal viability–that is, until about the 23rd week of pregnancy–saying that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." However, the Court in *Casey* opened the door to restrictions on abortion before viability if they did not constitute an "undue burden" on women. Conservative state legislatures across the United States then imposed a wide variety of restrictions on access to abortion providers, making it virtually impossible in some states for poor women to access abortion. In 2021 the Court went so far as to uphold a Texas law that allows any person to sue any other person who provides or helps facilitate an abortion from six weeks into the pregnancy, which is so early that some women don't yet know they are pregnant. (12) Then the hammer fell in 2022 when, for the first time, the Court withdrew a right from Americans that it had previously recognized. In ***Dobbs v. Jackson Women's Health Organization* (2022)**, the conservatives reversed *Roe* and *Casey* and stated flatly that "the Constitution does not confer a right to an abortion" because it is not explicitly enumerated in the document and because the right to an abortion is not "rooted in the nation's history and tradition." Of course, the practice of abortion is deeply rooted in American (and world) history, and the fact that abortion was outlawed in the United States in the nineteenth century has something to do with the fact that women were forbidden from voting and being doctors at the time.

Third-wave feminism is broadening the base of the women's liberation movement, which has traditionally—with exceptions, of course—been anchored by white, middle or upper-class women. Third-wave feminism has been most forcefully articulated by women from ethnic minority groups, who have intimately felt oppressed on account of their gender as well as their race. In 1992, the same year as the Clarence Thomas confirmation hearings, activist and writer **Rebecca Walker** exemplified this phenomenon when she coined the term 'third wave' in her *Ms. Magazine* article, "Becoming the Third Wave." In addition, third-wave feminists have embraced the cause of lesbians and trans-gendered people. Another component of third-wave feminism consists of eco-feminists, who understand ecological degradation as being linked to the women's oppression and the triumph of male-oriented exploitive behaviors. Philosopher Carol Hay summarizes the message of third-wave feminism:

"That sexism and racism and other forms of oppression like classism (discrimination against people of lower socioeconomic status) and ableism (discrimination against people with disabilities) and homophobia and transphobia are always interconnected, and as long as we continue to ignore these relationships we'll only ever advance the interests of some women at the expense of others." (13)

Black and Pink Feminist Symbol

One of the most difficult obstacles to feminism today is the sense that leaders of the past already "solved" women's problems. But feminist author Julie Zeilinger points out, "Unfortunately, sexism is alive and well—even if it may take a different form than concrete issues like being denied voting rights or limiting the ability of an unmarried woman to buy her own car." (14) Feminists today note that women are still subject to verbal harassment and physical violence at the hands of men; that they are portrayed in the media as men's playthings; that they are subject to moral double-standards not inflicted upon men; that many politicians seem to be on a crusade to control women's bodies; that their aspirations are often not supported by educators. This kind of treatment is referred to by feminist writer Laura Bates as **Everyday Sexism**, and it's very political in that it serves to make the public sphere—public streets, mass transit, workplaces, colleges and universities—hostile places for women. (15) With the *Dobbs* decision, bodily autonomy for American women is dependent on their state of residence and what personal resources they possess.

References

1. Seneca Falls Declaration.
2. Rebecca Walker, "Becoming the Third Wave," *Ms. Magazine*. January/February 1992. Pages 39-41.
3. No author, "Women's Rights," US History.org. No date. Graham Warder, "Women in Nineteenth Century America," Virginia Commonwealth University Library's Social Welfare History Project. 2015.
4. Merriam Webster Dictionary.
5. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *The University of Chicago Legal Forum*. Volume 1989, Issue 1. Article 8. Page 140.
6. Mary Wollstonecraft, *A Vindication of the Rights of Woman*. London: Penguin Books, 2004. Page 216.
7. Quoted in Sharon Hartman Strom, *Women's Rights*. Wesport, CT: Greenwood Press, 2003. Page 156.
8. Emily Yellin, *Our Mothers' War: American Women at Home and at the Front During World War II*. New York: Free Press, 2004.
9. Pregnancy Discrimination Act.
10. Clare Foran, "House Votes to Eliminate Equal Rights Amendment Ratification Deadline," CNN. Feburary 13, 2020.
11. Monica Steiner, "Marital Rape Laws," *Criminal Defense Lawyer*. No date.
12. Jeevan Ravindran, "Explainer: What is the Texas Abortion Ban and Why Does it Matter?" *CNN*. September 3, 2021.
13. Carol Hay, *Think Like a Feminist: The Philosophy Behind the Revolution*. New York: W. W. Norton and Company, 2020. Page 14.
14. Julie Zeilinger, "3 Reasons 'Feminism' is not a Dirty Word," *Huffington Post*. Posted 5/17/2012.
15. Laura Bates, *Everyday Sexism*. New York: St. Martin's Press, 2014.

Media Attributions

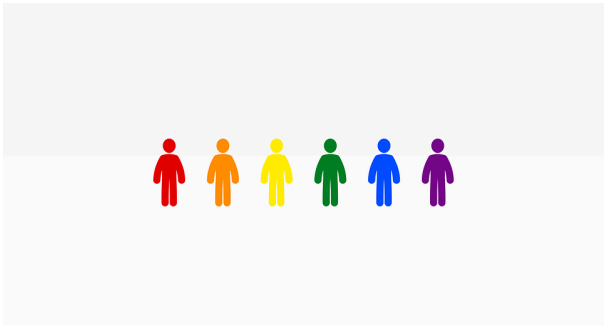
- Elizabeth Cady Stanton © Henry Bryan Hall, Jr. is licensed under a Public Domain license
- Pro-women Pro-choice © Lorie Shaull is licensed under a CC BY-SA (Attribution ShareAlike) license
- Feminist Symbol © TMagen is licensed under a CC BY-SA (Attribution ShareAlike) license

Chapter 70: Civil Rights Case Study--Sexual Orientation

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

—Andrew Sullivan in 2011 (1)

Background and Historical Development of Homosexuality as an Identity



Human Variety

Most Americans think of the gay rights movement as a recent phenomenon of the 1980s and 1990s, but it is actually somewhat older than that. Of course, homosexual behavior is as old as human civilization and evident across both tolerant and intolerant societies. Homosexuality as a form of personal identity—or even as a sexual orientation beyond one's voluntary control—is a much newer concept. While some scholars claim that a continuous gay subculture has existed in the West since as early as the twelfth century, everyone agrees that by the early 1700s, Europe possessed numerous established meeting places for homosexuals. John D'Emilio argues that modern capitalism transformed the family as an economic unit, and wage labor in a capitalist market opened a space for the development of what we call homosexuality today. He suggests that "Only when individuals began to make their living through wage labor, instead of as parts of an interdependent family unit, was it possible for homosexual desire to coalesce into a personal identity—an identity based on the ability to remain outside the heterosexual family and to construct a personal life based on attraction to one's own sex. By the end of the [nineteenth] century, a class of men and women existed who recognized their erotic interest in their own sex, saw it as a trait that set them apart from the majority, and sought others like themselves." (2)

The American colonists followed the precedent of their English cousins and outlawed **sodomy**, by which they meant all forms of nonprocreative sex, whether by individuals, heterosexual couples, or homosexual couples. Over time, however, laws against sodomy tended to be used more often against homosexual activity, and specifically anti-gay laws also went into effect. Rhode Island forbade sex between women in 1647, as did New Haven in 1655, and Massachusetts forbade cross-dressing in 1696. The laws governing sexual behavior were put in place to enforce a hetero-normative, marriage-and-family-centric worldview. But as Dartmouth College professor Michael Bronski wrote, puritanical societies of colonial America were "extraordinarily intolerant" at the same time that they were "often surprisingly lax." While the laws were quite strict and enforced with

imprisonment, the lash, and capital punishment in celebrated cases, there does seem to be quite a bit of evidence that people could privately engage in homosexual behavior—even when others knew about or suspected it was happening—so long as it did not rile the public. This was probably easier to pull off in cities than it was in small towns. (3)

By the latter part of the nineteenth and early part of the twentieth centuries, just as the medical profession deemed same-sex attraction a disorder, some homosexuals came to see themselves as positively defined by their sexual orientation. Many others repressed or hid their identities from their families, their employers, and from themselves. It is primarily for this reason that the historical incidence of homosexuality is almost certainly underrepresented. For those who embraced their sexual orientation, it was important for them to meet and develop relationships with other gay men and women. By the 1910s and 1920s, gay and lesbian bars, bathhouses, cafés, restaurants, and music halls were flourishing in most large American cities such as New York, Chicago, Boston, San Francisco, St. Louis, and Los Angeles. Other homosexuals formed private social clubs or cruised notorious pick-up areas in major cities. They faced prosecution, social ostracism, and employment discrimination if they were caught. (4)

In England, celebrated playwright **Oscar Wilde** (1854-1900) was convicted and imprisoned in 1895 for "gross indecency with other male persons" and for corrupting young men. The trial made famous this euphemism for homosexuality: "The love that dares not speak its name." Wilde eloquently defended his behavior—"There is nothing unnatural about it," he said on the stand. Oscar Wilde's trial and conviction "provided the stamp of legitimacy for the suppression of any public mention of same-sex love and served as a warning to its adherents." (5)

The Early Gay Rights Movement

Given this context, it is easy to see that it was difficult for anyone to start an organized gay liberation movement. One of the first organizations dedicated to promoting the equality of gays and lesbians was the **Scientific-Humanitarian Committee** founded in 1897 by Magnus Hirschfeld in Berlin. This committee dedicated itself to removing **Paragraph 175** from Germany's legal code, which penalized male homosexuality: "A man who fornicates with another man or lets himself be so abused will be punished with imprisonment." (6) Hirschfeld also directed the **Institute for Sexual Research** in Berlin. In surveys conducted in 1912 among 17,160 people, the Institute documented that the rate of homosexuality was 2.29 percent. (7) Other homosexual groups and gay-themed journals were started in Germany in the early part of the twentieth century, all of which flourished during the Weimar Republic in the 1920s. Finally, after much lobbying, the Reichstag approved a reform bill in 1929 that no longer penalized homosexuality. All these developments were reversed when the Nazis came to power in 1933. On May 6, 1933, the Nazis ransacked the Institute for Sexual Research and burned its library of 10,000 books on sex and gender. The Nazis went on to persecute homosexuals throughout Germany, a task made easier because local German police stations kept "pink lists" of gay men in each community. In 1936, Heinrich Himmler, head of the dreaded SS, created the Reich Central Office for the Combating of Homosexuality and Abortion. Around 100,000 German homosexuals—almost all gay men—were arrested, many were sent to prisons, and thousands of them perished in concentration camps. (8)

The nascent American gay liberation movement learned lessons from the European experience and attempted unsuccessfully to jumpstart change in American society. Members of the German Scientific-Humanitarian Committee lectured in New York early in the twentieth century. The **Society for Human Rights**, formed by **Henry Gerber** (1892-1972) in Chicago in 1924, was the first gay rights group in America. The Society set out to publish a journal, make connections with European gay rights groups, and publicly make the case that sodomy laws should be repealed, but its leaders were quickly arrested and prosecuted by Chicago police. The cost of

defending himself at three separate trials bankrupted Henry Gerber, even though the charges were ultimately dismissed. He lost his job at the Postal Service, and the Society didn't survive its leaders' prosecution. Gerber quietly spent the rest of his life helping gay men develop a sense of community and connection. Meanwhile in New York, the **Veterans Benevolent Association** formed in 1945 and attempted to secure G. I. Bill benefits for homosexual veterans who had been dishonorably discharged. It did not succeed. (9)

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

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

The modern gay rights movement was born in the midst of this persecution. In 1947 under the pseudonym Lisa Ben, which is an anagram of "lesbian," **Edythe Eyde** wrote *Vice Versa: America's Gayest Magazine*, America's first regular homosexual publication. (11) In 1951 a group led by **Harry Hay (1912-2002)** founded the **Mattachine Society**, which was dedicated to changing the public's mind about the "deviancy" of homosexuals. Founded in Los Angeles, the group took its name from Mattacino, an Italian theatrical jester character who spoke the truth to the king from behind a mask. Similar societies were created in large cities across the country. In its mission statement, the Mattachine Society pledged to unify "homosexuals isolated from their own kind," to educate homosexuals and heterosexuals toward "an ethical homosexual culture," and to assist "our people who are victimized daily." (12) The Society published a homophile magazine called *One*, which was initially banned by the Post Office. The Supreme Court ruled in 1958 that the ban violated the Mattachine Society's first amendment rights. The Society was very influential in the gay rights movement in the 1960s but became eclipsed in the 1970s by more militant groups. It finally disbanded in 1987. The first postwar lesbian organization was the **Daughters of Bilitis**, founded in 1955 in San Francisco by **Del Martin** and **Phyllis Lyon**. It, too, created a magazine—in this case called *The Ladder*. Active throughout the 1950s and 1960s, the Daughters of Bilitis survived until it was broken apart in the 1970s by internal factionalism. In 1957 **Frank Kameny** was fired from his government position with the Army Map Service because he was gay. He sued the government, and his case became the first civil rights case on the issue of sexual orientation to reach the Supreme Court. He lost, but did not give up the fight. In 1965 he organized the first gay rights demonstration in front of the White House. He received a formal apology from the U.S. government in 2009 for his unjust dismissal from federal service.

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

In August of 1966, a group of trans women, fed up with the regular abuse they took at the hands of police, sparked a riot at Gene Compton's Cafeteria in the Tenderloin District of San Francisco. As described by Sam Levin in *The Guardian*, "the night ended with overturned tables, a destroyed police car, a newsstand set on fire, and the women hauled off in officer's paddy wagons." (13) The most well-known event in the history of the American gay liberation movement is without a doubt the **Stonewall Rebellion**. The Stonewall Inn was a gay bar

in the Greenwich Village section of New York City. Eight police officers raided the establishment after midnight on June 28, 1969. This was not an unusual occurrence, but on that night the police met considerable resistance from Stonewall patrons and others in the neighborhood. More police arrived, beating protesters—who, in turn, were throwing bottles and rocks. Eventually, hundreds of police officers were battling a couple thousand protesters. The rioting lasted three nights. This was the first time that large numbers of homosexuals resisted police action, and it energized an already-forming nationwide revitalization of the gay-liberation movement. Activists founded new groups such as the Gay Liberation Front and the Gay Activists Alliance, and employed traditional political tactics such as marches, demonstrations, strikes, boycotts, lobbying, campaigning, and fund-raising.

Aside from making political demands to decriminalize homosexuality and to end discrimination against homosexuals, gay rights groups targeted the medical establishment's century-old stance that homosexuality was an illness. That line became untenable as research into the nature of homosexuality increasingly suggested that problems suffered by gays and lesbians were less a result of their sexual orientation and more a result of homophobia, discrimination, alienation from families, and social marginalization. As early as 1948, with the publication of **Alfred Kinsey's** *Sexual Behavior in the Human Male*, the medical community knew that 4 percent of men were exclusively homosexual throughout their lives. Then, in 1953, Kinsey published *Sexual Behavior in the Human Female*, which documented that 1 percent of women were exclusively homosexual throughout their lives. The National Association of Mental Health passed a resolution in 1970 calling to decriminalize homosexuality. In 1972, the National Association of Social Workers decided to reject the notion that homosexuality was an illness. By 1975, both the American Psychological Association and the American Psychiatric Association had voted to remove homosexuality from their lists of pathologies.

The 1970s and 80s also saw changes in the political sphere. In 1974, **Elaine Noble** became the first openly lesbian woman elected to public office. She won a seat in the Massachusetts state House of Representatives. In an interview, Noble said that her first campaign was "ugly," with gunshots through her windows, and harassment of people visiting her house and campaign office. Once, while in office, feces were left in her desk. She won re-election in 1976. (14) In 1978, **Harvey Milk** took office as the first openly gay man elected to public office, having been elected in November of 1977 to be on the San Francisco Board of Supervisors. Ten days after the election he recorded three tapes that he gave to friends and his lawyer, to be listened to in the event of his assassination. He said, "I fully realize that a person who stands for what I stand for—a gay activist—becomes the target or potential target for a person who is insecure, terrified, afraid, or very disturbed themselves." He sponsored a bill banning discrimination in San Francisco on the basis of sexual orientation, and Mayor George Moscone signed it into law. On November 27, 1978, Dan White, a former member of the Board of Supervisors who had recently resigned his position and then asked to be reinstated, assassinated Mayor Moscone and Harvey Milk with a .38 revolver. (15)

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

Marriage Equality and the Equality Act

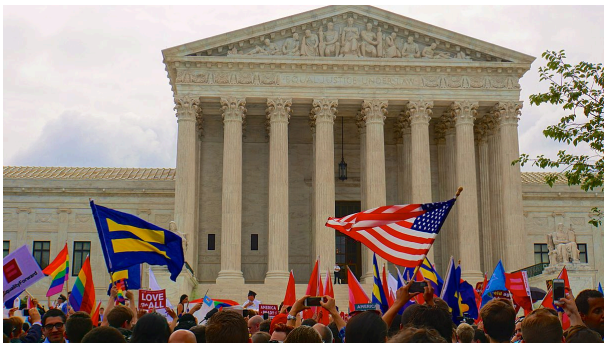
A high-profile issue with respect to the gay liberation movement was marriage equality. (16) The marriage equality issue came to a legal battle pitting civil rights leaders against two prominent attempts to stop the cultural shift in favor of marriage equality: The Defense of Marriage Act and California's Proposition 8. In 1996, Congress passed what it called the **Defense of Marriage Act (DOMA)**, which defined marriage for federal purposes to exclude same-sex marriage and also permitted states to refuse to recognize same-sex marriages performed in other states. At the time, no state allowed same-sex marriages, but it soon became legal in some places either as a result of court decisions or changes in state law. Challenges to DOMA and California's Proposition 8 worked their way up to the Supreme Court, and in 2013, the Supreme Court issued rulings on both.

In ***United States v. Windsor (2013)***, the Court invalidated those portions of DOMA that denied federal benefits to same-sex marriage partners. *The New York Times* summarized the case this way:

The case before the justices concerned two New York City women, Edith Windsor and Thea Clara Spyer, who married in 2007 in Canada. Ms. Spyer died in 2009, and Ms. Windsor inherited her property. The federal law did not allow the Internal Revenue Service to treat Ms. Windsor as a surviving spouse, and she faced a tax bill of about $360,000, which a spouse in an opposite-sex marriage would not have had to pay. (17)

In a 5-4 decision, the progressive justices pulled Justice Anthony Kennedy onto their side, and the Court ruled in favor of Ms. Windsor. The Defense of Marriage Act's provisions regarding the federal definition were declared unconstitutional.

The second case centered on California's **Proposition 8**, which was a ballot initiative that passed with 52 percent of the vote in 2008 to amend the California state constitution to forbid gay marriage. The proposition was upheld by state courts but challenged in federal courts as well. In 2010, a federal district court ruled that Proposition 8 was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection clauses. The state of California refused to participate in the appeal and the case–*Hollingsworth v. Perry (2013)*—was appealed to the Supreme Court by the original private proponents of Proposition 8. However, the Court ruled on technical grounds that the private proponents of Prop 8 did not have standing to bring the appeal, and that decision left in place the lower federal court's ruling that Prop 8 is unconstitutional. Both *Hollingsworth v. Perry (2013)* and *United States v. Windsor (2013)* were decided by narrow 5-4 decisions.



Supreme Court Decides Obergefell v. Hodges

The legal fallout from the Windsor case was swift. In Utah, a federal judge named Robert Shelby struck down a state referendum that had defined marriage as one man and one woman, writing, "Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional." (18) A test case arose almost immediately. James Obergefell and John Arthur married in Maryland right after the Windsor case was decided, and then sued the state of Ohio, their state of residence, when it refused to recognize their union. By the time the case reached the Supreme Court in 2015, it had been joined with three other similar cases from different jurisdictions around the country. The Court ruled 5-4 in ***Obergefell v. Hodges* (2015)** that state prohibitions against same-sex marriages were unconstitutional, as was

the portion of the Defense of Marriage Act that allowed states to refuse to recognize gay marriages performed in other states.

In 2020, the Supreme Court ruled that the 1964 Civil Rights Act's prohibition of workplace discrimination based on "sex" covered discrimination against members of the LGBTQ community as well. (19) In 2022 Congress passed the **Respect for Marriage Act**, which required that states must recognize same-sex marriages across state lines and also made clear that same-sex couples have the same federal benefits as any married couple. However, it did not require states to allow gay marriages in their own statutes—and so they could go back to not allowing such marriages if the Supreme Court overturned its own precedent in Obergefell. The Respect for Marriage Act also specifically allowed religious organizations to refuse goods and services to gay marriages without losing their tax exempt status. Lest one think that the United States has come to accept equal and fair treatment for all people regardless of their sexual orientation or their adherence (or not) to gender binaries, one is always reminded that legal and social commitments to LGBTQ equality remain under assault. Indeed, the Human Rights Campaign named 2021 as the worst year in recent history for LGBTQ rights as conservatives enacted a "record-shattering number of anti-LGBTQ measures into law." (20)

References

1. Andrew Sullivan, "Why Gay Marriage is Good for America," *Newsweek*. July 18, 2011.

2. John D'Emilio, *Making Trouble. Essays on Gay History, Politics, and the University*. New York: Routledge, 1992. Page 8.

3. Michael Bronski, *A Queer History of the United States*. Boston: Beacon Press, 2011. Chapter 1.

4. Aside from the sources already cited in notes 2 and 3, see also John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America*. Third Edition. Chicago: The University of Chicago Press, 2012.

5. Barry D. Adam, *The Rise of a Gay and Lesbian Movement*. Revised edition. London: Twayne Publishers, 1995. Page 35.

6. Author's translation of Paragraph 175 as displayed by the United States Holocause Memorial Museum.

7. Magnus Hirschfeld, *Die Homosexualitat des Mannes and des Weibes*. Originally published in 1914. Translated by Michael A. Lombardi-Nash and published by Prometheus Books in 2000. Page 544. Available here.

8. No Author, "Persecution of Homosexuals," United States Holocaust Memorial Museum. No date.

9. Michael Waters, "Why Did Gay Rights Take So Long?" *The Atlantic*. November 9, 2022. Lillian Faderman, *The Gay Revolution. The Story of the Struggle*. New York: Simon & Schuster, 2015. Page 55.

10. John D'Emilio, *Sexual Politics, Sexual Communities*. Chicago: University of Chicago Press, 1983. Pages 41-44.

11. Bronski, *Queer History*, 176.

12. Adam, *The Rise of a Gay and Lesbian Movement*, 68.

13. Sam Levin, "Compton's Cafeteria Riot: A Historic Act of Trans Resistance, Three Years Before Stonewall," The Guardian. June 21, 2019.

14. Elaine Noble interviewed for *Out and Elected in the USA*. Archived here.

15. Lillian Faderman, *Harvey Milk. His Lives and Death*. New Haven: Yale University Press, 2018.

16. Author's note: Since the people I knew who were advocating for change simply wanted civil marriage on an equal footing with heterosexual couples, the oft-used term *gay marriage* always struck me as a term that segregated marriage as a concept. I never accepted the division between gay marriage and straight marriage. There is only marriage, so this text uses *marriage equality* as the label for the issue and *same-sex marriage* when necessary to describe what conservatives wished to ban.

17. Adam Liptak, "Supreme Court Bolsters Gay Marriage With Two Major Rulings," *The New York Times*. June 26, 2013.

18. *Kitchen, et al. v. Herbert, et al.* (2013)

19. *Bostock v. Clayton County, Georgia* (2020).

20. Wyatt Ronan, "2021 Officially Became the Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures into Law," Human Rights Campaign press release. May 7, 2021.

Media Attributions

- Gay Symbol © Pixabay is licensed under a CC0 (Creative Commons Zero) license
- Martin Lyon Marriage © Olga Berrios is licensed under a CC BY (Attribution) license
- Obergefell © Ted Eytan is licensed under a CC BY-SA (Attribution ShareAlike) license

Acknowledgements

I'd like to thank Salt Lake Community College for supporting this project, especially Marianne McKnight, Jason Pickavance, Chris Blankenship, Jen Hughes, and Clifton Sanders.

Special thanks goes to Linda Bult, the project editor who helped me polish my language throughout the manuscript, and to Brian Powell for the design of the Cover Art.

My wife, Sheila, read and commented on draft chapters and supported me as I worked evenings and weekends on the project.

I am grateful for the content review and suggestions provided by:

- Perparim Gutaj, Associate Professor of Political Science at Salt Lake Community College.
- Colin Moore, Associate Professor of Political Science at Salt Lake Community College.
- Robert Stockwell, Professor of Political Science, Foothill De Anza College.
- Sean Owen, Student.

This book is dedicated to my children, who will hopefully live and work in a more robust democracy: Alexandra, Aidan, Vanessa, and Zachary.

About the Author

David Hubert writes a weekly Substack newsletter of political commentary, book reviews, and occasional humor, to which anyone can subscribe for free.

Professor Hubert received his B.A. in Political Science from Colorado State University and his M.A. and Ph.D. in Political Science from the University of Connecticut. He makes his home in Utah where he serves as Associate Provost of Learning Advancement at Salt Lake Community College (SLCC). He led the development and implementation of SLCC's ePortfolio requirement in its General Education program, directed SLCC's Faculty Teaching and Learning Center, and helped the college receive a commendation from the Northwest Commission of Colleges and Universities for its assessment of General Education learning outcomes.

Active as a professor of Political Science, Dr. Hubert developed three separate online Political Science courses and wrote *Attenuated Democracy*. He led four different study abroad trips to London that centered on active learning. In collaboration with colleagues, he developed two different learning communities. He serves as a faculty member at the AAC&U's Summer Institute on High Impact Practices, and the Summer Institute on General Education. He is Treasurer and board member of the Association for Authentic, Experiential, and Evidence-Based Learning (AAEEBL). In his spare time he loves tennis, photography, riding his bike, camping, and stargazing in Utah's southern wilderness.

Glossary

Numbers

***44 Liquormart, Inc. v. Rhode Island* (1996):** The Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted to them by the conservative majority. In this case, Justice Clarence Thomas firmly asserted in his concurring opinion that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Many scholars applaud this view. Chapter 64

A

Abington School District v. Schempp (1963): In this case, the Court struck down a Pennsylvania school's daily practice of having a student read the Lord's Prayer and a Bible passage over the school's PA system. The Schempp's were church-going Unitarians who objected to the practice. Chapter 65

Adams, Abigail (1744-1826): First Lady Abigail Adams famously wrote to her husband, John, in 1776 to "Remember the ladies" in the deliberations over independence from Britain, and also that "If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice or representation." John Adams wrote back, with respect to giving more consideration to female interests in the laws of the new country, "I cannot but laugh." Chapter 69

Adams, John (1735-1826): He wrote this to Richard Henry Lee: "A Legislative, an Executive and a Judicial power, comprehend [encompass] the whole of what is meant and understood by Government. It is by balancing each one of these Powers against the other two, that the Effort in human Nature towards Tyranny can alone be checked and restrained and any degree of Freedom preserved in the Constitution." Chapter 13

ad hominem: This literally means "against the man." In argument, it means that we attack the person who made the argument to discredit what s/he said or wrote, instead of attacking the argument on its merits. Chapter 5

agreements, executive agreements: These are agreements that the U.S. has with another country's head-of-state. **Status of force agreements** are a type of executive agreement with other heads-of-state in countries where the U.S. has stationed military personnel. Chapter 28

aggressive state voter-registration-roll purges: This practice concerns voting registration and first came to widespread attention during the 2000 presidential race in Florida. When the Supreme Court stopped the recounts, George W. Bush led Al Gore by 537 votes. What most people don't realize is that prior to the election, Florida's Republican Secretary of State Katherine Harris—who also served as Bush's campaign state cochair—oversaw a purge of Florida's voter rolls that used a company with strong Republican ties and that erroneously removed thousands of Democratic leaning voters. The list of purged voters was so flawed that the Madison County elections supervisor was surprised to find her name on it as a convicted felon. A U.S. Commission on Civil Rights analysis found that the list had at least a 14 percent error rate. With this successful

Florida, experience, Republicans turned to purging voter rolls as an election strategy. When it is employed, this strategy always hides under the legitimate interest that states have of keeping their voter rolls accurate. Chapter 52

amendment process: The U.S. Constitution is remarkably difficult to amend. Because the Constitution is so incredibly difficult to amend, we are governed by a slightly modified document written by a small number of slave-owning, wealthy white men who did not have the benefit of all we know about the world nor the appreciation we have for the dignity of all people. Chapter 19

amicus curiae: *Amicus curiae* means "friend of the court." Other individuals or groups who are not litigants may file what are known as *amicus curiae* briefs. *Amicus curiae* briefs are additional legal arguments filed by outside individuals or groups who are interested in a case's outcome and who are attempting to influence the Court justices. Chapter 39

anarchy: This means the absence of government. Chapter 37

annual deficit: This i**s** the shortfall between revenue and spending. In 2019, it was nearly a trillion dollars. Chapter 37

Anthony, Susan B (1820-1906): Anthony was leader of the National American Woman Suffrage Association. Feminists were outraged when the Fifteenth Amendment left out women, so they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the National American Woman Suffrage Association. Chapter 69

Anti-Federalists: Those who opposed the Constitution. Those who supported the Constitution called themselves **Federalists.** Chapter 14

anti-government impulse relies on several tactics: Anti-tax crusades, deficit scaremongering, anti-government cynicism, and the myth of rugged individual freedom. Chapter 36

apolitical: This means not interested in or involved in politics. Federal civil service employees must be apolitical in their professional capacities, which is a way that bureaucratic agencies promote the rule of law. Chapter 38

appeal to majority: This occurs in making arguments when we try to use as fact the fallacy that when many people believe a claim to be true, it is evidence of its truth. Chapter 5

appellate jurisdiction: The Supreme Court's second jurisdiction is its appellate jurisdiction, which are those cases on appeal from lower federal or state courts. Most of the Supreme Court's caseload falls here. When exercising its appellate jurisdiction, the Supreme Court does not act like a trial court, but instead reviews lower court rulings and either upholds them as correct or reverses them. The Court is under no obligation to take cases on appeal. Chapter 32

Apportioned: Senate seats are apportioned equally between the states, with each state getting two senators regardless of population. This enormously distorts the democratic principle of one-man, one-vote. Chapter 24

Argument: A claim plus evidence leading to a conclusion. Chapter 6

Article I, section 8 of the Constitution: These are called the **enumerated powers** of Congress because they are formally listed in the Constitution. These include the power to tax, borrow money, raise armies and navies, establish lower federal courts, regulate the money supply, regulate interstate and foreign commerce, and declare war. Chapter 13

Article I, section 10 of the Constitution: The Constitution clearly reduces the power of the states in this article, for example, the states would no longer have the kind of autonomy they enjoyed—but suffered with—under the **Articles of Confederation.** Chapter 13

Articles of Confederation: Under the Articles of Confederation, the central government's limited power and weakness caused many problems for the new country, which is perhaps the most important thing to know about the U.S. under the Articles. Congress could not perform the following: tax people directly, raise a sufficient military force, regulate interstate or foreign commerce, establish a sound money system, and enforce treaties. Chapter 12

articles of impeachment: Articles of impeachment are essentially the specific charges against the president. The full House debates the articles of impeachment and votes. Chapter 30

artificial persons: This means that corporations and other organizations can exist by state charter. Chapter 35

astroturf lobbying: Very often, an organized interest will fake a grassroots movement by generating thousands of emails or faxes that only look like they come from ordinary people. Senator Lloyd Bentsen coined the term astroturf lobbying to describe this behavior. Narrow economic interests will often employ astroturf lobbying to make it seem like they are representing large numbers of people. Chapter 46

Atheism: This is a disbelief or lack of belief in the existence of God or gods. Chapter 11

Australian ballot: This ballot was the first reform that all U.S. states adopted by 1888. Prior to the Australian ballot, the most common way to vote in the United States was to use **party ballots**, which were printed by the parties themselves. The Australian ballot has three important characteristics. 1) It is printed, distributed, and counted by the state at taxpayer expense. 2) It lists all the candidates for all the offices from all parties. 3) Voters complete the ballot in private. Chapter 50

B

Bachrach, Peter (1918-2007): A neo-Marxist who, with Morton S. Bratz, in their essay, "Two Faces of Power," analyzed the second dimension of power described as the mobilization of bias. Chapter 2.

balance the ticket: Beyond their few formal powers, vice presidents are nevertheless important in American politics. They are often chosen by presidential candidates to "balance the ticket" either geographically or politically. Chapter 26

ballot-access restrictions: These are any barriers to getting a candidate on the ballot. When ballot-access restrictions are lowered, the major parties faced significantly increased competition from third-party and independent candidates. Ballot-access restrictions include filing fees, early deadlines to declare candidacy, and signature requirements. The latter is perhaps the most onerous burden on third parties. Many states require independent and third-party candidates to secure enough signatures on petitions to get on the ballot. The more signatures required for nominating petitions, the fewer minor-party and independent candidates appear on the ballot. A third party that wants to run candidates for all the House seats across the country would have to collect millions of signatures. The Democrats and Republicans are relieved of this burden. Collecting these signatures is expensive and time-consuming. Together, filing fees and signature requirements stunt electoral competition, especially races for the House of Representatives. Chapter 44

Baratz, Morton S (1923-1998): A neo-Marxist who, with Peter Bachrach in their essay, "Two Faces of Power," analyzed the second dimension of power described as the mobilization of bias. Chapter 2

Baron de Montesquieu (1689-1755): In ***The Spirit of Laws*** **(1748)**, legal theorist, **Baron de Montesquieu** argued that governmental power could be divided into three types and that they ought to be separate: **Legislative:** Congress, the power to make law. **Executive:** Presidency, the power to enforce law. **Judicial:** the Supreme Court, the power to interpret law, in both specific and general cases. Chapter 13

Barron v. The Mayor of Baltimore **(1833):** John Barron owned a wharf in the Baltimore's eastern harbor. Beginning in 1815, Baltimore began a series of construction and paving projects that involved diverting streams. As it happened, the diverted streams came out into the harbor immediately next to Barron's wharf. By 1822, Barron sued Baltimore city and the mayor because the newly diverted streams were causing silt to build up to such a degree that ships were no longer able to access his wharf. The Supreme Court ruled in favor of Baltimore, saying that the Bill of Rights only protects people from actions of the central government, *not* from state and local actions. The Supreme Court said that Barron needed to seek redress from the Maryland state constitution, but there was no such provision in that document that would help Barron. The significance of the *Barron* decision is that it set up a dual system of civil liberties: a national one to protect individuals from the central government and widely varying standards to protect people from state and local government abuses. After the Civil War, the Fourteenth Amendment seemed to correct the imbalance defined in *Barron* by saying that no state "shall abridge the privileges and immunities of citizens of the United States." However, the Supreme Court did not interpret the **privileges and immunities clause** as a corrective to Barron. Chapter 63

