The Basics of American Government

Fourth Edition

Carl D. Cavalli
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Digital Version

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Preface to the Fourth Edition

Ten years! That is how long it has been since our first edition was released in 2011. The ensuing decade brought some of the most significant events in politics and government in generations. In just the four years since the publication of our previous edition, we have seen partisan shifts in both houses of Congress; significant changes to the Supreme Court; and controversies involving state laws, voter access, race, gender, and civil liberties. All capped off with a rancorous presidential election and a once-in-a-century worldwide health crisis. We touch on those events and put them in political context throughout our textbook.

As with previous versions, this edition examines the rise of new political figures and the exit of others, the shift in policy and political focus at both the state and federal level, the changes in the public, the continued rise of partisan divisiveness, and shifting views of government in everyday life—including those resulting from the COVID-19 pandemic. Lastly, we are honored to welcome the contribution and insights of Nathan Deal, who served as Governor of Georgia from 2011 to 2019.

Of course, we also continue to correct and clarify our content. While we bring you many changes and updates, we have not lost sight of our original mission to provide direct, no-frills information on the basics of American government.

It is unfortunate that we must end on a sad note. One of our contributors, Dr. Kenneth Michael Reese, passed away in July of 2019. Dr. Reese's work will live on in his *Civil Liberties and Civil Rights* chapter which was updated for this edition by fellow contributor Brian Murphy.

Carl D. Cavalli, editor
July 2021

Preface to the Third Edition

This third edition of our textbook contains significant updates designed to keep pace with the ever-changing political scene. Much of the book includes examples and coverage of events in American politics occurring over the last couple of years. We devote more attention to the rise in partisan polarization around the nation as well as the growth of social media and its effects on politics and on governing. The most notable of recent events of course, has been the 2016 elections and their aftermath. The elections, a new presidential administration, and a new Congress, are factored in to many areas throughout the book. In addition, many of our case studies have been updated with newer examples.

We also say farewell to our previous student contributor, and welcome a new one, Mary Catherine Beutel. She has updated our public policy supplement with examples from the 2017 Georgia state legislative session, including the controversial campus carry bill. She offers particularly valuable insights stemming from her time as an intern in the governor's office.

Of course, we also continue to correct and clarify material from the previous edition.

While we bring you many changes and updates, we have not lost sight of our original mission to provide direct, no-frills information on the basics of American government.

Carl D. Cavalli, editor
July 2017

Preface to the Revised Edition

The dynamic and cyclical world of politics demands constant attention. There are predictable electoral, policy, and international cycles; and there are unpredictable events. Even the predictable things often produce unpredictable and unanticipated consequences. With this in mind, we offer a revised edition of our book (and hope to offer future editions as well). We endeavor to bring you the latest developments in foreign and domestic events relevant to American politics. We also add a new supplemental section on Georgia public policies that we hope serves to complement both our Public Policy and State and Local Government chapters. With it, we welcome a new contributor, Courtney Mitchell, who recently earned her bachelor's degree in political science. While we offer no guarantees that college graduates can immediately become published authors, we hope she serves as a role model and inspiration that, yes, you do learn something in college, and there is something you can do with that degree! Lastly, we attempted to correct and clarify what we wrote in the rst edition. There are second chances in life!

The book is still the concise, no-nonsense text we originally envisioned. No change there. Enjoy and learn.

Carl D. Cavalli, editor
May 2013

Preface to the First Edition

This book is a collaborative effort among eight current and one retired [2021 Update: five current and four former] University of North Georgia faculty members in the Political Science and Criminal Justice departments, all of whom have extensive experience teaching and conducting academic research in the field of American politics. All of these professors were concerned with both the rising cost and lack of academic rigor among American government texts on the market. So, they decided to write their own.

The purpose of this book is twofold. First, it provides a thorough, no-frills overview and analysis of the American political system. Second, most chapters include a work of original academic scholarship that demonstrates or highlights the chapter content. In addition, all chapters provide questions for discussion and several feature a "civic engagement exercise" designed to spur students to become more involved in the political system. Ultimately, this book combines the best aspects of both a traditional textbook and a reader, presented in a concise, low-cost format. The reader will see that the "basics" of the American political system are all addressed. However, in addition, this text devotes entire chapters to topics not found in most texts on the market, i.e. state and local government and civic engagement. Unlike other textbooks, but consistent with political science research, this book is presented utilizing the APA format, with in-text citations. A secondary goal of the authors is to familiarize the reader with scholarship in the field, making it easier to locate the sources used to craft the chapters.

The authors hope you enjoy the book and are inspired to learn more about the American political system.

Ross C. Alexander and Carl D. Cavalli, editors
June 2011

Acknowledgements

We would like to thank all the peer reviewers who diligently reviewed each chapter in both initial and later editions of this textbook. We are also grateful for the feedback from our discussion panel at the 2010 Georgia Political Science Association annual meeting. Lastly, we are grateful to the people at the University of North Georgia Press including the director, Bonnie Robinson, and editors, both past and present—Corey Parson, April Loebick, and Matt Pardue—for taking a chance on an unusual idea, turning it into a reality, and maintaining that reality for the past decade. The corrections, edits, and suggestions of all the aforementioned made The Basics of American Government a better finished product. We would also like to thank Affordable Learning Georgia (https://www.affordablelearninggeorgia.org/) for making this a digital version of this textbook freely available to students.

Thanks also to Maria Albo's summer 2011 American government class for their feedback on a draft copy of the original edition, along with the numerous critiques and suggestions we have received from students and faculty over the years. Any remaining errors are, of course, our own.

Ross C. Alexander and Carl D. Cavalli
June 2011 (updated by Carl D. Cavalli, July 2021)

In July 2019, we lost our friend and colleague Dr. K. Michael Reese. Fortunately for all of us, Dr. Reese's memory and work will live on in our Civil Liberties and Civil Rights chapter. He will remain a co-author of the chapter in this and future editions.

Kenneth Michael Reese

1945 – 2019

We will cherish our memories of Mike as an engaging lecturer on legal topics, an acclaimed scholar, a loyal member of the university's faculty, and the best friend whom anyone could have.

Foreword

Nathan Deal, Governor of Georgia, 2011-2019

As I reviewed the book, *The Basics of American Government*, I was impressed with the ability of Dr. Carl D. Cavalli, editor, to cover such a broad subject in such a concise and informative fashion. Dr. Cavalli and his contributors have demonstrated impressive insight into the continuing evolution of many facets of our Constitutional Republic.

It is very difficult to analyze any subject or institution relating to our government structure in a completely sterile manner. That is especially true in our current partisan political environment. However, this book attempts to do so by concentrating on the facts and eliminating the "spin" in which they are often cloaked.

I was especially pleased to see how Dr. Cavalli and Dr. Barry D. Friedman dealt with the topic, "Interest Groups," in Chapter 5. This subject is often hidden from public view, but the writers expose the abuses of the nonprofit sector, and the hide and seek tactics of super PACs and 527 groups. The influence of these groups continues to saturate almost every major political campaign at state and federal elections.

During my time as Governor of Georgia (2011-2019), I was confronted with the ongoing presence of The Great Recession and the challenges associated with a recovery. I concentrated on growing jobs and the necessity of improving the skill sets of Georgians in order to do so. Emphasis was placed on technical skills that would be taught in our Technical College System of Georgia, and the importance of offering degrees in our colleges and universities that would lead to employability. We had to make changes to our HOPE Program to keep it from going bankrupt. The cost of our correctional system (over $1.2 billion per year) which was a revolving door for criminals, was revamped with amazing positive results.

An in-depth examination of what occurred during my administration should demonstrate that state government can operate successfully within the historical and constitutional guidelines set forth in the book. A quick summary will show that over 800,000 new private sector jobs were created, that Georgia was named the "Top State for Business" for seven consecutive years, that our criminal justice reforms have become a model for the nation, that we maintained a AAA bond rating, and that people came to Georgia moving it from the 10th to the 8th most

populous state in the nation. All of this took place without tax increases, but with targeted tax cuts. I am very pleased that these and many other advancements were achieved during my tenure as Governor.

My first election to public office was in 1980, when I went to the Georgia State Senate where I served for 12 years. In 1992 I was elected to the United States House of Representatives from the 9th Congressional District of Georgia. I resigned from that office in 2010 to campaign for Governor and was elected to that office in November 2010.

Many events occurred during those years, and I had the opportunity to observe and participate in many of them. Politics certainly changed during those past thirty-eight plus years, for me personally and for our State and Nation.

When I was elected to the Georgia State Senate in 1980, I ran as a Democrat and for each of my six elections to that body, I was a Democrat. At that time there were only five Republicans in the fifty-six members of that body. Today, the Georgia State Senate has thirty-four Republicans. Republicans now control both the State Senate and the State House of Representatives and have done so for many years.

When I arrived in Washington, D.C., in January 1993, as a new member of the United States House of Representatives, Democrats controlled that body. Bill Clinton was the newly-elected president. I was part of the largest freshman class since World War II, and the vast majority of those were Democrats.

Even though Democrats had superior numbers in the House of Representatives, there were signs of growing troubles ahead. It first became apparent when President Clinton's first budget passed by only *one* vote. Many members, especially those from the South, including me, believed the budget was too large. Over the first two years of the Clinton administration, the regional and racial divides within the Democrat Party became more pronounced.

As the election of 1994 approached, the leadership of Republicans in the House, especially Newt Gingrich of Georgia and Dick Armey of Texas, began to draw clear lines as to where the two major parties stood on important issues of the day. This was embodied in what they called the "Contract with America." Republicans had aggressive campaigns to recruit candidates who would run on the "Contract" issues. It was one of the most impressive and effective campaign strategies in modern history.

As Representative Newt Gingrich would explain, the "Contract" was a promise to the American people that if they would elect Republican representatives and put them in control of the House, the items set forth in the "Contract" would be voted on in the first 100 days of the next Congress. The issues that were in the "Contract" had been extensively polled and had an 80% or better approval rating with the public. Even though many Democrats, especially Southern Democrats, supported

those issues, their leadership had never given them a chance to vote on them on the floor of the House.

When the votes were counted in 1994, Republicans had elected enough new members to constitute a majority in the House, for the first time in forty years. Newt Gingrich was elected the Speaker of the House, and the issues embodied in the "Contract" were voted on in first 100 days of the next session of Congress in 1995.

As the issues of the "Contract" came to final votes, there was extreme pressure placed on every Democrat to vote against these measures. As I pointed out to the Democrat leadership, most of these issues were things I supported, and I had campaign literature to prove where I stood. Therefore, I wound up voting for most of the items in the "Contract."

When I came home for the Easter Recess in 1995, my wife and I decided that I should switch parties, since I could no longer support the positions being taken by the Democrat Party. Without consulting anyone in Washington and attempting to negotiate any favorable concessions, I held a news conference in our home town and announced my decision to become a Republican.

After my decision to change parties, four other Democrat members of the House did the same. While these events were significant at the federal level, it took longer for the political realignment to take place at the State level. Conservative, Southern Democrats had been voting for Republican presidential candidates for years, and gradually they started to vote for Republican candidates for Congress and the State General Assembly.

Today, Republicans hold eight of the 14 congressional seats in Georgia and have majorities in both chambers of the State General Assembly. Every Constitutional Officer in the State is a Republican[1].

This party realignment is possibly the most significant change in the politics of Georgia in modern times. Even though the party labels have switched, the underlying conservative opinions of many Georgians have not changed. While much discussion centers around "grass roots politics," this phenomenon of political realignments did not begin at the bottom of the political spectrum; instead, it started at the top and filtered down. A study of "how" and "why" those occurred should be instructive to those who aspire to work in politics.

Sincerely,
Nathan Deal

1 Editor's note: As covered in the Chapter 6 case study, as of 2021, Georgia's two U.S. Senate seats switched from Republican to Democratic incumbents.

1 Theories of Democracy and Types of Government

Ross C. Alexander

Learning Objectives

After covering the topic of theories of democracy, students should understand:

1. How democracy has evolved in the historical and contemporary sense.
2. How democracy in America functions, comparing and contrasting it with other systems around the world.
3. How foundational pieces in political philosophy influenced the establishment of our republic, most notably the contributions of John Locke.

Abstract

What is democracy? How does it differ from other political structures and systems that existed over the past two millennia? In this chapter, we address these foundational questions, in addition to others, to provide a solid framework for the remainder of the book. By examining those thinkers, philosophers, and scholars who have had an impact on the American political system, we can define democracy in the American sense and contrast it with other systems today and throughout time. To accomplish this end, this chapter offers an in-depth examination of Locke's Second Treatise of Government *to determine its effect on the American brand of democracy.*

Introduction—Toward a Definition of Democracy

Most texts addressing the American political system invariably begin with an attempt to define democracy, which is vaguely understood as "rule by the people." But what, exactly, does that mean? How does democracy differ from other systems of government? Philosophers, thinkers, politicians, and students have been trying to address and answer these questions for hundreds, if not thousands, of years with

little consensus. Over 2,500 years ago, Aristotle, the godfather of western political thought, in *The Politics*, offered a discourse on different systems of government, and outlined six possible forms—three positive or "good" and three negative or "bad"—each linked with another. For example, with regard to rule by one individual, **kingship** was the positive form; **tyranny,** the negative. Regarding rule by few in society, **aristocracy** was desirable, while **oligarchy** was undesirable. Finally, concerning rule by many in society, **polity** was the positive outcome, and **democracy** the negative. To fully understand Aristotle's distinctions, his terminology must be defined. His view of kingship was one of an enlightened, benevolent monarch ruling in the best interests of the people. Conversely, if kingship would erode into tyranny, the tyrant would function as a self-interested despot who would do anything to stay in power. For Aristotle, aristocracy was not rule by the rich, but rather rule by the most capable in society, whether it be the most educated, most experienced, or most enlightened. Conversely, as aristocracy devolved into oligarchy, power would fall into the hands of the power-hungry few. Finally, Aristotle viewed a polity as a representative democracy, where citizens would elect qualified leaders to carry out their wishes in government. As polity devolved into democracy, Aristotle envisioned rule by the mob which is different than the modern view of democracy. For Aristotle, this constitutional cycle was inevitable. Every enduring society would experience all these systems of government as it progressed and evolved (Aristotle, 1984).

So, if democracy is not simply "rule by the people," what is it? For Aristotle, democracy had a negative connotation and was marked by mob rule, chaos, and disorder. From a modern perspective, many political scientists and theorists have attempted to define the notion of democracy. E.E. Schattschneider defined democracy thusly: "Democracy is a competitive political system in which competing leaders and organizations define the alternatives of public policy in such a way that the public can participate in the decision-making process" (Schattschneider, 1960, 141). Schmitter and Karl viewed the concept as the following: "Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives" (Schmitter and Karl, 1991, 76). Vanhannen contended that "Democracy is a political system in which different groups are legally entitled to compete for power and in which institutional power holders are elected by the people and are responsible to the people" (Vanhannen, 1997, 31). Perhaps the CIA World Fact Book defines the concept of **democracy** best, with the following: "a form of government in which the supreme power is retained by the people,

but which is usually exercised indirectly through a system of representation and delegated authority periodically renewed" (Central Intelligence Agency, 2013). So, while it is impossible to offer an authoritative, singular definition of democracy, the common components of these various definitions seem to be concepts such as competition, accountability to the public, election of representatives, respect for the law, equal opportunity, encouragement and respect for debate, and involving the people in political decisions.

Since the 19th century, most "democracies" are better described as republics. A **republic** is an indirect democracy, a representative democracy whereby eligible voters (the electorate) choose representatives to carry out their wishes in the government. Most republics throughout the world function as **constitutional democracies**, meaning that the government draws its legitimacy from some authoritative document (a **constitution**) that defines the nation's system of government, its laws, and usually the rights of citizens (Central Intelligence Agency, 2013). The United States is, of course, a constitutional democracy or **constitutional republic**. In most republics and democracies today, the basic functions of government could include the following: (1) protecting citizens, (2) providing public goods such as education, parks, roads, sanitation, and health care, and (3) ensuring some degree of equality among its citizens. With regard to the American style of constitutional democracy, the relative degree of "success" is due in large part to many factors, including the relatively high level of affluence in the U.S. which contributes to governmental and societal stability, a high level of education among the populace which encourages participation, and plentiful resources with which to create jobs. To better understand the American political system and its governmental structure, it is helpful to compare and contrast it with other systems throughout history and today.

Other Systems of Government

When the U.S. Constitution was written in 1787 and ratified in 1789, most forms of government throughout the world were either **monarchies**—whereby a single sovereign (a king or a queen) exercised rule over a given populace and territory with power transfer based upon heredity, but in which laws and rights were established—or **absolute monarchies**—whereby the sovereign ruled with absolute power and authority with no defined laws or rights. Throughout the 19th century, during the industrial revolution, communism and socialism took root as a backlash against oppressive economic and social conditions in society created largely by industrialization. **Marxism**, based upon the writings of Karl Marx, espoused the inevitability that the working classes in society (who were

the overwhelming majority) would shrug off the oppressive yoke of the capitalist industrialists who were exploiting them, and set up a classless society in which goods would be shared by all people with the guidance of an authoritarian ruling party, which is what came to be known as **communism** (Marx, 1848). In most cases, including the Soviet Union, China, Cuba, and North Korea, communism devolved into **totalitarianism**, where the state controlled all aspects of life, including the economic, political, social, and cultural spheres, and where any dissent was quickly punished by the ruling party elite. This system functioned very much like a **dictatorship**, in which a single person or small group exercises absolute power, like North Korea under Kim Jong Un. In **theocracies**, or states with a strong religious influence, there is no separation of church and state, and the church, in effect, constitutes or controls the government, such as is the case in several Islamic republics in the Middle East today.

In the 19th century, **socialism** functioned like, or was aligned with, Marxism or communism. In the 20th century and today, socialism functions differently. In those nations that utilize socialist systems, most notably the Scandinavian nations of Sweden, Norway, and Denmark, the state provides many public goods, such as universal health care and public education, and also controls the economy or "means of production." Yet, citizens enjoy many of the same rights and liberties as those living in democratic republics, including freedom of speech and expression, freedom of the press, and freedom of religion, to name a few. The primary distinction between socialist nations and capitalist nations is the level of taxation. Obviously, taxes are much higher in socialist nations where the state controls the economy and provides more public goods to its citizens. Finally, **anarchy** is the unfortunate situation in which no government authority exists whatsoever with total chaos ensuing.

Democracy in the United States—Separating Myth from Reality

Are there certain characteristics and experiences that are unique to Americans or the American political experience? Do Americans have a unique political culture or common set of values shared by all? In his famous examination of Americans and the American political system in the early 19th century, French author Alexis de Tocqueville contended that Americans were individualistic, pragmatic, hard-working, freedom-loving, and industrious, among other qualities. In his treatise, *Democracy in America*, he argued that these common American qualities allowed its people to form a government that reflected these values which, at the time, were unique in his estimation (Tocqueville, 1945). So,

was Tocqueville correct? Are these qualities uniquely and exclusively American? Do they apply to all Americans, or just some? Do they *still* apply to twenty-first century America? Can they be applied to other cultures in other nations as well? These questions are difficult, if not impossible, to answer. So, what is myth, and what is reality? What constitutes *American* democracy?

Political culture influences the political system. Individuals voting in elections determine the nature of government, or so most are taught. This notion of **political equality**, or one person, one vote, is often cited as a cornerstone of the American political system. The notion that everyone's vote counts equally regardless of race, gender, sexual orientation, socioeconomic status, or religious affiliation is something taught to students in schools beginning at a very young age. Is political equality myth or reality? Do all citizens have an equal ability to impact the political system? Some would argue yes, others no. Both would be correct. In a practical sense, citizens can only cast one vote per election, seemingly resulting in political equality. However, some have more ability to impact the political system than others, largely through money, influence, power, or connections to policymakers, which would shatter the notion of political equality. The previous exercise sheds light on the nature of the American political system and its unique brand of democracy. There are many questions and few simple answers. If political equality does not exist, the myth does endure. How about **equality of opportunity**?—does it exist? The "work hard and you'll get ahead" myth has been ingrained in the American experience for generations[1], but is it accurate? Do we all have equal opportunity to succeed? Again, some would argue yes, others no. Those arguing "yes" would be quick to point out that we have relatively equal access to public goods such as a free education, as well as equal freedoms of speech, association, and expression. Those arguing "no" would contend that some in society are inherently better off than others, having access to better schools, business connections, nicer neighborhoods, and even more stable families. Who is correct? Both sides. Again, there are no easy answers.

Ultimately, these opposing forces have shaped and forged the American republic. The common perception of the American political system that students learn in elementary, middle, and high school is that the majority of citizens, voting in elections, determine the nature of government. Is that accurate? Is the United States a system governed by individuals exercising **majority-rule democracy**, or does this model exist only in a textbook? Can the *individual* shape the American political system? Perhaps. Does the individual, exercising his or her political rights, have the ability to cause change at the national level? Probably not. Does

1 See for example, Horatio Alger's *Ragged Dick* series. It is available online from the Project Gutenberg site: http://www.gutenberg.org/ebooks/20689

this same individual have the ability to cause change in his or her community by becoming involved in political matters at the local level? Probably.

If individuals do not substantively shape or influence the political system at the national level, what forces do? In our system, in the modern sense, groups exercise a tremendous amount of power and exert significant influence over the political system, largely through money. This notion of groups having a profound impact on the political system is referred to as **pluralism**. Groups donate significant amounts of money to finance the campaigns of politicians, including members of Congress, the Senate, and the president. These "special interests" lobby policymakers to enact laws and regulations that benefit their interests and are discussed in much greater detail in Chapter 5. Groups are able to exert this level of influence for many reasons, most notably because they possess constitutional protection that allows them to lobby government. The First Amendment to the U.S. Constitution reads, "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*" (italics added). While the shifting of power towards interest groups has surely had negative consequences, including an over-emphasis on the interests of groups with the most money, there have been positive outcomes as well, such as those groups advocating for social and educational policy influencing lawmakers to pass bills in those arenas. While the functioning of government in the United States is pluralistic in nature, it is by no means exceptional compared to democracies and republics throughout the world, where special interests also have tremendous degrees of power.

In sum, the myths of the development and functioning of the American political system can be separated from the realities in some cases, but not others. While much of what students learn about the system in grade levels is over-simplified and inaccurate, some is not. The founding and development of the American political system is a complex and fascinating case, but it can be compared to other nations' development as well. Furthermore, it is difficult to offer an authoritative set of political values that all Americans share or treasure, which is why American politics are so fascinating.

Case Study: The Influence of John Locke on The Declaration of Independence

To gain a better understanding of the American political process and the nature of American democracy, we need to examine the influences on the founders during the colonial and Revolutionary War eras. When Thomas

Jefferson authored the *Declaration of Independence* in 1776 under the guidance of Benjamin Franklin and John Adams, he demonstrated the degree to which he had been influenced by other great minds. Jefferson, like most of the delegates present in Philadelphia in 1776, was an educated, well-read man who had studied the classics (the writings of Greek and Roman historians and philosophers), as well as the works of the **Enlightenment Period** of the previous century. Arguably, the author who influenced Jefferson most was John Locke. Locke's ideas are woven throughout the *Declaration*. What follows is an in-depth examination of Locke's most famous writing and the impact that it had on Jefferson and the *Declaration of Independence* in particular.

John Locke (1632-1704) was an English political philosopher, commentator, and thinker who wrote during a time of great political change and upheaval when the monarchy was being challenged in England before the "Glorious Revolution" in 1688 and during the Enlightenment Period. Locke was considered one of the greatest minds of the Enlightenment era along with such luminaries as Voltaire, Jean-Jacques Rosseau, and Thomas Hobbes. Locke proposed and discussed many radical political beliefs during this period of upheaval and political change which dealt with the responsibilities of government, the rights of common people, and the philosophical basis of government in general (Locke, 1988, 16-20). Unlike previous generations, and contrary to the very nature of monarchy, Locke believed that humans were born free (in a state of nature) and possessed inherent, inalienable rights that could not be arbitrarily removed by the government (the king). Locke assumed that the rights of people were bestowed not by the monarch, but by their creator (God), which was a radical idea at the time (Locke, 1988).

Locke's most famous work, *The Second Treatise of Government,* contains the passages and ideas that were most influential to Jefferson and are easiest to identify in the *Declaration of Independence*. As Jefferson advocated in the *Declaration*, Locke believed in limited government. For Locke (and Jefferson), human freedom was the greatest right, bestowed not by government, but by God (an inalienable right). For Locke, people are born natural, reasonable, and free, beholden to no one, possessing inherent civil liberties and natural rights, including freedom and self-determination (Locke, 1988). Furthermore, people are able to acquire wealth from their labor, which is best evidenced through the accumulation of **private property**. For Locke, then, the primary duty of government is to preserve one's property, noting, "...whereas Government has no other end but the preservation of Property" (Locke, 1988, 94). For Locke, government exists to preserve life, liberty (freedom), and property, a theme paraphrased by Jefferson in the *Declaration* as, "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..." (Jefferson, 1776).

Another Lockean theme that influenced Jefferson was the notion that citizens consent to be governed—that the people create, craft, and mold the government because they allow it to exist—which was an extremely radical supposition at the time. The idea that government exists to serve the people and only exercises power over them because the people allow it to was contrary to the very ideals of monarchy. The impact this idea had on Jefferson is observable in the *Declaration*: "...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 abolish it, and to institute a new government..." (Jefferson, 1776). Ultimately, according to Locke and Jefferson, people and government enter into a **contract** of sorts, each with duties, responsibilities, and obligations. Government's obligation to its citizens is to exercise power in a limited fashion securing the life, liberty, and property of the people. The obligations of the people involve following the laws set forth by the government (which the people create) and respecting the rights and property of others. If government violates this contract, according to Locke, the people have the right to: (1) change the government, (2) leave society (keeping their property and wealth), and (3) revolt, an idea which especially appealed to Jefferson (Locke, 1988).

Locke's influence on Jefferson and the *Declaration of Independence* is profound and easily observable. Locke's radical teachings from the century before the founding period had far-reaching effects on the establishment of our republic (and others, such as France). Lockean teachings and principles are found in the *Constitution* as well, even if they are a bit harder to find at first glance. For example, Locke strongly advocated for separation of powers, which is a hallmark of our constitutional system. Locke wrote, "Therefore, 'tis necessary there should be a *Power always in being,* which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated" (p. 365, italics in original). Ultimately, Locke believed that people were inherently good. Furthermore, because of their inherent "goodness," they should not be constrained by government. Therefore, the responsibilities and duties of government were the following:

1. to provide a universal application of the laws to everyone, regardless of class,
2. making laws that are designed for the common good of the people,
3. ensuring low taxes, with tax increases being approved by the people or their representatives, and

4. ensuring that the power of government, especially with regard to lawmaking, resides in the legislature, because they are representatives of the people (Locke, 1988).

As can be plainly seen, Locke's ideals have impacted our republic since its founding, and still do so today.

Discussion Questions

1. Which definition of democracy do you prefer? Craft your own definition and compare it to the one you chose.
2. Which form of government is most similar to democracy? The most different? What positives and negatives do you see in each?
3. With its emphasis on pluralism, has the United States moved too far away from the ideal form of democracy? Do interest groups have too much power in our system?
4. In your opinion, how would Locke view our democracy today? Which of his ideals do we see reflected in our political system?

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2 The U.S. Constitution

Ross C. Alexander

Learning Objectives

After covering the topic of the U.S. Constitution, students should understand:

1. How forces during the Revolutionary War era led to the writing and ratification of the Constitution.
2. The basic structure and functioning of the U.S. government as laid out in the Constitution.
3. How the flexibility of the Constitution has allowed it to endure, but also resulted in debate and controversy.
4. How the framers of the Constitution stated their case to the American people in *The Federalist.*

Abstract

The Constitution is a revered, enduring document that provides the framework for our democratic republic, but it is not without controversy. It is brief, flexible, and open to interpretation, just as the framers intended. As a result, the document has been able to remain largely intact in its original form for over 230 years. The Constitution provides both the theoretical and practical framework for our government, providing insight into the intentions of the framers during the Revolutionary and Founding periods. In a practical sense, the document provides a framework for our branches of government, means by which they check and balance each other, and the scope and limits of the power of the national government. The Constitution was a product of events and forces culminating throughout the Colonial and Revolutionary War eras, not something that was produced in a vacuum in 1787. This chapter describes and analyzes not only the Constitution itself but also the historical events leading up to it. It also examines the legacy of the document and the reasons for the controversy it has caused.

The Events leading to the Constitution

The Revolution

The **American Revolution** raged from 1775, when shots were first fired at Lexington and Concord, until 1783 when the Treaty of Paris formally ended the war (even though the final battle was fought at Yorktown in 1781). Students learn in school that the Revolution was brought about by freedom-loving patriots who desired self-governance, shedding off the oppressive yoke of British rule. This story is partly true. The causes of the Revolution are varied and complex, and by no means did the entirety of the population of the colonies support the uprising. Many were fighting for the right to self-rule and determination while others were fighting for largely economic reasons (they were sick of paying high taxes to fund the various wars of the British Empire or they did not want to pay off their British creditors) while others yet were fighting for adventure. Some, especially along the western frontier of the colonies, paid little attention to the war in the east as it did not directly affect them. Finally, many colonists remained loyal to the crown and even fought side-by-side with their British cousins against the rebels. Regardless of their politics, loyalties, and motivations, most would have agreed that the chances of a rag-tag, loosely associated, underfunded, diverse group of colonies defeating the strongest military empire in the world would have been slim at best.

Discontent with British rule had been culminating for at least ten years before the skirmishes at Lexington and Concord. The British viewed the resource-rich colonies as a commodity that could be exploited and taxed to fund their extensive wars and campaigns around the globe. These increasing taxes on goods such as stamps and tea resulted in the beginnings of organized dissent, like the Boston Tea Party in 1773. Coupled with these high taxes was the reality that the planter classes in the middle Atlantic and southern colonies owed more and more to their British creditors for goods bought on credit–something that George Washington and Thomas Jefferson understood and experienced first-hand. A small, influential group of citizens believed that the colonies would be better as a sovereign, self-governing entity, divorced from British rule and control. These influential few echoed the sentiments of many who saw themselves as British citizens but who did not have the rights and privileges of those living in Britain. That is, they paid taxes to the British crown yet had no representative voice in Parliament. This notion of "taxation without representation" was a rallying cry for many itching for rebellion.

The Declaration of Independence

On July 4, 1776, 56 delegates to the **Second Continental Congress** signed the **Declaration of Independence** (including Lyman Hall and Button Gwinnett from Georgia). The treatise was penned by Thomas Jefferson, one of the youngest and brightest delegates to the Congress, under the tutelage of the more experienced John Adams and Benjamin Franklin. The document is one of rebellion, not reconciliation. It is written almost as a personal letter to King George III of England and explains in detail the reasons for rebellion against the crown. Jefferson borrowed liberally from many contemporary and historical sources, most notably John Locke's *Second Treatise of Government*, where Locke's "life, liberty, and property" became Jefferson's "life, liberty, and the pursuit of happiness" (Locke, 1988). In the document, Jefferson argues for a limited government that exists at the consent of the governed: the people, who possess these "inalienable" rights (see: https://guides.loc.gov/declaration-of-independence). Those who signed the Declaration were literally putting their lives on the line. Had the Revolution been lost, they would have been tried (and probably executed) for treason. The Declaration is one of our sacred founding documents largely because it articulates the philosophical basis for our political system.

The Articles of Confederation

After the former colonies had formally declared independence from Great Britain, one of the first orders of business was setting up some sort of government, largely in order to effectively wage war. The 13 former British colonies did not necessarily view themselves as one nation. Rather, they viewed themselves as 13 independent, sovereign countries, loosely affiliated, but working together (somewhat ineffectively) to fight the Revolution. The idea of one "United States of America" had not yet taken hold. However, some sort of government had to be created to coordinate the activities of all the former colonies. In November 1777, the **Articles of Confederation**, written by John Dickinson, was established. The hallmark of this new government was that the national government possessed very little real power. Rather, the true power remained with the states. A confederation is a loose association of independent or quasi-independent states. The national government under the Articles was so weak that it could not levy taxes, wage war, regulate commerce, or issue a uniform currency among all the states. It contained no executive branch, which resulted in relatively poor leadership. Rather, the power that did exist was concentrated in the legislature, or Congress. However, passing legislation or amending the Articles was onerous and difficult, requiring a

unanimous vote of all 13 members (Kammen, 1986, pp. 10-18). It quickly became apparent that the Articles was an inefficient, ineffective system of government and was created in a haphazard fashion. It was not even formally ratified by the states until 1781. The result was that funding the Revolution was uncoordinated and ineffective, making the American victory even more impressive. Nevertheless, the Articles was our first system of uniquely American government and existed until the late 1780s. It should also be noted that it is within the Articles that the words "United States of America" is mentioned for the first time, which is a rather odd coincidence considering the weak nature of the national government provided by the document.

The Great Compromise

By 1787, many in the new nation realized the inherent inefficiencies of the Articles of Confederation. They argued that such a weak national government could leave the new nation exposed to financial ruin or ripe for future foreign invasion by Great Britain, France, or Spain, all of whom still laid claim to vast stretches of the North American continent. However, others argued that there was no need for more government beyond what the states and the weak national government provided. Both sides tended to agree that the Articles could or should be amended to function better. That was the charge of those delegates who met in Philadelphia in the summer of 1787—to amend the Articles, not create a new system of government. That is, however, exactly what they did. Twelve states sent delegates to the **Constitutional Convention**, everyone except Rhode Island. The meetings occurred in secret; the windows were nailed shut, and sentries were posted at the doors and entrances. The framers very quickly understood that they would be proposing a brand new government, one which looked radically different from what existed under the Articles. They also understood that such a development would not be without controversy.

Two Plans of Government

Many delegates from the various states made speeches and proposals as to what the new government should look like. However, the proposals of two factions soon became the most popular and seriously considered. The Virginia delegates, proposed the **Virginia Plan** or Randolph Plan, which was written by James Madison, who had come to the Convention with the proposal already written for the most part. The Virginia Plan proposed a radical new form of government, one in which the national government was significantly more powerful than that

found under the Articles. If accepted, the states would be ceding a great deal of power to the national government. The plan proposed a bicameral or two-house legislature with representation in both houses based on population which favored the large population states such as Virginia, Pennsylvania, and Massachusetts. The people would choose members of the lower house, while state legislatures would choose members of the upper house (https://www.ourdocuments.gov). The plan proposed a fusion-of-power or parliamentary system, whereby the legislature would choose the chief executive (this is the type of arrangement present in Britain, and with which the framers were familiar) (Kammen, 1986, pp. 22-25). With regard to the judicial system, the Virginia Plan proposed a type of "supreme court" chosen by the upper house of the legislature (https://www.ourdocuments.gov). In a philosophical sense, the Virginia Plan viewed governmental power as being derived from one, unified American "people," rather than from the states—much different than the Articles, which was state-based in terms of power.

In contrast, the New Jersey delegates proposed the **New Jersey Plan**, or Paterson Plan. This plan looked very similar to the Articles, because it proposed a unicameral or one-house legislature with equal representation regardless of state population and favored the small population states such as New Jersey and New Hampshire. It proposed a multi-person chief executive chosen by the legislature (Kammen, 1986, pp. 25-30). In a philosophical sense, the New Jersey plan assumed that national government power would be derived from the states, not the American people as a whole. In our Constitution, there are elements of each proposal with more weight given to the Virginia Plan. After much debate, a compromise was reached by the framers, which came to be called the **Great Compromise** or **Connecticut Compromise**, because it was largely brokered by the Connecticut delegation. The proposal that resulted from the Constitutional Convention represented a radical departure from the government under the Articles.

The Document

The United States Constitution possesses seven articles, the first three of which detail the various branches of government. Article I outlines the powers of Congress (who would pass the laws); Article II the powers of the President (who would execute the laws); and Article III the powers of the Judiciary (who would interpret the laws). The framers chose this sequence deliberately, believing that Congress, the legislature, is the strongest branch of government. They were familiar with how a strong legislature functioned (British parliament) and were wary that the President (which had never before existed) would become tyrannical or king-like, and they had just had a bad experience with a king leading up to the

Revolution. Some among the framers (like Alexander Hamilton) even advocated that the President *should* possess powers similar to a king, serving a life-term and functioning as the strongest entity in the government, yet they were over-ruled. Rather, they reasoned, a bicameral (two-house) legislature possessing the most power would best articulate the wishes of the people. Therefore, Article I is long and detailed. Conversely, Article II, which deals with the presidency, and Article III, which addresses the Courts, are brief and less detailed. Neither a president nor an independent judiciary had ever existed and the framers were not exactly sure how either would function.

The document provides for a bicameral legislature. The lower house, the **House of Representatives**, is directly elected by the people. Representation in the House is based upon state population; the more people in a state, the more representatives it has in the House. However, representation in the upper house, the **Senate**, is equal with each state possessing two, regardless of population. According to the Constitution, *state* legislatures choose each state's Senators, a provision in place until the passage of the **17th amendment** in 1913, which resulted in the direct election of Senators by the people. House members serve two-year terms, must be 25 years old, and must be U.S. citizens for a minimum of seven years. Senators serve six-year terms, must be 30 years old, and have been U.S. residents for at least nine years. Both House members and Senators must reside in the state they represent. Today, there are 435 members of the House of Representatives (14 from Georgia) and 100 members of the Senate (two per state).

According to the Constitution, the president must be 35 years of age, a natural born U.S. citizen, and a resident of the U.S. for the previous 14 years. The president serves a four-year term of office and is not limited to any specific number of terms. Presidents for nearly 150 years served a maximum of two terms not because of any constitutional regulation, but rather because it was the precedent set by George Washington. Franklin D. Roosevelt was the only president to break with tradition, having been elected to four terms of office–1932, 1936, 1940, and 1944–during the Great Depression and World War II. In 1951, the **Twenty-Second Amendment** was ratified, which now limits the president to two terms of office.

The framers were not common men. Rather, they were the elite, the powerful, the educated, the aristocrats of the new nation. As such, they were a bit wary of giving too much power to the common people, and they structured the presidential election procedure uniquely. We do not directly elect the president as we directly elect members of Congress. Rather, when we vote for president, we are technically voting for a "slate of electors" who, in turn, several weeks after the general election,

vote for the president. Therefore, the true mechanism for choosing the president is this Electoral College. Electors are chosen by their respective political parties to serve this role. Representation in the **Electoral College** is based largely upon population. A state's total number of electors is the sum of its Representatives plus its Senators (Kimberling, 1992). For example, in Georgia, this number is 16. Therefore, states with more people have more electors. Today, the total number of electors is 538–which is the total number of Representatives (435) plus the total number of Senators (100) plus three representing the District of Columbia. In all states except Maine and Nebraska, the candidate who wins the majority of the popular vote receives all that state's electors. For example, if candidate A receives 60% of the popular vote in a state and candidate B receives 40%, candidate A would receive 100% of the electors. To win the presidential election, a candidate must receive a majority (270) of the votes (Kimberling, 1992). Therefore, candidates for the presidency are wise to gear their campaigns toward competitive states with high numbers of electoral votes (FL, NC, PA, OH, GA, etc.). Because of the Electoral College, the person receiving the majority of electoral votes (not popular votes in the general election) becomes the president. In fact, five times, most recently in 2016, the "victor" actually received fewer popular votes than the "loser," but received more votes where it counted–the Electoral College.

While no federal rule requires electors to choose the winner of their state's popular vote, most states have such rules. Until recently though, no so-called "faithless elector" was ever punished. There have been a few such electors, but none were decisive. They were always isolated protest votes. After the 2016 election, the states of Washington and Colorado attempted to punish such electors by fining or replacing them. The Washington state Supreme Court, and a federal court in Colorado issued conflicting decisions on whether electors had the right to vote their conscience. The Supreme Court accepted the Colorado case, and unanimously decided that states *could* punish electors: "[A] State may enforce its pledge law against an elector" (*Chiafalo v. Washington*, 591 U.S. ___, 2020)

Impeachment is the formal means of removing the president from office. It is a two-step process involving both houses of Congress. First, the House of Representatives conducts an investigation to determine if the president has committed some sort of crime. If so, "Articles of Impeachment" can be voted against the president, requiring a simple majority vote. The "Articles" then go to the Senate for the formal trial of the president. Here, the Senators serve as the jury, and the Chief Justice of the Supreme Court oversees the proceedings. For presidents to be convicted and forced to leave office, they must be found guilty of "High Crimes and Misdemeanors," requiring a super-majority (two-thirds)

vote. Two presidents, Andrew Johnson and Bill Clinton, have had Articles of Impeachment voted against them, but neither was convicted of High Crimes and Misdemeanors.

Article III established the **Judicial Branch** of government, or the courts. An independent judiciary had never existed, so Article Three is very vague. In it, the framers described the parameters of the highest court in the land–the Supreme Court. Today, the Court has nine members. However, the Constitution does not require a specific number of justices. The most controversial aspect of this Article is the notion that federal judges receive life appointments, serving as long as they are deemed to be in good standing.

Article V of the Constitution describes the formal **amendment** process. The U.S. Constitution is amended infrequently, only 27 times in total. The first 10 amendments serve as the Bill of Rights (adopted in 1791). The process of both proposing and ratifying an amendment is onerous and requires more than a majority vote. There are two methods of proposing an amendment to the Constitution. The more common method is by a two-thirds vote in both houses of the U.S. Congress. The less common method is at the request of two-thirds of the state legislatures. With regard to ratifying a proposed amendment, the more common method is by a three-quarters vote of all state legislatures. The less common method of ratification is by three-quarters of the states in a special convention. With respect to both the proposal and ratification process, a relatively small minority can block the will of the majority, which has resulted in only 17 amendments being ratified since 1791.

Slavery

The words "slave" or "slavery" do not appear in the Constitution, yet the framers were very aware of the controversial nature of the institution. Slavery is addressed indirectly, most notably by the **three-fifths compromise.** Article I, Section Two, Paragraph Three of the Constitution describes how slaves would be counted as three-fifths of a person in terms of representation, when determining the total number of persons in a state. The slave-holding states of the south argued that slaves should be counted in terms of representation, resulting in more representatives in the House for those states. The non-slave-holding states contended that they should not count as "persons" because they were considered property. The resulting compromise was that slaves would be counted as three-fifths of a person.

Many framers were slaveholders, including Washington and Jefferson. Others were abolitionists who abhorred the practice and desired to see it ended

immediately. Most, however, understood that ending slavery would be difficult, as the many southern states depended upon it economically. Had slavery been outlawed in the Constitution, it would probably not have been ratified, because many southern states would have withdrawn their support. Valid arguments can be made saying that the framers should have outlawed slavery at the founding. The counterargument that ending slavery at that time would have resulted in the Constitution not being ratified is also valid. There are no simple or authoritative answers on this subject.

Controversy

Enumerated v. Implied Powers

The framers understood that they could not possibly predict the challenges that the Constitution would have to face, yet they wanted to create a document that would endure and be applicable for future generations. To that end, they crafted a purposefully ambiguous product that could be molded, changed, and applied somewhat differently by future policymakers. One mechanism they included to allow for this constitutional evolution is found in Article I. Article I, Section Eight of the U.S. Constitution is referred to as the **Necessary and Proper Clause.** This clause, sometimes referred to as the "Elastic Clause," allows for the future expansion and evolution of the power of the federal government. It says Congress has the power "To make all Laws which shall be necessary and proper for carrying into the 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 relatively simple provision, which leaves open-ended the power of the federal government, has sparked a great deal of controversy about the limits of its authority.

At the time of the founding, and even today, many argued that the powers of the federal government should be limited to those specifically listed, or enumerated, in the Constitution—no more, no less—and that the powers of the federal government are not open-ended. Rather, they argued, the states should possess those powers not listed in the Constitution. These states' rights advocates also looked to the Constitution and the Bill of Rights to substantiate their case. The 10th Amendment to the Constitution is referred to as the **Reserved Powers Clause**, which simply states: "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

These two clauses, one found in the Constitution and one found in the Bill

of Rights, are contradictory in nature. The Necessary and Proper Clause assumes that the federal government possesses **implied powers** beyond what are listed in the Constitution. Conversely, the Reserved Powers Clause assumes that the federal government possesses **enumerated powers,** or those listed in the Constitution, with all others being given or reserved to the states. This ambiguity has caused a great deal of debate, confusion, conflict, and even rebellion over the past 200 years, resulting in events leading to the Civil War and conflicts between the states and the federal government ever since. What did the framers actually intend? It is impossible to know exactly. They purposely crafted and envisioned a flexible document that is open to interpretation by future generations. However, they also understood the need for strong state governments.

Federalists v. Anti-Federalists

The ratification of the Constitution was not a foregone conclusion. Many were opposed to its passage. Mostly, they were fearful of a tyrannical national government that would take all power away from the states, causing them to wither away. These anti-Constitution forces were largely fearful of what was referred to at the time as consolidation of power, or the notion that all governmental power would be concentrated in one level of government (the national level in this case). Rather, they contended, power should be decentralized across two levels of government—the national and the state—leaving the states with considerable power and authority. The forces in favor of the Constitution were dubbed **Federalists**, while those opposed to it were called **Anti-Federalists**.

The Federalists included such dignitaries as James Madison, John Adams, Alexander Hamilton, and George Washington—those who had attended the Constitutional Convention and played a large part in the crafting of the document. The Federalists saw the need for a strong, energetic, and efficient national government that would unify the new republic as one nation. They assumed that power would be somewhat consolidated under the national government, but realized that states would play a major role in this power-sharing arrangement. The Federalist base of support was much stronger in New England and the Middle Atlantic States, in the cities, and among intellectuals, merchants, and scholars. Conversely, the Anti-Federalists believed that the states should remain strong, that they be at least co-equal players with the national government, and that power should be dispersed among these levels of government. The Anti-Federalist base of support was stronger in rural areas, the south, and among farmers, frontier settlers, and individualists.

Case Study: Marketing the Constitution: *The Federalist*

Once the Constitution was written, it needed to be ratified by the states. To become the law of the land, nine of the thirteen states had to support it. To ensure passage, the framers needed to explain to the states, and more importantly, to the people, why the Constitution was in their best interests. The primary method they chose to sell the Constitution to the people was through a series of periodic essays published in newspapers throughout the states, laying out in simple terms, the basic provisions of the Constitution. These 85 essays, collectively called *The Federalist,* appeared in newspapers and were widely circulated in 1787-88. Not only did they explain how the Constitution was structured and how it would function but also the essays provided insight into the framers' philosophical and theoretical reasoning when crafting the document. Three men wrote the 85 essays, James Madison, Alexander Hamilton, and John Jay. Madison and Hamilton penned the vast majority. Overall, Madison's essays are probably the most famous, because he laid out a commonsense, nuanced, and balanced argument, which respectfully addressed the concerns of the Anti-Federalists. Hamilton, on the other hand, was more direct and less conciliatory towards the Anti-Federalists.

The framers reasoned that if people could read these essays and understand their reasoning, they would ultimately support the new Constitution. The Anti-Federalists wrote a number of rebuttal essays that in many cases provide excellent arguments against the Constitution. However, because the Constitution ultimately is ratified and the Federalists "won," the Anti-Federalists' essays have been largely marginalized or forgotten. Throughout this year-and-a-half, Madison and Hamilton would publish periodic essays under the pen-name "Publius" and various Anti-Federalist writers, many of whom would also use a pen-name, would respond with a counter-essay. What follows is an analysis of some of the most famous essays of *The Federalist*—those that lay out the argument of the Federalists best. Collectively, the 85 papers that comprise *The Federalist* are probably the third-most important set of documents of the founding era, behind only The Declaration of Independence and the Constitution. These three pieces comprise the basis of American political philosophy.

Federalist #10, written by James Madison, is probably the most famous and influential of all the essays. It best summarizes the Federalists' collective argument in favor of the Constitution. In this essay, Madison primarily addresses the issue of factions, what we would call special interests or interest groups, or

even political parties today. With incredible foresight into the development of the modern American political system, Madison explained that if a strong, energetic government was not established, factions would dominate the system, alienating the people and negatively influencing the crafting of legislation and public policy (which, many today would argue, is exactly what occurred). Madison defined factions as "...a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community" (Hamilton, Jay, & Madison, 2001, p. 92). Madison explained that factions would always exist, but government should ensure that their effects are tempered or diminished. To accomplish this end, he reasoned, a strong national government, a republic, must be established to safeguard the liberties and will of the people. He further argued that too much freedom and liberty can result in too much faction: "Liberty is to faction what air is to fire" (Hamilton, et al, 2001, p. 92). Madison further explained that the best system of government to limit the power and influence of factions is a republic, a representative democracy. Echoing Rousseau and others, Madison understood that democracy was predisposed to breeding faction. However, he reasoned, the United States, with its large territory and population, was uniquely situated and comprised to limit factions. Factions were inevitable but could be marginalized in a large, vast republic. Madison envisioned a system whereby the people would choose the best, brightest, and most capable members of society to represent them in government. He, in fact, advocated for a "natural" aristocracy that would represent the people in government. Like the rest of the framers, he was a well-educated aristocrat who felt that some were better fit to lead than others. Throughout #10, and in other essays, the authors refer to "men of fit character" who would govern in the best interests of the people.