Bear River Massacre, 1863: In January 1863, after thousands of predominantly Mormon pioneers had entered the Southern Idaho area, the prospects of the local Shoshone people looked increasingly desperate. Unable to feed themselves, the Shoshone ended up dependent on food donations from Mormon settlers. After a Native American attack on some miners, Colonel Patrick Connor led a group of volunteers from Fort Douglas to a Shoshone encampment along the Bear River. Colonel Connor appeared to have made his decision to attack the Shoshone without any definitive proof that they were involved in the attacks, and he fully intended not to take any prisoners. The Shoshone had taken some defensive measures, but their weaponry was clearly inferior, and they were desperately short of ammunition. The troops surrounded the encampment and attacked at dawn on January 29, 1863. After a four-hour battle, the infantry and cavalry almost annihilated the Indian encampment. Connor, who was promoted to General after the battle, estimated that his men had killed between 250 and 300 men, women, and children—the deadliest massacre of Native Americans in U.S. history. One observer claimed that as many as 265 women and children were among the dead. Chapter 60

Beard, Charles (1874-1948): Beard was an historian who, in 1913, wrote one of the most famous and contentious books on the Constitution called *An Economic Interpretation of the Constitution of the United States*. He asserted that founders who were merchants, who had money on loan to others, and who owned public bonds pushed the Constitution at the expense of farmers and debtors. Beard's work forever changed the way we understand the American founding. No longer would we ignore that the small group of men who wrote the Constitution had economic interests and that they preferred a central government strong enough to protect those interests, but not one empowered by the will of a majority interested in different economic arrangements. Chapter 19

begging the question: In making an argument, when we beg the question, we use evidence that is essentially the same as the claim. Chapter 5

bill of attainder: This is when a legislative body acts like a judicial body by passing a law that declares a person or a group guilty of a crime and punishes them. Congress and state legislatures are forbidden from doing this. Chapter 62

Bill of Rights 1689: In England, this guaranteed, among other things, the right not to be taxed without Parliament's approval, the right to petition the King, the right for Protestants to bear arms for self-defense,

freedom from cruel and unusual punishments, freedom from excessive bail, freedom of speech in Parliament, and guarantees of a trial before having to pay fines. Chapter 29

Bill of Rights: This is a list of rights amended to the Constitution to protect the people. The Bill of Rights consists of ten amendments. The bulk of your civil liberty guarantees are in the Bill of Rights. These include freedom of speech and the press, freedom of religion, freedom from unreasonable searches and seizures, procedural guarantees if you are accused of a crime, freedom from cruel and unusual punishment, and property rights. The Bill of Rights is said to have been fathered by two men: Anti-Federalist **George Mason and Federalist James Madison.** Other civil liberties protections are included in the body of the Constitution itself, including the privilege of ***habeas corpus*****,** and prohibitions against bills of attainder, *ex post facto* laws, and the impairment of contracts. Chapters 14; 62

Bill of Rights features: The **Bill of Rights guarantees are absolute** compared to its historical and contemporary antecedents. The Bill of Rights went further than any previous document had in vigorously articulating individual liberties and freedom from an oppressive government. In that sense, the Bill of Rights is a ringing pronouncement that abstract concepts like natural rights have real meaning in our lives and that government needs to respect them. However, **the liberties enunciated in the Bill of Rights are not, in fact, absolute**. It is fair to say that all these liberties are subject to legislation. Chapter 14

Bill of Rights language: The majority of the Bill of Rights language, free speech, free exercise of religion, prohibitions against illegal searches, freedom of assembly, the right to counsel, etc., **came from the American colonial context:** Political theorist Donald Lutz clearly documents that, "The states constitutions' and their respective bills of rights,' not the amendments proposed by state ratifying conventions, are the immediate source from which Madison derived what became the U.S. Bill of Rights." Delegates at state ratifying conventions proposed amendments and assertions of rights that had already been written into state constitutions. The assertions of rights were particularly important. In those early state constitutions, the assertions of rights were included as prefaces that began those documents, whereas the U.S. Bill of Rights was appended at the end of the U.S. Constitution. Chapter 14

Bipartisan Campaign Reform Act: In the spring of 2002, Congress passed the Bipartisan Campaign Reform Act, popularly known as the **McCain-Feingold Campaign Finance Reform Bill**, and President Bush signed it into law despite many in his own party objecting. This law banned soft-money contributions to the national party organizations, doubled the hard money contribution limits of the Federal Election Campaign Act, and restricted advocacy ads from airing sixty days before a general election. Chapter 54

Black Codes: In the years immediately after the Civil War, Congress passed a series of laws that became known as Black Codes, which kept as many African American citizens in conditions of servitude as possible. Blacks were forbidden from self-employment, and thereby denied trades like blacksmithing, which they may have learned while they were slaves. More importantly, Black Codes required blacks to sign "annual labor contracts with plantation, mill, or mine owners. If African Americans refused or could show no proof of gainful employment, they would be charged with vagrancy and put on the auction block, with their labor sold to the highest bidder. . . [If] they left the plantation, lumber camp, or mine, they would be jailed and auctioned off." And whites discriminated rampantly by not allowing blacks to access basic commercial businesses. Chapter 68

black/white thinking: In making an argument, black/white thinking goes by many names, the most common of which are false dichotomy and false dilemma. When we commit this fallacy, we shrink the world of possibilities down to two choices and insist that everyone must choose between them. One choice is that which we favor. The other choice is some extreme or disastrous possibility that no one in her right mind would choose. Chapter 5

blanket primary: In a blanket primary, voters can essentially split their ticket within the Democratic and Republican primaries. Chapter 50

block grants: These are the second form of federal money that state and local governments receive. Block grants are looser than categorical grants. They grant states money to use for a broad public policy area, such as the welfare block grants that replaced existing federal welfare programs in the mid-1990s. Chapter 15

blogosphere: Partisan or ideological blogs challenge politicians and sometimes hold the mainstream media to account. Often, blogs start rumors or conspiracy theories that are then picked up by corporate media. The location of all this debate and dialogue is often referred to as the blogosphere. Chapter 48

Bork, Robert (1927-2012): In 1987, President Ronald Reagan nominated Robert Bork to the Supreme Court. In nominating Bork, Reagan was seeking to replace retiring centrist Justice Lewis Powell Jr., with an activist conservative justice. The senate defeated Bork's nomination 58-42. As far as most Democrats and a few moderate Republican senators were concerned, Bork had two strikes against him. First, Robert Bork was the Justice Department official who carried out President Nixon's "Saturday Night Massacre." Nixon had ordered his Attorney General to fire the special prosecutor investigating the Watergate scandal. The Attorney General refused and resigned. So did the Deputy Attorney General. Bork, who was third in command at the Justice Department, carried out Nixon's order and fired the special prosecutor. Second, Bork's legal opinions put him far to the right of mainstream legal thinking. Chapter 33

bounded rationality: Voters display what is known as bounded rationality, a concept political science borrowed from behavioral economics, meaning that voters are not fully rational due to the complexity of the decisions they have to reach, their own cognitive limitations, and the limited time and resources they have to devote to understanding politics. Absent full knowledge, voters' ability to process all the needed information in the time needed to do so, results in making rational decision short cuts. Chapter 41

Bovay, Alvan (1818-1903): Bovay was one of the people who initiated the push to establish the Republican Party in 1854. He is credited with naming it "republican" to hearken back to the views of Thomas Paine and Thomas Jefferson. He worked on a number of radical causes, including a "vote yourself a farm" campaign, and wrote for George Evans' *Working Man's Advocate* and *Young America* newspapers. Chapter 42

***Brandenburg v. Ohio* (1969):** In this case, the Court established the **imminent lawless action standard** in its majority opinion. The case dealt with Ohio prosecuting a Ku Klux Klan leader for publicly advocating violence. The majority ruled against Ohio and said that the First Amendment does not allow a state statute "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." Essentially the Court said that *advocacy* of violence is not punishable in general, but *inciting* violence is punishable. Chapter 64

Brown v. Board of Education of Topeka, Kansas (1954): In this case, the Supreme Court ruled 9-0 that segregated schools were inherently unequal, reversing the *Plessy* doctrine as it applied to education. Thus, *de jure*, by law, segregation is unconstitutional, but *de facto,* in fact, segregation is alive and well in America's schools. Chapter 68

Buckley v. Valeo (1976): The Federal Election Campaign Act limited the amount of money that candidates could give to their own campaigns. The Supreme Court struck down this provision in the case of *Buckley v. Valeo (1976).* The Court said the limitation of self-contributions was a violation of the candidate's freedom of speech. Chapter 54

bully pulpit: This refers to pushing an agenda. Today, we generally refer to a bully pulpit to mean any position which gives the holder the positional and rhetorical context in which to strongly advocate a position. Presidents

use their rhetorical abilities and media attention to force the country to at least consider specific policy proposals. President Theodore Roosevelt recognized and used these abilities, coining the term bully pulpit to refer to his ability to push an agenda. Chapter 27

bundlers: Wealthy people often act as bundlers or people who organize and collect contributions to one campaign from a variety of other wealthy people. A candidate from the elite who knows a few other elites who are willing to act as bundlers is in a very good position indeed. Chapter 54

Burgh, James (1714-1775): The American founders were sympathetic with the arguments of **Joseph Priestly**, codiscoverer of oxygen and a founder of Unitarianism, and **James Burgh**, a Scottish minister and political writer, who both wanted the English **Test and Corporation Acts** to be repealed. Burgh wrote, "Away with all foolish distinctions about religious opinions. Those with different religious views are both equally fit for being employed in the service of our country." Chapter 17

***Bush v. Gore* (2000):** This case shows how the 2000 Presidential Election illustrates the Court majority's animus toward democracy and the Court's willingness to set aside its own precedents when given a chance to hand the presidency to their preferred Republican candidate who lagged behind in both the popular and electoral college vote. Democrat Al Gore was ahead of Republican George W. Bush in the national popular vote as well as the electoral college vote. In Florida, Bush was ahead by .061 of 1 percent in the initial vote tally. As per state law, Gore asked for a recount. Florida's Secretary of State, Katherine Harris, who was also Bush's state campaign manager, abused her office by trying to shut down the recount. The Florida Supreme Court ordered the recount to continue. The U.S. Supreme Court, at Bush's request, stepped into the case while Harris refused to extend deadlines for recounts, and the Florida Elections Canvassing Commission certified Bush as the winner with 537 more votes than Gore. On Friday, December 8, the Florida Supreme Court again ruled in Gore's favor and ordered Florida's Supervisor of Elections and the Canvassing Board to continue with manual vote recounts. The U.S. Supreme Court heard arguments in Bush v. Gore on December 7 and then again on December 11. In a 5-4 decision, the U.S. Supreme Court decided along ideological lines to overturn the Florida Supreme Court's actions. Specifically, the Court said that the Florida Supreme Court's decision failed to specify how all counties should do the recount and therefore violated the Fourteenth Amendment's equal protection clause, even though the Florida Supreme Court had designated a single judge to hear all disputes, thus guaranteeing a single standard. Even worse, the majority opinion specifically said that the U.S. Supreme Court's interpretation of the equal protection clause was a one-off and should not be precedent setting. The solution to the Court's ruling was simply to remand the case back to the Florida State Supreme Court and ask it to establish clear standards for the recount. Instead, the conservatives on the U.S. Supreme Court stopped the recount altogether, thus handing a 537 vote and the Florida victory to Bush, which allowed him to squeak by in the electoral college by one vote. The 2000 election in Florida forever changed American politics and kicked off a new wave of GOP-led voter disenfranchisement efforts. Chapter 35

buying access: What do organized interests get for donating their money? Critics of America's campaign finance system argue that if contributions are not actually buying votes, which would be very hard to prove, they are certainly buying access. That is, these groups' lobbyists are likely to have the kind of close contact with congressional members and their staff that would not be afforded to other groups that had not donated. Chapter 46

C

cabinet: The Constitution says that the president "may require the opinion, in writing, of the principal officer

in each of the executive departments." From that prerogative, the cabinet evolved, the main role of which is to advise the president. Chapter 25

Calhoun, John C (1782-1850): Calhoun was a prominent Democrat from South Carolina who served as a vice president, a senator, and a representative once lamented that the phrase in the Declaration of Independence that all men were created equal "has become the most false and dangerous of all political errors. . . We now begin to experience the danger of admitting so great an error to have a place in the declaration of independence." Chapter 42

capital punishment: The Eighth Amendment's ban on cruel or unusual punishment is the focus of America's longstanding debate over capital punishment, which is when the government kills someone as punishment for a crime. Chapter 66

capital strike: Corporations and the wealthy can engage in a capital strike by withholding capital investment or moving money elsewhere until they get the government policies they want. A capital strike might take the form of layoffs, offshoring jobs and money, denying loans, or just a credible threat to do those things, along with a promise to relent once government delivers the desired policy changes. Chapter 45

categorical grants: Categorical grants are money that the federal government provides to states and local governments to spend on specific delineated categories or purposes. States or local governments receiving the grants must abide by federal nondiscrimination laws, and they may have to pay wages at certain levels. There are two types of categorical grants: **project grants** and **formula grants**. Chapter 15

Catt, Carrie Chapman (1859-1947): Chapman took over leadership of the National American Woman Suffrage Association from **Susan B. Anthony**. Feminists were outraged when the Fifteenth Amendment left out women, so they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the National American Woman Suffrage Association. Chapter 69

caucus: This is a meeting, or a series of meetings, at which party members gather, deliberate, and choose nominees that they support and where they often choose delegates for state or national political conventions. Chapter 50

causal hypothesis: In this hypothesis, some of the variance in one variable is being caused by the variance in the other variable. In all the other hypotheses, the two variables do not need to connect, but in a causal hypothesis, they do. Chapter 4

Central Hudson Test: Often, the Court has acted to ensure that consumers are able to get information via commercial advertisement. In *Central Hudson Gas and Electric Corporation v. Public Services Commission* (1980), the Court established what is known as the Central Hudson Test: Government may regulate commercial speech under the following conditions: 1) The government may regulate commercial speech that is fraudulent or misleading. 2) The government's interest in regulating an instance of commercial speech must be substantial. 3) The regulation must directly advance the government's asserted interest in regulating the commercial speech. 4) The regulation must be narrowly tailored to advance the government's interest in regulating the commercial speech. Chapter 64

ceremonial laws: These laws do relatively trivial things like rename federal buildings, award medals, or designate special days. Chapter 22

***Chaplinsky v. New Hampshire* (1942):** The Court defined the idea of **fighting words in *Chaplinsky v. New Hampshire* (1942)** as words that "by their very utterance inflict injury or tend to incite an immediate breach of peace." Civil libertarians worried about fighting words as a Constitutional principle, largely because it was so

vague—there is no list of words and phrases that fall under it. For instance, in the *Chaplinsky* case, one man started a fight after he was called "a damned Fascist" and "a goddamned racketeer!"—phrases which seem quaint today. As a result, the Court backed away from fighting words as legitimate grounds for restricting speech. Chapter 64

characteristics of attractive candidates: Political parties tend to put forward candidates with name recognition, access to money, and an appealing biography. Name recognition is important, so parties look for people who are already in office, or for prominent business leaders, or people who have been active in the community. Access to money is another important characteristic: parties look for candidates who can partially self-fund their campaigns or who have vast connections to people in positions to donate to the campaign. Parties also look for candidates with an appealing biography, which might include anything from being a combat veteran to being a successful entrepreneur. Chapter 41

Charles I (1600-1649): In 1649, the English Parliament executed Charles I. During his rule, he levied taxes without Parliament's approval, disbanded Parliament for eleven years, forced people to loan money to the government, and sent armed force into Parliament to arrest members. Chapter 29

checks and balances: This term does not appear in the Constitution, but the practice is intentionally and strategically woven throughout the document. Key checks and balances allow the three separate government institutions, **Executive, Legislative, and Judicial** to meddle in each other's business. Chapter 13

Chief of Staff: This person manages the White House staff operations and often controls access to the president. Chapter 25

Child Online Protection Act of 1998: To replace the Communications Decency Act, Congress passed the Child Online Protection Act, which threatened prison and fines for anyone caught placing material that is "harmful to minors" on a web site available to children under the age of seventeen. The law became the focus of a legal battle for more than a decade until it died a quiet death in 2009 when the Supreme Court declined to review yet another appeal. During the legal battle, most courts were uncomfortable with the broad language of the law. In addition to the vagueness of the phrase "harmful to minors" is the problem that the law applied local community standards to the Internet. Most federal judges and Supreme Court justices were concerned that the law allowed any community—even the most rural and conservative—to define the content of the Internet for everyone in the country. In distinction to this legal morass, the Supreme Court firmly established in 1982 that bans on child pornography are constitutional, so long as the material in question depicted an actual—as opposed to a virtual—child. Chapter 64

circuit courts of appeal: The district courts are grouped into twelve circuit courts of appeal, plus there is a court of appeals for the federal circuit that handles appeals from the U.S. Claims Court, the U.S. Court of International Trade, and other national-level courts. Chapter 32

citizens' assembly: A citizens' assembly is a group of adult citizens chosen at random to discuss specific issues, such as automobile fuel standards, judicial appointments, and immigration reform, etc. The citizens assembly would practice **deliberative democracy**, which is a nonadversarial, discussion-centric form of decision making that educates the citizens in the assembly and helps them reach decisions. Chapter 55

Citizens United v. Federal Election Commission: In 2010, the Court ruled in *Citizens United v. Federal Election Commission* that key restrictions on corporate or union spending in elections were unconstitutional. Because of this decision, corporations and unions are free to make advocacy ads during the election period and are free to make unlimited independent expenditures in favor of—or opposed to—specific candidates. As the Center for Responsive Politics puts it, "Citizens United permits corporations and unions to make political expenditures from their treasuries directly and through other organizations, as long as the spending—often in the form of

TV ads—is done independently of any candidate. In many cases, the activity takes place without complete or immediate disclosure about who is funding it, preventing voters from understanding who is truly behind many political messages." As a result of the *Citizens United* case and another federal case called *SpeechNow v. FEC* (2010), outside spending has exploded. Chapter 54

civil disobedience: In the mid-nineteenth century, **Henry David Thoreau** coined the term civil disobedience in his essay called *On the Duty of Civil Disobedience.* Political philosopher John Rawls defined civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government." Chapter 59

civil liberties: These are essentially your natural rights of life, liberty, and property translated into specific guarantees by the United States Constitution, especially the Bill of Rights and the **due process clause** of the **Fourteenth Amendment**, which says that no state may "deprive any person of life, liberty, or property, without due process of law." These guarantees were designed to protect individuals from the potentially abusive power of government, although civil libertarians today are growing increasingly concerned about large corporation's ability to infringe on individual rights as well. The bulk of your civil liberty guarantees are in the **Bill of Rights**. Chapter 62

civil liberties revolution: Mankind went through a civil liberties revolution between the Medieval period and the nineteenth century. U.S. citizens continue to benefit from that revolution. This means that our entire frame of reference has changed from one that emphasized the primacy of royal and aristocratic privileges to one centered on individual liberties. It was a slow and difficult revolution, but it happened through the struggles of many people. Chapter 62

civil rights: Our modern notion of civil rights—freedom from discriminatory treatment based on some characteristic—is tied in large part to the **civil rights clause** of the **Fourteenth Amendment**, which says that no state may "deny to any person within its jurisdiction the equal protection of the laws." Chapter 62

Civil Rights Act of 1875: To give the civil rights clause practical effect, Congress passed several Civil Rights Acts during Reconstruction (1865-1877), including the Civil Rights Act of 1875. This law stipulated that people must be allowed full and equal access to public accommodations—public facilities as well as private businesses that serve the general public, like theaters, inns, restaurants, etc.—regardless of their race or color. This was the last civil rights bill to pass Congress for eighty-two years. Chapter 68

Civil Rights Act of 1964: Civil rights leaders demanded this act for decades. It was proposed by President John F. Kennedy and pushed through by President Lyndon Johnson after Kennedy's assassination. This act was a monumental political achievement and was truly bi-partisan legislation, with most congressional Republicans and Democrats supporting it. This Act did the following: 1) Outlawed discrimination in voter registration, but this section had poor enforcement language. 2) Established that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 3) Authorized the U.S. Attorney General to sue in cases where people were denied the equal protection of the laws, unequal access to public accommodations, or equal access to public schools and colleges. 4) Banned discrimination in programs that receive federal assistance. 5) Banned employment discrimination directed at "any individual because of his race, color, religion, sex or national origin." This includes hiring, firing, conditions of employment, and compensation. 6) Created the Equal Employment Opportunity Commission, which is empowered to make prosecution recommendations to the U.S. Attorney General regarding employment discrimination. Chapter 68

Civil Rights Act of 1968: This act was primarily designed to address two issues that previous legislation had not.

It applied the Bill of Rights protections on Native American reservations and afforded equal access to housing. The two main pieces are the **Indian Civil Rights Act and the Fair Housing Act.** Chapter 68

Civil Rights Cases (1883): Many court cases resulted directly from passing the 1875 Civil Rights Act, as African Americans continued to be refused service on account of their race at inns, hotels, railroads, and theaters around the country. Four cases reached the Supreme Court in 1883 and were decided together as the *Civil Rights Cases (1883).* This was an important test of the meaning of civil rights and the Fourteenth Amendment's mandate that no state may deny any person the equal protection of the laws. In a devastating decision for those who believed in equality, eight of the nine Supreme Court justices ruled in favor of private business owners in these cases and overturned the 1875 Civil Rights Act as unconstitutional. The Court ruled that while states must not discriminate, the owners of private businesses were free to discriminate against potential customers because of race. Justice Bradley, writing for the majority, said that "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." Chapter 68

civil rights clause: The Fourteenth Amendment's civil rights clause mandated that all people receive the "equal protection of the laws." Chapter 68

Civil Rights Movement, American, 1955: The 1955 civil rights movement engaged in coordinated political, legal, and nonviolent direct-action strategies to overcome housing segregation, educational segregation, voter discrimination, segregation of public accommodations, and a variety of other manifestations of racism. In 1955, **Rosa Parks** refused to move to the "colored section" of a public bus. She was not the first to engage in this kind of protest, but she became the most famous because her action stimulated an African American city-wide boycott of Montgomery, Alabama's bus system. The boycott's organizers elected newcomer Martin Luther King, Jr. to coordinate and lead the effort. In another example, the **Greensboro Four**—Ezell Blair Jr., David Richmond, Franklin McCain, and Joseph McNeil—all of whom were students at the North Carolina Agricultural and Technical College, sat down at a segregated lunch counter at a Woolworth's store and refused to leave. Their actions spread to college towns across the South. Chapter 59

civil servants: Below political appointees are the millions of civil servants who perform the work of the federal government. We're referring to civilians—not uniform military—who are not appointed by the president to their positions. Chapter 38

Civil War: The North and the South became increasingly divided over the slavery issue and the political question of whether additional states would be admitted to the United States as slave or free, which would determine the political balance in Congress. There is no space here to recount America's slide into the meatgrinder that was the Civil War, but Republican Abraham Lincoln's presidential election was the final straw for white southerners who benefitted economically, culturally, and psychologically from slavery. Even though Lincoln asserted often that he did not believe in the inherent equality of blacks and whites, he did say things like, "There is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness." South Carolina repealed its ratification of the Constitution on December 20, 1860 and six states met in Montgomery, Alabama, on February 4, 1861 to form the Confederate States of America. Ultimately, eleven states joined the Confederacy, and the war between them and the Union killed at least 670,000 soldiers and civilians—most by disease—freed 3.5 million slaves and crushed federal authority's most serious challenge in American history. This war was a decisive victory for those who held that while the official name of this country is The United States of America, the states are merely administrative units of the people in whose name government operates. The Constitution begins with "We the People," not "We the states." Chapter 16

Civil War Amendments: After the North's Civil War victory, Congress passed three amendments to the

Constitution called the Civil War Amendments: the Thirteenth Amendment abolished slavery; the Fifteenth Amendment provided that citizens shall not be denied voting rights based on "race, color, or previous condition of servitude"; the Fourteenth Amendment's **civil rights clause** mandated that all people receive the "equal protection of the laws." Chapter 68

clear and present danger doctrine: This doctrine came out of ***Schenck v. United States*** **(1919), which** holds that speech is not protected by the First Amendment if it clearly endangers the lives, health, and property of others, or the national security of the United States. Chapter 64

clear differences: The Democratic and Republican parties show clear differences on the following policies: taxes, civil rights, female bodily autonomy, gun control, the environment, and healthcare. Chapter 43

climate strikes, 2018; Greta Thunberg: Greta Thunberg**,** 16-year-old Swedish student, started boycotting school on Fridays to call attention to the climate emergency. Her action blossomed into a worldwide #FridaysForFuture movement. Millions of students in 117 countries have participated in multiple iterations of this form of protest. The goal of the movement is to "Sound the alarm and show our politicians that business as usual is no longer an option." As if to show the students how clueless politicians were, British Prime Minister Theresa May criticized the protesters and said that each demonstration "increases teachers' workloads and wastes lesson time." When she was asked to speak at the United Nations Climate Action Summit in 2019, Thunberg stuck to her values and made the crossing from Sweden to New York by sailboat rather than jet plane. Chapter 59

Clinton, President Bill (1946-): The House of Representatives voted along party lines in 1998 to impeach President Bill Clinton in what is surely the most sensational sexual, political scandal ever to hit the American presidency. Clinton survived impeachment by a comfortable margin, with only fifty of the required sixty-seven senators voting to convict. Very few people outside of the president's staunchest political allies argued that Clinton's testimony did not constitute perjury—he clearly gave false statements under oath in a federal case. **The debate in the Clinton impeachment revolved around two issues**: 1) Did lying under oath in court about an embarrassing extramarital affair constitute a serious enough offense to remove the president? 2) How much damage did the salacious Clinton scandal do to the presidency's moral authority? In the end, the broad national consensus was that Republican efforts to impeach and remove Clinton amounted to an overly moralistic and politically opportunistic overreaction to a scandal that in no way threatened the Constitutional order. Chapter 30

closed primary: Closed primary means that only people who are registered with a political party can vote in that party's primary. Chapter 50

commander in chief: The president is commander in chief of U.S. military forces. This means that the president is a civilian in charge of the U.S. military. Generals and admirals must take orders from him. **You should know these examples**: 1) Without a congressional declaration of war, President Harry Truman ordered American troops into battle on June 30, 1950 to defend South Korea. 2) During the Vietnam War, an undeclared war from 1965 to 1973, both Presidents Lyndon Johnson and Richard Nixon involved themselves heavily in U.S. fighting force's day-to-day tactics. 3) With congressional authorization—although not a formal declaration of war—President George H. W. Bush launched an invasion on Iraq in response to Iraq invading Kuwait. 4) Following the 9/11 attacks, President George W. Bush's administration decided to invade Iraq even though that country had nothing to do with the attacks. Chapter 28

commercial speech: This refers to when corporations speak to potential consumers about products and services. This sort of advertising is not political speech. Chapter 64

Communications Decency Act: In 1996, Congress passed the Communications Decency Act, and President Clinton signed it into law. The law made it a federal crime to knowingly transmit to a minor—or post on a

web site where a minor might visit—any obscene, indecent, or patently offensive picture or text. Many groups immediately sued, and the American Civil Liberties Union carried the case. In ***Reno v. ACLU*** **(1997)**, the Court unanimously struck down the Communications Decency Act because the law would require that the Internet only carry information suitable for children. Quoting one of its earlier decisions, the Court said, "The level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." Chapter 64

commute a sentence: The president can commute a sentence, which typically allows a person to leave federal prison before completing their full sentence, but they maintain the other impacts of their federal conviction. Chapter 27

concept: A word or phrase that stands for something complex or abstract. Chapter 4

concurring opinion: Sometimes, justices agree with each other enough to create a majority vote but may do so for different legal reasons. In this case, a justice may write a concurring opinion explaining his or her unique legal reasoning for voting with the majority. Chapter 31

confederal system: In a confederal system of government, the states are very powerful relative to the weak central government. Chapter 12

conference committee: Conference committees are so important that they are sometimes called the third house of Congress and are composed of both representatives and senators who are chosen by a bill mark-up committee(s) chair and senior-minority party leader. Two bill versions can be melded into one in a conference committee called specifically for that purpose. Chapter 22

conference meeting: After a case's oral argument, the Chief Justice presides over the justices in a conference meeting where they reach a preliminary decision on the case. The Chief Justice speaks first, followed by the other justices in the order of their Court seniority. This conference meeting is very private, with only the justices allowed in the room. The justice with the least seniority "acts as 'doorkeeper,' sending for reference material, for instance, and receiving it at the door." Chapter 31

Connecticut or **Great Compromise (1787):** This compromise called for a bicameral legislature and a different representational scheme for each chamber. For example, in the House of Representatives, each state would have seats proportional to its population. The original formula was one representative for every 30,000 people. The Senate would have two senators from each state, regardless of population. Representatives would be elected by popular vote, while senators would be chosen by state legislatures. The Compromise narrowly passed the convention on July 16, 1787. Chapter 13

conservatism: The terms conservatism, neo-liberalism, classical liberalism, and cultural conservatism all hang together even though those group's adherents don't necessarily agree with each other. Chapter 35

constituent service: This is an important congressional role often referred to as casework. Congressional staff spend much time on constituent service, which refers to troubleshooting and problem solving for their constituents. By being able to solve problems for their constituents, congressional members generate positive feelings that challengers cannot. Also, constituent service benefits ripple through many people via word of mouth. This is an advantage for incumbents that most challengers cannot match. Chapters 21; 55

Constitutional Convention: Because of the turmoil under the Articles of Confederation—Congress called on the states to send delegates to Philadelphia in May 1787. The delegates were to gather there "for the sole and express purpose of revising the Articles of Confederation." Every state except Rhode Island sent delegates to what we now know as the Constitutional Convention. Chapter 12

Constitution articulates five important core values; Constitution's preamble: We the people of the United

States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. The Constitution's preamble articulates five important American core values: democratic government, effective governance, justice, liberty, and equality, which was added to the Fourteenth Amendment. Chapter 34

Constitution, particularly difficult to amend: The U.S. Constitution stands apart from other written constitutions in one important regard: Law professor Richard Albert has established that "The United States Constitution is extraordinarily difficult to formally amend, in contrast to most other less-rigid democratic constitutions." Chapter 18

controlled experiment: This is an experiment that is carefully set up by the scientist to control the variables that might affect the outcome, thereby isolating and evaluating the variable in which she is most interested. Chapter 4

Cooperative Federalism (1930-1960s): Th period of cooperative federalism was marked by two important developments. First, the federal government and the states became partners as they solved problems associated with the Great Depression, World War II, and the Cold War. Secondly, the Supreme Court finally acceded to government regulating the economy and protecting civil rights and liberties. Chapter 16

corporate demand: This is another element driving the federal government to expand. Businesses benefit from the stability and predictability afforded by government regulating the economy. Chapter 37

Corporate Democrats: Still socially liberal, the Democratic party became controlled by the New Democrats, who can more properly be called the Corporate Democrats because of their connections with and deference to large corporations. Chapter 42

correlative or correlational hypothesis: This hypothesis suggests that two variables vary together. Chapter 4

corruption: The legislative process is occasionally subject to outright corruption and illegal behavior. This sometimes takes the form of bribery, in which special interests provide tangible benefits for congressmen in exchange for congressmen providing favors. Other forms of corruption are more mundane. Chapter 23

Council of Economic Advisors: Established by Congress in the Employment Act of 1946, the Council of Economic Advisors is charged with providing the president helpful domestic and international economic policy analysis and guidance. Chapter 25

counter-cyclical spending: This is an important federal government economic function that helps lessen the negative impacts of economic downturns. When the economy declines, federal welfare and unemployment insurance payments stimulate consumer spending that would otherwise decline, thereby helping people directly and the economy generally. Chapter 36

court of appeals: Sometimes, cases handled in state courts can raise questions that need to be adjudicated in federal courts; these are called courts of appeals. Chapter 32

court packing plan: Court packing allows the president to nominate new justices and expand the total number of justices on the Court. In 1937, President Franklin Roosevelt proposed to expand the number of justices by adding one for every sitting justice who was seventy- and one-half-years-old and who didn't retire. Potentially, this move could have increased the number of justices to fifteen. Roosevelt was frustrated that the Court was thwarting his New Deal policies, which were targeted at ameliorating the effects of the Great Depression. His court packing plan was not approved by Congress, but the Court nevertheless became more amenable to an activist federal government. Chapters 16; 33

cracking: Cracking is a form of gerrymandering that involves "drawing districts in such a way as to divide a concentration of voter-specific types across several districts such that they are a minority in each one, with practically no hope of achieving representation in any of the districts." The party doing the gerrymandering seeks to spread the opposing party's supporters across the remaining districts, hoping to dilute their electoral weight. Chapter 53

Cult of True Womanhood; Cult of Domesticity: These phrases mean that women should be the moral cultivators of their children, should be devoted to their domestic duties, and should be morally pure, religiously pious, and submissive to men. Chapter 69

D

Dahl, Robert A (1915-2014): Dahl is a political theorist who, in his 1961 *Who Governs*, analyzes how elites from a variety of interests compete for decision-making power. Decision-making power is described as the "first dimension of power." Chapter 2

Daley, Richard (1902-1976): For a time, urban political machines were key power centers in American politics, particularly for the Democratic Party. The machine built by Democrat Richard Daley helped him rule Chicago from 1955 to 1976. Chapter 41

Daughters of Bilitis (1955): This was the first postwar lesbian organization founded in San Francisco by **Del Martin** and **Phyllis Lyon**. They created a magazine called *The Ladder*. Active throughout the 1950s and 1960s, the Daughters of Bilitis survived until it was broken apart in the 1970s by internal factionalism. Chapter 70

Defense of Marriage Act (DOMA): In 1996, Congress passed the Defense of Marriage Act (DOMA), which defined marriage for federal purposes. The Act excludes same-sex marriage and permits states to refuse to recognize same-sex marriages performed in other states. At the time, no state allowed same-sex marriages, but it became legal in some places because of court decisions or changes in state law. Challenges to DOMA and California's Proposition 8 worked their way up to the Supreme Court, and in 2013, the Supreme Court issued rulings on both. Chapter 70

Definitional Period of American Federalism: The U.S went through wrenching—and ultimately deadly—struggles over federal versus state power called the definitional period of American Federalism. This period was marked by several key struggles, all of which resolved in favor of central government power. Chapter 16

definition of politics: Politics is the authoritative and legitimate struggle for limited resources or precious rights and privileges within the context of government, the economy, and society. Chapter 1

***de facto* discrimination:** This means discrimination in everyday life that is unsupported by law or policy. Chapter 68

Deism: This is the belief in a supreme being or creator—Nature's God—who does not intervene in the universe or interact with humankind, but who disappears into the natural rules that govern all matter. Chapter 11

***de jure* discrimination:** This means discrimination written into laws and official policies at the federal, state, local, and company levels. Chapter 68

delegate: A congressional representative who is bound to vote the way constituents want. Chapter 21

deliberative democracy: Deliberative democracy is a non-adversarial, discussion-centric form of decision making that educates citizens in an assembly and helps them reach decisions. More technically, political scientists Amy Gutmann and Dennis Thompson define deliberative democracy as "a form of government in which free and equal citizens and their representatives, justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future." Chapter 55

demand-side economics: This is not really a term people use like they do supply-side economics. Rather than providing tax incentives for wealthy individuals and corporations, Democrats tend to support tax cuts for middle-class people, policies like increasing the minimum wage and social programs for poor people. Their assumption is that these people are more likely to go out and spend that money, stimulating demand, and prompting wealthy individuals and companies to invest in businesses to meet that demand. Chapter 46

Democratic-Republican Party: Jeffersonians formed the Democratic-Republican party, explicitly aiming to invoke the Revolution's egalitarian principles, while the Hamiltonians formed the **Federalist** party to remind people of the Constitution's triumphal plan. Chapter 42

Democrats: The Democratic-Republicans disagreed amongst themselves in the 1820s and formed two discrete parties: the Democrats, which have continued to the present day, and the National Republicans, which then became the **Whig Party** that eventually dissolved over slavery in the 1850s**.** Chapter 42

demographic groups: Some organized interests were created to defend or advance the interests and rights of specific demographic groups. Chapter 45

descriptive representation: This concerns the extent to which a representative resembles those being represented, such as, to what extent do our representatives resemble the population being represented. Chapter 20

dichotomous questions. This question has only two possible answers. Questions that require a yes or no answer are dichotomous, as are questions that ask you to put yourself into one of two categories, like whether you are or are not a citizen. Chapter 7

diplomatic-recognition power: Another foreign policy power is the president's ability, spelled out in the Constitution, to "receive ambassadors and other public ministers." This means that the president, acting without Congress' approval, has diplomatic-recognition power. Chapter 28

directional hypothesis: This hypothesis posits a direction to the relationship in question: a **positive relationship,** which is the value of one variable increasing along with the value of another variable. For example, when someone says that as religious fundamentalism increases, acts of terrorism increase as well. Or the direction may posit a **negative relationship,** which involves the value of one variable decreasing as the value of the other variable increases, for example, someone might hypothesize that as personal income increases, willingness to support public transit will decrease. Chapter 4

discretion: When enforcing federal laws and ensuring federal regulations compliance, agencies have a certain amount of discretion in their work. This means that federal agency leaders can make choices about which violators to pursue, what penalties to seek, and on what areas of their responsibilities they want to concentrate their efforts. Discretionary spending falls into two categories, defense spending and nondefense spending. Chapter 38

discretionary spending—Discretionary spending refers to federal spending that changes year to year as Congress passes appropriation bills to fund agencies. Presidents make proposals to Congress for what they'd like to see spent, and each congressional chamber has its own budget committees. Chapter 40

discrimination: In the political arena, discrimination occurs when people who are otherwise quite similar are not receiving the equal protection of the laws or equal access to liberties based on a characteristic such as their gender, race, religion, national origin, sexual orientation, age, or disability. Chapter 62

dissenting opinion: The Supreme Court operates by majority vote, so decisions can be 9-0, 8-1, 7-2, 6-3, or 5-4. The decision's legal validity and political acceptability do not depend on the Court's vote; indeed, they depend on the winning majority's size. Someone in the winning majority writes a **majority opinion,** which explains the Court's decision in terms of its compelling legal precedent. If the Chief Justice is in the majority, he will assign who writes it; if he is not in the majority, the most senior justice voting with the majority will assign the majority opinion. Someone in the minority writes a **dissenting opinion**, which explains why the minority feels the majority erred in applying precedent or constitutional principle. Majority opinions carry legal weight in the form of precedent, and they also instruct legislators about how acceptable the proposed legislation is. Dissenting opinions do neither of those things, but they do become important if the Supreme Court decides later to reverse itself. Chapter 31

divided government: Divided government occurs when the president and at least one congressional chamber are from different parties. This also refers to when national-level political institutions are controlled by different parties at the same time. For example, the Republicans might control the White House and the Senate, but the Democrats have a majority in the House of Representatives. Or, a Democrat might be president, but the Senate and House are controlled by Republicans. Also, the current conservative Supreme Court majority means that Democratic victories in congressional and presidential elections can be countered by the life appointments of five conservative justices. Divided government can lead to gridlock and makes it very difficult for American political parties to translate their political programs into public policy. Chapter 41

dogmatism: This is a philosophy that says we have already arrived at the truth, so no new claims or evidence need to be entertained. Chapter 6

donate money: A prominent organized-interest strategy is to donate money to political campaigns. Lobbyists form political action committees—known as PACs—which must be registered with the Federal Election Commission. The PACs donate money to political candidates who are likely to support the group's interests. Chapter 46

Don't Ask, Don't Tell policy: In 1994, President Bill Clinton's administration instituted a Don't Ask, Don't Tell policy in the U.S. military. The policy allowed homosexual men and women to serve in the military if they remained closeted, which was the *don't tell* part of the policy. The military would not actively look for gays and lesbians in the ranks, the *don't ask* part of the policy, but it would not tolerate them if they were discovered. In 2010, Democrats in the House of Representatives amended the Defense Authorization Act to end Don't Ask, Don't Tell and allow gays and lesbians to serve openly in the military. Republicans led by Senator John McCain successfully filibustered it in the Senate. Later that year, a standalone bill ending Don't Ask, Don't Tell finally passed both chambers and was signed by President Barack Obama. Chapter 70

double jeopardy: This prohibits anyone from being prosecuted twice for substantially the same crime. When the Fifth Amendment says that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb," we refer to that as the protection against double jeopardy. Chapter 66

Dred Scott v. Sanford (1857): The Supreme Court's decision in *Dred Scott v. Sanford (1857)* is particularly instructive. Dred Scott, a slave from Missouri, sued his owner for freedom because his owner had taken him to Illinois, a free state, and to the Wisconsin Territory, a free territory. Chief Justice Roger Taney ruled that Scott did not have standing to sue saying, "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the

Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?" The Court answered a resounding "No," which was its way of saying that blacks—slave or free—could not ever expect to become full and equal members of the American political community. Chapter 68

dual federalism (1865-1932): This is commonly called Layer Cake Federalism. Despite the outcome of the Civil War, states continued to assert their prerogatives to govern exclusively in important public policy areas, and they were aided by Supreme Court rulings to that effect. The idea of dual federalism is that there are public policies over which the federal government predominates, such as foreign policy, tariffs, monetary policy, national defense, interstate commerce, and the mail. States took the lead in other areas of governmental responsibility like public safety, education, elections, business licensing, family and morals policy, inheritance and property laws, and commerce within state boundaries, including wages and working conditions. Chapter 16

due process: This is a fundamental, constitutional guarantee that "all legal proceedings will be fair and that one will be given notice of the proceedings and an opportunity to be heard before the government acts to take away one's life, liberty, or property. . . [and] a constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious." Chapter 66

due process clause: In the late nineteenth century, the Court begin **incorporating the Bill of Rights protections** using the Fourteenth Amendment's due process clause instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law." Chapter 63

Duverger's Law: In the U.S. political voting system, the tendency for winner-take-all, single-member district systems to promote two parties is sometimes referred to as Duverger's Law, after the French political scientist Maurice Duverger. Chapter 44

E

earmark: This is typically a small paragraph of very specific language inserted into a budget appropriation bill directing an agency to fund a project. Chapter 23

ecological fallacy: This refers to making conclusions about a person based on aggregate data that is relevant to that person. Aggregate data is information compiled into summaries for public reporting and cannot be used to make definitive statements about an individual. Chapter 15.

economic interests: These are groups that coalesce around the financial interests of their members, such as corporations and business interests and labor interests. Chapter 45

Eighth Amendment: This amendment provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Chapter 66

Eisenhower, Dwight (1890-1969): In his famous 1961 **farewell address**, President Dwight Eisenhower—who spent a lifetime in the military before becoming president—warned against the power of what he called the **military-industrial complex**. "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist." Chapter 29

election fraud: Election fraud occurs when election officials, campaign staff, advocacy groups, or political

candidates intentionally corrupt the electoral process. This happens more often than does voter fraud. According to the Justice Department, "Election fraud usually involves the corruption of one of three processes: the obtaining and marking of ballots, the counting and certification of election results, or the registration of voters." Chapter 52

elections; voting patterns, age and education: Age is a strong and consistent predictor of voter turnout. As age increases, tendency to vote increases. In the 2016 presidential election, 43 percent of eighteen- to twenty-nine-year-olds voted; 57 percent of thirty- to forty-four-year-olds voted; 66 percent of forty-five- to sixty-four-year-olds voted; and 71 percent of people sixty years and older voted. This age ranking holds true in all recent elections. Also, formal education correlates with tendency to vote. In the 2016 presidential election, 31 percent of people without a high school diploma voted, and 85 percent of people with a graduate degree voted. This pattern holds at every increased level of education: high school graduates vote at higher rates than those who didn't finish high school; people with college degrees vote at higher rates than high school graduates, and so on. Chapter 57

elections; voting patterns, gender gap: The gender gap refers to women's tendency to vote for Democratic candidates and men's tendency to vote for Republican candidates. Chapter 57

elections; voting patterns, party affiliation: Race and Ethnicity clearly impacts the tendency to vote Republican or Democratic: In general, whites tend to vote Republican, and ethnic minorities vote Democratic. In the 2016 election, according to CNN exit polls, Republican Donald Trump beat Democrat Hillary Clinton among whites by 20 percentage points—57 percent to 37 percent. Clinton beat Trump among African Americans by 81 percentage points—89 percent to 8 percent. Clinton beat Trump by 66 percent to 28 percent among Hispanics and by 65 percent to 27 percent among Asian Americans. Exit poll results show African American and Hispanics identifying with the Democratic party as well: African Americans by an 84 percent to 8 percent margin, followed by Hispanics with 63 percent to 28 percent. Whites are about 8 percent more likely to identify as Republican. Chapter 57

elections; voting patterns, race and ethnicity: A useful generalization about the people who *do* tend to turnout in American elections is that demographic variables correlate with each other. Race and ethnicity are relevant. In the 2016 presidential election, 65 percent of whites voted, 60 percent of blacks voted, and 45 percent of Hispanics voted. That ranking generally holds true over time, although in 2008 the black turnout rate did eclipse that of whites only. The Hispanic voting turnout rate has been increasing over time. In 1996 Hispanic turnout was only 38 percent. Chapter 57

elections; voting patterns, religion: Religious denomination and overall religiosity are important demographic factors in party identification and voting. Evangelical Christians—those belonging to more fundamentalist, white Protestant denominations—voted 80 percent to 16 percent for Trump over Clinton in 2016. Mormons voted 56 percent to 28 percent for Trump, with most other voters choosing an independent candidate named Evan McMullin. Overall, Mormons are much more likely to identify as Republicans. Catholics were more evenly split in 2016, with a slight tilt toward Trump. Jews voted 71 percent to 23 percent for Clinton and are more likely to identify as Democrats. Religiosity—the extent to which a person is devote and practices their religion by going to religious services—also plays a role in voting. Fifty-five percent of people who said they attend religious services weekly or more voted for Trump, while 62 percent of people who said they never attend religious services voted for Clinton. People who say they are religiously unaffiliated are significantly more likely to identify Democratic. Chapter 57

elections; voting patterns, turnout: American voting turnout is not particularly high. It bounces around depending on whether it is a presidential election year or a midterm election, meaning one in which presidential candidates are not on the ballot, but that does include the electors pledged to presidential candidates. From 1980 to 2016, voting turnout in presidential election years averaged just shy of 57 percent,

meaning that for every 100 people who were of voting age, only 57 did so. From 1982 to 2018, voting turnout in midterm elections averaged just under 41 percent. (2) By international standards, voter turnout in the United States is lower than most countries to which we'd like to be compared. Chapter 57

elections; voting patterns, urban/rural: The United States has a pronounced urban/rural voting divide. The generalization to be made here is that urban areas tend to vote Democratic, rural areas tend to vote Republican, and suburban areas are more likely to be battlegrounds that could go either way. This held true in 2016. According to exit polls, voters in urban areas supported Democrat Hillary Clinton by 60 percent to 34 percent, while voters in rural areas supported Republican Donald Trump by 61 percent to 34 percent—almost a mirror image. The suburbs went for Trump by 4 percentage points. Party identity also mirrors this urban/rural divide. Chapter 57

Electoral College: The Electoral College is probably the least understood aspect of American government. As originally conceived at the Constitutional Convention, the electoral college was to be an esteemed body of men chosen according to state law who would cast votes for the president and vice president. It appears to have been a solution to two concerns—the concern that the general population would be ill suited to cast votes for president, and the concern over sectionalism. Chapter 51

elite theory: This is the theoretical perspective posed in this text, which is that a relatively small and wealthy class of individuals largely gets its way. According to this theory, the power elite either are the decision-makers, or they so influence the decision-makers that the elites get their way most of the time. Elite theory highlights the power of organized business and military interests combined with the affluent strata of society and points to many government policies that lavish benefits onto them. Business interests create interlocking and overlapping connections that reinforce their position and allow them to control the political system. Elite theorists hold that the many-interests-on-a-level-playing-field vision of the pluralists and the interest-group-chaos scenario of the hyper-pluralists fail to accurately show what is really going on: that a relatively small and wealthy class of individuals—the power elite—largely gets its way regardless of the surface appearance of political conflict. Chapters 3; 45

Ellsberg, Daniel (1931-): During the Vietnam War, Daniel Ellsberg stole a copy of a secret history of America's involvement in that conflict. As an employee of the Rand Corporation, Ellsberg had participated in producing this secret report for the Secretary of Defense. Ellsberg gave it to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called ***The Pentagon Papers.*** It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and the considerable degree to which the American people were deceived by the government. Chapter 64

empirical: Empirical, adjective, and empiricism, noun, mean that scientists base their conclusions on careful observation and experience rather than on intuition, revelation, prejudice, superstition, or anecdote. Chapter 4

enabling legislation: These are additional laws that give agencies the authority to issue regulations to solve defined problems. Executive agencies are not free agents that act on their own initiative. **They are creations of Congress, and no executive agency can act unsupported by statutory authority**. This means that Congress must first pass a law to create the executive agency and then pass additional laws called enabling legislation. Chapter 38

enforcing: The second important task of federal agencies is to enforce congressional statutes as well as their own rules and regulations. Chapter 38

Engel v. Vitale (1962): In this case, the Court struck down a New York law that required students to recite daily the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Despite that the prayer was nondenominational and that

students with permission from parents could opt out of reciting the prayer, the Court ruled that the practice constituted an establishment of religion. Chapter 65

English Bill of Rights (1689): This is a document forced upon England's William and Mary as they were invited to replace James II after the Glorious Revolution. It first addressed the right of subjects to petition the King and stated that "Protestants may have arms for their defence suitable to their conditions and as allowed by law." Seven specific protections in the U.S. Bill of Rights trace their heritage to English precedents. Chapter 14

English Petition of Right (1628): This was a petition against England's Charles I in which Parliament prohibited quartering soldiers in civilian households against the civilian's will. Chapter 14

entitlement spending: Mandatory spending refers to programmatic spending that is essentially automatic. Congress sets eligibility requirements and benefit formulas. If you meet the eligibility requirements, you are entitled to receive the benefit according to the formula. That's why this category is also referred to as entitlement spending. Mandatory spending is the largest overall category of government spending, which includes Social Security, Medicare, Medicaid, and other. Chapter 40

enumerated powers: Article I, section 8 of the Constitution is called the enumerated power**s** of Congress because they are formally listed in the Constitution. These include the power to tax, borrow money, raise armies and navies, establish lower federal courts, regulate the money supply, regulate interstate and foreign commerce, and declare war. Chapter 13

Epicureanism: This teaches that, man can attain the greatest good and a tranquil state, free from fear and pain, through reasoned and virtuous action. It is a system of philosophy founded around 307 BC and based on the teachings of Greek philosopher **Epicurus** (341-270 BC). Chapter 11

epistemic crisis: Epistemology is a branch of philosophy dedicated to understanding how we know things and what it means for something to be true or false, accurate or inaccurate. An epistemic crisis is when a society cannot agree upon who we trust or how we come to know things or what we believe we know or what we believe exists is true, has happened, and is happening. Chapter 61

Equality Act (2019): Democrats in the U.S. House of Representatives passed the Equality Act, which "prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system." Most Republican Representatives voted against the Equality Act on the grounds that it would not allow religious organizations and religiously minded proprietors to refuse to hire or serve those whose lifestyles they find objectionable. They are also very concerned about transsexual men and women using the restroom that matches their identity rather than the one matching their birth certificate. The bill has forty-six sponsors in the Senate, but the Republican leadership has not brought it up for a vote as of this writing. Chapter 70

Equal Rights Amendment: Alice Paul of the National Women's Party first proposed an Equal Rights Amendment to the Constitution in 1923. It read as follows: "Men and Women shall have equal rights throughout the United States and every place subject to its jurisdiction." The proposal languished for decades in the U.S. Congress, despite being reintroduced repeatedly. A later version did pass Congress. It read "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." The Equal Rights Amendment was submitted to the states, but it came three states short of the three-quarters needed to ratify, and the deadline ran out in 1982. Chapter 69

establishment clause; free exercise clause: The First Amendment's treatment of religion occurs in a phrase called the establishment clause because it restricts Congress' ability to legislate regarding "an establishment of religion." The second phrase, "or prohibiting the free exercise thereof," is referred to as the free exercise

clause. Taken together, the founders did not want America to become a country like England and its Church of England, with an established official religion. Interestingly, the only time religion is mentioned in the Constitution, is when it says, "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." This forbids the government from requiring that elected or appointed leaders be from a religion or even that they believe in God at all. Chapter 65

Ethos: This is a rhetorical appeal that centers around the author's credibility or trustworthiness. Such credibility—or lack thereof—can be vested inside the words the author uses; this is called *intrinsic ethos* and refers to the author's character and integrity. Chapter 9

euphemism: This is when a person substitutes an agreeable or inoffensive expression for one that may offend or suggest something unpleasant. During war, the military uses the euphemism "collateral damage," which sounds like a tank accidentally bumped a farmer's shed. In fact, collateral damage typically means that a military strike killed and maimed innocent men, women, and children. Political language on all sides of the ideological spectrum is full of euphemisms. Chapter 61

Evers, Medgar (1925-1963): In 1963, a white supremacist Klansman assassinated Medgar Evers, the Mississippi Field Secretary of the National Association for the Advancement of Colored People (NAACP). Evers was ambushed and shot in the back as he walked from his car to his house. He died in front of his two small children. The assassin, Byron De la Beckwith, was twice acquitted by all white juries—the fact that African Americans were routinely excluded from juries is a great example of structural violence—and congratulated by the state governor. The case was finally reopened thirty years later, and De la Beckwith was convicted of murder in 1994. Chapter 60

everyday sexism: Feminist writer Laura Bates describes Everyday-Sexism as very political in that it serves to make the public sphere—public streets, mass transit, workplaces, colleges and universities—hostile places for women. Feminists today note that women are still subject to everyday-sexism: verbal harassment and physical violence at the hands of men; women are portrayed in the media as men's playthings; women are subject to moral double-standards not inflicted upon men; male politicians seem to be on a crusade to control women's bodies; and women's aspirations are often not supported by educators. Chapter 69

exclusionary rule: This rule provides that any evidence state and local police gather in violation of the Fourth Amendment must be excluded from the defendant's trial. Chapter 63

Executive Branch: This is the Presidency branch of the U.S. government, which has the power to enforce law. Chapter 13

Executive Branch appointments: Senate must approve each appointment with a simple majority vote: Presidential appointments such as cabinet-level secretaries, other executive agencies' high officials, and ambassadors are all subject to the "advice and consent of the Senate." Chapter 27

Executive Office of the President: This office was created by Congress during the Franklin Roosevelt administration when the demands of modern government made it clear that the presidency needed a more extensive organization. The Executive Office of the President employs several thousand people. It comprises staff and agencies that directly support the president. Chapter 25

Executive Order #9066: Issued, February 1942—President Franklin Roosevelt authorized the Secretary of War to remove against their will over 100,000 Japanese Americans living in California, Oregon, and Washington. These people, most of whom were U.S. citizens, were placed in prison camps for the war's duration because they constituted a security risk, even though no evidence was ever presented to that effect. Chapter 27

Executive Order #9981: Issued July 1948—President Harry Truman directed "that there shall be equality of

treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." This order effectively desegregated the U.S. military and officially ended a long-standing practice of assigning fewer desirable duties to racial minorities. Chapter 27

Executive Order #13228: Issued October 8, 2001—President George W. Bush **created the Office of Homeland Security** to "identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States." Chapter 27

Executive Order #13769: Issued January 2017—President Donald Trump issued an executive order called **Protecting the Nation from Foreign Terrorist Entry into the United States**. For 120 days it barred entry to any refugee waiting to resettle in the United States; it prohibited all Syrian refugees from entering the U.S; and it banned "the citizens of seven Muslim-majority countries—Iraq, Iran, Syria, Somalia, Sudan, Libya, and Yemen—from entering the U.S. on any visa category." Chapter 27

executive orders: A president issues executive orders to executive branch members. By issuing an executive order, the president can direct executive branch members to do many things, so long as those actions lie within the law and do not entail appropriating new federal money. Congress can overturn an executive order if there are enough votes to do so. Chapter 27

executive privilege: Executive privilege is never explicitly mentioned in the constitution, but presidents have long held that they are entitled to withhold from Congress certain executive branch documents and deliberation's transcripts within executive agencies. They also say that the separation of powers built into the Constitution gives presidents a certain amount of discretion when responding to the legislative and judicial branches' orders for requests and information and that executive privilege allows them to defy congressional subpoenas to testify before oversight committees. Chapters 21; 29

executive privilege cannot do the following: Executive privilege cannot protect the president when he is acting in his personal capacity. Shield information related to presidential decisions once they have been made. Hide communications related to committing a crime. Block information Congress requires in an impeachment proceeding. Protect communications that the president or his office never received. Provide absolute immunity to congressional subpoenas. Chapter 29

ex post facto: *This* means "after the fact." So, an ex post facto law is one that declares an action illegal after it has already happened and subjects the person or group who did it to arrest and trial. It would also refer to a law that increased the penalty for a crime if the legislature tried to apply the stiffer penalty to those who committed the crime before the law was passed. Chapter 62

extradition (Article IV, section 2): "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime." Chapter 15

Eyde, Edythe (1921-2015): In 1947 under the pseudonym Lisa Ben, which is an anagram of "lesbian," Edythe Eyde wrote *Vice Versa: America's Gayest Magazine*, America's first regular homosexual publication. Chapter 70

F

Fair Housing Act: This part of the Civil Rights Act of 1968 outlawed housing discrimination. The Act made it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or

rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." Further, it made it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." The law also made it unlawful "to represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." Chapter 68

fairness doctrine: From 1949 to 1987, public airwaves communication, such as radio and television, was governed by The Federal Communications Commission, which required licensees to serve the public interest in two ways: 1) devote a "reasonable percentage of their broadcasting time to the discussion of public issues of interest to the community served by their stations," and 2) design programs "so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." Chapter 47

fake news: Fake news, a real phenomenon carefully crafted, is unsubstantiated false stories intended to trigger fears or stimulate anger in a target audience, which has infected our political information stream. Fake news allows politicians to label as "fake news" any legitimate story that they don't like. Fake news stories flourish on the internet where they sow confusion and animosity, and they undercut the news media and government's legitimacy. Chapter 48

fallacy: This is an argument that is faulty, logically invalid, or deceptive. Chapter 5

false balance: The culture of newspaper objectivity has led to false balance on some issues. False balance has been defined as "when journalists present opposing view-points as being more equal than the evidence allows. When the evidence for a position is virtually incontrovertible, it is profoundly mistaken to treat a conflicting view as equal and opposite by default." Chapter 47

falsifiability: This is also known as testability and refers to the fact that scientific-knowledge claims are subject to being proven wrong. Chapter 4

Federal Constitution features: The constitution does not begin with a declaration of rights. Instead, the first ten amendments—and subsequent amendments over the years—are grafted onto the end of the Constitution to modify or add to the original text. Chapter 14

federal courts: Most Supreme Court cases come up through the federal district courts and then through one of the twelve federal circuit courts of appeals. Chapter 32

federal district courts: The federal court system's lowest rung is composed of the ninety-four federal district courts. Chapter 32

Federal Election Campaign Act (FECA): Hard money contributions are regulated by the Federal Election Campaign Act, which Congress passed in 1971 and was significantly amended in 1974. **Hard money** refers to contributions made directly to a political campaign. FECA limited the amount of money that candidates could give to their own campaigns. The Supreme Court struck down this provision in the case of ***Buckley v. Valeo (1976)***. The Court said the limitation of self-contributions was a violation of the candidate's freedom of speech. Chapter 54

Federal Election Commission (FEC): Enforcing federal election laws is weak. America's weak election laws are enforced by a weak agency. The Federal Election Commission, charged with regulating America's election and campaign finance laws, has long been referred to as "The little agency that can't." Structurally, the nature of the FEC produces deadlock because the Democrats and Republicans each have the same number of commissioners. The FEC is under-funded, under-staffed, making it difficult to police elections, and it has a

perpetual backlog of cases so that candidates and organized interests have little fear of being prosecuted for alleged violations. Sometimes, the FEC is given a near impossible task. Take the case of **coordination**: outside groups are forbidden from coordinating their expenditures with political campaigns. It's extremely difficult to prove, especially for a hobbled agency like the FEC. In many instances, campaign finance-law violators are let off with a slap on the wrist or with a plea bargain arrangement because the FEC does not have the resources to pursue the matter. And, the commission is evenly divided between Republicans and Democrats, which often results in paralysis. Chapter 54

Federalist Party: In the beginnings of the U.S. party systems, Hamiltonians formed the Federalist party to remind people of the Constitution's triumphal plan. Jeffersonians formed the **Democratic-Republican** party, explicitly aiming to invoke the Revolution's egalitarian principles. Chapter 42

Federalist Papers: Alexander Hamilton recruited James Madison and John Jay to help him write a series of eighty-five essays from 1787 into 1788 in favor of the Constitution. These essays were published serially in newspapers under the pseudonym Publius. Chapter 14

Federalists: Those who supported the Constitution. Chapter 14

Federalist Society: Founded in 1982, the Federalist Society supports cultivating conservative law students and jurists. It has been funded with millions of dollars by a who's who of deep-pocketed conservatives, and it has been key to Republicans creating a far more unified strategy with their approach to the federal judiciary. Chapter 33

Federal Register: This is a publicly available online and printed source that documents federal government behavior. Chapter 38

federal regulations: According to the Federal Register, the federal regulations code totaled 9,745 pages in 1950 and had grown to 185,484 pages by 2018. Chapter 37

federal system: This is where there is more of a power balance between the central government and the states, although in practice, the balance is often tilted in favor of the center. Chapter 12

feminism, first wave: The first wave of feminism occurred in the nineteenth century and early part of the twentieth century. It focused on attaining women's right to vote and other changes in the law. Chapter 69

feminism, intersectionality: Feminists share many civil rights leaders and scholars' emphasis of intersectionality, a term that legal scholar and civil rights activist Kimberlé Crenshaw coined in 1989. Intersectionality refers to "the complex, cumulative way in which the effects of multiple forms of discrimination—such as racism, sexism, and classism—combine, overlap, or intersect, especially in the experiences of marginalized individuals or groups." Chapter 69

feminism, second wave: From the early 1960s to the early 1980s, activists worked to change the law, but also saw that *de facto* social discrimination was equally responsible for the oppression of women. Chapter 69

feminism, third wave: This wave began in the 1980s and appears to be a much more fragmented phenomenon. Third-wave feminists seem to have in common a willingness to see and make connections between feminists and members of other oppressed groups. Chapter 69

Fifteenth Amendment (1870): In 1870, the Republican-dominated Congress passed the Fifteenth Amendment, which simply established a prohibition on the states without firmly establishing a right to vote. The Fifteenth Amendment says that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude..." There was some

consideration of extending the right to vote to women, but most congressmen dismissed it out of hand. Feminists were outraged when the Fifteenth Amendment left women out. Chapters 49; 69

Fifth Amendment (1791): The Fifth Amendment has many protections for criminal defendants, stating that **"**No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Chapter 66

fifty-one votes: Article II, Section 2, of the Constitution says that the president appoints Supreme Court justices with the Senate's advice and consent. The same procedure applies to seating all federal judges. The president's nominee needs at least fifty-one votes in the Senate to take his seat on the bench. Chapter 66

fighting words: The Court defined the idea of fighting words in ***Chaplinsky v. New Hampshire*** **(1942)** as words that "by their very utterance inflict injury or tend to incite an immediate breach of peace." Chapter 64

filibuster: A filibuster is an effort to prevent action in a legislature, such as the U.S. Senate or House of Representatives, by making a long speech or series of speeches. A filibuster prevents a bill from passing by dragging out the debate—if the debate does not end, there can be no vote, and without a vote, the bill cannot pass. If the Senate does not pass a unanimous consent agreement to limit a debate, some senators might filibuster a bill to kill it or to gain concessions. A **cloture motion** puts time constraints on a filibuster, but it only takes forty-one senators to defeat a cloture and prevent a bill from being voted on. Chapter 22

financial advantage: Incumbents, those currently holding office, often have a significant financial advantage over their challengers. Political Action Committees and wealthy individuals have numerous incentives to donate to incumbents. This has enormous implications for how a challenger might mount a campaign, since campaign commercials are expensive to produce, air time is expensive to purchase, effective websites that provide continually updated information and allow people to donate are expensive to set up and maintain, electoral consultants are expensive to hire, and so on. Chapter 55

financially uncompetitive races: A financially uncompetitive race is when more than half of House races feature one candidate spending at least $10 for every $1 spent by the challenger. "A challenger who spent less than a million dollars technically had zero chance of winning." Chapter 55

final court of appeal: As an arbiter, the Supreme Court serves serve as the final court of appeal for lower courts—there is no appeal if someone loses in the Supreme court. Chapter 31

first dimension of power: Early twentieth century political and social theorists analyzed political decision-making power, which they described as the first dimension of power. Chapter 2

formula grants: These are a type of categorical grant and are pots of money that get distributed to state and local governments based on some preestablished formula, which might entail giving money based on population, per capita income, chance of being hit by terrorists, or some other reasonable criteria. Chapter 15

foundational sins: America has a history of committing foundational sins such as genocide—the near extermination of all native American peoples, and slavery—250 years of institutionalized slavery inflicted upon people abducted from Africa and their decedents. Chapter 10

Fourth Amendment (1791): The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Chapter 66

frames: The news is portrayed through frames that embed events in a linguistic or situational context. An **episodic frame** emphasizes individual events or cases, one after another. This frame predominates in television and newspaper news coverage. Episodic news often focuses on the story's sensational details at the expense of asking, "Of what is this an example?" or "How is this related to that?" or "What is the broader context for this event?" A **thematic frame** reverses the emphasis by looking at the broader context of an issue and relationships between the day's or week's happenings. Chapter 48

franking privilege: Since the beginning of the republic, congressional members have enjoyed the franking privilege, which means that they can send mail for free to their constituents. Chapter 55

free exercise clause; establishment clause: The First Amendment's treatment of religion occurs in a phrase called the establishment clause because it restricts Congress' ability to legislate regarding "an establishment of religion." The second phrase, "or prohibiting the free exercise thereof," is referred to as the free exercise clause. Chapter 65

free market: Any free market economy that is more sophisticated than familial or tribal barter is the result of government action. The value of money must be regulated for a free market to work. This power was given to Congress in Article I of the Constitution, and government was empowered to punish counterfeiting because that practice undermines people's faith in the money supply. Free markets also need a legal infrastructure such as laws, courts, and police powers. Chapter 36

Friedan, Betty (1921-2006), *The Feminine Mystique (1963):* Many people argue that the second wave of feminism was launched by the 1963 publication of Friedan's *The Feminine Mystique*, in which she argues that women—especially educated women—are unfulfilled by the social requirement of subsuming their identities under their domestic duties' demands as wives and mothers. Chapter 69

Full Faith and Credit Clause (Article IV, section 10): This clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Chapter 15

***Furman v. Georgia* (1972:** Due to the arbitrary and racially biased way that capital punishment was meted out across the United States, in *Furman v. Georgia* (1972), the Supreme Court essentially invoked a moratorium on applying capital punishment. Two of the justices—Thurgood Marshall and William Brennan—opined that the death penalty violated the Constitution's prohibition against cruel and unusual punishments, regardless of procedural issues. Chapter 66

G

Galtung, Johan (1930-), three forms of political violence: A Swedish sociologist named Johan Galtung made important contributions to understanding political violence. His **three forms of violence** characterize any political system's treatment of violence. Galtung calls these forms **direct violence, structural violence, and cultural violence.** Galtung referred to direct violence as a discrete *event*, structural violence as a *process*, and cultural violence as a *permanence* that legitimizes and renders acceptable the other two. Chapter 60

Gandhi, Mohandas (1869-1948): In 1893 while serving as a lawyer in South Africa, Mohandas Gandhi took up

the cause of discrimination against Indians. Gandhi refused to move from a first-class railroad car when a white passenger objected. He was thrown off the train at the next stop. After the end of World War I, Gandhi emerged as a leader of India's independence movement against colonial British rule. At the Massacre of Amritsar in 1919, colonial forces opened fire on unarmed demonstrators and killed 400 of them. Gandhi organized marches, boycotts, walkouts and tax protests. Gandhi's most famous act of defiance was the **Salt March of 1930**. The British had imposed laws against Indians collecting or selling salt and had imposed a tax that fell heavily on poor Indians. Gandhi walked for twenty-four days over 240 miles from his home to the coast where he broke the law by gathering salt from evaporated seawater. Gandhi was named *Time* magazine's Man of the Year in 1930. India and Pakistan gained independence in 1947. Gandhi was assassinated in 1948 by Hindu nationalist Nathuram Godse, who did not like Gandhi's tolerance of Muslims. Chapter 59

Garland, Merrick (1952-): In February of 2016, sitting Supreme Court justice Antonin Scalia died unexpectedly. President Barack Obama nominated centrist Merrick Garland to fill that Court seat. Garland had served for twenty years as chief judge of the D.C. Circuit Court and had never had one of his decisions overturned by the Supreme Court. Flouting Constitutional norms, Senate Majority Leader Mitch McConnell and his fellow Republican senators said they would not meet with Garland, hold confirmation hearings, or hold a vote. The Republicans argued that they did not have to hold hearings or a vote on a president's nominee and that the voters should speak in the 2016 presidential election before the seat was filled. So, the Republicans kept the seat vacant for over a year. When President Trump won the election, McConnell and his colleagues promptly approved Trump's nominee, a conservative originalist named Neal Gorsuch, to fill the empty seat. Chapter 33