Federalist #39, also penned by Madison, addresses the primary concern of the Anti-Federalists–that the proposed Constitution would result in a consolidated government whereby all power would be concentrated in the national government, and the states would lose all or significant power, causing them to wither away. Madison does concede that the states would lose some power, but would remain very important partners in this unique power-sharing arrangement that the Constitution proposes, where there are multiple levels of sovereign government existing at the same time, which is the definition of **federalism**. Today, we use the terms "federal" and "national" almost interchangeably. To Madison, they were different. In explaining how the states would retain power under the Constitution, he made a detailed distinction between "federal" and "national."

Madison explained that the government would function simultaneously as federal and national in nature. When governmental authority flowed from the states, it was federal in nature. However, when governmental authority flowed directly from the people, it was national in nature. Therefore, the proposed Constitution viewed its power as derived from sovereign states individually as well as from the American people collectively. For one of the first times, the nation was beginning to view itself as one, unified entity.

Most of the essays written by Hamilton are not nearly as delicate as Madison's. In fact, at times, they tend to even contradict Madison. In *Federalist #15*, Hamilton also addresses the issue of consolidation of power and is not nearly as conciliatory to states' rights advocates, explaining that a powerful national government is the best guarantee of national progress and health as a nation. He even refers to the Articles (which guaranteed the strength and power of the states) as a "national humiliation." In this essay, Hamilton argues that the fledgling nation needs to be grounded on firm financial footing and possess an ability to defend itself, something that can only occur through the establishment and leadership of a strong national government. He argues that the states had proven to be ineffective in either of these areas. Hamilton also argues strongly for consolidation, even at the expense of state power: "...we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper objects of government" (Hamilton, Jay, & Madison, 2001, p. 111). Here, Hamilton is advocating that the government rightly serves all Americans as individual citizens of one nation, not the interests of the states. Until then, he reasoned, the new nation would remain financially insolvent, fractured, and ripe for foreign invasion.

A Civic Engagement Challenge: Draft a Constitution

Are there aspects to the Constitution that do not seem just or fair? Did the framers err when drafting certain articles that left the document open to interpretation and speculation that did not mirror their intent? Would you like to see certain amendments made to the Constitution? Here's your chance. Break into groups of five or so students and draft your own Constitution for a nation you have created. Be sure to include the following: a brief description of your society or nation, a Preamble or "mission statement," and 10-12 realistic, detailed, specific changes and/or provisions your group would like to see enacted. Your document can be focused at a national, state, community, or even campus level.

After you have finished, trade papers with another group to see what they have crafted. Be serious, but have fun!

Discussion Questions

1. Are the Declaration of Independence and the Constitution compatible documents? How are they similar? How are they different?
2. How do you think the framers would react to the evolution of the power of the president over the past 200 years? Has the office become too powerful? Was that their intent?
3. Should the federal government be more limited to the enumerated powers found in the Constitution, or is it inevitable that it assumes implied powers over time? What are the consequences or implications? What did the framers intend?
4. Should the framers have ended the institution of slavery in the Constitution? Why or why not?
5. If you were alive in 1787, would you have been a Federalist or Anti-Federalist? Why? What were their basic differences?

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3

Federalism

Charles H. "Trey" Wilson III

Learning Objectives

After covering the topic of federalism, students should understand:

1. What federalism is and how the U.S. Constitution allocates powers to both the national and state governments to create a federalist system in the United States.
2. The evolution of American federalism from inception to its modern manifestations. The concepts of "dual federalism," "cooperative federalism," "New Federalism," and "New Age Federalism."
3. The future of federalism in light of recent Supreme Court decisions affecting the distribution of power between the national and state governments.

Abstract

Federalism in the United States refers to a governmental system outlined in the Constitution in which power is distributed between the national government and the state governments. The U.S. Constitution allocates power to the national government chiefly through the enumerated powers, the implied powers, the power to tax, and the Supremacy Clause, and to the state governments through the "Reserved Powers Clause." The nuances of federalism have evolved and changed in the U.S. as views altered over time about how power should be shared between the federal government and state governments. Political scientists routinely use labels such as "dual federalism," "cooperative federalism," "New Federalism," and "New Age Federalism" to describe the various incarnations of federalism. The future of federalism may be dynamic depending upon how the U.S. Supreme Court chooses to adjudicate cases in which the distribution of power in government is at issue.

Introduction

Federalism may be defined as a political system in which power is divided between a central government and multiple constituent, provincial, or state governments. While the U.S. Constitution never expressly states anything like "the United States will have a federal system," various provisions in the document confer or deny powers to the national government while others reserve or withhold powers for the fifty state governments. In this way, a federal system was created for America. This system has evolved and changed over time and continues to do so today, as a kind of tension has grown to exist between the central and the state governments over which will exercise power. Understanding this system and its nuances is requisite to fully grasping American government, since federalism is at the heart of how government is organized in the United States.

Why Federalism?

For the framers, federalism was a kind of middle ground between two other systems of government that had proven to be unsatisfactory for Americans. In one such system (called a **unitary** system by political scientists), a centralized, national government retained virtually all governmental power, as in the case of the British monarchy. Many colonists believed they had been subjected to tyrannical oppression at the hands of the king, and so were wary of conferring too much power on what they feared would become a distant and unfamiliar national government. However, the opposite extreme of government was equally undesirable. While the **confederal** system created by the Articles of Confederation did create a national government, the Articles gave relatively little power to that central government and instead reserved most governing power for the several states. While this provided for a great deal of local autonomy, the result was a puny national government. Indeed, this national government was too weak and ill-equipped to respond to even internal crises such as Shays' Rebellion (a minor uprising of Massachusetts farmers angered over an ailing economy), let alone external threats from powerful neighbors. A **federal** system empowered to some extent both the state and national governments, thereby combining the benefits of both.

Creating a Federal System

Empowering a National Government

Four items contained in the U.S. Constitution serve to confer the lion's share of power on the national government: the "enumerated powers," the "implied

powers," the "Supremacy Clause," and the power to tax.

To enumerate something simply means to count it off, one by one, as in a list. Hence, the **enumerated powers** are essentially contained in list form in the U.S. Constitution, specifically in Article I, Section 8. This text gives "Congress," which should be taken to mean the national government, the power to do many specific things, including coining money, establishing post offices, and maintaining a navy, among others.

While the enumerated powers specify many things that the federal government can do, the framers knew that they could never create an exhaustive list of powers for the Congress. After all, times change, and much would doubtlessly occur in the future that they could not even anticipate, let alone write about. Consequently, the framers included language in Article I, Section 8 which has come to be known as the **Elastic Clause**, so-called because it lets the federal government expand and stretch its power under certain circumstances. The Elastic Clause provides that Congress shall have the power to make all laws which are "necessary and proper" for executing any of its enumerated powers (The Elastic Clause is sometimes referred to as the "Necessary and Proper Clause" because of this language). The result is that, providing Congress can demonstrate that a law it likes is both necessary and proper, it may be able to do something that might, at first glance, seem beyond the scope of its enumerated powers. Of course, determining exactly how "necessary" and "proper" should be defined in any given circumstance is often a matter of fierce debate in government, and anyone who does not like the law in question will certainly argue that it is unnecessary and improper. Political scientists refer to powers the national government derives from the Elastic Clause and the enumerated powers as **implied powers** since, while they are not overtly stated, such powers may be fairly construed to exist.

Article VI of the U.S. Constitution contains what is referred to as the **Supremacy Clause**. Occasionally, both the federal government and one or more state governments might each claim some power to do something—for example, the power to regulate the issuance of monopolies on steamboat ferry transportation across the Hudson Bay (see the Supreme Court case of *Gibbons v. Ogden* later in the chapter). The Supremacy Clause states that in these conflicts, the federal government shall be presumed to win out over the state government(s). Chief Justice John Marshall put it more eloquently in the judicial opinion he wrote in 1819 for the U.S. Supreme Court case of *McCulloch v. Maryland*. Marshall declared, "the Constitution and the laws made in pursuance thereof are supreme…they control the constitution and laws of the respective States, and cannot be controlled by them." The framers included this provision because they

had seen first-hand under the Articles of Confederation how the nation could suffer under an impotent national government.

Finally, the national government derives much of its power from the ability to tax. To avoid the myriad problems of inadequate revenue that surfaced under the Articles of Confederation, the framers empowered the federal government with the ability to levy charges against such things as activities, products, and, with the Sixteenth Amendment, income. The power to tax can be a powerful tool to shape public policy. Consider, for example, consumption or "sin" taxes imposed by government on everything from alcohol to tobacco products to "gas guzzling" vehicles. Proponents of such taxes hope tacking on additional expenses to the cost of taxed products will discourage people from acquiring them and, eventually, make the products so unattractive to consumers that they disappear from the market.

Empowering State Governments

Like the federal government, state governments derive power from the U.S. Constitution. Regarding state power, Supreme Court Justice Hugo Black once wrote that federalism meant, "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways" (*Younger v. Harris*, 44). Indeed, having lived for a decade with the Articles of Confederation under which states maintained virtually all governmental power, it would have gone without saying for many of the framers that states would retain power under the U.S. Constitution. Consequently, relatively little is stated outright regarding state power in the Constitution's articles. However, Anti-Federalist concerns over the national government usurping too much power eventually led to the inclusion of the Tenth Amendment in the U.S. Constitution. It states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Political scientists refer to this bit of text as the **Reserved Powers Clause** and these powers as "reserved powers" or, alternatively, "police powers." While the latter term might conjure up images of men and women in blue brandishing pistols and handcuffs, think of it more broadly. Besides being a noun, "police" can also be a verb. To "police" something essentially means to keep something maintained in good order. In the context of federalism, a state's "police powers" let it exclusively regulate within its borders things like law and order, health, safety, and morality as it sees fit and prohibits

the federal government from interfering with state interests in these areas. This explains why some states may permit some practices (such as same-sex marriage or capital punishment), while others do not. Each state is exercising its reserved powers autonomously.

Powers Shared Between (and Denied to) the Federal and State Governments

We have seen how the U.S. Constitution confers power onto the national government and onto state governments to create America's federal system. However, to completely grasp how federalism functions, we must also understand the concepts of concurrent powers (or shared powers) and prohibited powers (or denied powers). **Concurrent powers** are powers that are held by both the federal and the state governments. For example, both the federal government and the several state governments have the power to establish a court system. This is why the United States has a federal Supreme Court, just as each state has its own state supreme court of last resort for cases moving through the state judicial system. Another example of a shared power would be the power to tax. If you have not already begun doing so, every year around mid-April, you will submit your Federal Income Tax Return, probably the (in)famous I.R.S. Form 1040. In most states, such as Georgia, you will also submit an income tax return to the state you live in around this time as well. Some states, such as Florida, Nevada, and New Hampshire, do not have a state income tax. As the name implies, concurrent powers may be exercised by the states and the national government simultaneously. However, note that states may exercise these shared powers only up to the point that they do not violate or conflict with national law. For example, while the state of Georgia does have the power to tax, the state could not begin taxing goods slated to be exported to other countries through its shipping ports. This is because the U.S. Constitution contains a clause that prohibits export taxes from being used (note that Georgia and other states can tax *imported* goods—providing they obtain approval from Congress to do so).

The prohibition on export taxes is a good example of a "prohibited power." As the name implies, a **prohibited power** is one that is denied to either the federal government, the state governments, or, at times, denied to both governments. For example, the Constitution contains a clause that reads, "No Title of Nobility shall be granted by the United States." Hence, as nifty as they might sound, there will never be a "John Jones, Duke of Dahlonega" or "Susan Smith, Duchess of Dawsonville"—at least not officially, anyway. Another example of a prohibited power relates to what are called *ex post facto* laws. "*Ex post facto*" is Latin for

"after the fact." An **ex post facto law** is one that would criminalize some action for the purpose of prosecuting it *after* someone had already performed the action at a time when it was legal to do so. Vengeful politicians in neither the federal government nor any state government can enact such laws. Examples of powers prohibited to only state governments would include the power to make treaties or to coin money. Examples of powers prohibited to only the federal government could include things like establishing a drinking age or setting the age of consent for marriage, since these would be considered state police powers protected from federal government intrusion thanks to the Tenth Amendment.

"Horizontal Federalism" and Relations between the States

The foregoing material describes how the U.S. Constitution allocates (or does not allocate) powers to the national and state governments. Some political scientists qualify this as **vertical federalism** since it describes a dynamic occurring between government on two different levels, federal and state. Just as important, however, is how power is shared *between* the several different governments that all inhabit the state level.

To many people, part of what makes the United States a remarkable country is the heterogeneity of its fifty states. The size, population, resources, natural environment, and political culture of no two states are exactly alike. What is it that keeps big California with its population of around 40 million people and vast resources from trying to throw its weight around against other, smaller states? In fact, several provisions of the Constitution serve to put all the states on one level (i.e., horizontal) playing field. Four of the most significant of these provisions of **horizontal federalism** are the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Interstate Rendition (a.k.a. Extradition) Clause, which are all contained in Article IV, and interstate compacts.

The **Full Faith and Credit Clause** requires each state to respect "the public Acts, Records, and judicial Proceedings of every other State." Practically speaking, this statement means that contracts and judicial orders arising out of one state will continue to be binding in other states, mostly because it better facilitates national commerce. It is the reason a couple can drive cross-country all night, get married at a 24-hour wedding chapel in Las Vegas, and then return home, still married, even though their ceremony occurred several states away. Assuming the marriage contract was valid in Nevada, the Full Faith and Credit Clause requires that other states recognize it as well.

But what if something permitted by a minority of states happens to be a thing that a majority of other states would rather *prohibit*? Could the Full Faith

and Credit clause compel that majority of states to kowtow to the policy of the minority? A scenario rather along these lines emerged in the U.S. beginning around the 1990s. A handful of states (including Hawaii, Vermont, and Massachusetts) began legalizing either civil unions for same-sex couples or same-sex marriage. For a variety of reasons, many other states and many lawmakers in the Federal government bristled at this. In 1996, the federal congress passed and President Clinton signed into law the "Defense of Marriage Act" (DOMA) which, among other things, essentially defined marriage as being a union between one man and one woman. As well, by around 2006, more than a dozen states had amended their own constitutions to deny recognition and acknowledgment within their borders of what became popularly termed "gay marriages" that had been performed in other jurisdictions.

The next decade saw much litigation over the constitutionality of DOMA and state-authored gay marriage bans. Court battles culminated in June of 2015, when a closely-divided U.S. Supreme Court ruled in the case of *Obergefell v. Hodges* (2015) that same-sex marriage bans were unconstitutional. Interestingly, though, the Court did not rely at all upon the Constitution's Full Faith and Credit clause to inform its ruling that essentially legalized gay marriage in the U.S. Rather, the Court struck down the bans because, in its view, they violated Fourteenth Amendment guarantees of equal protection under the law to all citizens, including homosexuals.

Does this leave unanswered the question of whether or not the Full Faith and Credit Clause can subordinate a majority of states to the will of a minority of states? Not entirely. In another case decided in 1988, the Supreme Court noted that the Full Faith and Credit clause "does not compel a State to substitute the statutes of other States for its own statues dealing with a subject matter concerning which it is competent to legislate" (*Franchise Tax Bd. of Cal. v. Hyatt*, 2003, citing *Sun Oil Co. v. Wortman*, 1988). Language such as this has been interpreted by some legal observers as giving states the prerogative to claim what is termed a "public policy exception" to the Full Faith and Credit clause. Though there is not a great deal of case law providing much nuance about the exception, states can presumably invoke it in at least some instances to avoid having to embrace some unwanted policy adopted by a sister state. Whether it would be the public policy exception or the rule (i.e., the Full Faith and Credit clause) that would control in any given situation is, of course, something that the judiciary would determine. Like the Full Faith and Credit Clause, the **Privileges and Immunities Clause** also serves to equalize power distribution between states. This clause guarantees that citizens of one state shall be deemed to possess the same fundamental rights as citizens

of all other states. It is occasionally referred to as the "Comity Clause" because it prevents any state from discriminating against visiting citizens from another state in certain respects, which would tend to preserve harmony as people travel between states ("comity" means a friendly social atmosphere, which probably would better come about if everyone thought they were on equal footing with everyone else). Note that this clause applies only to basic constitutional rights such as those discussed in Chapter 11. So, for example, a state might legally charge residents one price to enter a state museum but charge non-state-residents a higher price since museum-going is not a fundamental right protected by the U.S. Constitution.

Interstate Rendition (or perhaps more commonly, if not entirely correctly, referred to as "extradition") occurs when a fugitive apprehended in one state is handed over to the authorities of another state for prosecution for crimes committed in that latter state. To preserve interstate comity, when rendition occurs, it typically does so without much incident. However, occasions have arisen when one state may not want to turn over a fugitive to another state. Perhaps the most celebrated instance of this in recent years came in the legal case of *Puerto Rico v. Branstad*. In this case, an Iowa governor declined to extradite a man charged with homicide in Puerto Rico who had fled to Iowa while released on bail. The man (who was white) stood accused of killing a Hispanic woman, and the governor did not believe he could get a fair trial owing to racial circumstances. The case eventually reached the U.S. Supreme Court, which ruled that federal courts have the power to force states to hand over fugitives thanks to the Extradition Clause in Article IV, Section 2, Clause 2. (See *Puerto Rico v. Branstad*, 1987).

Interstate compacts are discussed in Article I, Section 10 of the U.S. Constitution and also serve to harmonize relationships between states. These compacts are legally binding agreements between two or more states to do something that must be approved by Congress before taking effect. They can be on any subject, but often revolve around natural resources (such as lakes and rivers) that touch or flow through multiple states. Signatories to these compacts agree to share power and resources to maintain the common natural resource and prevent any one state from polluting or overusing the resource.

Ultimately, these several provisions of the U.S. Constitution do much to help the fifty states get along. Except for one unfortunate period from 1861 to 1865, horizontal federalism has worked for over two hundred years. This track record should argue powerfully that horizontal federalism is just as important as federalism in the vertical sense when it comes to American government.

The Evolution of Federalism

Early Years: The "Supremacy" Period

Our present understanding of federalism and the manner in which power is allocated between the state governments and the national government did not spring into being overnight. Rather, this understanding has changed over the last two hundred-plus years. This process began with the writing of the U.S. Constitution. The framers meant for that text to communicate much about how power would be distributed; hence, we have the enumerated powers, the implied powers, the reserved powers, etc., discussed earlier. At the same time, the framers meant for their words to be interpreted by future generations. They understood that times would change and that phrases such as "necessary and proper" and words like "supremacy" would have to be qualified in the future to be meaningful in light of those changes. The job of qualifying this constitutional language typically falls to the United States Supreme Court. How that language has been qualified over time by the Court in response to changing times is the evolutionary process of federalism.

This evolution of federalism really commenced in the early 1800s when Chief Justice John Marshall, a very talented jurist, headed the U.S. Supreme Court. In 1819, the Marshall Court heard a case called **McCulloch v. Maryland**, which is often referred to as "the bank case" for reasons soon to become apparent. In a simplified version, things began when Congress chartered a national bank and located a branch office of this bank in Baltimore. Maryland's state legislature, which doubtlessly disliked the idea of added competition for state-owned banks within its borders, responded by levying a steep tax on all banks operating in the state that had not been chartered by Maryland. When James McCulloch, the head of the Baltimore branch of the federal bank, received the tax notice, he refused to pay. The state of Maryland sued McCulloch in state court and, unsurprisingly perhaps, won. McCulloch appealed to the U.S. Supreme Court.

There were two central issues in the case that the Supreme Court was asked to decide, and both related to federalism. The first was, "Did Congress have the authority to charter a bank?" Maryland pointed out that the U.S. Constitution never mentioned such a power; indeed, the word "bank" never even appeared in the document. However, the Supreme Court sided with the federal government's argument on this issue. That argument asserted that it was reasonable to *imply* that Congress should have the power to charter a bank thanks to the Elastic Clause. After all, the Constitution did expressly give Congress the power to issue currency, collect taxes, and to borrow money in the enumerated powers. A bank

could assist with doing these things—indeed, the U.S. government claimed it was *necessary* to have a bank to do them efficiently. Also, a national bank was not some arcane, complicated contraption that Congress conjured up out of nowhere. Many countries had national banks of one form or another even back then. Hence, one could say that having a national bank was *proper* as well as necessary for a nation like the United States to thrive. The Supreme Court decided that the federal government had made its case that the national bank was "necessary and proper" to the exercise of Congress's enumerated powers involving revenue and currency. And, according to the Elastic Clause, if something Congress wants to do can be deemed "necessary and proper," then that something is a constitutionally permissible exercise of federal government power.

The second question presented for resolution in *McCulloch v. Maryland* related to taxation. Maryland argued that, assuming the national bank could exist, nothing should stop the state from taxing it. After all, the bank was on Maryland soil and so was potentially a burden to the state, albeit a minor one. The tax would compensate the state for its trouble. The Supreme Court did not buy it. Chief Justice Marshall, who wrote the majority opinion in the case, invoked the Constitution's Supremacy Clause and held that a state law taxing the bank must be trumped by a federal law permitting the bank to operate freely.

McCulloch v. Maryland is an important case in the evolution of federalism because of how the Supreme Court interpreted the Elastic Clause and the Supremacy Clause. In both instances, the Court read the U.S. Constitution in such a way that opened the door for the expansion of the federal government's power. Consider that the Court *could have* qualified "necessary and proper" in such a way that would have made it very difficult for the federal government to characterize anything as either necessary and/or proper. It did not. Rather, the Court put the entire country on notice that satisfying the parameters of the Elastic Clause was something doable. Likewise, the Court could have adopted a more limited definition of "supremacy." Again, it chose not to, sending in the process a clear signal to states that their laws would fare poorly in competition with federal statutes (See *McCulloch v. Maryland*, 17 U.S. 316 [1819]).

Another landmark case affecting federalism came before the Marshall Court only a few years after *McCulloch*. In 1824, the Court heard **Gibbons v. Ogden**, which has come to be known as the "steamboat case"—again for reasons that will soon become apparent. Though the case eventually turned out to be somewhat complicated on several levels, the main issues in dispute were actually fairly simple. Aaron Ogden, who had ties to Robert Fulton, the inventor of the steamboat, had secured exclusive rights from the New York State legislature to

operate a steamboat passenger ferry service on the Hudson River between New York and New Jersey. About the same time, Thomas Gibbons, a former business partner of Ogden's, also secured exclusive rights to do roughly the same thing—but his license came from Congress, not a state legislature. Ogden sued to protect his monopoly.

Before the Court, the case turned chiefly on how the **Interstate Commerce Clause** of the Constitution would be interpreted. This clause states that Congress, not the states, shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." No one much disputed that the two steamboat services were operating "among" states. However, the parties to the lawsuit differed over how the word "commerce" in the clause should be defined. Ogden argued that commerce should amount to what people probably typically think of when they think of commerce—namely, exchanging money for goods. Since Ogden's steamboat ferry provided a service, not goods, in exchange for money, he argued that what he did fell outside of the definition of commerce. And, if what he did was not commerce, then the Interstate Commerce Clause could not apply to give Congress the power to issue anything.

The Supreme Court demurred. Justice Marshall wrote that commerce should be broadly defined to include "intercourse, all its branches." So, you would be engaging in commerce if you swapped money for goods, money for services, services for goods, goods for goods, etc. Hence, the Congressional license granted to Gibbons was the valid one since the national government and not the state of New York was constitutionally empowered to regulate commercial activities that involved more than one state, which the steamboat ferry service did. This broad interpretation of what constituted commerce would let Congress use the Interstate Commerce Clause as a rationale to regulate many things over the next two centuries, much to the chagrin of many states. While during this time period the Court would occasionally reformulate its ruling on the matter (sometimes contracting when the clause could apply only to re-expand it at a later time), the clause has still always remained a powerful resource for the federal government (see *Gibbons v. Ogden*, 1824).

The final truly significant Supreme Court case that qualified federalism during its age of supremacy was that of **John Barron v. The Mayor and City Council of Baltimore**, which was decided in 1833. Barron owned part of a lucrative wharf in the Baltimore harbor. He sued Baltimore for damages, claiming that when the city had diverted the flow of several streams to facilitate road work, the diversion caused sand and silt to collect around his wharf. Barron asserted that this hurt his business by making the water around the wharf too shallow to accommodate

many big vessels that sought to dock and unload their cargos there. Barron won the suit in the lower court, but Baltimore appealed the ruling, eventually all the way up to the Supreme Court.

The key issue in the case was whether or not state government takings of private property for public use (known in the law as "eminent domain," which, essentially, this was) required just compensation to individuals deprived of property. The Court held that while the Fifth Amendment of the U.S. Constitution did require this, the requirement only applied to the *federal* government and not the several state governments. Importantly, the Court essentially ruled that the freedoms guaranteed by the Bill of Rights did not restrict the state governments but, rather, applied only to the federal government. This qualifier was important in the development of federalism because it furthered a divide between federal and state governments (see *Barron v. Mayor of Baltimore*, 1833).

The Era of "Dual Federalism"

While the Supreme Court's rulings in both *McCulloch* and *Gibbons* interpreted constitutional language in such a way that favored the federal government over the states, this would not always be the outcome. Over the next several decades following these decisions, the Court would be asked many times to decide just how far federal government power extended. The justices occasionally ruled against the federal government, thereby firming up the power of state governments.

Perhaps the most (in)famous instance of this occurred in the 1857 case of *Dred Scott v. Sandford*. In this dispute, an African American slave sued for his freedom after moving with his owners from the slave-holding South to a free state in the North, believing his residence on free soil had ended his slave status. In an extremely controversial opinion, the Court held that Scott and other slaves should be "regarded as beings of an inferior order" not considered citizens of the United States, and so prohibited from filing suit in federal court. From a federalism standpoint, the case is significant because the Court declared that Congress lacked the power to ban slavery in the western territories such as Kansas and Nebraska, something it had attempted to do with the Missouri Compromise of 1820. States, then, and their citizens, would determine the fate of the "peculiar institution" (as slavery was sometimes euphemistically called) within their borders, not the federal government (see *Dred Scott v. Sandford*, 1856).

Supreme Court rulings like that in *Dred Scott* that conferred power on state governments or rulings like those in *McCulloch* and *Gibbons* that conferred power on the national government collectively created what political scientists refer to as **dual federalism**. Under this scheme, the federal government and the state

governments are viewed as each having their own "sphere of influence" in which each exercises power and into which the other may not encroach. The national government derives its power to control everything in its sphere largely from the expressed and implied powers of the U.S. Constitution. The state governments control their spheres and keep the federal government out of their business largely thanks to the Reserved Powers Clause in the Tenth Amendment.

A time-honored model used by American government students to visualize the arrangement of dual federalism is a two-layer-cake. Think of the federal government as being the top layer and the state governments as being the bottom layer. Each otherwise identical layer of cake is analogous to a sphere of influence and each is separated from the other by a thick layer of gooey icing, an insulating confection whipped together by the U.S. Constitution.

The basic belief in dual federalism controlled American constitutional jurisprudence until the 1930s. Despite the notion of duality, the federal government's overall power as compared to the states arguably, if gradually, increased during this interval. Perhaps the biggest factor for this increase was the Civil War. Ironically, this conflict that started out to increase the power of state governments ended up augmenting the national government's power in many ways. For example, the federal income tax came into being. This taxation gave the national government a revenue source it had not possessed before. The tax would eventually become a permanent fixture in American life with the ratification of the Sixteenth Amendment and provide the federal government with vast capital resources (see U.S. Department of the Treasury, 2010).

Also out of the Civil War came the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution. These so-called "Civil War Amendments" all dealt with race and sought to uplift free-blacks in whatever state they lived. However, judicial rulings like *Plessy v. Ferguson* (discussed in detail in Chapter 11) often thwarted this aim by returning power to states to make their own civil rights laws.

Some years after the war, another kind of fight would increase the federal government's power. Congress enacted the Sherman Antitrust Act in 1890 to combat the growth of corporate monopolies in America. This act permitted the federal government, not the states, to regulate many aspects of business and commerce in the name of protecting consumers from anti-competitive practices.

While the Civil War Amendments and the Sherman Act empowered the federal government, not everything during the era of dual federalism was a loss for state governments. Supreme Court rulings in some cases, like *Plessy*, empowered

states. For example, states enjoyed relative autonomy to legislate in the areas of voting and civil rights within their own separate spheres.

The Era of "Cooperative Federalism"

Dual federalism became old news in 1933 with the advent of the New Deal. "New Deal" was the name given to a collection of radical government programs championed by President Franklin Roosevelt to get the United States out of the economic quagmire that was the Great Depression. Almost any problem one could think of (unemployment, crime, etc.) loomed large in America during this age. About the only entity anyone believed was sizable enough to even stand a chance at combating these ills was the federal government. Congress enacted law after law, creating new federal agencies geared toward promoting some aspect of economic recovery. These agencies had names like the Civilian Conservation Corps or the Tennessee Valley Authority, but were more often known by their initials. Collectively, history knows the CCC, the TVA, and others somewhat jokingly as the "Alphabet Soup Agencies." The laws that created them demanded cooperation from multiple levels of government.

The laws associated with the New Deal demanded that multiple levels of government (federal, state, and, now for the first time, often municipal governments) work together on implementation. For example, the federal government might do something like provide funds to a state that would then hire some of its unemployed citizens to, in turn, complete a roadwork project for a city. Because of the governmental interconnectedness inherent in this arrangement, political scientists refer to this as **cooperative federalism**. Recall that under dual federalism, the different levels of government operated autonomously within their separate spheres of influence—little cooperation there, to be sure. With the advent of this new kind of federalism, the lines between governmental spheres blurred and became more fluid.

Of course, this changing federalism requires a change of metaphor as well since a slice of layer cake will always reveal two distinct parts separated from each other by frosting. Think of cooperative federalism as being illustrated by a piece of marble cake instead. A slice of that confection—when viewed from the side—reveals a swirling, intermixing of light and dark cake. Just as it is difficult to discern precisely where one cake starts and the other stops in a marble cake, cooperative federalism accepts that the boundaries of power for federal, state, and local governments are no longer fixed and distinct.

You will probably have surmised that the shift from dual federalism to cooperative federalism was a radical one. Many people feared this unprecedented

growth of the federal bureaucracy and some filed legal challenges to New Deal legislation that made it all the way to the Supreme Court. Initially, the Court overturned much of the legislation. The justices often agreed with challengers that aspects of the New Deal conferred too much power on the national government.

President Roosevelt fumed. In private, he derisively referred to the justices as the "nine old men." Publicly, he proposed a plan that would essentially have given him and a sympathetic Congress the power to expand the Supreme Court from nine to fifteen justices. Of course, the additional jurists he would install would be New Deal supporters.

Roosevelt's **court-packing plan**, as it came to be known, proved to be largely unpopular with the American people, who resented his effort to tamper with the judiciary. However, merely proffering the plan may have had the effect FDR desired. Perhaps a bit spooked by the court-packing threat, the high court began ruling in favor of much New Deal legislation starting around 1935. These rulings cleared the way for Congress to increase its sway over states (see Leuchtenburg, 1969).

Since the New Deal era, the primary tool employed by the federal government to induce states and municipalities to do their share of the cooperating in cooperative federalism was something called a **categorical grant**. A grant is simply an assignment of funds—usually a lot of funds when it is a federal program in question. The federal government had provided a few grant programs to states over the years prior to the Great Depression (such as the Morrill Land Grant Act of 1862, which gave states federal land to establish public colleges), but these were nothing compared to New Deal grant programs in either size or scope. The term "categorical" is meant to describe how Congress doles out federal dollars to states to accomplish distinct things in some particular area—as opposed to giving states money to spend however they might wish.

Using categorical grants, Congress can, for all intents and purposes, regulate just about anything. Indeed, even though the Tenth Amendment reserves some powers to states, Congress can often tempt states with grants to induce them to police something in a way desired by the federal government. For example, there was a period of time during the 1970s where many oil-rich Arab countries instituted an oil embargo against the United States, mostly to punish Americans for historical support of Israel. Gasoline prices spiked, hours-long lines at pumps were common, and many places ran out of gas entirely as refinery oil supplies dwindled. The federal government wanted the nation to drive slower to conserve fuel. However, setting speed limits is a classic police power and lowering them is something only individual states could do thanks to the Tenth Amendment. Still,

the federal government would get its way. It offered states large grants of highway improvement money if they would only lower their interstate speed limits to 55 mph. Hungry for those highway funds, virtually all did so in a relatively short time. Hence, the national government accomplished its goal almost just as if it had regulated things directly (see Weiner, 1992).

Beginning in the 1960s, the tone of cooperation between the states and the federal government began to change. Prior to that decade, most states had been generally content to work with the federal government under the terms of categorical grants, believing as they did that the two levels of government shared common aims. However, as the federal government advanced programs to combat poverty and discrimination under the Kennedy and Johnson administrations, many states—particularly in the South—abandoned this view. This occurred largely because the national government found ways to bypass state legislatures en route to achieving national objectives. Local governments and even community organizations received much federal funding, since Congress believed they would be more likely than several staunchly conservative states to spend money in ways benefitting African Americans and other marginalized groups. From many states' points of view, the cooperation in federalism had disappeared.

Equally vexing for states was the fact that many of the federal government programs that did emerge in the 1960s and 1970s contained what are known as **unfunded federal mandates**. Put simply, this term means that the federal government enacted some regulation that states were required to abide by but gave no money to states to spend for this purpose. For example, in 1974, Congress passed the Safe Drinking Water Act. Essentially, this act stated that public water sources had to meet Environmental Protection Agency standards of purity within a given time frame. While everyone will agree that clean drinking water is a good thing, Congress left to the states and local governments the responsibility and expense of getting water supplies tested and of removing pollutants and impurities if any were found. Governments that did not comply with the act faced stiff federal penalties and, in extreme circumstances, could be forced to find some other water supply—however inconvenient or expensive doing so might be. State and local governments, already short of time and money, bristled at what they saw as unreasonable burdens imposed by SDWA. This and other unfunded federal mandates would eventually be amended or repealed so as to lessen the burden on state and local governments; however while they were in effect, relations between these governments and the federal government were strained.

"New Federalism" and Beyond

Ronald Reagan assumed the presidency in 1981 with an eye toward vastly curbing federal government power that had increased thanks to the growth of unfunded mandates and the deterioration of cooperative federalism. Reagan, a conservative political thinker dubious of big government, served as governor of the state of California from 1967 to 1975. He had experienced first-hand the frustration visited upon states by the federal government and unfunded mandates. Reagan sought to shrink federal government power and return more autonomy to the states by greatly reducing unfunded mandates and by changing how federal grants operated. In doing so, he built upon the groundwork laid by another Republican president, Richard Nixon, who had initiated a practice of *revenue sharing* in 1972 in an effort to shift some power and responsibility back to state and local government through a federal assistance program.

Political scientists refer to what Reagan ushered in as **New Federalism** because of its novelty. It had several key features. Soon after assuming office, President Reagan rallied public opinion to urge Congress to make drastic cuts in both federal domestic programs and income tax rates. This action created an environment in which the federal government took in less revenue and had fewer programs to disburse back to the states the revenue it *did* collect. Consequently, state and local governments had to become more self-sufficient, which lessened the power the federal government had over them.

But things did not stop there. Another key feature of New Federalism was a heavy reliance on **block grants**. Recall that in cooperative federalism, the federal government offered states and municipalities categorical grants. These grants came with many strings attached and required states to spend any federal dollars they received doing very specific things. Block grants are very unlike categorical grants because states and local governments receive sums of money along with better flexibility in determining how the funding can be spent. Additionally, federal government oversight or monitoring of block grant funds is relatively light. All of these actions had the effect of reducing the influence of the federal government over state and local governments since the power of the purse is effectively transferred to the latter. While block grants had been around in one form or another since the 1960s or so, New Federalism employed them with a gusto not yet seen in the United States to give states increased agency in governing areas ranging from healthcare to education to transportation, etc.

The trends of New Federalism and the downsizing of the federal government generally continued to some extent for many years after President Reagan left office in 1989. For example, in the 1990s, the Clinton administration encouraged

states to explore new ideas and options for policymaking. However, they had no trouble imposing federal solutions on problems that states failed to solve. Republicans gained a majority in Congress in the 1994 elections by promoting their "Contract with America." Much of this "contract" was devoted to decreasing the size of the federal government. Some provisions became law; many did not. While it may be debated as to just how much the Contract succeeded in curtailing the size and power of the federal government, that was certainly its aim.

While President George W. Bush campaigned on a platform of continuing to return power to state and local governments in 2000, the events of September 11, 2001, made doing so largely infeasible. Rather, the federal bureaucracy and the power wielded by it swelled as America fought enemies foreign and domestic and, later, grappled with natural disasters and economic crises.

The direction federalism took under the administration of President Barack Obama is not entirely settled. Obama championed a major expansion of federal policy, including an historic health care bill, a huge overhaul of financial regulation, a bail-out of America's automotive industry, the "race to the top" educational grants, sweeping immigration and gun control reforms, and heavy investment in "green" technologies. While critics asserted that these could only lead to bigger national government, states may not be out of the picture. Political scientist Peter Harkness (2012) observed that Obama pursued a, "unique mixture of collaborative and coercive strategies in dealing with states and localities, making it hard to define just what kind of federalism we're seeing". Harkness and others see a "nuanced federalism" combining both incentive grants and mandates (carrots and sticks, if you will) to gain state compliance with presidential designs.

The Trump administration's view of federalism is difficult to pin down. Since President Trump identities as a conservative, many thought he would favor curtailing federal power. Trump administration officials initially *did* express interest in curbing federal power in some areas, such as education policy. However, Trump also seemed to spurn state authority at times. For instance, he publicly criticized states supportive of "Sanctuary Cities" (cities electing not to aggressively enforce federal immigration policy) and encouraged more federal anti-narcotics policing in states moving to legalize recreational use of marijuana. Even the COVID-19 pandemic saw mixed messages from Trump regarding federal and state power. With states issuing shelter-at-home orders to combat the virus in the spring of 2020, Trump tweeted that it is "the decision of the President" as to when states would reopen (Forgey & Gerstein, 2020). However, when states asked the federal government for medical supplies, Trump said that this is a task "for

the local governments, governors and people in the state" (Forgey, 2020). Yet that summer, Trump dispatched federal law-enforcement agents to Portland, Oregon, to quell protests. Given these examples, President Trump's views on federalism remain unclear.

Federalism and the Modern Supreme Court: A (Slow) Return to States' Rights?

For most of the twentieth century, the U.S. Supreme Court generally sided with the federal government when adjudicating legal questions of federalism. Consequently, the power of the national government expanded just as that of the various states contracted. This judicial trend would shift somewhat beginning in the 1980s. As part and parcel of New Federalism, President Reagan appointed jurists who attempted to return some power to states through their legal opinions. On topics ranging from gun control to abortion to gambling on Indian reservations to physician assisted suicide, the Supreme Court handed down decisions that restricted Congress's power and rendered the states somewhat more sovereign.

The Court's recent shift toward favoring state governments has not been absolute, however. For example, in a pair of cases decided in 2004 and 2006, the justices ruled that under the Americans with Disabilities Act, Congress could require states to make their courthouses and prison facilities reasonably accessible to handicapped individuals. Also, in 2012 in the case of *Arizona v. U.S.*, the Court struck down parts of a state law that essentially would have given local law enforcement officers the authority to enforce immigration law on the grounds that federal law preempted state involvement in such matters. That same year, the Court upheld Congress' power to enact most provisions of the Patient Protection and Affordable Care Act (ACA), commonly called Obamacare, which riled some state governments. Whether these holdings herald a return for the Court to old habits or are merely aberrations along a path toward recognizing greater state sovereignty remains to be seen.

Civic Engagement and Federalism

The sheer size and scope of the United States government has doubtlessly prompted more than one person to ask, "What difference can a single individual possibly make in governing?" Indeed, unless that one person happens to be the president of the United States, a Supreme Court justice, or the like, it will probably be difficult to directly influence national policy to any great degree. However, thanks to federalism, other opportunities for civic engagement actually exist for

just about anyone. Federalism encourages democratic participation by dividing government powers and responsibilities between different levels of government—and some of those levels are very accessible. The trick is to know what level of government to approach about any given issue. Given the overlapping complexity of government, discerning the layers can oftentimes be difficult. Nevertheless, with diligence and an understanding of how federalism operates, one can tease out the correct federal, state, or local entity to approach about virtually any problem. The Internet can be a citizen's best friend in accomplishing this task. While the mechanics of federalism are still fresh in your mind, make it a point to visit the websites of your local, state, and federal governments. As you browse those pages, you will begin to get a sense of what agencies and departments deal with what and, just as importantly, how you can contact them. Do this and you will be doing some good, since, as Thomas Jefferson observed, "Whenever the people are well-informed, they can be trusted with their own government."

Discussion Questions

1. What is federalism? What powers does the U.S. Constitution confer on the national government? What powers does the U.S. Constitution confer on the several state governments? What powers are shared by and denied to both the federal and the state governments?
2. What is "horizontal federalism" and what are the parts of the U.S. Constitution that function to place all states on a level playing field?
3. How were the Supreme Court rulings in the cases of *McCulloch v. Maryland* and *Gibbons v. Ogden* important for federalism?
4. Compare and contrast "dual federalism," "cooperative federalism," "New Federalism," and "New Age Federalism."
5. What is the current state of U.S. Supreme Court jurisprudence on the topic of federalism?

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4 Political Socialization and the Communications Media

Maria J. Albo and Barry D. Friedman

Learning Objectives

After covering the topics of political socialization and the communications media, students should understand:

1. How the process of political socialization traditionally reinforced Americans' patriotic sentiments and their acceptance of the legitimacy of government institutions and laws.
2. The factors that have prompted deep division between Democrats and Republicans and unprecedented resentment about rivals' election victories.
3. The increased partisanship of news organizations and the role of social media in providing alternative news sources and political commentary.
4. How young Americans can contribute to political discourse and influence public policy through political participation and civic engagement.

Abstract

Based on traditional American political thought and mythology about the trustworthiness of American government officials and institutions, the United States historically enjoyed a consensus of attitude about the legitimacy of its political and government systems. In recent years, a large segment of the American public has developed reservations about the legitimacy and fairness of capitalism, the system of law enforcement and criminal justice, and the distribution of resources and employment opportunities. The consensus of attitude about the system has given way to divisiveness and rancor not experienced since the Civil War era. Regardless of one's ideology and opinion about the validity of traditional American values, opportunities to participate in public discourse and to influence public policy abound. These opportunities include voting, organizing and joining interest groups, and participation in public meetings and protest demonstrations.

Introduction: An Amazing Experiment in Democracy and Liberty

All kinds of American political thinkers have characterized the United States as an extraordinary "experiment" in democracy and liberty. Echoing Jesus Christ's Sermon on the Mount (Matthew 5:14) and Massachusetts colonial founder John Winthrop (1630), President Ronald Reagan frequently spoke of this nation as "a shining 'city on a hill.'" In his farewell address, he described the city as

> *a tall, proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here.* (Reagan, 1989, para. 33).

The topic of this chapter is **political socialization**. In a few short words, political socialization is the process by which an individual learns to be a citizen and a participant of her political system. The heart of political socialization is the transmission of ideas about what is worthy and significant in the nation's political and governmental systems. Political socialization can perpetuate great appreciation of and loyalty to such systems especially when the history and mythology of the nation tell an inspiring story.

The Foundation of American Liberty and Prosperity

> *The unity of government which constitutes you one people is also now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very liberty which you so highly prize. But as it is easy to foresee that, from different causes and from different quarters, much pains will be taken, many artifices employed to weaken in your minds the conviction of this truth; as this is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed, it is of infinite moment that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as of the palladium of your political safety and prosperity; watching for*

its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned; and indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the sacred ties which now link together the various parts.

For this you have every inducement of sympathy and interest. Citizens, by birth or choice, of a common country, that country has a right to concentrate your affections. The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles. You have in a common cause fought and triumphed together; the independence and liberty you possess are the work of joint counsels, and joint efforts of common dangers, sufferings, and successes.

But these considerations, however powerfully they address themselves to your sensibility, are greatly outweighed by those which apply more immediately to your interest. Here every portion of our country finds the most commanding motives for carefully guarding and preserving the union of the whole.

President George Washington (1796, para. 9-11)

During the seventeenth century, waves of white Anglo-Saxon Protestants arrived on North America's Atlantic coast for the purpose of settling the "New World." Their arrival proved to be ominous for the Native Americans who had enjoyed the bounty of a sparsely populated continent. But for the settlers North America offered unlimited possibilities. They left behind the densely populated European continent, where permanent socioeconomic classes were common. In some countries, land was so scarce that it seemed necessary to divide the real estate among privileged "lords," an economic arrangement known as "feudalism." The rest of the population was relegated to the status of "serfs"—a life-long disadvantaged social and economic status that could not be escaped under the laws that prevailed. In England, some citizens enjoyed hereditary upper-class status, others were laborers or tradesmen, there was a middle class of professionals and businessmen, and social status was inherited. What the settlers craved and found in the New World was a virtually unlimited supply of land that made feudalism or other permanent-class systems pointless. No more would their socioeconomic status constitute an inescapable hindrance. Their desire for estates of their own would be satisfied and their dreams of economic security were limited only by their imagination. Instead of feudalism, they developed a system based on

the idea of limited government, individual liberty, a free-market economy (i.e., capitalism), and equality under the law. Of course, they were not freed from the need to devote strenuous physical labor to coax produce from the soil nor from the challenges of nature itself (natural disasters, extreme weather, and so on). Other than that, they were free to determine their own destinies.

American history is a narrative of unparalleled political freedom, remarkable economic opportunity, religious tolerance, harmonious communities, and universal celebration by the nation's inhabitants of "the land of the free and the home of the brave."

The result, by and large, was a level of prosperity known to no other societies. Practice of the Protestant work ethic tended to be more than sufficient to sustain life. And, if one believed that their pantry was not sufficiently stocked, the work ethic suggested that they simply needed to work harder. In the long run, this arrangement led to the existence of a flourishing middle class. In turn, the existence of a flourishing middle class was the basis for a political system most of whose members had no use for extreme ideologies. An **ideology** is a belief system about what politics and government should be and do. As time went by, most Americans were not attracted to the extreme left-wing ideology of Marxist communism, nor were they attracted to the extreme right-wing ideology of fascism. Americans had little interest in the extreme ideologies of anarchy or totalitarianism. Instead, in a land of opportunity, the vast majority adhered to the moderate ideology of liberalism. Here, the word *liberalism* is used in the classical sense: the ideology that calls for a system based on liberty and limited government. There is a compelling argument for a system based on liberty: The most authoritative expert about what will make a person happy is *that person*. Therefore, the government should let that person make choices about how to live. There is no reason for government interference in that person's decisions up to the point that any decisions inflict a disadvantageous interference with *someone else's* life. Otherwise, the government's attitude should be *laissez faire* ("let alone")—leave the individual alone and leave the marketplace alone as well. John Locke (1689/1884, pp. 230-240) theorized that the legitimate role of a government is to protect the citizens' life, liberty, and property. Over time, Americans flocked to the ideological appeal of liberalism (Hartz, 1955, pp. 911). The extent of this agreement is referred to as the *liberal consensus*. Note that, in using the word "liberalism," the authors are not referring specifically to either the progressive (left-wing) or the conservative (right-wing) strains of this ideology; we are simply referring to the belief in liberty. This general agreement with a very significant perspective about how our political, economic, and governmental systems should

operate calmed the American public. As E. E. Schattschneider (1942/1977, p. 91) put it: "Elections are not followed by waves of suicide."

A Peaceful, Respectful Political Culture

Americans' widespread acceptance of liberal philosophy fostered the development of a relatively (and remarkably) peaceful political environment. Certainly, this is not to say that there was never conflict. The American Civil War of 18611865 was as violent and bloody as any other total war. But at most times Americans were able to tolerate their disagreements, to enjoy political victories, and to endure political defeats philosophically—taking the position of beleaguered fans of the old Brooklyn Dodgers baseball team, who at the end of each unsuccessful season would sigh, "Wait 'til next year." By the end of the twentieth century, one could reasonably say that the United States enjoyed this **political culture**:

- Disputes would be resolved *peacefully* in one of two major ways:
  - ▹ Voting
  - ▹ Litigation

  Americans would understand that games (baseball, business, elections, etc.) have rules. All abide by the rules, and the losers accept the results. Americans would respect the legitimacy of the outcome. There was a quaint ritual marking the end of an election for public office. In the case of a local election, for example, the loser of the contest for a seat on the city council would visit the winner's headquarters, shake his hand, and congratulate him. In the case of a state or national election, where distance might not facilitate travel between the campaign headquarters, the loser would make a telephone call to the winner, congratulate her, and *concede defeat*. The concession was a signal to the loser's supporters that the election was over, they should go back to their usual activities, and *they should refrain from any unlawful effort to undo the result of the election*.
  - ▹ Extreme ideologies—though it may be legal to advocate them—would be rejected and denounced.
  - ▹ Criminal penalties are expected to be proportional to the criminal offenses (American governments don't shoot or hang horse thieves anymore).
  - ▹ Brazen acts of discrimination, verbal abuse, and other actions that systematically mistreat members of minority groups are considered immoral. By the end of the last century, in polite company, it was

known to be offensive and unacceptable to tell a joke that ridicules any racial group, any religious group, those who have come to the United States from other countries, women, and so forth.

Winners and Losers

> *Oppressed people cannot remain oppressed forever. The urge for freedom will eventually come. This is what has happened to the American Negro. Something within has reminded him of his birthright of freedom; something without has reminded him that he can gain it.*
>
> Martin Luther King Jr. (1963, para. 30)

The operation of a capitalist, free-market economy and a system of limited government inevitably produces winners and losers. American history includes the somber tale of the experience of *disadvantaged minority groups*.

The sacrifices made during the numerous protests in the 1950s and 1960s including the Montgomery Bus Boycott, The Freedom Rides, and Selma deserve more than just a cursory mention in our history books. Leading up to the black civil-rights movement were countless attempts at drawing attention to the indignities faced by black citizens in the United States. Many states' policymakers continually rejected any attempts at desegregation and the Warren Court's decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), added heat to southern politics. The court's decree was not greeted with swift compliance. Frustrated young activists participated in freedom rides, leading to the sit-in movement and other protests. Major riots broke out in American cities and thousands of injuries and arrests intensified the discord. The 1968 assassination of Dr. Martin Luther King Jr. sparked more unrest, forcing Congress to face its most significant domestic crisis since the Civil War. For the first time video images of police brutality mobilized many African Americans and their supporters across the country, who organized street rallies, picket lines, and other forms of non-violent protest that characterized the civil-rights movement. Civil-rights activists remember "Bloody Sunday" as a major turning point in the black civil-rights movement that galvanized public opinion and mobilized Congress.

Children who were members of these disadvantaged minority groups received and often accepted the pleasant message of limitless opportunity that teachers would express to them in elementary school. As they became teen-agers and young adults, however, their experiences often damaged their perception of their own country as a land of opportunity for all.

Transmitting the "Good News" Through Political Socialization

The relative civility of the American political system was very compatible with the traditional process of political socialization. While political socialization occurs in all countries, the "agents" of *American* political socialization had a story to tell. Greenberg (1970, p. 165) defined **political socialization** as "the process by which an individual acquires attitudes, beliefs and values relating to the political system of which he is a member and to his own role as citizen within that political system." Political socialization is a lifelong process, and it is specific to the nation in which it is occurring. For many decades, in the United States, political socialization would begin virtually from birth when very small children would be taught that they were Americans and that they ought to be enormously proud of that fact. In school, "civics" education would begin at the elementary level—in fact, in kindergarten or first grade. It was likely to be the very first day of school when the pupil would be taught to recite the Pledge of Allegiance to the American flag. The teaching of the "Star-Spangled Banner" would follow almost immediately. Symbolism would be a subtle but key instrument of political socialization. Children would be shown photographs of Mount Vernon when they learned about George Washington; they would see the stately mansion and develop respect for the father of our country. They would be shown photographs of historic, famous members of Congress, appearing statesmanlike in debate. Images of the Lincoln Memorial, Washington Monument, and U. S. Capitol were all intended to build reverence among American children and adults for government institutions and leadership. Political socialization was deemed necessary to instill feelings of patriotism and love for one's country in its citizens. This process exists in all cultures and is crucial for the continuation of national identity.

Some of the most influential agents of political socialization have been family, schools, religious institutions, peer groups, and the communications media.

Family: Parents might take a four-year-old child to an Independence Day parade. As the first person on the parade route would approach with an American flag on a pole in hand, a parent would say to the child: "Look! The American flag is about to pass by! Be quiet! Stand up straight! Show respect for our flag!" If the child inquired about the ritual, the parent would explain: "We are proud to be Americans. It's a privilege to be an American. And we love our beautiful flag."

School: It is in school where the child likely got a first formal lesson in civics education when taught to recite the Pledge of Allegiance, sing the "Star-Spangled Banner," and recognize key national landmarks.

Religious institutions: Religious institutions and organizations regularly seek input into policymaking through direct lobbying efforts and by influencing congregants and members.

Peer groups: Rarely would peer groups have a substantial influence on political opinions, as young people tend to affiliate with acquaintances of the same socioeconomic status and probably just reinforce the opinions and attitudes of the family. But when a public-policy issue is specifically relevant to young people (as have been the Vietnam War and determination of the minimum age for drinking alcohol), peers could be very influential in mobilizing collective action.

Communications media: The communications media offer a wide range of information and opinions. These media include the traditional newspaper and the broadcast conduits (radio and television), and in the late twentieth century the 24-hour cable news channels joined the array. Now, of course, the "wild card" of communication is the Internet, on which social-media platforms allow anyone to be a publisher or at least a reporter and commentator and allow recipients of the messages to express their feedback in real time.

The Value of Traditional American Political Socialization

Critics of features of orthodox American liberalism—such as limited government authority, the relatively unregulated marketplace, and private control of property—had no use for the results of the traditional approach to politics and government and, therefore, they had no small amount of contempt for the process of political socialization that perpetuated the system. Their objections covered a range of imperfections: that private control of property and **laissez-faire** economics allowed inequality in the workplace, that limited government authority allowed racial and sex discrimination to go unanswered, and that unrestricted liberty allowed bigoted hate speech to go unpunished.

But, for Americans in and near the center of the political spectrum, the process of political socialization paid handsome dividends. The process delivered these outcomes:

- Political socialization perpetuated patriotism. Nothing would bring an assembly of Americans together more effectively than the playing of the "Star-Spangled Banner." In wartime, patriotic passion would bring young men and women to military-induction centers to adequately staff the Army, the Navy, and the Marines.
- Political socialization fostered respect for government institutions. As elementary-school pupils' attention was repeatedly directed toward the

> posters showing the White House, the U. S. Capitol, the Supreme Court building, and photo galleries depicting U. S. presidents, the children developed the attitude that what goes on in those majestic buildings is *legitimate* and *worthy of respect* and that the constitutional officials *represent the citizens' interests*. Therefore, *Americans should have respect for what these officials do* and *should voluntarily obey the laws that they enact and the rules that they make*.

No one should fail to understand the significance of these outcomes. Communities did not need to employ huge forces of law-enforcement officers. This was reflected on the 1960s CBS television series *The Andy Griffith Show*, Sheriff Andy Taylor and Deputy Sheriff Barney Fife were able to control the population of the Town and County of Mayberry, N. C., without difficulty. The major crime problem in Mayberry was Otis Campbell's every-weekend drinking binge. Note that Otis would *voluntarily* arrive at the jailhouse, lock *himself* into a jail cell, and the next day, use the key to let himself out. Otherwise, Mayberry residents obeyed laws without any need for coercion. Now, this was certainly a romanticized vision of small-town America. It was not shared by many Americans, especially African-Americans and other historically disadvantaged groups, but it did reflect a desire among many.

Things work very differently in other countries not governed based on liberal theory. The Communist government of the Soviet Union held elections, but the population knew very well that the elections were fabrications and that, therefore, *the government was not legitimate*. Accordingly, the government had to have on hand *innumerable* police officers, spies, and other agents to keep a lid on the oppressed masses. In May 1982, the renowned American evangelical preacher, the Rev. Billy Graham, took advantage of the Soviet government-approved opportunity to preach to "a state-approved audience of KGB agents, reporters and peace conference delegates at the Church of Evangelical Christian Baptists" (Hatfield, 2013, p. 199). This was a breakthrough for Graham: his first penetration of the USSR. Graham reminisced that his aides prepared him for the event by warning him that, as he would speak in the church, about half of the audience would be policemen, KGB agents, and other enforcers of despotic rule monitoring the attendees' conduct. Graham replied, "Good! They need to hear the Gospel, too." *That* was the level of *costly* enforcement that totalitarian rule necessitated because, without it, the oppressed population would have deposed an illegitimate government. This level of *expensive* enforcement has not been necessary in the United States, because Americans have policed themselves, believing the laws to be legitimate. In his book *Why People Obey the Law*, Tom R. Tyler (2006, pp. 3, 56)

states that many government authorities instinctively pursue "instrumental" means of coercing compliance, a strategy whose outcome is the filling of prison cells. To be sure, federal and state prisons are swollen with inmates who have been the targets of the deterrence approach. In contrast, as Tyler says, "[v]voluntary compliance costs much less and is, as a result, especially highly valued by legal authorities" (p. 4). The chief reason why Americans voluntarily obey laws is that they look at the content of laws and verify that the content comports with their values. The second most determinative reason is that *Americans believe that the process by which the laws are made is legitimate* (pp. 4, 25, 56, 64).

> *The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong; a second factor is the person's feeling of obligation to obey the law and allegiance to legal authorities* (p. 64).

The result is an incalculable saving. In summary, the republican, liberal system of the United States has been *economically efficient* in minimizing the costs of law enforcement.

A Sweeping Change in the Twenty-First Century

> *Our government, Sir, is founded upon the intelligence of the people; it has no other basis; upon their capacity to arrive at right conclusions in regard to measures and in regard for men; and I am not afraid of their failing to do so from any use that can be made of any thing that can be got out of my papers. . . . I for one do not despair of the republic; I have great confidence in the virtue of the great majority of the people, and I cannot fear the result.*
>
> President Andrew Jackson (quoted in Remini, 1981, Vol. II, p. 31)

By the close of the twentieth century, the American political system was undergoing a historic transformation. The two major parties and their supporters were becoming increasingly polarized and ideologically pure (Sapenfeld, 2020; see also VoteView.com). Democrats consider predominantly conservative Republicans to be intolerant of members of disadvantaged groups (i.e., blacks and women) and Hispanic and Muslim immigrants. These Democrats also condemn Republicans' predilection for an "America First" posture in international relations. On the other hand, Republican leaders often label liberal Democrats as unpatriotic socialists and communists, who lack respect for American myths and symbols (such as the American flag), and who are reluctant to use military force

against hostile foreign governments and militant (i.e., guerilla) groups.

One manifestation of this growing partisan division is the battle over voter access to the polls.

Case Study: The Partisan Battle over Election Laws

A long-standing controversy involving the matter of which American citizens may vote occupied the attention of civil-rights activists and political campaign strategists during the 2020 election cycle. As Chapter 6 explains, during this country's early decades, state election laws limited the privilege of voting to an elite socioeconomic class of white male Christian property-owners. An excruciatingly slow process of reform extended the franchise (i.e., the right to vote) to less affluent males, to adherents of religions other than states' "official" churches, and to women. Many state governments defeated the purpose of the Fifteenth Amendment, which, when ratified in 1870, prohibited denial of the right to vote based on race. Devices for thwarting Congress's intent included financial burdens that poor individuals would struggle to overcome (i.e., a requirement to have paid certain taxes such as "**poll taxes**"), educational burdens that oppressed individuals could not overcome (i.e., **literacy tests**), blatantly discriminatory policies (i.e., **grandfather clauses**), and—when the state governments had run out of other devices—pernicious threats and acts of violence directed against African-Americans attempting to register to vote. The turnout of black voters increased only gradually between 1870 and 1965, until the U. S. Congress enacted, and President Lyndon B. Johnson signed, the Voting Rights Act of 1965. The law empowered the U. S. Department of Justice to intervene actively and forcefully in all state governments' schemes to suppress African-Americans' opportunity to register and vote. Black voter registration then flourished. Since then, civil-rights leaders, and voting-rights activists, often supported by the Department of Justice, have contended that the more effort needed to satisfy voting qualifications, the lower turnout there will be of younger individuals, less affluent individuals, less educated individuals, naturalized immigrants for whom English is a second language, and members of socially-marginalized groups. The voting-rights activists targeted requirements such as these:

- The need to travel to a city hall, county courthouse, or other specific office building to be registered and sworn in as a new voter.
- The need to travel to polling places that are distant, inaccessible to disabled individuals, etc.
- The need to stand in long waiting lines to vote because of the inadequacy

of the number of polling places, the inadequacy of number of voting machines in such polling places, etc.
- The need to vote on one specific day—"Election Day."
- The need to keep election officials apprised of a voter's residential address or to vote with some frequency, lest otherwise the officials deactivate the individual's voter registration.

Some of these complications have been addressed. Today, citizens may register to vote at schools that they attend, at driver's-license service centers, by mail, and on the Internet. States spread out voters' arrival at the polls with "early voting" during the weeks preceding Election Day. However, these attempts at increasing ballot access have been counterbalanced by increasingly restrictive eligibility requirements enacted by many states. Most of the new restrictions involve tightening requirements for proof of voter identity along with limiting early voting and placing more restrictions on absentee voting. States enacting these new restrictions most often cite concerns about voter fraud and the integrity of the vote as justification (see Chapter 6).

Reflecting increased partisan and ideological polarization in the nation, the attempts to widen voter access are supported mainly by Democrats and liberals, while the increased voter ID and ballot restrictions are supported mainly by Republicans and conservatives. By the 2010s, most state legislatures were controlled by Republicans, so tightening of restrictions supported by that party generally won out over any attempts to widen access (Carnegie Corporation, 2019; For a discussion of the divide over voter access, see these two PBS *NewsHour* video reports from June 9th and June 10th, 2021: https://youtu.be/2AVeT346T_M, https://youtu.be/g__dI2eZmy0).

In 2016, Donald Trump surprised Democrats and Republicans alike by overcoming 16 Republican opponents and Democratic nominee Hillary Clinton to win the presidential election. He won a greater number of presidential electors (see Chapter 2 for a brief discussion of the Electoral College), even though Clinton won the popular vote by about 2.9 million votes. Trump and his supporters tried to explain away his popular vote loss with claims of millions of fraudulent votes cast for Clinton nationwide (Schallhorn, 2018).

In 2020, the battle between concerns about voter access versus concerns about voter fraud took a dramatic turn, heightened by the worldwide COVID-19 virus pandemic. The pandemic produced circumstances that certainly appeared to justify an enormous shift from inperson voting to "absentee" and vote-by-mail balloting (which were more in-line with the "social distancing" guidelines created to help curtail the spread of the virus). Many states, under the control of

both parties took steps to make voter registration and voting by mail and online easier in the wake of the pandemic. This reversed the recent trend of increased restrictions. The changes produced record voter turnout nationwide, with a "large shift to early voting and voting by mail" according to the U.S. Census Bureau (Fabina, 2021, para. 7). Since traditionally disadvantaged groups (blacks, Hispanics, poor)—who often favor Democratic candidates—have generally lower turnout rates, this increase was thought to favor Democrats and may have played a part in Trump's loss to Joseph Biden in the 2020 presidential election.

In Georgia, as an example, Democrats demanded the state make it easier to register and to vote during the pandemic. As the partisan differences covered earlier noted, Republicans preferred rules that would tighten voter registration and voting requirements. Negotiating with Stacey Abrams, the unsuccessful Democratic nominee for governor in 2018 and the leader of the Fair Fight Action organization, Georgia Secretary of State Brad Raffensperger agreed to these revised rules:

- Prompt notification to a voter that their absentee ballot has been rejected and invitation to that voter to report to the local elections office to resolve the problem so that the ballot will be counted.
- Invalidation of a voter's absentee ballot because the signature on the ballot does not match the signature in the elections office's data base only upon the agreement of three election officials, followed by prompt invitation to that voter to report to the local elections office to resolve the problem so that the ballot will be counted.

After the results of the November 3 election and the January 5, 2021, Senate "runoff" elections were known, Republicans—up to and including Trump himself—denounced Raffensperger for, in their minds, opening the door to election fraud that cost Trump the state's 16 electoral votes and the U. S. Senate seats. In the melee, Trump also denounced Republican Governor Brian Kemp for refusing to cite Raffensperger's agreement with Abrams as a basis for reevaluating and possibly nullifying Biden's apparent acquisition of Georgia's electoral votes.

Republican legislators in Atlanta and Democratic legislators in Washington, D. C., proceeded to pursue legislative efforts to adjust election laws in accordance with their respective policy preferences. Georgia's Republican-controlled General Assembly enacted and Governor Kemp signed the Election Integrity Act of 2021, which requires a photoID card to vote not only in person but also by mail ballot, reduces the period of time during which a voter may request a mail ballot, limits the placement and usage of mail-ballot "drop boxes", and allows the state legislature to replace local election officials

(Niesse, 2021). Because the stakes have clearly become very high in this politically competitive state, Abrams and the Democrats vehemently protested the law, insisting that the Republican-controlled legislature was endeavoring to suppress voting by disadvantaged citizens. They attracted corporate support from Coca-Cola, Delta Air Lines, and Major League Baseball, which relocated the 2021 AllStar Game from an Atlanta suburb to Denver, Colo., to reflect the sport's repudiation of Georgia Republican politicians. Meanwhile, Democrats in the U. S. Congress introduced a bill, H.R. 1, the "For the People Act," which—if enacted and then signed by President Joe Biden—would impose on state and local elections officials a mandate to "expand voter registration (i.e., automatic and same-day registration) and voting access (i.e., vote-by-mail and early voting)" and to cut back on the purging of voter-registration lists due to voters' suspected relocation or failure to vote in previous elections. The bill also "requires states to establish independent redistricting commissions to carry out congressional redistricting" and "establish[es] in the legislative branch the National Commission to Protect United States Democratic Institutions [which will explore how] to improve the cybersecurity of election systems" (Congressional Research Service, 2021).

This heated dispute between the two political parties represents another symptom of the chasm that has opened between them. Republicans want the voter-registration lists to be relatively stable, insofar as the Republican electorate is relatively stable (tending to migrate between communities infrequently), is more attentive to such political matters as voter-registration deadlines and has the resources necessary to travel to polling places. Democrats want voter registration to be easy to accomplish and want voting to involve the minimum amount of effort, because, for the most disadvantaged citizens involved in daily struggles to make ends meet, the priority attached to voting is often secondary and the subject of a last-minute thought process. For both parties, this issue is a life-or-death struggle, because the concept of losing elections to their political enemies is too distasteful to even contemplate.

This departure from American political tradition was playing out in other societal arenas as well. In 2016, NFL quarterback Colin Kaepernick remained seated as the national anthem was played before a preseason game. During the regular season, Kaepernick began kneeling during the anthem at the suggestion of an Army veteran and Green Beret, former Seahawks player Nate Boyer who urged Kaepernick to "take a knee" as soldiers do in front of a fallen brother's grave in a demonstration of respect. Kaepernick's actions were widely imitated through the sports world.

Some said this represented contempt for the national anthem and the American flag. One of the rituals of American life—the demonstration of respect for the flag—that had long united all Americans. Political leaders divided based on ideology on the propriety of this form of protest. Republican presidential nominee Trump said it showed a "lack of respect for our country" (quoted in Heck, 2016). On the other hand, others praised Kaepernick for his willingness to use his platform to bring awareness to the growing concerns about race relations in the United States and for his influence in emboldening other professional players to protest.

Amy Cooper (alias "Central Park Karen"), "BBQ Becky," and "Permit Patty" were among those who became notorious for harassing innocent black individuals and demonstrating how some white people, empowered by entitlement and privilege, are willing to readily exploit black's social disadvantage. Even more interesting is the fact that these women utilized the 911 system to place their calls with impunity while black customers who legitimately use 911 for instances of perceived personal harm are fined and even arrested for "misuse of the system" (Friedman and Albo, 2017). These instances are directly related and represent a much larger experience of social injustice that throughout the history of the United States has excluded an entire segment of the population based on race. This is not a failure of political socialization but rather the acknowledgment that the policies that were instituted following the civil-rights movement have yet to produce true equality of opportunity in the United States (Hutchinson, 2018).

The central issue of the 1932 presidential election was the Great Depression. Promising a "New Deal" for American workers, Democratic nominee Franklin D. Roosevelt not only won the election but also was instrumental in the occurrence of a historic political realignment (see chapter 6 for a discussion of realignments). The realignment repositioned the Democratic party as a progressive (left-wing) liberal mechanism and attracted enough voters to the party to make it the majority party for decades to come. However, the rhetoric and campaign promises of some of the candidates for the party's 2020 presidential nomination strongly suggest that the candidates believe that the Democratic electorate has drifted **further** to the left—to the point of **democratic socialism**. They advocated for universal health care ("Medicare for All") for citizens and illegal immigrants alike, free higher education, free child care, and free school breakfasts and lunches. A drift to the left also indicates weakening of nationalist sentiment; echoing Karl Marx's contempt for national identity and national boundaries, the Democratic candidates called for loosening restrictions on immigration. Given the increasingly conservative

shift among Republicans, this represents a decline of the "liberal consensus"—i.e., of the nation's moderate, unimodal political system.

This description suggests that the U. S. political system is more polarized now than at any time since the Civil War of 18611865 (i.e., see Voteview.com).

In 2012, Iyengar, Sood, and Lelkes applied the psychological concept of "affect" to this division—i.e., how people **feel** about the members of the opposite party.

> *. . . [T]o the extent that party identification represents a meaningful group affiliation, the more appropriate test of polarization is affective, not ideological, identity. . . .*
>
> *In 1960, Almond and Verba found that only 5 percent of Republicans and 4 percent of Democrats felt "displeased" if their son or daughter married outside their political party. . . .*
>
> *In . . . 2008, . . . the proportion of Democratic and Republican identifiers who indicate[d] feeling "somewhat upset" or "very upset" at the possibility of an out-party marriage of a child increased to [27 and 20 percent] for Republicans and Democrats, respectively. . . .*
>
> *In the current era of polarized politics, the level of inter-party ill will is sufficient to inject partisanship into decisions that are entirely personal.*
>
> *. . . [I]n comparison with 1960, Democrats and Republicans were nearly 50 percent more likely to associate negative traits with opponents than supporters in 2010. . . .*
>
> *A more serious concern is that those who impugn the motives and character of political opponents are less likely to treat as legitimate the decisions and policies enacted when the opponents control government, and may also be less satisfied with institutions that respond to popular will. . . . Dissatisfaction with policy outcomes and democratic institutions can escalate into mass protest, and in some cases to acts of violence* (pp. 406, 416418, 420, 428; emphasis added).

More recently, Mason (2018) separated the "feelings" into those that are issue-based and those that are identity-based.

> *. . . [W]e already know that Democrats and Republicans hate each other, but liberals and conservatives likely hate each other too, for reasons that go beyond partisanship or even issue-based disagreement.*

> *. . . [L]liberals and conservatives prefer to date inside the ideological group. . . . Liberals and conservatives are distancing themselves from one another on behalf of their identity-related feelings about who is "in" and who is "out." . . .*
>
> *Identity-based ideology can drive affective ideological polarization even when individuals are naïve about policy. The passion and prejudice with which we approach politics is driven not only by what we think, but also powerfully by who we think we are* (pp. 284, 298299).

Accordingly, a Democrat may react to Republicans in an antagonistic manner, and Republicans may disparage Democrats in blunt terms. Berman wrote:

> *I already think we've seen some pretty dangerous signs, the most important of which is the demonization of opponents. The second step is seeing people as unable to be dealt with or compromised with, and that can fairly easily slip into more extreme kinds of behavior* (quoted in Mak, 2018).

Many forms of public discourse have become dominated by rhetoric that reflects the severe polarization, Hanson says.

> *Almost every cultural and social institution—universities, the public schools, the NFL, the Oscars, the Tonys, the Grammys, late-night television, public restaurants, coffee shops, movies, TV, stand-up comedy—has been not just politicized but also weaponized.*
>
> *[The United States stands] at the brink of a veritable civil war* (quoted in Raymond, 2019).

In general terms, possible outcomes are noteworthy if not alarming.

- Peter Turchin, an ecologist, evolutionary biologist, and mathematician, is the founder of cliodynamics, the study of historical patterns. He projected the pressure of polarization to erupt in unrest in 2020. "My model suggests that the next [peak in violence] will be worse than the one in 1970 because demographic variables such as wages, standards of living and a number of measures of intra-elite confrontation are all much worse this time" (quoted in Wolchover, 2012).

  Silber attributes the 1860s' polarization to Americans' perception of "political opponents in extreme, even demonic, ways" so that it is "impossible to find any middle ground." That situation incites the masses

to resort to violence against political enemies (quoted in *BU Today* staff, 2019).

- If there is a fracture of the country, the process that brings it about may be a second American civil war. One theory states that this second Civil War will actually be Round 2 of the first one. Giesberg explained:

> *When you look at the map of red and blue states and overlap on top of it the map of the Civil War—and who was allied with who in the Civil War—not much has changed. We never agreed on the outcome of the Civil War and the direction the country should go in. The postwar [constitutional] amendments [13th, 14th, and 15th] were highly contentious—especially the Fourteenth Amendment, which provides equal protection under the law [to black and white Americans]—and they still are today* (quoted in Wright, 2017).

Certainly, dissidents have the right to criticize the United States and to question the appropriateness of government policies of the past and present. On the other hand, the revisionist approach to questioning the **legitimacy** of American government institutions and the nation's worthiness of allegiance is inevitably undoing the illusion of a tranquil political culture that is described earlier in this chapter. It is difficult to foresee how the unraveling of this culture can fail to undermine the benefits of the nation's traditional political socialization, such as the propitious voluntary obedience to laws attributed to Americans' belief in the legitimacy of government institutions and the nation's long history of peaceful transition of power after an election. Government officials will need to be judicious in their response when dissidents express their displeasure at actions or policies to which they object through their constitutional right to express dissent through peaceful protest.

Perhaps political socialization beyond 2020 should include more dialogue and discussion about America shortcomings including the removal of the Native American, the lasting legacy of Jim Crow, and our high prison population. If we include frank discussion of these realities and draw previously marginalized voices into the conversation, perhaps we can create a new type of political socialization so that future generations will not have to question their patriotism and the opportunity of equality in the United States can be more readily realized. Andersson (2015) advocates for "situational political socialization" which is described as a "concept used to approach, describe and analyze situations and processes—here and now, there and then—in specific contexts in which the

participants, within the battle between different groups attempting to organize society through action, adopt and acquire political preferences and skills" (p. 975). Young people with access to unlimited media require a new critical-thinking skill, and new strategies for successful political socialization may be necessary.

The News Media and Political Attitudes

The First Amendment to the Constitution guarantees "freedom of the press." The courts have interpreted this right as expansively as possible, especially for newspapers, drawing the line only at libel and grotesque pornography (obscenity). With respect to radio and television, the Federal Communications Commission had a "Fairness Doctrine," which required broadcasters to provide equal access for all issue positions. However, this regulation was abandoned in the 1980s, giving rise to broadcasters like CNN, Fox News, OAN, and MSNBC that cater primarily to one side of the ideological spectrum. The Internet has also been subject to censorship attempts. Congress enacted the Communications Decency Act in 1996 to protect children from explicit Internet material. The U. S. Supreme Court struck down the law a year later as overly broad (*Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997)). A subsequent attempt at similar legislation, the Child Online Protection Act, was similarly struck down by federal courts. In 2012, political demonstrations blocked the passage of the proposed Protect IP Act (PIPA) and the Stop Online Piracy Act (SOPA). While the bills originally had bipartisan support, the public backlash against these potential restrictions indicates that public opinion clearly favors the limitations placed upon Congress by the First Amendment.

This means that newspapers, radio, television, and the Internet have broad leeway regarding the content of their products. The rule for readers, listeners, and viewers is *caveat emptor*—buyer beware. Government makes no certification as to the accuracy or reasonableness of the contents. Some readers, listeners, and viewers express concern about the accuracy, fairness, and objectivity of the news they receive. Media critics act as "watchdogs" to expose prejudicial news reports. There is new cause for suspicion with the popularity of online blogs controlled by interest groups or partisans that may be mistaken for traditional news sources. Kathleen Hall Jamieson of the Annenberg Public Policy Center helped create nonpartisan websites including factcheck.org which was widely used during the last two presidential elections to moderate the tremendous amount of conflicting information found in all forms of media.

Conservative Republicans are virtually unanimous in claiming that the news media are biased toward progressive Democrats. Sean Hannity of Fox News

Channel insists as much on a regular basis. They say that surveys showing that most reporters are Democrats (or, at least, vote Democratic most of the time) support their claims. In 2014, a survey showed that many American journalists identify as independents. Of those identifying with one of the two major parties, Democrats outnumber Republicans four to one. The number of self-identified Republican and Democratic journalists has dropped since 2002: Journalists who identify as Democrats dropped 8 percentage points to about 28 percent while journalists who identify as Republicans dropped from 18 percent in 2002 to 7.1 percent in 2013 (Cillizza, 2014).

Everett Carll Ladd Jr. and Seymour Martin Lipset, in *The Divided Academy: Professors and Politics* (1975), explained:

> *Another sphere of activity in which the elite show clear signs of being influenced by ties to the university world is the mass media; the people who write for major newspapers, magazines, and news services, and who direct network broadcasting, have values and political orientations similar to academics. It may be argued that those who have risen to prominent positions in the media seek acceptance as intellectuals and along with theologians look to faculty as a primary reference group. A. James Reichley of Fortune has described this development in the outlook of journalists: "Since World War II the old reporters of the Front Page school, whose attitudes were at least as much anti-intellectual as anti-government, have gradually disappeared. The new journalists have tended to be better educated and more professional and strongly influenced by prevailing currents of opinion in the academic community. The part played by the Ivy League in the intellectual establishment has no doubt been exaggerated, but it is worthy of note that almost one third of the nation's most influential journalists who are not college graduates . . . operate in a milieu in which liberal intellectual attitudes are pervasive. The suggestions of one critic that many national journalists now function as a kind of `lesser clergy' for the academic elite is 'not far from correct'"* (pp. 2-3).

Democrats have disputed the conservatives' accusations, and argue that the news media are biased in the opposite direction. They cite wealthy corporate owners who are threatened by progressive, anti-business, pro-regulation politics. Editorial-page sentiment was quite favorable to Richard Nixon in 1972 and to Ronald Reagan in 1980 and 1984. Liberal activists charge that the news is written to discredit those who favor progressive social movements. Instead, the news favors status-quo policy approaches. The news media glorify most foreign-policy

adventures and rarely exposes imperialistic initiatives of the U. S. government. Fox News Channel benefited from the unprecedented coverage of the Iraq War during the Bush administration. According to Steve Schifferes of the BBC, Fox News Channel with its "patriotic spin" coverage of the conflict increased its number of viewers by 300 percent to average 3.3 million daily viewers (Schifferes, 2003).

These perspectives can be reconciled. Reporters, for the most part, serve to the people what they want to read and hear. Page and Shapiro (2009, p. 346) stated that television news commentary was an indicator for other contemporary influences on public opinion and may simply track the climate of opinion in the country as a whole. They also state (pp. 341-342) that the news media are aware that people prefer to receive news from politically compatible sources. To access political analysis, most people delegate most of the work to people they trust as like-minded agents. So reporters show preference for popular candidates. Reagan's 1984 opponent, Walter Mondale, recalls viewing television news reports in which he was featured, and thinking to himself, "I would have voted against the fool, too." Diana Owen noted the news media's continued obsession with "horserace coverage" in the 2008 election. According to Owen (2010), "the candidate who led in the polls received more positive media evaluations than those who trailed. Obama had an advantage over McCain in the horserace throughout most of the campaign, a trend that was reflected in the tone of mainstream media accounts. Stories about Obama were more positive (36 percent) than negative (29 percent); 35 percent of stories were neutral. In contrast, coverage of McCain was highly unfavorable, as 57 percent of reports were negative, 14 percent were positive, and 29 percent were neutral" (p.174).

Candidates can certainly benefit from positive media coverage and be at a disadvantage when they receive negative coverage. In the 2016 presidential election, the Harvard Kennedy School's Shorenstein Center on Media, Politics, and Public Policy conducted research about the effects of positive and negative media coverage. It found that, overall, Trump had somewhat less negative media coverage (56%) than Clinton (62%) in the full campaign (Patterson, 2016). The Center found the reverse in 2020, with Democrat Joseph Biden receiving more favorable coverage than Trump—though there were stark differences between "mainstream" media (i.e., CBS) and conservative media (e.g, FOX) in their coverage (Patterson, 2020).

Reporters have a natural predilection for attractive or charismatic personalities. They gravitated toward John F. Kennedy and Reagan alike. According to Press and VerBurg (1988, p. 97), Stephen Hess calls this "style bias" (Hess & Torney, 2005). He observes that reporters prefer a Kennedy or a George

Will to a Jimmy Carter or a Gerald Ford. "It is possible for a 'liberal' press to be anti-George McGovern and pro-William Buckley."

Vice President Spiro T. Agnew criticized the news media in a memorable speech titled "On the National Media" that he delivered in Des Moines, Iowa, on November 13, 1969. Agnew complained that every televised speech by the president was followed by so-called "instant analysis" by news commentators in which they would criticize what the president had just said even before the viewers were able to digest the speech. Once the president concluded his speech, his image would fade from the screen to be replaced by the image of some three to five network commentators seated in a semi-circle who would proceed to question everything from the president's integrity to his sanity. Agnew observed that the spontaneity of the analysis was patently phony, recalling the confusion into which the commentators were thrown on the evening in 1968 that President Lyndon Johnson announced unexpectedly that he would not seek reelection. Agnew's speech seemed to hit its mark; the era of "instant analysis" abruptly ended. Ironically the "instant analysis" mode of journalism has become mainstream through cable news programming which focuses on "interpretative reporting" and social media which allow citizens to directly respond to political events.

Presidents have in the past found this treatment to be humiliating. As Nixon complained: "Scrubbing floors and emptying bedpans has as much dignity as the presidency." President Reagan's spokesman, Larry Speakes, criticized the American news media for the "steady denigration of the president [that] has gone on for two decades."

In 1977, Michael Robinson wrote, "[T]he network news has emerged as 'the loyal opposition' more so than even the party out of office. *It is now the networks that act as the shadow cabinet*" (p. 20). The cable-news commentators whose ideological affiliation differs from that of the president subject him to daily rhetorical bombardment, portraying him as inept and insincere.

Of the landmark election of 2008 Owen (2010) stated:

> *The [Obama] campaign prompted the development of groundbreaking political applications employing a host of innovative communication platforms including web sites, blogs, and discussion boards which were an integral part of the communication landscape. The mainstream media were able to move somewhat beyond established protocols and adapt to evolving technological trends. In other ways, however, it was the same old story. While new media were a focal point of the nominating campaign, the general election media scenario largely resembled that of past campaigns* (p.167).

However, in 2008 for the first time a large number of people were able to utilize a wide variety of media to obtain their information and checked for updates throughout the day (p. 180). The use of media, specifically social media, was essential in the 2016 campaign as Donald Trump communicated directly to his 22.7 million followers on Facebook, Twitter and Instagram, often linking to favorable news stories and updates from his rallies (Graham, 2016).

Introduction to Political Participation

Political participation is defined by Conway (1991, pp. 34) as "activities of citizens that attempt to influence the structure of government, the selection of government authorities, or the politics of government." Political participation is a learned behavior. While our civics education in schools tends to focus on voting as a major instrument of political participation, there are many ways in which individuals can participate politically. According to Gant and Luttbeg (1991, pp. 106107), "while voting is probably the easiest, and therefore the most common, form of political participation, citizens have available to them a wide variety of alternative forms of political activity. These range from writing to a government official about some particular problem or issue, to contributing money to a political party, to running for public office."

There are various ways to become involved in the political process. Political participation can include voting, working on or contributing to a political campaign, writing letters to local government officials, or joining local civic groups committed to social and/or political causes. Sidney Verba and Norman Nie recognized that there are numerous ways individuals take part in political matters and identified six categories of political participation along with an overview of individual characteristics typical of each group:

Table 15.1: Political Participation

Inactives	Virtually never vote and are not involved in political matters.	Inactives are typically minorities, women, the young, and individuals with low socioeconomic status.
Voting Specialists	Vote regularly but have little participation in other aspects of political life.	Voting specialists are generally older and have strong ties to a political party.
Parochial Participants	Do not typically vote or engage in political matters but may seek government intervention on a specific issue. Generally highly involved in local community matters.	Parochial Participants tend to be minorities and citizens of low socioeconomic status.
Communalists	Do not vote regularly but are highly engaged in group and community activities aimed at solving social problems.	Communalists are usually of high socioeconomic status, white, Protestant, and well educated.
Campaigners	Vote regularly and are highly engaged in campaign activity. Highly partisan and very interested in political matters.	Campaigners are typically well educated, white and middle to high socioeconomic status.
Complete Activists	Vote regularly and are deeply involved in all aspects of social and political life.	Complete activists are typically well educated, white, and middle to high socioeconomic status.

Source: Verba and Nie (1972, pp. 8184).

All of these activities are important and set the stage for lifelong political participation and civic engagement. There are many factors that influence political participation. Political efficacy is defined as a person's sense of being able to accomplish something politically (Bresler et al., 2007, p. 153). Individuals with high political efficacy are more likely to participate politically, while those with low efficacy are at risk for minimal participation. Another motivator for political participation is a sense of patriotic duty. These individuals see their participation as a part of citizenship and likely have a very strong party identification. Party identification, strong allegiance to a political party, is itself a strong motivator for political participation. Finally, there may be social motives for political participation. In certain circles, it is simply socially unacceptable to not participate in the political process, so participation occurs in response to social pressures.

It is evident that demographics and individual socioeconomic status, defined as one's social position based predominantly on an individual's education, income and career, are closely related to political participation. Middle- to upper-class educated citizens are more likely to participate politically in all aspects of citizenship mostly since their political efficacy is likely to be higher. However, it is important to note that it is Parochial Participants, typically of a lower socioeconomic status, who are most likely to be involved in local community affairs.

Responsibilities of Citizenship

Looking at the chart, one should note that, while voting regularly is certainly important, it is hardly the only way to influence public policy. Both the Parochial Participants and the Communalists are highly involved in local matters but do not vote regularly. While voting is truly the best way to influence government in a representative democracy overall, it is what citizens do in between elections that has the most impact in our communities (and on our everyday lives). Much of our formal schooling focuses on the nuts and bolts of government and encourages adherence to societal norms, a shared set of expectations about what people think people should do as good citizens (Dalton, 2008, p. 78). Yet very few of us are ever taught how to be an "engaged citizen" which goes beyond the traditional responsibilities of "duty-based citizenship" that is typically promoted in American public schools. Duty-based Citizenship encourages conformity and adherence to social norms while promoting basic activities such as registering with a political party, voting in all elections, donating to campaigns, and joining civic groups. Engaged Citizenship refers to a more active role in politics and local communities beyond simply voting and belonging to a political party. While duty-based citizenship has been on a steady decline, engaged citizenship appears to be on the rise. Russell Dalton of the University of California at Irvine argues that this shift is a good thing by "increasing political tolerance in America, which strengthens the foundation of our democratic process and encompasses norms of greater social concern and engagement" (Dalton, 2008, p. 22). Here is a comparison between duty-based citizenship vs. engaged citizenship:

Table 15.2: Two Types of Citizenship

Duty-Based Citizenship Principles	Engaged Citizenship Principles
Vote in elections	Be active in voluntary organizations
Serve on a jury if called	Be active in politics
Always obey laws and regulations	Form opinion, independently of others
Men serve in the military when the country is at war	Support people who are worse off than themselves
Reported a crime that he or she may have witnessed	

Source: Dalton (2008, p. 21).

Engaged Citizenship

Engaged citizenship requires an active role in politics and the greater community beyond the traditional responsibilities of citizenship. Dalton notes that engaged citizens are more likely to be involved in continuous political action that challenges political institutions and promotes tolerance of different beliefs through action-based citizenship, including protesting and boycotting (Dalton, 2008, p. 88). He also argues that engaged citizenship is the most effective avenue of political participation, especially on the local level and for controversial political issues. Dalton notes, "Citizen duty encourages Americans to show up on election day and participate in election campaigns. However, citizen duty discourages participation in protest and other continuous forms of participation" (Dalton, 2008, p. 22).

The principles of engaged citizenship go beyond "How a Bill becomes a Law," and questions "How can I participate effectively in the public life of my community?" (Putnam, 2000, p. 405). Engaged citizenship requires three things: electoral participation, political awareness, and civic activity. These categories are very broad to account for various ways in which individuals can take part in these various activities—for example, civic activity can encompass a wide range of activities from attending religious services to joining a sports league.

Political Awareness

The second component, political awareness, is critical in democracy because democracy depends on an informed electorate in order to function effectively. Dalton (2008, p. 2) states, "The citizen's role in being sufficiently informed about government is to exercise a participatory role. The citizens should participate

in democratic deliberation and discuss politics with other citizens, and ideally understand the views of others." This advice clearly goes against conventional dogma that one should never discuss "religion and politics" with friends. but rather these types of discussions may actually encourage future political participation by promoting awareness among one's peers. Community organizations offer an exceptional opportunity to meet with like-minded neighbors and discuss issues facing our everyday lives.

Not surprisingly, as a nation we actually know very little about politics and seemingly the more information we have access to, the less we are informed about political matters. William Galston revealed an important link between basic civic knowledge and citizen participation. Galston concluded that the more knowledgeable citizens are about political matters, the more likely they are to participate in political life. Galston states, "Civic knowledge helps citizens understand their interests as individuals and as members of groups" (Galston, 2001, p. 223). Interestingly, Putnam notes, "the average college graduate knows little more about public affairs than did the average high school graduate in the 1940s" (Putnam, 2000, p. 35). Despite our exceptional advances in access to information, Americans today are less informed about political matters than we were 50 years ago. This trend is disturbing as politically knowledgeable citizens are more effective citizens. When individuals are knowledgeable about politics, they can better understand how policy decisions affect their interests and protect their interests when necessary.

Without basic civic knowledge it is difficult for individuals to understand political events therefore, they are likely to withdraw from political life altogether. A lack of political knowledge can also lead to the spread of "fake news" which was a significant problem in the 2016 election as social media became a dominant news source. Facebook customizes users' news feeds using algorithms. Herrman (2016) explains, "Algorithms [used by Facebook] have their pick of text, photos, and video produced and posted by established media" and advocacy sites that exist solely on Facebook (para. 5). These news sites cherry-pick and piece together news to make it as interesting as possible. Their main goal is to get as many shares and likes as possible (Herrman, 2016). This has been a huge component in the rise of "fake news." For these Facebook-specific news sources, it is all about the shock factor and "shares" rather than facts and accuracy. It is the responsibility of the user to determine whether or not a news story is legitimate. *USA Today* (2017) offers the following tips for distinguishing between Real News and Fake News:

- URL look odd? That "com.co" ending on an otherwise authentic-looking website is a red flag. When in doubt, click on the "contact" and "about"

links to see where they lead. A major news organization probably isn't headquartered in a house.

- Does it make you mad? False reports often target emotions with claims of outlandish spending or unpatriotic words or deeds. If common sense tells you it can't be true, it may not be.
- If it's real, other news sites are likely reporting it.
- How is the writing? Caps lock and multiple exclamation points don't have a place in most real newsrooms.
- Who are the writers and the people in the story? Google names for clues to see whether they are legitimate, or not.
- What are fact-checking sites like Snopes.com and FactCheck.org finding?

Practicing Democracy

Aside from campus life, the best way to become involved in political matters is to begin on the local level. While regular voting is essential, you will need to look beyond election day if you have a specific problem that requires personal attention. Remember, politicians in a direct democracy must be responsive to public opinion because that is what keeps them in office. Especially on the state and local level, individuals have a great deal of power to influence their government. While it may seem overwhelming or intimidating, contact with elected officials is truly the best first step toward handling problems in your community. However, you do not need to go at it alone. If you are upset about an issue, it is likely that other members in your community are concerned as well. Remember that, with collective action, ordinary citizens have had extraordinary influence on public policy. While a heartfelt effort from a single constituent can get an elected official's attention, a large number of letters (or a petition) almost guarantees notice.

Following the divisive 2016 election, constituents began flooding congressional town-hall meetings to express grievances with everything from the potential repeal of the Affordable Care Act to concerns about budget cuts. Clare Foran of *The Atlantic* (2017) stated, "In states across the country, liberal activists are taking a page out of the Tea Party playbook to help organize turnout at town hall events. Some of those activists are following guidelines that draw inspiration from Tea Party tactics (following the 2008 election) as a way to put pressure on members of Congress and generate headlines, explicitly recommending that activists 'reach out to media, during and after the town hall.' Still, that doesn't necessarily mean the people voicing concern at town halls are exclusively liberal activists." Citizens recognize that town halls are their opportunity to communicate directly with their elected representatives and provide feedback on current policy

directives. Senate offices across the country were flooded with calls during the confirmation hearings for Betsy DeVos during her confirmation for secretary of education, prompting GOP Senators Susan Collins (Maine) and Lisa Murkowski (Alaska) to oppose DeVos (resulting in a tie vote that Vice President Mike Pence broke in DeVos's favor, the first time that a vice president has ever cast a tiebreaking vote on the confirmation of a Cabinet appointment) (Hefling, 2017).

Bradford Fitch (2017) of the Brookings Institution reported:

> *The Congressional Management Foundation (CMF) tracked the activity at town hall meetings in April and May 2017, examining data publicly available through news media outlets. The group recorded which members of Congress held meetings, the number of people attending, and the media's impression of how well legislators managed the audiences. Average town hall attendance was 281, a huge increase above the norm. CMF has monitored town hall meetings for years and usually attendance at meetings hosted by a member of the House of Representatives is between 20 and 50 constituents. One representative saw more than 2000 citizens show up for his town hall meeting. And, as the media reported, many citizens were angry and wanted to vent.*

Who Votes?

Voting is one of the least time-consuming forms of political participation. Voters have a significant influence on public policy. Their influence is not limited to the selection of public officials and the results of referenda. The very act of voting gives voters disproportionate influence over government policies, because "policy makers cater more to the wishes of voters than nonvoters" (Leighley and Nagler, 2014, p. 2). Because of their more precarious control of the resources that they and their families need, lower-income citizens have a greater stake in what policies public officials select and they prefer different policies than higher-income citizens do. Ironically, they are much less likely to vote than are higher-income voters. The low turnout of low-income voters perpetuates and exacerbates their disadvantaged socioeconomic status.

The actual electorate is not by any means a statistically unbiased replica of the entire citizen population. Research about the 2008 electorate reveals the following:

- Nearly 80 percent of high-income citizens vote, while 50 percent of low-income citizens do.
- Citizens in the third-lower-educated segment have a 50-percent turnout while those in the third-highest-educated segment have a 79percent turnout.

- Citizens in the 1824 age cohort have a 49percent turnout while those in the 6175 cohort have a 73 percent turnout. Here is one explanation for the disparity:

  > *. . . [P]olitical elites are . . . more likely to mobilize those who have a record of voting, and those who are easily reached and socially connected. This suggests that political elites are less likely to target younger individuals* (Leighley and Nagler, 2014, p. 73).

Because younger people more frequently move from their homes to college dormitories, relocate to other cities or states to pursue employment opportunities, and move from one apartment to another, political operatives find it difficult to keep tabs on their whereabouts.

- White citizens have a 65percent turnout as do black citizens, while Hispanic citizens and those of "other" races have a 50percent turnout.
- Women's rate of turnout is 66 percent; men's rate of turnout is 61 percent.
- Married people turn out at a rate of 70 percent while the turnout of single people is 56 percent.
- "Respondents who perceive a greater difference between the candidates, and presumably have a stronger preference for one over the other, are more likely to vote" (Leighley and Nagler, 2014, pp. 1, 2829, 3234, 135).

There are statistical relationships *among* the assortment of variables that characterize the population, which can complicate the effort to isolate the effect of specific characteristics on turnout. For example: Do Hispanics have a lower turnout than white individuals because of their race or because of their lower average income? Statistical methods allow analysts to distinguish the mathematical relationship between two variables by "controlling" for other variables (i.e., by holding the other variables constant). These methods reveal intriguing behaviors.

- Based on 1984 data, Leighley and Nagler (2014, p. 68) found that "blacks were more likely to vote [than whites] . . . when [analysts] control[] for other demographic characteristics such as education, income, and age, along with the election law characteristics of the states in which citizens reside."
- Data from 1996 show that "Hispanics vote as often as whites once demographic characteristics and region are controlled for" (Leighley and Nagler, 2014, p. 69).
- This is Leighley and Nagler's summary of the influences of income and education:

> *The effect[s] of income and education remain most striking. The gap in turnout between an individual in the bottom third of the education distribution and an individual in the top third is approximately 25 percentage points once we condition on other demographic characteristics. That is a chasm in expected turnout rates for otherwise demographically similar individuals. For income, the relationship between the bottom fifth and top fifth of the income distribution once we condition on other demographic characteristics is approximately 20 percentage points. . . . [E]ducation is a more influential predictor of turnout than is income* (Leighley and Nagler, 2014, p. 80).

Readers of this textbook should remember this practical relationship between voting and policy: Elections determine who the most authoritative policymakers will be (i.e., the members of Congress and state legislatures) and policymakers are more attentive to voters than nonvoters as they make and implement policy. A citizen's decision to forgo her opportunity to vote causes her interests to be accorded less significance when policymakers make consequential policy decisions.