Gerber, Henry (1892-1972): In 1924, Gerber formed the **Society for Human Rights** in Chicago, which was the first gay rights group in America. The society set out to publish a journal and make connections with European gay rights groups, but its leaders were quickly arrested and prosecuted by Chicago police. The cost of defending himself at three separate trials bankrupted Henry Gerber, even though the charges were ultimately dismissed. He lost his job at the Postal Service, and the society didn't survive Gerber's prosecution. Chapter 70

gerrymander: In 1812, state legislative supporters of Massachusetts Governor Elbridge Gerry created a salamander-like electoral district that slithered its way from Marblehead through Danvers and Lynnfield and up to Salisbury, Massachusetts. The district was lampooned in local papers as a gerrymander, and the name has stuck ever since, referring to any manipulation of election districts to serve the interests of one party or group over others. Gerrymandering has become a real problem in the House of Representatives in the last few decades, as political parties have been able to combine massive demographic databases with geographic information systems software. These tools have allowed unprecedented levels of slicing and dicing of the electorate to suit political interests. Chapter 53

Gettysburg Address, 1863: During the Civil War, Abraham Lincoln gave the Gettysburg Address to dedicate a cemetery on the site of a great battle between the North and South in Pennsylvania. In light of this text's conversation about federalism, Lincoln's famous passage is best articulated in a way that emphasizes that government is for people and not states: "that government of **the people**, by **the people**, and for **the people**, shall not perish from the earth." Chapter 16

***Gibbons v. Ogden* (1824):** This case centered on interpreting Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," which is also known as the commerce clause. Chapter 16

***Gideon v. Wainwright* (1963)** This case deals with the Sixth Amendment's provision that criminal defendants have a **right to counsel** for their defense. In this case, the Supreme Court also incorporated the Sixth Amendment into the Fourteenth Amendment and required that states provide counsel to indigent defendants. This is an important procedural guarantee, but one that often falls short in practice. *Gideon* essentially put an

unfunded mandate on the states to provide and pay for lawyers for the 80 percent of defendants who can't afford to pay for their own counsel. Chapters 63; 66

Glorious Revolution (1688-1689): England's king, James II was forced from power in the Glorious Revolution when Anglicans feared that his son's birth would establish a Catholic dynasty in England. Instead, they asked his Protestant daughter, Mary, and her husband, William of Orange, to rule. Chapter 28

going-public: Organized interests often use the going-public strategy to further their interests. This is a catch-all category of activities in which the group generates or demonstrates public support for its cause. An example is **mobilizing the grassroots**, which is getting ordinary people or members of the group to write letters. Chapter 46

government employees: Between 7 and 8 million people directly owe their livelihoods to a federal government paycheck, out of a population of over 330 million people. Chapter 37

government interests: This term means that state, city, and local government interests have coalesced into organized groups. Most states and major cities have paid lobbyists in Washington. Chapter 45

grand juries: The Fifth Amendment provides for grand juries, which are panels of citizens who hear evidence and decide if there is sufficient evidence to proceed with a prosecution. Chapter 66

Great Compression: This is the period from 1937 to the early 1970s is when middle- and lower-income people gained more from economic growth than did the rich. Chapter 10

Green, **Victor H (1892-1960):** In 1937, Victor H. Green, a New York City postman, created the first ***Green Book,*** a reference guide to tell African Americans where they could safely go in the New York Metropolitan area. He updated and expanded the Green Books every year, encompassing more and more of the country. The first edition was fifteen pages long, and the final edition in 1967 was ninety-nine pages long. The book even listed private residences who would welcome black travelers to stay in areas where there were no welcoming hotels. Chapter 68

***Gregg v. Georgia* (1977):** States that practiced capital punishment rewrote their statutes, and in *Gregg v. Georgia* (1977), the Court upheld capital punishment again, although justices Marshall and Brennan again argued that it was inherently cruel and unusual punishment that cannot be tolerated under the Eighth Amendment. Chapter 66

gridlock: Perhaps the legislative processes' biggest pathology—gridlock—is the ability to stop something that the American people desire. There are a thousand and one ways for this to happen in Congress. Chapter 24

***Griswold v. Connecticut* (1965):** In this case, the Supreme Court ruled that married couples had a right to privacy with respect to reproductive issues, thereby striking down a Connecticut law that forbade anyone from selling contraceptive devices or instructing anyone on their use. This right-to-privacy finding was then used in ***Roe v. Wade* (1973)**, which granted a fundamental right to terminate an unwanted pregnancy in the first trimester. Chapter 69

Gross Domestic Product (GDP): This is the total value of goods and services produced in the United States in one year. Since the 1970s, federal government spending has hovered between 20-24 percent of GDP. Chapter 37

growth in the American government: The reasons for growth in the American government are war, corporate demands, popular demands, and social density and complexity. These operate on governments all over the

world, so the U.S. federal government is not unusual in this respect. These factors operate on liberal democracies and authoritarian regimes alike. Chapter 37

guide to spotting the three dimensions of power: 1) First Dimension of Power—Look for situations where people who have authority to directly impact the course of an issue have a say in making key decisions. 2) Second Dimension of Power—Look for biases in the rules of the game and in procedures that favor one side over another. Look for people or groups whose stories are told by others. 3) Third Dimension of Power—Look for people who have had the wool pulled over their eyes, who are apparently acting against their own interests, or who take on the viewpoint of others. Look for people who possess resources and access to media or educational tools with which to manipulate attitudes and opinions. Chapter 2.

H

habeus corpus: *Habeus corpus* literally means "you have the body," and refers to a court ordering state or federal authorities to bring a detained person to the court and show cause for their detention or incarceration. Chapter 62

Hammer v. Dagenhart (1918): Congress passed the Keating-Owen Act in 1916, regulating commerce involving goods produced by children. It banned interstate sale of goods made by children under the age of fourteen and by children under sixteen if they were working more than sixty hours a week. But, in ***Hammer v. Dagenhart,*** the Supreme Court struck down Keating-Owen as unconstitutional, which rendered the federal government powerless to ban or regulate child labor. Writing for the Court, Justice William Day said that manufacturing itself was not interstate commerce. Since the children were only involved in manufacturing—in this case, cotton—but not involved in transporting the goods once they were manufactured, the federal government had no power to legislate. The Tenth Amendment, said Day, reserved states' powers, and that among these was the power to regulate manufacturing, even if the goods were intended to be shipped across state. Chapter 16

hard money: Hard money contributions are regulated by the **Federal Election Campaign Act** (FECA), which Congress passed in 1971 and was significantly amended in 1974. Hard money refers to contributions made directly to a political campaign. Chapter 54

Harlan, Justice John Marshall (1833-1911): This justice was the lone dissenter in the *Civil Rights Cases* who argued that the states were complicit in the so-called private discrimination of businessmen. He wrote, the "keeper of an inn is in the exercise of a quasi-public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person." Harlan was alone among the justices in being many decades ahead of his time. The decision in the *Civil Rights Cases* sent a huge message to businessmen that the United States Constitution would not stand in the way if they wanted to refuse service to blacks. Many did just that—and this behavior was not limited to the South, nor was it only targeted at African Americans. Chapter 68

Hatch Act of 1939: In 1939, Congress passed "An Act to Prevent Pernicious Political Activities," otherwise known as the Hatch Act of 1939—named for Senator Carl Hatch of New Mexico. The Hatch Act provides that no person may "intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the Houses of Representatives." Federal employees are forbidden from using their "official authority for the purpose of interfering with or affecting the election or the nomination

of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives." Chapter 38

hate speech: Many people argue that the First Amendment shouldn't protect hate speech. The American Library Association says that hate speech doesn't have a formal legal definition, but that it refers to "any form of expression through which speakers intend to vilify, humiliate, or incite hatred against a group or a class of persons." Hate speech is disgusting because no one wants to hear people say things that are racist, sexist, anti-Semitic, and otherwise bigoted, but such utterances in a public forum are protected by the First Amendment if they are intended to make a political point. Chapter 64

Hay, Harry (1912-2002): In 1951, Hay led a group to establish the **Mattachine Society**, which was dedicated to changing the public's mind about homosexuals' "deviancy." Founded in Los Angeles, the group took its name from Mattacino, an Italian theatrical jester character who spoke the truth to the king from behind a mask. Chapter 70

hearings: When writing legislation, standing committees go through three stages, one of which is a hearing. The committee or subcommittee chairman invites interested individuals to testify at the hearing. People who commonly testify are executive department heads, technical experts and scholars, and interest-group representatives. Chapter 22

hierarchy: This means a "chain of subordination" and is very important to conservatives. As Edmund Burke wrote when criticizing the French Revolution, hierarchy is very important to conservatives. They believe that some people are fit to rule others in the political sphere as well as private spheres of families, farms, factories, and offices. Political scientist Corey Robin states that "Conservatism is the theoretical voice of . . . animus against the agency of the subordinate classes. It provides the most consistent and profound argument as to why the lower orders should not be allowed to exercise their independent will, why they should not be allowed to govern themselves or the polity. Submission is their first duty, and agency the prerogative of the elite." Chapter 35

Hill committees: These refer to the congressional committees on Capitol Hill in Washington, D.C. In the House of Representatives, there are the Republican and Democratic Congressional Committees, composed of each party's various Representatives. In the Senate, there are the Republican and Democratic senatorial committees, composed of each party's U.S. Senators. While Hill committees have been in existence for many years, the increase in congressional partisanship has elevated their importance. Chapter 41

Hobbes, Thomas (1588-1679): He is a social contract theorist. Hobbes along with John Locke imagined how people might live in a state of nature that would allow mankind absolute freedom, where there is no authority to limit individual behavior. But they believed that his state of nature would essentially lead to anarchy in which there was no government. Hobbes argued in *Leviathan* that the state of nature would result in a war of all against all, and that people's lives would be "solitary, poore, nasty, brutish, and short." Their solution was that people could avoid this fate by using their reason to construct a civil society. Chapter 11

homophily: This is the tendency for individuals to associate with similar others, and it is one of the most persistent findings in social network analysis. For example, adolescents who share certain prior attributes in common tend to associate with each other and tend to influence each other as the result of continued association. Chapter 56

Hoover, Herbert (1874-1964): The Great Depression began with the stock market crash in October 1929 and marked the death-knell for Republican's long-held dominance of national politics. Many people concluded that reckless pro-business Republican policies of the 1920s caused the Depression and were convinced that President Herbert Hoover's conservative response to the crisis was insufficient. Chapter 42

House Rules Committee: When a bill comes out of the House committee, the bill must first make a stop at the House Rules Committee, which has been called "the majority leadership's traffic manager" for floor debate. Like other committees, the majority party has the most rules-committee seats, and these members are very likely to have the party leadership trust. The Rules Committee attaches a special rule to each bill that specifies the debate's nature. Chapter 22

***Hustler Magazine v. Jerry Falwell* (1988):** *Hustler Magazine* ran a cartoon ad spoof indicating that Jerry Falwell's first sexual experience was with his mother in an outhouse. Rather than pay Falwell damages for the false, malicious cartoon, *Hustler* publisher Larry Flynt took the case to the Supreme Court and won. In this case, the Court held that the allegedly libelous statement had to be a statement of fact, and not a joke. This decision protected magazines, websites, and comedy shows that poke fun at public figures. Chapter 64

hyper-pluralism: The theory posits that the government has essentially been captured by the demands of interest groups. Rather than being an arbiter of the struggle between organized interests, the government tries to put into effect the wishes of them all to the detriment of the country. The hyper-pluralism system more closely resembles a free-for-all and is often used interchangeably with the label "interest-group liberalism." Chapters 3; 45

hypothesis: This is a research question—an inquiry that asks how the political world operates or why it works the way it does. The hypothesis posits an answer to the research question that you then test by conducting studies or experiments. Chapter 4

I

ideological groups: Ideological groups are interested in a variety of political issues and have a clear ideological bias that governs the kind of policies the group endorses. Chapter 45

imminent lawless action standard: In ***Brandenburg v. Ohio,*** the Court established the imminent lawless action standard in its majority opinion. The case dealt with Ohio prosecuting a Ku Klux Klan leader for publicly advocating violence. The majority ruled against Ohio and said that the First Amendment does not allow a state statute "to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce such action." Essentially the Court said that *advocacy* of violence is not punishable in general, but *inciting* violence is punishable. Chapter 64

impeach; articles of impeachment: Articles of impeachment are essentially the specific charges against the president. Chapter 30

impeached and removed: Historically, the founders were aware that neither ancient Grecian or Roman societies had figured out how to peacefully remove a chief executive who was abusing his office—often assassination or uprisings were the only remedy. Chapter 30

impeachment process: The full House debates the articles of impeachment and votes. A **successful majority vote on one of the charges means that the president has been impeached**. Then the process moves to the Senate, where the president is put on **trial.** The senators determine whether the president is "guilty" of the offenses in the articles of impeachment. The House Judiciary Committee comes to the Senate to present the case against the president. The president's lawyers mount a defense. The **Chief Justice** of the Supreme Court presides over the trial. **The Constitution requires a two-thirds vote in the Senate to convict and remove the**

president. Thus far, no American president has been impeached by the House *and* removed by the Senate. Chapter 30

Imperial Presidency: This classic 1973 book, written by **Arthur Schlesinger, Jr.,** warned that the growth of presidential power—particularly in response to national security concerns—threatened to warp the country's constitutional fabric. Chapter 29

incorporating the Bill of Rights protections: The Bill of Rights protects you against abuses from all levels of government, but this has not always been true. In the case of ***Barron v. The Mayor of Baltimore*** **(1833)** the Supreme Court ruled that the Bill of Rights protects people from actions of the central government, not state and local actions, but there was no such provision in state constitutions at the time. After the Civil War, the Fourteenth Amendment seemed to correct the imbalance defined in *Barron* by saying that no state "shall abridge the privileges and immunities of citizens of the United States." However, the Supreme Court did not interpret the **privileges and immunities clause** as a corrective to *Barron*. Instead, in the late nineteenth century, the Court begin incorporating the Bill of Rights protections using the Fourteenth Amendment's **due process clause** instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law." Many people see this as an odd way of nationalizing the Bill of Rights and other broad liberties. In specific cases, the Court incorporated individual Bill of Rights protections into the due process clause by limiting states' ability to infringe upon them. The Court did this selectively and patiently, waiting for individuals to challenge their state from infringing on specific civil liberties. The process of incorporatio**n** lasted into the early twenty-first century as cases came to the Court. Chapter 63

incumbent: An incumbent is a current officeholder who is seeking to be reelected to that office. Incumbent congressmen have excellent odds of being reelected. This is especially true of Representatives. Chapter 55

Independents: People may support the Democratic or Republican parties—or one of the third parties—without formally registering as a party affiliate. Independents, the largest "party" in the United States, are those who either intentionally refuse to commit to one of the parties or who have turned away from partisan politics altogether. However, even these Independents tend to favor the political positions of one party over another. Chapter 43

Indian Civil Rights Act of 1968: This part of the Civil Rights Act of 1968 applied most of the Bill of Rights and Constitutional protections to Native Americans living under the various tribes' jurisdiction. It stipulated that no Indian tribe shall prohibit free exercise of religion, free speech, free press, or the right of people to assemble peaceably and petition for redress of grievances. Further, no Indian tribe shall violate the Fourth Amendment's protections against unreasonable and warrantless searches and seizures. Indian tribes were forbidden from conducting unreasonable and warrantless searches and seizures, taking of private property without just compensation, violating fair trial procedures, and inflicting cruel and unusual punishments. Chapter 68

Indian boarding schools, American (1860-1978): Native American Indian children were shipped off to American Indian boarding schools, the goal of which was to destroy indigenous language and culture, as kids were taken from their parents and assimilated into Anglo culture. **Colonel Richard Henry Pratt**, director for twenty-five years of one of these schools, famously said that his goal was to "Kill the Indian, save the man." Chapter 60

Indian Removal Act of 1830: This is one of the most aggressively imperialistic laws in American history. This Act euphemistically sought to "provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi." According to President Andrew Jackson, the Removal Act "will place a dense and civilized population in large tracts of country now occupied by a few savage

hunters." Cherokee leaders addressed the United States and said that "We wish to remain on the land of our fathers. We have a perfect and original right to remain without interruption or molestation." Chapter 60

in forma pauperis: Normally, a Supreme Court petitioner must pay a fee and meet paperwork requirements to petition for a *writ of certiorari,* but indigent petitioners can file *in forma pauperis,* which waves the fee and many of the paperwork requirements. Congress has recently tightened regulations regarding *in forma pauperis* petitions. Chapter 31

insider trading: It is against federal law to use information not available to the public when executing securities trades. This is another form of corruption regarding securities fraud that sometimes ensnares congressional members. Chapter 23

Inspector General: This is an independent, non-partisan organization established within each executive branch agency assigned to audit the agency's operation to discover and investigate cases of misconduct, waste, fraud and other government procedural abuses that occur within an agency. For cabinet-level agencies, inspectors general are appointed by the president and approved by the Senate. They can be removed by the president. While the inspectors general are not congressional employees, the Inspector General Act put them in place to assist Congress with oversight. Chapter 38

Institute for Sexual Research: Magnus Hirschfeld directed the Institute for Sexual Research in Berlin. In 1912, the institute surveyed 17,160 people and documented that the rate of homosexuality was 2.29 percent. Chapter 70

Insurrection Act 1807: This law requires Congress to authorize the military to undertake any domestic policing functions. The Insurrection Act was used by President Eisenhower in 1957 to send federal troops to desegregate Little Rock High School and by President George H. W. Bush in 1992 to send the military in to quell the Los Angeles riots that erupted after Los Angeles police officers were acquitted for beating Rodney King. The Insurrection Act is impressive in its scope. Chapter 27

intentionalism: This is another convention of statutory interpretation which attempts to take into consideration the legislation's broad intent. Intentionalism can be used as an alternative to textualism but is primarily employed as a supplement when the plain meaning rule doesn't apply. For example, a justice wanting to rely on intentionalism would want to consider the congressional deliberations that occurred when the bill was debated, its legislative history, and the broad goal or goals that Congress was trying to achieve. Chapter 34

interest on the debt: Because the federal government fails to take in enough tax revenue to cover its spending, every year we spend hundreds of billions of dollars to service our debt—that is, we pay interest to wealthy people, institutional investors, and banks who lend the U.S. government money by buying Treasury bonds. Chapter 40

Internet revolution: The Internet is a network of networks that gives people all over the globe the capability of emailing, webpage browsing, chatting, and file sharing. It grew out of the Defense Department's Advanced Research Projects Agency Network (ARPANET) and the National Science Foundation's NSFNet. The **World Wide Web**, the most visible part of the Internet, began when researchers at the European Organization for Nuclear Research (CERN) created the first few web pages. There are well over 4 billion regular users of the Internet worldwide. This revolution has been transforming the face of American politics by campaign mobilization and fundraising, political advertising, and blogs. Chapter 48

iron triangle: This term refers to the triangular relationship organized interests form with executive agencies and congressional decision makers. Political scientists refer to this mutually reinforcing relationship as an iron triangle because it often seems impervious to outside influence. The triangle seems to operate as a sub-government unto itself. Chapter 46

J

Jefferson, Thomas (1743-1826): One of the founding fathers and third president of the U.S., Jefferson substituted "pursuit of happiness" for "property" in the *Declaration of Independence*. Chapter 11

Johnson, Andrew (1808-1875): When Johnson removed Secretary of War Edwin Stanton without the Senate's approval and replaced him with Lorenzo Thomas, the House voted to impeach him for the clear violation of the *Tenure of Office Act*. They also impeached him for very derogatory statements he made about Congress, specifically that he "did attempt to bring into disgrace, ridicule, hatred, contempt and reproach to the Congress of the United States." That's not a crime, although they impeached him for it anyway. After a three-month trial in 1868, President Johnson's opponents came one vote short of a two-thirds majority to remove him from office. He served out the remainder of his term. Interestingly, the Tenure of Office Act was repealed in 1887, and then the Supreme Court definitively ruled in *Meyers v. United States* (1926) that the president does not need Senate approval to fire executive branch officials. Chapter 30

journalistic culture of objectivity: This means that journalism is committed to reporting news objectively. In the early twentieth century, the nineteenth century partisan press began to fade, and professional journalism schools graduated journalists committed to reporting the news without intentionally slanting their coverage to suit party politics or ideology. This began a new format to separate newspaper pages between news stories, editorials, columns, and letters to the editor. Chapter 47

Judicial Branch: The Supreme Court branch of the U.S. government, which has the power to interpret law, both generally and in cases. Chapter 13

judicial federalism: This refers to the dual federal and state court systems operating in the United States. State courts handle most United States' criminal and civil cases, while federal courts handle federal criminal and civil statutes, regulations, and constitutional provisions. Chapter 32

judicial review*:* As arbiter, the Supreme Court exercises judicial review, which refers to examining the actions of Congress, the executive branch, and the states to determine whether they are constitutional. Chapter 31

Judiciary Act of 1789: Congress initially established a six-member Supreme Court, with a Chief Justice and five associate justices. After the Civil War, Congress gradually expanded the number of justices to ten. Then, to limit President Andrew Johnson's powers, Congress reduced the number of justices through retirement down to seven. In 1869, Congress raised the number of justices to nine, where it has stayed ever since. Chapter 33

K

kairos: Kairos is the rhetorical appeal that refers to taking advantage of or creating a perfect moment to deliver a message, such as saying or writing the right thing at the right time. Chapter 9

Kavanaugh, Brett (1965-): When justice Anthony Kennedy announced his retirement in 2018, it afforded President Trump an opportunity to replace a swing-voting centrist with a solid conservative, thus tilting the court even more to the right. Trump appointed conservative Brett Kavanaugh. During the confirmation process, Kavanaugh's high school classmate Christine Blasey Ford came forward with sexual assault allegations that had allegedly happened when the two were in school together. Kavanaugh vehemently denied the allegations and launched partisan invective at the Democratic Judiciary Committee senators. Classmates who knew Kavanaugh at Yale University made similar allegations, but they were not heard at the hearings, and the FBI did a superficial job of investigating them. Kavanaugh's opponents raised credible allegations during the

confirmation process that he had perjured himself on multiple topics. Nevertheless, the Republicans were not of a mind to seriously probe those allegations. Kavanaugh was approved by a vote of 50-48. Chapter 33

killings of Andrew Goodman, **James Chaney**, and **Michael Schwerner, Mississippi, 1964:** Three young men, Andrew Goodman, James Chaney, and Michael Schwerner, were working on voter registration, education, and civil rights when they were stopped for speeding and taken to the Neshoba County sheriff's office. They disappeared after that. After six weeks of searching—during which the bodies of nine young black men were found in the nearby woods and swamps, the bodies of Goodman, Chaney, and Schwerner were found buried in an earthen dam. Eighteen white men were indicted, and eventually seven were convicted and served time. Chapter 60

King, Jr, Martin Luther (1929-1968); *Letter from Birmingham Jail;* how to recognize just and unjust laws: While confined in Birmingham City Jail in 1963 for civil disobedience targeting that city's segregationist policies, Martin Luther King, Jr. wrote a letter in response to a letter in local papers from eight local clergy who criticized the actions of the civil rights movement of which King was a leader. In his famous *Letter from Birmingham Jail*, King argued that unjust laws must be opposed, even if it means breaking the law. (5) He then made arguments regarding **how to recognize just and unjust laws**. "A just law is a manmade code that squares with the moral law or with the law of God. An unjust law is a code that is out of harmony with the moral law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. An unjust law is a code that a majority inflicts on a minority that is not binding on itself. An unjust law is a code that is inflicted upon a minority which that minority had not part in enacting or creating because they did not have the unhampered right to vote. There are some instances when a law is just on its face and unjust in its application." Chapter 59

Kinsey, Alfred (1894-1956): As early as 1948, with the publication of Kinsey's *Sexual Behavior in the Human Male*, the medical community knew that 4 percent of men were exclusively homosexual throughout their lives. In 1953, Kinsey published *Sexual Behavior in the Human Female*, which documented that 1 percent of women were exclusively homosexual throughout their lives. Chapter 70

Know Nothing Party: This was the nativist American Party, a U.S. political party in the 1850s, that took over the state legislature in Massachusetts, elected the mayor of Chicago, captured 40 percent of Pennsylvania's vote, and had short-term successes elsewhere. The Know Nothings directed their hatred particularly at Catholic immigrants. The party fragmented over slavery, with the pro-slavery Know Nothings tending to end up in the Democratic party and the anti-slavery Know Nothings aligning with the Republicans. Chapter 10

L

***44 Liquormart, Inc. v. Rhode Island* (1996):** The Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted to them by the conservative majority. In this case, Justice Clarence Thomas firmly asserted in his concurring opinion that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Many scholars applaud this view. Chapter 64

laboratories of democracy: The idea that federalism has many advantages was suggested by Supreme Court justice Louis Brandeis in 1932 when he wrote that "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." Chapter 15

***laissez-faire* economic policies:** Since the 1970s, both political parties have pursued clear *laissez-faire* economic

policies. *Laissez-faire* is French for "allow to do," and refers to a hands-off approach to economic policy that leaves corporations to do as they please with limited tax and regulatory burdens. Chapter 43

Lasswell, Harold D (1902-1978): Laswell is a political scientist who came up with a concise definition of politics that we use as a starting point for this course. He said that politics can be defined as "who gets what, when, and how. Chapter 1

leadership positions: The party with the most seats in each chamber gains considerable power, not just from their numerical majority, but also from their ability to select the leadership positions in each chamber. Chapter 56

leading questions: These are questions that are intentionally or unintentionally phrased to elicit a particular response. Chapter 56

legal briefs: Legal briefs are written legal documents arguing why precedent supports their client's case and potential victory. When the Supreme Court accepts a case, the litigant's lawyers file legal briefs for the justices to examine. Chapter 31

legal realism: An argument against originalism comes from legal realism, which is a political science and legal school-of-thought, arguing that justices use contrivances such as originalism, textualism, intentionalism, and other interpretive methods to support their own policy preferences. Chapter 34

Legislative Branch: This is the congressional branch of the U.S. government that has the power to make law.Chapter 13

Lemon Test: An important milestone in how the Constitution interpreted the establishment clause developed in ***Lemon v. Kurtzman* (1971)**. Rhode Island was subsidizing private religious schools for money spent on teacher salaries, and Pennsylvania was reimbursing private religious schools for money spent on teacher salaries. In both states, these provisions were part of larger, general state statutes that supported elementary and secondary education. The Court struck down these practices as a violation of the establishment clause. And in doing so, it set forth the **Lemon Test** for government laws concerning religious organizations: 1) The statute "must have a secular legislative purpose." 2) Its "principal or primary effect must be one that neither advances nor inhibits religion." 3) It must not foster "an excessive government entanglement with religion." Chapter 65

***Letter from Birmingham Jail;* how to recognize just and unjust laws:** While confined in Birmingham City Jail in 1963 for civil disobedience targeting that city's segregationist policies, Martin Luther King, Jr. wrote a letter in response to a letter in local papers from eight local clergy who criticized the actions of the civil rights movement of which King was a leader. In his famous *Letter from Birmingham Jail*, King argued that unjust laws must be opposed, even if it means breaking the law. (5) He then made arguments regarding **how to recognize just and unjust laws**. "A just law is a manmade code that squares with the moral law or with the law of God. An unjust law is a code that is out of harmony with the moral law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. An unjust law is a code that a majority inflicts on a minority that is not binding on itself. An unjust law is a code that is inflicted upon a minority which that minority had not part in enacting or creating because they did not have the unhampered right to vote. There are some instances when a law is just on its face and unjust in its application." Chapter 59

libel: Libel is a written defamation of another person, especially of public figures, and is not protected by the First Amendment, but the Court has set high standards for victims to win libel cases. Chapter 64

liberal arts and sciences: Many Americans are woefully unknowledgeable and ideologically unsophisticated. If you are getting a college degree, make sure that it has a robust general education component that will give

you broad knowledge in the liberal arts and sciences, by which we mean arts, humanities, social sciences, and natural sciences. Chapter 61

lies, big lies, obvious lies: Beware of big lies and obvious lies, repeatedly told. In *Mein Kampf*, **Adolph Hitler** articulated "the sound principle that the magnitude of a lie always contains a certain factor of credibility," and that people "more easily fall victim to a big lie than to a little one." The same can be said of an obvious lie. When a politician tells a big or an obvious lie, particularly when he tells it repeatedly and publicly, some people tend to believe it simply because it is told so openly. Chapter 61

Likert-response scale: In survey research, this is one of the major survey question types. For Likert-response scale questions, the respondent is probed for his or her agreement level with a statement such as, "The death penalty is justifiable in some circumstances: strongly disagree; disagree; neutral; agree; strongly agree." Chapter 7

Lincoln, Abraham (1809-1865): Lincoln was the Republican's second presidential candidate. He won the very divided election of 1860 with only 40 percent of the popular vote. The land reform that Alvan Bovay and George Evans advocated in the 1850s was pushed by Lincoln and became the Homestead Act of 1862, which distributed land in the West to settlers who would "improve" it. Chapter 41

Lincoln, Abraham; 1861 State of the Union letter to Congress: In this letter, Lincoln warned against giving capitalists too much power and threatened to usurp labor as the primary government consideration. He said "Labor is prior to and independent of capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." He then issued a warning to working men that they should not surrender "a political power which they already possess, and which if surrendered will surely be used to close the door of advancement against such as they and to fix new disabilities and burdens upon them till all of liberty shall be lost." Chapter 60

litigants: These are the people or groups involved in a court case. Chapter 31

litigation: Organized interests frequently use litigation—taking the matter to court—to achieve their ends in addition to lobbying the legislative and executive branches. This can be an expensive strategy but can pay off well if they prevail in court and set precedent in their favor. The organized interest can bring the lawsuit directly, or they can finance lawsuits brought by others, or file *amicus curiae* briefs in favor of one side in another case to which the organized interest is not a direct party. Chapter 46

Ludlow Massacre, 1914**:** In 1913, thousands of Colorado miners went on strike for better wages and working conditions and to protest the feudal conditions they suffered in company-owned towns. When labor organizer Mother Jones came to Colorado to support the miners, she was arrested and deported from the state. Evicted from their shacks by the mining companies, thousands of miners and their families set up shanty towns in the Colorado hills. The largest of these tent settlements was at a place called Ludlow. On April 20, 1914, the National Guard, called in by Colorado's governor at the behest of the Colorado Fuel & Iron Corporation, which was owned by the Rockefeller family, opened up on the camp with machine guns and then set fire to the tents. Twenty-six people were killed, including eleven children and two women. More violence followed. In total, sixty-six people were killed. No one was indicted for the crime. Chapter 60

Lukes, Steven M (1941-): Lukes is a political and social theorist, who, in his book, *Power: A Radical View*, put forward a "third dimension of power" described as shaping perceptions. Chapter 2

lobbying: This term comes from the centuries-old British House of Commons tradition where constituents petition their member of Parliament (MP) in the building's lobby. Since lobbyists cannot participate directly in

work on the House or Senate floor, they interact with Representatives and Senators—figuratively speaking—in the Capitol building's lobbies. Chapter 46

Locke, John (1632-1704): Locke is an English philosopher and social contract theorist. In his *Letter Concerning Toleration* (1689), Locke argued in favor of religious toleration and tried to "distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other." Chapters 11; 17

logos: This rhetorical appeal has to do with the logic, evidence, or factual data that is used to persuade an audience. Chapter 9

logrolling: This means trading votes for something desired: A congressman votes on something he doesn't really care about, in exchange for something in return. Chapter 23

lynching: This term refers to the extra judicial killing by persons or a mob that is incited to take the law into its own hands. Chapter 60

Lyon, Phyllis (1924-2020): In 1955 San Francisco, along with **Del Martin,** Lyon founded the **Daughters of Bilitis,** the first postwar lesbian organization. They also created a magazine called *The Ladder*. Active throughout the 1950s and 1960s, the Daughters of Bilitis survived until it broke apart in the 1970s by internal factionalism. Chapter 70

M

macho, brutal language: Pay attention when politicians frequently need to show how strong they are by using macho, brutal language. Do they encourage their supporters to assault their political opponents? Do they threaten to bomb other countries back to the stone age? Do they bully their opponents and expect complete submission from their supporters? Do they—like domestic abusers—use a "you made me do it" language style that blames the victims of their abuse or policies? People who are frequent users of that kind of language are unlikely to uphold democratic principles while in office. Chapter 61

Madison, James (1751-1836): A Federalist, he is considered to be the second father of the **Bill of Rights.** He came reluctantly to the task, because he originally thought such a listing of liberties was unnecessary—he called them "parchment barriers" to government tyranny in a letter to Thomas Jefferson. Chapter 14

Magna Carta, 1215: This was an historical settlement between England's King John and his barons. King John of England—after disastrous foreign policy and domestic power abuses—was forced to accept the Magna Carta, or Great Charter. The Magna Carta limited the king's power vis a vis the nobility and the clergy. This agreement, which was forced upon King John by the aristocracy, said that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." The Magna Carta was not a statement of liberties for ordinary people, but it was nevertheless historically significant for firmly establishing due process for free men. Four specific rights in the American Bill of Rights can be traced to the Magna Carta: due process, jury trials, prohibiting unlawful seizures, and prohibiting excessive fines. Chapters 14; 29; 66

majority opinion: The Supreme Court operates by majority vote, so decisions can be 9-0, 8-1, 7-2, 6-3, or 5-4. The decision's legal validity and political acceptability do not depend on the Court's vote; indeed, they depend on the winning majority's size. Someone in the winning majority writes a **majority opinion**, which explains

the Court's decision in terms of its compelling legal precedent. If the Chief Justice is in the majority, he will assign who writes it; if he is not in the majority, the most senior justice voting with the majority will assign the majority opinion. Someone in the minority writes a **dissenting opinion**, which explains why the minority feels the majority erred in applying precedent or constitutional principle. Majority opinions carry legal weight in the form of precedent, and they also instruct legislators about how acceptable the proposed legislation is. Dissenting opinions do neither of those things, but they do become important if the Supreme Court decides later to reverse itself. Chapter 31

mandates, federal; mandates, unfunded: Federal mandates command that states undertake certain public policies or enforce certain restrictions. Unfunded mandates are those that require the states to pay for what is essentially a decision made in Washington, D.C. Examples are the No Child Left Behind Act of 2001, which enforced new performance standards on individual schools and school districts. States complained that the federal government did not provide nearly enough money to restructure curricula, target struggling students, administer tests, and hire qualified teachers. Unfunded mandates also affect private companies, such as the Clean Air Act, which requires energy companies to buy expensive equipment to mitigate their pollution. Chapter 15

manufactured consent: Manufactured consent means that an interest controls the media, what issues get addressed, and how they are framed. For example, political consent is manufactured through election campaigns that focus on superficial considerations and frightening or getting people angry. Similarly, consumer demand for products is manufactured by the public relations industry. Chapter 3