Opting Out

Political participation, when it works, benefits the entire citizenry as it creates support for the democratic system, the belief that participation and voting are essential to the democratic process, and approval of government policies and administration. When these attitudes do not materialize, political alienation has occurred, which is dangerous to the system.

There are four varieties of political alienation:

- *Political powerlessness*: Individuals with low political efficacy often feel separated from the government and limited in their ability to influence government actions. Political powerlessness is often experienced by disadvantaged groups in society.
- *Political meaninglessness*: Individuals who believe that there are no predictable patterns to political decision making and, therefore, no way to influence the political system, may give up. These individuals cannot rationalize certain government behaviors, such as government spending in the face of deficits, civil liberties for accused felons, and a perceived lack of government attention to ongoing social problems.
- *Political normlessness (anomie)*: Individuals conclude that government

and its officials are violating widely accepted norms, leading to a breakdown of the political system. These individuals become distrustful and cynical of government officials, resulting in a breakdown of the political system. Tax loopholes for the very wealthy, complaints about welfare recipients, and scandals and policies that appear to promote the breakdown of family values are all related to anomie.

- *Political isolation*: This occurs when an individual rejects current norms as "unfair and illegitimate," and, therefore, withdraws from political life. According to Gant and Luttbeg (1991, p. 125), "this form differs from anomie in that anomie suggests that an individual perceives that others are violating norms which he accepts. But in the case of political isolation, an individual rejects the norms themselves and is not concerned with whether leaders are adhering to them or not."

It is unfortunate that this disconnection from the political system develops. Adoption of these feelings simply creates further barriers between the citizenry and government.

Introduction to Civic Engagement

In the United States as a representative democracy, our society expects and depends on citizen participation. We entered the twenty-first century more politically equal than ever, as virtually all adult United States citizens are entitled to vote and exercise their stake in society. However, researchers like Robert Putnam have argued that we are experiencing a serious decline in citizen participation. Putnam argues in his monograph, *Bowling Alone*, that Americans are suffering from a lack of social capital, which Putnam defines as "connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them" (Putnam, 2000, p. 19). Putnam asserts that declining social capital has resulted in the average American withdrawing from the political process. Because a democracy gets its power from the people, when individuals do not engage politically, it allows politicians and special interests to pursue their own agenda. Political participation is the only way to keep government accountable!

Active engagement in civic affairs has long been part of the American landscape as the nature of direct democracy depends on citizen participation. Schools traditionally have focused on the institutions of government and the importance of voting but overall civic education is lacking in schools. According to Fritschler and Smith (2009, p. 8), civic education in the United States is "merely knowledge of the institutional features of government: the function of local,

state and national governments; the role of the legislative, executive and judicial branches; voting requirements, etc." While this understanding of the nuts and bolts of government is certainly important, it does not focus on how everyday people can influence their government. Much citizen involvement in political life happens on a local level and is a result of ongoing community involvement that truly impacts the political system and ultimately public policy.

Public Opinion and Public Policy

When it is strong and clearly expressed, public opinion has a substantial influence on public policy. Historically, social movements resulting in major policy changes were due to changes in public opinion. The black civil-rights movement, for example, was a combination of persistent collective action that pushed issues on to the policy agenda and a shift in public opinion that could no longer justify racism. When the Supreme Court handed down its *Brown v. Board of Education of Topeka*, 347 U.S. 483, opinion in 1954, school boards throughout the South ignored the mandate and actively resisted any attempts at integration. Many Southerners considered the decision illegitimate and, therefore, politicians were loath to implement it. While we tend to credit the success of the black civil-rights movement to the charismatic leadership of Dr. Martin Luther King Jr., it is important to acknowledge that the changes in public opinion began with the actions that took place in the background. The arrest of a vulnerable looking Rosa Parks, the persistent non-violent protests, and the senseless murders of African-American school girls in Birmingham led the public to demand change and resulted in public opinion moving in favor of integration (Bianco and Canon, 2009, pp. 511-514). However, in general, Americans have little direct control over public policy because policy decisions are plagued by a number of social and economic constraints that must be reconciled by policymakers. Most policy problems do not tend to attract the public's attention as extensively as the persistent mistreatment of black Americans as described above. When the public is not sufficiently interested in an issue topic, or public opinion does not coalesce in a certain direction, American public opinion is unlikely to have much impact on the making of a public policy.

While overall individuals have limited direct control over public policy, we entrust elected officials to carry out the "will of the people," which ideally deters legislatures from making truly unpopular decisions. Consider the role of citizen participation in getting a local issue on the public policy agenda. Mothers Against Drunk Drivers (MADD) was founded in 1980 as a response to the death of 13-year-old Cari Lightner, who was killed by a serial drunk driver in

Sacramento, California. Cari's mother, Candy Lightner, determined to avenge her daughter's death, began a national movement that would forever change the perceptions of drunk driving in the United States. At the time local attitudes viewed drunk driving as a trivial offense, and drunk drivers in popular culture were often depicted as comical rather than dangerous. MADD sought to change these perceptions and hold accountable individuals who choose to drive while intoxicated. MADD's effectiveness could not have been clearer. Within five years, hundreds of MADD chapters had been established nationwide (Graham, 2010, p. 123). MADD's advocates fought tirelessly with decision makers in Washington to reform drunk-driving laws including raising the drinking age and instituting mandatory sentences for repeat offenders. These changes to public policy eventually swayed public opinion and criminalized drunk driving.

A substantial facet of MADD's success was the group's ability to establish a network of citizens with a common purpose (to stop drunk driving). They expanded that network to include groups all across the country which were able to lobby in numbers and influence policy. Secondly, MADD members took the initiative to contact officials on their behalf and lobby for policy changes. MADD members did not sit back and complain about drunk-driving laws, nor did they simply go to the polls and vote for the candidate who promised to reform existing laws. Rather, as a group MADD initiated letter-writing campaigns, met with local and national officials, engaged in group protest when needed, and most importantly developed a network of like-minded citizens committed to a common cause. It is this type of grassroots American effort that demonstrates the biggest influence individuals can exert over public policy.

Former U. S. Senator Bob Graham's book, *America: The Owner's Manual* (2010), offers an insider's view on how to effectively participate in the political process. Senator Graham identifies the biggest obstacle in democratic participation as the perception that the average American has little influence in the democratic process. Many Americans believe that political influence is limited to the elite and special-interest groups that seem to dominate the political landscape. Americans tend to suffer from low political efficacy, the idea that their participation in the political process can influence outcomes. Remember, when political efficacy is high, individuals are likely to engage in political matters while, when efficacy is low, citizens refrain from political participation. In reality, many of our proudest political movements began with ordinary citizens bringing attention to issues, influencing decision makers, and ultimately influencing public policy.

The Communications Media and Public Policy

The communications media have an important agenda-setting function and are able to put something on the public-policy agenda by bringing attention to a problem. In addition, the media have great influence over how the public perceives political events and help shape political attitudes. The media serve as a vehicle of direct communication, allowing policymakers to communicate directly with the public. In addition, the media act as gatekeepers and spotlights for policy problems by signaling what the public should know and care about.

Journalism in the United States has a long history of being a watchdog relative to government institutions and officials. In the late nineteenth and early twentieth centuries, local newspapers—such as New York's *World* and *Journal*—developed and perfected the art of yellow journalism and muckraking. Those terms describe exaggerated descriptions of supposed corruption of government officials and political-party officials, including leaders of New York City's Democratic-party "machine" (popularly known as "Tammany Hall").

Local newspapers employed armies of reporters looking for behind-the-scenes wheeling and dealing, business scandals, street crimes, society news, professional-sports trade negotiations, and human-interest stories. Many such newspapers were owned by local families or investors. In large cities, circulation was robust because the local newspaper was a significant facet of the public's lifestyle. Many Americans couldn't imagine starting their day without catching up with national and local news by reading the morning paper. Many others relaxed after diner by sitting in a comfortable chair and reading the evening paper. Revenues from sales and advertising supported large workforces.

> *. . . Jim Maroney noted that in 2005 the Dallas Morning News was spending $30 million a year on news-gathering with "more reporters on the street than the ABC, NBC, CBS, and FOX affiliates in our market combined"* (Kirk, 2017, p. 32).

Some metropolitan newspapers posted correspondents in their respective state capitals and one or more reporters in Washington, D. C. The major "wire services"—notably the Associated Press, United Press International, and Reuters—operated bureaus in large cities and posted stringers throughout the country to write articles for distribution to newspapers and broadcast stations. By comparison, the radio and television networks' news divisions and local affiliates' news staffs were skeletal.

There can be no doubt about the influence of newspapers on local politics and government policymaking. There can also be no doubt about the significance of the dramatic decline of the local press in recent decades. Across the country, one evening paper after another disappeared or was submerged into the city's morning paper. University of North Carolina journalism professor Penny Abernathy reported that between 2004 and 2019 the United States lost nearly 1800 newspapers—60 daily and 1700 weekly newspapers—while the Pew Research Center discovered that between 2008 and 2019 half of the approximately 176,000 newspaper reportorial jobs across the country vanished (cited in Manfredi, 2020). The circulation of remaining newspapers has declined, advertising revenue has fallen, and the newspapers have become thinner and thinner. City dwellers know less and less about policy decisions under consideration and policies that have been made at city hall.

The news business in the United States has been substantially affected as well by the pattern of mergers and acquisitions that has led to oligopoly in virtually every industry. Countless newspapers and broadcast stations have been gobbled up by media conglomerates. In Atlanta, the Cox Media Group owns the *Atlanta JournalConstitution*, WSBTV, WSBAM, WSB and WSBBFM, WALRFM, and WSRV (another FM station). (The group also owns newspapers and numerous radio stations in other cities around the country.) Says Kirk (2017):

> *Today there are too few traditional journalists producing news content. That results in fewer news stories and too little original content. . . . In . . . 2014 . . ., Amy Mitchell wrote that "at this point, fully a quarter of the 952 U. S. television stations that air newscasts do not produce their news programs." As a result, much of the news is redundant content in a mediated echo chamber* (p. 36).

Parents and grandparents of readers of this book will gladly reminisce about the network-television news divisions whose star reporters—such as John Daly, Peter Jennings, and Diane Sawyer on ABC; Douglas Edwards, Walter Cronkite, and Dan Rather on CBS; and Chet Huntley, David Brinkley, and Tom Brokaw on NBC—commanded the airwaves at 6:30 or 7 p.m. and were also significant features of the American lifestyle. The networks' already modestly sized teams of reporters have suffered successive layoffs and cutbacks as more and more Americans have turned to online sources and the 24hour cable news channels. As the news organizations have become increasingly enfeebled, communications directors at the White House and in congressional offices have become increasingly effective at manipulating the content of the daily news cycle. The White House

communications office feeds themes relating to the president's appointments, decisions, public appearances, and availability to reporters during the course of the day. White House correspondents have routinely been guided by these prompts as they decide what stories to file for the evening-news programs and the next day's newspapers. One is left in great doubt about whether the resulting personality-focused news reports help Americans understand very much about the most important societal issues and policy proposals.

The Washington correspondents and the editors, publishers, and owners who employ them have been justifiably concerned about how they have been manipulated by presidents and congressional leaders, but in Donald Trump they have met their most daunting challenge.

> *. . . [H]is savvy for courting media attention through staged events, impromptu calls into news and talk shows, and his social media use succeeded in helping him dominate the news agenda during the [2016 presidential] primary season* (Culver, 2018, p. 286).

In public appearances and in Twitter tweets, President Trump made impromptu announcements, denounced other officials and his own political appointees, excoriated "fake news" reporters, and confounded readers with careless misuse of the English language. This turmoil made *him*—and not societal problems and policy issues—the center of attention and the subject of front-page articles, radio and television news broadcasts, cable news programs, and messages racing around social-media platforms. Trump's rivals in Congress took the bait, and their public communications were directed toward how best to discredit the president, how to impeach him, and how to retrieve the communications media's attention. Scholars of political science, mass communications, sociology, and other fields of study will analyze the fallout of this Trump phenomenon for a very long time.

For More Information About Journalism in the United States

This chapter contains excerpts of co-author Barry Friedman's description of journalism in the United States. For the longer essay, which includes a history of American journalism, please see Chapter 4 on this textbook's website at http://www.upnorthgeorgia.org/amergovt/.

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5 Interest Groups

Carl D. Cavalli and Barry D. Friedman

Learning Objectives

After covering the topic of interest groups and political participation, students should understand:

1. The history of and reasons why interest groups exist.
2. Why we join interest groups, and their structure, their organization, and the "free-rider" problem.
3. The mythology and reality of interest groups.
4. The influence of interest groups on public policymaking, including the various methods of influence.

Abstract

The framers' hostility to "factions" was addressed not by restrictions, but by encouraging proliferation, creating what today is referred to as a pluralist system. While groups offer potential members many social and economic reasons for joining, obtaining active support is often difficult because of the "free-rider" problem. Modern literature challenges the popular myth of benevolent groups alleviating inequities in society. Instead, Roberto Michels speaks of an "iron law of oligarchy" and E.E. Schattschneider warns of a strong upper-class bias. Data on federal spending by lobbyists support this theory about bias. Groups use many methods to influence public policy. These methods include lobbying, direct access through "iron triangles," litigation, direct grants of power from governments, "going public," and electoral activity. Government regulation of groups' electoral activity has resulted in the formation of many types of organizations, including political action committees, "527" and 501(c) organizations, and, most recently, "SuperPACs."

Introduction

Watching each others' backs

In the feudal systems that once dominated European countries, lords, as the saying goes, "watched each others' backs." For that matter, so did the serfs. The feudal system placed all individuals into automatic, life-long affiliations with their peers. In case of trouble, help was on the way.

The European immigrants who came to North America to populate the colonies had a common, middle-class background. Besides, while the shortage of land in Europe was part of the rationale for feudalism, once they arrived here, the immigrants discovered an abundance of land. Imitating feudalism in North America was, quite simply, out of the question.

But the choice of individualism came with a new challenge: Each individual, faced with some sort of problem, could not automatically rely on any association for assistance. For example, if someone's barn was burning down, it would be problematic to endeavor to put out the fire alone. Therefore, the colonists learned to create associations for collective benefit—associations like volunteer fire departments. As a matter of fact, it was Benjamin Franklin who founded the first such association, known as the Union Fire Company, in 1736 in Philadelphia. The stage was set for the creation of innumerable interest groups in the United States.

In *Federalist* #10, James Madison reflects the distaste of the framers toward what he called "factions" (see Chapter 2): "The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice [i.e., factions]" (Madison, 2001, p. 92). We generally understand his term "factions" to encompass political interest groups, political parties, and other instruments whose purpose is to cultivate political influence. Conventional wisdom states that the delegates to the Constitutional Convention were still in some kind of shock over **Shays' Rebellion**, the recent incident in Massachusetts during which debt-ridden farmers set out to topple the state government in Boston so that there would be no instrument to enforce their debts. Although the rebellion failed, the affluent delegates to the convention must have feared imitators and, thus, the possibility that private property would not be secure. Insofar as the *Federalist* papers were intended to advocate the ratification of the proposed Constitution, Madison took on the challenge of showing that the document would manage the threat posed by factions. Did the delegates to the Constitution Convention decide to *outlaw* factions? No, says Madison; they did not outlaw them by "destroying the liberty which is essential to [their] existence." That, he acknowledges, would be "worse

than the disease" itself. Instead, he explains, the framers did something much cleverer: They decided to "extend the sphere"—i.e., they transformed the system of 13 separate political systems into *one large*, *national* system.

And then they set the stage for factions to proliferate. Then, he boasted, there would be so many factions in this one national system that they would cancel each other out, rather than creating the conditions under which one faction would eventually prevail.

By the time that the French observer Alexis de Tocqueville toured the United States in the early 1830s, the creation of clubs and associations had clearly become second nature to Americans. His observation was that Americans form associations at the drop of a hat. Subsequently, scholars in the field of American government found many reasons to celebrate the proliferation of interest groups. Tocqueville himself referred to the spectrum of clubs and associations as "great schools, free of charge, where all citizens come to be taught the general theory of associations," in which Americans learn to make proposals, debate them, vote on them, and accept the majority decision (Tocqueville, 1835/2000, p. 497). In 1951, David B. Truman referred to interest groups as the "balance wheel in a going democratic system" (p. 514). The existence of innumerable interest groups, and each American's affiliation with a variable number of such groups, amounted to a system of **pluralism**, whose net effect is the moderation of individual Americans and, as a result, of the entire political system.

The Basics

What are they and why do they exist?

Quite simply, interest groups organize to influence government. This makes them purely *political* entities, as they seek to affect public policy. However, these groups generally are not interested in all policies. Typically, they focus on a single area, remaining uninterested in others (except to the extent those others may affect their interest). This focus leads many to refer to them as *special-* or *single-*interest groups.

While the framers' distaste for "factions" included interest groups as well as political parties, this single focus distinguishes them from political parties, which generally seek to mold policy in *all* areas. Another distinction is that, in general, while interest groups are focused on *influencing* government—largely from the outside—parties want to get their members elected to government in order to *run* it (see Chapter 6).

Democracy, Diversity, and Division

While not an absolute requirement, *democracy* helps explain the existence of interest groups. Democratic governments are set up to listen to public input, and an organized group is more easily heard than a scattered collection of individuals (Think of a chorus versus a crowd).

Another explanation is found in *diversity*. There would be little reason for groups to form if the entire population possessed the same beliefs, desires, and needs. Indeed, in *Federalist* #10, Madison notes that one way of "removing the causes of faction" is to give everyone "the same opinions, … passions, and … interests" (Madison 2001, p. 92). He quickly dismisses this as impossible. So—factions happen!

One other less appreciated but equally important explanation for the existence of interest groups is *division*. More precisely, our government is fragmented—divided in many ways. Implementing the constitutional principle of separation of powers leads to a divided government—three branches (Executive, Legislative, and Judicial) in each of three levels (national, state, and local). In addition, each branch at each level usually has multiple agencies with many individuals within it. This diversity creates numerous **access points** for interest groups to contact. In addition to lobbying Congress for favorable legislation, they may also lobby executive agencies for favorable regulations as well as accessing the legal system to affect laws, regulations, and their implementation. All of these may be pursued at the state (governor, state legislature, state courts) and local (mayor, city council, municipal courts) levels as well.

The Rationale for Forming or Joining Groups

Clubs and associations originate because of their founders' perception of self-interest. Others join these organizations to advance their self-interests, too. While one cannot rule out the possibility that those who establish an association are doing so for purely altruistic reasons, systematic observation suggests that such an event is a rarity. People join groups for some of these reasons:

- People may join an organization in order to obtain a *material benefit*. For example, one may join AARP—the organization for people 50 years of age and older—to obtain health insurance at a discounted group rate or to obtain discounts when checking into a hotel.
- People may join an organization in order to feel good about themselves. They may volunteer their unpaid labor to helping a free-soup kitchen so that they can get some *personal satisfaction* out of feeding hungry

people. They may join a museum organization to feel as though they are doing something worthy by being a patron of the arts.

- People may establish or affiliate with an organization in order to obtain *employment*. Clubs and associations employ millions of Americans. The most successful organization executives even in the nonprofit charitable sector command generous salaries, sometimes exceeding $1 million.
- People or business enterprises may affiliate with an organization in the hope that the organization will attempt to persuade legislators and others who possess government authority to make decisions that will promote the well-being of the members' industry or other *common interest*.
- People may affiliate with an organization because of their intention that the organization's ideological program or policy preferences would, if transformed into public policy, *benefit the individual* or, at least, create the kind of society that they prefer.

Organization

There are more *potential* interests than most of us may comprehend. Your interests may stem from any number of factors related to you or your surroundings, including sociological factors (race, ethnicity, nationality, religion, sexual orientation), political factors (partisanship, ideology), behavioral factors (activities, personal and consumer habits), demographic factors (gender, age, location, income, occupation, education), and even physical characteristics (height, weight, health issues). However, not all interests gain the attention of government. The key to gaining this attention is *organization*. Organization is what separates interests from interest *groups* (recall the earlier analogy: a chorus versus a crowd).

Any interest wishing to influence government must have some sort of structure, consisting most basically of *leadership* and *membership*. The leadership provides direction and (along with the staff) usually accounts for much of the group's activities. The membership may account for some activity (i.e., picketing, protesting, writing to or calling government officials), but in many instances provides mainly financing and popular support.

In general, organized groups cannot achieve significant success without a sound *financial structure*. Most organizations rely on membership dues along with additional contributions from supporters (including charitable foundations and think tanks—i.e., other groups). Many groups also benefit from federal and state funding. This funding is not *supposed* to be used to support their attempts to influence government. However, funding in the form of research or project

grants—often providing data in support of a group's aims—may help them succeed nonetheless.

The "Free-Rider" Problem

As noted above, people join groups for many reasons. In general, it makes sense to say that we look to obtain some sort of benefit from our memberships. In turn, groups need our support in order to function effectively. Yet many groups find it difficult to obtain that support. Interestingly, this difficulty generally increases with the size of a (potential) group. You might think that the broader the interest, the easier it is to organize, collect resources, and take action. You would be wrong! Broad interests face a **free-rider problem**. Mancur Olson (1982) describes the logic:

> *The successful boycott or strike or lobbying action will bring the better price or wage for everyone in the relevant category, so the individual in any large group with a common interest will reap only a minute share of the gains from whatever sacrifices the individual makes to achieve this common interest. Since any gain goes to everyone in the group, those who contribute nothing to the effort will get just as much as those who made a contribution. It pays to "let George do it," but George has little or no incentive to do anything in the group interest either, so … there will be little, if any, group action. The paradox, then, is that (in the absence of special arrangements or circumstances ...) large groups, at least if they are composed of rational individuals, will not act in their group interest* (p. 18).

In other words, groups that pursue **collective, or public, goods**, cannot limit them only to those who contribute time and resources to the cause (see Samuelson 1954). National defense is one of the purest examples of a collective good. It is impossible to divide: If it is provided at all, it is provided for everyone. Contrast this with largely private goods—like typical consumer goods—that are bought and sold through individual transactions. You must pay for that iPhone you want! On the other hand, much of the regulations regarding the manufacture and sale of iPhones (material and manufacturing quality, limitations on the use of hazardous materials, required disclosure of radiation levels) are closer to public goods that exist (or not) regardless of your individual actions. If you benefit from these goods whether you contribute or not, it is not rational for you to contribute to any groups seeking these benefits. Groups seeking these regulations often will struggle to build support. You will just "let George do it" (which, of course, he will

not because he has no more incentive than you!). In small groups (such as a local union seeking a pay raise for a company's workers), you may quickly realize that if you and George do not act, you may not receive any benefit. This realization may spur you to action. However, in large groups (such as consumer, environmental, social, and issue groups), there are lots of other Georges, at least some of whom (you are likely to assume) will act. Yet again, they have no more incentive than do you. This lack of action is the problem.

Governments may address this problem through compulsory action. National defense is funded through tax revenues. You pay taxes or you go to prison (assuming you are caught). Interest groups, however, do not have that compulsory power. So how do groups overcome this problem? Two words: **selective incentives** (or selective benefits). These are benefits that *can* be limited in their distribution. As Olson (1971) says,

> *... group action can be obtained only through an incentive that operates ... selectively toward the individuals in the group. The incentive must be "selective" so that those who do not join the organization ... can be treated differently from those who do* (p. 51).

These are the kind of benefits mentioned earlier, including material benefits like access to or discounts on consumer goods or other resources or information, and social benefits like entertainment, travel, and other group activities. Regardless of what George does, you are more likely to contribute your time and money to the group if it means that you can get a t-shirt with the group's logo on it, or a magazine with information on the group's accomplishments and activities, or a discount on tickets to a Yankees game or on an insurance policy, or if you can attend a group party or lecture, or go on a Caribbean cruise with group members.

The Mythology and the Reality

The Myth: Inequities Are Alleviated

The spectrum of communications-media sources that discuss American life in general contains a significant amount of mythology about groups, organizations, associations, and so forth. The traditional mythology describes these collectivities in mostly flattering terms. They are said to contribute to the spirit of American democracy. They are described as effective instruments of political participation. Charitable organizations are rhapsodized as instruments by which socioeconomic inequities are alleviated because the charities redistribute wealth from generous

haves to appreciative have-nots.

That there is such a mythology is somewhat ironic, given the clear skepticism among the framers of the U. S. Constitution about such collectivities. To Tocqueville, the participation of Americans, who, he said, organized clubs and associations at the drop of a hat, in such groups gave the public experience with the idea of democracy: The members would learn to make a proposal, debate it, vote on it, and abide by the results of the majority vote. Thus, he said, these groups served as training grounds for democracy. While Madison considered "factions" a threat to the republic, Tocqueville considered associations to be its very mainstay.

The Reality: Oligarchy, the Upper Class, and Corporations

As the twentieth century proceeded, the literature of political science, following the direction of the literature of sociology, gradually departed from the mythology of popular publications about the value of interest groups, but for reasons that were different from Madison's rationale. In 1915, French sociologist Roberto Michels made this chilling observation: "Who says organization, says oligarchy" (1915/1958, p. 418). His "iron law of oligarchy" suggests that, in *any* organization, a clique of some sort will inevitably rise to the top and assume control. The automatic process that determines who will become the leaders recognizes charisma, strength, leadership ability, intelligence, wealth, access to influential individuals, and so on. When, in 1966, Grant McConnell studied special-interest groups in the United States and their influence on public policy, he rediscovered Michels' "iron law," and complained: "If private associations themselves should be undemocratic [because of the iron law of oligarchy], … how can they be essential to democracy?" (pp. 122-123).

The further development of the literature of political science explores with increasingly greater sophistication and alarm the actual effect of groups. The effect is not, as Tocqueville surmised, the empowerment of average people as their participation in groups makes them effective participants of the political system, but, rather, to solidify the dominant position of those who are already affluent and influential. Evaluating the celebrated idea of American "pluralism," which heralds the role of groups as, in the words of David Truman, the "balance wheel in a going political system like that of the United States" (1951, pp. 514).E. E. Schattschneider lamented, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent" (1960/1975, pp. 34-35). Theodore J. Lowi decried the influence of special-interest groups in American policy-making as a distortion of democratic decision-making that he called "interest-group liberalism" (1979, p. 50).

Even though groups of various kinds tend to promote the interests of the wealthy, their insatiable appetite for funds causes them to solicit dues and donations from people of modest means. These groups certainly include political parties, ideological groups, SuperPACs, and campaign committees. While, to be sure, political leaders tend to be wealthier than the average American, they send desperate solicitations to the masses to send money lest their political opponents inflict irreversible damage on the United States. The solicitations, written by shrewd fundraisers, contain shrill, disingenuous messages to alarm and inflame the recipients, who proceed to write checks as donations to the organizations. Undoubtedly, an immediate effect of these transactions is to transfer wealth from lower-middle and middle-class Americans to wealthier political operatives and fundraising professionals. Most vulnerable to these appeals are elderly citizens, who, confronted by the question, "What kind of country are we going to leave for our children and grandchildren?" write generous checks that they can often ill afford. Even the most casual observer can see that this economic activity has done little to create a better country, but it certainly has depleted the resources of working-class and retired Americans somewhat while it has allowed the organizations' managers to prosper.

In addition, this upper-class "accent" leans in a clearly corporate direction. This leaning can be demonstrated by examining the spending done by lobbyists at the federal level. Compiling data from the U.S. Senate Office of Public Records, The Center for Responsive Politics ranked various sectors of society by how much they spent on lobbying (Center for Responsive Politics, 2021a). In 2020, definably corporate sectors—health (dominated by pharmaceutical companies), finance/insurance/real estate, communications/electronics, energy/natural resources, transportation, agribusiness, defense contractors, construction, and other business interests—spent almost $3 billion on lobbying while non-corporate interests—ideological, single-issue (i.e., environmental, human rights, social issues), labor, education, public sector, religious interests, lawyers/lobbyists—spent about $428 million. In other words, corporate interests spent about seven times as much as did non-corporate interests.

Case Study: The Self-Centered Behavior of Many Charity Executives

Relentless Begging for Donations

Let's say you receive in the mail a solicitation for a donation for a charity, and you send them $25. Is the charity satisfied? Of course not! The charity now

suspects that you might own other money, and it will want that, too. You can expect to receive *another* solicitation from the charity within a few weeks. If you send more money, then a fundraiser for that charity may call you before too long, get you to admit you have $500 in your checking account, and persuade you to send them that $500. Is the charity satisfied *now*? Possibly, for the time being. But, in a few months or a year, they will suspect you have replenished your supply of money, and will want the next installment. The fundraiser might call you again and suggest that, for your and the charity's mutual convenience, you should authorize a continuous $50 monthly transfer (by authorizing their use of your bank-account or credit-card number). If you agree, the charity may eventually propose that you include in your will a bequest to the charity. In other words, the charity won't be finished with you until you are dead.

In his 1979 book *Charity U. S. A.*, Carl Bakal wrote (p. 211):

> *So ubiquitous is the Red Cross presence, particularly in connection with fundraising, that it is easy to believe the probably apocryphal story of the mountaineers stranded for days on some Alp who, upon seeing a Red Cross-armbanded rescue party approach, instinctively waved it away, shouting, "We gave!"*

But charity fundraisers understand that, to establish continuing relationships with donors, they need to cause donors to feel good about having donated. What would cause this good feeling? Well, let's say you might like to enhance your social status. Many people would like enhancements like this. So donors might feel good about donating to a charity that appears to be successful and supported by influential people.

One has good reason to be skeptical about the accuracy of the content of charities' communications. Charity publicists and fundraisers are paid to manipulate the public, and the more persuasive they are, the more pay they will draw. They are certainly *not* paid to be scrupulously honest. Charities take advantage of Americans' gullibility and depend on us not to check on their claims and, when the charities are caught doing scandalous things, to forget about them.

News-media outlets aid and abet charities by promoting them on their news pages and during their news broadcasts and printing and airing their public service announcements at no charge. At the extreme, the news-media outlets get their own editors, writers, and on-air talent to solicit donations from readers, listeners, and viewers. These news-media outlets exaggerate the purity of the charities' operatives and—what is even worse—underestimate charities' misconduct.

Taking Advantage of Gullible Americans

It is typical American behavior to trust charities implicitly and to donate without asking questions about the motivations of the charities' managers. In his 1979 book, *Charity U. S. A.*, Carl Bakal reflected on the gullibility of Americans who, in studies conducted by newspapers and researchers, have been found to contribute willingly to a "Heroin Fund for Addicts," an "American Communist Refugee Fund," a "National Society for Twinkletoed Children," a fund to "Help Buy Rustproof Switchblades for Juvenile Delinquents," a "National Growth Foundation for African Pygmies," and a "Fund for the Widow of the Unknown Soldier" (pp. 289290).

Roberto Michels' "Iron Law of Oligarchy" pertains to nonprofit organizations, most of which operate as oligarchies. It is safe to say that all large nonprofits operate as oligarchies. These oligarchical organizations tend to serve as instruments of elite privilege. Let's say that a population of affluent individuals in a large city donates money to a symphony orchestra. When these donors donate, they deduct the amount of these donations from their amount of income that is taxable. Thus, the government receives less tax revenue from them—revenue that it could have used for social-service programs for disadvantaged people. Who benefit from the symphony? Typically, the audience of symphonic performances consists of affluent people. Not too many homeless individuals show up to hear a concert at symphony hall. Now consider this situation: Harvard University has an endowment fund whose investments total over $40 billion. When an affluent alumna of Harvard donates $10,000, her tax liability may decline by some $4000—money that the government cannot use to alleviate inequity and poverty. Little about the structure of the nonprofit sector gives us any reason to believe that the existence of nonprofit organizations serves the purpose of redistributing wealth from rich to poor and alleviating the suffering of society's neediest people.

In a case study about the American Red Cross (ARC), this chapter's coauthor, Barry Friedman (1997), describes an incident in which new disaster-relief volunteers in White County, Ga., struggled to become productive and disaster-ready while the executive director and some board members conspired to deprive them of access to such resources as staff support. (A major purpose of a charity's paid staff is to provide information and other resources that enable the volunteers to do what they are supposed to do.) When these volunteers became aware of the conspiracy and protested it, the board cracked down on them and terminated the volunteer status of three individuals, including Friedman. Their appeals to the state, regional, and national levels of the ARC caused the leadership to circle the wagons and stymie the volunteers' efforts by putting in place a veil of secrecy.

The dignitaries on the chapter board—business owners, bankers, lawyers, etc.—could not identify with the field volunteers, who aspired to donate a lot more of their volunteer labor than the dignitaries were prepared to give. Threatened by the volunteers' desire to be active and to participate in decision-making and disaster planning, the executive director, chairman of the board, members of the executive committee, and other board members preferred to insult, browbeat, frustrate, and chase away the volunteers and perpetuate the chapter's pathetically insufficient disaster-relief force. When two of the volunteers were invited to meet with the two board members whose title was "chairmen of volunteers," and stated that the disrespect for volunteers would leave the chapter bereft of sufficient volunteer participation to cope with the needs of disaster relief, the board members replied contemptuously, "There will always be volunteers." That is to say, the Red Cross will always be able to attract new people who assume that the organizers will relate to them in good faith. "Perfect information"—an assumption of the free marketplace—is hard to come by. The volunteers in Northeast Georgia are certainly not the only ones to offer their volunteer labor and find themselves the targets of mean-spiritedness. There are former Red Cross volunteers all over the United States who describe the same kind of experience. Here are two observations:

- This case study about the ARC is not meant to suggest that the Red Cross is unique in its treatment of volunteers. The literature review makes the clear point that this abuse is common in nonprofits that recruit volunteers.
- Nobody should approach a nonprofit organization, offer generous gifts of money and volunteer labor, and expect to find managers who will respond with a commensurate level of generosity of spirit. Ask questions. Probe by asking about "what if" scenarios. Ask to see minutes of the last several board meetings! Protect yourself from exploitation and disappointment. Use the rule of *caveat emptor* that applies to purchases from for-profit firms.

Secrecy vs. Transparency

The perpetuation of corruption is the product of secrecy. Nonprofit operatives who are benefiting personally from organization resources depend on secrecy. Under the cover of secrecy, those who practice corruption are not subject to the pressures of stakeholders who might otherwise intervene in the misconduct. One might wonder why a nonprofit organization needs secrecy. Perhaps there are personnel matters that require secrecy. Perhaps there are pending real-estate transactions that require secrecy. But why should anything about the character

of revenues and expenditures be shrouded in secrecy? Why should the decisions made during board meetings be shrouded in secrecy? What can possibly be the rationale for confidentiality in a nonprofit's proceedings?

Friedman and North Georgia alumna Amanda M. Main (2015) assert that charities should publicize their minutes of their board meetings. Examine the Web sites of some charities and notice how many of them have links to such minutes. It rarely happens. Friedman and Main contacted leaders of 17 organizations in Dahlonega, Ga. In every case, the leaders said that, if asked, they would disclose their minutes to anyone who requested access to them. Why should anyone donate to a charity that opts to conceal its decision-making process? Why don't the Better Business Bureau and Charity Navigator include charities' willingness to publicize minutes of board meetings when they rate the charities? Why doesn't the IRS require charities to make their minutes public? Perhaps, if a charity asks you to donate, you should request a copy of the minutes of the most recent board meeting. If the charity withholds the minutes from you, perhaps you should withhold your money from the charity. If a board is doing its job responsibly, it should be proud to display its minutes to the public.

Ethics and transparency go hand in hand. Americans ought to insist on both from nonprofit organizations and give a wide berth to those that prefer secrecy.

The Misguided Character of State Corporation Laws

Common provisions of state laws impose on board members the duties of care, loyalty, and obedience. As Tschirhart and Bielefeld (2012, pp. 204205) explain the duty of loyalty, they state:

> *Once a board has made a decision, each board member is expected to stand behind it or resign from the board. However, board members may still wish to record their dissent from a decision on the record. This may protect them from personal liability if this decision is later found to be in violation of board duties or connected to illegal activities. Board members are also expected to respect confidentiality in relation to the nonprofit's legitimate activities.*

The implication of this legal mandate is that there is no room for dissent in board deliberations. Board members believing that the majority is doing something improper, can acquiesce to the misconduct or quit. Even if they quit, they are legally constrained from telling anyone, even other members and field volunteers of the organization, about their objections. This makes it impossible for the organization's members and field volunteers to intervene in organizational

misconduct that is being kept a secret from them. How does this situation promote accountability? What kind of transparency can this be? How can this possibly serve the public interest?

A dissident board member *may* report misconduct to law-enforcement officials, the state's attorney general's office, and/or the U. S. Internal Revenue Service. The IRS even has a form, Form 13909, "Tax-Exempt Organization Complaint (Referral) Form." The board is unlikely to successfully sue a dissident for blowing the whistle by truthfully notifying these government authorities about misconduct. However, if the dissident discloses the misconduct by informing organization members or the local newspaper, the board can sue for violation of duty of loyalty. Incidentally, a dissident's whistle-blowing report to government authorities rarely results in repercussions to the nonprofit organization. Law-enforcement officials are much too busy arresting folks for possession of half an ounce of marijuana. The IRS doesn't have nearly enough personnel to review complaints. As an IRS agent once said about submissions of Form 13909, "We get *thousands* of them."

Comedian Jerry Lewis served as the chairman of the board of the Muscular Dystrophy Association for decades and hosted annual fundraising telethons from 1952 to 2010. He raised *$2.6 billion* in the process. In 2011, the association announced that Lewis had been ousted from his volunteer-leadership position and banished from the Labor Day telethon. Why? The association has never divulged the reason, and Lewis was uncharacteristically silent. Many observers have wondered whether Lewis had developed doubt about the association's progress in discovering a cure for muscular dystrophy after $2.6 billion had been raised for that purpose. An August 20, 2017, CBS News obituary written by Justin Carissimo reported:

> *The money led to longer life spans for those patients, but it didn't buy a cure. At times, Lewis could only watch as the disease claimed the lives of children.*
>
> *"The days and hours I spent in hospital hallways waiting for the answer of this child—was he going to live or die? And I took it very personal," Lewis told CBS News in 2016. "How could he die? Look at the work I've done. And what did we do with all that money? Why don't we use it to help him?" [emphasis added].*

But Lewis couldn't say any more than that because of the confidentiality rule. Let's consider this question: Why should the public know why Lewis and the MDA's board had this parting of the ways? If we don't know, then how are

Americans supposed to make an *informed* decision about whether to donate to the MDA? Remember that the capitalist model assumes that the parties to a transaction have perfect information. In the MDA case, there *cannot* be perfect information, because the laws muzzled Jerry Lewis. The theory of scholarship about the nonprofit sector is that it is designed to serve the interests of the entire public. In reality, the system is *not* designed to do any such thing but is, instead, designed to satisfy an elite community that controls nonprofit organizations, not to mention the other significant institutions of American society.

The Influence of Groups in Public Policymaking

Lobbying

Countless interest groups have been established to influence public policymaking in the national government. If you plan to visit Washington, D. C., consider taking a walk along K Street. Enter the buildings, and look at the list of groups that appear on each building's directory. You will notice that a lot of the groups that occupy space in the buildings are called "American _____ Association" and "Center for _____." These groups have set up shop in the nation's capital to lobby Congress and other government officials and to obtain public policies that will benefit or satisfy them. Of course, maintaining an office in Washington and staffing it are costly matters, so that the upper class is disproportionately represented in this competition to influence policymaking. The business community is amply engaged at numerous points of contact in this frenzy of lobbying activity.

One of the challenges facing these groups is knowing how to play the game. All the money, expertise, and effort a group has may go to waste if it does not know the whos, hows, and whens of lobbying. To assist them, an entire community of professional lobbying firms also line K Street. These firms are not dedicated to any causes—their value lies in both their knowledge of the policy process and (more importantly) their connections to it. They are populated with highly-paid former members of Congress and ex-congressional and Executive Branch staffers. What makes these people so valuable is their knowledge of the process and *especially* their connections to current members of the Legislative and Executive Branches. A former member of Congress has access to many places in the Capitol to which others do not. This advantage gives them a chance to buttonhole current members that ordinary interest-group members do not have. The "revolving door" of legislators and staffers going from government to lobbying firms (and back again) has become a regular feature in Washington, D. C. The high price

of these professional lobbyists also limits their availability to upper-class and corporate clients.

LOBBYISTS HELPING LOBBYISTS: Sometimes, interests and their lobbies form unlikely allies. T.R. Reid (1980) describes a situation in the late 1970s in which railroad lines and environmentalists both favored a waterway user charge for barge lines and opposed funding to rebuild a major Mississippi River Lock and Dam in Alton, Ill. The environmentalists were concerned about the ecological impact while the railroads were battling a competitor in the transportation business. The railroad companies were flush with lobbying cash while the environmentalists were not (see the earlier discussion of the free-rider problem). Yet railroads were hesitant to spend a lot for fear of being dismissed as a self-interested competitor with a financial stake. They thought that environmental lobbying could have a greater impact because these groups had no direct financial or business interest in the policies. However, the railroads could not contribute funds directly to the environmentalists because they were equally big (if not *bigger*) polluters as were the barge lines. Environmental groups would not take their money. The railroads' chief lobbyist got an idea.

> *He conjured, out of thin air, a new organization, for which he created a name (The Council for a Sound Waterways Policy), an address (a vacant office down the hall in the Western Railroads Building), and a bank account. Each month he transferred some money from the railroads' lobbying fund to the Council, and the Council, in turn, transferred a monthly grant to environmental groups lobbying for waterway charges and against the Alton project.... For the environmental groups, this arrangement was just right. They could continue their work without ever acknowledging that they were accepting money from a major polluter* (Reid, 1980, pp. 50-51).

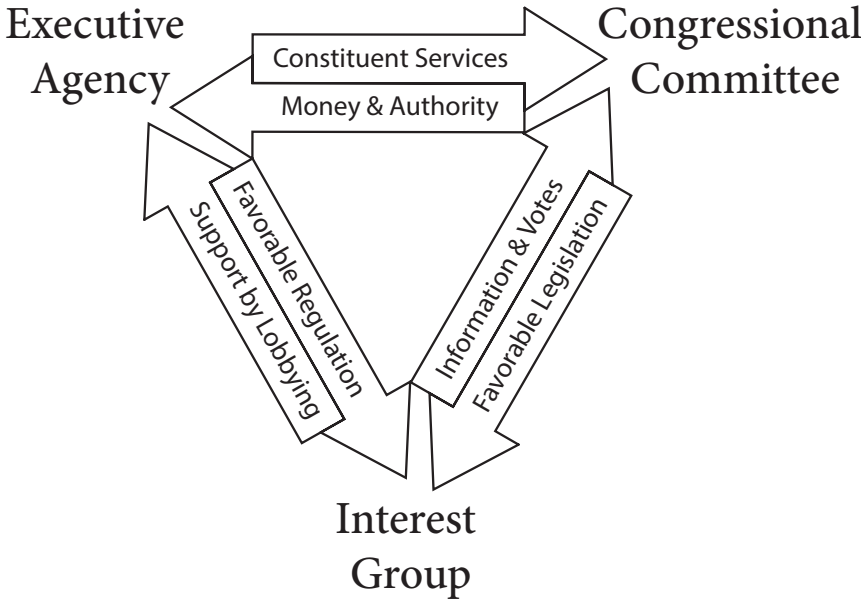
The funding for the non-corporate environmentalists was now coming in large part from a major corporate interest. So, the corporate bias discussed earlier is likely even greater than the data may indicate.

Interest Groups in the Iron Triangle

David Truman (1951) maintained that interest groups have an extensive influence in public policymaking in the United States (see a detailed description of his analysis in Chapter 12). Another analysis is widely known among scholars and students in the field of political science. This analysis features the "subgovernment model of public policy." Cater and Freeman discussed this theory in their 1964

and 1965 works, respectively. This subgovernment model states that, in each area of public policy, there is a subgovernment that dominates policymaking in that policy area. The famous illustration of subgovernment is the **iron triangle** (see Figure 5.1).

Figure 5.1: Iron Triangles



For example, in the policy area of agriculture, the partners in the iron triangle are as follows: congressional committees, the standing Agriculture Committees; executive agency, the Department of Agriculture; and interest groups, the American Farm Bureau Federation, among others. The theory is that these partners take control of policymaking in the policy area of agriculture, while other officials and citizens pay little attention to the making of agricultural policy.

Meanwhile, other iron triangles dominate policymaking in other areas. In the policy area of veterans' benefits, the partners are as follows: congressional committees, the standing Veterans' Affairs Committees; executive agency, the Department of Veterans Affairs; and interest groups, the American Legion, the Veterans of Foreign Wars, and others. Again, these partners take control of policymaking in the policy area of veterans' benefits, while the partners in the agriculture iron triangle pay little attention to the making of veterans'-benefits policy.

If this model is accurate—and many political scientists have found it to be very persuasive over the years—the motivation of people to establish and operate interest groups becomes perfectly clear. Participating in an iron-triangle partnership can be extraordinarily beneficial for the partners, while those who are not involved in these mutually beneficial arrangements are condemned to pay the taxes that finance the benefits that the iron-triangle partners are enjoying. No enterprising individual or group will be content for very long to be left out of the process by which the pie is divided and the pieces are distributed to those who are actively playing the game.

Interest Groups and Litigation

Many groups—notably **public-interest groups**—set out to influence policy by going "over the heads" of the president and Congress, and filing lawsuits in the judiciary. This tactic accounts for much of the influence that public-interest lawyer Ralph Nader and his "Public Citizen" public-interest law firms have been able to exert. While Nader's interests have been far-reaching, he is best known as an activist for consumer protection. For example, when in 1972 Nader was "bumped" from a flight that Allegheny Airlines had deliberately overbooked, Nader retaliated against the airline by filing a lawsuit in the case of *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), accusing the airline of concealing its policy of overbooking. Nader collected $25,000 in punitive damages, as did an organization of his creation—the Connecticut Citizens' Action Group—whose meeting Nader, the would-be guest speaker, was unable to address when Allegheny refused to board him. Today, of course, an airline will do anything within its power to find "volunteers" who are willing to give up their seats to ticket-holders whose travel plans are inflexible. Many policies in the areas of consumer protection, worker protection, environmental protection, and so forth have come about through litigation filed by interest groups.

Delegations of Raw Government Power

Congress and the state legislatures sometimes delegate raw government power to certain kinds of interest groups. This occurrence happens most commonly when one of these legislatures empowers a professional association of some kind to determine who will be licensed to practice the profession.

> *Often . . . the exercise of licensing powers is delegated to "private" associations, even though the coercive power involved is that of a state. In the clearest case of*

> *this sort an association receives direct delegation; in other cases professional or trade associations are given the power to nominate personnel, virtually as a form of representation, to official licensing boards (bar associations, for example) and, on occasion, to policy-making boards* (McConnell, 1967, p. 147).

The licensing power is an extremely significant form of influence over economic activity. For example, the American Bar Association has a keen interest in the licensing of lawyers and the accreditation of law schools, for such reasons as erecting barriers to entry into the profession in order to limit competition and sustain the levels of their fees. McConnell writes:

> *The practice of giving public authority—sometimes formally but often in practice—to private associations of professionals is quite old. As early as 1859 the North Carolina legislature enacted that "the association of regularly graduated physicians . . . is hereby declared to be a body politic and corporate," with "power to appoint the body of medical examiners"* (1967, p. 188).

While one might find the licensing of physicians and dentists to have some justification as a method of protecting the public from incompetent practitioners, the practice of licensing, often controlled by the members of the profession and trade, extends into a variety of fields for questionable reasons.

> *. . . [T]he list of activities frequently given state authority to regulate the qualifications of their members also includes barbers, hairdressers ("cosmetologists"), dry cleaners, funeral directors, cemetery salesmen, and many others. Even garage mechanics have attempted to gain such standing. Clearly, protection of the job market, which has been behind much trade unionism, forms a large part of the motivation to establish under state authority licensing systems effectively controlled by members of a given vocation* (McConnell, 1967, p. 189).

Going Public, Grassroots, and "Astroturf"

Legislators may or may not listen directly to interest groups (who may sometimes be discounted or dismissed as unrepresentative of the general population), but they will *frequently* listen to public opinion. The quest for reelection means constantly pleasing the voters. Recognizing this idea, many groups attempt to influence public opinion in addition to trying to directly influence government. In the age of modern media, "going public"—as it is often

called—is an increasingly popular strategy that may take several forms:

- *Advertising*: Trade and issue groups will try to build a favorable public image through advertising. One of the more successful ad campaigns is the dairy industry's "Got Milk?" ads (i.e., see https://www.gotmilk.com/). Look carefully at the ads. They are not designed to sell one company's brand of milk. They are designed to build support for the overall dairy industry. Their hope is that these ads will pressure governments to support policies favorable to a "popular" industry. Other ad campaigns may involve more naked attempts to pressure governments for favorable action. In 2021, the National Association of Manufacturers (https://www.nam.org) ran a series of ads to pressure the federal government into enacting tax policies favorable to manufacturers. Its ads raised the specter of job losses and other calamities if Congress did not do what it wanted (see: https://www.nam.org/manufacturers-launch-ad-campaign-to-protect-american-jobs-13411/?stream=series-press-releases). In addition to broad advertising, groups may try to build support with narrower direct mail or email campaigns in which they obtain lists of customer addresses from companies that they believe their potential supporters will patronize (i.e., if you subscribe to the *Wall Street Journal*, you are a good target for business, Republican-leaning, and conservative groups), and send out information to those customers.
- *Letters, phone calls, and emails*: As they build favorable public opinion, groups will also encourage supporters to take action. One of the simplest forms of action is to have supporters contact government officials by mail, phone, or email. The New York branch of the AIDS policy organization ACT-UP explains the value of letter-writing campaigns:

> *Letter-writing and post card campaigns, like phone and fax zaps, are a direct means of letting public officials and others know how you feel about a particular issue and what you want them to do. Like phone calls, they are counted and often used by politicians or agency heads to justify their actions. Without taking personal responsibility, they can then claim they were "responding to their constituencies."* (ACT-UP New York, 2000).