***Mapp v. Ohio* (1961)** This case involved the Fourth Amendment's provision that people be protected from unreasonable searches and seizures. Additionally, the *Mapp* case applied the **exclusionary rule** to the federal government and to state and local police, which means that any evidence they gather in violation of the Fourth Amendment must be excluded from the defendant's trial. Chapters 63; 66

***Marbury v. Madison* (1803); Marbury, William (1762-1835):** This is an important case because of its role in establishing judicial review, where for the first time, the Supreme Court voided a congressional law. It is considered one of the most important Supreme Court cases because since it was decided, no one has seriously questioned the Court's power of judicial review. Democratic-Republican, Thomas Jefferson defeated incumbent Federalist, President John Adams. With Jefferson's win, the Federalists lost their congressional majority. In 1801, Federalist Marbury was commissioned a judgeship, but it was undelivered, so Marbury filed suit straight in the Supreme Court and asked the Court to issue a writ of *mandamus*—an order to Secretary of State James Madison to deliver the commission so Marbury could take his place as a federal judge. Section 13 of the Judiciary Act of 1789 specifically gave the Supreme Court original jurisdiction to issue such writs. But Marbury made a mistake in bringing his case straight to the Supreme Court instead of appealing from a lower court. Thus, in *Marbury v. Madison (1803),* Supreme Court Justice James Marshall said that due to this legal technicality, he couldn't help Marbury. Marshall went further and declared that section 13 of the Judiciary Act of 1789 violated the Constitution and therefore was void. This was exactly the remedy the Democratic-Republicans wanted, so they went along with Marshall in exerting Supreme Court power to strike down congressional legislation that had been passed and signed into law by the president. Marshall, a Federalist, thought the decision would set the Court up to be a check on future Democratic-Republican policies. In his majority opinion, Marshall wrote that "it is emphatically the province and duty of the judicial department to say what the law is," and that arguments that "courts must close their eyes on the Constitution, and see only the law would subvert the very foundation of all written constitutions." Chapter 31

March on Washington, 1963: Civil rights groups staged the March on Washington in 1963, filling the National Mall with approximately 250,000 peaceful protesters. Famously, it was at that march that Dr. Martin Luther King, Jr., gave his "I Have a Dream" speech. Chapter 46

March, Women's March on Washington D.C 2017: This march occurred the day after Donald Trump's presidential inauguration. But, the idea for this march began as a Facebook post by a Hawaiian grandmother the day after Trump was elected. The post ballooned into what was referred to as "one of the largest and significant demonstrations for social justice in America's . . . history." The turnout of 500,000 people dwarfed the turnout for Trump's inauguration itself, and altogether 2.6 million people marched in all fifty states and thirty-two countries. Chapter 46

margin of error: In public opinion surveys, the margin of error refers to the variability amount that a poll will have from its true result, which would be that the entire population were surveyed. Margin of error comes with a confidence interval. Thus, "A margin of error of plus or minus 3 percentage points at the 95 percent confidence level means that if we fielded the same survey 100 times, we would expect the result to be within 3 percentage points of the true population value 95 of those times." Always look for polls that publish the margin of error. Chapter 56

mark-up sessions: During several congressional meetings, committee members edit a bill's language. In pre-computer days, congressmen literally marked-up paper bills with pens. Mark-up sessions often attract lobbyists whose clients pay them to favorably influence the legislation's wording. Chapter 22

Marshall, Chief Justice John (1755-1835): Marshall was the U.S. Supreme Court chief justice who clarified for a unanimous Court the Necessary and Proper Clause's meaning and its relationship to the enumerated powers. Chapter 13

Martin, Del (1921-2008): In 1955 San Francisco, along with **Phyllis Lyon,** Martin founded the **Daughters of Bilitis,** the first postwar lesbian organization. They also created a magazine called *The Ladder*. Active throughout the 1950s and 1960s, the Daughters of Bilitis survived until it broke apart in the 1970s by internal factionalism. Chapter 70

Mason, George (1725-1792): An Anti-Federalist, he is sometimes called the father of the **Bill of Rights** because he wrote the Virginia Declaration of Rights in 1776 and constantly criticized the U.S. Constitution for omitting this important feature. Chapter 14

Materialism: This philosophical idea espouses that nothing exists except matter, its movements, and modifications—matter is all that there is, that it is composed of atoms, that matter has always existed, that it cannot be created out of nothing, that it cannot be destroyed, that it is continually transformed and recycled into different forms, and that the universe is infinite. Chapter 11

Mattachine Society, 1951: Harry Hay led a group to establish the Mattachine Society, which was dedicated to changing the public's mind about homosexuals' "deviancy." Founded in Los Angeles, the group took its name from Mattacino, an Italian theatrical jester character who spoke the truth to the king from behind a mask. Similar societies were created in large cities across the country. In its mission statement, the Mattachine Society pledged to unify "homosexuals isolated from their own kind," to educate homosexuals and heterosexuals toward "an ethical homosexual culture," and to assist "our people who are victimized daily." The Society published a homophile magazine called *One*, which was initially banned by the Post Office. The Supreme Court ruled in 1958 that the ban violated the Mattachine Society's first amendment rights. The Society was very influential in the gay rights movement in the 1960s but became eclipsed in the 1970s by more militant groups. It finally disbanded in 1987. Chapter 70

McCain-Feingold Campaign Finance Reform Bill: In the spring of 2002, Congress passed the **Bipartisan Campaign Reform Act,** popularly known as the McCain-Feingold Campaign Finance Reform Bill, and President Bush signed it into law despite the objections of many in his own party. This law banned soft-money

contributions to the national party organizations, doubled the hard money limits of the FECA, and restricted the airing of advocacy ads sixty days before a general election. Chapter 54

***McCulloch v. Maryland* (1819):** This was a tremendously important case because it set the stage for central government to expand power. Much of what the central government does is tied to its ability to use the Necessary and Proper Clause to extend the reach of one of its enumerated powers. In 1816, the federal government chartered the Second Bank of the United States. States objected to establishing the second Bank of the United States. The state of Maryland did not like the Bank of the United States competing with their state-chartered banks. So, Maryland placed a prohibitive tax on "any bank not chartered within the state" in an attempt to drive the Bank of the United States out since it was the only bank operating in Maryland that had not been chartered there. Instructed by his superiors, James McCulloch, Bank of the United States Baltimore branch cashier, refused to pay the tax. Maryland brought the case to tax to a state court and won—and even won on appeal—but lost when McCulloch appealed those lower decisions up to the Supreme Court. Two important issues were contested: 1) Since "establish a national bank" is not one of the enumerated powers in the Constitution, can Congress even do that? 2) Can a state tax an activity of the U.S. government? The Supreme Court ruled that states could not tax federal operations and that Congress had broad implied powers when its enumerated powers were combined with the Necessary and Proper Clause. Chapters 13; 15; 16

***McCulloch v. Maryland (1819)* ruling**: In this case, Chief Justice **John Marshall**, clarified for a unanimous Court the Necessary and Proper Clause's meaning and its relationship to the enumerated powers. He wrote "let the ends be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." In other words, **if** Congress can legitimately tie its new exercise of power to one of the enumerated powers and **if** the new exercise of power is not expressly forbidden in the Constitution, then it is constitutional. Thus, it was constitutional for Congress to establish a Bank of the United States. Then Marshall went on to write that the "power to tax is the power to destroy," and that the **Supremacy Clause** meant that the states could not nullify and destroy legitimate exercise of federal authority. Maryland lost, and both the Necessary and Proper Clause and the Supremacy Clause were clarified in ways that expanded the central government vis-a-vis the states. Chapter 13

***McDonald v. Chicago* (2010)** *T*he most recent Bill of Rights incorporation case occurred in 2010 and involved the Second Amendment's guarantee of the right to bear arms. *In* ***McDonald v. Chicago*, 2010,** the Supreme Court decided (5-4) in McDonald's favor, and incorporated the individual right to bear arms into the Fourteenth Amendment. The ruling, therefore, made it applicable to states and cities across the United States. The Court made it clear, however, that the individual right to bear arms was subject to regulation. In the D.C case, Justice Antonin Scalia wrote: "Like most rights, the right secured by the Second Amendment is not unlimited. . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." He was also clear that the list of restrictions he just mentioned was not "exhaustive." Chapter 63

mean; median: The mean is defined as the average in a value range. You get the mean by adding up all the variables' values and divide by your data set values. The median is defined as the middle value in a range: the value that has the same number of values above it as it has below it. Chapter 7

merit system: A merit system in government bureaucracies means that people are hired and promoted to ever greater responsibilities due to their qualifications and their capabilities. A merit system contrasts with what is known as a **spoils system**, which is one where the winning political party stocks the bureaucracy with their own people. Because of the *Pendleton Civil Service Act,* the merit system provides protection to federal civil servants from being fired or punished when a presidential administration of one party takes power from an

administration of a different party. Federal civil servants can only be fired "for cause," meaning that they can be fired for not adequately performing their job, but not for extraneous or political reasons. Chapter 38

militarized policing: The United States has a problem with its militarized approach to policing, which is a function of three things. America is a heavily armed society, with more personal firearms than there are people to carry them. This means that police have to go into every situation with the knowledge that the person they encounter could very well be armed; pervasive war metaphors have taken over our cultural understanding of the relationship between the police and society. Since the late 1960s, our politicians have led us into waging twin wars on crime and drugs, and our movies are rife with scenes of uncivilized criminals kept at bay only through the armed response of police; and America's imperialist and warlike approach to global relations has ensured a steady stream of military equipment and tactics that are made available to police forces around the country. Chapter 60

military-industrial complex: In his famous 1961 **farewell address**, **President Dwight Eisenhower**—who spent a lifetime in the military before becoming president—warned against the power of what he called the military-industrial complex. "In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist." Chapter 29

Milk, Harvey (1930-1978): In November 1977, Milk was elected to the San Francisco Board of Supervisors. Upon officially taking office in 1978, he became the first openly gay man elected to public service. Ten days after the election, he recorded three tapes that he gave to friends and to his lawyer to be listened to in the event he was assassinated. He said, "I fully realize that a person who stands for what I stand for—a gay activist—becomes the target or potential target for a person who is insecure, terrified, afraid, or very disturbed themselves." He sponsored a bill banning sexual orientation discrimination in San Francisco, and Mayor George Moscone signed it into law. On November 27, 1978, Dan White, a former member of the Board of Supervisors, who had recently resigned his position and then asked to be reinstated, assassinated Moscone and Milk with a .38 revolver. Chapter 70

***Miller v. California* (1973); Miller Test:** In this case, the Court articulated a set of criteria by which lower courts could determine whether something was officially obscene. Popularly known as the Miller Test, these standards have been incorporated into federal and state statutes. A work—e.g., a novel, magazine, video, play, or statue may be declared obscene if it passes *all three* of the following: 1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest in sex. 2) The work depicts or describes sexual conduct in a patently offensive way as specifically defined in an applicable law. 3) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a work is determined to be obscene, it can be banned. However, many juries have difficulty coming to consensus about obscenity, given the difficulty of passing the Miller Test. Chapter 64

***Miller v. Johnson* (1995):** After passing the 1965 Voting Rights Act, several states practiced "affirmative gerrymandering," or designed districts intended to elect members of racial minorities to the House. In ***Shaw v. Hunt* (1993**) and then *Miller v. Johnson* (1995) the Supreme Court decided that race could not be a predominant factor in creating election districts. Chapter 53

***Miranda v. Arizona* (1966); Miranda rights:** To ensure that people fully exercise their freedom from self-incrimination, the Supreme Court acted in ***Miranda v. Arizona* (1966)**. In a tight 5-4 decision, the majority threw out Ernesto Miranda's kidnap and rape conviction because he gave his confession without understanding that he had a right to remain silent and had a right to have a lawyer present at his interrogation. Now, As a result, police must inform you of your **Miranda rights**: that you have a right to remain silent, that anything you say can

be used in a case against you, that you have the right to have a lawyer present, and that if you cannot afford a lawyer one will be appointed for you. Chapter 66

Mitbestimmungsrecht: Corporations, particularly those that are large and cross state and country boundaries, can dictate much of our lives on a take-it-or-leave-it basis. **C**orporate power is taken for granted in the United States because workers are often in a poor bargaining position. Fifty years ago, one-third of workers belonged to a union; now only 7 percent of private-sector workers belong to a union. The United States doesn't structurally empower workers like some other countries do. For example, Germany's Mitbestimmungsrecht—or codetermination—requirement, which dates back to the 1920s, says that "depending on the size of a German limited company, a third or even half of the members of its supervisory board are voted in by its employees." This kind of power for workers has helped support German wages, working conditions, and the vitality of Germany's manufacturing sector. Chapter 67

mobilizing the grassroots: Organized interests often use the **going-public** strategy to further their interests. This is a catch-all category of activities in which the group generates or demonstrates public support for its cause. Examples include mobilizing the grassroots, which is getting ordinary people or members of the group to write letters. This can be very effective if it is genuine. That is, if the interest group can really get thousands of people to call, write, or email their congressman all expressing one side of an issue, it tends to get legislators' attention. Chapter 46

money, American elections: Most money contributions in American elections comes from corporations and the wealthy. According to data from the Federal Election Commission, corporations and wealthy individuals contribute at least two-thirds of federal-election money. Chapter 54

money, bundlers: Wealthy people often act as bundlers or people who organize and collect contributions to one campaign from a variety of other wealthy people. A candidate from the elite who knows a few other elites who are willing to act as bundlers is in a very good position indeed. Chapter 54

money, candidate spending: The candidate who spends the most money tends to win. If you were a betting person and the only information you had about a particular race for the House of Representatives or the Senate was the amount of money the candidates were spending, you would be wise to bet on the candidate who was spending the most money. Chapter 54

money, conservative, right politics: Money in American elections pushes politics to the right. Because corporations and the wealthy are the principal sources of most campaign money, the entire campaign finance system is biased in favor of conservative candidates and against candidates who would like to see real progressive changes. Corporations and the wealthy are beneficiaries of the current system, so it is typically not in their interest to support candidates who would shake up the *status quo*. Chapter 54

money, dark: A special kind of soft money is called dark money. Under sections 501(c)(4) and 501(c)(6) of the tax code, politically active nonprofit organizations can raise unlimited money and spend it to support or oppose candidates. The most interesting thing about these organizations—and the reason they are called "dark"—is that they don't have to disclose the sources of their money. These organizations are supposed to be primarily social-welfare groups rather than overtly political, but neither the IRS nor the FEC has cracked down on them. Conservative dark money organizations funnel corporate and elite money to promote presidential, congressional, and judicial candidates who fight against increasing the minimum wage, organizing rights for workers, worker safety laws, universal health care, background checks for gun purchases, environmental regulations, policies to fight the climate emergency, and many more. Chapter 54

money, hard: Hard money contributions are regulated by the **Federal Election Campaign Act** (FECA), which

Congress passed in 1971 and was significantly amended in 1974. **Hard money** refers to contributions made directly to a political campaign. Chapter 54

money, investment approach: Back in 1995, political scientist Thomas Ferguson coined the phrase the investment approach to American party politics, in which he argued that ordinary voters cannot afford the costs of paying attention to political issues, researching candidates, watching what they do once elected, and rewarding or punishing them if they don't pursue policies beneficial to those ordinary people. Who can afford those costs? Corporations and wealthy people have the resources to monitor politics, donate to candidates to reward them for good behavior when in office, and punish them if they don't follow the wishes of the elites. Moreover, these individuals and corporations have much to lose if the politicians don't act the way they would like, so they invest in those that will. Chapter 54

money, never-ending race: Because elections are so expensive, and we don't publicly finance campaigns, politicians appear to be in a never-ending money race. It typically takes a couple of million dollars to win a race for House of Representatives and anywhere from two to ten times more than that to win a Senate race. In presidential races, the candidates together spend in the billions of dollars—not counting outside spending by organized interests on behalf of one candidate or the other. Chapter 54

money primary: Money is so central to a person even considering whether they could enter politics that political scientists and journalists often speak about the money primary, by which they mean "the competition of candidates for financial resources contributed by partisan elites before the primaries begin." Money is the ticket to success in American politics. You must either have enough to finance your own campaign, come from the elite strata where you have friends, contacts, and supporters with disposable wealth to donate to your campaign, or you must ingratiate yourself to the elites who can fund your campaign. Chapter 54

money, soft: Soft money originally referred to contributions to political parties that were supposed to be used for "party building measures," but instead, were used to help elect candidates. Because there are no limits on soft money contributions, corporations especially began to flood the parties with soft money. Soft money now refers to largely unregulated independent expenditures by parties and organized interests to support or oppose candidates. These organizations buy advertisements, establish phone banks, pay for people to go door to door for a candidate, and so forth. Chapter 54

money, Supreme Court strikes down reigning in money: Supreme Court has stricken down many attempts to reign in money in American elections, for example, ***Buckley v. Valeo*** **(1976):** Overall campaign spending, personal spending on one's own campaign, and independent expenditures cannot be capped. ***FEC v. Wisconsin Right to Life*** (2007): The government cannot stop outside groups from spending on political advertising in the period before an election. ***Citizens United v. FEC (2010):*** The government cannot place limits on the amount of outside spending, and corporations can spend directly to support or oppose campaigns. ***Arizona's Free Enterprise Club's Freedom PAC v.*** **Bennett (2011):** Public financing systems cannot use escalating matching funds. ***American Tradition Partnership v. Bullock*** **(2012**): The Court struck down Montana's ban on corporate spending on state elections that dated back to 1912. ***McCutcheon v. FEC*** **(2014):** A donor's overall spending on federal campaigns cannot be capped. Chapter 54

motion of cloture: This is a motion to place a time limit on a filibuster. At least sixty senators must agree to the cloture, and then a bill-vote is allowed. Chapter 22

Mott, Lucretia (1793-1880): American feminist Mott, along with **Elizabeth Cady Stanton,** created the Seneca Falls Convention in 1848**.** Eight years earlier, Mott and Stanton attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations, but the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women watched the proceedings from the

balcony. That experience helped convince them that women, as well as slaves, needed emancipation. Chapter 69

muckraker: This is a progressive-minded writer who investigates and reports on power abuses and on the ways that government serves powerful interests at ordinary people's expense. The early twentieth-century muckrakers were pioneers of the kind of investigative journalism that continues to challenge the politically and economically powerful. The term "muckraker" was an epithet coined by President Theodore Roosevelt in 1906 but has become something of a badge of honor among investigative journalists. Chapter 47

multi-party system: This political system features three or more parties with a viable shot of participating in government. Chapter 44

multiple-choice questions: In survey research, these questions offer three or more defined choices from which the respondent can choose. Chapter 7

N

name recognition: Incumbents benefit greatly from name recognition and positive media coverage. Incumbents usually enjoy a name recognition advantage over their challengers. Chapter 55

National American Woman Suffrage Association, 1890: Feminists were outraged when the Fifteenth Amendment left out women, so they created two organizations to fight for the right to vote: The National Woman Suffrage Association and the American Woman Suffrage Association, which differed in their tactics. The two organizations merged in 1890 to form the National American Woman Suffrage Association. **Carrie Chapman Catt** took over leadership of the Association from **Susan B. Anthony**. Chapter 69

national committees: These committees conduct the party's business in between the quadrennial national conventions and are composed of prominent members of each state's party organizations. Chapter 41

National Emergencies Act of 1976: When a president declares an emergency, the National Emergencies Act of 1976 and other statutory provisions opens all sorts of new presidential powers. The Brennan Center for Justice catalogued 136 emergency powers available to a president, ninety-six of which "require nothing more than [the president's] signature on the emergency declaration" to go into effect. The president can "shut down many kinds of electronic communications inside the United States or freeze American's bank accounts." Emergency declarations are supposed to last less than one year, but emergency declarations are often renewed "for years on end." Chapter 27

nationalists, broad; nationalists, narrow: The delegates at the Constitutional Convention did not want to establish a unitary system, but they agreed that the weak central government under the Articles of Confederation needed to be strengthened. They differed on how much power to give to the central government. Political scientist David Brian Robertson distinguishes between the narrow nationalists and the broad nationalists. Broad nationalists include James Madison, Alexander Hamilton, James Wilson, and Gouverneur Morris, who wanted to give the national government more expansive powers. The narrow nationalists includeRoger Sherman, Oliver Ellsworth and most of the delegates from the small states like Connecticut, Delaware, Maryland, and New Jersey. They wanted to give the national government limited and well-defined powers. Chapter 15

National Security Act of 1947: This act consolidated the Department of War and the Navy Department into the Department of Defense, creating a rhetorical shift from War to Defense; it's easier to support large expenditures

year after year for "defense" rather than "war." The Act created the **National Security Council** to advise the president on foreign affairs and security. The Act also created the Central Intelligence Agency, which was designed to gather intelligence and engage in covert operations around the world. Chapter 29

National Security Council: The National Security Council was established in 1947 by the National Security Act. Its responsibility is to advise the president and coordinate American security and foreign policy. Chapter 29

nativism: This is a more organized political philosophy that is opposed to immigration; it favors limiting the power of and opportunities for immigrants. Chapter 10

natural experiment: This experiment is an observational study in the real world where the scientist does not control the variables, but where natural processes or social events provides an opportunity to see the effect of a variable in action. For example, over a four-year period, researchers found that states that had expanded Medicaid reduced their mean annual mortality rate by 9.3 percent, meaning that the fourteen states that did *not* take advantage of the ACA to expand Medicaid had 15,600 people die who would not have died had the states expanded Medicaid. This natural experiment shows the variable's impact at the state level—Medicaid expansion on people's health—yes or no? Chapter 4

natural persons: Actual living, breathing human beings, distinct from **artificial persons,** i.e., corporations and other organizations allowed to exist by state charter. Chapter 35

natural rights: These are rights that stem from the state of nature, and thus pre-date the government established by the social contract. Philosophers say that natural rights are granted by nature's God or by virtue of being born. The important thing to remember is that government does not give you your natural rights, as when it establishes a Bill of Rights. The Bill of Rights merely recognizes and specifies your preexisting natural rights. Chapter 11

Necessary and Proper or **Elastic Clause:** At the end of the enumerated powers is the Necessary and Proper or Elastic Clause, which states, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." This has historically been a very important phrase in the Constitution because it has allowed the national government to expand its powers into a variety of areas that were not anticipated by the founders. For example, Congress has forbidden child labor, set maximum-hour laws, and established a minimum wage, none of which are explicitly mentioned in the Constitution. All these measures have been justified with the Elastic Clause, combined with the enumerated power to regulate interstate commerce. When Congress does expand its powers, it justifies its new role by saying that it is only "carrying into execution" one of its enumerated powers. Following the precedent of ***McCulloch v. Maryland (1819),*** the federal courts have usually agreed with Congress. Chapter 13

negative relationship: Used in surveys and studies, negative relationship is the value of one variable decreasing as the value of the other variable increases. Chapter 4

Neo-feudalism: This refers to the idea that our society resembles the feudalism that existed in the Medieval period in which most ordinary people had very limited freedom and in which economic, political, and legal structures dictated an aristocracy's privileged position. However, under neo-feudalism, the privileged position in our society is occupied by the wealthy corporate elite. Chapter 67

net neutrality: The term net neutrality means that internet service providers should charge basic access fees to the Internet but otherwise not discriminate between those who would post web pages, video, or email. This has been the norm on the Internet. However, in the United States, telecommunication giants such as AT&T, Verizon, and Comcast, who own the "pipelines" through which the emails, videos, files, and web pages flow, want to

charge big companies like Google and Yahoo large fees to guarantee that their content gets to customers at higher speeds. Those who could not pay for more than a simple connection would be relegated to whatever slow service was available after the large commercial content providers had used and paid for their share. In other words, there'd be an elite toll road alongside a free but crowded interstate." A coalition of consumer's groups, small businesses, and ideological groups from the left and the right argue that net neutrality should remain the standard practice. Chapter 48

New Deal: The period of 1932 to the late 1960s, known as **Cooperative Federalism**, was marked by increased federal power. Due to the Great Depression and Post World War II, the Democrats in Congress and the Roosevelt administration passed New Deal economic regulations and instituted social welfare policies that had never been seen at the U.S. national level. The national government regulated the banking industry, supported agricultural prices, set the first federal minimum wage, created unemployment insurance, established social security for the elderly, supported the right of workers to unionize and collectively bargain, and put people to work building schools, hospitals, and roads. Chapter 16

New Deal Coalition demise: The success of the Civil Rights Movement, the cultural turmoil of the late 1960s, and the stridency of the Democratic party's anti-Vietnam War wing fractured the New Deal coalition and hurt many Democratic candidates' electoral chances. The New Deal coalition had been built upon the economic interests of the common man regardless of race or religion. By the late 1960s and early 1970s, however, the Republicans became increasingly successful in attracting support from whites opposed to racial desegregation, from men and women who were disconcerted by women's liberation, from rural voters concerned about gun control, and from voters who disdained the perception of pacifism in American foreign policy. Moreover, the *Roe v. Wade (1973)* decision legalizing abortion and the rise of the gay rights debate handed Republicans two social issues that were instrumental in courting Catholics, evangelical Protestants, and Mormons. Chapter 42

New Deal; New Deal Coalition: The period of 1932 to the late 1960s, known as **Cooperative Federalism**, was marked by increased federal power. Democrats in Congress and the Franklin Roosevelt administration passed New Deal economic regulations and instituted social welfare policies that had never been seen at the U.S. national level. Roosevelt used government's power to alleviate suffering, regulate the economy, and put people back to work. The overall policy, known as the **New Deal**, included Social Security, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, the Civilian Conservation Corps, and the Works Progress Administration, among many others. The Democrats dominated national politics from 1933 to the end of the 1960s, largely because of what has become known as the **New Deal Coalition**. They cobbled together a coalition of unionized workers, farmers, Jews, white-collar professionals, African Americans, and urban immigrants who were predominantly Catholics. The New Deal programs were popular enough that the 1950s Republican Eisenhower administration left them in place and the Democratic Lyndon Johnson administration built on them somewhat. Chapter 42

New Federalism: This period, which began in the late 1960s, is sometimes called the Era of Devolution because of the ways that governmental power seems to have devolved back on to states. A defining factor in this modern period is that in the thirteen presidential elections held between 1968 and 2016, Republicans have "won" eight of them. Two of those victories—Bush in 2000 and Trump in 2016—were the result of the electoral college giving the presidency to the popular vote *loser*. The disproportionate number of Republican presidents in this period have loaded up the Supreme Court and the federal courts with a disproportionate number of appointees who would be very comfortable if the United States were to go back to the bad old days of dual federalism and have the national government be powerless to act in many areas of public policy, particularly economic, worker safety, and environmental regulation. For example, four Supreme Court justices were ready to strike down the Affordable Care Act's individual mandate as an unconstitutional extension of Congressional power, and it was only Chief Justice John Roberts' uncharacteristic decision not to join them that saved the

law in 2012. Earlier, in 1995, the Court ruled that the interstate commerce clause could not be stretched far enough by the elastic clause to constitutionally cover Congress' attempt to pass a Gun Free Schools Act and ban handguns near schools. Chapter 16

news deserts: America is pockmarked bynews deserts, areas that receive little or no substantive public affairs or community-interest news coverage. Chapter 48

***New York Times v. Sullivan* (1964**): In this case, the Court announced guidelines that the public figure needs to establish in court if s/he is to win a libel case. In that case, the *New York Times* was sued in an Alabama court by a police commissioner named Sullivan, who claimed that an advertisement taken out by the Committee to Defend Martin Luther King had libeled him by implication. The Supreme Court ruled in favor of the *New York Times* and said in what is known as the **Sullivan Test** that the victim must show: 1) that the information printed about them was false, 2) that the publisher either knew it was false or the statements "were made with a reckless disregard for the truth," 3) the information was written due to malice, and 4) publication of the inflammation damaged the victim. The Court set the standard high to avoid public officials being able to escape public criticism by threatening lawsuits against newspapers and magazines. Chapter 64

New York Times v. United States* (1971):** In this famous case, the Court interpreted freedom of the press to mean that government should not be able to engage in what is known as **prior restraint**, which is when the government prevents publication of something that it finds to be objectionable or illegal. During the Vietnam War, **Daniel Ellsberg** stole a copy of a secret history of America's involvement in that conflict. As an employee of the Rand Corporation, Ellsberg had participated in producing this secret report for the Secretary of Defense. Ellsberg gave it to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called ***The Pentagon Papers. It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and how the American people were deceived by the government. Even though most of the deception had occurred under Democratic administrations, Republican President Richard Nixon wanted The *Pentagon Papers* suppressed. The government got a federal court to issue an order to the *New York Times* to desist from further publication, arguing that publication violated the Espionage Act's prohibition against willfully communicating information it "knew or had reason to believe. . . could be used to the injury of the United States. . . to persons not entitled to receive such information." In a 6-3 decision, the Court ruled that the government had not met its "heavy burden of showing justification" for prior restraint of *The Pentagon Papers*. Chapter 64

Nineteenth Amendment (1920): After a long, difficult struggle to secure women's right to vote, feminists finally won the right to vote regardless of sex when the Nineteenth Amendment passed in 1919 and was ratified in 1920. Chapters 49; 69

Nixon-Kennedy 1960 presidential debates: Televised presidential debates began in the 1960 election, and it immediately became clear that a candidate benefited from being telegenic. In the first of the four Nixon-Kennedy 1960, presidential debates *radio listeners thought that Nixon bested Kennedy, while television viewers came to the opposite conclusion.* The reason? The radio listeners couldn't see that with no make-up and sporting a five o'clock shadow, Nixon looked horrible compared to the tanned, make-up-wearing Kennedy. No presidential candidate has ever made Nixon's mistake again. Chapter 47

Nixon, President Richard (1913-1974): On June 17, 1972, agents of President Richard Nixon's Committee for the Re-Election of the President (CREEP) were caught breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Nixon immediately tried to cover up the incident. The cover-up did not work. Nixon did everything he could to forestall the inevitable. In the famous **Saturday Night Massacre**, Nixon ordered Attorney General Elliot Richardson to fire Archibald Cox, who was serving as the independent special prosecutor in the case. Richardson resigned rather than carry out the order. Nixon then ordered Deputy

Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused to do it and resigned instead. Then Nixon asked Solicitor General Robert Bork to fire Cox, and Bork complied. The scandal that started with the Watergate break-in expanded to reveal shocking corruption in the Nixon administration. Nixon had a taping system in the White House that recorded his conversations with everyone who came into his office. Nixon refused to turn over the tapes in the face of a congressional subpoena until forced by a unanimous Supreme Court decision. ***The United States v. Nixon (1974)*** established that while the president had the right to confidentially record conversations with his advisors, executive privilege did not extend to refusing to turn over records pertinent to a criminal proceeding. Nixon resigned the presidency on August 9, 1974, just before the full House had a chance to vote on accepting three articles of impeachment. The House impeached him. Chapter 30

Noble, Elaine (1944-): In 1974, Noble became the first openly lesbian woman elected to public office. She won a seat in the Massachusetts state House of Representatives. In an interview, Noble said that her first campaign was "ugly," with gunshots through her windows, and people visiting her house and campaign office were harassed. Once, while in office, feces were left in her desk. She won re-election in 1976. Chapter 70

non sequitur: This means "it does not follow," and refers to an argument in which the evidence and conclusion don't match the original claim. Chapter 5

Northwest Ordinance (1787): This ordinance concerned the territories located in the Old Northwest, what is today north of the Ohio River and east of the Mississippi River. The ordinance allowed territories to enter the Union as states on the same equal legal footing as the original thirteen states. Chapter 12

null hypothesis: A null hypothesis essentially asserts that there is no relationship between two variables. Chapter 4

Nullification Crises: The perilous and unsettled nature of federal and state relations during the 1789 to 1865 **Definitional Period of American Federalism** was exemplified by state attempts to nullify federal laws. States effectively said, "We do not recognize this federal law as operable on us." In 1798, President John Adams signed the Alien and Sedition Acts. Kentucky and Virginia both passed resolutions nullifying the law in their states and asserted the right to disregard the federal laws with which they disagreed. The Kentucky resolution, secretly written by Thomas Jefferson, said that since the Constitution was created by the states, each state has "the unquestionable right to judge of its infraction," which is a way to say that Kentuckians get to determine whether a law is unconstitutional. This nullification crisis didn't boil over because the Democratic-Republican *Jeffersonian* victory in the 1800 election resulted in states repealing the offending federal legislation. Chapter 16

O

***Obergefell v. Hodges* (2015):** James Obergefell and John Arthur married in Maryland right after the *Windsor* case was decided; they then sued the state of Ohio, their state of residence, when it refused to recognize their union. By the time the case reached the Supreme Court in 2015, it had been joined with three other similar cases from different jurisdictions around the country. The Court ruled 5-4 in *Obergefell v. Hodges* (2015) that state prohibitions against same-sex marriages were unconstitutional, as was the portion of the Defense of Marriage Act that allowed states to refuse to recognize gay marriages performed in other states. Chapter 70

obligation of contracts: Congress and state legislatures are also forbidden from impairing the obligation of contracts. For example, if I render services to you and you owe me a great deal of money according to the contract that we both signed, you might be tempted to go to your friends in Congress and get them to pass a law saying that you do not have to pay me. That is not allowed. Chapter 62

obscenity: Obscenity is not protected by the First Amendment, but the Court has set the bar high for defining obscenity. Chapter 64

Office of Management and Budget. Originally created in 1921 as the Bureau of the Budget in the Treasury Department. The OMB is a powerful agency within the executive branch. According to the White House, the OMB assists the president with the following: Developing and executing the budget. Managing agency performance and oversight, human capital, Federal procurement, financial management, and information technology. Coordinating and reviewing all significant executive agencies' federal regulations policy. Coordinating the Legislative branch and providing them clearance. Coordinating Executive Orders and Presidential Memoranda. Chapter 25