Notice their suggestion that this kind of contact not only helps pressure officials into action but also provides them with some cover as

well. Phone calls and emails work much the same way.

Rallies and protests: As with letters, phone calls, and emails, rallies and protests are a way of turning public support into action. They are often used by groups with fewer resources, as the main costs—time, transportation, bullhorns, and hand-signs—are much less expensive than media ads, billboards, and professional lobbyists. The purpose of most rallies and protests is to gain the attention of government officials *and* the news media in the hopes of building further support for a cause. It should also be noted that, in many instances, these gatherings provide as much of a cathartic experience for their participants as anything else. CODE PINK—AN EXAMPLE: Code Pink is a grassroots, anti-war organization comprised largely of women (see http://www.codepink.org/about). Its tactics include interrupting events with shouts and large signs. During the 2016 election, they condemned both major presidential candidates as "war hawks" (Gupta, 2016, para.7). Some members interrupted former New York City Mayor Rudolph Giuliani's Republican Convention speech by shouting and holding up large signs decrying the party's "hate" and "Islamophobia" (Norton, 2016, para.6). Similarly, other members disrupted New York Governor Andrew Cuomo's Democratic Convention speech, decrying his support for Israel (Vielkind, 2016, para.9).

"Grassroots" and its evil twin, "Astroturf": Sometimes the public seemingly will act on its own, with little or no aid from organizing groups. This type of spontaneity is known as **grassroots** activity (as in, from the bottom up). Grassroots activity generally consists of the letters, phone calls, emails, rallies, and protests described above. New laws or proposed legislation may energize people to contact their legislators in support or opposition. They may gather in public to protest, as Code Pink often does. Interest groups may encourage these activities or use them as a springboard for their own activities.

Grassroots activities may appear to be democracy at its purest—but sometimes appearances can be deceiving. Knowing the value of public opinion to lawmakers, interest groups may try to artificially generate activity that appears to be grassroots. That is, what look like grassroots letter-writing campaigns or spontaneous protests may actually be carefully planned and orchestrated by interest groups. These activities have been derisively (but not inaccurately) referred to as "Astroturf" (get it? fake grass!). In a 1996 PBS documentary, Hedrick Smith interviews

the head of a professional public-relations firm that generates these kinds of campaigns (Smith, 1996): HEDRICK SMITH [VOICE OVER]: Usually, business is targeting Congress.
JACK BONNER/PRES., BONNER & ASSOCIATES: They want 100 phone calls, 20 calls into a senator, 25 letters, 200 letters to a particular member of the House.
SMITH: So you have 300 phone lines, that means you can have 300 people out of here at one time?
BONNER: The biggest thing we ever did we were doing six thousand patch through phone calls a day to the Hill.
HEDRICK SMITH [VOICE OVER]: Patch through phone calls are a hot item for Bonner and leading edge lobbyists. Bonner's staff phones ordinary citizens, sells them on a client's issue, and when successful, immediately patches the call through to their senator or house member, while the mood is hot.
SMITH: If they're on the side of the issue your client wants, they get patched through?
BONNER: Right.
SMITH: If they're on the other side of the issue, what happens to them?
BONNER: What's your guess?
SMITH: They get dropped.
BONNER: That's right.
[*Source:* http://www.hedricksmith.com/site_powergame/files/uneltrans.html.]

So be wary. What appears to be grassroots activity may be democracy at its purest—or it may be Astroturf at its most artificial!

Groups and Election Campaigns

One way in which groups may increase their chances of obtaining favorable policies is to help put the "right" people in office in the first place by getting involved in election campaigns. The further benefit of this is that officials who arguably owe their election to groups' support may feel gratitude for that support. This gratitude, in turn, may influence their policy positions in ways beneficial to the groups.

The most common electoral strategy is campaign spending. This spending may take the forms of either contributions to parties and candidates or direct spending

in support of candidates. To address the concern among many Progressives in the early 1900s that politicians were "bought" by corporate money, the 1907 Tillman Act outlawed corporate campaign contributions. The 1947 Taft-Hartley Act also outlawed labor-union contributions. In addition to those laws, many others in the first half of the twentieth century established a patchwork of regulations on money in elections. Following the 1968 presidential election and during the 1972 election and the Watergate scandal, there was still public concern regarding the influence of wealthy individuals and groups over elections.

Congress enacted a set of laws known as the Federal Election Campaign Acts (FECA) in the early 1970s to

- Set strict limits on individual and group contributions to parties and candidates.
- Require the public reporting of contributions.
- Require groups to register with the federal government before they can contribute.
- Limit the spending of presidential and congressional candidates.
- Set up a system of public funding for presidential elections.
- Create an independent agency, the Federal Election Commission (FEC), to administer and enforce the regulations.

See Chapter 6 for more details on the FECA.

Political Action Committees

While law forbids corporations and unions from contributing to candidates' campaign committees, the FECA formalized their *members'* ability to create **political action committees** (PACs) for the purpose of raising money to contribute to campaigns. These PACs (the legislation actually refers to them as "multi-candidate committees") must register with the FEC before they can raise and contribute money, and they are limited to contributing a maximum of $5,000 per candidate, per election. To qualify as a PAC, they must support at least five candidates.

The number of PACs has grown dramatically, from fewer than 1,000 in the mid-1970s to over 4,000 today, with the bulk of that increase coming in trade association and non-connected (ideological and issue-oriented) PACs (Campaign Finance Institute, 2016). Consistent with the upper-class and corporate biases discussed earlier, the greatest amount of spending on campaigns by far comes from corporate and trade-association PACs. FEC data from 2020 indicate that corporate and trade-association PACs spent almost 60% more than labor and non-connected PACs combined (U.S. Federal Election Commission, 2021).

FOLLOW THE MONEY: PACs differ in their goals and strategies. Paul Herrnson (2016) describes three PAC strategies: access, ideological, and mixed. The bottom-line goal of access PACs is to influence legislation. They like winners, so they contribute most often to incumbents and to sympathetic candidates in close elections (where the extra money may make the difference). They do not wish to waste resources on challengers with little chance of getting elected. Most corporations pursue an access-oriented strategy. Ideological PACs wish "to increase the number of legislators who share their broad political perspective or position on specific, often emotionally charged issues ..." (Herrnson, 2016, p. 147). Most of their contributions go to sympathetic candidates in close elections, but they are far more likely than access PACs to contribute to sympathetic challengers as well. Most non-connected (issue or ideological) PACs pursue this strategy. PACs pursuing a mixed strategy will make some contributions to candidates sharing their views, and some contributions to incumbents "to improve their access to legislators" (Herrnson, 2016, p. 149). Most unions pursue a mixed strategy.

Beyond PACs: "Soft Money," 527 Groups, and "Super PACs"

Restrictions placed on political-party spending by the Bipartisan Campaign Reform Act (BCRA) of 2002 (see Chapter 6) opened the way for vastly-increased spending by groups in recent elections. The law restricted the ability of parties to raise and spend unregulated "soft money," and restricted their ability to run "issue ads." However, no such restrictions were placed on interest groups. Party activists, now restricted by BCRA, simply shifted their activity to outside groups. Given the exponentially growing costs of campaigns, PACs were not an attractive alternative, given their $5000-per-candidate, per-election limitation. Activists found their answer in tax-exempt "527" groups (named for Section 527 of the Internal Revenue Code). These groups are technically not allowed to engage in campaign activity.

However, FEC and court decisions established that soft money and issue ads do *not* amount to campaign activity as long as they do not expressly advocate the election or defeat of candidates. What seals the deal is that these decisions also said that candidate names and images could be used in soft-money-funded issue ads without violating the campaign restriction.

In recent years, whole new classes of groups have formed to keep interests involved in the big-money world of modern campaigns. The latest creation is the "Super PAC." These are officially known as independent expenditure-only committees, and they

> *may raise unlimited sums of money from corporations, unions, associations and individuals, then spend unlimited sums to overtly advocate for or against political candidates. Unlike traditional PACs, super PACs are prohibited from donating money directly to political candidates, and their spending must not be coordinated with that of the candidates they benefit. Super PACs are required to report their donors to the Federal Election Commission on a monthly or semiannual basis—the super PAC's choice—in off-years, and monthly in the year of an election* (Center for Responsive Politics, 2021b).

In addition, the restrictions placed on corporations (and presumably unions) have been upended by the 2010 Supreme Court decision in *Citizens United v. Federal Election Commission* (130 S.Ct. 876). The court said that corporations have a First Amendment right to spend money from their own treasuries to expressly support the election or defeat of candidates, which the BCRA had forbidden (though they are still forbidden from contributing to campaigns, and their members' PACs still face contribution limits).

Other Activities

While spending dominates the election-related activity of interest groups, there are other ways in which members may get involved. Group members may volunteer their time and effort to candidates. Supportive candidates may recruit volunteers for groups to help with information and get-out-the-vote (GOTV) activities. This often involves staffing phone banks, operating computers, or stuffing envelopes. Given their place among the workforce, union members are especially able to help candidates they support by going door-to-door throughout their communities, encouraging residents to vote for their candidates.

Discussion Questions

1. Discuss the history of interest groups. Why do they exist at all?
2. Tocqueville said that America is a nation of joiners. What did he mean? Investigate other nations to see whether they differ from the United States.
3. Contact a local interest group or the local chapter of a larger group. A number of groups may be found at this site: https://www.twyman-whitney.com/americancitizen/links/lobbies.htm. What are their goals? What are their strategies for achieving those goals?
4. Examine the data on the "revolving door" by going to the OpenSecrets.

org Web site. Under the "Influence & Lobbying" menu, click on "Revolving Door." On the left-hand menu, click on "Lobbying Firms," and select one of the firms. You will see a list of its lobbyists. Examine the lobbyists' employment timeline and history. In addition, there are tabs for information on the industries they represent and their expertise. Examine several lobbyists' profiles. What do you see? Did they spend time in government service before their current employment as a lobbyist? If so, explore their time in government. Does it appear related to their expertise and/or their clients? Can you make the case that their past government work constitutes a current asset to their lobbying work?

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6 Political Parties, Voting, and Elections

Carl D. Cavalli

Learning Objectives

After covering the topic of political parties, elections, and voting, students should understand:

1. The evolution, organization, and functions of the two major political parties.
2. The role of "third" or "minor" parties and the hurdles they face in our system.
3. The history of suffrage in America and the rules governing registration, voting, and elections.
4. The prominent role of money in contemporary elections.

Abstract

As noted in chapters 1 and 2, our government is a democratic republic, and the centerpiece of all such governments are elections in which eligible voters select candidates to represent them. The organizing of voter preferences through political parties is central to the electoral concept. Not only did the framers not foresee this, but they were actually hostile[1] *to the concept. This lack of foresight may have been their biggest failure. A strong case may be made that our two-party system traces its roots to the nation's founding. This system is sustained by our most common electoral rules: single-member district, plurality (or "SMDP") rules. Not only do these rules affect our party system, but there is strong evidence that they can affect the* outcome *of individual elections. Other rules affecting elections include campaign finance regulations.*

1 See especially *Federalist* # 10 (https://guides.loc.gov/federalist-papers/text-1-10#s-lg-box-wrapper-25493273) and George Washington's farewell address (https://www.ourdocuments.gov/doc.php?doc=15&page=transcript).

Introduction

Political parties seek to control government through elections. As such, their existence is closely tied to the electoral process.

Political Parties

What is a political party? It is an organization that *selects* candidates for office to represent the party's ideals, conducts *election* campaigns to get their candidates into office, and *organizes* government to facilitate achievement of its goals. Selection includes recruiting (searching for and encouraging) candidates to run, and then conducting a nominating process to formally select a nominee among all competing candidates. In election campaigns, parties provide services (i.e., advertising, polling) for their nominees, and will also encourage turnout to support them. Examples of organization include majority party leadership in Congress (see chapter 7) or state legislatures, and presidential or gubernatorial appointments to the executive and judicial branches (see chapter 8). All of this is toward the goal of implementing a broad *policy* agenda. In addition, political party labels serve as "cues," or shortcuts to help us as voters decide whom to support in elections.

Unlike other multi-party democracies, we have sustained a system of two major parties for most of our history. This fact is interesting because the framers did not anticipate their formation. Indeed, they were actively hostile to the idea. James Madison devotes *Federalist #10* to a discussion of controlling the effects of factions. He defined a faction as "a number of citizens...united...by some common impulse of passion, or of interest..."—a definition in which all modern interpreters include political parties (Madison, 1787). Additionally, in his farewell address as president, George Washington warned us "against the baneful effects of the spirit of party."

However, the formation of political parties was in the air, and that air portended *two* political parties from the start. Every major issue surrounding the formation of the government provoked two opposing sides: national versus state power, commerce versus agriculture, North versus South, and when it came down to it, pro-Constitution versus anti-Constitution. Moreover, these were not random divisions. Those on one side of any issue tended to be consistently on the same side of each of the other issues. Two *big* factions.

Elections

Why conduct elections? With elections, we can reward elected officials who appear to serve us well (by re-electing them to office), and punish elected

officials who fail to serve us well (by kicking them out). That is, we can hold them responsible for their actions. This ability also provides the public with a sense of *influence* (as debated in chapter 1). One might actually make the case that voting replaces violence as the main means of political participation (consider: if you cannot vote politicians you dislike out of office, then how do you *get* them out?).

From the viewpoint discussed above, elections represent a bargain, both in the sense that they are (at least in theory) a good deal for us *and* in the sense that they represent an *exchange* between us and the government. What is the bargain from the government's standpoint? They concede our right to participate—to influence their composition—in exchange for gaining *stability* and *legitimacy*[2]. What is the bargain from our standpoint? We concede other means of altering the government (for example, *violence*) in exchange for the sense of influence discussed above.

Basics: Parties

Formation

As noted in the introduction, political parties were neither anticipated nor welcomed by the framers. However, the stage was set from the founding for a two-party system. The two big factions mentioned earlier developed, at first, into the Federalists and the Anti-Federalists.

The Federalists

The better organized faction at our founding was the **Federalists**. The framers were largely Federalists. They felt the Articles of Confederation was a failure (see chapter 2) and so wrote an entirely new constitution. They favored national power over local power—in large part because they felt co-ordination at the national level was required to promote and develop the nation's commerce and industry (i.e., see Wood, 1998). Most were northerners, probably because most of the nation's commerce and industry was located in the north.

The Anti-Federalists

At least as numerous, but less organized were the **Anti-Federalists**. With many located in the agricultural South, they feared a powerful national government and the industrialization it might bring. They wanted to maintain the nation's agrarian roots. Throughout the states, opposition to centralized national power was found

2 That is, we will respect and obey the laws they create, even if we disagree with them. Disagreement becomes a catalyst for voting (and other forms of participation), and *not* for violence.

most often in areas "in which small, self-sufficient, and often debtor farmers were most numerous" (Main, 2006, p.112).

From the Anti-Federalists to the Democrats

The Anti-Federalists began to organize into a true political party in the mid-1790s. They recognized the value of coordinating their efforts to win elections throughout the nation and to help bridge our system of separation of powers. Under the leadership of Thomas Jefferson and James Madison, they called themselves Republicans[3]. By the election of 1800, their organizational efforts paid off and they began to win huge majorities in Congress (Senate Historical Office, 2010, Office of the Clerk, 2010) as well as an unparalleled seven consecutive presidential elections.

Among intra-party divisions in the 1820s, Andrew Jackson came to lead the party and attempted to preserve its Jeffersonian roots. It was at this time they began to call themselves **Democrats**. Even though some left the party, perceiving Jackson's leadership to be autocratic, they continued to win elections. Including their Jeffersonian Republican forebears, they won all but two presidential elections from 1800 through 1856 and maintained control of Congress for all but a few years during that time.

After a period of dominance by the new Republican Party (see below) in the late 19th and early 20th centuries, the Democratic Party regained its majority in the 1930s under the leadership of Franklin Roosevelt. They maintained this majority largely intact into the 1970s. It was a changed party, however.

From its Anti-Federalist forebears, it came to be the party of the "common man." While the party maintains a similar focus today as the party of workers, minorities, and women, its view of government has changed drastically. Franklin Roosevelt's Democratic Party was quite different from Jefferson's and Jackson's. Gone were the Anti-Federalist fears of national government. Roosevelt's "New Dealers" believed in using the power of the national government to fight economic distress and inequality (i.e., see: https://democrats.org/where-we-stand/party-platform/).

From the Federalists to the Whigs to the Republicans

Though our founding was dominated by Federalists, their dislike of political parties proved to be their downfall. They began organizing into what looked like a political party around the same time as the Anti-Federalists—the mid-1790s.

3 This is not the modern Republican Party (see next section). To distinguish this party from the modern one, the terms "Democratic-Republicans" or "Jefferson's Republicans" are often used.

However, as the faction in power, their focus was on policy, not elections. By the time they realized the value of organizing for elections, it was too late. In the elections of 1800, they lost out to their better-organized opponents (see above) virtually everywhere. By the early 1800s, they were finished as an organized group.

Their sympathizers did not disappear, however. A combination of former Federalists and Democrats (who feared what they saw as autocratic rule in the election of Democrat Andrew Jackson to the presidency) formed the Whig Party. They were quite successful in the 1830s and 1840s, electing several presidents and building congressional majorities (Senate Historical Office, 2010, Office of the Clerk, 2010). The thorny issue of slavery split and ultimately destroyed the party in the early 1850s.

At that time, a new party arose from anti-slavery elements in both the Democratic and Whig parties. To emphasize their belief that they were truly fulfilling the framers' vision, they called themselves **Republicans**. Under the leadership of John C. Fremont and Abraham Lincoln, they quickly rose to major party status. From the mid-1850s through today, they have competed with the Democrats as one of the two major political parties in America.

Consistent with their Federalist roots, the Republicans have historically been the party of business and commerce. However, unlike their forebears who saw a strong national government as the key to commercial development, modern Republicans often take a dim view of federal power. More like the Anti-Federalists, modern Republicans generally place more trust in local government. The modern Republican Party supports free-market commerce (i.e., it opposes much government regulation of businesses and industries), small and localized government, and a socially conservative ideology (i.e., see: https://www.gop.com/our-party/).

Three-Part Structure

As noted earlier, parties exist to select and elect candidates and to organize government. This idea suggests a three-part structure to parties as we know them. There is not only the *party organization* itself but also the *party in government* and the *party in the electorate* (voters) (i.e., see Key, 1964, Beck, 1997).

It is the party *organizations* at all levels (national, state, and local) that help to select and elect candidates. They do this by first nominating candidates as their choices for the general election. The process of nominating usually consists of either a *primary,* where voters select a nominee, a *caucus,* where party members gather to agree upon a nominee, a *convention*, where party members gather in one location to formally choose a nominee, or some combination of these methods.

Presidential Nominations

We can see all three of these methods in presidential party nominations. In the mid-to-late summer of presidential election years, the national party organizations (the Democratic National Committee and the Republican National Committee) each hold a national *convention* to formally select their presidential nominees. At the convention, delegates representing all 50 states and many territories vote to select the nominees. Most delegates are bound by state and/or party rules to vote for particular candidates, so the outcome is rarely in doubt (leading some to talk more of coronations than conventions). So, how are the delegates chosen, and why are they bound to one candidate? This is where the other methods come into play.

All states and territories hold either a primary or caucus[4] to choose their delegates to the national conventions. A *primary* can be either open to all voters or closed to all but registered party members (there are some other variations as well). Voting takes place at polling places around the state, much like any election. A *caucus* involves only party members meeting around the state. They involve more effort as participants must gather in one spot (an auditorium or gymnasium) to openly debate the choices (i.e., see: https://www.c-span.org/video/?403824-1/iowa-democratic-caucus-meeting). Because of the effort involved, caucuses usually involve far less of the electorate than do primaries. The Democratic Party requires all of its primaries and caucuses to use **proportional representation** rules which allocate delegates favoring candidates in proportion to their support in the primary vote or the caucus. The Republican Party allows states to use **winner-take-all** rules, where the top finisher gets *all* the state's delegates, if they so choose.

To win elections, the party organizations help candidates appeal to the *electorate*. The focus of these "get-out-the-vote" (GOTV) efforts is two-fold. First, the organizations want to make sure their supporters—the *party in the electorate* (often called the "base") turn out to vote. Next, they want to reach out to independent and uncommitted voters to win their support. Particularly strong or popular candidates may even reach out to supporters of other parties. Today, these are high-tech efforts to target and appeal to the public using mailing and email lists, consumer and demographic data, and social networking media (i.e., YouTube, Twitter, Facebook) in addition to traditional speeches, fliers, rallies, and TV/radio advertisements.

Candidates who win the general election will take their seats in office to become their party's *party in government*. In legislating or administering policy, they will attempt to represent their party and to get its agenda enacted into law.

4 Or in some cases, like Kansas and Maine, a combination of both.

Modern Regional Bases

The Democratic and Republican parties have competed head-to-head as our only major parties for over 150 years. Currently, the Democratic Party's regional bases are in the Northeast, the Great Lakes region, and the West. The Republican Party's regional bases are in the South, the Upper Midwest, and in the Great Plains. This distribution is evident in the 2020 presidential Electoral College results (i.e., see https://uselectionatlas.org/RESULTS/). While this distribution is accurate, it is also misleading.

Both parties are *competitive* in many areas. However, while some suggest that a mixed "purple America" is a more accurate portrayal of recent party competition than is red (Republican) versus blue (Democrat) (i.e., see Ansolabehere, Rodden, and Snyder, 2006), others see increasingly stark partisan division in the future (i.e., see Wasserman, 2017)[5].

Realignment

The current alignment of political parties has not always been the case. We have seen many different partisan alignments. At any given time, there is a set of parties competing over the issues of the day. This set of parties competing over these issues comprises a **party system**. New events and new generations with new issues will alter the composition of—and competition between—the parties, leading to a new party system. This change is often referred to as **realignment** (Burnham, 1970). Through much of our history, realignments occur with surprising regularity—approximately every 30 years. Perhaps it is a result of generational change.

In any case, most electoral scholars identify five or six realignments in our history (i.e., see Sundquist, 1983), usually resulting in a dominant party. They are identified here by approximate year:

- *1800*: In a sense, 1800 saw an *alignment* rather than a *re*alignment since this was the point at which political parties were developing. Indeed, the very development of parties was the issue. Recall the differing views on organizing between the Federalists and Anti-Federalists. The Federalists disliked factions, believing them detrimental to the public good, while the Anti-Federalists saw organizing as the key to success. The Anti-Federalists' organization into Jefferson's Republicans paid off as they became the dominant party in American politics for many years (and, indeed, the only party for a few years).

5 For a graphic representation of this notion, see https://vanderbei.princeton.edu/JAVA/election2020/

- *1828*: A new generation of Americans saw the rapid disappearance of property requirements for voting. This change meant voting and politics were no longer limited to the wealthy elite. In a more practical sense, it made public campaigning a viable option for election. Andrew Jackson was the first person to run for president by openly campaigning for votes among the public. It was the new issue of the political age—political participation, and Andrew Jackson's Democrats capitalized on the expansion of the vote to ordinary (white, male) citizens to become the dominant party for the next 30 years.
- *1860*: An old issue, slavery, became the issue of the age as the nation debated its expansion into the west. The industrial North—less dependent upon slavery—was the locus of a growing movement to abolish the practice, while the agricultural South was still dependent upon it. The issue fractured both the Whigs and Democrats, destroying the former, and leaving the Democrats as a largely Southern, pro-slavery party. In 1854, the abolitionists united to form a new party, the Republicans. The growing anti-slavery movement rapidly catapulted the party to majority status (aided by the secession of largely Democratic Southern states from the union in the 1860s). They would remain the majority party nationally until well into the 20th century.
- *1896*: The late 19th century saw the United States emerge as a major industrial, economic power in what we might today call the *first* age of globalization. The major issue was how far to pursue industrialization and globalization. The Democrats, still located largely in the more agricultural South, resisted the trend while the Republicans embraced it. The nation sided with the Republicans, re-energizing their majority at the dawn of the 20th century.
- *1932*: Perhaps the most iconic realignment occurred in the 1930s as a result of the Great Depression—the greatest period of economic distress the country has experienced. The issue for the age was the extent to which the federal government should actively combat it. While both parties embraced at least some activism (it may be argued that Herbert Hoover, the Republican president at the time the Depression hit in 1929, made greater use of the federal government to address the nation's troubles than any previous president[6]), it was the Democratic Party under Franklin Delano Roosevelt that eventually advocated extensive use of the federal government to actively combat the effects of the Depression

6 See for example the Reconstruction Finance Corporation, created in 1929 https://www.archives.gov/research/guide-fed-records/groups/234.html).

(the **New Deal**). An increasingly distressed public flocked to Roosevelt and the Democrats, who won unprecedented majorities in the 1930s.

- *1960s*? If the 30-year cycle held, we would expect to see another realignment in the 1960s. However, there is scant evidence of any traditional realignment. The Democratic Party maintained a relatively strong majority through the 1970s and weaker majority into the early 1990s. While there were new issues—most notably the **civil rights movement**, and more recently the rise of economic and social issues—they led to neither a new majority nor radically reformed parties. To this day, while Democratic support has weakened notably, there is little corresponding increase in support for Republicans. Instead, beginning in the 1970s, people began to leave both parties and identify as independents (i.e., see Gallup Poll data on party identification: https://news.gallup.com/poll/15370/party-affiliation.aspx). This change leaves us with a more competitive two-party system, but not with a "50-50" division of Democrats and Republicans. More accurately we now have a "30-40-30' division that includes independents—leading some to say there has not been a *re*alignment, but rather a *de*alignment, or a movement away from political parties (Nie, Verba, & Petrocik, 1976, Rosenof, 2003).

In the mid-1990s, many proclaimed a Republican realignment. There were similar claims of a Democratic realignment after the 2006 and 2008 elections, and again by Republicans after the 2010, 2014, and 2016 elections. All are wrong. The key to realignments is their establishment of a stable, long-term party system, which means you can never proclaim one after only one or two elections. They may only be designated in retrospect after a decade or more.

Minor Parties

That only two major parties have dominated our politics for over 150 years does not mean no other parties exist. There are dozens and possibly even hundreds of smaller parties[7], which raises a few questions.

Why are there only two major parties?

There are several contributing reasons. First, as noted earlier, we divided into two major factions very early on, leading almost inevitably to our two major parties. Second, though, is that our divisions have never been so vast as to sustain

7 The site Politics1.com lists 47 others at the time of this printing (see: https://politics1.com/parties.htm)

many major parties. We share several universal values (see chapter 4) that do not leave much support for additional parties. Third is our self-fulfilling skepticism of third parties. Most all of us are not so issue driven that we will back parties with little chance of winning, even if we agree with their issue positions. In fact, there is evidence to the contrary—we often adjust our own issue positions to conform to the party we support (Campbell, et al, 1960, Fiorina, 1981, Green, et al, 2002, Karol, 2009). We like to back winners, essentially because the rather reasonable logic is that parties do us no good unless they can actually win elections. Of course, if we do not support them, they will not win. It is a vicious cycle for third parties.

Last, and least appreciated, are rules. Rules matter. While we like to think that elections are simply "The candidate with the most votes wins," it is more complicated. Different rules may lead to different outcomes even with the same set of votes. All American elections are state-run; it is a delegated power (see chapter 3). There are federal regulations and constitutional requirements imposed on the states, but the bottom line is that they actually run the contests. This in itself is a "rule" that matters! It means 50 states may have 50 sets of differing electoral rules. Since all contemporary state legislatures and governors, who write the rules, are under the control of one major party or the other, those rules are generally favorable to the major parties. The first hurdle third parties must clear is negotiating 50 sets of rules—none of which were written by (or for!) them.

There are two sets of rules that have the greatest effect: voting rules and ballot access rules.

- *Voting Rules*: The most common American voting rules are Single-Member District, Plurality rules—known as **SMDP**. Not all U.S. elections are SMDP, but most are.
    - ▹ As the name implies, **Single-Member Districts** have only one representative. It is how we elect representatives to Congress and state legislatures. For example, the state of Georgia is currently apportioned 14 U.S. representatives based on its population (see chapter 2). The state does not, however, simply elect 14 people state-wide. Federal law requires states to create one electoral district per representative—so Georgia must elect one representative each in 14 separate districts. It is this winner-take-all nature (often referred to as "first-past-the-post") that advantages major parties. You must have enough support to finish first. As such, it may be better to think of *single-winner elections*. Contrast this with **Multi-Member District** systems (or *multi-winner elections*), where each

district elects several representatives. If states were allowed to use multi-member systems for Congress, Georgia might hold a single, state-wide election where the top 14 finishers won office. Another possibility might be a handful of districts electing several representatives each. In either case, candidates can finish second, third, or lower and still win office. This procedure gives minor parties a much better chance.

- ▷ In **Plurality** elections, the threshold for victory is simply getting more votes than anyone else. Contrast this to **Majority** elections where the threshold is higher: more than half of the votes cast (or alternatively, more votes than everyone else combined). The advantage of plurality rules to major parties may seem counter-intuitive at first. Since winning requires a lower threshold, it is tempting to think minor parties have a better chance at meeting the lower standard—and they do. However, major parties do, too—and they get, by definition, more votes than minor parties (the very meaning of plurality, right?). In addition, they do so without needing help from anyone else. This situation leaves little hope for smaller parties. In contrast, even major parties will not always meet the higher standard of a majority election without help (see the case studies at the end of this chapter). That help may come in the form of coalitions with smaller parties to build the necessary majority—giving those smaller parties at least some influence (and a reason to stick around!).

- *State Ballot Rules*: As noted above, states control elections, and each sets its own rules. This power includes deciding which parties get access to limited ballot space. All states award space to parties who won a significant portion of the vote in previous elections—usually 20-25%. Major parties easily meet that standard, so their candidates appear on virtually all ballots. However, minor parties rarely do that well, so they generally do not get automatic access. They must seek it each time. To get access, states have all manner of requirements: fees (ranging from a few to thousands of dollars), petition signatures (again, ranging from a handful to thousands), paperwork, and legal action. Minor parties have to spend precious resources meeting these requirements, while the major parties are already out campaigning. This structure means the major parties can devote all of their time and money to campaigning while minor parties have to devote a significant portion just to get on ballots.

So why do they bother?

Minor parties bother because they have a message. That message usually involves individuals, issues, or just a better way (or any combination of those things).

Some minor parties are vehicles for a single candidate. The Reform Party of the 1990s was the classic example of a single-person, or cult-of-personality party (see: https://reformparty.org/). Its life blood was two-time presidential candidate Ross Perot, a billionaire who practically bankrolled the entire party from his own pocket. While he was a candidate in 1992 (when the entity was the more loosely-organized "United We Stand America"), and 1996, the Reform Party was born and rose to become the most formidable third party in decades. In 1992, Perot captured almost 20 million votes—the best showing for a third-party presidential candidate in 80 years. In 1996, he ran for the Reform Party's nomination at a convention that he paid for. In the general election, he captured over 8 million votes—a significant drop, but still one of the best third-party showings in years. After that, Perot began to withdraw from active participation in the party, and in 2000, he declined another bid for president. The effect on the party was dramatic. Public support dropped, and the party fractured among internal fighting. The official party nominated conservative columnist Patrick Buchanan for president, and a splinter group nominated Dr. John Hagelin. Combined, they managed to win fewer than 600,000 votes. The Reform Party (though it still exists today) was effectively dead.

Some minor parties are, in a sense, super-interest groups. Much like a traditional interest group, they will focus on a single issue (or a small range of related issues). However, they will go beyond merely trying to influence government; they will actively run candidates for office. Perhaps the best known national single-issue party is the Green Party (technically, a collection of parties with international roots). While generally a liberal party, their focus is on environmental issues (see: https://www.gp.org). Green Parties originated in Germany in the 1980s, and came to the United States in the 1990s. They gained prominence in 2000 when their presidential candidate, long time consumer activist Ralph Nader received over 2 million votes for president. In 2016, their presidential candidate, Jill Stein, received almost 1.5 million votes. The party continues to function nationally, with over 160 elected officials nationwide as of June 2021 (see: https://www.gp.org/officeholders).

Still other minor parties are organized and function just like the major parties with a range of issue positions and fielding candidates throughout the country. They are simply smaller. One of the more prominent better-way parties is the Libertarian Party (https://www.lp.org). The Libertarians ran hundreds

of candidates nation-wide in 2020, including their presidential candidate, Jo Jorgensen, who received over 1.8 million votes. While Libertarian philosophy supports minimal government, the party neither focuses on a narrow range of issues (like a single-issue party) nor does it revolve around a single person. In a very real sense, the Libertarian Party functions just like the Democratic and Republican parties; it is just a smaller version.

Minor parties are most successful when their message has two components: (1) it resonates with the general public, and (2) it has been ignored by the major parties. The rise of Ross Perot and the Reform Party in the 1990s best exemplifies these components. His 1992 candidacy revolved around concern about growing annual national budget deficits (and their cumulative impact on the national debt). In the 1970s and 1980s, both major parties had campaigned on balancing the federal budget, yet the publicly-held portion of the national debt more than tripled between 1976 and 1985 (Office of Management and Budget, 2010). This lack of action by both parties over many years (in spite of their rhetoric) led many people to listen closely to Perot when he chided the major parties and focused on reducing the deficit. The Reform Party's success shocked the major parties into action. In 1997, a Democratic president and a Republican-led Congress negotiated a balanced budget that quickly led to budget surpluses into the start of the next decade. This action removed deficits as an issue, leaving little reason for continued public support for the Reform Party.

Basics: Voting and Elections

The basics of voting and elections largely encompass four questions: Who votes? How do we decide? What do the results mean? and What can our vote affect?

Who votes, part 1: the history of suffrage

At our founding, the answer to "Who votes?" was, "Not many!" While the original Constitution did not set voting requirements, most of the states restricted voting to propertied white males (often with additional restrictions based on religion, wealth, and other factors). In some states, free blacks and women could vote, though by the early 1800s no states allowed female suffrage. Since that time—with some notable and unfortunate exceptions—the trend has been toward expanding suffrage:

- In the first third of the 19th century, states dropped most all of their property and wealth requirements, opening participation far beyond

just the elites in society.

- Following the Civil War and the abolition of slavery, the first constitutional voting requirement was enacted when the 15th Amendment extended suffrage to otherwise qualified African American males.
- A long-developing women's rights movement produced the next constitutional requirement when the 19th Amendment extended suffrage to otherwise qualified females.
- By the mid-1960s, many "baby-boomers" had reached their late teens. At the time, voting in all states was restricted to those 21 and older. With the Vietnam War raging, many called for increased political rights for the young, arguing that if the government can draft 18-year-olds into the military, then they should be guaranteed the right to vote. In 1971, the 26th Amendment guaranteed just such voting rights to 18-year-olds nation-wide.

By the 1970s, the vote was guaranteed (in *theory*—more on that below) to most everyone over 18. The remaining exceptions were (and still are) for convicted felons and those deemed mentally incompetent. Yet all was not well. Turnout rates were dropping significantly. In the 19th century, voter turnout often exceeded 80% of those eligible. As late as the 1960s, 60% of those eligible were voting in presidential elections. By the 1970s, though, that percentage had dropped to around 50% and remained around there through the rest of the 20th century. In recent years, the focus has been more on encouraging voter turnout than on expanding suffrage.

Added Barriers: Some Intended, Some Not

While the trend generally is toward expanding suffrage, that expansion has not been uniform and includes both regulations depressing turnout (often unintentionally), and deliberate attempts to deny the vote to some—most notably African Americans.

Voting rights extended to former slaves by the 15th Amendment were originally enforced by federal troops during the Reconstruction era in the 1870s. When those troops were removed in the late 1870s, southern states enacted laws known as **Jim Crow laws**[8] to strip African Americans of social and political rights. These laws included barriers to voting. Among these barriers were:

- *Literacy Tests*: Many states required these tests of potential voters who could not prove their education. They were often administered in an

8 For more information on Jim Crow laws, see the 2002 PBS documentary, *The Rise and Fall of Jim Crow* at https://www.pbs.org/wnet/jimcrow/voting_start.html.

unfair manner, with long, difficult tests given to African Americans (i.e., see examples from Louisiana: https://www.crmvet.org/info/la-littest2.pdf and Alabama: https://www.crmvet.org/info/litques.pdf) while similarly-educated whites were simply given short words to spell. Some illiterate whites could not pass even the simplified tests. However, these tests affected African Americans to a far greater degree since the literacy rates for newly freed slaves (who, as slaves, were legally prohibited from being educated) and their descendants well into the 20th century (who were limited to inferior, segregated schools) were much higher than the rates for whites.

- *Grandfather Clauses*: Even illiterate whites were often allowed to vote if their ancestors had that right prior to Reconstruction. Since most white ancestors had the right while slaves were denied it, African Americans were forced to prove their literacy while whites were often exempted from any required proof.
- *Poll Taxes*: State laws required potential voters to pay an annual tax in order to vote. The sums were small but still out of reach for many African Americans and poor whites. They were cumulative—if you could not pay the first time, you likely could never pay since you had to pay all back taxes as well. While these taxes affected poor whites, enforcement was lax, and the taxes were also subject to grandfather clauses that exempted whites.
- *White Primaries*: Because the Democratic Party dominated the south, almost literally to the exclusion of any Republican participation (i.e., see: https://www.umich.edu/~lawrace/votetour7.htm), winning the Democratic Party nomination for office was effectively the same as winning the general election. Democrats declared their organizations to be private and claimed the right to control their membership. They prohibited African American participation in party primaries, which as noted above, effectively disenfranchised them.
- *Difficult Registration and Voting Requirements*: In addition to formal restrictions, there were all manner of methods used to discourage African American participation. Michael J. Klarman (2004) describes some discriminatory registration methods:

> *Some registration boards...registered voters at undisclosed times in secret locations... Whites discovered through word of mouth where and when to show up to register, while blacks were kept in the dark...*

> *Registrars required blacks to fill out their own forms and flunked them for trivial errors, while they filled out whites' forms for them. Blacks but not whites were asked to recite the entire U.S Constitution or to answer impossible and insulting questions, such as "How many bubbles are in a bar of soap?"...Some registrars did not even bother to indulge in the pretense of legality and informed blacks that they would not be registered regardless of their qualifications.* (p.244)

- There were similarly discriminatory voting practices. Polls were often located in segregated white neighborhoods, meaning the few registered African Americans would have to travel great distances into hostile locations. There were complex procedures developed to facilitate disenfranchisement of African Americans. One notorious example was South Carolina's "eight box" law, "which operated as a literacy test by requiring voters to deposit ballots in the correct boxes" (Klarman, 2004, p. 31). Any mistake would invalidate all ballots. As with the registration procedures described above, whites were usually given assistance as needed while African Americans were not.
- *Intimidation and Violence*: Threats to the livelihood, safety, health, and even lives of potential African American voters turned voting procedures and requirements that might sound innocuous into very dangerous and discouraging hurdles. For example, some states required the names and addresses of registered voters be published in local papers. While this caused little concern for whites, African Americans knew that being publicly identified as voters often cost them their jobs, and even worse, subjected them and their families to beatings and killings (and their homes to burnings) from local Ku Klux Klan members.
- *Registration and Identification Requirements*: Not all barriers involve deliberate suppression. Early in our history, when only a few prominent citizens could vote, no system of tracking voters was needed. As suffrage expanded and the ranks of eligible voters swelled, states began requiring eligible voters to register with the state to help track who voted (Fischer & Coleman, 2006). The purpose was to curb fraud (i.e., in the 19th century, some states recorded more votes cast than there were eligible voters!). A major effect, however, is a significant decline in turnout. That is, registration is a hurdle to overcome that is especially problematic among:
  - ▷ The Less Educated – because it requires awareness and knowledge of elections well before they are held. If we know anything about

elections, we are much more likely to know approximately when Election Day is than to be aware of registration deadlines.

- Lower **Socioeconomic** Classes – because voter registration is likely to be a very low priority for someone struggling to maintain food and shelter for their family. Upper classes are much more likely to have the time, ability, and awareness to be involved.

In recent years, several states enacted strict photo identification requirements for voting (i.e., see Georgia's requirements: https://sos.ga.gov/index.php/elections/georgia_voter_identification_requirements2). These laws generally require people to produce a valid photo ID (usually a driver's license, passport, state employee or student card, or something similar) before they can vote. Proponents claim the laws are needed to help prevent voting fraud, while opponents claim the requirements place an undue burden on those—like the elderly, minorities, and the poor—who are otherwise qualified to vote but are less likely to either possess such ID or to be able to obtain them. In 2008, the Supreme Court upheld Indiana's version (*Crawford v. Marion County Election Board*, 2008). As of 2021, 36 states have some form of ID requirement (see: https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx). In some, like North Carolina and Texas, federal courts blocked the laws citing concerns similar to those noted above (Weber, 2017).

By the mid-1960s, most of the deliberate attempts to suppress African American voting had been removed. In *Smith v. Allwright* (1944), the Supreme Court declared that white primaries were unconstitutional. In 1964, the U.S. Constitution was amended to outlaw all poll taxes. In 1965, the federal Voting Rights Act outlawed many of the remaining discriminatory practices and provided for federal enforcement of voting rights. In 2013, a key enforcement provision of the Act was struck down by the Supreme Court in the 2013 case of *Shelby County v. Holder*. Since then, many states enacted new restrictions, not just around ID requirements, but also regarding the times and places for voting among other things.

Who votes, part 2: making it easier

Originally, registration meant taking time off to physically travel to a specific location to fill out paperwork. This fact added to the hurdles faced by the less educated and the lower classes, who were not aware of the locations and/or not able to take the time or travel the distance to register. In recent decades,

attempts have been made to ease the burdens of registration. Most notably, the **Motor Voter Act of 1993** requires all states to offer mail-in registration forms, and also requires them to offer the forms at most state government facilities like schools and many state services locations like motor vehicle bureaus (hence the name "Motor Voter"). In addition, many states have made greater efforts to promote voter registration in high schools, colleges, and among the public in recent years.

Many states have also attempted to make voting itself easier by liberalizing voter registration or absentee ballot rules (which were traditionally used for voters who certified that they could not get to their local voting location to vote) among other measures. As of 2021 there are 19 states that have adopted automatic voter registration (see: https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary). Under an automatic system, voters are registered by the state unless they 'opt-out'.

Also, in the wake of the controversial **2000 presidential election** (which was held up for over a month by voting controversies in Florida), Congress passed the Help America Vote Act. Among other things, it provided money to help states upgrade their voting equipment and required states to allow people to cast provisional votes if their eligibility is in question[9].

How we decide: Voting Cues

When we cast votes, we are choosing among alternatives. How do we decide? The answer is that we use **voting cues**, or indicators. Historically, the most important of these is *party identification* (i.e., which candidate belongs to the party we favor?). As information has become easier to obtain in recent decades (at first with the immediacy of radio and television, and now with the information explosion on the internet), *issue positions* (i.e., which candidate's issues do we most like?) have become an increasingly prominent indicator as well. Beware of issues, though (more on that below)! While these are the most prominent cues, there are others. Here's a brief discussion:

- *Party Identification*: Very few Americans are formal (i.e., "card-carrying") party members. That does not mean we lack strong attachments. Americans have very strong personal attachments. Most of us identify with a party. Recent polls say about 60% of the public identifies with a major party—and the number reaches 90% if "leaners" (self-described independents who, when pressed, express some support for a party) are included (see: https://news.gallup.com/poll/15370/Party-Affiliation.

9 Such votes would be counted later, if the voter's eligibility was certified.

aspx). This party attachment begins early in life as part of our political socialization (see chapter 4).

Prior to the age of mass media (especially before radio and television), parties were *the* source of political information. Well into the 19th century, most major newspapers were run by one of the major parties and made no pretense of objectivity. Political rallies and speeches were considered social events. With little independent information, party labels served as our primary (and often *only*) cue.

Modern commercial media displaced parties as a prime source of political information. With other sources increasingly available, Americans drifted away from political parties, with independents becoming as common as partisans. By the late 20th century, most observers said parties were "in decline." Even as they have revitalized in the last couple of decades (first as fund-raisers, and now as ideological competitors), this decline allowed other cues to rise in prominence.

- *Incumbency*: As parties declined in influence, more candidates appealed directly to the public through radio and television. With little help from the parties, voters searched for other cues, with **incumbency** (who currently holds office?) filling the gap (Mayhew, 1974). The thinking is that, with less party information, voters began to notice who was currently in office (the incumbent), and began voting for them. Incumbents had the finances and organization to take advantage of new media to out-campaign obscure and underfunded challengers.

  Though parties re-emerged as major players, incumbents still enjoy greater support than their challengers. For example, at a time of seemingly great dissatisfaction with the federal government, incumbents running for re-election to the U.S. House of Representatives in 2020 won 95% of the time.
- *Issues*: The mass media age (radio, television, internet) has made information easier for us to obtain. As such, voters focus increasingly on candidate issue positions. It is laudable to say, "I don't vote just for a party label, I want to know where the candidates stand on the issues!"—however, one must beware that issues can be manipulated.
  - ▹ **Valence (**one-sided) **issues** are campaign favorites. Many candidates will carefully emphasize issues they know you will agree with. "Criminals should be punished!" or "I believe in America!" are examples. You might find yourself saying, "I agree with that statement!," but has the candidate actually said anything substantial?

Next time you hear an issue statement from a candidate, try applying the "stupidity test." Imagine the opposite of the statement. If the opposite is debatable, then the statement is probably reasonable ("Social Security should be reformed," vs. "Social Security should be preserved"). If the opposite sounds stupid ("Criminals should be punished" vs. "Criminals should go free"), then the statement is absurd.

- ▷ Another favorite is attempting to appease all sides on an issue particularly on divisive issues. For example, about abortion a candidate might say, "I am personally opposed to it, but I don't believe government should get involved." There is nothing intrinsically wrong with this kind of issue position, but be aware that it may be designed to appeal to both sides. It says to pro-life supporters that the candidate is on their side, but it also says to pro-choice supporters that they have nothing to fear from the candidate.

- *Candidate Characteristics*: In addition to the major cues, we use any number of others to help us decide. Most common among the remainder are candidate characteristics. We like to think candidates will understand us and help us. *Demographics* like race, gender, and ethnicity help us understand who candidates are and whether they can relate to our concerns. Other *background* characteristics like occupation, education, religion, ideology, childhood, and residence help us understand their experiences and whether they can empathize with our life. Lastly, basic *personality* traits like honesty, competence, friendliness, and intelligence help us understand how approachable they are and how they might handle the responsibilities of office.

What votes mean: Rules (again!)

This consideration may be decisive, yet it is little appreciated. Rules matter. They affect outcomes. In other words, how we translate votes into outcomes is how we know who wins. We tend to take words like "vote" and "election" for granted. However, it is not that easy.

First, different votes do different things. *Party primaries* select nominees to represent the party in a general election. If you vote in a primary, you have exercised an important civic function, but you have not elected anyone to office. *General elections* fill government offices for fixed terms, while *special elections* are used to fill vacancies temporarily. Some states allow *recall elections* that can actually remove someone from office. Most unusual is the *presidential election*

where you do not actually vote for president at all! It is an indirect system where you, in fact, vote for electors for your state who in turn vote for president.

Second, rules vary from election to election and from state to state. The same set of votes might lead to different winners using different rules. Again, rules matter! Single-Member District, Plurality (SMDP) rules discussed earlier are one example. Elections using SMDP rules can produce different outcomes from Multi-Member District and Majority rules. We discussed earlier how these rules affect political parties. Let us now see how they affect elections.

The following example (based on Ross, 1988) demonstrates the effect of rules on outcomes, even with the exact same set of voter preferences. We start with four candidates: A, B, C, and D. A is supported by 40% of the population, B is supported by 30%, C is supported by 20%, and D is supported by 10%. In a straight, SMDP election, where there is one winner needing only more votes than anyone else, A wins (see Table 6-1, Plurality column). However, if the rule is changed to a multi-member one, with say three winners, then A, B, and C would win. The votes have not changed, only the rules.

In a single-member (or "single-winner") election with a *majority* rule, the same set of votes produces yet another result. Since the initial result, where A leads with 40%, does not produce a majority for anyone, we need a way to force one, which is done with a second, *run-off* election between the top two finishers, A and B. Since the supporters of C and D can no longer vote for them, they must decide between A or B. Table 6-1 lays out the distribution of preferences among all voters. Looking at C's supporters, we see that their second choice is D, their third is B, and their last is A. Thus, we deduce that they prefer B over A. From the table, we also see that D's supporters also prefer B over A. So, the result of the runoff is that A gets the 40% of their own supporters, and B gets the 30% of their supporters *plus* the 20% of C's supporters, *and* the 10% of D's supporters for a 60% majority. Again, no votes have changed, only the rules. A plurality rule favors A, but a majority rule favors B.

Yet another possibility is **approval voting**, where voters may cast votes for *each* candidate they like. Proponents argue this is a more accurate representation of our preferences as it allows us to cast votes for two or more candidates if we cannot make up our mind or if we like two or more equally. The winner of such a vote would be the most widely approved candidate among the voters. In Table 6-1, we can determine voter approval by observing the vertical bars ("|") among the voter preferences. Voters approve of choices to the left of the bar, and they disapprove of choices to the right. For example, the 40% whose first choice is A also approve of D, but not of C or B. Using this rule, we find that the first 40%

cast votes for both A and D. The next 30% vote for both B and C. The next 20% vote only for C (which shows you can still cast a traditional single vote under this rule). The last 10% vote for everyone *except* A. Tallying these votes, we now find that C is the most widely approved candidate. Again, there are no changes in voters or their preferences, only in the rules.

Table 6.1: Distribution of Voter Preferences and Results Using Different Voting Rules

Votes	1st	2nd	3rd	4th	Plurality	Majority	Approval
40%	A >	D > |	C >	B	A = 40 ✓	A = 40	A = 40
30%	B >	C > |	D >	A	B = 30	B = 60 ✓	B = 40
20%	C > |	D >	B >	A	C = 20		C = 60
10%	D >	B >	C > |	A	D = 10		D = 50

The bottom line: Again, rules matter. The same voters with the same preferences produced different results using different rules!

What voting affects:

The quick answer to this question is not everything. In other words, we do have some ability to shape our government, but we cannot shape everything. Our reach is limited.

How is it limited? The most obvious answer is that not everything or everyone in government is subject to election. We cannot vote on:

- presidential advisers or other executive branch officials.
- congressional staff members.
- federal judges or Supreme Court justices.
- many state and local administrative and judicial officials.
- federal laws or regulations.
- many state and local laws or regulations.

Even when we can vote, it is often in a limited fashion. For example, since U.S. Senate elections are staggered (see chapter 7), with only one-third of the Senate up for election every two years, we can only change that much in any single election. In other words, two-thirds of the Senate is insulated from us in every election. In addition, the reach of our vote is limited by geography; we can only vote for U.S. Senators in our state and U.S. Representatives in our local congressional district (and state and local geography is usually even *more* limited). Those geographic

districts also limit our ability to act collectively, since many groups among the public (i.e., racial, ethnic, gender, occupational, ideological, religious, and others) are fragmented among many districts and states[10].

Too Many Votes?

There are more than a half-million elected officials in the United States (i.e., see Shelley, 1996). Add to that party primaries, run-off elections, recall elections, special elections, judicial elections, sheriff and school board elections among other local offices, and even policy proposals on ballot measures and state constitutional amendments, and it becomes quite clear that Americans have a lot of voting to do! This amount contributes to a phenomenon known as "voter fatigue," which helps account for why turnout rates in the United States are far lower than in similar democracies. Consider this example:

There were five elections conducted in 2010 to determine who Georgia's 9th Congressional District representative to the U.S. House would be. Why five? First, the incumbent—Republican Nathan Deal—resigned his House seat in March 2010 to run for Governor of Georgia (spoiler alert: he won). This situation required a special election to fill the seat until the term expired in January of 2011. The special election was held in May. Second, since Georgia's election laws require a majority vote to win, a run-off election was needed because none of the candidates received a majority. The run-off was held in June. So, it took two votes just to fill out the term. Tom Graves was elected to fill the seat.

It does not end there. The regular vote to fill the next term was still scheduled for November 2nd, and the party primary votes for this election were scheduled for July 20th. The Republican primary (there were no Democratic candidates) required a runoff vote which was held in August. The incumbent, Tom Graves, won the runoff. So, there was a special election in May, a run-off for that special election in June, a party primary in July, a primary run-off in August, *and* the election in November (Graves won)—five elections for one seat in one year! There could even have been a sixth, a November run-off, had any significant opposition kept Graves from getting a majority.

It gets even more interesting. Like many states, Georgia attempted to make voting easier by allowing people to vote up to 45 days before an election at the time. This early voting meant people could vote in the July 20th primary as early as June 7th. It is noteworthy because the special election run-off date was June *8th*, meaning it was possible for voters to vote in the regular election primary at

10 Sometimes deliberately so. See "gerrymandering" in chapter 7.

the same time or even before they voted in the special election run-off (Fielding, 2010). Of course, this situation created some confusion. Some voters in the 9th District, who intended to vote in the special election run-off accidentally voted early in the primary vote instead (Redmon, 2010)! The state has since reduced early voting down to about three weeks.

Money

In the past, political parties and election campaigns revolved primarily around organizing and energizing people in order to win elections. The focus was on face-to-face gatherings like campaign rallies. Today, things are far more complex. Make no mistake, people are still important. Our votes are, after all, the bottom line. However, as communications technologies (radio, television, internet) and campaign techniques (polling, phone-calling, direct mail marketing, and other public relations methods) develop, parties and campaigns have changed. In addition to the traditional armies of staffers and volunteers spreading out to win over our votes, there are now groups of more elite technology and marketing experts working behind the scenes to win us over as well.

These new experts and their technologies and techniques are far more expensive than the hordes of staffers and volunteers. This in turn pushes money and fund-raising to the forefront, requiring parties and campaigns to seek out ever-greater amounts of cash. Candidates and parties naturally turned to wealthy supporters for large donations to meet the demands. By the 1970s, an increasingly uneasy public grew concerned that politicians were being "bought" by these wealthy contributors (that is, that politicians were ignoring the public and focusing on keeping their few, wealthy contributors happy). This situation led to federal regulations (see below) that limited the amount of money individuals could contribute in any election to $1000 per candidate. Oddly enough, these regulations make fund-raising more important because far more contributors were now required to pay for increasingly expensive campaigns[11].

Campaign Finance Reform

Some campaign finance regulations date back more than a century. The Tillman Act of 1907 prohibited the direct contribution of corporate funds to campaigns. The Taft-Hartley Act of 1947 similarly prohibited direct contributions from labor unions. However, there have been two major waves of reforms in

11 Where a candidate could once raise $100,000 from a single wealthy donor, they now had to seek out 100 people to get the same amount.

recent decades. The first was in the 1970s. Spurred on by perceived loopholes in the first wave, the second was in the late 1990s and early 2000s[12].

The Federal Election Campaign Acts of the 1970s (FECA)

In 1971, 1972, and 1974, Congress enacted laws that:

- limited contributions to federal campaigns from individuals ($1000 per candidate, per election) and from groups ($5000 per candidate, per election);
- required groups representing various interests (known as Political Action Committees) to register with the federal government before they could contribute to federal campaigns;
- limited both candidate and independent (individuals and groups
- not connected with any candidate) spending in federal elections (House, Senate, Presidency);
- created the Federal Election Commission (FEC) to oversee federal campaign regulations; and
- set up a system of public funding for presidential nominations and elections.

Opponents of these regulations claimed they violated the First Amendment speech rights of both candidates and potential contributors, and they challenged the laws in court. In the case of *Buckley v. Valeo* (1976), the Supreme Court upheld many of the regulations. However, they struck down the spending limits as unconstitutional, saying that candidate and independent spending amount to protected speech. In addition, they said contribution limits only apply to activities involving "express advocacy"–meaning words that clearly advocate the election or defeat of a candidate. Contribution limits and public funding of presidential campaigns set the tone for federal elections for the next two decades. However, things were changing.

Soft Money and Issues Ads

In 1979, one change in FEC interpretations led to what is called **soft money**. This money is used for non-campaign, "party-building" activities like get-out-the-vote drives or issue advertisements (as opposed to express campaign advertisements). Based on the Supreme Court's "express advocacy" restriction in *Buckley*, soft money contributions are not subject to limitations. Little-noticed at the time, this change, combined with federal court rulings in the 1990s that

12 A good description and history of campaign finance may be found on the Federal Election Commission website at https://transition.fec.gov/pages/brochures/fecfeca.shtml#Historical_Background.

said candidate images and names used in ads do not amount to express advocacy, had profound consequences as the political parties re-invented themselves as soft money machines. Wealthy supporters were no longer able to donate more than $1000 to candidates or groups that run ads saying something like "Vote for Smith," but they now could pour unlimited contributions into political parties and groups that run **issue ads** saying "Smith is good for America" or "Smith supports legislation X while Jones opposes it." (For examples of issue ads in the 2000 presidential campaign, see: https://www.gwu.edu/~action/ads2/partyadlist.html).

The Bipartisan Campaign Reform Act of 2002 (BCRA)

By the late 1990s, as issue ads saturated the airwaves before every election, many saw them as a loophole rendering contribution limits meaningless. The argument was that the average television viewer, in weeks before an election, would not distinguish between ads that say "Bob Dole will cut our taxes" and ones that say "Vote for Bob Dole." Calls for new legislation to close the perceived soft money loophole were led by U.S. senators John McCain (R-AZ) and Russell Feingold (D-WI). Their proposals were debated for several years and finally enacted into law in 2002 as the Bipartisan Campaign Reform Act. This law banned political parties from using soft money in federal elections (and restricted state parties' soft money) so that contributions from wealthy contributors to political parties were once again limited. However, to compensate for 30 years of inflation, the individual contribution limit was doubled to $2000 and subsequently indexed to the inflation rate (as of 2020, the limit was $2800). In addition, issue ads featuring candidate names and faces were limited. Ads could not show or mention a candidate 30 days before a party primary or 60 days before a general election.

The new laws were soon challenged, but the Supreme Court in 2003 upheld all but a few minor provisions.

"527" Groups "501" Groups, *Citizens United*, and beyond

BCRA did little to stem the flow of money in elections. For one thing, the national parties subsequently became very adept at raising record sums of money through good old-fashioned limited contributions. For another, while parties were restricted from using soft money and running issue ads, many types of outside groups were not. Tax-exempt "527" groups (named for Section 527 of the federal tax code) could exploit a difference between tax law and campaign law. Tax law prohibits these groups from engaging in campaign activity, but remember *Buckley* and the FEC said issue ads are *not* campaign ads. Therefore, 527s could run all

the issue ads, using all the unlimited money, they wanted![13] Traditional interest groups formed 527s. More importantly though, members of political parties that could *not* spend soft money simply went out and formed 527s which could.

In the 2004 elections and beyond, the airwaves were still saturated with issues ads. But they were no longer party ads, they were 527 ads. Then came *Citizens United*.

In addition to the long-standing bans on corporate and union campaign contributions, BCRA also restricted them from using their own funds to engage in "electioneering" (though their members could form political action committees to raise funds and make limited contributions. See chapter 5). In 2008, a little-known, non-profit corporation known as Citizens United wanted to broadcast and advertise a documentary titled "Hillary: The Movie," which was critical of presidential candidate Hillary Clinton. A federal court held that doing so would violate the BCRA restrictions on issue ads and on corporate electioneering. The case reached the Supreme Court in 2009, originally simply to determine whether or not the film and its ads amounted to issue ads or "electioneering." However, the Court ordered the case to be reheard a year later, this time to determine the far more consequential question of whether or not the BCRA restrictions on corporations and unions use of their own funds is constitutional. In a 5-4 vote, the Court struck down the restrictions as unconstitutional violations of the First Amendment's speech protection (*Citizens United v Federal Election Commission*, 130 S.Ct. 876). This ruling opens the door for corporations and unions to use their own money for any political activity they desire (except for direct contributions, which are still prohibited).

Where will this lead? Will we see multi-million dollar product marketing campaigns that endorse candidates ("Vote for Smith for president because she uses our product!")? It is trite to say that only time will tell, but surely the issue is not yet resolved. The question remains: What place does money have in our elections?

What we *have* seen in the last decade is that both traditional corporations and incorporated interests (like *Citizens United*) have become involved in campaigns. However, traditional corporations often wish to remain anonymous (to avoid offending customers or partners). Many incorporated interests also wish to remain anonymous (often just to avoid retaliation or scrutiny). In these cases, the kind of overt spending allowed by the Citizens United decision won't do. To accommodate their wish to remain anonymous, many political organizations, including some quite close to candidates and campaigns (though direct co-

13 Other types of tax-exempt groups, known as 501(c)(3) and 501(c)(4) groups could run these ads as well.

ordination is illegal), are using a two-pronged approach. They form both Super PACs (see chapter 5) and tax-exempt groups known as 501(c)(4) groups. Why both? Because Super PACs can raise and spend unlimited amounts of money and overtly express support for candidates (though direct contributions are forbidden), but they must disclose their donors. That's where the 501(c)(4)s come in handy. As "Social Welfare" groups, according to the tax code, express political support cannot be their primary function. However, they can accept unlimited donations and they *can* contribute to political organizations like Super PACs. The key is that 501(c)(4)s do not have to disclose their donors! So, corporations and wealthy individuals can contribute unlimited amounts to these 501 groups and remain anonymous. The 501 groups then contribute the money they raise to Super PACs that spend it on express electioneering.

When you ask a Super PAC where they got their money from, they must tell you. If they use the approach described above, they tell you they got it from a 501(c)(4). When you ask the 501(c)(4) where *their* money came from, all they have to say is, "None of your business!" Mission accomplished!

Majority versus Plurality in the real world

While most states use SMDP rules, Georgia does not. It requires a majority for election. In fact, a 1966 law made it the only state to require majority votes for all nominations and elections[14]. If no candidate receives a majority, the state requires a later run-off election between the top two vote-getters. This situation has had real-world consequences for the people of Georgia. Let's explore an example.

Case Study: Rules Matter—The 2020 U.S. Senate elections in Georgia

Most U.S. elections use plurality rule. The state of Georgia is an exception. It requires a majority vote (see: Georgia Code Title 21. Elections § 21-2-501). If no candidate has captured a majority on election day, then a "run-off" is held several weeks later between the top two finishers to determine the winner. This rule affected not one, but *two* U.S. Senate elections in Georgia in 2020—and had repercussions for control of the Senate in 2021. Normally, 33 or 34 states have *one* Senate election in an election year (see Chapter 7). Why only 33 or 34 states, and why only one each for those states? More rules! The Constitution specifies that only one-third of Senate seats are up for re-election every two years, and they are

14 However, it exempted local municipalities using other rules prior to the law's adoption.

distributed so that no state has more than one seat up in any election cycle. So why did Georgia have *two?*

In the summer of 2019, one of Georgia's incumbent U.S. senators, Johnny Isakson, announced that he would resign at the end of the year due to declining health (Everett, 2019). Governor Brian Kemp appointed business executive Kelly Loeffler to fill the seat until a special election was held concurrently with the upcoming November election. Georgia's other incumbent senator, David Perdue would also be up for re-election at the same time, as his regular six-year term was expiring.

The *rules* were different for each of these contests. The special election for Loeffler's seat was a "jungle primary", with all eligible candidates competing (i.e., there were no party nominees). Instead of just two major-party nominees dominating the ballot, there could be any number of candidates from both major and minor parties. If no candidate won a majority, then the top two finishers—regardless of party—would compete in a later runoff (Keenan, 2020). The election for Perdue's seat was a more traditional affair with the two major parties nominating candidates to compete in November.

Georgia has been solidly Republican for a couple of decades, though Democrats have made recent inroads. 2018 saw their best results in many years, with a close governor's race, and some gains in both the U.S. House and the state legislature. Still, throughout most of 2020, both Perdue and Loeffler were expected to retain their seats (i.e., see: Silver, 2020, Gonzales, 2020, Cook, 2020).

By late October, both senators' leads were nearly gone. Perdue's lead dissipated at least partly because of missteps by the candidate (Fox News, 2020)—but also because of a well-positioned Democratic nominee, Jon Ossoff who maintained significant statewide name recognition and support from a strong U.S. House challenge two years earlier. Meanwhile, Loeffler's lead fell victim to a strong challenge from Republican U.S. Representative Doug Collins (who was endorsed by President Trump). Remember, Loeffler was competing in the jungle primary, so there was no party nomination to settle intra-party challenges. Loeffler and Collins were splitting the Republican vote while on the Democratic side, Rev. Raphael Warnock had emerged as a singular favorite. Heading into election day, the special election was essentially a three-way race which virtually guaranteed that no candidate would receive the 50 percent needed to avoid a runoff. The other election was a razor-thin race between Ossoff and Perdue, with neither candidate clearly above 50 percent. It looked like both races would result in runoffs.

On election day, neither of the races were settled. In the special election, Warnock finished first, with just under 33% of the vote. Loeffler finished second

with just under 26%, and Collins finished third with just under 20%. Warnock and Loeffler were headed to a runoff. In the other election, Senator Perdue's vote total flirted with the 50 percent mark, but as later votes (mostly absentee ballots) were tallied, he fell just short with 49.7%. Ossoff finished with just under 48% of the vote. This race was also headed to a runoff. So . . . rules matter. Under plurality rule, both races would have been settled. However, the state's majority voting rule meant the contests would continue.

Both runoffs were scheduled for January 5th, 2021—a date based on . . . you guessed it . . . Georgia election *rules*. This *mattered* as it occurred two days after Senator Perdue's term expired. So, for two days, Georgia had only one Senator, Kelly Loeffler. Her term did not expire until after the special election was resolved.

Runoff elections are usually very low-turnout events. However, because victories by both Democratic candidates would result in a shift in Senate power, these runoffs had national implications and drew a lot of attention, leading to unusually high turnout. This turnout was not uniform across the state. African Americans voted in large numbers in the runoff (Cohn, 2021). This helped the Democratic candidates in both races. In the end, both Democrats won their runoffs. Jon Ossoff defeated incumbent Senator David Perdue 50.6% to 49.4%, and Raphael Warnock defeated incumbent Senator Kelly Loeffler 51% to 49%. For the first time in more than 60 years, a state lost two incumbent U.S. senators in the same election cycle. The last time was in West Virginia in 1958 (Ostermeier, 2021).

Under plurality rule, Republicans would have retained both seats and retained control of the Senate. However, under Georgia's majority rule, Democrats were able to capture both seats and return control of the Senate to their party. Oh, one last rule. Jon Ossoff was elected to a full six-year term. So he will not be up for re-election until 2026. However, Raphael Warnock was elected to finish the full term begun by Johnny Isakson and continued by Kelly Loeffler. That term ends in 2022, so if Warnock wishes to retain his seat, he will have to run *again* just two years after he was first elected.

Discussion Questions

1. Why did political parties become such a central part of our political environment if the framers derided them as "factions"? In other words, what do they do that might make them so central?
2. Compare "third" or "minor" parties to the major parties. A list can be found here: https://www.politics1.com/parties.htm. Peruse their web sites and compare their goals, organization, and success to that of the two major parties.

3. Compare our largely two-party system to other systems (i.e., Great Britain's three-party system or Israel's multiple-party system). How do their party systems affect their politics?
4. As noted earlier, our history is full of attempts to disenfranchise African Americans (see chapter section: "Added Barriers: Some Intended, Some Not"). Some were obvious (white primaries), but some seemed more innocuous to whites (publishing names and addresses of registered voters). Today, there are still provisions that might not concern whites while they seriously concern blacks. For instance, many states have toughened their identification requirements in the name of combating voter fraud. Why might this concern African Americans? Contact or visit a nearby chapter of the NAACP (https://www.naacp.org) and investigate their concerns with these tougher restrictions.
5. Many campaign finance regulations were enacted in the name of preventing the appearance of elections being "bought" by wealthy contributors. Is there any validity to this concern? Explore campaign contribution data on these sites to investigate the role of money in election campaigns: https://www.cfinst.org/, https://www.fec.gov.

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7

Congress

Carl D. Cavalli

Learning Objectives

After covering the topic of Congress, students should understand:

1. The origins and representative nature of Congress and the roles of individual members.
2. The organization of Congress, including the leadership and the committee system.
3. The functional processes, including legislating and annual budgeting.
4. Influences on the decision-making of members of Congress.

Abstract[1]

The framers created a bicameral congress out of their concern that the legislature is the most powerful branch. Beyond simple division into two houses, they deliberately created differences: different terms, and different methods of apportionment. They allowed each house to create its own rules and organization. This separation results in a complex parallel structure of rules and behavior that produces significantly differing views on policy from representatives and senators—even though both are attempting to represent their constituents. The resulting legislative and budgetary processes are difficult, complicated, and more likely to lead to failure than success for any given proposal. In recent decades, the Congress has evolved to meet public demands for greater democracy and openness, and has attempted to adapt to increasing polarization between the political parties. This evolution results in even greater complexity and a focus on responsiveness (to constituency) over responsibility.

1 Portions of this chapter were originally included in Cavalli, Carl. D. 2000. Congress. Lesson 9 in POLS 1101: American Government. University System of Georgia eCore™

Introduction

The First Branch

The first branch of government described in the Constitution is the Congress. The framers did this deliberately. If politics is about "who gets what, when, how" (Lasswell, 1936), then it is important to first consider those who *decide* these things—the Congress.

Congress does its work in the Capitol building in Washington, DC. Not surprisingly, the structure of the Capitol itself lends clues to the operation of Congress. The building is divided into three connected segments: two large columned wings on either side, connected in the center by a towering dome. The center dome is vast, decorative, and largely empty (except, of course, for the hordes of gawking tourists). All the action occurs in the two intricate and busy wings. The architecture of the building is a close metaphor for the Congress itself: two complicated, active houses forever linked to one another and to the public (those gawking tourists). Why two? Why linked? And above all, why so busy?

Basics

Bicameralism

Bicameralism is the division of a legislative body into two chambers. In our case, Congress is divided into two houses: the House of Representatives (or simply, "The House") and the Senate. What is the purpose of bicameralism? James Madison had this to say in Federalist #51, "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."

The framers feared Congress might become the most powerful, and thus dangerous, branch. Their solution to the problem of power was division. With the *legislative* branch, this meant division into two houses. Notice Madison's quote above, though. The focus is not on simply dividing the Congress into two *twin* houses. Rather, it is "to divide the legislature into *different* branches. . . as little connected with each other" as possible. Here are some examples of these differences:

Two Different Branches

- The House is larger, with 435 members apportioned according to the population of each state (states with larger populations have more representatives), while the smaller Senate has 100 members apportioned two per state regardless of population.
- Because of this system, representatives in the House generally have fewer constituents than do senators. There are from 1 to 53[2] representatives per state whereas both senators in each state represent its entire population.
- The previous point means each representative has about the same number of constituents whereas senators represent vastly different numbers of constituents. It also means a representative's constituents are usually more homogeneous than a senator's.
- Representatives' terms of office are two years, while senators serve for six years.
- Representatives are generally younger than senators: first, because the Constitution requires them be at least 25 while it requires senators be at least 30, and second, because the House is often informally considered a stepping-stone to the Senate.
- The Constitution designates that all revenue bills originate in the House (but the Senate must still concur), while the Senate has exclusive powers to confirm executive and judicial appointments and ratify treaties negotiated between the United States and other nations.

Why the differences? The answer may come from examining the *effects* of these differences.

With generally smaller constituencies and a shorter term of office, the connection between House members and the public is both closer and more direct. The short two-year term also means representatives are constantly in campaign mode (think about it: They are forever either running for re-election this year, or next year). There is often a got-to-get-it-done-now-because-I'm-up-for-re-election mentality. In addition, the generally smaller, more homogeneous constituency also means representatives are less likely to deal with diverse opinions on any issue.

With larger and more varied constituencies, a longer term of office, and generally older members, the Senate is more "elite"—less directly connected to the public. The mentality in the Senate is often one of going slow and of considering a wide array of views on any issue.

2 As a result of the 2020 census, California will lose one seat, dropping its total to 52.

The differences between the houses produce different *perspectives*. The views of senators will *differ* from the views of representatives. They will argue. There is an often-repeated tale that suggests a junior House Democrat once referred to House Republicans as "the enemy." This junior representative was quickly corrected by a more senior member who intoned that the Republicans are simply rivals—"the *Senate* is the enemy!" (i.e., see Ornstein, 2008). What we today refer to as "gridlock" is something to which the framers would not object. They feared quick action far more than they feared delay.

Lawmaker, Representative

What is the role of a legislator? Most people would answer that the basic job is to create laws. This description is correct, but incomplete. Equally important is a focus on representing the public. But what does "representation" mean? There are several ways of defining the term.

Representation

Does Congress truly represent the public? One way to assess representativeness is to see if it shares the same **demographic** characteristics as the public. In other words, does Congress *look* like the public? The answer is clearly no! In 2021, the average ages in the House and Senate are 58 and 64, respectively—more than 20 years older than the average American. Most members are lawyers or political professionals.[3] Also, while there are more women and minorities in Congress than ever, they are still vastly underrepresented compared to the general public. For example, in 2021, 26.9% of Congress was female compared to over 50% of the general public, and just over 11% of Congress was African American compared to around 13% of the general public (Manning, 2021). In addition, there are far more military veterans and far more Protestants than are found in the general public. So, from a demographic standpoint, Congress does not represent the public at all.

However, demography is not the only type of representation. Another type is known as **agency representation**. Do members of Congress speak for their constituents (in the same way that "agents" in the entertainment and sports professions speak for their clients)? This assessment method yields a far more positive answer. One way to measure agency representation is to see if constituents express their satisfaction with their incumbent representatives by voting to re-elect them. Over the last 25 years, re-election rates in the House average over 90% and have not dropped lower than 87%. Over the same period, rates in the Senate

3 A "political professional" is someone who has worked most of their lives in political offices, either as legislative or administrative assistants, or as elected officials in local or state offices before their election to Congress.

average over 80% and have not dropped lower than 75% (The 2020 rates were 95% in the House and 84% in the Senate). These consistently high re-election rates are particularly interesting given the relatively low levels of public support shown for the Congress as a whole in recent decades—currently in the thirties, and rarely above 50% over the last 50 years (Gallup, 2021). In total, this data suggests that while the public does not often approve of the collective actions of Congress as an institution, they are more than satisfied with their own members of Congress (i.e., see Mendes, 2013).

Indeed, researchers like David Mayhew (1974) find that it is this "electoral connection"—regularly facing the voters—that largely promotes agency representation. It appears to be a conscious design of lawmakers. Their desire for re-election produces a palpable focus on what Richard Fenno (2003) calls "home style." That is, legislators are concerned about how they are perceived by their constituents. As Fenno says,

> *there is no way the act of representing can be separated from the act of getting elected. If the congressman cannot win and hold the votes of some people, he cannot represent any people. . . [T]he knowledge that they will later be held accountable at the polls will tend to make [representatives'] behavior more responsive to the desires of their constituents* (p.233).

To build support, "[M]embers of Congress go home to present themselves as a person and to win accolade: 'he's a good man,' 'she's a good woman'… And their object is to present themselves as a person in such a way that the inferences drawn by those watching will be supportive" (p.55). Beyond simply appearing "good," leadership and helpfulness are also part of the presentation: "[T]he core activity is providing help to individuals, groups, and localities in coping with the federal government. . . . [I]t is a highly valued form of activity. Not only is constituent service universally recognized as an important part of the job in its own right. It is also universally recognized as powerful reelection medicine" (p.101).

DISTRICTING: WHO IS YOUR "AGENT?" Rules matter. They affect outcomes. Congressional representation is affected by rules for creating congressional districts[4]. As noted earlier, representatives in the House are apportioned by state population (so the most populous state, California, currently has 53[5] representatives while the seven least populous states each have only one representative). Federal law requires states with more than one representative to draw individual districts for each. Constitutionally, those districts must be as equal

4 This is not a concern in the Senate, where both senators in a state represent the *entire* state.

5 As a result of the 2020 U.S. census, California has been reapportioned down to 52, to take effect in 2022.

in population as possible. Federal law also requires the creation of districts where minority groups comprise the majority of the district population where possible[6]. Population shifts and demographic changes are measured by the decennial United States Census. These requirements mean district boundaries must be redrawn at least every decade as indicated by population and demographic shifts detected by the census. How the boundaries are redrawn—"**redistricting**"—can have a decisive effect on who we elect to represent us.

For example, a state with a population large enough to be apportioned three representatives must create three districts. However, state legislatures are free to draw the boundaries as they please, keeping in mind the population and minority requirements. Yet, how those boundaries are drawn can strongly affect who gets elected as the districts' representatives.

Figure 7.1: Districting Possibilities in a Hypothetical State

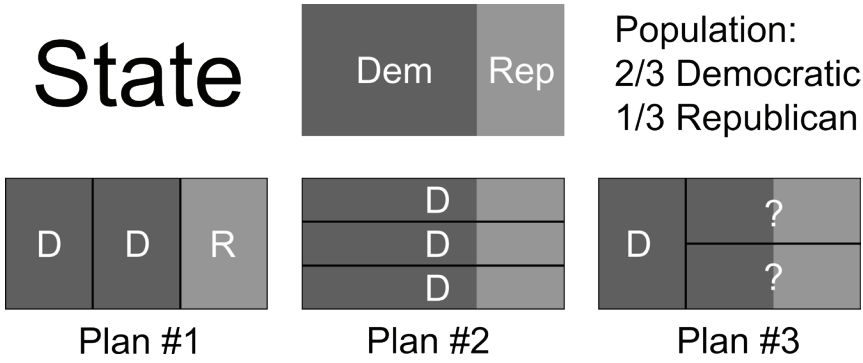

Figure 7.1 provides an example of possible district boundaries in a state with three districts and an evenly-distributed population. Assuming people vote for the candidate of their party, the plans produce a state represented by anywhere from a solidly Democratic delegation (Plan #1) to a potentially majority Republican delegation (Plan #3). In other words, the state's population may be represented by notably different representatives depending upon how the districts are drawn. When you consider not only partisan, but also ideological, racial, ethnic, and other demographic differences within most states, it is easy to see why redistricting often results in heated battles.[7]

These battles frequently involve **gerrymandering**[8]**.** The term "gerrymander" has its roots in the districting process used in Massachusetts in the early 19th

6 This provision has been challenged in federal court.

7 For example, see https://www.reuters.com/article/us-usa-politics-redistricting-idUSKBN2AI1CX.

8 Pronounced *with a soft "g", as in "jerry"*

century under the direction of Governor Elbridge Gerry (where one unusually-shaped district was said to look like a salamander). Today, the term is used to describe districts deliberately drawn to advantage one group of people over another. Most battles have been fought over racial, ethnic, and partisan gerrymandering. Historically, this was one method of disenfranchising African Americans. Concentrations of African Americans were divided between districts to prevent any district majorities. This method of dividing a population is known as "cracking" (see Plan #2 in Figure 7.1) and was used to prevent the election of blacks (or sympathetic whites) to Congress. The method in part explains the lack of *any* black representatives elected from southern states in Congress from 1901 to 1965 despite black populations often 25-50% of the total state population (Gibson & Jung, 2002). As noted above, federal law now prohibits racial/ethnic "cracking" and requires the creation of "majority-minority" districts where possible, though the law has been challenged in court.

Another method of gerrymandering is known as "packing" (see Plan #1 in Figure 7.1). This involves concentrating a group into as few districts as possible. This often guarantees electing someone from (or sympathetic to) that group in those districts, but leaves surrounding districts lacking in that group. Critics of majority-minority districts see them as "packing" and note that while they lead to the election of some minority members, they ultimately lead to more racially- or ethnically polarized politics while diluting minority influence in more numerous surrounding districts (defeating the very rationale for requiring them).

As the nation has become more politically polarized, partisan gerrymandering has become increasingly common (i.e., see Cooper, 2010). States controlled by one party will draw districts to advantage their party. States under divided control (between state legislative houses and/or the governor) will battle it out. Some states (most recently California) have turned to independent districting commissions. These range in power from mere fig leaves for the legislatures to truly independent bodies.

Delegate v. Trustee

A final point about representation: What exactly does the word mean? Some say the legislator's role as a "representative" is simply to reflect constituents' wishes. This definition is known as the *delegate* theory of representation. Former Rep. Ron Paul (R-TX) seemed to invoke the delegate theory to defend changing his stance on the policy forbidding homosexuals to serve openly in the military (often called "Don't Ask, Don't Tell"). A long-time supporter of the policy, he later voted to repeal it, saying, "I have received several calls and visits from constituents

who, in spite of the heavy investment in their training, have been forced out of the military simply because they were discovered to be homosexual... To me, this seems like an awful waste" (Weigel, 2010).

Others say their role is to use their knowledge to do what is best for their constituents, regardless of what the constituents say. This idea is known as the *trustee* theory of representation. Former Rep. Eric Massa (D-NY) invoked the trustee theory in voicing his opinion regarding health care legislation to a gathering of liberal activists by saying, "I will vote adamantly against the interests of my district if I actually think what I am doing is going to be helpful" (Pickett, 2009).

Yet, others note that the roles are not necessarily distinct. Consider the words of Rep. Gary Peters (D-MI):

> *My philosophy is that my sole responsibility is to represent and fight for the people who elected me to serve them. That means seeking out opinions and listening to local residents constantly. I try to listen to as many views and collect as much information as possible, thoroughly read legislation and then vote my conscience based on the answer to this question: Does the proposal improve the lives of people in our community? Representing the people you serve and voting your conscience are not mutually exclusive if your primary goal is to help solve problems people are facing* (Gilbert, 2010).

Philosophers from Edmund Burke in the 18th century to today argue over which role for a representative is proper. At least one entire book has been devoted to the subject (see Pitkin, 1967).

There are additional factors to consider. "Representation" may include political party, ideology, region, religion, race, ethnicity, district interests, and gender as well. Given some of these, sometimes demographic representation *is*, in fact, agency representation!

Organization

The Leadership

There are two types of congressional leadership: institutional and partisan. The institutional leaders are the presiding officers. That is, they preside over the floor of each chamber. With more rules, this means more in the House than it does in the Senate. The partisan leaders are in charge of their respective parties in each house. They develop their party's legislative agenda, and coordinate their positions on issues of the day.

Institutional Leadership

The institutional leader of the House is the Speaker. The Speaker is elected by a majority vote of the entire House. The vote is traditionally a party-line vote, so the Speaker is always a member of the majority party. The institutional leaders of the Senate are the Senate president and president pro-tempore. Constitutionally, the Senate president is automatically the vice president of the United States. This rule means the Senate president may or may not be a member of the Senate's partisan majority. The president pro-tempore traditionally is the senior-most member of the majority party[9].

House rules empower the Speaker, who has the authority to decide to which committee(s) bills are referred. Also, as the officer presiding over floor debate, the Speaker has the power to enforce formal limits on floor activity—debating and amending bills—that are set by the House Rules Committee. To add to these powers, the Speaker also has the ability to appoint the majority party members of that committee. Together, these powers mean the Speaker controls the legislative process, almost literally, coming and going! The House legislative process begins with the Speaker, the Speaker significantly shapes the committee that sets the rules for legislative consideration, and the Speaker has the authority to enforce those very rules on the floor.

Here are a couple of views from past Speakers on what it is like to be Speaker (note the similarity):

- "The power of the Speaker of the House is the power of scheduling" — Thomas P. "Tip" O'Neill (D-MA), Speaker 1977-1987. November 15, 1983. Congressional Record, daily ed., 98th Congress, 1st sess.
- "When you are Speaker you get to set the agenda" — Newt Gingrich (R-GA), Speaker 1995-1998, in Rosensteil, Thomas B., and Edith Stanley. November 9, 1994. For Gingrich, It's 'Mr. Speaker'. Los Angeles Times. p. A2.

In the Senate, with very few rules, the president (of the Senate) and president pro-tempore have little to do in those roles. In addition, they both have other formal roles to play—the president is the vice president of the United States, and they play increasingly important roles as advisors to modern presidents. The president pro-tempore, by virtue of traditionally being the senior-most member of the majority party, is almost always chair of an important Senate committee. The *real* leadership in the Senate falls to the majority party leader (see below).

9 The Speaker and the President Pro-Tempore are second and third in the line of succession to the presidency, respectively, behind the Vice President.

Partisan Leadership

Each party in each house has its own leadership to coordinate party policy positions and manage the party's voting. The majority party leader (the leader of the party with the most seats) in each house is also in charge of scheduling floor activity (mainly, when bills come to the entire house for debate and passage). The minority party leaders serve mainly to organize and coordinate their party in opposition to the majority. These leaders are assisted by party "whips" (formally, "assistant floor leaders"), who act as the eyes and ears of their party. They link the leadership to everyone else. Mostly, they are vote-counters and negotiators. It is their job to keep everyone informed of the legislative schedule and to round up votes in support of their party.

In the House, the majority leader effectively serves *under* the Speaker (who, recall, is always a member of the majority party) as part of a leadership team. In the Senate, however, without a strong institutional leader it is the majority leader that runs the show. With few formal rules in the Senate, power is exercised informally and strategically.

What follows is an exploration of one past Senate majority leader's method of running the Senate.

THE "JOHNSON TREATMENT" Before he served as Vice President of the United States in the 1960s, Lyndon B. Johnson was a United States representative (1937-1949) and senator (1949-1961) representing the state of Texas. He rose quickly to serve in the position of Senate majority (Democratic) leader (1955-1961).

Because of the lack of formal Senate rules, there was never much use for any kind of leadership—institutional or partisan. Johnson, however, transformed the position of majority leader into a powerful one.

He was always interested in acquiring and using power. He wanted to use the position of majority leader to advance the legislative agenda of the Democratic Party during the Republican presidency of Dwight D. Eisenhower (1953-1961). He managed to transform the position on the sheer force of his will and personality—through something that became known as "the Johnson Treatment." The effectiveness of the treatment began with Johnson's thorough and breathtaking knowledge of those with whom he would interact. He knew the likes, dislikes, predilections, and indiscretions of every senator. He then would put this knowledge to use when he needed to build support for legislation. Here is a description of "The Treatment" by journalists Rowland Evans and Robert Novak:

> *Its tone could be supplication, accusation, cajolery, exuberance, scorn, tears, complaints, the hint of threat. It was all of these together. It ran the gamut of human emotions. Its velocity was breathtaking, and it was all in one direction. Interjections from the target were rare. Johnson anticipated them before they could be spoken. He moved in close, his face a scant millimeter from the target, his eyes widening and narrowing, his eyebrows rising and falling. From his pockets poured clippings, memos, and statistics. Mimicry, humor and the genius of analogy made the treatment an almost hypnotic experience and rendered the target stunned helpless* (Evans and Novak, 1966).

No future Senate leaders possessed Johnson's talents, so "The Treatment" was not seen again. However, the expectation of an active, involved majority leader subsequently became the norm.

The Rank and File

"Rank and file" means everyone else—members not in leadership positions. As noted earlier, Congress is more demographically diverse than ever. In addition, its ranks since the 1950s are increasingly filled with political professionals. These changes have consequences for the functioning of Congress.

Political professionals often see Congress as a career, making re-election important. These careerists will act as "policy entrepreneurs" or "professional legislators"—deliberately seeking issues on which to legislate to demonstrate their value to their constituents. Their growing ranks have transformed Congress into a sort of legislating machine with specialized subcommittees (see "The Committee System" below) and increasing numbers of staff and support agencies (i.e., see the Congressional Budget Office [https://www.cbo.gov] and the Congressional Research Service [https://www.loc.gov/crsinfo]), all geared toward developing legislation on issues of interest to their constituents.

Much of this activity involves *pork barrel legislation*—usually defined as legislation or funding for projects of little to no benefit beyond a single district (the term is loosely related to the idea of "bringing home the bacon" to please local voters). Pork barrel projects take the form of things like research grants for local institutions, and funding for highways, bridges, museums, and parks. The process generally involves inserting amendments—or "**earmarks**"—into vital "must-pass"" legislation like the annual federal budget. Mutual support among legislators (or "logrolling") virtually assures their passage.

The public and many legislators decry earmarks as wasteful, and the House of Representatives actually banned them in 2010 (United Press International, 2010).

However, eliminating them entirely is tricky. "Pork barrel" is often in the eye of the beholder. One person's wasteful pork barrel spending is another's vital jobs program (an especially likely view within the benefitting district). In 2021, both parties in Congress decided to reinstate earmarks (Zanona & Emma, 2021).

The increasing diversity of Congress has led to the growth of another type of organization: *congressional caucuses*. These are groups of legislators promoting particular interests within Congress[10]. While there have been groups promoting ideological and commercial interests for a long time, recent decades have seen a growing number of caucuses representing demographic interests. Most prominent among these is the Congressional Black Caucus (see: https://cbc.house.gov/).

Taken together, policy entrepreneurism among the rank and file and its attendant effects on staff, structure, and legislating produce tremendous advantages for incumbent legislators. As noted earlier, re-election rates for incumbents have remained consistently high in recent decades. The developments discussed here play a large part in those high rates.

However, below the leadership level, the most prominent organizations in Congress are **committees**.

The Committee System

Long before he was elected president, Woodrow Wilson wrote extensively about our government. Of the congress, he said, "Congress in session is Congress on exhibition, whilst Congress in its committee rooms is Congress at work" (Wilson, 1885/2009, p.79). Wilson's quote still holds true over 135 years later! In it, Wilson conveys some important points. One is that most of the speechifying, arguing, and blustery debate you may see or hear takes place on the floor of each House. Second, and more important, is that the real work of writing, shaping—some say "crafting"—legislation takes place in the smaller, behind-the-scenes groups we call committees and sub-committees.

Why Committees?

The Constitution allows each house to organize itself in any way it sees fit. Why, then, would both houses choose to organize into committees? It may have something to do with workload and expertise. Consider the alternative of each house working on legislation as one large group as opposed to several smaller groups. There have been about 14,000 pieces of legislation proposed in recent

10 For information on House caucuses (formally known as Congressional Membership Organizations), see: https://cha.house.gov/member-services/congressional-memberstaff-organizations.

two-year congressional sessions. Without committees, it would be impossible to address anywhere near this number of proposals. In addition, committees are not undifferentiated groups. Each committee focuses on a specific topic. This focus helps to promote expertise within the Congress that further "greases" the process.

Types

If you are familiar with any committees in Congress, they are probably one of the "standing" committees, which are permanent, legislative committees. However, they are not the only committees in Congress. Here are brief descriptions of the four basic committee types:

- Standing: They are permanent and focus on legislating. They contain only members of one chamber.
- Select (or Special, or Ad Hoc): They are temporary and generally used to investigate issues that do not fit neatly into any standing committees. They, too, contain only members of one chamber.
- Joint: They may be permanent or temporary and are generally advisory. They exist to coordinate policy between the House and Senate. As such, they contain members from both chambers.
- Conference: The most temporary and specific of all committees. They are created as needed, solely to resolve differences between House and Senate versions of a single bill. They contain members from both chambers (usually members from the standing committees that developed the bill).

Committee Assignments

Members inform their party's selection committee of their preference for assignments. These preferences are usually based on their own interests, expertise, or on improving their re-election prospects. While the selection committees consider these factors, committee assignments are based mainly on seniority.

Seniority System

Seniority is defined as the length of continuous service. This definition applies to both chamber and committee service. Chamber seniority is a factor in committee assignments, while committee seniority is a factor in determining the committee's leadership. Members with greater chamber seniority may request committee assignments before members with less chamber seniority. Within each committee, a chair is determined largely on the basis of committee seniority.

Majority party committee members with the greatest committee seniority have first choice at chairing the committee.

Using chamber seniority to determine committee assignments is not unlike the registration process used at most colleges and universities (that is, seniors get to register for a class first, while freshmen must settle for whatever classes are still available after everyone else has registered).

Why seniority? While not a formal rule in either chamber, seniority is a strong tradition in both. It is clear that both chambers feel the benefits outweigh the drawbacks. What are the benefits? Chamber seniority tends to promote continuity and legislative expertise by rewarding members for remaining in Congress. Committee seniority also promotes expertise by putting in charge those who have spent the most time on a particular committee. In addition, one of the less-appreciated benefits of committee seniority is that it helps avoid leadership fights—no confusion, no campaigning, no battles, no power struggles; If you are the senior member of the majority party on a committee, you get the chair if you so desire. Case closed!

There are drawbacks. Consider the following questions. Are people necessarily better suited for a committee or for a chair just because they have been around a long time? If someone keeps their chair mainly by seniority, are they more or less likely to listen to anything other committee members may have to contribute?

Seniority has been, and continues to be, the primary basis for selecting chairs. However, not everyone has always considered it to be the wisest of methods for committee assignment and chair selection. Here is the story of some that questioned the value of seniority.

ONCE UPON A TIME, IN A CONGRESS FAR, FAR AWAY... In the 1950s, Congress was under the control of a few conservative, southern Democrats. They got their power through seniority. With no Republican opposition in the South, they constantly won re-election (racking up far more seniority than their eastern, northern, or western colleagues). As conservatives, they were resistant to change and opposed most legislation brought before them.

However, society was changing. The Civil Rights Movement was in full swing by the late 1950s. There were many calls for legislation to end racial segregation and promote civil rights and integration. In addition, the Cold War between us and the Soviet Union had evolved into an arms and space race—with many feeling that the Soviets were ahead of us in science and technology. This fear led to many calls for legislation to promote education and develop technology. By 1958, there were so many calls for action that a huge number of Democrats were

elected to Congress because of their support for new programs. Because of their proposals for change, they were labeled "programmatic liberal" Democrats. In 1964, another wave of these Democrats was elected. By the mid-1970s, these liberals were gaining seniority, which finally gave them the numbers they needed to challenge the old southern conservatives.

The stage for confrontation was set: The southern conservatives wanted nothing to do with these new proposals—and as committee chairs, they were able to thwart many (though not all) attempts at change. These refusals left the growing ranks of liberals frustrated and vowing to change the way Congress did business.

In 1975, four senior members of the House were denied their committee chairs by the rest of the House Democrats. One was forced out because of a scandal (involving someone known as "Fanne Fox, The Argentine Firecracker"). The other three were forced out because they had not been responsive to other members of their committees. In other words, they were *not* forced out because of specific *wrongdoing*, they were forced out for doing *precisely* what chairs had done all along—running their committees in a dictatorial fashion. This action was the warning shot by the liberals that seniority would no longer be the sole determinant for committee chairs.

The liberals formalized their control through the Subcommittee Bill of Rights, a new set of House rules that steered power away from committee chairs. It stated that committees must follow set rules. They must have subcommittees, and committee chairs could not control what the subcommittees did. The bill also limited the number of chairs anyone could hold, forcing the southern conservatives to give up several chairs to the less senior liberals. It also said that all legislation must be referred to the subcommittees—so there was less chance that a committee chair could kill a proposal by refusing to act on it. Subcommittees, who were often chaired by the younger programmatic liberal Democrats, became the locus of power and activity in the House.

The less formal Senate did not pass any similar changes. However, the influx of programmatic liberals changed the way they did business as well. The result was that, by the late 1970s, power was spread out among many more people than it was just a decade earlier.

When Republicans finally gained control over Congress in 1995, they attempted to reverse the decentralization trend. One of their first acts was to repeal the Subcommittee Bill of Rights. Because the new Republican Speaker, Newt Gingrich of Georgia, had enough support from his party to hand-pick some chairs, he—and not the chairs—was really the beneficiary of this change.

By this time, though, the die of decentralization had been cast. Congress operated under "subcommittee government" for a generation by the late 1990s, and was becoming used to it.

While seniority was attacked from the left in the 1970s and from the right in the 1990s, it still survives as a formidable tradition in Congress.

Operation

Once again, Woodrow Wilson is on target with the following passage from his book: "Once begin the dance of legislation, and you must struggle through its mazes as best you can to the breathless end—if any end there be" (Wilson, 1885/2009, p.297).

The process of creating laws is often referred to as labyrinthine—having lots of twists and turns where proposals can (and do) disappear. To understand the method for this madness, let us explore the process.

The Dance

Proposals may come from anywhere: constituents, interest groups, the president, and yes, even members of Congress come up with ideas now and then! Most proposals come from the president. Why? The Executive Branch is charged with carrying out the laws, so they are in the best position to make suggestions.

Proposals go round and round through the legislative path. They may or may not emerge at the end. Of the 14,000 proposals typically introduced in recent congresses, only 400-500 become law—and often over 100 of these are ceremonial in nature (Singer, 2008).

Proposals must pass both houses in identical form before being sent to the president to consider. They may begin in either house (or both simultaneously), with one exception: constitutionally, all bills for raising revenue must begin in the House.

In the House, bills are first submitted to the Speaker's office. The Speaker determines to which committee(s) to send the bill. One of the changes made in the mid-1970s was to give the Speaker the power of *multiple referral*, which allows the Speaker to send a bill to several committees at once or to divide pieces of a bill among several committees. Once in committee, bills are first referred to a specialized subcommittee, which is where the action begins. The subcommittee holds hearings to gather information on the bill. They then "markup"—make changes to, or *amend*—the bill based on information from the hearings. They then vote on whether or not to send the bill to the full committee. If the majority

of the subcommittee fails to support the bill, it is dead. If they do support the bill, it then goes back up to the full committee for further consideration.