Office of the United States Trade Representative: Established by Congress with the Trade Expansion Act of 1962, the Office of the United States Trade Representative is responsible for coordinating U.S. trade policy and negotiating international trade agreements. Chapter 25

one-party system: This is a political system in which other parties are either banned or so hobbled that they can't compete with the ruling party. Chapter 44

open-ended questions: In conducting survey research, these questions provide the respondent with much freedom to structure the answer for themselves by asking the respondent what they think about something. Chapter 7

open primary: In an open primary, voters can vote in the party primary of their choice, but not in both. Chapter 50

opinion leadership: This refers to political leaders' ability to change the opinions of many people, mainly because on many issues, individuals do not have strongly formed opinions. If a political leader who they respect and with whom they share party affiliation comes out forcefully in favor of a different approach to a policy, many people will shift their opinion to that of the political leader. Chapter 65

oral argument: After briefs have been filed, the Supreme Court picks an oral argument date. Oral arguments take place in public sessions on Mondays, Tuesdays, and Wednesdays from October to May, and there is a public gallery, so visitors can watch the Court work. Normally, petitioner and respondent's lawyers are each allowed thirty minutes to present their case to the assembled justices. Chapter 31

organized interests: This term refers to political interests that have a specific organizational unit that works to influence public policy in numerous ways, short of running actual election candidates. This organizational unit requires money and staff simply to exist, plus additional money to influence policy. Organized interests can be categorized into economic, citizens groups or non-economic, and government groups. Chapter 45

originalism: Originalism is the interpretive convention of the Constitution that argues that the Constitution should mean now what it meant to the people who wrote it. Chapter 34

original jurisdiction: Original jurisdiction refers to those cases that are heard first in the Supreme Court. The paths to the Supreme Court are conditioned by its jurisdiction. Jurisdiction refers to the scope or mandate of a court, meaning w*hat* kinds of cases it can hear and *how* it hears them. The Supreme Court has the broadest jurisdiction of any federal court, but its mandate is divided into its original and appellate jurisdictions. According to Article III of the Constitution and federal statute, the Supreme Court has original jurisdiction in the following kinds of cases: controversies between two states; all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; all controversies between the United States and a state; all actions or proceedings by a state against the citizens of another state or against aliens. Chapter 32

oversight: A final important congressional role is performing executive-agency oversight. Standing committees and their subcommittees hold hearings to inquire into executive agencies' operations to see how programs and regulations are working and what impacts federal laws have once they go into effect. Chapter 21

overt city ordinances: This is a significant form of housing discrimination in American history. Many cities used overt city ordinances that divided the town into racial zones and mandated that residential property in "white" areas be purchased by whites, while property in "black" areas be purchased by nonwhites. The Supreme Court ruled these kinds of city ordinances unconstitutional in 1914, but the practice continued as a matter of custom. Chapter 68

P

PAC, favor incumbents: PACs give most of their money to incumbents, or those who are in office and are running for reelection, as opposed to challengers. There are three reasons why PACs favor incumbents. 1) Incumbents tend to win. It's a safe bet to give money to an incumbent who already votes favorably to your organized interest. 2) Incumbents have Washington experience and might sit on important committees. Committee and subcommittee chairmen tend to receive a great deal of PAC money. 3) Incumbents have a voting track record on national issues, so they are often more of a known commodity than are challengers. Chapter 54

packing: Packing involves "the practice of drawing particular districts in such a way as to ensure that another party's candidate wins that seat by a tremendous margin." The party doing the gerrymandering wants to concede this district and pack as many of the other party's supporters in there as possible, which will make neighboring districts more competitive. Chapter 53

PAC, leadership: A leadership PAC is established or controlled by a political candidate or a person who holds federal office to raise and give money to other politicians. Leadership PACs are separate from the candidate or office holder's election or reelection committee. Congressional members often have leadership PACs to raise money and support candidates or other congressional members with whom they share ideology, party affiliation, or policy positions. Chapter 54

PAC, political action committee: The only legal way for organized interests to donate money directly to campaigns is for them to create a political action committee, or PAC, which is an FEC-recognized entity that can legally engage in campaign finance. There are different types of PACs that give directly to campaigns. Two of them are t**raditional PACs** and **leadership PACs.** Chapter 54

PAC, super: As a result of the *Citizens United* case and another federal case called *SpeechNow v. FEC* (2010), outside spending has exploded. The vehicles for much outside spending are super PACs, a new kind of organization that falls under the soft money category. Where traditional and leadership PACs donate money directly to campaigns, super PACs cannot do so, but they can spend unlimited amounts of money on behalf of one candidate or another. They must do so independently of the candidate they are supporting, meaning they cannot coordinate their activities with the campaign they are supporting. They can raise unlimited amounts of money from corporations, unions, and individuals, but they must disclose their donors to the FEC. Chapter 54

PAC, traditional: Traditional PACs are entities created by organized interests, such as corporations, unions, and interest groups, as vehicles to raise money and funnel it to candidates. Chapter 54

Palmer Raids, 1919-1920: U.S. Attorney General Alexander Palmer, fearing insurrection from leftist radicals, directed a series of **red-scare** raids, called Palmer Raids, that rounded up around 10,000 Communists, Socialists,

and Anarchists, mostly Italian and Eastern Jewish immigrants with alleged leftist ties. Over 500 of them were deported. Chapter 60

pardon, controversial: The presidential pardon power is absolute in the sense that neither Congress nor the Supreme Court can countermand a presidential pardon. **Controversial presidential pardons that have occurred in modern history:** In 1974, President Gerald Ford pardoned Richard Nixon for any crimes committed while in office. In 1979, President Jimmy Carter granted a blanket amnesty to all Vietnam-era draft evaders. In 1992, President George H. W. Bush issued controversial pardons to several high Reagan administration officials who had been involved in the Iran-Contra Scandal. In 2001, President Bill Clinton pardoned billionaire financier Marc Rich, who fled the country in 1983. In 2017, President Barak Obama used the pardon power most controversially when he commuted the remaining sentence of Chelsea Manning, an American activist, whistleblower, and former U.S. Army soldier. In 2017, President Donald Trump issued the first of several controversial pardons. Trump pardoned Sheriff Joe Arpaio, who had been found guilty of defying a judge's order to stop detaining and harassing Latino residents of Maricopa County, Arizona. In 2019, Trump pardoned an Army officer and a Navy SEAL who had been convicted of committing war crimes—one for murder and obstruction of justice and the other for posing with the corpse of an enemy combatant. Trump also pardoned another Army officer who was awaiting trial for murdering a detainee in Afghanistan. Trump's pardons disregarded the recommendations of the Pentagon leadership, who felt that they would undermine a general and admiral's ability to maintain proper order. Chapter 27

pardon, two limitations on pardon power: Presidents can only pardon people who have been charged with a federal (not state) crimes, and presidents cannot pardon someone in the executive or judicial branches whom Congress has impeached. The president can issue a **full pardon**, which restores the recipient's full rights so they can run for office, serve on juries and purchase firearms, or a **conditional pardon**, which restores partial rights. Pardons do not imply that the person is innocent, nor do they expunge the original conviction. The president can also **commute a sentence,** which typically allows a person to leave federal prison before completing their full sentence, but they maintain the other impacts of their federal conviction. Chapter 27

partisan conservative media ecosystem' rise: The most recent development in political media's history is the rise of the partisan conservative media ecosystem. The demise of the fairness doctrine in 1987 allowed corporations and wealthy libertarians to develop an especially insular media empire centered on conspiracy theories and partisan news. Chapter 47

partisan gerrymandering: This is when the majority party in a state draws legislative districts to make it difficult for the opposition party to win seats in the state legislature or U.S. House of Representatives. The Supreme Court majority said that the partisan gerrymandering issue was a "political question" for state legislatures to resolve. It is primarily majority parties in state legislatures that are causing the problem, so the Court's decision amounts to giving a pass to this anti-democratic practice. Chapter 35

partisan press: The nineteenth century was the golden era of the partisan press. Most newspapers didn't worry about objectively printing the day's or week's events; they were often openly tied to political parties or movements and tilted the news accordingly. Competition in the business was stiff, and publishers often went for scandal and sensationalism to sell newspapers. Chapter 47

party ballots: Before 1888, the most common way to vote in the United States was to use party ballots, which were printed by the parties themselves. When ready to vote, you would go to the voting place, pick up a ballot that only listed one party's nominees for all the offices, and drop it into the ballot box. Party ballots were color-coded, so it was very easy for your neighbors to see which party you supported, and it was easy to stuff the ballot box at the end of the day. No one would know the difference between a legitimate vote and a fraudulent one. Chapter 50

party identification: This refers to a voter's self-identification with one party or another, whether they are formally party members or not. Chapter 43

party in government: This refers to elected and appointed public officials who identify with one party or another. As with party organization, this is a relatively well-defined universe of people that can be subdivided into precise groups like members of the House of Representatives or U.S. Senators. Chapter 43

party in the electorate: This refers to the voters who support each party. People may support the Democratic or Republican parties—or one of the third parties—without formally registering as a party affiliate. The largest "party" in the United States are those who either intentionally refuse to commit to one of the parties or who have turned away from partisan politics altogether. Chapter 43

party organization: This refers to people who hold offices or volunteer positions in a political party at the local, state, or national level. They tend to be quite dedicated, devoting considerable time and effort promoting the party, its policies, and its candidates. Chapter 43

party platform: The party platform lays out the party's position on various issues of the day and is adopted at the national convention. Chapter 41

pathos: This rhetorical appeal refers the author's appeal to the audience's sense of identity, their self-interest, and their emotions. Chapter 9

peer-reviewed journal: A magazine that publishes only peer-reviewed articles. Scientists publish their findings in peer-reviewed journals. The peer-review is a blind process in which a journal article is reviewed by others in the same field. The author of the manuscript does not know who is reviewing it, and the reviewers do not know who wrote the manuscript. Chapter 4

Pendleton Civil Service Act, 1883: This Act set the U.S. federal government on the path to a merit system. The merit system provides protection to federal civil servants from being fired or punished when a presidential administration of one party takes power from an administration of a different party. Federal civil servants can only be fired "for cause," meaning that they can be fired for not adequately performing their job, but not for extraneous or political reasons. Chapter 38

The Pentagon Papers: In this famous case, ***New York Times v. United States* (1971),** the Supreme Court interpreted freedom of the press to mean that government should not be able to engage in what is known as **prior restraint**, which is when the government prevents publishing something that it finds to be objectionable or illegal. During the Vietnam War, **Daniel Ellsberg** stole a copy of a secret history of America's involvement in that conflict. As an employee of the Rand Corporation, Ellsberg had participated in producing this secret report for the Secretary of Defense. Ellsberg gave it to Neil Sheehan, a reporter for the *New York Times*, which began to print the report in installments, collectively called *The Pentagon Papers*. It was explosive, because it revealed the extent of the morass in Vietnam, important decisions along the way, and the considerable degree to which the American people were deceived by the government. Even though most of the deception had occurred under Democratic administrations, Republican President Richard Nixon wanted The *Pentagon Papers* suppressed. The government got a federal court to issue an order to the *New York Times* to desist from further publication, arguing that publication violated the Espionage Act's prohibition against willfully communicating information it "knew or had reason to believe. . . could be used to the injury of the United States. . . to persons not entitled to receive such information." In a 6-3 decision, the Court ruled that the government had not met its "heavy burden of showing justification" for prior restraint of *The Pentagon Papers*. Chapter 64

petitioner: The petitioner is the person or group who brings a case or appeal to court, and the **respondent** is the person or group who answers. Chapter 31

Phillips, David Graham (1867-1911): Graham was a journalist who wrote a nine-installment series called "Treason of the Senate" in 1906 for *Cosmopolitan Magazine*. He documented corporate manipulation and corrupt process of selecting U.S. Senators, which galvanized the reform movement that eventually resulted in ratifying the Seventeenth Amendment in 1913, which mandated that senators be elected directly by the people. Chapter 47

physical infrastructure: The U.S. economy depends on the nation's physical infrastructure**.** The National Interstate and Defense Highways Act of 1956 started one of the largest infrastructure projects in American history: the creation of the interstate highway system, benefitting individual people and commercial businesses alike. Chapter 36

plain meaning rule: Supreme Court justices apply what is known as the plain meaning rule, which is simply to say that if the statutory language is plain and unambiguous, it must be followed and applied to the case at hand. Chapter 34

plain view: During traffic stops, police can examine that which is in plain view—e.g., on your dashboard or sitting on the back seat—without reasonable suspicion or probable cause, but they would need probable cause to search further without your permission. Anything incriminating that is in plain view can be grounds for probable cause. Police can ask you to step out of the car and can frisk you with reasonable suspicion, which presumably they already have if they legally stopped your vehicle. Chapter 66

plea bargaining: This means to admit guilt to obtain a reduced sentence, which has, in fact, been abandoned in a few jurisdictions in the United States but is growing around the world. A former attorney for the United States Department of Justice, Ralph Adam Fine argued back in 1987 that plea bargaining was a double evil: "It encourages crime by weakening the credibility of the system on the one hand and, on the other, it tends to extort guilty pleas from the innocent. Chapter 66

***Plessy v. Ferguson (1896);* Plessy, Homer (1862-1925):** In 1890, the Louisiana legislature passed the Separate Car Act requiring that all trains operating in the state be segregated by race and forbidding people from "going into a coach or compartment to which by race he does not belong." On June 7, 1892, Homer Plessy was arrested after he purchased a first-class ticket on the East Louisiana Railroad train running from New Orleans to Covington, Louisiana, and took a seat in a car reserved for whites only. Plessy, a married shoemaker whose heritage was African and French, was one-eighth black. Indeed, press accounts of the time indicate that the train conductor had to ask Plessy his race before he was arrested for being in the "wrong" car. The Committee of Citizens hoped that the Supreme Court would rule in favor of Plessy, for surely this state law that mandates segregating train passengers according to race was a violation of the civil rights clause of the Fourteenth Amendment. But the Supreme Court upheld the law as constitutional, arguing that no civil rights clause violation had taken place because the passengers were all treated equally, albeit in a segregated fashion. This reasoning became known as the **separate but equal doctrine** and was the rationale to officially sanction segregation for the next six decades. Justice John Marshall Harlan was the lone dissenter; he argued that, "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." His argument did not carry the day, and the precedent set by *Plessy* allowed separate but equal to characterize American life. Chapter 68

pluralism: American politics is marked by a rich diversity of organized interests. Pluralism is the theory that allows ordinary Americans to be free to start or join any organized interest groups with the intent that their respective wishes will be translated into government policy. The theory being that a variety of possible interests makes for a more-or-less level playing field. Chapters 3; 45

plurality of votes: In the United States' winner-take-all, single-member district voting system, the most votes out of those cast are called the plurality of votes. Chapter 44

political advertising: This can involve everything from yard signs to YouTube ads, from radio spots to micro-targeted messages on social media. Chapter 41

political advertising types: The following are several political advertising types that candidates use to get their message out. **Negative campaign ads** seek to associate an opponent with events or actions that are portrayed as horrendous in the extreme. **Backfire ads** use the words and images of the opponent against them. Candidate's **biography ads** are sentimental and often sappy reviews of the candidate's life. Ads featuring **endorsements** by average folks or celebrities present the viewer with real people who praise and/or endorse the candidate. Chapter 48

political appointee: Cabinet-level agencies are headed by a Secretary—Secretary of Labor, Secretary of State, Secretary of Defense, and so on—who is a **political appointee**, meaning that they are appointed by the president and confirmed by the Senate and that they are expected to carry out the president's program with respect to the agency. Similarly, the agency leadership's top layer are also political appointees, with titles like Assistant Secretary, Deputy Assistant Secretary, General Counsel, and so forth. Chapter 38

political efficacy: Formal education tends to promote what is known as political efficacy, or a person's belief that she can influence public policy through her political behaviors, like voting, demonstrating, donating to candidates, and organizing collectively for action. Chapter 56

political imagination: Political imagination is our ability to envision new and creative ways to make the political system work for ordinary people and to ask "What if" questions. Chapter 1

political participation; attend a demonstration: A moderately active form of political participation is to attend a demonstration for a cause in which you believe. Political demonstrations' effects range from inconsequential to earth shaking. A good demonstration broadly raises the publics' awareness of a cause, making the news and bringing the issue to people who may never have considered that the issue was even a problem. When thousands or tens of thousands or millions of people gather in one location or in cities and towns across the country or world, that tells other people and politicians that the issue is salient. For every person who attends the demonstration, typically there are many more who think the same way. Politicians pay attention to that show of support. Chapter 58

political participation; attend a townhall meeting: A form of political participation is to attend a townhall meeting, which is an open forum where lawmakers give a speech and answer questions from the audience. A **tele-townhall meeting** is an online or conference call meeting with more restricted participation. Some politicians only hold tele-townhall meetings because they are afraid to fully defend their positions to their constituents. Check your politician's website for information about upcoming meetings or call the staff in the local office. The Townhall Project can connect you with events, and it keeps track of congressional members who do *not* meet with their constituents. The Townhall Project encourages you to organize an **empty chair townhall meeting** and invite your congressional member to fill that chair. If they don't come, have the meeting anyway and educate the attendees about the congressman's voting record. Chapter 58

political participation; organize: A form of political participation is to get together with like-minded people and organize yourselves into a group that can exert more influence. **Join an already existing organization**. Get to know people in your local or state chapters, and work on meaningful projects. There are myriad state and national-level political organizations working to influence public debate, organize protests, lobby legislators, and make life better for millions of Americans. When you have extra money, donate some to that organization. If not, give your time. If an organization doesn't exist that specifically addresses your political interest, start a **new**

organization. The Internet and social media can be great resources in this regard. This is not slacktivism. This is using the connectivity afforded us by modern technology to organize people and to communicate a common purpose. Chapter 58

political participation; political parties: G**et involved with a political party or campaign:** Getting involved with a political party or campaign offers myriad ways for you to get involved in politics, such as volunteering, certifying the accounts, putting up yard signs, being a county-level leader, or staffing a phone bank. Parties need a cadre of long-term volunteers who can be counted on for a variety of projects and initiatives over time. Volunteers help develop networks and deepen the party's resources. R**un for political office**. People do it often. It can be an extremely valuable and empowering experience. Volunteering is also a great way to gain experience before you run for office. There are websites and books that can guide you through the process. Chapter 58

political participation; write op-ed pieces for publication, tips: When writing your op-eds, keep them short. Make one central point. Write one sentence that strongly addresses your central point. Make this be the first sentence or two. Tell readers why they should care. Offer *specific* recommendations. Use the active voice. Showing is better than discussing. Acknowledge the other side. Make your ending a winner. Chapter 58

political participation; write to an elected official, tips: To write to an elected official, look at the website for your Congress members and find the contact form, which will allow you to paste your text and submit your letter. Keep it brief. State w*ho you are* and w*hat you want up front*. Hit your three most important points. Personalize your letter. Personalize your relationship. Be courteous, to the point, and firm. Spell-check your letter before sending it. Chapter 58

political parties provide candidates with expertise and data: The **benefits of** political parties are that they provide candidates with expertise and can hook them up with consultants and make mailing lists and past election results available to them. Chapter 41

political program: Responsible party government needs parties that develop a political program which is a set of policies on issues facing the country. This program should be prominent and well-publicized, because voters vote for the party that best advances their interests. Voters can't do that if the parties are unclear about their political program. The party also must be strong enough to carry out the program once it is in power. The party must be able to control its own politicians sufficiently to guarantee that the program will be translated into bills that can pass the legislature and become policy. When parties have sufficient power and coherence to translate political programs into policy, voters can easily see which party is responsible for what policies, and this is essential information as they head into the voting booths. Voters reward politicians from the party they support and punish the politicians from the party they oppose. Chapter 41

political socialization: This means the process by which people acquire their political attitudes, beliefs, opinions, and behaviors, which include four areas: 1) it is in part a hard-wired component of our personality; 2) conservatives and progressives have an innate difference in threat perception; 3) conservatives have a higher tolerance for ambiguity and a lower tolerance for disorder than progressives; 4) progressives see fairness as accessing basic resources, and conservatives see fairness as getting what one deserves based on effort. Chapter 56

politicized partisanship: This refers to a highly politicized time with respect to the federal judiciary. Congressional partisanship has not only led to contested nominations, but it has spilled over into the judiciary, such that battles lost in Congress manifest themselves as wars in the federal courts. It is also clear that **Republicans have been particularly aggressive and successful in packing the courts with conservative judges**. This is accomplished via the following three mechanisms: 1) **Creating a conservative judicial strategy:** In recent decades Republicans have been far more unified and strategic with their approach to the federal

judiciary than have Democrats; *2)* **stalling judicial nominations; 3) rushing nominations through the judicial approval process.** Chapter 33

polity: A political organization, which includes individuals, groups, corporations, unions, politicians, and so on. Chapter 1

poll taxes: A poll tax is a fee one must pay to vote. The Twenty-fourth Amendment effectively outlawed poll taxes, which Southern states had passed early in the 1900s primarily to suppress blacks and poor people from voting. Chapter 49

popular demand: The federal government has grown by popular demand because the people have demanded that it solve real problems. Chapter 12

pork barrel spending: The phrase, "bringing home the bacon," is related to pork barrel spending. The practice of congressmen dipping into the national treasury to fund local projects came to be known as them dipping into the pork barrel, and the name and the practice have continued ever since. Chapter 22

positive relationship: In using the scientific method to make observations, positive relationship is the value of one variable increasing along with the value of another variable. Chapter 4

post hoc ergo propter hoc: In making an argument, this fallacy is often used and literally means "after this, therefore because of this." We assert that A caused B simply because A preceded B. Chapter 5

power elite: This the theory that a relatively small and wealthy class of individuals largely gets its way. According to this theory, the power elite either are the decision-makers, or they so influence the decision-makers that the elites get their way most of the time. Elite theory highlights the power of organized business and military interests combined with the affluent strata of society and points to many government policies that lavish benefits onto them. Business interests create interlocking and overlapping connections that reinforce their position and allow them to control the political system. Chapters 3; 45

power of seniority and experience: The power of seniority and experience applies to campaigns in which an upstart challenger is up against a congressional veteran incumbent who stresses the importance of his seniority and experience in Washington. This is a powerful argument because it is true that seniority in Congress results in more power, better committee assignments, and greater ability to get bills passed, or the greater ability to stop unfavorable bills. All this power can translate into a larger voice for the state or district being represented by the incumbent. Chapter 55

power, political: In politics, power is the struggle over resources, rights, or privileges: the struggle for who gets what. Chapter 2

precedent: When the Supreme Court makes a definitive ruling on a matter of law, that decision sets a precedent for other courts to follow in subsequent cases. **Two caveats apply to precedent-power in lower court decisions.** 1) The case at hand must be similar enough to the one that set the precedent. 2) A later Supreme Court can always decide to change precedent by overturning a previous Supreme Court's decision. Chapter 31

preclearance: The **Voting Rights Act of 1965** was designed to shore up a weakness of the Civil Rights Act, which was that it was insufficient in defending the right of all people to vote regardless of race. One section of the Voting Rights Act that was originally passed in 1965 required that states with a documented history of voting discrimination receive "preclearance" from the Justice Department or the United States District Court in Washington, DC, before implementing changes to their election laws. This applied heavily to mostly Southern states that had worked overtime for nearly a century to deny voting rights to African Americans. The purpose of

preclearance was to ensure that states would not revert to election practices that overtly discriminated or that had discriminatory effects. Chapters 35; 68

Pregnancy Discrimination Act (1978): In 1976, the Supreme Court ruled that discrimination against pregnant women was not a form of sex discrimination that was forbidden by the Civil Rights Act of 1964 because not all women are pregnant. Congress responded in 1978 and passed the Pregnancy Discrimination Act, which banned discrimination "on the basis of pregnancy, childbirth, or related medical conditions" in medium- and large-sized companies. Chapter 69

presidential elections: The American president is not elected by the people. Instead, presidents are elected by the Electoral College. Popular vote does not determine who sits in the White House. The electors' vote is determinative. It is difficult to call a country's political system fully "democratic" when majority vote does not select the president. Chapter 19

presidential signing statements: These are written statements that presidents have issued when they sign a bill into law. Regarding **unitary executive theory,** the president can go beyond merely executing the law, he can execute the law as he interprets it. Chapter 29

Presidential Succession Act of 1947: This act has been amended several times. This law spells out the succession order if the president and vice president are both killed or otherwise incapacitated. Chapter 26

President of the Senate: One of the vice president's few formal powers is to be the President of the Senate, which is mostly a formality. The vice president isn't even allowed to participate in Senate debates. As President of the Senate, vice presidents only have two formal Senate roles that are meaningful: they preside over the electoral college vote-counting, which takes place in a joint session of Congress, and the vice president can cast a tie-breaking vote if one is needed in the Senate. Chapter 26

Priestly, Joseph (1733-1804): The American founders were sympathetic with the arguments of Joseph Priestly, codiscoverer of oxygen and a founder of Unitarianism, and **James Burgh**, a Scottish minister and political writer, both of whom wanted the English **Test and Corporation Acts** to be repealed. Burgh wrote, "Away with all foolish distinctions about religious opinions. Those with different religious views are both equally fit for being employed in the service of our country." Chapter 17

primary: This is an election before the general election in which people vote for one of several possible nominees. Chapter 50

primary goal of a political party: The primary goal of a political party is to determine government policies by having its candidates win elections and become decision makers. Chapter 41

prior restraint: The Court has interpreted freedom of the press to mean that government should not be able to engage in what is known as prior restraint, which is when the government prevents publishing something that it finds to be objectionable or illegal. The most famous case involving this principle was ***New York Times v. United States* (1971).** Chapter 64

privileges and immunities (Article IV, section 2): This article states that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause meant that as free men and women traveled out of their state, other states were obligated not to discriminate against them with respect to civil rights. But the nondiscrimination terms were set by the state being visited. In the late nineteenth century, the Supreme Court begin **incorporating the Bill of Rights protections** using the Fourteenth Amendment's **due process clause** instead of the privileges and immunities clause. The due process clause says that states may not "deprive any person of life, liberty, or property, without due process of law." Chapters 15; 63

probable cause: Probable cause is the standard used when judges issue warrants or when police operate in what are known as exigent circumstances. **Reasonable suspicion** is a lower standard than probable cause. In ***Terry v. Ohio* (1968),** the Supreme Court ruled that police may stop and frisk people on the street if they have a reasonable suspicion that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use anything they find in court. Chapter 66

professional conferences: These are conferences **where scientists present their findings to their peers** and where they challenge each other, share new ideas and data sets, and develop common research interests around which they can collaborate. Chapter 4

Progressivism: This philosophy holds that the truth is real and that we are on a never-ending journey towards it. Chapter 6

progressivism: The terms liberalism, progressivism, social-welfare liberalism, and democratic-socialism all hang together even though those group's adherents don't necessarily agree with each other. This includes democratic socialists but **does not include** true socialists whose aim is to dismantle capitalism. Chapter 35

project grants: These are a type of categorical grant and are open on a competitive basis. They often require an elaborate application process. Many entities such as state governments, city governments, and colleges employ people to draft grant applications. Chapter 15

property qualifications: That a person needed property qualifications to vote was a practice that America inherited from England, where these restrictions had been in place since the Middle Ages. The idea behind property qualifications restrictions was that only men who freeheld enough property could be determined to be independent, which means not dependent on others as women, servants, slaves, free blacks, children, and others were. By being independent, they simultaneously possessed a stake in society. Chapter 49

Proposition 8: California's Proposition 8 was a ballot initiative that passed with 52 percent of the vote in 2008 to amend the California state constitution to forbid gay marriage. The proposition was upheld by state courts but challenged in federal courts. In 2010, a federal district court ruled that Proposition 8 was an unconstitutional violation of the Fourteenth Amendment's due process and equal protection clauses. The state of California refused to participate in this decision's appeal, so the case, *Hollingsworth v. Perry (2013),* was appealed to the Supreme Court by the original private proponents of Proposition 8. However, the Court ruled on technical grounds that the private proponents of Proposition 8 did not have standing to bring the appeal, and that decision left in place the lower federal court's ruling that Proposition 8 is unconstitutional. Both *Hollingsworth v. Perry (2013)* and *United States v. Windsor (2013)* were decided by narrow 5-4 decisions. Chapter 70

pseudo-event: A pseudo-event is an event that exists solely to generate media coverage and has little or no substance of its own. Chapter 48

public interest groups: These groups are also known as good-government groups; they claim to represent America's broad interests. Some of these interest groups include Common Cause, the Center for Public Integrity, Citizens Against Government Waste, Citizens for Responsibility and Ethics in Washington, Public Citizen, and the Center for Responsive Politics. Chapter 45

public opinion poll, public opinion survey, and survey research: These terms are used interchangeably to mean scientifically rigorous solicitations and aggregations of individual political views. Chapter 56

public policy, issue salience: Four conditions are the most important for allowing ordinary Americans' opinions to influence public policy. "Policy tends to move in the same direction as public opinion most often when the opinion change is large and when it is stable, which means it is not reversed by fluctuations." Large

and stable shifts in public opinion can result in public policy change. "Similarly, policy congruence [with public opinion] is higher on salient than on non-salient issues." **Issue salience** refers to its prominence in the public sphere—are people talking about it, are they writing about it on news sites, is the issue important to many people? A third condition is the intensity with which people hold their opinions. If a significant enough plurality of people holds very intense opinions about an issue—e.g., gun rights, abortion, or civil rights—that translates into letters to Congress, votes on election day, demonstrations, and other forms of political behavior that can move elected officials to act. The fourth condition that determines whether public opinion can influence policy is whether elites are divided about the issue. When elites are divided on a salient political issue, at least one side of that division has an interest in enlisting public opinion as an argument for why their side of the policy debate should win. Chapter 56

push poll: This poll combines a survey with biased information designed to get the results the sponsoring organization or candidate is looking for. A push poll is a form of negative advertising in the guise of a survey. Push polls have been denounced by all legitimate survey research organizations. Chapters 7; 56

Q

qualitative evidence: In making an argument, qualitative evidence means words, such as political speeches, national constitutions, journalists' and commentators' writings, interviews with average people, behavior observations, historical events, and so forth. Chapter 6

quantitative evidence: In making an argument, quantitative evidence means numbers, such as voting statistics, campaign finance figures, public opinion survey results, government revenue and spending, economic data, and so forth. Chapter 6

question's wording: In conducting survey research, the question's exact wording must be published when you see a public opinion poll cited in the media; if you don't, you should be suspicious and look for the original survey so that you can check the wording. Chapter 7

R

racial or religious covenants: A form of housing discrimination was called restrictive racial or religious covenants, which were agreements entered into between buyer and seller that restricted the future sale of the property to only certain kinds of people. The Supreme Court ruled against these kinds of covenants in 1948, but it was very difficult to enforce the Court's ruling until the Fair Housing Act passed in 1968. Chapter 68

random sample: In conducting survey research, because it is not feasible to survey large populations, the researcher instead selects a random sample out of the larger population and gives them the survey. Chapter 7

ranking-list questions: In conducting survey research, ranking-list questions present the respondent with an items-list and asks him or her to rate the item's importance. Chapter 7

reapportionment: Every ten years, the Census figures out how many people are in the United States and where they are living, forcing the reapportionment of the 435 House of Representative seats. Some states gain House seats after reapportionment, and some states lose them. Each time that happens, the district boundaries are redrawn. Chapter 53

reasonable suspicion: In ***Terry v. Ohio*** **(1968),** the Supreme Court ruled that police may stop and frisk people

on the street if they have a reasonable suspicion that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. Reasonable suspicion is a lower standard than **probable cause**, which is the standard used when judges issue warrants or when police operate in what are known as exigent circumstances. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use in court anything they find. Chapter 66

red herring: Like the straw man fallacy, in making an argument, we commit the red herring fallacy when we bring up a nonrelated issue to make our case. Chapter 5

Red Republicans (1854): Many early Republicans were so progressive that they were referred to as Red Republicans. They pledged to fight the "twin relics of barbarism"—slavery and polygamy. Early Republicans had a vision of America as a land free not only from slavery, but from **wage slavery** as well, meaning the business of exploiting laborers for-hire. They celebrated autonomous workers, primarily independent farmers and the self-employed, and feared the power of capitalists, regardless of whether they were plantation owners in the South or factory owners in the North. Chapter 42

Red Scare: This term refers to a hyped fear of socialists and communists and a movement to silence their voices and any progressives or leftists. Elites were terrified at the prospect of a successful social and political revolution in the United States. Three years following the 1917 Russian Revolution, government leaders created a Red Scare and went after socialists. Aided by the Espionage and Sedition Acts of 1918, "Hundreds of Socialist leaders and other radicals were convicted of sedition and antiwar activities, and party newspapers across the U.S. were suppressed and barred from the mails." Another Red Scare took place from 1947 to 1957 and is most closely associated with Republican **Senator Joseph McCarthy** from Wisconsin. Earlier, in 1940, Congress had passed the **Smith Act**, which made it a crime to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States or of any State by force or violence, or for anyone to organize any association which teaches, advises or encourages such an overthrow, or for anyone to become a member of or to affiliate with any such association." In 1947, Democratic **President Harry Truman** issued **Executive Order 9835**, which established loyalty oaths for government employees. The House Un-American Activities Committee issued subpoenas and hauled people in to testify about their political affiliations or to rat out their co-workers and colleagues. Thousands of people—from blue-collar union workers to Hollywood stars and writers—lost their jobs. McCarthyism had a chilling effect on people advocating leftist ideas such as universal healthcare. Chapter 65

reductive fallacy: In making an argument, we commit this fallacy when we try to address complex issues with simple solutions. For example, someone might say that the key to solving poverty is to "make lazy people work." Chapter 5

register to vote: The final state-level reform that affects today's politics is the requirement that citizens register to vote sometime prior to election-day. Chapter 50

regulatory capture: This is an issue with respect to the federal agency's ability to fully serve the public interest, which happens when wealthy corporations, industrial sectors, and financial interests are able to use their close relationships with executive agencies to get them to work for their interests rather than those of ordinary Americans. Chapter 39

relativism: This philosophy posits that there is no ultimate truth, so there is no basis to reject one argument in favor of another. Chapter 6

religion, establishment clause, free exercise clause: The First Amendment's treatment of religion occurs in a phrase called the establishment clause because it restricts Congress' ability to legislate regarding "an

establishment of religion." The second phrase, "or prohibiting the free exercise thereof," is referred to as the free exercise clause. Chapter 65

religious expression: To mobilize conservative voters over a false issue, some on the far right have argued that the Court has indeed banned prayer from public schools. The Supreme Court has not banned prayer or other religious expression from public schools. There are **forms of religious expression that are and are not allowed in public schools**. Chapter 65

Religious Freedom Restoration Act of 1993 (RFRA): This Act was designed to reverse the *Employment Division v. Smith (1990)* decision and other restrictions on religious practice. In the *Smith decision*. the Court ruled against Native Americans who had been fired and denied state unemployment benefits because they used peyote as part of an off-duty religious ceremony. The RFRA prohibited state and federal governments from limiting a person from exercising their religion unless it was in the government's compelling interest to do so and unless the regulation in question is the least restrictive way to achieve the government interest. Chapter 65

remarkable similarities: The Democratic and Republican parties show remarkable similarities on numerus policies including mass incarceration, governmental and private sector population surveillance, and a campaign finance system that puts corporations and the wealthy in the driver's seat. Chapter 43

***Reno v. ACLU* (1997):** In this case, the Court unanimously struck down the Communications Decency Act because the law would require that the Internet only carry information suitable for children. Quoting one of its earlier decisions, the Court said, "The level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." In 1996, Congress passed the **Communications Decency Act,** and President Clinton signed it into law. The law made it a federal crime to knowingly transmit to a minor—or post on a web site where a minor might visit—any obscene, indecent, or patently offensive picture or text. Many groups immediately sued, and the American Civil Liberties Union carried the case. Chapter 64

reporting out: Reporting out is one of the stages that standing committees go through when writing legislation. If the committee votes to approve a bill, it is reported out to the main chamber along with a report describing the bill and its rationale. The bill's supporters and opponents can include their views in the report. Chapter 22

representation: Congressional representation is closely related to the legislative role. Congressmen are elected to represent their constituents' interests. Chapter 21