Action in the full committee is the same as in the subcommittee: hearings, mark-up, vote. In a sense, it is a second chance to affect the bill—this time by a somewhat wider circle of actors. If the full committee fails to support the bill, it is dead. If they do support it, it will eventually go before the entire chamber.

In the Senate, bills are first submitted to the office of the majority leader who will, in consultation with the minority leader, refer the bill to one or more committees. The committee and subcommittee process in the Senate is identical to the House process (see above). If the full Senate committee supports the bill, it will also go before the entire chamber. However, at this point the House and Senate paths differ.

In the House, because it is such a large body, there are strict limits on debating and amending legislation on the floor. In the smaller Senate, there are no such limits. Debate and amendments are unlimited and need not be *germane* (related to the issue).

In the House, each and every bill gets a rule from the Rules Committee before it is scheduled for floor action by the entire chamber. The rule may place limits on floor debate and amendments. House rules specify that the *maximum* allowable debate on any bill is one hour per member. In addition, the rules require all debate and all offered amendments to be germane. The Rules Committee may enact stricter limits on debate (all the way down to no debate at all), and may place limits on amending (all the way down to no amendments at all) as well. These abilities make the Rules Committee a very powerful force in the House. Keep in mind—the Speaker exercises control over it (see the earlier discussion of the Speaker's powers).

With no similar rules in the Senate, there is no similar referral to any rules committee. They consider legislation using *unanimous consent agreements* (UCAs). These are agreements (negotiated between proponents and opponents) on debate and amendment limits that—as the term implies—require the consent of everyone in the chamber. There are no standard rules to enforce UCAs. This lack of enforcement power is often used strategically in the form of a **filibuster**—an attempt to talk a bill to death—or a *hold* (which is basically a *threat* to filibuster). It works this way: to debate legislation, senators seek recognition to speak. When granted, they may engage in discussion and debate. As long as they are recognized, no other action takes place on the Senate floor. Under UCAs, they voluntarily give up that recognition after a while so others may speak. However, a senator wishing to disrupt the process may continue to speak. At this point, the senator is said to be filibustering.

Remember, there are no standard limits on a filibuster—including the content of the discussion. Some filibustering senators have sung songs. Some have read recipes. Some have even read from phone books! All is fair during a filibuster. It is not a tactic used lightly, though. Consider this: If you filibuster my bill today, I just might come back tomorrow and filibuster your bill.

The one way to end a filibuster is through a cloture vote. *Cloture* is essentially a petition among senators to formally limit debate on a bill. However, it is very difficult to invoke cloture because the vote is not determined by a simple majority. Invoking cloture currently requires 60 votes, which is a very high standard.

MODERN FILIBUSTERS: SANITIZED FOR YOUR PROTECTION? In earlier times, filibusters were tiresome and physically difficult—as depicted in the classic film *Mr. Smith Goes to Washington*. In the past, senators wishing to filibuster had to talk continuously—hour after hour. The record for an individual filibuster was set in 1957 by Senator Strom Thurmond (D-SC), who spoke continuously for just over 24 hours in opposition to civil rights legislation. For one person, that may be a long time, but for the entire process, it is really not very long. Some began to realize that one way to elongate a filibuster is to work in concert with others. Teams of senators may filibuster for days, weeks, or longer. When one Speaker tires, a sympathizer rises to ask a question—which may take several hours—giving the original Speaker a much-needed break (the rules allow a senator to maintain recognition while others are asking questions). Thus, a typical filibuster involves several senators taking turns speaking and asking questions of each other. A classic example of this was the 57 days that several senators held control of the floor during debate over the Civil Rights Act of 1964.

In recent decades, changes in the way the Senate handles debate has led to an explosion of filibustering. First, majority leaders of both parties began scheduling two or more bills for floor action at the same time. They will then bring up one of the bills for debate—but they will seek to invoke cloture *first—before* any debate occurs. If the cloture vote fails, the bill is pulled off the floor in favor of one of the others scheduled at the same time. Consequently, bills may now be kept off the floor with simply the *threat* of a filibuster—often called a "hold." A senator will essentially say to the majority leader, "If you bring up this bill, I will filibuster."

In addition, when a traditional filibuster *does* occur, the Senate now acts in a "genteel" manner. Instead of forcing around-the-clock sessions, the Senate will adjourn each evening. When it reconvenes in the morning, the previous speaker is recognized first—to continue the debate (filibuster).

Together, these changes make filibuster/cloture activity the focus of the contemporary Senate. If we use cloture petitions as indicators of the filibuster or

hold, we can see a truly massive increase in this activity. In the fifty years before the process changed—from the 1920s through the 1960s—there were a total of 56 cloture petitions. In 2019-2020 *alone*, there were 328 petitions (United States Senate, 2021).

In addition to legislation, presidential nominations to the executive branch and courts were also subject to filibusters. These nomination filibusters increased dramatically as well, from virtually none in the 1950s to over 300 from 2007 through 2011 (Kane, 2013). This led the Democratic majority at the time to change the rules on all but Supreme Court nominations to allow debate to be stopped by a simple majority vote. This so-called "nuclear option" was extended to cover Supreme Court nominees by the Republican majority in 2017. In 2021, Senate Democrats—once again in the majority (see the Chapter 6 case study)—debated eliminating filibusters entirely to prevent Republicans from derailing their ambitious legislative agenda. As of June 2021, Democrats lacked enough votes to once again invoke the "nuclear option".

The End Game

In order for a bill to become law, it must pass both houses in identical form and be submitted to the president. Given the ability of both houses to amend legislation, *if* bills pass both houses, they are almost always different from one another. These differences must be resolved if the legislation is to be presented to the president. One way to resolve any differences is to have one house simply adopt the other's version. Sometimes it happens, but given the different perspectives of the two houses, it is not likely. Often, both houses will call for a *conference committee* consisting of members of each house (usually from the committees that worked on the bills). As noted earlier, conference committees exist solely for the purpose of resolving the differences between the House and Senate versions of a bill. Once those differences are reconciled, the committee disbands.

The reconciled version is presented to both houses for an up-or-down vote (conference reports may not be amended). If it passes both houses, it is presented to the president, who may sign it into law (or allow it to become law without signing it), or veto it. If it is vetoed, it is returned to the Congress, where both houses may try to override the veto with a two-thirds vote in favor from each house[11]. If such a vote is successful, the bill becomes a law without the support of the president.

The dance must begin anew with each new Congress. If a bill has not become law by the time Congress adjourns before the next congressional elections,

11 Except for "pocket vetoes," which are vetoes occurring while Congress is not in session. Pocket vetoes may not be overridden.

it must begin the process all over again at the start of the new Congress the following January.

The Budget

In addition to legislating, Congress also keeps the federal government running by passing an annual budget. The rules governing this process have a profound effect on both the functioning of Congress and the distribution of power within it.

The process is relatively simple. Early every year, the president submits a budget proposal to the Congress. It consists of requests from all federal agencies and organizations for operating funds, as well as requests from the president for funding new programs and policies. Congress then molds these proposals into a budget for the following year.

From February through mid-April, Congress works on *authorizing* legislation. This step is the typical legislative process described above. While there are many exceptions, in general, for laws to take effect the following year, they must be authorized by mid-April of the current year. This legislation includes a budget for the program/policy (the maximum funding it may legally withdraw from the U.S. Treasury). Authorization must be completed by April 15th, when Congress must approve a preliminary budget resolution.

While budgets have now been authorized, not a single penny has been allocated yet. The process of actually doling out money to each policy/program is known as the *appropriations* process. From May through mid-June, two huge committees—the Appropriations Committees in each house—do this work. They decide how much funding each policy/program actually gets. Appropriations must be completed by June 15th, at which point Congress must approve another—binding—budget resolution.

Not every policy/program gets everything it wanted. Difficult economic times or less than expected revenue may mean some items get appropriations that fall short of their authorized maximum. In many instances, this shortfall requires rewriting the authorizing legislation to accommodate the newer budget realities. Orders from the Appropriations Committees to rewrite are known as *reconciliation orders*. These orders mean standing committees must return to work legislating. They must complete their work by the end of September. The new budget ("fiscal") year begins on October 1st.

This relatively straightforward process—authorization, appropriation, reconciliation—sounds as though it can be carried out simply and completely every year. Is it? No. Modern budget realities mean frequent funding shortfalls,

and that means fights over every penny. The process is *rarely* completed in time for the new fiscal year. The government cannot operate without a budget (even if the money exists, it cannot be withdrawn from the Treasury without the proper legislation). To avoid a shutdown, Congress will pass a *continuing resolution*, which is a joint resolution (which must be signed by the president, like regular legislation) that allows the government to continue spending at current levels. Continuing resolutions may last anywhere from a few hours to several months or longer.

CONTINUING ALL YEAR The budget for 2007 was never completed. This marked the first time since the budget process was adopted in 1974 that the government failed to finish the process. By the end of 2006, the outgoing Congress had completed work on funding for only two areas: defense and homeland security.

After losing seats in the 2006 elections, the outgoing Republican majority passed a continuing resolution that left the remaining work to the new Democratic majority taking office in 2007. Once the Democratic majority assumed control of both houses in January 2007, they quickly realized that they could not complete work on the 2007 budget while simultaneously working on the 2008 budget. They simply passed another continuing resolution to fund the remainder of the government through the end of the fiscal year (September 2007) at the 2006 levels.

2008? You guessed it! Congress did not complete a budget in time, so they had to pass yet another continuing resolution. This lasted through December of 2007—marking the first time the government operated for more than an entire year under continuing resolutions. Since then, the government has operated under resolutions about as often as under formal budgets as Congress, the president, and the two political parties continue to push very different priorities. The PBS *Frontline* documentary "Cliffhanger" covers some of the recent battles (see https://www.pbs.org/wgbh/pages/frontline/cliffhanger/).

Congressional Evolution[12]

The 1970s and beyond were a time of great change in the Congress. The changes in the membership and operating rules discussed earlier went hand-in-hand with changes in the legislative process and the functioning of Congress. What emerged is a far more complicated institution using far more "unorthodox" processes (Sinclair, 2017).

12 Much of this section is based on Sinclair, Barbara. 2017. *Unorthodox Lawmaking*. 5th ed. Washington DC: CQ Press.

The "Traditional" Process

Prior to the institutional reforms of the mid-1970s, when committee chairs still ruled the show, the legislative process was relatively simple and open. Bills were referred to a single committee in each house. In the House, the rules for debate and amendments were generally open—allowing members the maximum amount of debate and relatively unrestricted ability to propose amendments. The amendments were often supportive and they usually passed. In the Senate, the process was similarly open. Unanimous consent agreements were relatively simple and filibusters were rare. House-Senate differences in legislation were often minor and were resolved in small conference committees.

The Modern Process

Beginning in the 1970s as congressional power became more dispersed, but especially in the 1980s and later as the parties became increasingly polarized, the process grew far more complex. To allow the growing ranks of policy entrepreneurs many avenues to tend to their constituents, bills were often referred to several committees in each house. This led not just to action within each committee, but also to negotiations *between* committees as well. To keep fragile coalitions together in the House, floor rules became more restrictive. These rules left little time for members to speak. Complex rules limiting amendments became the norm. In the Senate, unanimous consent agreements became more complex and limiting. Negotiations among senators to avoid potential filibusters became commonplace. Yet, even with these negotiations, the amount of filibustering increased significantly. Prior to the 1970s, the number of filibusters (as measured by cloture votes) in each two-year Congress usually numbered in the low single digits. From the 92nd Congress (1971-72) through the 99th Congress (1985-86), the number fell below 20 only twice. From the 100th Congress (1986-87) to the present, the number has fallen below 40 only once, and topped 100 for the first time in the 110th Congress (2007-08) (United States Senate, 2021).

Negotiation rules the day not only within the Senate but between the houses as well, as ever-larger conference committees (often containing over 100 representatives and dozens of senators) discuss major changes in legislation—often, in effect, rewriting bills. Furthermore, negotiations occur not only within Congress itself but between Congress and the president too, as presidents try to secure votes for passage of their programs and as Congress tries to avoid presidential vetoes.

What Happened, and Why?

The changes in membership and operating rules discussed earlier had a profound effect on the behavior of the institution and its members. Barbara Sinclair (2017) notes three factors involved in the increasingly complex legislative environment:

- Internal reforms: Changes in the composition of the Congress in the 1960s and beyond (especially the influx of "programmatic liberals" discussed earlier) and changes in the media landscape (especially the increased imagery of television) led to a greater focus on individuals. In the Senate, this meant extended debate and a greater number of amendments to legislation. Passing legislation increasingly required 60 votes to stop the growing number of filibusters. In the House, there were shifts in power to accommodate these changes—downward to increasing numbers of subcommittees and upward to the Speaker—reducing the power and autonomy of the standing committees. This made legislating more difficult for the majority party.
- The budget process: As part of the reforms in the 1970s, a formal, annual budget process was created by the 1974 Budget and Impoundment Act. This new process provided Congress with a mechanism for comprehensive policy change. In other words, policies must now fit into a single annual budget. Congress can no longer simply pass laws and worry about the budgetary consequences later (as it could before the 1974 law was passed).
- The political environment: From the 1960s onward, three things became more common in the political environment—adding to the complexity of the legislative process: divided government, partisan polarization, and budget deficits. From 1911 to 1961, there were only 14 years of divided government (where the majority party in one or both houses of Congress is not the president's party). From 1961 to 2011 that number more than doubled to 30 years[13]. At the same time, the two parties have become more polarized as conservative southern Democrats defected to the Republicans and liberal northeastern and western Republicans defected to the Democrats. This left Democrats largely moderate to liberal and Republicans largely moderate to conservative by the 1990s (i.e., see Kohut et al, 2010)[14]. At the same time, increasingly common

13 Including the unprecedented year of 2001, where the government went from divided to unified and back to divided (because of a single party defector) in the space of six months.

14 For an illustration of this increasing polarization in Congress, see Keith Poole's NOMINATE data at https://voteview.com. To view the changes from the 1960s, examine the graphic here: https://voteview.com/static/articles/party_polarization/voteview_party_mean_

budget deficits create a "zero-sum game" where new policies become more difficult to fund. All of this makes the widespread cooperation needed to work the legislative process more and more elusive.

Other "Stuff"

How Members Decide

Just as voters use cues (see Chapter 6) in elections, so do members of Congress use them to decide whether or not to vote for legislation. Though written 30-plus years ago, John Kingdon's (1977, 1981) research on congressional voting is still considered the standard. According to Kingdon, there are several "actors" that influence congressional voting: constituents, fellow legislators, party and committee leadership, interest groups, the Executive Branch, congressional staff, and media.

As Kingdon says, the obvious place to start is with *constituents*—the voters. It is all too easy to say legislators should simply represent their constituents. Reality is far more complicated. For one thing, most votes cast by members of Congress involve regulatory, budgetary, or arcane procedural issues about which, as one representative bluntly said, "[m]ost of my constituents don't care" (Kingdon, 1981, p.32). When voters *do* care, though, even the most homogeneous constituencies may not possess a single, obvious opinion. A related complication is the intensity of voter preferences. Many voters may hold an opinion on an issue, but they may not feel strongly about it. Should a legislator vote with an apathetic majority, or with an intense minority?

Because constituents are not always the best source, legislators also look to other actors.

- *Fellow legislators*, including *party and committee leaders,* can sometimes provide direction. Fellow legislators provide a trusted and convenient source, whereas the leadership is often a strategic source—especially to the ambitious legislator.
- Despite our jaundiced view of *interest groups*, they are often a valuable source of information regarding an issue. This makes them valuable at times when there is no constituency consensus and/or when legislators lack detailed knowledge of the issue at hand.
- While *presidents* often possess "a store of credit" with their *own* party, Kingdon finds remarkably little reliance on the Executive Branch as a source (Kingdon, 1981, p.186). This is most likely because of both

diff.png. Notice that after a period of relatively low polarization in the middle of the 20th century, the measured distances between the parties ("polarization") in each house began to increase again in the 1960s.

partisan and institutional competition. That is, at any given time, a large portion of Congress is not from the president's party (often a majority). In addition, Congress is fiercely protective of its constitutional power and position. This interinstitutional rivalry sometimes keeps even fellow party members from relying on the president. Also, local constituencies are often at odds with the president's national concerns. What appears to be executive influence may better be explained by partisanship.

- While rarely credited by members of Congress as a source, their own staff commonly provide significant direction:

> *Adequate staff, the argument rules, could considerably ease the information burdens and the claims on the congressman's time. In the process, the staff could be expected to be an influence on congressmen's decisions of considerable importance, since they work with the legislators day in and day out, presumably have their confidence, and supposedly are in a position to furnish and withhold information, suggestions, and advice.* (Kingdon, 1981, p. 201)

- The *media* and *other sources of information* also provide direction to members of Congress. Traditional media and ever-expanding Internet sources (including blogs, Facebook, and Twitter) may affect members both directly and through their influence on many of the other cues noted above. Members of Congress also have access to information not available to the outside public. This extra information includes committee and staff reports, Executive Branch reports, and in some cases, classified information.

Other Activities

Lastly, while the basic job of Congress is legislating, and the main focus of that job is representation, there are other tasks Congress performs.

- Perhaps the most important is **oversight**. Oversight may take two related forms. First, it is the review of existing laws and programs to see if they are functioning as Congress intended, which is often closely connected to the budget process to see if existing laws and programs require budgetary adjustments. The second form involves investigations into businesses, industries, or other aspects of society—often in the wake of crimes, scandals, natural disasters, or economic distress—to see if government action is warranted.

- As noted earlier, the Senate has exclusive powers to confirm executive and judicial appointments and ratify treaties negotiated between the United States and other nations. This authority gives the Senate an increasingly important source of input into the other two branches of government as it acts as a check on presidential power. In addition, the 25th Amendment requires the House join the Senate in confirming appointments to fill vice presidential vacancies.
- In extreme instances, Congress also has the ability to discipline and even remove its own members and to impeach and remove members of the other two branches. Each house may *expel* a member upon a two-thirds vote of that house. **Impeachment** and removal from office of an executive or judicial official is similar to indictment and conviction in the court system. Constitutionally, the House has the sole power of impeachment. When impeached, an official is then tried by the Senate (with the chief justice of the Supreme Court presiding), which requires a two-thirds vote to convict and remove from office.

Discussion Questions

1. Do the nature of Congress and the roles of its members make it a truly representative body?
2. Explore how parliamentary systems function and compare them to our congressional system.
3. Attend a state legislative or city council meeting or visit the local office of a U.S. representative or senator. After doing so, consider: Do legislatures actually function as textbooks suggest they do?
4. Are interest groups *vital* to democracy, or do they *distort* democracy? You can research one of the largest and most controversial influences on Congress at these and other sites:
   - ▹ UShistory.com: *Interest Groups* (https://www.ushistory.org/gov/5c.asp)
   - ▹ Twyman & Whitney: T*he American Citizen and Interest Groups in American Politics*: (https://twyman-whitney.com/americancitizen/links/lobbies.htm)
   - ▹ The Center for Public Integrity: *Lobby Watch* (https://publicintegrity.org/topics/accountability/lobby-watch)

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8 The Presidency

Carl D. Cavalli

Learning Objectives

After covering the topic the presidency, students should understand:

1. The origins and executive nature of the presidency and the roles played by presidents.
2. The sources of presidential power.
3. The organization of both the White House and the larger Executive Branch.
4. The growth of presidential power and how that power has changed over the past century.

Abstract[1]

The framers envisioned a presidency that left them concerned about what they termed "energy in the executive." In other words, they thought the presidency would not be powerful enough. Contemporary politicians and scholars present a very different view. They often debate whether or not the presidency has in fact become too powerful. Related to this shift in the views about power is a shift in what is perceived to be the main sources of presidential power. The framers created an office empowered by, and limited by, the Constitution. However, modern analysts see the office empowered by a very different—and extra-constitutional—source: the public.

1 Portions of this chapter were originally included in Cavalli, Carl D. 2000. The Presidency. Lesson 10 in POLS 1101: American Government. University System of Georgia eCore℠

Introduction

The Second Branch?

The president is the head of the Executive Branch. By executive, we mean that it is the branch designed to carry out (or *execute*) policy. The framers clearly treated the executive as a secondary branch. It is discussed in Article II of the Constitution. Article I covers the Legislative Branch largely because they felt it would be the most powerful branch. It seems more the opposite today. How can this be so?

Basics

Presidential Roles

It is best to begin exploring this question by reviewing the expectations placed on presidents. That is, what roles do they play in our system? Generally, they play two roles: Chief of State and the head of government.

Chief of State

One role the president plays is that of **chief of state**, or national symbol. The presidency is the only office in this country elected by the entire nation. Presidents have come to embody their symbolic role in many ways.

The night Joseph Biden was formally declared the winner of the presidential election, he said "We must restore the soul of America." Is "we" his family? The White House? The federal government? No. His use of the term is a reference to the nation. Presidents often claim to be a voice for the American people (i.e., see Barger, 1978, Teten, 2007). True or not, their priorities do become our priorities—when a president suggests the nation focus on an issue (like civil rights or health care), we do engage in debate. We may not always *agree* with the president, but we do wind up *discussing* these issues as a nation.

In addition, presidential involvement in international affairs is the equivalent of American involvement. When the president signs an international agreement, America is committed to that agreement. When the president receives another nation's ambassador, it is *America* recognizing the existence of that country.

Consider the following private presidential conversations that were recorded on Dictabelts in the White House. Is it just the president talking, or is it *America* talking?

- Following the space flight of Major Gordon Cooper on May 16, 1963, President John Kennedy called him and said, "*We're* very proud of you, Major" (Miller Center, 2010a, emphasis added).

- On the birthday of famed poet Carl Sandburg, January 6, 1964, President Lyndon Johnson called Sandburg and said he wanted "to tell you how fortunate *America* was to have you with *us*" (Miller Center, 2010b, emphasis added).

These conversations were not intended for public consumption, and so they provide us with evidence that presidents often speak for all of America even in private moments. Of course, a glance at most public presidential addresses reveals the same character. You can see this by perusing White House video (https://www.youtube.com/whitehouse) and briefing (https://www.whitehouse.gov/briefing-room) sites.

Head of Government

The other role of the president is that of **chief executive** or chief operating officer of the United States. In this role, the president is recognized as the person atop the federal government's policy-making team.

In a sense, the president as the head of government is in charge of the day-to-day operations of the United States government. The president is, of course, the person charged with carrying out the laws of the land (as noted earlier). The president is also charged with evaluating the laws and recommending changes.

Most of the legislative proposals that Congress works on actually originate in the Executive Branch. The executive departments and agencies charged with carrying out the laws will also evaluate those laws: Are the laws having their intended effect? Are any changes needed? If so, what? All of this information eventually flows back up to the president, who will in a very real sense act as chief *legislator* in addition to being the chief executive.

Shortly after speaking to Carl Sandburg, President Johnson also called Minnesota Senator Eugene McCarthy regarding civil rights legislation in the Senate. He said, "I want you to pull together those other Democrats and make them attend the meetings, make them keep their mouths shut, make them vote down the amendments, and get me a bill out on that floor!" (Miller Center, 2010c). Though seated in the White House, Johnson is clearly acting as a legislator during this phone call.

Chief Legislator entails more than just evaluating and recommending laws. The president also has the constitutional power to veto legislation. Congressional legislation must be submitted to the president for approval. The president can either sign it into law or veto it. If the president vetoes a bill, it is dead unless two-thirds of each house of Congress votes to override the veto (see Chapter 7). This action would enact the bill into law without presidential approval. It is hard enough to get

sufficient votes to pass a bill in the first place, so you can imagine the difficulty of trying to get two-thirds of each house to override a veto. The consequence is that, generally, nothing becomes law without the president's approval[2]!

These roles are a lot to invest in one person. How does this compare to other nations? Who plays these roles in other countries? Compare the United States to the United Kingdom. In the United Kingdom, these roles are separated. The Queen acts as the ceremonial Chief of State, and the Prime Minister acts as the day-to-day head of government. In the United States, we combine them into one person, which would seem to make our presidents very powerful people. This statement is true, but the framers designed a system where one powerful executive does not go unchecked. We tether our presidents (that is, we limit their independence). They are tethered to Congress and the courts through checks and balances (see Chapter 2), and they are tethered to the public through elections (and politically through measures of public approval). In the United Kingdom, the Prime Minister is tethered only to the majority party in the House of Commons, and the Queen is not tethered to anyone.

In some instances, we can actually see a combination of these two roles. Our recognition of presidents as national leaders leads us to allow them substantive powers.

Executive Orders

As the head of government, the president supervises the Executive Branch. This responsibility includes deciding how to execute the laws of the land.

Bolstered by the role of Chief of State, the president has a lot of authority. That authority is exercised through the issuance of **executive orders**. If, for example, the Executive Branch is charged with carrying out various programs called for by legislation, the president may issue executive orders directing whom to hire and how to disburse the appropriate funding. While divorced from formal congressional authorization, these orders carry the same official weight as laws and at times may be used by presidents in place of legislation in the face of an uncooperative Congress.

The effects of this kind of order may have profound consequences, not only for the Executive Branch, not only for the program involved, but also for the individuals hired and for the society at large.

The situation was true for one of the most famous executive orders in the post-World War II era: Executive Order #10952. With this order, President

2 There is a third possibility—the president may let a bill become law without signing it by letting it sit for 10 days. This option essentially says, "I don't like this bill, but I don't want to fight it." It is not a commonly exercised option.

John F. Kennedy created the Equal Employment Opportunity Commission in 1961. It was charged with insuring that, in all contracts using federal funds, the contractors must take affirmative action to ensure that applicants are employed, and employees are treated fairly during employment, without regard to race, creed, color or national origin. This marked the first time the term "affirmative action" was used by the federal government, putting its weight behind the cause of civil rights with consequences (and controversy) still felt today.

Executive Agreements

An **executive agreement** is an agreement between the President of the United States and the head of another country. While the president has the constitutional power to negotiate treaties with other countries, such treaties require the approval of two-thirds of the Senate. Executive agreements, on the other hand, do not require any congressional approval (although any money or changes in the law that may be required to fulfill an agreement must be approved by Congress through the normal legislative process), yet they are recognized as having the same force of law as treaties. This recognition has been granted—and upheld by the courts—precisely because of the president's standing as Chief of State. In other words, the president has the power to speak for the country and to commit its resources in an agreement with other nations. For example, despite an official policy of neutrality, President Franklin Roosevelt took it upon himself to reach an agreement with the United Kingdom to exchange U.S. warships for British bases during the opening months of World War II. At the time, there was no specific legal or constitutional provision empowering the president to do so. He justified his actions on the *commander-in-chief* and *executive* powers found in the Constitution, as well as a minor law permitting the president to dispose of obsolete military equipment. Congress eventually acquiesced to this by passing the Lend Lease Act of 1941, which permitted the president to lend "defense articles" to any government "whose defense the president judges vital to the defense of the United States."

Executive Privilege

Executive privilege is the claim by presidents of their right to refuse to hand over information requested by Congress. The logic is that the constitutional provision for separation of powers means that the Congress has no right to force the president to turn over information to them. It is most often used with the rationale of maintaining secrecy for purposes of national security.

In his battle with Congress over materials related to the Watergate scandal, President Richard Nixon tried to exert an absolute claim of executive privilege. In the case of *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court ruled that, while presidents do have a right under the separation of powers to claim executive privilege, the right is not absolute.

In 1998, Federal Judge Norma Holloway Johnson ruled that executive privilege does not cover presidential conversations with White House aides absent any national security claims. In so ruling, she compelled reluctant presidential advisers to testify in the investigation into President Clinton's affair with Monica Lewinsky.

More recently, the administration of President George W. Bush invoked claims of executive privilege on a number of occasions, including its refusal to disclose documents relating to Vice President Dick Cheney's meetings with energy company executives during the administration's development of energy policy proposals and its refusal to allow White House personnel to testify before Congress during the investigation into the firing of U.S. attorneys (i.e., see Holding, 2007).

What Makes a President Powerful?

In one of the most famous explorations of presidential power, Richard Neustadt (1990) claims that the constitutional powers of the president amount to no more than the powers of a clerk.

Remember, the framers designed the presidency as an office which merely carries out the laws passed by Congress. Yet, modern presidents are often referred to as the most powerful person on Earth. During the Cold War, presidents were referred to as "the leaders of the free world." This description sounds like a lot more than just a clerk. How can it be?

If Neustadt is correct, most presidential power does not come directly from the Constitution. It must come from somewhere else. An exploration of presidents' constitutional and legal sources of power, along with their more political sources, may help clarify this confusion.

Constitutional and Legal Power Sources

These sources of power stem from either the Constitution itself or from federal law.

The Vice President

The vice presidency is established in both Articles I and II of the Constitution. Our first vice president, John Adams, said, "I am nothing. I may be everything." The first part of Adam's lament is based on the lack of formal duties for vice presidents. This case was especially true in Adams's day, because vice presidents were then the second-place finishers in the presidential elections—which meant they were the opposition as far as the new president was concerned. So, vice presidents were then largely isolated from their presidents. The 12th Amendment changed this situation by providing for the separate election of vice presidents, which grew into a system where vice presidents are largely elected with their own party's presidential nominee.

The second part of Adams's quote, "I may be everything" is based on the vice president's position as first in the line of presidential succession. Should a president die, resign, or become incapacitated, it is the vice president who takes over as president. It has happened eight times in our nation's history (eleven times, if you count the three times that recent vice presidents temporarily took charge as their presidents underwent medical procedures).

Today, vice presidents are on much friendlier terms with their presidents. They are often trusted advisers. Vice presidents are increasingly charged with leading various presidential initiatives. For example, George W. Bush's Vice President, Dick Cheney led many administration policy initiatives, including those regarding energy and anti-terrorism policy. Cheney was described by many as the most powerful vice president ever (Walsh, 2003, Kuttner, 2004), though some speculated that his successor Joe Biden may have been as or more powerful (Hirsch, 2012, Rothkopf, 2013, McDuffee, 2013). Biden was also a trusted adviser to President Obama, especially in the area of foreign policy. He led many administration initiatives, especially those involving the budget and gun control. President Trump's Vice President, Mike Pence, also acted as an adviser, and all indications are that President Biden's Vice President, Kamala Harris will as well.

As noted in Chapter 7, vice presidents are also formally charged with presiding over Senate floor debate, but since that debate is essentially unregulated, this duty is without true power. Oftentimes, the vice president is mainly an electoral resource—someone to help a presidential candidate pull in votes in an area of the country where that person might be weak.

The White House Staff and The Executive Office of the Presidency

Positions and organizations in these two entities may be based on direct presidential creation or on congressional statutes (or some combination thereof). They act as personal/political and policy advisers to the president, respectively.

- The **White House Staff** are the people who most immediately surround the president. They act as *personal* advisers. These people advise the president on what to say, when to say it, what to do, who to meet, and when. The president's Chief of Staff coordinates this group, which includes people like speech writers, press and appointment secretaries, and political advisers.
- Members of **Executive Office of the President** (or E.O.P.) act as *policy* advisers to the president. They advise the president on what policies to pursue and propose and assist with management of the federal bureaucracy. This group includes economic advisers, legislative advisers, and domestic and foreign policy advisers, among others.

The president appoints members of the White House Staff and top E.O.P officials. Many do not require Senate confirmation because they are advisers without any true operational responsibility. In addition, they serve "at the president's pleasure." This phrase means they serve only as long as the president wants them. The president may fire them at any time without cause.

Because of their advisory role, presidents often place some of their closest acquaintances in these positions. New presidents generally replace all of the previous occupants with people they want and trust. Information on White House offices and agencies may be found on the White House website (see: https://www.whitehouse.gov/administration).

Cabinet Departments and Executive Agencies

These are the organizations created by congressional statutes. They actually carry out policy. In this capacity, they both assist the president in fulfilling the roles of the chief executive and provide the president with advice on future policies to pursue. These departments and agencies are grouped according to substantive topics, much like the committee system in Congress. Examples include the departments of Agriculture, Commerce, Defense, and Homeland Security, The Small Business Administration, and NASA (see Chapter 9).

The president nominates the heads of these organizations, but unlike the advisers, they require Senate confirmation. The reason for this distinction is

that, unlike the advisers, these organizations have operational responsibilities (in other words, unlike advisers, they actually do something). They carry out the will of Congress (in the form of laws), so Congress has a say as to who heads these departments and agencies.

Like the advisers, department and agency heads serve at the president's pleasure. Generally, incoming presidents will replace most or all department and agency heads with their own people. Everyone below the few top levels in these organizations are neither appointed nor fired by the president. They are hired under provisions of the Civil Service (see Chapter 9) based on merit and cannot be fired except for cause. As such, lower level department and agency employees often serve in their positions as careers which cross two or more administrations. Information on cabinet departments and executive agencies may be found at the USA.gov website (see: https://www.usa.gov/federal-agencies/).

It is clear from all this information that cabinet departments and executive agencies are more independent and removed from the president than are the White House Staff and E.O.P.

WHO DO YOU TRUST? Presidents have many sources of advice. Members of the White House Staff and the E.O.P. are hired as advisers, but cabinet secretaries and agency heads are also in a good position to provide advice—especially since they are the ones actually out there carrying out laws and policies.

Since members of the White House Staff and the E.O.P. depend on the president for their jobs, they sometimes become "yes people" and shield the president from bad news. Understandably, this characteristic makes them potentially poor advisors[3]. The **Cabinet** may actually be in a better position to give advice. After all, they know if policies are working or not because they are running them! But will presidents listen to them?

Cabinet departments and executive agencies are less dependent on the president for their jobs (since the heads of these organizations require congressional confirmation and everyone else is a civil service hire). As such, they are much more likely to say no to the president when needed. Is there potential here for a president to become isolated in a "White House Fortress" favoring those White House aides who are least likely to be honest over the cabinet and executive officers who have real-world experience? Is there any evidence that recent presidents favored their White House and E.O.P. advisors over their department and agency heads?

3 When she was President Reagan's Assistant for Public Liaison, Elizabeth Dole once ironically remarked, "The president doesn't want any yes-men and yes-women around him. When he says no, we all say no" (Werthheimer & Gutgold, 2004).

Appointment Power

The Constitution empowers the president to appoint all federal judges and Supreme Court justices, and top-level cabinet and executive agency personnel (including the ambassadors who represent the United States around the world), subject to Senate confirmation (see Chapter 7). In addition, presidents may hire White House staff as they see fit. These appointments amount to over 6,000 people by recent estimates. This ability is considered a source of power, because it gives the president the ability to shape the Executive Branch. The president has the power to appoint area and issue experts and/or to reward loyal supporters with jobs ("**patronage**"). Also, while judicial appointments serve for life, Executive Branch appointments (except for those in regulatory agencies) serve "at the president's pleasure" (meaning they may be fired at any time, without cause). As mentioned earlier, this power is best illustrated at the start of each new administration, especially if the new president is not from the same party as the outgoing one. At that time, most, if not all, incumbent department and agency heads resign to allow the incoming president to nominate "friendly" replacements[4].

Legislative Power

Though not part of the Legislative Branch, many consider the president our "chief legislator" (Rossiter, 1956, p. 14; see also Cavalli, 2006). The president is an important actor throughout the legislative process. The presidency is actually the primary source of legislative proposals. In fact, in some instances, such as with the federal budget, the president is actually required by federal law to submit proposals[5]. The Constitution even requires the president to recommend legislation "from time to time" (Article II, Section 3). This process has become institutionalized as the president's annual "State of the Union Address." This **agenda-setting** function gives the president a lot of influence over Congress's legislative work (i.e., see Light, 1999).

Modern presidents tend to live or die by the success of their campaign proposals (Cavalli, 2006), which almost always involve legislative proposals. So, once proposals are submitted to Congress, presidents have a natural interest in taking steps to ensure their passage. Much of their time is spent building support for their proposals both publicly and with members of Congress.

4 Though rarely admitted, there is evidence that most presidents ask new appointees to submit a standing letter of resignation. Presidents will pull out these letters when they want to replace someone but wish to avoid the distasteful act of firing them (which sometimes leaves the impression that the president erred in their hiring).

5 The Budget Act of 1921 requires the president to submit a budget to Congress every year. A related example is the Employment Act of 1946 which requires the president to submit an annual economic report to Congress that includes direction on how to achieve future economic goals.

The constitutional **veto** power (Article I, Section 7) also gives presidents influence at the end of the process. All legislation must be presented to the president who may sign it into law (or allow it to become law without signature after ten days) or reject it with a veto, which the Congress may try to override and enact into law on its own[6] (see Chapter 7).

So, the head of the Executive Branch is actually one of the most influential players in the legislative process at all stages: The beginning (recommends legislation), the middle (builds support), and the end (signs or vetoes).

Chief Diplomat and Commander-in-Chief

The president is also our chief diplomat and **commander-in-chief** of our armed forces. The president effectively manages our relationship with the rest of the world. As chief diplomat, the president meets with foreign heads of state, negotiates treaties, and enters into executive agreements with them, and receives foreign ambassadors in recognition of their government. As commander-in-chief, the president oversees the nation's military establishment:

> *In times of peace he raises, trains, supervises, and deploys the forces that Congress is willing to maintain. With the aid of the Secretary of Defense, the Joint Chiefs of Staff, and the National Security Council—all of whom are his personal choices—he looks constantly to the state of the nation's defenses.* (Rossiter, 1957, p. 11)
>
> *In [times of war] the President's power to command the forces swells out of all proportion to his other powers. All major decisions of strategy, and many of tactics as well, are his alone to make or to approve.* (Rossiter, 1956, p. 12)

WHO LET THE DOGS OUT? Though the Constitution makes the president the commander-in-chief of our armed forces (Article II, Section 2), it gives the power to declare war to the Congress (Article I, Section 8). The power to, as Shakespeare put it, "Cry 'Havoc,' and let slip the dogs of war" (*Julius Caesar*, Act III, Scene I) is actually divided between the two branches. This division has generated a long-lasting tension between them that particularly flared up during the Vietnam War. As with all post-World War II military actions, this "war" was never declared by Congress. Presidents simply began committing troops into military action without seeking a formal declaration from Congress. The escalation of the Vietnam War by presidents Lyndon Johnson and Richard Nixon in the face of drastically declining public and congressional support led Congress

6 Except for "pocket vetoes," which are vetoes occurring while Congress is not in session. Pocket vetoes may not be overridden.

to pass the **War Powers Resolution** in 1973. The act limits the president's ability to commit troops into hostile action without the express consent of Congress (see Chapter 14). Though never challenged in court for fear of losing, all presidents since its passage have considered the act an unconstitutional infringement on their power as commander-in-chief. Congress, also fearing that they would lose a court challenge, has never fully insisted on the act's enforcement. Instead, the two sides seem to have reached a mutual understanding where presidents will continue to commit troops to action without any formal war declaration by Congress. In place of a formal declaration, though, presidents will seek some sort of consent (e.g, see CNN politics, 2002), and Congress, not eager to appear unpatriotic or unsupportive of the military, will most always grant that consent.

These constitutional and legal sources of power are available to all presidents. As such, they would not explain variations in presidential power. In addition, in and of themselves, they have changed little over time. The size of the executive branch has grown tremendously, especially during the 20th century. However, the appointment power has actually been curtailed—largely through the Civil Service Act. As noted earlier, Richard Neustadt claims all these resources make the president nothing more than a clerk (with a really top-notch support staff!). They do not, according to Neustadt, explain the modern transformation of the presidency into something often regarded as the most powerful position on earth. To explain that, we must move beyond these sources.

Political and Other Power Sources

These sources of power are not formally specified either in the Constitution or in federal law. However, Neustadt and others say they are responsible for much of the power of the modern presidency.

Support: Election and Approval

Whether through election or through ever-present public opinion polls, a president with the support of the public can accomplish a lot. For example, presidents often suggest legislation to Congress. Congress is more likely to act on those suggestions if the president can claim that the American people support such legislation. After all, the American people collectively comprise the voters who put members of Congress in office (and can take them out as well!). A president who claims a popular mandate because of a landslide electoral victory and/or high public approval ratings can claim such support. One without such a mandate cannot.

Support: Party and Group

Political party is a source of loyalty and cooperation that can bridge the separation of powers built into our system. This was the original intent of the Anti-Federalists as they organized themselves into the first American political party (see Chapter 6). Presidents can often count on their fellow partisans to support their initiatives and proposals. In Congress, this support translates into votes. There, it helps even more if the president's party is the majority—more able to control the process and to deliver a victory for the president. Obviously, a Congress controlled by the other party can severely constrain a president's influence over policy.

Groups can work to build public support for presidents. This support, in turn, can bolster a president's influence over Congress when seeking legislation. Democratic presidents will often seek to work with labor unions like the AFL-CIO, while Republican presidents will often seek to work with business groups like the Chamber of Commerce.

Leadership

When the president raises an issue, it becomes the topic of discussion for many, if not most, Americans. For example, if the president says we should debate the issues of reforming Social Security or access to affordable health care, the country debates those issues. We may or may not agree with the president's position, but if it is an issue to the president, then it is an issue to us. In fact, we expect presidents to do this.

Think about what you look for in a presidential candidate. Do you look for one who says "I promise to do the best I can to execute the laws of the land" or one who says "I want to change this law or create that policy?" You probably prefer the latter. It gives the president the opportunity to set the nation's agenda. That is, to lead the way on the issues upon which we will focus our energies.

Media

When the president says it, it is news. It is as simple as that. The White House is simply required coverage for any major news organization. This means that presidents can rely on media to convey their ideas to the public. In fact, with the development of the Internet, presidents have far more avenues to advance their ideas than ever before. Ironically, many presidents often distrust the media, seeing them as the enemy rather than as an ally (Nelson, 2000). However, presidents who see the benefits can use the media as a conduit to exercise the leadership

discussed earlier. In the television—and now, Internet—age, presidents are increasingly "going public" to sell their policies directly to the people (Kernell, 1986). The Internet especially allows presidents to communicate directly with the public, avoiding the scrutiny and punditry of news media (for example, see: https://twitter.com/POTUS).

Presidential Power Redux

The contention among presidential scholars like Richard Neustadt is that presidents' constitutional and legal powers add up to no more than that of a servant to Congress. Yet, we know that the president is thought of oftentimes as the most powerful person on earth. Neustadt and many others claim that *real* presidential power stems from persuasive abilities backed up by public support and skillful use of other political resources (Neustadt, 1990, Tulis, 1987, Jacobs, 2010, Tichenor, 2010).

THE "JOHNSON TREATMENT" COMES TO THE WHITE HOUSE: Shortly after the assassination of President John F. Kennedy in November 1963, the new president, Lyndon Johnson, formed a commission to investigate the murder. One person he asked to serve on the commission was Senator Richard Russell of Georgia, one of the most senior and powerful members of Congress at the time.

Sen. Russell tried to decline the appointment. Yet, President Johnson took the audacious step of simply announcing that Russell, among others, had been appointed to the commission. In a conversation recorded on a Dictabelt on the evening of November 29, 1963, President Johnson tells Sen. Russell that the announcement has already been made (Miller Center, 2010d). Russell protests, "I just *can't* serve on that commission!"

Over the course of many minutes, Johnson simply wears Russell down. Russell is relentlessly bombarded with a mixture of flattery ("I've got one man that's smarter than the rest…"), patriotism ("You're going to serve your country and do what is right!"), loyalty ("I'm begging you!", "…your president's asking you to do these things…because I can't run this country by myself!"), and conspiracy theories ("The Secretary of State…[is] deeply concerned…about this idea that [Soviet Premier] Kruschev killed Kennedy.").

Eventually, a resigned Russell says, "We won't discuss it any further, Mr. President, I'll serve."

The Growth of Presidential Power

As noted earlier, the Executive Branch was not first on the minds of the framers. They clearly felt Congress would be the more dominant branch. Their vision held true through the 19th century and into the 20th. Then, things began to change.

The Legislative Branch is designed to discuss and debate. These are essential abilities for law-making in a democratic society. The Executive Branch is designed to execute, in other words, to *do* things. It is designed for *action*. In the 20th century, a series of major—indeed international—crises touching several generations of Americans began to permanently shift our main expectation of the federal government from one of democratic deliberation to one of action.

The Great Depression of the 1930s, The Second World War in the early 1940s, and the Cold War of the late 1940s through the late 80s all required action—in many instances immediate action—often on a massive scale. We began to *expect* the federal government to secure our well-being from threat after threat. The government responded by taking unprecedented action to manage the economy during the Great Depression, and to beef up our military capabilities and international involvement throughout the Second World War and the Cold War. These responses are now permanent areas of government activity. Concerns over domestic and international terrorism in the early 21st century have perpetuated this activity.

So how do these things empower the presidency? Quite simply, all this activity required legislation and each new law and program required another executive agency and more presidential advisers.

"The President Needs Help"

So said the Brownlow Committee on Administrative Management in its 1937 report following President Roosevelt's attempts to cope with expanded government in the face of the Great Depression. The committee recommended a formal structure to help manage the growing number of agencies and the laws and programs they administer. Over time, most of their recommendations were adopted as the Executive Office of the Presidency. This management assistance in turn allowed the pursuit of a broader array of policies, further empowering the Executive Branch.

Congressional Accomplices

In some instances, the Congress actually ordered the president to take action. For example, in the last several decades, presidents have been required

to monitor and manage levels of national inflation and unemployment. They have also been required to certify which foreign countries are worthy of our highest levels of trade.

The more laws, the larger the Executive Branch. The larger the Executive Branch, the greater the effect of presidents and presidential decisions on our lives. By the late 1920s, the Executive Branch grew to and has remained at over 1.5 million civilian personnel. There are yet another 2 million military personnel under the Department of Defense. These numbers make the Executive Branch the largest single employer in world history!

Case Study: Presidential Power in the Trump Era

The research for this case study was provided by University of North Georgia students Hayden Lathren and Antonia Ramirez.

Presidential Power established Richard Neustadt as the leading presidential scholar of our time. The book has had a "greater effect than any other book about a political institution." (Charles O. Jones quoted in Nelson, 2010, para. 21).

To Neustadt, presidential power is "the power to persuade" (1990, p.11). Success is conditioned upon the ability to persuade others that their interests coincide with the president's, especially as those whom presidents must persuade will have at least some means to resist. Because everyone has some measure of status and authority, presidents derive persuasive abilities (aside from any innate talents) from their status and authority relative to others. The greater degree of these possessed by presidents, relative to others, the greater is presidential persuasiveness.

Presidents accrue status and authority from their professional reputation and personal prestige, that is, their standing with both those in power and the public. The building blocks of both—and the *foundation* of Neustadt's formula—are a president's *choices*. A good foundation consists of choices made with power stakes in mind and those that help enlighten the public (Neustadt, 1990).

Later editions of *Presidential Power* suggest that presidents most effectively gain power by starting at the end and working backward, what Neustadt calls "backward mapping" (1990, p.215). So, presidents should focus on their *choices*. Even before taking office, newly elected presidents have crucial decisions to make, on organization, staffing, and priorities. New incumbents must address these with very little guidance. As Neustadt says, "No continuity of pattern, no stability of doctrine, and precious little lore survives from one Administration to the next . . ." (1990, p.228). This is true especially of transitions involving partisan change.

Donald Trump and Presidential Power

President Trump deliberately tried to distinguish himself from his predecessors. He was described as "an unusual president" (Kheel, 2019, para. 1), as someone who sought "transformational policy change" (Edwards, 2018, p. 475), who "differed significantly from other recent presidents in his management of the White House staff, domestic cabinet appointments, and relations with his national security team" (Pfiffner, 2018, p. 153), and who "followed a strategy of ignoring . . . those outside of his base and has concentrated on keeping his base in a high fever" (Kennedy School, 2019, 1:01:35).

Trump also acted differently from his predecessors by "appoint[ing] to most domestic departments cabinet secretaries who were opposed to their departments' missions" (Pfiffner, 2018, p. 159). He defied convention at every turn—since only he could fix a broken nation, as he memorably said at the 2016 Republican National Convention (Applebaum, 2016). His West Wing was "an unstructured workspace governed by [his] moods", including all external communications and press operations (Karni & Haberman, 2019, para. 6).

So, did President Trump "represent a new way of thinking or is he merely an extension of trends that have long been in place" (Jordan & Pennebaker, 2017, p. 312)? Is Donald Trump an outlier in Neustadt's universe, or is he another example of the still-relevant framework of *Presidential Power*?

President Donald Trump: Persuasive? Successful?

Was Trump's unusual style successful? First exploring both popular and academic assessments will help clarify the meaning of "success." Behind this exploration, though, always lies the question of Neustadt's ongoing relevance.

A Mixed Bag

George C. Edwards III (2018) says that

> *[t]he most notable fact about Trump's legislative record to this point is the relative absence of passage of significant legislation. Although tax cuts did pass, prominent among the legislation that did not pass were bills dealing with health care reform, infrastructure spending, and immigration—policies central to Trump's presidential campaign. In 2018, Congress simply ignored large sections of the president's budget proposals.* (p. 456)

Edwards implies that Trump's legislative success is low because he did not try to obtain support for his proposals. In fairness, Edwards attributes this omission not to any lack of persuasiveness but to an "opportunity structure that was mixed" (2018, p. 475). Similarly, Matthew Glassman (2019) suggests that "[t]hroughout the first two years of the Trump presidency, Republican leaders in Congress skillfully used a variety of tactics to minimize the president's influence and maximize their own control over public policy" (p. A23).