Republican Party: In the mid-1850s, northern Whigs joined some antislavery Democrats and members of the antislavery Free Soil Party to create the modern Republican Party. Chapter 42

research and data gathering: Once a Federal agency has been given statutory authority to regulate a given issue, the first step is usually research and data gathering, which means that the agency researches the current state of the problem, the solutions, and the costs. This research and data gathering stage of the rule-making process can take years of careful study before a sound regulation can be written. Chapter 38

respondent: The **petitioner** is the person or group who brings the case or the appeal to court, and the respondent is the person or group who answers. Chapter 31

responsible party government theory: This theory posits a mechanism that is fundamental to the operating a democracy, namely, that public preferences are translated into governing policy and that there is a continual process for the public to hold those policy-makers accountable when their wishes are not followed. Chapter 41

revolving door: The phrase, "**government-to-lobbyist revolving door,"** is often just shortened to the "revolving door," which refers to when people move from government positions in the legislative and executive branches

to positions within the industries that need to be regulated for the public good. This is a problem with respect to congressional members as well as political appointees and civil servants in executive branch agencies leaving public service to lobby for wealthy industries. Chapter 39

revolving door, three ways the government-to-lobbyist revolving door threatens the government's integrity: 1) Public officials may be influenced in their official actions by the implicit or explicit promise of a lucrative job in the private sector with an entity seeking a government contract or to shape public policy. 2) Public-officials-turned-lobbyists will have the access to lawmakers that is not available to others, access that can be sold to the highest bidder among industries seeking to lobby. 3) The special access and inside connections that former officials-turned-lobbyists have to sitting government officials comes at a hefty price tag; wealthy special interests who can afford to hire such revolvers are provided with powerful means to influence government, which is unavailable to the rest of the public. Chapter 39

***Reynolds v. United States* (1878):** In this case, a man named Reynolds was married to more than one wife, which was part of his religious beliefs. Even though plural marriage was part of Reynolds religious beliefs, the Supreme Court upheld a federal law banning polygamy. This case was particularly important because the Court made the distinction between religious beliefs, which the government could not regulate, and religious practices, which the government could regulate. Without this distinction, the Court argued, people could hide all sorts of outrageous and/or dangerous behavior behind the curtain of religion. Chapter 65

right to counsel: The Sixth Amendment provides that criminal defendants have a right to counsel for their defense. Chapter 63

rise of the national security state. Much of the executive/presidential power's growth can be attributed to what scholars and critics refer to as the **rise of the national security state**. This concept suggests that the exigencies of protecting the United States from real or imagined external enemies inflates the power of the military, the intelligence agencies, and the internal security agencies—all of which are directed by the president. The founders feared this sort of development because it inevitably eroded democracy and the civil liberties they cherished; they continually warned against a large standing army in peacetime. Chapter 29

***Roe v. Wade* (1973):** In this case, the Supreme Court granted women a fundamental right to terminate an unwanted pregnancy in the first trimester. The ruling granted progressively greater state power to regulate abortion in the second trimester, and even more state control in the third trimester. Chapter 69

Roosevelt, President Franklin (1882-1945); New Deal: The 1932 election brought Democrat Franklin Roosevelt to power, and his administration used government's power to alleviate suffering, regulate the economy, and put people back to work. The overall policy is known as the New Deal, which included such features as Social Security, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, the Civilian Conservation Corps, and the Works Progress Administration, among many others. Chapter 42

Roosevelt, Franklin; "fireside chats": An early twentieth century development that changed the news media forever was the radio. By the 1920s, radio was becoming commonplace and had an immediacy and presence that newspapers couldn't replicate. Politicians could speak directly to people, unmediated by journalists and newspaper editors. The most effective early use of radio was Franklin Roosevelt's "fireside chats," which began in 1933 and ran to 1944. These broadcasts helped him explain his policies and decisions directly to millions. Chapter 47

***Rucho v. Common Cause* (2019):** The Supreme Court has thus far decided to sidestep the issue of partisan gerrymandering. In 2019, it reviewed a challenge to a Democratic gerrymander in Maryland and a challenge to a Republican gerrymander in North Carolina. In a narrow decision along ideological lines, the Court ruled

that the issue was out of its hands. Writing for the five conservatives on the Court, Chief Justice John Roberts said in *Rucho* that partisan gerrymandering presents "political questions beyond the reach of federal courts." In her blistering dissenting opinion, Justice Elena Kagan wrote, "The partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. Of all the times to abandon the court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government." Chapter 53

rulemaking: The first important task of federal agencies is rulemaking, which refers to creating new regulations and revising existing regulations. The rulemaking process is governed by the Administrative Procedure Act, which was originally passed in 1946. Once the research and data gathering stage is finished, the Act requires the following steps: **publish planning documents, engage stakeholders, write and publish a regulatory proposal, accept public comment, and publish the final rule or regulation.** Chapter 38

rule of four: The most common way to appeal to the Supreme Court is to petition for a *writ of certiorari,* which is a formal request to review a lower court's decision. Such petitions are governed by an informal rule of four, whereby four or more justices must agree to take the case. Chapter 31

rule of law: This phrase refers to the related ideas that no one is above the law, that all of us are equally subject to the laws that we collectively make together, and that decisions are reached by following pre-established procedures. It is a cherished ideal that people around the world have struggled to achieve and one that authoritarian leaders seek to undermine. It is essential that citizens demand that elected and appointed office holders as well as government staff uphold the rule of law in all that they do. Chapters 29; 38; 61

Rules of the House: This is a document that is passed in a new congressional term's first week that expresses how the majority party wants to conduct business. Chapter 22

runaway slaves (Article IV, section 2): This article states that "No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to who such Service or Labour may be due." This is one of three places in the Constitution that refers to slaves and slavery without using those words. This clause not only forbid Northern states from freeing a slave who had fled from the South, it pledged to give the slave back to his/her master if the master came to claim the slave. Chapter 15

S

sacrifice zones: America's economy is characterized by regional booms and busts, and many locations around the country have become, in journalist Chris Hedges' words, "sacrifice zone**s** for America's brand of exploitative capitalism, places where the project of endless exploitation of natural resources and human labor manifests itself in the form of agricultural fields where laborers endure near slave-like conditions to produce cheap food for American tables; fulfillment centers crammed with low-wage workers, and robots process cheap goods for American front porches; and abandoned industrial centers where jobs disappeared over the horizon to places with lower wages and fewer regulations." Chapter 67

safe seat: Many House races are uncompetitive because of the incumbent's financial advantages and because many districts have been gerrymandered to produce safe seats for one party or the other. A safe seat is one that is securely in the hands of one party as long as that party puts forward a reasonable candidate. Candidates in safe seats win with 67 percent or more of the vote in the district. Chapter 55

Salt March, 1930: Mohandas Gandhi's most famous act of defiance was the Salt March of 1930. The British

had imposed laws against Indians collecting or selling salt and imposed a tax that fell heavily on poor Indians. Gandhi walked for twenty-four days over 240 miles from his home to the coast where he broke the law by gathering salt from evaporated seawater. Gandhi was named *Time* magazine's Man of the Year in 1930. India and Pakistan gained independence in 1947. Gandhi was assassinated in 1948 by Hindu nationalist Nathuram Godse, who did not like Gandhi's tolerance of Muslims. Chapter 64

Sand Creek Massacre: In November 1864, a group of Arapahoe and Cheyenne camped along Sand Creek in eastern Colorado, thinking they were under the protection of soldiers at Fort Lyon. Instead, Major Scott Anthony and Colonel John Chivington planned an attack on the peaceful encampment. Captain Silas Soule, Lieutenant Joseph Cramer, and Lieutenant James Connor protested, saying that "It would be murder in every sense of the word" and a violation of pledges of safety that had been given to the tribes. The Sand Creek Massacre was a war crime, pure and simple. The encampment set no watch and was attacked by 700 soldiers at first light while its occupants slept. The cavalry, led by Chivington, killed 133 people, 80 percent of whom were women and children. Many were scalped or otherwise brutalized. Chapter 65

Sanger, Margaret (1879-1966): Sanger was a New York City nurse who ministered in the 1910s to poorly housed, poorly paid women who wanted to regulate their family size. She defied the law to educate women about contraception. In 1914, Sanger distributed her pamphlet, *Family Limitation, which* led to an arrest warrant, so she fled to Europe to avoid prosecution. In 1916 after charges were dropped, she returned to continue her work advocating birth control into the 1950s. The birth-control movement was rejected by the medical establishment. Oral contraceptives were developed in the 1960s, which revolutionized sexual relationships by giving women greater choices and control over whether and when to have children. States continued to try to limit access to birth control devices. The Supreme Court ruled in ***Griswold v. Connecticut*** **(1965)** that married couples had a right to privacy with respect to reproductive issues, thereby striking down a Connecticut law that forbade anyone from selling contraceptive devices or instructing anyone on their use. Chapter 69

Saturday Night Massacre, 1973: This phrase refers to how President Richard Nixon tried to cover up his agents breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Archibald Cox was serving as the independent special prosecutor in the case. Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson resigned rather than carry out the order. Nixon then ordered Deputy Attorney General William Ruckelshaus to fire Cox. Ruckelshaus also refused to do it and resigned instead. Then, Nixon asked Solicitor General Robert Bork to fire Cox, and Bork complied. Chapter 30

scab: This term refers to a worker—often one who was unemployed or who had no prior connection to a company—who is willing to cross a picket line and work. Chapter 60

scapegoating: This term refers to improperly placing blame on a person or group for bad things that have or are happening, either to fit a political narrative or to displace blame from the real culprit. Chapter 61

Schenck v. United States **(1919): The clear and present danger doctrine** came out of *Schenck v. United States*. This doctrine held that speech is not protected by the First Amendment if it clearly endangers the lives, health, and property of others, or the national security of the United States. In the *Schenck* case, socialists were prosecuted for distributing flyers during World War I that encouraged men to avoid service in the army. The Court upheld their prosecution because it considered their actions to be a threat to American national security. In his opinion, Justice Oliver Wendell Holmes argued hypothetically that someone could not shout "Fire!" falsely in a crowded theater, and then hide behind the First Amendment. That kind of utterance imperils the lives of others as well as the theater owner's property, because the crowd will stampede to get out. The clear and present danger standard essentially still applies, although the Court does not explicitly rely on it. Note that it refers to speech that is essentially lawful, but that in certain contexts crosses the line. If the theater really is on fire, shout "Fire!" Or, pull the fire alarm. Chapter 64

Schlesinger, Arthur Jr (1917-2007): In his classic 1973 book, *The Imperial Presidency, Schlesinger* warned that the growth of presidential power—particularly in response to national security concerns—threatened to warp the country's constitutional fabric. The book was especially timely given the Nixon administration's abuses, but its theme has continued to resonate to the present. Chapter 29

school to prison pipeline: This pipeline refers to the way in which students are identified as struggling or disruptive in school and funneled out of schools to juvenile detention and criminal justice systems. The school to prison pipeline affects young black and brown people more than it does whites. Facing disproportionately more suspensions, expulsions, and arrests in schools, and often excluded from honors or college-track courses, black and brown students are more likely to enter juvenile justice systems, which further limits their opportunities, often resulting in their incarceration as adults. Chapter 60

Scientific-Humanitarian Committee (1897): One of the first organizations dedicated to promoting gay and lesbian equality was the Scientific-Humanitarian Committee founded in 1897 by Magnus Hirschfeld in Berlin. This committee dedicated itself to removing **Paragraph 175** from Germany's legal code, which penalized male homosexuality: "A man who fornicates with another man or lets himself be so abused will be punished with imprisonment." Chapter 70

scientific method: The scientific method is a systematic, logically driven process used to gather information and make conclusions about natural and social phenomena. Chapter 4

scope: The federal government's scope is the range of things that it does. Some, but not all categories include social welfare, war-making, diplomacy, justice and law enforcement, commerce, fiscal and monetary issues, infrastructure, and human services, to name a few. Chapter 37

Second Bill of Rights: In 1945, President Franklin Roosevelt gave his last state of the union speech in which he called for a Second Bill of Rights that would have guaranteed employment with a living wage, adequate housing, medical care, social security, and a good education. Chapter 35

second dimension of power: The power of mobilization of bias is described as the second dimension of power. Mobilization of bias that exists in the political system being analyzed are "the dominant values, the myths, and the established political procedures and rules of the game" as well as "which persons or groups . . . gain from the existing bias and which . . . are handicapped by it." Chapter 2

secular compact: This is the understanding that in an orderly society, the state guarantees people freedom to believe or not believe whatever they want, and in exchange, all citizens agree to limit their religious practices to those that do not violate the law or disrupt society. People can believe whatever he or she wants but can only act on those beliefs that don't hurt others or destabilize society. Chapter 17

secularism's advantages: Religion, atheism, and agnosticism all tend to thrive in secular republics, perhaps because secularism separates state authority from the dominant religion and all sects equally. Chapter 17

Sedition Act of 1798: Congress passed, and President John Adams signed the Sedition Act, generally considered to be a great threat to the United States free press. This Act was basically a case of Federalist politicians attempting to stifle the voices of opposition newspapers. Chapter 47

Senate elections: In the original Constitution, senators were not popularly elected. Instead, the founders wanted senators chosen by their respective state legislatures. Thus, the Senate was doubly insulated from the popular will. This defect was remedied in 1913 when the Constitution's Seventeenth Amendment was ratified, which said that senators would henceforth be "elected by the people" of each state. Chapter 19

Senate Majority Leader: This Senate Majority Leader is elected by the majority party and schedules and manages all the Senate's business. It is a powerful position. Chapter 22

Seneca Falls Convention, 1848: This convention was the creation of **Lucretia Mott (1793-1880)** and **Elizabeth Cady Stanton (1815-1902).** Eight years earlier, Mott and Stanton attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations, but the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women watched the proceedings from the balcony. That experience helped convince them that women, as well as slaves, needed emancipation. Chapter 69

Seneca Falls Declaration, 1848: This was the first national call for women's suffrage. The Seneca Falls Declaration was modeled after the Declaration of Independence, asserting that, "All men and women are created equal," and leveled a series of charges against men, such as they have denied women the right to vote, the right to own property, education, employment opportunity, and that women are held to a different moral standard than men. Organizations like the National American Women Suffrage Association employed tactics such as petitions, marches, speeches, court cases, debates, picketing at the gates of the White House, and prison hunger strikes. The White House gate protest involved over 5,000 women during its two-year run and has been described as "the first high-visibility nonviolent civil disobedience in American history." Chapter 49

separate but equal doctrine: In 1890, the Louisiana legislature passed the Separate Car Act requiring that all trains operating in the state be segregated by race and forbidding people from "going into a coach or compartment to which by race he does not belong." On June 7, 1892, Homer Plessy was arrested after he purchased a first-class ticket on the East Louisiana Railroad train running from New Orleans to Covington, Louisiana, and took a seat in a car reserved for whites only. Plessy, a married shoemaker whose heritage was African and French, was one-eighth black. Press accounts of the time indicate that the train conductor had to ask Plessy his race before he was arrested for being in the "wrong" car. The Committee of Citizens hoped that the Supreme Court would rule in favor of Plessy, for surely this state law that mandates segregating train passengers according to race was a violation of the civil rights clause of the Fourteenth Amendment. But the Supreme Court upheld the law as constitutional, arguing that no civil rights clause violation had taken place because the passengers were all treated equally, albeit in a segregated fashion. This reasoning became known as the **separate but equal doctrine** and was the rationale to officially sanction segregation for the next six decades. Justice John Marshall Harlan was the lone dissenter; he argued that, "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." His argument did not carry the day, and the precedent set by *Plessy* allowed separate but equal to characterize American life. Chapter 68

separate sovereigns doctrine: A notable exception to the double jeopardy protection concerns is the separate sovereigns doctrine, which means that the federal government state governments are separate units under our federal system. Therefore, state governments and the federal government can prosecute you separately for the same crime. Chapter 66

separation of powers: The U.S. Constitution is organized according to a principle known as the separation of powers. John Locke argued for the separation of the legislative and executive powers, and in ***The Spirit of the Laws*** (1748) the **Baron de Montesquieu** similarly argued that governmental power could be divided into three types and that they ought to be separate. **Legislative:** Congress, the power to make law. **Executive**: Presidency, the power to enforce law. **Judicial:** the Supreme Court, the power to interpret law, both generally and in cases. The separation of powers provides two beneficial results. 1) It tends to slow legislation down; democracy requires time for deliberation, argumentation, and compromise. 2) It helps avoid tyranny; a government of separated powers is structurally unresponsive to large, sudden changes in popular will and can stay afloat even though

tyrannical leaders take over one branch. Presumably, the other two institutions would stand up for liberty. Chapters 13; 19

Seventeenth Amendment (1913): This changed the Senate selection process by having the people directly elect senators. Chapter 24

shared sovereignty: The U.S. Constitution created the first modern federal system. Up until 1787, the political philosophy of shared sovereignty, which is the federal ideal that states and the central government would share authority over the same territory, hadn't previously been considered. Chapter 15

***Shaw v. Hunt* (1993):** After passing the 1965 Voting Rights Act, several states practiced "affirmative gerrymandering," or designed districts intended to elect members of racial minorities to the House. In *Shaw v. Hunt* (1993) and then ***Miller v. Johnson* (1995),** the Supreme Court decided that race could not be a predominant factor in creating election districts. Chapter 53

Shays' Rebellion, 1786-87: In Massachusetts, farmers unable to make payments on their property and bitter that they were faced with increased taxes and scarce money due to the state legislature's policies in Boston, Massachusetts, did what they were supposed to in a republic: they peacefully petitioned the state legislature for redress. As historian Joseph Ellis has written, "The ultimate irony of Shays' Rebellion is that what began as a rural protest against centralized government actually ended up strengthening the advocates for a new U.S. Constitution, which consolidated political power at the federal level in precisely the fashion that the rebels regarded as a betrayal of the American Revolution." Chapter 12

***Shelby County v. Holder* (2013):** In this case, Shelby County, Alabama, sued the U.S. Attorney General, arguing that the **preclearance** provision was unconstitutional. Preclearance refers to one section of the **Voting Rights Act** that was originally passed in 1965 and required that states with a documented history of voting discrimination receive "preclearance" from the Justice Department or the United States District Court in Washington, DC, before implementing changes to their election laws. This applied heavily to mostly Southern states that had worked overtime for nearly a century to deny voting rights to African Americans. The purpose of preclearance was to ensure that states would not revert to election practices that overtly discriminated or that had discriminatory effects. In the *Shelby* case, the conservative justices on the Court agreed with *Shelby County* in a 5-4 decision and said that the preclearance provision was out of date and unconstitutional. Combined with the Court's disinterest in the negative effects of restrictive state voting laws, *Shelby County* has signaled that the Court will allow a variety of attempts to reduce the number of minorities, college students, and poor people from exercising their voting privileges. This opened the gates for many Republican-led state legislatures to pass without Justice Department review onerous voter I.D. laws that fell heaviest on the poor, the elderly, and people of color. Writing in dissent, Justice Ginsberg argued that "Throwing out preclearance because it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." A study by the Brennan Center for Justice found that states that had previously been required to preclear their voting law changes, purged voters off their election rolls at a significantly higher rate than other states in the wake of the *Shelby County decision.* In 2016, for the first time in twenty years, the black voter-turnout rate dropped in a presidential election. Chapters 35; 68

Sheridan, General Philip (1831-1888): Sayings such as U.S. General Philip Sheridan's "The only good Indians I ever saw were dead," typified the culture of the colonists. Pushed to ever marginal lands and reservations, the way of life of one tribe after another changed forever. As the invaders took the lands of Native Americans by theft, deception, and treaty, they also took steps to establish property rights and the rule of law for themselves and their descendants in the Wild West. Chapter 65

shield laws: Many states have shield laws that protect journalists from having to reveal their sources, but the

federal government does not. In 2005, *New York Times* reporter Judith Miller was jailed by a federal court for eighty-five days for refusing to reveal her sources in a story about the Bush Administration, which revealed the name of CIA operative Valerie Plame. Chapter 64

Sinclair, Upton (1878-1968): Sinclair was a freelance journalist and **muckraker** commissioned by *Appeal to Reason* to write a series about exploiting factory workers and their hardships. He focused on the meatpacking industry in Chicago and wrote a serial novel about it. The novel, published as *The Jungle*, described the life of meatpacking industry workers through the character of Jurgis Rudkos and his family, as they experienced corruption, injury on the job, unsanitary work conditions, jail, and homelessness. Sinclair, a Socialist, was disappointed that the public focused on the poor quality and unhealthy meat-packing process instead of on the laborers' poor working and living conditions. The publication of *The Jungle* did add fuel to the movement to pass the Pure Food and Drug Act of 1906. Chapter 47

single-issue groups: These are groups that tend to concentrate on one issue or one area of public policy. For example, the Sierra Club, the National Rifle Association, the NARAL Pro-Choice America, and the National Right to Life Committee. The narrow focus of these groups tends to attract highly motivated members, which can help the group maintain its power and role in the political system. Members are called upon to donate money, write emails to congressmen, and show up at demonstrations. Chapter 45

single-member districts. In such a system, a single person represents each electoral district for the House or Senate and gets that distinction by receiving the most votes of those cast, even if he did not receive the majority votes. Chapter 44

Sixth Amendment (1791): The Sixth Amendment provides that **i**n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. Chapter 66

size of the federal government; spending: One way to put the federal government's size in perspective is to see how much it spends relative to the overall size of the American economy, and also how its spending compares to that of state governments. Since the 1970s, federal government spending has hovered **between 20-24 percent of Gross Domestic Product**—the total value of goods and services produced in the United States in one year. According to the Treasury Department, in 2019, the federal government spent about $4.4 trillion and took in about $3.5 trillion in revenue. Chapter 37

slacktivism: The *Cambridge Dictionary* defines **slacktivism** as "activity that uses the Internet to support political or social causes in a way that does not need much effort, for example by creating or signing online petitions." Slacktivism feels good because you get to add your voice to potentially thousands of other people whom you've never met. The Internet and social media have sorted people into like-minded groups who speak to each other, share news stories of interest to each other, and serve as the same insular audience for online petitions and boycott drives. There is a preaching to the choir effect in slacktivism. Slacktivism "does not lead to increased meaningful support for social causes." Chapter 58

slate of electors: Sometime prior to the November election, each party with a presidential candidate on the ballot will select a **slate of electors** who are pledged to vote for that party's nominee. Chapter 51

Snyder v Phelps (2011): In this gut-wrenching hate speech case, the Supreme Court ruled in favor of Westboro Baptist Church whose members picketed funerals of U.S. servicemen and women, carrying signs that said, "You're Going to Hell," "Fag Troops," and "*Semper fi* Fags." Chapter 64

social class: This refers to a group of people in a society with similar levels of income, wealth, education, and type of job. Chapter 59

social contract: This is a philosophy where the people agree to certain government-enforced restrictions on their liberties in exchange for a measure of security. Chapter 11

social desirability bias: Polling can sometimes be undermined by social desirability bias, which is "the concept that people won't tell pollsters their true intentions for fear of being stigmatized or being politically incorrect." Chapter 56

societal density and complexity: Governments expand in the United States and virtually everywhere depending on the density and complexity of the society. The earliest political states organized within dense people-groupings who engaged in the radically complex, up to then, practice of growing food and domesticating animals. For thousands of years, government size has reflected the types of societies they governed: While agrarian societies were vastly more socially dense and complex than hunter-gatherer life, they pale in comparison to the scale and complexity of the industrialized and urbanized societies that developed in America after the Civil War. In 1880, 50 percent of the American population worked on farms, but by 1920, only 25 percent did. Also, by 1920, most Americans lived and worked in urban centers. According to the Census Bureau, the American population exploded from 50 million in 1880 to 106 million in 1920. Chapter 37

Society for Human Rights: In 1924, **Henry Gerber** formed the Society for Human Rights in Chicago, which was the first gay rights group in America. The Society set out to publish a journal and make connections with European gay rights groups, but its leaders were quickly arrested and prosecuted by Chicago police. The cost of defending himself at three separate trials bankrupted Gerber, even though the charges were ultimately dismissed. He lost his job at the Postal Service, and the Society didn't survive its leaders' prosecution. Chapter 70

Sodomy: The American colonists followed the precedent of their English cousins and outlawed sodomy, by which they meant all forms of nonprocreative sex, whether by individuals, heterosexual couples, or homosexual couples. Over time, laws against sodomy were used more against homosexual activity, and specifically, anti-gay laws also went into effect. Chapter 70

soft money: Soft money originally referred to contributions to political parties that were supposed to be used for "party building measures," but instead, were used to help elect candidates. Parties were not supposed to use soft money to directly help individual candidates, but in the 1990s, both parties violated the law, especially in presidential races, and used the money for candidates' campaign commercials. Because there are no limits on soft money contributions, corporations began to flood the parties with soft money. **Soft money** now refers to largely unregulated independent expenditures by parties and organized interests to support or oppose candidates. Chapter 54

solicitor general: Despite whether the U.S. government is the petitioner or the respondent, the solicitor general handles the case; this is a Justice Department position dedicated to this function. Chapter 31

Solid South: The Democrats maintained a stronghold in the South and strong support among Northern-city Catholic immigrants and small Mid-western farm owners. Later, the South became known as the **Solid South** because Democrats dominated there until after the mid-1960s when Republicans began to rise. Chapter 42

sortition: This refers to drawing lots, where we get the term lottery, and so means selecting our members of Congress by some sort of random process that resembled a lottery. In ancient Athens, magistrates, members of the Boule (council), and jurists were chosen via sortition. Chapter 55

sound bite: The **incredible shrinking** sound bite in politics is a short selection of what a candidate or sitting

politician says in a speech or interview. Media editors use their judgment to select such clips to represent what they believe to be the politician's most important or relevant point. Chapter 48

Southern Strategy: Beginning in the 1960s, Republicans pursued what most people call the Southern Strategy—a conscious and largely successful attempt to capture the South by playing on white's fears of the Civil Rights movement. The Southern Strategy was really a broader strategy linking the South with suburban and rural areas across the United States, aimed at white fears of racial integration, urban crime, and economic insecurity. Chapter 42

Speaker of the House: This is Congress' preeminent leadership position. In the House of Representatives, the Speaker of the House is elected by the majority party and serves as both the House's partisan and administrative leader. Chapter 22

Spin: This term refers to the biased portrayal of events that is designed to favor one set of interests over another. Spin happens in any mass communication setting, including political communication. Chapter 48

Spiritualism: This is the doctrine that the spirit exists as distinct from matter and is the only reality. Spiritualists argue that the spiritual world governs the material and is essentially unknowable except through faith and revelation. Chapter 11

split-ticket voting: This type of voting is when you divide your votes among different parties for different offices. For example, you might vote Democratic for president and Republican for representative. The prevalence of split-ticket voting peaked in the early 1970s and has steadily declined since as the two major political parties polarized. Chapter 50

spoiler candidate: The so-called Green spoiler candidate can pull enough votes away from the Blue candidate to ensure that Red wins the seat. Chapter 44

spoils system: This is a system where winning political parties stock the bureaucracy with their own people. A spoils system contrasts with what is known as a merit system. Chapter 38

standing committees: These are called such because they persist over time and do much work in Congress. The **Speaker of the House** refers bills to a standing committee. Or, the Senate majority and minority leaders negotiate between themselves to decide who refers a bill to a standing committee. The House of Representatives has twenty standing committees and the Senate has sixteen. And, there are about a dozen joint committees in both chambers, such as the Joint Taxation Committee, or there are select committees, such as the Select Intelligence Committee. Most standing committees are organized around topics such as agriculture, defense, foreign relations, taxation, and so on. Committees, in turn, are divided into subcommittees. Chapter 22

Stanton, Elizabeth Cady (1815-1902): American feminist Stanton, along with **Lucretia Mott,** created the Seneca Falls Convention in 1848. Eight years earlier, Mott and Stanton attended the World Anti-Slavery Convention in London as representatives of American abolitionist organizations, but the mostly male delegates refused to allow the female delegates seats. Due to that snubbing, the two women watched the proceedings from the balcony. That experience helped convince them that women, as well as slaves, needed emancipation. Chapter 69

stare decisis: The Supreme Court decides relatively few cases per year. Their decisions carry weight due to the principle of ***stare decisis***, which literally means "to stand by that which is decided." Lower courts must make decisions that are consistent with similar cases' past decisions. Chapter 31

state courts: The state court system is where most U.S. cases occur, for example, people on trial for murder,

rape, robbery, burglary, embezzlement, fraud, civil lawsuits, and so on. These cases can go straight through the state court system and on to the Supreme Court, but that is not a common path. Chapter 32

State of the Union Address: The State of the Union Address is given by the President before a national television audience. The president addresses a joint session of Congress in January or February, accentuates his administration's accomplishments, and argues for measures he would like Congress to pass. Chapter 27

state organization: The larger political parties have a state organization in each of the fifty states. State party organizations have become more institutionalized professional organizations in the last several decades. Still, state and local parties rely on countless volunteer work. Chapter 41

***status quo*:** This means "the situation as it is now" in any given realm. Chapter 8

statutory interpretation: This means that the Supreme Court authoritatively defines ambiguous words and phrases in federal laws as they apply to specific controversies between litigants. Once the Court has defined such a word or phrase, that interpretation becomes binding on all lower courts should future disputes arise. Chapter 34

Steffens, Lincoln (1866-1936): Steffens, a **muckraker,** was an editor and writer for *McClure's Magazine*, where he wrote a series of investigative reports called "The Shame of the Cities" and "The Shame of the States," focusing on political corruption and efforts to fight it. Chapter 47

Stonewall Rebellion, 1969: The watershed event in the history of the American gay liberation movement is the Stonewall Rebellion. The Stonewall Inn was a gay bar in Greenwich Village, New York. Eight police officers raided the inn after midnight on June 28, 1969. This was not an unusual occurrence, but on that night, the police met considerable resistance from Stonewall patrons and others in the neighborhood. More police arrived, beating protesters, who, in turn, were throwing bottles and rocks. Eventually, hundreds of police officers were battling a few thousand protesters. The rioting lasted three nights. This was the first time that numerous homosexuals resisted police action, and it energized and revitalized an already-forming national gay-liberation movement. Activists founded new groups such as the Gay Liberation Front and the Gay Activists Alliance and employed traditional political tactics such as marches, demonstrations, strikes, boycotts, lobbying, campaigning, and fund-raising. Chapter 70

straw man: In making an argument, a fallacy called the straw man tactic involves distorting an opponent's position by stating it in an oversimplified or extreme form, and then refuting the distorted position instead of the real one. Chapter 5

strict scrutiny: The First Amendment to the U. S. Constitution says that "Congress shall make no law…abridging the freedom of speech, or of the press. But this does not mean that you are free to say or print anything you want and remain protected by the First Amendment. The **clear and present danger doctrine**, which came out of ***Schenck v. United States* (1919),** holds that speech is not protected by the First Amendment if it clearly endangers the lives, health, and property of others, or the national security of the United States. However, the Supreme Court often applies a standard known as strict scrutiny to cases where government attempts to restrict overtly political or ideological speech. This means that limiting speech is presumptively unconstitutional unless the government can show that the law is narrowly tailored to achieve a compelling government interest. Chapter 64

strict voter-identification laws: Allegations of voter fraud, which is not a real problem, are often used as a reason to implement strict voter-identification laws. In principle, there's nothing wrong with ensuring that the person who is casting a vote is the person he says he is and is eligible to vote. The question is whether the onus

is on the person or on the state. Some states require potential voters to prove their identification. These are almost always states with Republican majorities in state legislatures and/or Republican governors. Chapter 52

strike busting: This term refers to when workers resort to strikes because corporate owners will not negotiate or make concessions on wages or working conditions. In the nineteenth century and early twentieth century, companies often used their own guards or hired outsiders to beat and harass strikers. They hired what striking workers called **scabs** to break strikes. Chapter 60

***Stromberg v. California* (1931**): A controversial area of free speech case law surrounds **symbolic speech**, which we define as nonverbal or nonwritten behavior or symbols that convey a political viewpoint. Since the 1930s, the Court has recognized the right of Americans to engage in symbolic speech. In this case, the Court struck down a California law that banned displays of red flags targeted at Socialists and Communists. Chapter 64

substantive laws: These are laws that make a change in federal law or that authorize spending taxpayer dollars. Chapter 21

substantive representation: This is about whether representatives advance the policy preferences that serve the interests of the represented. Chapter 20

Sullivan Test: In ***New York Times v. Sullivan* (1964**), the Court announced guidelines that the public figure needs to establish in court if s/he is to win a libel case. In that case, the *New York Times* was sued in an Alabama court by a police commissioner named Sullivan who claimed that an advertisement taken out by the Committee to Defend Martin Luther King had libeled him by implication. The Supreme Court ruled in favor of the *New York Times* and said in what is known as the Sullivan Test that the victim must show: 1) that the information printed about them was false, 2) that the publisher either knew it was false or the statements "were made with a reckless disregard for the truth," 3) the information was written due to malice, and 4) publication of the inflammation damaged the victim. The Court set the standard high to avoid public officials being able to escape public criticism by threatening lawsuits against newspapers and magazines. Chapter 64

superpower: Following World War II, the United States was a **superpower**, a nation-state able to project military, economic, and cultural power across the globe. Its only rival from 1945 to 1991 was the Soviet Union, and the United States under both parties pursued an aggressive policy of trying to contain and push back against perceived communist advances around the world. Even beyond the U.S.-Soviet rivalry, America took on the role of the world's policeman. Chapter 43

supply-side economics: Democrats and Republicans generally subscribe to two different economic policies. Conservatives tend to be advocates of what is known as **supply-side economics**. Supply-siders argue that economic growth is best promoted by lowering tax rates on wealthier individuals and corporations. The primary assumption of supply-side economics is that the recipients of these tax breaks will invest their extra money to expand existing businesses and create new ones. This, in turn, will put more people to work, and the workers will spend their paychecks to purchase goods and services. Chapter 43

supremacy clause in Article VI: This clause means that states could not nullify and destroy legitimate exercise of federal authority. This clause eliminates any doubts that the power balance in the new federal system would be tilted in the central government's favor: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Chapter 13

Supreme Court: The paths to the Supreme Court are conditioned by its jurisdiction. Jurisdiction refers to the scope or mandate of a court, such as w*hat* kinds of cases it can it hear and *how* it hears them. The Supreme

Court has the broadest jurisdiction of any federal court, but its mandate is divided into its original and appellate jurisdictions. **Original jurisdiction** refers to those cases that are heard first in the Supreme Court. Chapter 32

Supreme Court and election money: The Supreme Court has stricken down many attempts to reign in money in American elections: ***Buckley v. Valeo* (1976)** Overall campaign spending, personal spending on one's own campaign, and independent expenditures cannot be capped. ***FEC v. Wisconsin Right to Life*** (2007) The government cannot stop outside groups from spending on political advertising in the period before an election. ***Citizens United v. FEC (2010)*** The government cannot place limits on the amount of outside spending, and corporations can spend directly to support or oppose campaigns. ***Arizona's Free Enterprise Club's Freedom PAC v.* Bennett (2011)** Public financing systems cannot use escalating matching funds. ***American Tradition Partnership v. Bullock* (2012**) The Court struck down Montana's ban on corporate spending on state elections that dated back to 1912. ***McCutcheon v. FEC* (2014)** A donor's overall spending on federal campaigns cannot be capped. Chapter 54

Supreme Court appeals: Supreme Court cases come on appeal, but the Court is under no obligation to hear all appealed cases. The most common way to appeal to the Supreme Court is to petition for a *writ of certiorari,* which is a formal request to review a lower court's decision. Such petitions are governed by an informal **rule of four**, whereby four or more justices must agree to take the case. If the rule of four condition is met, then the Supreme Court issues a ***writ of certiorari***—an announcement that the court is taking a case as well as an order to the lower court to send up the case's records. Since *certiorari*, is difficult to pronounce, people normally say or write that "cert has been granted," or "cert has been denied" by the Court. Normally, a petitioner must pay a fee and meet paperwork requirements to petition for a writ of certiorari, but indigent petitioners can file ***in forma pauperis***, which waves the fee and many of the paperwork requirements. Congress has recently tightened regulations regarding in forma pauperis petitions. Chapter 31

Supreme Court nominations: Justices who sit on the Supreme Court and make enormously significant decisions about the constitutionality of state and federal laws and regulations are insulated from the popular will. They are nominated by the president, who may or may not be in office due to the will of the people and are approved by the undemocratic Senate. Further, they hold their seats for life. Chapter 19

surveillance capitalism: The very notion of privacy undermines the insatiable corporate need for our private information, and our political leaders have allowed this to happen. Author Shoshanna Zuboff describes our predicament as surveillance capitalism: "a new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction, and sales." Reflect on the fact that your labor is worth something to corporations; they must pay for it if they want to produce value, but almost all the information about you is freely available to corporations who buy and sell it between themselves, aggregate it, and compile it to expand their profits. Chapter 67

survey, legitimate: A legitimate survey must follow two simple rules regarding the population samples about which they want to make a statement. The survey must be based on a **random sample** drawn from the population about which you wish to make a statement. Survey researchers go through several practices to ensure that the people they contact are truly random. All people in the population need to have an equal chance of being in the sample. Above all, pollsters want to avoid **selection bias**, which is when some members of the population who have particular characteristics have an increased or decreased chance of being sampled. Chapter 56

swing states: The Electoral College forces presidential campaigns to focus on swing states, which are states that are narrowly balanced between Republicans and Democrats, so they could go either way. Swing states are competitive states; they are also referred to as battleground states. The winner-takes-all principle means that it

is smart for presidential campaigns to devote considerable resources to getting every possible popular vote in those states because even a slim victory results in winning all that state's electors. Chapter 51

symbolic speech: Symbolic speech is defined as nonverbal or nonwritten behavior or symbols that convey a political viewpoint. Since the 1930s, the Court has recognized Americans' right to engage in symbolic speech. Chapter 64

T

Tammany Hall: For a time, urban political machines were key power centers in American politics, particularly for the Democratic Party. Tammany Hall dominated New York City politics for much of the nineteenth century, providing immigrants with food, coal, patronage jobs, and a decidedly Democratic political orientation. Chapter 41

Tarbell, Ida (1857-1944): A **muckraker**, Tarbell investigated the Standard Oil Trust for *McClure's Magazine* and wrote a series of articles in 1902-03 exposing the secret bookkeeping, bribery, sabotage, conspiracy, and other machinations of the Standard Oil monopoly. Chapter 47

tax compliance costs: This refers to the time, accountants, software, lawyers, and other expenses that individuals, families, nonprofit organizations, and businesses need to complete their taxes. Chapter 37

Telecommunications Act of 1996. The congressmen who voted for this law, and President Clinton, who signed it, promised that it would create more media competition, more diversity, lower prices for things like cable service, and more jobs in the media and telecommunications industries. According to Common Cause, however, the law brought the public "more media concentration, less diversity, and higher prices." Chapter 48

Tenure of Office Act of 1867***:*** Congress passed this act in 1867, which said that the president could not remove the holders of any appointed positions unless the Senate concurred. Chapter 30

Terry v. Ohio **(1968):** In this case, the Supreme Court ruled that police may stop and frisk people on the street if they have a **reasonable suspicion** that the person has committed a crime, is in the process of committing a crime, or is about to commit a crime. Reasonable suspicion is a lower standard than **probable cause**, which is the standard used when judges issue warrants or when police operate in what are known as exigent circumstances. The Court also ruled that even if police do not have reasonable suspicion to stop and frisk someone, if that person has an outstanding warrant, police can use anything they find in court. Chapter 66

Test and Corporation Acts (Corporation Act 1661; Test Act 1673)**:** These acts prohibited all non-Anglicans from holding office in England. The American Revolution and the writing of the Constitution happened during the same period as a fight in England against the Test and Corporation Acts. Chapter 17

Texas v. Johnson **(1989):** At the 1984 Republican National Convention in Dallas, Texas, Gregory Johnson was arrested for burning a U.S. flag while making a speech condemning the Reagan administration. He filed suit, claiming his freedom of speech was violated. In a narrow 5-4 decision, the Supreme Court agreed with Johnson and ruled that flag burning is protected by the First Amendment as a form of symbolic speech. Chapter 64

textualism: This term refers to the desire to rely on the plain meaning of words when interpreting federal law. Textualism puts a burden on the legislature to be clear when writing bills so that there will be no ambiguity when that statute is applied by the executive branch. Chapter 34

theoretical perspectives: These are concepts, definitions, and a body of well-developed scholarly literature developed over time. Chapter 4

thermometer-scale questions: In conducting survey research, these questions are called "feeling thermometers" because they are usually used to probe the respondent's affect toward a certain subject or person. Chapter 7

third dimension of power: The power of shaping a person's perceptions is described as the third dimension of power. Chapter 2.

Thomas, Justice Clarence (1948-): The Court has worked to empower corporations with the kind of freedom of expression traditionally reserved for natural persons, and corporations are taking full advantage of the leeway granted to them by the conservative majority. Justice Thomas firmly asserted in his concurring opinion in ***44 Liquormart, Inc. v. Rhode Island* (1996)** that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" Many scholars applaud this view. Chapter 64

Thomas, Justice Clarence (1948-) Confirmation Hearing: In 1991, President George H. W. Bush appointed Clarence Thomas to replace Supreme Court Justice Thurgood Marshall who had retired from the Supreme Court due to failing health. An important point to note is that while both justices are African American, Marshall was a prominent liberal with an historically long progressive interpretation of the Constitution. Thomas was an up and coming conservative originalist. Thomas' Senate confirmation hearings became a national television event. Anita Hill, who had worked for Thomas when he led the Equal Employment Opportunity Commission (EEOC), accused him of pestering her for dates, sexually harassing her, and creating a hostile workplace environment replete with crude references to sex and pornography. Keep in mind that the EEOC is charged with investing federal sexual harassment cases. The Republican Senators who went after Hill in the hearing showed how out of touch they were on sexual harassment issues. Thomas was approved by a 52-48 vote. Chapter 33

Thoreau, Henry David (1817-1862): In 1846, Henry David Thoreau coined the term civil disobedience in his essay called *On the Duty of Civil Disobedience*. Political philosopher John Rawls defined **civil disobedience** as "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government." Thoreau's essay *On the Duty of Civil Disobedience* has been one of the most globally influential pieces of political writing by an American who wasn't a politician. Disgusted with slavery and the war with Mexican, which he saw as an unjust attempt to extend slavery to new territory, Thoreau refused to pay his Massachusetts poll tax and spent a night in jail. He said that prison was "the only house in a slave-state in which a free man can abide with honor." His friends paid his tax without his consent and he was released. When his friend Ralph Waldo Emerson asked him why he had gone to jail, Thoreau reportedly replied "Why did you not?" Chapter 59

Three-fifths Compromise, 1787: A dispute related to state representation: If a state's population determined House of Representative seat numbers, the question whether to count slaves or not became an important issue. The three-fifthscompromise resolved the dispute to the South's advantage. Essentially, one slave would be counted as three-fifths of a person. Chapter 13

Three Forms of Political Violence; Johan Galtun (1930-): Swedish sociologist Johan Galtung made important contributions to our understanding of political violence by describing **three forms of violence** that can characterize any political system. Galtung referred to direct violence as a discrete *event*, structural violence as a *process*, and cultural violence as a *permanence* that legitimized and rendered acceptable the other two. **Direct violence** refers to a specific destructive act by a definable actor that limits the bodily or mental potential of the

persons who are the object of the act. Murder, rape, assault, torture, and verbal abuse have physical as well as mental effects. American history has been rife with direct violence: assassinations, bombings, lynching, riots, military campaigns, and the like. **Structural violence** refers to the same limitations of bodily or mental potential, but that result from the way political, social, or economic systems are organized, instead of via direct action by a specific individual or group. Often, there is no readily definable actor in structural violence, but people are nevertheless being hurt, killed, or mentally anguished. It's called structural violence because violent outcomes appear to be built into the structure of the system; people are hurt *because* the system operates the way it does. For example, when one husband beats his wife there is a clear case of personal [direct] violence, but when one million husbands keep one million wives in ignorance, there is structural violence. Correspondingly, in a society where life expectancy is twice as high in the upper class as in the lower classes, violence is exercised even if there are no concrete actors one can point to directly attacking others, as when one person kills another. **Cultural violence** refers to cultural symbols of religion, ideology, language, art, and science that can be used to justify or legitimize direct or structural violence. Chapter 60

Thunberg, Greta (2003-); Climate Strikes, 2018: Greta Thunberg**,** 16-year-old Swedish student, started boycotting school on Fridays to call attention to the climate emergency. Her action blossomed into a worldwide #FridaysForFuture movement. Millions of students in 117 countries have participated in multiple iterations of this form of protest. The goal of the movement is to "Sound the alarm and show our politicians that business as usual is no longer an option." As if to show the students how clueless politicians were, British Prime Minister Theresa May criticized the protesters and said that each demonstration "increases teachers' workloads and wastes lesson time." When Thunberg was asked to speak at the United Nations Climate Action Summit in 2019, she stuck to her values and made the crossing from Sweden to New York by sailboat rather than jet plane. Chapter 59

Tillman Act of 1907: The U.S. has a long history of trying to regulate money in politics. The **Tillman Act of 1907** banned corporations from making direct campaign contributions, and this prohibition was extended to unions in 1943. Over time, laws and court decisions have created confusing rules and allowances. Generally, the U.S. divides campaign finance into hard money and soft money. Chapter 54

Tinker v. Des Moines School (1969): During the Vietnam War, the Court confronted the issue of symbolic speech again when students in Iowa protested the war by wearing black armbands to school. The students were peaceful and did not disrupt classes, but the school board had banned wearing armbands to head-off the students' protests. Several students sued when they were suspended for wearing the armbands, and the Court ruled that such peaceful symbolic speech was protected even for minors. Chapter 64

tolerance: This is a willingness to accept behavior and beliefs that are different from your own, although you might not agree with or approve of them. Chapter 61

Trail of Tears, 1838-1839: Up to 100,000 indigenous men, women, and children were removed from their lands in Tennessee, Georgia, and Alabama and forced to march during the winter of 1838-39 to new lands west of the Mississippi River. About half of the Cherokee, Muskogee, and Seminole perished along the way, and about 15 percent of the Chickasaws and Choctaws also died during the march. Chapter 60

treaty power: In foreign affairs, the president has treaty power, or the ability to negotiate and sign formal agreements with other countries. Chapter28

Triangle Shirtwaist Factory Fire, 1911: The first major female-led labor strike took place in 1909-1910 among low-paid garment workers in New York City. The strike collapsed when male garment workers went back to work in 1910. The next year, a massive fire broke out at the Triangle Shirtwaist Company. Because management had

locked the fire escapes, 146 workers, mostly women, perished in the blaze. The Triangle Shirtwaist Factory Fire was a watershed in both the women's movement and the worker-safety movement. Chapter 69

Trump, President Donald (1946-): In late 2019, the House of Representatives impeached Trump on a party-line vote because a whistle-blower came forward with a claim: Trump's months-long conspiracy to use his office and taxpayer resources for his personal political benefit to get Ukraine to announce that it sought to investigate Democratic presidential candidate Joe Biden. Trump refused to release any relevant documents—except a summary of two calls between Trump and the Ukrainian president—or to allow any administration personnel to testify to the House Intelligence Committee about the matter. **The house passed two articles of impeachment**: 1) Abuse of power by soliciting foreign interference in the 2020 election and compromising the national security of the United States. 2) Obstruction of Congress by the categorical and indiscriminate defiance of lawful Congressional subpoenas for information and testimony in an impeachment investigation. All Republicans except for Senator Mitt Romney (R-UT) voted "not guilty" on both articles of impeachment, and all Democrats voted "guilty" on both articles of impeachment—a result that fell far short of the two-thirds vote needed to remove Trump from office. **Two legacies of the Trump impeachment** are likely to have long-term consequences. The first centers on the Trump administration getting away with obstructing a congressional inquiry. Republican senators seemed not to care about Congress' institutional need to have Trump or any future president honor its subpoenas for documents and testimony. Alan Dershowitz, one of Trump's lawyers, said on the floor of the Senate that "Every public official that I know believes that his election is in the public interest. If a president does something which he believes will help him get elected in the public interest, that cannot be the kind of *quid pro quo* that results in impeachment." This was an astounding argument that lacked any support in the scholarly or judicial record. According to this line of thinking, a president could exercise his legal authority to declassify national security secrets for another country in exchange for that country's help with his re-election. It is a way of thinking that subsumes the national interest of the United States underneath the personal political interest of the president. Chapter 30

trustee: This is a representative who is directed by his or her own judgment rather than their constituents' views. This can be politically risky if the politician votes in direct opposition to what the majority of his or her constituents want. Chapter 21

Twelfth Amendment (1804): The Twelfth Amendment altered the way electors cast ballots for the president and vice president. In the original Constitution, electors cast two ballots, and the person who got the most votes became president while the person with the next most votes became the vice president. Today, presidents and vice presidents run on a ticket together. Chapter 26

Twenty-fifth Amendment (1967): When a sitting vice president becomes president, she nominates someone to be vice president. According to the **Twenty-fifth Amendment,** that nominee needs both the House and the Senate majority approval. The Twenty-fifth Amendment also has two provisions that deal with presidential incapacity. First, the president can inform the President Pro Tempore of the Senate and the Speaker of the House that he is unable to fulfill the powers and duties of the office. In an additional section of the Twenty-fifth Amendment, the vice president and a cabinet majority can inform the President Pro Tempore of the Senate and the Speaker of the House that the president is unable to fulfill the powers and duties of the office, and then the vice president would become the Acting President. Chapter 26

Twenty-fourth Amendment (1964): In 1964, sufficient states ratified the Twenty-fourth Amendment, which states that "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." This effectively outlawed **poll taxes**, which Southern states had passed early in the 1900s primarily to suppress poor people from voting. Chapter 49

Twenty-second Amendment (1951): In 1951**,** the Twenty-second Amendment came into effect. It states that "No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." Chapter 25

Twenty-sixth Amendment (1971): The final national-level expansion of the right to vote happened in 1971 when the Twenty-sixth Amendment was ratified. This amendment set a national voting age at eighteen. The Vietnam War was raging, and the campaign for the Twenty-sixth Amendment argued that if people were old enough to fight, they were old enough to vote. When the Twenty-sixth Amendment was submitted to the states, it was ratified in a record 100 days, the fastest of any constitutional amendment. Chapter 49

two-party system: Because of the two major parties' dominance, political scientists classify the United States as a two-party system, even though we have many political parties.Chapter 44

two primary mechanisms: Corporate dominance operates through two primary mechanisms. One is by participating in the political system very much as people do. The second mechanism is the cultivation of fear, for fear breeds conservative responses. Chapter 45

typology: A smart beginning to conducting any political analysis is to organize information into a typology. This is a visual device that allows you to systematically classify types that have common characteristics. Use a basic typology to sort things by how they score on two important dimensions. Chapter 7

U

unanimous consent agreement: Regarding a bill, senators must first agree on debate rules, called unanimous consent agreements, which set a debate time, a debate time limit, and may limit the amendments allowed. To be accepted, however, a unanimous consent agreement requires all 100 senators to agree to those debate rules—and that might not happen. Chapter 22

unicameral: At the national level, the government under the Articles of Confederation had no president or supreme court, as we understand them today. The central institution was a unicameral, meaning a one-chambered Congress in which each state has one vote. Nine of the thirteen states needed to consent for most congressional actions, and amendments to the Articles required unanimous congressional approval. Chapter 12

Uniform Congressional District Act: Gerrymandering has long been a problem in American politics. It stems from a few basic historical facts. 1) the Constitution mandates that the number of House seats a state receives be apportioned based on population. 2) The Apportionment Act of 1842 requires that congressional districts be compact and contiguous and that states with enough population be split into more than one single-member district. In 1967, Congress passed the Uniform Congressional District Act that mandated single-member House districts. Now, every ten years the Census figures out how many people are in the United States and where they are living, forcing the **reapportionment** of the 435 House seats. Some states gain seats in the House of Representatives after reapportionment, and some states lose them. Each time that happens, the district boundaries are redrawn. Chapter 53

unitary executive theory: Proponents of this theory argue that the president has broad inherent powers that are implied by the Constitution's executive authority vestment with the presidency. The president, these theorists argue, can act without legislative authorization and is virtually without check in the realm of national security. The theory also holds that the president can go beyond merely executing the law, he can execute the law as he interprets it. Chapter 29

unitary system: Historically, confederacies tend not to survive, either because they are defeated by external enemies or because they fragment internally. A unitary system is the opposite of a confederal system, in that the central government is very powerful relative to the states. Often, the states exist merely as central government administrative units with little autonomy to conduct their own policies. Most world governments today are unitary. Chapter 12

***United States v. Nixon* (1974):** This case established that while President Richard Nixon had the right to confidentially record conversations with his advisors, executive privilege did not extend to refusing to turn over records pertinent to a criminal proceeding. The Supreme Court ruled against Nixon, a decision that sealed his presidency's fate because the tapes were damning. But it also gave some credence to the executive-privilege idea. Nixon resigned the presidency on August 9, 1974, just before the full House had a chance to vote on accepting three articles of impeachment, which they did, and the House impeached him. Chapters 29; 30

United States v. Windsor (2013): In this case, the Court invalidated those portions of the Defense of Marriage Act that denied federal benefits to same-sex marriage partners. *The New York Times* summarized the case this way: two New York City women, Edith Windsor and Thea Clara Spyer, married in 2007 in Canada. Ms. Spyer died in 2009, and Ms. Windsor inherited her property. The federal law did not allow the Internal Revenue Service to treat Ms. Windsor as a surviving spouse, and she faced a tax bill of about $360,000, which a spouse in an opposite-sex marriage would not have had to pay. In a 5-4 decision, the progressive justices pulled Justice Anthony Kennedy onto their side, and the Court ruled in favor of Ms. Windsor. The Defense of Marriage Act's provisions regarding the federal definition were declared unconstitutional. Chapter 70

unit rule: In every state except Maine and Nebraska, electors are awarded according to a unit rule, meaning that the candidate whose slate has the most votes, even if it is not a majority, gets all the electors. The unit rule means that in forty-eight states, the Electoral College is a winner-takes-all situation. Chapter 51

untestable claim: In conducting scientific, empirical, formalized methodologies, an untestable claim is a theory that cannot be refuted, meaning that it is not falsifiable through any observation or experiment. Chapter 4

V

***Valentine v. Chrestensen* (1942): Commercial speech** refers to when corporations speak to potential consumers about products and services. This sort of advertising is not political speech. As David Schultz wrote for the First Amendment Encyclopedia, for much of American history corporate commercial speech "had been subject to significant regulation to protect consumers and prevent fraud," and courts had generally upheld such regulations. In *Valentine v. Chrestensen,* the Court ruled that unlike political speech, which is presumptively constitutional and difficult for government to regulate, "the Constitution imposes no such restraint on government as respects purely commercial advertising." Chapter 64

variable: A concrete concept that we can measure. Chapter 4

Veterans Benevolent Association, 1945: This association formed in New York in 1945 and attempted to secure G. I. Bill benefits for homosexual veterans who had been dishonorably discharged. It failed. Chapter 70

veto, pocket veto, and regular veto: The word "veto" is Latin for "I refuse." When Congress sends a bill to the president, he can sign the bill, and it becomes law. If the president does not sign the bill, it will become law anyway after ten working days. If Congress happens to adjourn in the ten-day period, the president must consider the bill. If the president does not sign the bill, this is called a **pocket veto**. Also, a president can veto a bill by sending it back to Congress with a veto message about why it should not become law. This is called

a **regular veto**. Congress can override a regular veto with a two-thirds vote in both chambers. One important difference between a regular veto and a pocket veto is that Congress cannot override a pocket veto. Chapter 27

voter fraud: Voter fraud occurs when a voter intentionally corrupts the electoral process resulting in distorting the "one-person, one-vote" principle. Voter fraud is a federal crime, punishable by heavy fines and the possibility of jail time. Chapter 52

voter good character clauses; voter literacy tests; poll taxes: Despite the Fifteenth Amendment passing in 1870 guaranteeing the right to vote regardless of race, Southern Democrats regained control over state legislatures and undertook several measures to keep blacks from voting. A form of discrimination was literacy tests. Potential voters were required to take an often-subjective "test" of their literacy, their knowledge of the federal or state constitution, or their knowledge of completely arcane bits of information. Literacy tests were combined in some cases with good character clauses in which people needed to be certified as being of good character to register to vote. Poll taxes were also used to discourage blacks from voting. Chapter 68

voter grandfather clauses: Before the Fifteenth Amendment passed in 1870, these clauses automatically registered anyone white whose male ancestors were eligible to vote. Chapter 68

voter intimidation: Despite the Fifteenth Amendment passing in 1870 guaranteeing the right to vote regardless of race, Southern Democrats regained control over state legislatures and undertook several measures to keep blacks from voting. One measure was extralegal and consisted of outright intimidation. Groups like the Ku Klux Klan lynched blacks, shot those who were politically active, bombed their houses, got them fired from their jobs, burned crosses to frighten communities, and spied on civil rights organizations. Chapter 68

voter registration drives; voter turnout efforts: Political parties help people from specific neighborhoods or from specific demographic groups register to vote. Political parties also make sure as many of their partisans as possible vote in the election. This may entail organizing party workers to contact potential voters directly or to drive people to the polling stations. Chapter 41

voting, no positive right to vote: The original Constitution never articulated an affirmative right to vote to anyone, and instead, left the vote-granting privileges to states. Initially, states granted voting privileges to the minority of property-owning white men. Through amendments to the Constitution, we have extended the "right to vote" to people of color, to women, and to people who are eighteen years and older. Chapter 19

voting, racial gerrymandering; white primaries: Despite the Fifteenth Amendment passing in 1870 guaranteeing the right to vote regardless of race, Southern whites used racial gerrymandering to design election districts that bisected African Americans' populations, thereby diluting their numbers should they actually register to vote. Southern states also instituted white primaries in which nonwhites were barred from voting. This was important because the South was solidly Democratic at the time, meaning that the primary race was often of greater significance than the general election in November. Chapter 68

Voting Rights Act (1965): The Voting Rights Act was designed to shore up a weakness of the Civil Rights Act, meaning that it was insufficient in defending the right of all people to vote regardless of race. One section of the Voting Rights Act that was originally passed in 1965 required that states with a documented history of voting discrimination receive **"preclearance"** from the Justice Department or the United States District Court in Washington, DC, before implementing changes to their election laws. This applied heavily to mostly Southern states that had worked overtime for nearly a century to deny voting rights to African Americans. The purpose of preclearance was to ensure that states would not revert to election practices that overtly discriminated or that had discriminatory effects. Chapters 35; 68

W

wage slavery: Early 1820 Republicans had a vision of America as a land free not only from slavery, but from wage slavery as well, meaning the business of exploiting laborers for-hire. They celebrated autonomous workers, primarily independent farmers and the self-employed, and feared the power of capitalists, regardless of whether they were plantation owners in the South or factory owners in the North. Chapter 42

Walker, Rebecca (1969-): Third-wave feminism has been most forcefully articulated by women from ethnic minority groups, who have intimately felt oppressed on account of their gender as well as their race. In 1992, the same year as the Clarence Thomas confirmation hearings, feminist, activist, and writer Rebecca Walker exemplified this phenomenon when she coined the term 'third wave' in her *Ms. Magazine* article, "Becoming the Third Wave." Chapter 69

war: War is one impetus for governments to expand; prosecuting and financing warfare expands government growth. U.S. federal spending spiked during the Civil War, World War I, World War II, the Korean War, the Cold War, the Vietnam War, and the War on Terror. Chapter 37

War on Terror: President George W. Bush declared a "war on terror" following the events of September 11, 2001. Spending on the military and other security operations increased, intelligence and law enforcement operations of the CIA, the NSA, and the FBI became more aggressive, and President Bush asserted broad executive authority in the name of national security. Chapter 29

War Powers Resolution: Congress passed this resolution in 1973 over President Nixon's veto. The Resolution stipulates that 1) presidents consult with Congress when possible before committing U.S. military forces to action, 2) forces be withdrawn after sixty days unless Congress either declares war or grants a use-of-force extension, and 3) Congress can pass a concurrent resolution ending American use-of-force at any time. Chapter 28

warranted inference: In making an argument, warranted inference means under what conditions are we warranted or justified in accepting a conclusion or inference? Chapter 6

Washington, President George (1732-1799): At the Constitutional Convention, the delegates adopted a secrecy rule. When someone carelessly left a copy of the Virginia Plan outside the meeting chamber, George Washington rose to "entreat the gentlemen to be more careful, least our transactions get into the newspapers and disturb the public repose by premature speculations." Chapter 47

Washington, President George, farewell address: President George Washington warned against political parties, particularly those based on geographic loyalties, saying that partisanship "serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which finds a facilitated access to the government itself through the channels of party passion." Nevertheless, political parties became entrenched in the political system. Chapter 42

Watergate, 1972: On June 17, 1972, agents of President Richard Nixon's Committee for the Re-Election of the President (CREEP) were caught breaking into the Democratic Headquarters in the **Watergate** office and residential complex. Nixon immediately tried to cover up the incident by ordering hush money payments and telling the Federal Bureau of Investigation to not investigate it. The cover-up ultimately did not work. The Watergate break-in revealed shocking corruption in the Nixon administration. Nixon and his subordinates were responsible for, among other things, extorting money from rich individuals and corporations; spying on

American citizens because they disagreed with the president's policies; trying to use the Internal Revenue Service to destroy "enemies" of the president; selling government favors in exchange for campaign contributions; seriously contemplating the murder of a journalist; and breaking into psychiatrists' offices looking for dirt on opponents. Chapter 30

Wells, **Ida B (1862-1931):** Wells was Born into slavery and become a journalist and African American and women's rights crusade organizer. She wrote the pamphlet *Southern Horrors: Lynch Law in All Its Phases,* in which she referred to lynching as "that last relic of barbarism and slavery." Chapter 47

Wesberry v. Sanders **(1964):** In this case, the Supreme Court ruled that House districts that are grossly unequal in population violated the Fourteenth Amendment's equal protection clause. Chapter 53

what if question: In *From What Is to What If*, environmentalist Rob Hopkins writes that one of our most important challenges is "we need to be able to imagine positive, feasible, delightful versions of the future before we can create them." Occasionally throughout this text, you are asked to respond to "**What if"** questions, which will make great conversation topics with your classmates, family, and friends. The key to a better politics is our ability to transcend the status quo and envision a system that consistently serves us all. Chapter 1

Whig Party: TheDemocratic-Republicans disagreed amongst themselves in the 1820s and formed two discrete parties: the Democrats, which have continued to the present day, and the National Republicans, which then became the Whig Party that eventually dissolved over slavery in the 1850s.Chapter 42

Whistleblowers; Whistleblower Protection Act, 1989: Inspectors general are not congressional employees, but the Inspector General Act put them in place "to assist Congress in its oversight role." Inspectors general often rely on information from whistleblowers, who are people who come forward with information about maladministration, corruption, waste, or abuse of office within the agency. Whistleblower Protection Act forbids agency leaders from retaliating against the whistleblower or threatening retaliation. Chapter 38

white-collar crime: These crimes are defined by the Federal Bureau of Investigation this way: Reportedly coined in 1939, the term white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. These crimes are characterized by deceit, concealment, or violation of trust and are not dependent on the application or threat of physical force or violence. The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage. There are **two main reasons why the federal government fails when it comes to white-collar crime** while heavily enforcing other kinds of criminal activity: **Resource imbalance and a higher bar for white-collar criminal liability.** Chapter 38

The White Rose, 1943: Numerous people resisted the German Nazi regime. People in extermination and work camps committed sabotage; some people tried to assassinate Adolph Hitler; some helped Jews and others escape persecution. One resistance movement was called the White Rose, which consisted mostly of young people who abhorred the regime's racism and antisemitism as well as the destruction unleashed when Germany invaded western and eastern Europe. Among the leaders of the White Rose were siblings Hans and Sophie Scholl and college students Christoph Probst, Alexander Schmorell, and Willi Graf. Kurt Huber, a Munich University professor, acted as a mentor to the group. The White Rose wrote graffiti on buildings in Munich—e.g., Hitler Mass Murderer, Freedom—and printed thousands of leaflets that they secretly left in university buildings and elsewhere. On February 18, 1943, the Scholls were seen distributing leaflets at the university, and the group's leadership was rounded up. **Hans Scholl**, **Sophie Scholl**, and **Christoph Probst** were found guilty of treason four days later and were beheaded. Schmorell, Graf, and Huber were also later executed, and ten other members were sentenced to prison. The British Royal Air Force got ahold of the last leaflet printed by the White Rose and dropped hundreds of thousands of copies of it over Germany. Chapter 59

White House staff: This group comprises key aides and support personnel who do not require Senate approval. Among these are the president's secretarial staff, who are responsible for correspondence and calendaring; the White House Legal Counsel, who advises the president on what he can and cannot do with respect to constitutional and statutory powers; the White House Press Secretary, who is responsible for all communications with the news media; the National Security Advisor, who coordinates security policy and the various agencies involved with those matters; the Office of Legislative Affairs, which is concerned with getting the president's agenda through Congress; plus a variety of other offices dedicated to presidential trips, intergovernmental affairs, communication, economic policy, domestic policy, and so forth. Chapter 25

Wilde, Oscar (1854-1900): In 1895 England, Wilde, **a** celebrated playwright, was convicted and imprisoned for "gross indecency with other male persons" and for corrupting young men. The trial made famous this euphemism for homosexuality: "The love that dares not speak its name." Wilde eloquently defended his behavior: "There is nothing unnatural about it," he said on the stand. Oscar Wilde's trial and conviction "provided the stamp of legitimacy for the suppression of any public mention of same-sex love and served as a warning to its adherents." Chapter70

William and Mary: The founders of the U.S. constitution were cognizant of what history had to teach about checking executive power. For example, in England, James II's Protestant daughter, Mary, and her husband, William of Orange, were asked to rule England and forced to accept the **1689 Bill of Rights**, which guaranteed, among other things, the right not to be taxed without Parliament's approval, the right to petition the King, the right for Protestants to bear arms for self-defense, freedom from cruel and unusual punishments, freedom from excessive bail, freedom of speech in Parliament, and guarantees of a trial before having to pay fines. Chapter 29

winner-take-all elections: A structural element causing the United States to have a two-party system is our winner-take-all elections. Chapter 44

Wollstonecraft, Mary (1759-1797): In 1792 England, Mary Wollstonecraft, who was the mother of Mary Shelley, the author of *Frankenstein,* wrote the extremely influential book, *A Vindication of the Rights of Woman*, as an explicit attack on liberal theories that argued for liberty and equality only among men. She emphasized that women and men were both capable of developing their mental faculties through education, but that women were denied that opportunity. She wrote that, "To render . . . the social compact truly equitable . . . women must be allowed to found their virtue on knowledge, which is scarcely possible unless they be educated by the same pursuits as men. For they are now made so inferior by ignorance and low desires, as not to deserve to be ranked with them." Chapter 69

World Wide Web: This is the most visible part of the Internet and began when researchers at the European Organization for Nuclear Research (CERN) created the first few web pages. There are well over 4 billion regular users of the Internet worldwide. Chapter 48

writ of *certiorari:* This is an announcement that the Supreme Court is taking a case, as well as an order to the lower court to send up the case's records. Chapter 31

writ of *habeus corpus:* If a state defendant has exhausted her state options, she may seek a *writ of habeus corpus* from a federal court. ***Habeus corpus*** literally means "you have the body," and refers to the court ordering state or federal authorities to bring a detained person to the court and show cause for the detention or incarceration. Chapters 32; 62

writs of *mandamus:* These writs were well established in English common law. They allowed courts to order government officials to do their jobs. Section 13 of the Judiciary Act of 1789 specifically gave the U.S. Supreme

Court the ability to issue such writs. In ***Marbury v. Madison*** **(1803),** Supreme Court Justice James Marshall declared that section 13 of the Judiciary Act of 1789 violated the Constitution and therefore was void. Chapter 31

X

Xenophobia: This is a fear of foreigners. Chapter 62

Y

yellow journalism: This term means nonobjective newspaper printing, which was openly tied to political parties or movements and tilted the news accordingly. Competition in the news business was stiff, and publishers often went for scandal and sensationalism to sell newspapers. In the nineteenth century, yellow journalism was perfected through the rivalry of the New York *World,* published by Joseph Pulitzer, and the New York *Journal,* published by William Randolph Hearst. Both Hearst and Pulitzer stirred up stories of Spanish atrocities in Cuba and implicated Spain in the explosion that destroyed the *U.S.S. Maine* in Havana harbor, which may have helped prime their audiences for America to intervene. Chapter 47

Z

Zenger, John Peter (1697-1746): Zenger began publishing the New York *Weekly Journal* in 1733 and almost immediately printed critical articles of New York colony governor William Cosby, accusing him of "schemes of general oppression and pillage, schemes to depreciate or evade the laws, restraints upon liberty and projects for arbitrary will." The paper went on to say that Cosby's rule was so corrupt that the people of New York might soon revolt against the government. Zenger was arrested in 1734 and tried for seditious libel. The jury found him not guilty because the critical stories were factual and so did not constitute libel. Chapter 47