After tracking Trump's campaign promises, *Politifact* points out that at the midpoint of his term, Trump kept 17 pledges and compromised on another 11. However, "almost half of his promises from the 2016 campaign have been blocked or dropped." (Tobias 2019a, para. 2). On a more positive note, they also point out that "close to a third of his goals were achieved or saw partial progress" (Tobias 2019a, para. 2).

By comparison, about a quarter of the promises of Trump's predecessor, Barack Obama, were blocked or dropped.

> *Two years in, Obama had broken 7 percent of his promises, and 15 percent were Stalled. That means the proportion of Obama's promises that ran into significant obstacles was less than half the proportion of Trump's.* (Tobias 2019b, para. 6).

While Trump's team "proudly points to a number of first-year successes", as David E. Lewis, Patrick Bernhard, and Emily You (2018) conclude, his critics alternatively "suggest that the administration's achievements have occurred despite the president's management performance rather than because of it" (p. 495).

Those critics might point to Executive Order 13769—prohibiting refugees and immigration from several countries with large Muslim populations. According to James Pfiffner (2018), high-ranking Trump officials, including his Press Secretary and Homeland Security Secretary emphatically denied that the ban intended to prevent Muslims from traveling to the U.S. However,

> *President Trump undercut them when he tweeted, "People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"* (p. 156).

Pfiffner goes on to say that "cabinet members were not consulted or informed about important policies" and "often publicly disagreed with the president or had to backtrack or explain his changes of mind", indicating "a lack of communication" (p. 162).

Critics may also point to the 2017 tax cuts that Edwards (2018) suggests were the "most important legislative victory" for Trump (p. 467). As Edwards notes, this was "the area of policy on which [Trump and Congress] have the most agreement" (p. 467).

> *Thus, cutting taxes is easier than virtually any other legislative task for Republicans. "If we fail on taxes, we're toast," said Republican Senator Lindsey Graham.* (p. 467)

Such a legislative victory arguably does *not* exemplify presidential power, since the Republican majority in Congress was predisposed to support such cuts (Cavalli, 2006). As Senator Graham said at the time, "Cutting taxes is in the Republican DNA" (Stolberg, 2017).

Trump's choices as president did indeed affect his power, just as Neustadt suggests.

President Trump, Persuader

Another and perhaps the best example of *Presidential Power*'s continued relevance is the successful enactment of criminal justice reform in the First Step Act, a bill characterized as "a significant victory for Trump" (Rodrigo 2018, para. 5).

While it had bipartisan support in both houses and passed the House with overwhelming support (360-59), the bill faced significant Senate opposition, including from Majority Leader, Mitch McConnell who initially refused to schedule it for a vote (Kim & Dawsey 2018, para. 2). While it may have passed in the Senate anyway, persistent, vocal, and public support for the bill from the President and his surrogates (i.e., see: Offutt 2018, Levine & Everett 2018, Fandos & Haberman 2018, and Trump 2018) led the opposition to reconsider.

Indeed, the President's public support is said eventually to have convinced several reluctant Republican senators to support the bill and, more crucially, McConnell to schedule it for a vote: "Trump's support for the bill was key last month for advocates, and he repeatedly pushed Senate GOP leadership to bring it up for a vote this month." (Rodrigo 2018, para. 10)].

Trump's *choice* to vocally support the bill had a direct effect on its eventual passage.

Conclusion: Is *Presidential Power* still relevant?

Trump's wins and losses do suggest the continuing relevance of Neustadt.

Matthew Glassman (2017) notes that when Trump chose to ignore "Neustadt's strategic advice" he made "simple errors that have damaged his professional reputation and public prestige—and ultimately his power" (para. 15), leading to several policy failures.

On the other hand, when Trump applied Neustadt's advice—as with his active promotion of the First Step Act—he scored a policy victory over some significant opposition within his own party. To paraphrase Neustadt, persuasion (criminal justice reform) succeeds, command (travel ban) does not.

Neustadt described our governmental system as "separated institutions *sharing* power" (1990, p. 29). Former Presidential Assistant Roger Porter recently pointed out that this is evolving into separate institutions *competing* for power (Kennedy School 2019, 00:32:32). As such, former Harvard Provost Harvey Fineberg—who worked with Neustadt—stresses the importance of persuasion in the presidency alongside the importance of learning about history (Kennedy School 2019, 00:25:26).

"Backwards mapping", staffing the presidency, and other *choices* presidents make were crucial in the Trump era and will continue to be so to Biden and beyond. Presidents can still benefit from Neustadt.

Discussion Questions

1. Discuss the nature of executive power and the framers' intentions for the presidency.
2. From where do other nations' leaders derive their power? For example, compare the source of power in both the British monarch and Prime Minister to our presidents.
3. Visit or contact either your state governor's office or a state executive agency, or if possible, the White House or a federal agency or cabinet department and explore the "every-day" meaning of executive power.
4. Perhaps the most famous modern study of the presidency is Richard Neustadt's *Presidential Power*. Contrary to earlier views, Neustadt suggested the main power source is *not* the Constitution (as the best known work at the time–Edward S. Corwin's *The President: Office and Powers*–suggested), but rather presidents' persuasive abilities, as affected by their situation relative to others ("status and authority"). His work is still celebrated today (i.e., see Michael Nelson's tribute in *The Chronicle*

of Higher Education: "Neustadt's 'Presidential Power' at 50," https://chronicle.com/article/Neustadts-Presidential/64816/). Later research built on his ideas:

- Aaron Wildavsky's 1966 "The Two Presidencies" (*Trans-Action*, vol. 4, iss. 2, pp 7-14)
- Graham Allison's 1971 *Essence of Decision* (Boston: Little, Brown, and Co.)
- James David Barber's 1972 *Presidential Character* (Englewood Cliffs, NJ: Prentice-Hall)
- Samuel Kernell's 1986 *Going Public* (Washington, DC: CQ Press)

Use these classic works as a starting point to research changing views on the nature of presidential power.

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9 Executive Agencies

Barry D. Friedman

Learning Objectives

After reading this chapter students will be able to:

1. Explain why the assortment of executive institutions is necessary to administer the laws that Congress enacts.
2. Describe the various structural forms of executive institutions.
3. Understand the various ways in which executive officials obtain their jobs.
4. Evaluate the relationships that the executive institutions conduct with the president, Congress, the judiciary, and the institutions' respective clientele groups.

Abstract

Article II, Section 3, of the Constitution empowers presidents to "take Care that the Laws be faithfully executed." Executing the thousands of laws that Congress has enacted requires the work of more than one official, so an enormous administrative apparatus (commonly referred to as the "bureaucracy") is in place to execute the laws under presidential supervision. During the over 230 years since the Constitution went into effect, the administrative establishment has grown piecemeal, with a wide variety of institutional forms (such as departments, multi-member commissions, government corporations, and other types) that have been installed for sound or arbitrary reasons. The officials who are appointed to serve in the Executive Branch obtain their jobs in a variety of ways, sometimes based on rewarding loyalty to the president and sometimes based on installing the most qualified individual. While presidents struggle to get their subordinates to follow directions, they discover to their chagrin that bureaucrats—to serve their own interests or to hold on to their jobs—routinely act, instead, to indulge members of Congress, clientele groups, and others who are just as adamant as the president about their own interests that, they are convinced, ought to be served by the administration.

Introduction

In Article II, the U. S. Constitution presents a pithy description of what the president's job will be. Perhaps the principal duty assigned to the president is the one that is inherent in the job of being the chief executive. The **executive power** is the power to execute the laws (or, synonymously, to administer the laws). Thus, Article II, Section 3, states, ". . . [H]e shall take Care that the Laws be faithfully executed. . . ." And while the Constitution is laconic in its discussion of the presidency, it is virtually silent about the organizational structure that will help the president execute (administer) the laws. Article II refers off-handedly to "the principal officer in each of the executive **departments**" and "the heads of departments." Otherwise, the Constitution left the first Congress to figure out how to structure the Executive Branch and the first president to figure out how to manage it.

In 1789, the year in which the Constitution went into effect, the first Congress enacted laws establishing the Department of Foreign Affairs (renamed, within months, as the Department of State), the Department of the Treasury, and the Department of War (known since 1949 as the Department of Defense). Meanwhile, President George Washington and his principal advisor, Alexander Hamilton, designed the format by which the president would interact with his top-ranking subordinates. He began to conference regularly with **Secretary** of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, Secretary of War Henry Knox, and **Attorney General** Edmund Randolph. At some point, James Madison referred to this group as the president's **cabinet**, and the term had come into accepted use by 1793.

The Structure of the Administrative Establishment

In order to explain the structure of the national government's administrative establishment, this section of the chapter classifies the instruments of the administrative establishment into four components. This classification system is a simplification of the countless forms of administrative entities, but it serves as a helpful introduction to the structure of the Executive Branch.

Departments and Bureaus

As the introduction observed, Article II of the Constitution refers to "departments," and the first Congress established three of them. The department is, therefore, the oldest form of administrative apparatus in the Executive Branch. A department houses some number of **agencies**. An agency may house

some number of **bureaus**. Generally speaking, a bureau is the smallest unit of administration. Accordingly, the Executive Branch is popularly referred to as the **bureaucracy**. The traditional term for the head of a department is "secretary" (i.e., an assistant in whom an executive can confide), for the head of an agency is "director," and for the head of a bureau is "chief." But this general hierarchy of department–agency–bureau is very much a generality; not a single department of the national government adheres consistently to this nomenclature. Over time, departmental components have arisen haphazardly with titles such as administration, center, institute, office, and service.

Today, the national government has 15 departments. The departments are listed here in order of their department heads' cabinet seniority. Cabinet seniority determines the order of presidential succession, after the vice president, speaker of the House, and president pro-tempore of the Senate.

- Department of State (1789)
- Department of the Treasury (1789)
- Department of Defense (1789)
- Department of Justice (1870; expansion of attorney general's office, established in 1789)
- Department of the Interior (1849)
- Department of Agriculture (1862)
- Department of Commerce (1903)
- Department of Labor (1913)
- Department of Health and Human Services (1953)
- Department of Housing and Urban Development (1965)
- Department of Transportation (1967)
- Department of Energy (1977)
- Department of Education (1979)
- Department of Veterans Affairs (1989)
- Department of Homeland Security (2003)

As an example of how a department is structured, here is a guide to the components of the Department of Commerce:

Department of Commerce

- *Bureau of Industry and Security*
- *Economic Development Administration*
- *Economics and Statistics Administration*
  - ▷ Bureau of Economic Analysis
  - ▷ Census Bureau
- *International Trade Administration*

- *Minority Business Development Agency*
- *National Oceanic and Atmospheric Administration*
  - ▹ National Environmental Satellite, Data, and Information Service
  - ▹ National Marine Fisheries Service
  - ▹ National Ocean Service
  - ▹ National Weather Service
  - ▹ Office of Oceanic and Atmospheric Research
  - ▹ Office of Program Planning and Integration
- *National Telecommunications and Information Administration*
  - ▹ Office of Spectrum Management
  - ▹ Office of International Affairs
  - ▹ Office of Policy Analysis and Development
  - ▹ Office of Telecommunications and Information Applications
  - ▹ Institute for Telecommunications Sciences
- *National Institute of Standards and Technology*
  - ▹ Building and Fire Research Laboratory
  - ▹ Center for Nanoscale Science and Technology
  - ▹ Chemical Science and Technology Laboratory
  - ▹ Electronics and Electrical Engineering Laboratory
  - ▹ Information Technology Laboratory
  - ▹ Manufacturing Engineering Laboratory
  - ▹ Materials Science and Engineering Laboratory
  - ▹ Center for Neutron Research
  - ▹ Physics Laboratory
  - ▹ Technology Services
- *National Technical Information Service*
- *Patent and Trademark Office*
  - ▹ Patent Office
  - ▹ Trademark Office

This guide shows how the department houses a number of agencies (whose names are italicized), and some of the agencies house a number of bureaus. However, the titles of these entities are rarely referred to as "agency" or "bureau," insofar as Congress tends to disregard such conventions when naming new executive institutions.

The departments that the first Congress established arose for the purpose of accomplishing inevitable functions of a national government: the Department of State, diplomacy; the Department of the Treasury, finance; and the Department of War, military operations. The Department of Justice, an elaboration of the Office

of Attorney General, was established in 1870 to represent the national government in legal matters. The theme of most departments established in and since 1862 has been very different. Those departments, such as the Department of Agriculture, were established not to carry out a function of the government but, rather, to provide services to certain people or businesses, known as their **clientele**. The secretaries of these **clientele-oriented departments** are known to be committed to the well-being of their respective clientele groups, rather than to the health and prosperity of the nation as a whole. The creation of the Department of Homeland Security (2003) brought about a department that, like the earliest departments, is responsible for a government function–in this case, preparing for and responding to natural disasters and turmoil caused by humans (especially terrorists).

Today, presidents rarely convene a meeting of the cabinet. They understand most of the department heads are committed to the well-being of their respective clientele groups, and so their advice would tend to be directed toward those interests. When a president does bring the cabinet together, the purpose is likely to be the creation of a "photo opportunity" for the sake of attracting publicity. However, as Thomas E. Cronin (1975) observed, presidents will usually confine their solicitation of advice from department heads to the secretaries of defense, homeland security, state, and treasury, and the attorney general—i.e., heads of the functional departments because they are most likely to share the president's more generalized concern about the condition of the nation. Cronin refers to those department heads as the president's **inner cabinet**, and to the heads of the clientele-oriented departments as the president's **outer cabinet**, to indicate the president's perception of the former as being a source of more useful advice.

Executive Office of the President

The U. S. Constitution is designed to put the three branches of the government in competition with each other for power. From 1789 to the early twentieth century, Congress's clear motivation was to limit the power of the president by limiting the personnel resources available. President Washington and his successors had so little help assigned to them that they sometimes hired assistants and paid them out of their own pockets. One of the ways in which Congress limited the president's scope of authority was to control the process of compiling the national government's annual budget. Congress clearly intended to freeze the president out of this exceptionally important government function.

In 1921, Congress threw in the towel, admitting that the time-consuming budgeting process had grown to the point that the legislature could no longer handle it. Very reluctantly, Congress enacted the Budget and Accounting Act

of 1921. The law's creation of the president's Bureau of the Budget significantly expanded the size of the White House workforce. Otherwise, the president's personal staff remained modest.

President Franklin D. Roosevelt's New Deal programs, designed to respond to the challenges of the Great Depression, were predicated to some degree on the need for more presidential leadership and, therefore, more staff. In 1937, he appointed a Committee on Administrative Management (popularly known as the **Brownlow Committee**) to recommend improvements in the organization of the Executive Branch. The most famous sentence of the committee's report said, simply, "The president needs help."

Congress was mostly antagonized by the report's recommendations, insofar as it is loath to give presidents more resources that they can use to expand their base of power. But, again reluctantly, it gave Roosevelt authority to augment his White House staff in 1939. In accordance with this temporary authority, Roosevelt created the **Executive Office of the President** (EOP). The Bureau of the Budget (which is now known as the **Office of Management and Budget**) became the first component of the EOP.

One might wonder why the president, who has the assistance of the workforce of the 15 departments at the ready, would need the help of a separate establishment, the EOP. The answer is that each of the 15 departments has a specific mission to carry out programs in its respective area of function or constituency. The EOP, on the other hand, has, as its purpose, the job of helping presidents in their *general management* of the entire Executive Branch. The Office of Management and Budget (OMB), for example, helps presidents to ensure that Executive Branch agencies are properly funded and that the agencies spend the money responsibly and lawfully.

Today, the EOP houses the following institutions:

- Council of Economic Advisers
- Council on Environmental Quality
- National Security Council and Homeland Security Council
- Office of Administration
- Office of Management and Budget
- Office of National Drug Control Policy
- Office of Science and Technology Policy
- Office of the U. S. Trade Representative
- Office of the Vice President
- Executive Residence
- White House Office

Regulatory Institutions

Whenever a government makes prescriptions about what we may or may not do (such as outlawing murder), we can literally say that the government is regulating our behavior. But, in modern times, when people say something about government **regulation**, they are probably referring to rules made by government officials that direct *business owners and managers* about how they should run their companies. For example, the Environmental Protection Agency directs owners of industrial facilities to limit the quantity of pollutants that they emit into the air and waterways.

While all governments impose regulation in one way or another, Congress broke new ground in 1887 when it enacted the Interstate Commerce Act. On this occasion, the members of Congress believed that it had become necessary to extensively regulate the behavior of the owners and managers of the nation's railroad lines. Agriculture interests were complaining about the prices that the railroads were charging to haul agricultural products. But, in the Interstate Commerce Act, Congress did not simply prescribe standards for future railroad-company actions.

Instead, Congress established a new multi-member decision-making body, which it called the Interstate Commerce Commission (ICC). And it gave the ICC the power to regulate the railroads by *delegating legislative power* to it. Specifically, the ICC could study actions of the railroad industry and then promulgate (i.e., issue) **rules and regulations** *having the force of law*. Without further action by Congress, therefore, the ICC could make policies backed by the threat of penalties that could include fines and imprisonment.

The ICC and similar regulatory institutions are very worthy of note, if for no other reason than that they extraordinarily possess *all three of the major powers of government*, the separation of powers notwithstanding.

- They have the power to make rules and regulations that have the force of law. Therefore, we say that they have **quasi-legislative** ("kind of legislative") power.
- They have the power to issue notices and summonses in order to administer their rules and regulations. Therefore, they have *executive* power.
- If a regulated party objects to the way in which the regulatory institution has administered the rules, the institution has the power to hold a hearing in order to adjudicate the matter. Therefore, we say that these institutions have **quasi-judicial** ("kind of judicial") power.
- Most (but not all) of the regulatory establishments that Congress created from 1887 until the 1950s had these characteristics:

- ▹ Each one was created to regulate *one* industry. For example, the ICC was established to regulate the railroad industry. The Federal Communications Commission was established to regulate the broadcast-communication industry.
- ▹ The focus of the regulation to be developed by these establishments was **economic regulation**–especially prices charged by the industry and how companies would report their financial status to the government and to investors.

- Although the ICC was originally established as a component of the Department of the Interior, in 1889 Congress decided to insulate the commission from control by the president by lifting it out of the Department of the Interior and making it independent. Thus, it was Congress's common practice for several decades to create **independent regulatory commissions** (IRCs)—multi-member bodies that would be independent of day-to-day presidential supervision. Since 1935, when the U. S. Supreme Court handed down its decision in the case of *Rathbun ("Humphrey's Executor") v. United States*, 205 U.S. 602 (1935), members of these commissions have been immune from dismissal by the president during the commissioners' terms of office. The court invalidated President Franklin D. Roosevelt's dismissal of Federal Trade Commission member William E. Humphrey because of the possession by FTC members of quasi-judicial power. The court disliked the idea that a president could influence a commission member who might be involved in adjudicating a case to find in a certain way by threatening the member's job.

Here are examples of the IRCs that have been established to regulate single industries:

- Interstate Commerce Commission (railroads, and later trucking), 1887, terminated 1995.
- Federal Power Commission (electric utilities), 1920, succeeded by the Federal Energy Regulatory Commission in 1977.
- Federal Communications Commission (radio and television), 1934.
- Civil Aeronautics Board (airline fares), 1938, terminated 1985.
- Federal Maritime Commission (ocean-borne transportation), 1961.
- Nuclear Regulatory Commission (nuclear energy), 1975.

During the 1950s, a body of literature in economics and political science arose that revealed the IRCs' propensity to eventually do the bidding of the regulated industry rather than to serve the public interest. For this reason, the

reputation of the IRCs deteriorated. In addition, the theme of Congress's and the public's interest in regulation changed; instead of being principally concerned about prices, Congress and the public showed more concern about human issues, such as worker safety and the condition of the environment. Therefore, since 1960, when Congress has established regulatory institutions, it has done so in these ways:

- Instead of creating an independent multi-member commission, Congress will create (a) a regulatory agency that is housed within one of the 15 departments and headed by one administrator who reports to the secretary or (b) an **independent executive agency** that is *not* housed in a department and is headed by one administrator who reports directly to the president.
- The focus of the regulation to be developed by these agencies is **social regulation**—i.e., pertaining to the safety of consumers, workers, etc., to the condition of the environment, or some other noneconomic value.
- Instead of regulating *one* industry, the social-regulatory agency regulates a function of *all* industries. For example, the Occupational Health and Safety Administration (OSHA), a component of the Department of Labor, regulates the function of protecting worker safety in all industries. Similarly, the EPA, an independent executive agency whose administrator reports to the president, regulates the function of controlling pollution emissions in all industries.

Here are examples of social regulatory agencies that regulate functions of all industries:

Table 9.1: Some Social Regulatory Agencies

Name	What It Regulates	Type, Location	Date Est.
Federal Trade Commission	Truth in advertising and labeling; anti-competitive behavior	Independent regulatory commission	1914
Equal Employment Opportunity Commission	Fairness in employment	Independent regulatory commission	1965
National Highway Traffic Safety Administration	Automobile safety	Agency in the Department of Transportation	1970

Environmental Protection Agency	Pollution emissions	Independent executive agency	1970
Occupational Safety and Health Administration	Worker safety	Agency in the Department of Labor	1971
Consumer Product Safety Commission	Product safety	Independent regulatory commission	1972
Office of Surface Mining Reclamation and Enforcement	Environmental effects of coal mines	Agency in the Department of the Interior	1977

Insofar as some of these agencies are housed in the departments, this category of Executive Branch entities overlaps the first category (departments and bureaus), preventing these categories from being genuinely mutually exclusive.

Public Enterprises (Government Corporations)

The Executive Branch contains a number of institutions that are known as **public enterprises** and as **government corporations**. These institutions have a different purpose and a different structure than those described above. The purpose of these institutions is to sell products and services to people and businesses that want to purchase them. In this regard, the intention is that the users of the products and services will pay for the institutions' operating costs, rather than all of the taxpayers paying for them. Thus, in the operation of these corporations, the government relates to members of the public as a businessman would, rather than as the sovereign customarily does. The structure is somewhat different as well. The **red tape** to which government departments are subjected tends to be relaxed for the corporations in order to avoid strangling them. For example, while a government department has a fiscal-year budget whose remaining balance becomes inaccessible at the end of the fiscal year, a corporation does not forfeit the balance of its operating treasury just because the fiscal year expires.

Here are some active public enterprises of the U. S. government:

- Tennessee Valley Authority (sells electricity in the Tennessee Valley area, 1933).
- Federal Deposit Insurance Corporation (sells bank-deposit insurance to banks, 1933).

- U. S. Postal Service (sells postage stamps for mail delivery, 1970).
- National Railroad Passenger Corporation (popularly known as Amtrak, sells tickets for travel on railroads, 1971).

How Executive Branch Employees Obtain Their Jobs

While elections in the United States tend to be frequent and complicated, there are only two officials of the national government's Executive Branch whose names on the ballot result in their selection: the president and the vice president. All of the other employees have obtained their jobs through some kind of appointment process, such as these:

- *Partisan appointment*. Officials whose jobs involve advising presidents and helping to make public policy obtain their jobs through **partisan appointment**. That means that presidents or one of their top subordinates appoint such individuals based on arbitrary preference. The reason for the arbitrary preference can be any criterion that a president values. In the case of President Washington and his several successors, the major qualification for appointment tended to be membership in the landed gentry. Upon the 1828 election of Andrew Jackson, loyalty to Jackson and the Democratic party became the major criterion. When party loyalty is the criterion, we refer to appointments as being **patronage** or **spoils** appointments. Today, presidential appointments to cabinet-level positions tend to be based on a blend of apparent loyalty, experience, and ability. The presidents are loath to appoint an unqualified individual to head a department for fear that the incompetence will throw the department into disarray. Loyalty may be increasingly more important for sub-cabinet policymaking positions as the risk posed by ineptitude becomes less severe. In the case of ambassadorships, presidents will award any number of them to their most generous supporters who not only made contributions to their campaigns but also raised funds from many other affluent individuals. It has been settled law since the U. S. Supreme Court handed down its opinion in the case of *Myers v. United States*, 272 U.S. 52 (1926), that presidents may dismiss all of their partisan appointees in the Executive Branch, not including the members of independent regulatory commissions, who may not be removed during their terms of office.

  Presidential appointments to the most prominent positions in the Executive Branch—notably cabinet-level and top sub-cabinet-

level positions, seats on independent regulatory commissions, and ambassadorships—require a vote of **confirmation** by the Senate if they are to be effective. Appointments to less prominent positions do not require Senate approval. The jobs of the president's appointees have an "Executive Schedule" (EX) rating that determines the appointees' salary.

Pursuant to the Civil Service Act of 1883, partisan appointment to positions below the policymaking level is now illegal.

- *Professional and clerical positions*. For professional and clerical jobs whose incumbents are relatively uninvolved in policymaking, appointees obtain their jobs through merit appointment to positions listed in the "General Schedule (GS) Classification System." A person may obtain a job as a file clerk and be at the GS-1 level. A physician working as an experienced medical officer may be at the top, GS-15 level. On occasion, an outstanding experienced civil servant may be promoted beyond the GS-15 rank: A civil-service executive may be appointed to "Senior Executive Service" rank, a non-executive may be appointed to "Senior Level" (SL) rank, and a research scientist may be promoted into the "Scientific or Professional" (ST) rank. In the national government, professionals and clerical employees are appointed on the basis of **merit** to the **federal civil service**. All decisions about appointment and promotion are based on merit. Candidates' merits may be assessed through an examination, evaluation of their educational transcripts, evaluation of their résumé, and observation of their performance in an employment interview. In theory, the most qualified individual obtains the job. In order to eliminate patronage and spoils considerations in decisions about retaining and promoting employees, the civil-service system awards job security to appointees after a 1-year probationary period and then a 2-year "career-conditional" period. The job security protects civil-service employees from dismissal as long as they do their jobs competently and obey laws and rules. Employees threatened with dismissal are entitled to impressive due process, including numerous hearings in which their appeal is heard. So complicated and lengthy is this process that executives rarely make the effort to dismiss employees who are determined to hold on to their jobs.
- *Uniformed appointment*. Enlisted personnel and officers in the armed services obtain their jobs through uniformed appointment. The ranks of enlisted personnel, including noncommissioned officers, are specified by "Enlisted" (E) codes. For example, in the Army, a private has an E-1 or

E-2 rank and a sergeant major has an E-9 rank. The ranks of officers are specified by "Officer" (O) codes. For example, in the Navy, an ensign has an O-1 rank and an admiral has an O-10 rank. Appointment as an officer is based on merit. No particular merit is required to enlist as a private. Once a person is a member of the armed services, subsequent personnel decisions, such as promotions, are based on merit. One's adherence to a political party is not a basis for appointment or promotion; on the other hand, political activity can be deemed to interfere with the duty to serve the commander-in-chief (i.e., the president), the secretary of defense, and so forth, and can stop a soldier or officer's career in its tracks.

- *Impartial appointment*. Jobs involving trades, crafts, and unskilled labor (such as groundskeeper and janitor) are filled by impartial appointment of applicants to positions in the "Federal Wage System," in which the employees have "Wage Grade" (WG) ranks. The managers who hire these employees do a relatively cursory review of the candidates' applications, on which the applicants describe their training and experience. While the requirement of merit varies with some jobs requiring no particular merit for appointment, it is impermissible for the administration to take candidates' political beliefs or activity into account.

The Principles of Bureaucracy

Max Weber (pronounced vā′ bûr) was one of the legendary founders of the modern discipline of sociology. In 1922, he published a description of the characteristics of bureaucracies. Generally speaking, the institutions of the U. S. national government's Executive Branch conform to Weber's descriptions. He offered these observations about the way in which bureaucracies operate.

- *Hierarchy*. Weber explained that a bureaucracy is arranged as a **hierarchy**. That means that those whose positions are located atop the bureaucracy have more authority than those whose positions are located at the bottom. The arrangement of power based on this "scalar principle" is known as the **chain of command**. That means that those at the top of the bureaucracy issue commands, and commands are communicated vertically from the top to the bottom as lower-level employees are expected to implement the orders.
- *Unity of command*. The principle of **unity of command** means that each member of the bureaucracy reports to one and only one supervisor.
- *Division of labor*. The organization of a bureaucracy is also based on the existence of a **division of labor**. This term means that work is distributed

such that certain tasks are assigned persistently to the same individuals day after day, so that employees specialize in their regularly assigned tasks. Employees do not discover, upon their arrival at work on a given day, *what kind* of function they will carry out on that day.

- *Merit*. Weber said that decisions about appointments, promotions, and so on in the bureaucracy are based on qualifications rather than arbitrary criteria.
- *Adherence to rules*. A bureaucratic organization has a set of rules that determine how it will operate and what standards apply to employees. Some of these rules may be called **standard operating procedures** (or SOPs). Managers and employees are expected to be knowledgeable about these rules and to obey them; disobedience may attract a penalty.
- *Impersonality of policies*. In a bureaucracy, any kind of reward or disciplinary penalty directed toward an employee is expected to have resulted exclusively from the job-related performance or behavior of the employee, *not* on favoritism or prejudice. Therefore, if a supervisor fires an employee, the supervisor might point out to the employee that "it's nothing personal."

Defiance of Hierarchical Authority

The Constitution directs the president to "take Care that the Laws be faithfully executed." Therefore, the expectation must be that the officials and employees who staff the Executive Branch are responsible for helping the president ensure that the laws enacted by Congress are administered. Unfortunately for presidents, compliance with their directives is hard to come by. President William Howard Taft is quoted as having said, "Every time I make an appointment, I create nine enemies and one ingrate" (i.e., see Kettl, 2020, para. 4) Many research studies have been conducted to determine why the president's subordinates exhibit recalcitrance. This section of the chapter will describe what those studies have revealed.

Oversimplicity of the Hierarchical Model

As we mentioned above, Weber identified hierarchy, in which a chain of command is inherent, as a characteristic of bureaucracy. In the national government's Executive Branch, presidents would, presumably, take note of laws enacted by Congress, notify the bureaucracy about them, and instruct subordinates about the manner in which they want the laws administered; then,

the Executive Branch's workforce would administer the laws as the president has instructed them to do. However, while the Executive Branch is working to administer laws, other institutions in and out of government are operating simultaneously and attempting to exert influence in the execution of the laws. In the case of the other two branches of the government—the legislature and the judiciary—they arguably have a legitimate basis for monitoring how the laws are being executed and making generally inescapable demands that Executive Branch officials act in ways that are contrary to the president's preferences.

A list of institutions and other influences that may persuade the bureaucracy to act in such a contrary manner follows:

- *Congress*. The president competes for influence over the bureaucracy with Congress, but Congress tends to be more persuasive to Executive Branch officials. As explained in Chapter 7, one of the routine functions of congressional committees is **oversight** of Executive Branch agencies. After Congress has enacted a law and the Executive Branch proceeds to administer the law, congressional committees exhibit ongoing interest in whether the Executive Branch is administering the laws in the manner in which Congress intended. In order to carry out their oversight function, committees may summon Executive Branch officials to testify. If an official resists, the committee may issue a subpoena commanding the official's appearance. In the case of high-ranking officials, such as the president, vice president, or department heads, the White House may fight the subpoena on the basis that such officials have busy schedules and should not be at Congress's beck and call. On rare occasions, a federal court may consider whether the subpoena should be enforced and backed up with the threat of a penalty for contempt of Congress. Another compelling reason for agencies' attentiveness to Congress and its committees is Congress's exclusive power to appropriate money to Executive Branch agencies. Agencies are reluctant to antagonize members of Congress, knowing that Congress is the source of financial resources. Harold Seidman (1980, p. 54) reported that cabinet members are more likely to lose their jobs because of a breakdown in their relationship with a congressional committee rather than because of a disagreement with the president.
- *Judiciary*. The nation's more than 230 years of experience with the U. S. Constitution has resulted in general acceptance of the federal courts as the conclusive decision-makers about the constitutionality of laws, the acceptability of executive agencies' administration of laws, and the

disposition of federal criminal cases. An order from a federal court to Executive Branch officials is something that no official wants to defy, even if the president wants them to defy it. The officials know that defiance of a court order can expose them to fines or imprisonment. Just the threat of having to hire one or more lawyers and pay legal fees in order to deal with an altercation with the judiciary can be a very expensive proposition for an official.

- *Clientele groups*. Many institutions in the Executive Branch have connections with **clientele groups**. For example, each of the clientele-oriented departments—such as Agriculture, Commerce, Education, Labor, and Veterans' Affairs—has, as its principal purpose, the delivery of services that will gratify its clientele group. Therefore, the secretary of Veterans' Affairs cannot afford to alienate the leadership of such groups as the American Legion and the Veterans of Foreign Wars. Given the choice between angering the president or angering the department's clientele groups, a department official will usually focus on trying to appease the clientele groups. The president may forget about the argument, but the clientele groups are likely to carry a grudge against the official whose job, as they understand it, is to serve them every day.

  As another example, many of the independent regulatory commissions (IRCs) were established to regulate a single industry (i.e., the Interstate Commerce Commission that was established to regulate the railroad industry). A body of economics and political-science literature arose in the 1950s and exposed the fact that the IRCs were susceptible to the phenomenon of **clientele capture**. This term refers to the tendency of IRCs to promote the industries that they are supposed to regulate, instead of promoting the public interest. Economists George J. Stigler and Claire Friedland (1962) reported that prices charged by regulated electric companies were no less than they would be *without* regulation. The Civil Aeronautics Board, whose purpose was to regulate air fares, was shut down in 1985; after the CAB's elimination, air fares dropped precipitously.

  The behavior of Executive Branch institutions that shows more concern for pleasing clientele groups than for pleasing the president is described by a sociological term: **going native** (Katz and Kahn, 1966, p. 51). In literature of sociology, members of an organization are said to "go native" when they identify with the people on the wrong side of their organization's boundary. Accordingly, President Richard Nixon's

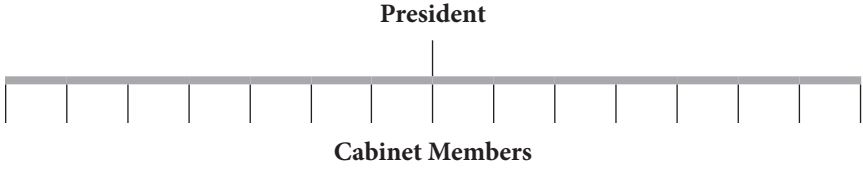
assistant for domestic policy, John Ehrlichman, became exasperated with the uncooperativeness of clientele-oriented department appointees whom the president appoints "and then the next time you see them is at the Christmas party. They go off and marry the natives" (quoted in *Los Angeles Times–Washington Post News Service*, 1973, p.79).

- *Others*. Agencies may also be influenced to make decisions unwanted by the president by such other entities as labor unions, employees' professional associations, civil servants protected by job security, and the news media.

The result of all of these relationships is that presidents are left with frustration as many of their orders to the bureaucracy are disregarded. In fact, Howard Ball (1984, p. 6) reported that, in 1969-1970, "there was noncompliance with more than half of the president's orders, commands, requests, and directives to the Executive Branch." Defiance of the president's orders does not usually result in attempts by the president to dismiss the recalcitrants. Presidents are fully aware of the pressures that the officials of clientele-oriented departments experience from their clientele groups, and know that replacement of such officials will simply result in more officials who go native. Frequent dismissals would simply make the president look inept, because, as the public is aware, he appointed the officials in the first place and the public would tend to wonder about the president's judgment.

The Force Field Diagram

The organization chart of the Executive Branch of the national government is conventionally presented this way:



The chart continues and expands downward by identifying sub-cabinet appointees, agency heads, bureau chiefs, and civil servants.

However, the multiple points of access and influence into the bureaucracy that are available to all sorts of political actors, as described in the preceding paragraphs, result in a reality that is far more complicated than that hierarchical chart. Grover Starling (2010/2011, p. 63) counters with a chart called the "force-

field diagram," which reflects the multitude of influences that affect an agency's decision-making process.

The heads of agencies, far from being responsible solely to the political appointee to whom they report, finds themselves on the receiving end of countless demands, orders, and pieces of advice that they can ill afford to disregard as they make rules, regulations, and other policies and decisions. This causes them to routinely give less weight to what they know are the president's policy preferences and to try to appease all of these other entities that may be applying pressure on them day in and day out. The simple chain-of-command principle may not stand up to this more complicated fact of life for executive officials.

Discussion Questions

1. What factors complicate the president's effort to manage the Executive Branch?
2. Why do executive officials frequently disobey presidential directives? What does this behavior reveal about the motivations and incentives that executive officials sense and that influence how they do their jobs?
3. How much power do executive agencies, their executives, and their civil-service employees exercise? What are the sources of their power?

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Court Cases

Rathbun ("Humphrey's Executor") v. United States, 205 U.S. 602 (1935)
Myers v. United States, 272 U.S. 52 (1926)

10 The Federal Judiciary

Brian M. Murphy

Learning Objectives

After covering the topic of the federal judiciary, students should understand:

1. The relationship of state courts to the federal judiciary.
2. The jurisdiction of federal courts.
3. The structure of the federal judicial system.
4. The procedures of the U.S. Supreme Court.
5. The powers of the federal judiciary.

Abstract

The judicial system in the United States is based on the doctrine of federalism. Two court systems exist side-by-side, national and state, and each has a distinct set of powers. State courts, for the most part, are responsible for handling legal issues that arise under their own laws. It is primarily when a federal question is presented that the federal judicial system can become involved in a state court. Otherwise, state judiciaries are generally autonomous even from one another. The Constitution precisely outlines the types of cases that can be heard by federal courts, yet it is almost impossible to force a federal court to hear a case that falls under its jurisdiction if the judge(s) wants to avoid it. The authority of the U.S. Supreme Court has slowly grown over time, largely through the power of judicial review. Nonetheless, federalism has managed to remain a significant barrier against federal courts becoming too powerful. The judicial system designed by the framers continues to survive and function after 200 years.

Introduction

The federal judicial system is the least commonly known and least understood branch of American government. In 2015, 32 percent of Americans did not even know the Supreme Court is one of the three branches of the federal government (Bomboy, 2016). This lack of knowledge is largely because judicial work is conducted out of the limelight. Only 43 percent could name *any* member of the Supreme Court (Green and Rosenblatt, 2017: 9), while 9.6 percent of college graduates believe TV's Judge Judy is one of the justices (American Council of Trustees, 2016, 5.). Anonymity works to the Supreme Court's advantage by building confidence in the institution. A survey by Marquette Law School found that the Supreme Court has a much higher level of public confidence (57 percent) than either of the other branches (22 percent in Congress and 21 percent in the executive branch) (Franklin, 2019, 18). In other words, the American public trusts the Supreme Court even though they know little about it.

Public apathy toward the judicial system runs counter to the increasingly important role courts are playing in the governing process. It is clear the framers believed the federal judiciary would be the weakest of the three branches since, as Alexander Hamilton wrote, it "has no influence over either the sword or the purse" (Hamilton, 1961, 465). Put another way, courts cannot command an army (or even the police) to enforce their decisions or allocate money to implement one of their rulings. Judges must depend on the other branches to get anything done, and this level of dependence on the other branches has not changed over time. According to an oft-repeated story, President Andrew Jackson supposedly mocked a decision by Chief Justice John Marshall with the words, "John Marshall has made his decision, now let him enforce it" (Schwartz, 1993, 94). But times and the role of the federal judiciary have not remained static. The federal judiciary has evolved beyond what Hamilton initially contemplated. One scholar even concluded that the United States is now operating under a "government by judiciary" because the U.S. Supreme Court can revise the Constitution by how it interprets the wording (Berger, 1997). As Chief Justice Charles Evans Hughes once quipped, "We are under a Constitution, but the Constitution is what the judges say it is" (Hughes, 1916, 185).

The actual power of federal courts lies between these two extreme viewpoints. While the federal judiciary remains dependent on Congress and the president to enforce judicial rulings, the courts are not powerless in the tussle over checks and balances. This chapter examines judicial power and defines the powers and limitations of federal courts. What must be kept in mind, however, is that relatively few cases ever end up in federal courts. Most judicial decision-making

takes place at the state level. The old adage that "I'll fight all the way to the U.S. Supreme Court" is legally impossible in the overwhelming majority of cases. State courts handle most of the legal action in the United States, so that is where we will start our discussion of the judicial system. Federalism quite clearly applies to the country's judicial system as well.

State Court Systems

In the United States, two court systems exist—federal and state—and there is remarkably little overlap between the two. In most situations, decisions on matters of state law are resolved by state courts, and no federal court, not even the U.S. Supreme Court, can overrule, which means state courts usually render the final judgment on most cases involving state law. The principal way cases from state courts can end up in the federal judiciary is when a **federal question** is involved in a dispute. A federal question is defined as a legal issue that concerns a federal law, federal treaty, or federal Constitution.

Consider the following example. Suppose an African American walks into a restaurant in a small town and is forcibly thrown out by the owner, breaking the visitor's arm. This scenario presents several potential legal claims, including aggravated assault and the violation of federal civil rights laws. The first issue, aggravated assault, constitutes a question of state law, while the civil rights claims are federal in nature. Where will this case be heard? Since state law is at stake, the case will go to a state trial court. What about the federal questions? Contrary to what some believe, state courts have the authority to decide federal questions when they are mixed with state law.

Judges in state courts are bound by two constitutional constraints in deciding cases that combine state and federal issues. First, Article VI, Section 2 of the U.S. Constitution, called the **Supremacy Clause**, declares the following:

> *This Constitution, and the Laws of the United States … and all Treaties … 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.*

As such, judges at the state level must swear to obey the federal Constitution, laws, and treaties regardless of state law. If there is a conflict between the two, the Supremacy Clause requires a state judge to enforce federal law over state law. The second legal constraint on state judges involves the interpretation of federal law. Does the state's supreme court, for example, have the authority to instruct lower

courts in its state how to interpret a federal law? In 1816, the U.S. Supreme Court ruled that state courts are bound by its holdings on federal questions (*Martin v. Hunter's Lessee*, 1816) no matter what the state's highest court has decided on the issue. In short, state judges must apply the rulings of the U.S. Supreme Court in deciding federal questions and should ignore any state law or state court ruling that is in contradiction.

Now, let us take another look at the restaurant dispute. At trial, the state court can rule on both the aggravated assault and civil rights issues. The judgment on aggravated assault, however, should be based on state law while the civil rights controversy should follow the rulings of the U.S. Supreme Court. Will a jury be used? In a state case, the right to a jury trial varies depending on whether a criminal or civil case is involved. A jury trial in a criminal case is available under the Sixth Amendment when a jail term of six months or more is a possible outcome of a trial (*Duncan v. Louisiana*, 1968). A civil case differs from a criminal case in several ways: (1) a criminal case involves either jail time or a fine as an outcome while a civil case is seeking either monetary damages (i.e., to cover injuries suffered like in an auto accident) or a declaration of rights (i.e., to decide who owns a piece of property or who has custody of a child); (2) the government is always a party in a criminal case while a civil case is a lawsuit between private parties; (3) the government's **burden of proof** in a criminal case requires establishing guilt beyond a reasonable doubt while the burden of proof in a civil case is the **preponderance of evidence** (i.e., the winning side is the one with the majority of evidence in its favor); and (4) states are under no constitutional mandate to provide juries in any civil case, although states are not forbidden from allowing them (*Minneapolis & St. Louis R.R. v. Bombolis*, 1916).

The famous O.J. Simpson murder case illustrates the differences between criminal and civil trials. Simpson was charged criminally with the murder of his ex-wife (Nicole Brown) and Ronald Goldman. While Simpson was acquitted of both murders in 1995, a few years later in 1997 he lost a civil suit to the families of Brown and Goldman for battery (touching without consent) and for wrongful death (causing death without legal justification)—the latter a civil parallel to murder. What must be understood is that the outcome of a criminal case has no bearing on a civil case involving the same act—like the death of Brown and Goldman—because the burdens of proof are not the same. Consequently, Simpson was found *liable* (the term guilty does not apply in a civil case) for $33.5 million for the wrongful death of Goldman, battery against Goldman, and battery against ex-wife Brown. In other words, O.J. Simpson was not guilty of murder but liable for causing the wrongful death of the same person!

Since all states guarantee the right to one appeal, a higher court can review a trial court's decision. It should be noted that the U.S. Constitution has no specific provision that requires the right to an appeal, even in cases heard in federal courts. An appeal is possible solely because every state as well as the federal government have enacted this right into law and, at least in theory, the right could be taken away.

It is important to note that an appeal cannot be based on the fact that the loser is unhappy with the outcome of a trial. Nor can a person appeal claiming innocence. Rather, appeals can only be based on a **question of law** that alleges an error(s) in procedure or application of a law occurred at the trial (i.e., evidence that should have been excluded was allowed or a juror was biased and should not have been permitted to serve). In practical terms, an appeal is contending that the judge made a mistake during the trial that could have impacted the outcome. Since an error in legal procedure or law is the basis of the claim, no juries exist in appellate cases because the average person has no background to know whether a judge committed a legal error. Juries are only found in trial courts and are used to determine questions of fact, such as guilt or innocence. Judges decide all questions of law during a trial. If a person declines a jury trial, the judge acts as both judge and jury (known as a **bench trial**).

In a criminal case, only the defendant can appeal if convicted. The government cannot appeal an acquittal. Either party, however, can appeal after the verdict in a civil case. Why would the winning party want to appeal? Consider Ward Churchill, a tenured professor at the University of Colorado. On the day after the destruction of the World Trade Centers on September 11, 2001, he wrote an essay comparing some of the workers in the buildings to Adolf Eichmann, who coordinated the Holocaust for Nazi Germany. Outrage emerged on a national level as the essay slowly worked its way across the internet. Churchill was eventually investigated by the university for this writing as well as on allegations of plagiarism. The University of Colorado Board of Regents fired him in 2007 for repeated and intentional academic misconduct. In 2009, a jury decided that Churchill had been fired in retaliation for his article but he was only awarded $1 in damages. Although Churchill won the civil case, he might contemplate appealing in an effort to collect a higher settlement.

Another popular misconception is that a person can be found innocent on appeal. It cannot happen, of course, because an appeal only involves questions of law, not questions of fact. If a person wins on appeal, the usual result is that a new trial is conducted before a different judge and jury, with the legal error from the first trial being corrected. Take the famous case of Ernesto Miranda, who was

convicted at trial for sexual assault. Miranda appealed to the U.S. Supreme Court, which held that Miranda's confession could not be used as evidence because he was never warned about his right to refuse to answer police questions. Miranda was not set free but was given a new trial in which he was again convicted because enough evidence of guilt existed without his confession. Thus, a person on re-trial after a successful appeal can still lose again and even receive a harsher sentence than the original penalty. Appeals are certainly not without risk.

Once a trial is over, a decision must be made whether to appeal. All states allow only a certain number of days to make this decision or the opportunity is forfeited. In the restaurant case, let us assume the **plaintiff** (the person bringing the case) lost on both issues at the trial court. Specifically, the jury decided that no aggravated assault took place because the restaurant owner (the **defendant**, or the person being sued) was defending himself and that no civil rights violation occurred since the plaintiff was kicked out for being unruly. Where will the appeal be heard? Let's find out.

Most states have three levels of courts in their judicial system:

- Trial courts determine questions of fact (a conclusion about the evidence).
- Intermediate appellate courts (found in most, but not all, states) sit without juries and handle questions of law made by judges at trial.
- State supreme courts (not called "supreme" in all states) generally hear appeals from intermediate appellate courts. In states with no intermediate appellate court, (https://www.appellatecourtclerks.org/links.html), an appeal from a trial court's decision is taken directly to the state's highest court.

In our example, let us assume that the intermediate and state supreme courts both upheld the decision of the trial court. Now what? The decision on state law (aggravated assault) is over and no further appeal is possible. The decision of the state's highest court will be the final word because aggravated assault is a matter of state law. With respect to the federal question (a possible civil rights violation), the losing party can appeal directly to the U.S. Supreme Court. No other federal court has the authority to take the appeal.

Aside from an appeal from a state's highest court to the U.S. Supreme Court, there are two other ways in which federal courts can become entangled with state courts. Upon conviction in a criminal case and an unsuccessful appeal to the state's highest court, a prisoner can file a *habeas corpus* petition to a federal trial court (called a U.S. District Court) claiming that a violation of a federal constitutional right took place (such as not being allowed to cross-exam a key

witness). If granted, the federal judge will issue a *writ of habeas corpus*—which translates into "you have the body"—to the jailor requesting that the prisoner be brought before the U.S. District Court to determine the legality of detention. In this way, *habeas corpus* serves as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" (*Harris v. Nelson*, 1969). Much like an appeal, a new trial at the state level will generally be ordered if the federal judge finds that a federal constitutional right was indeed denied. The new trial is designed to correct whatever error happened at the initial hearing.

The final way federal and state courts interact is through a **diversity suit**. These cases arise when citizens of different states (hence the word "diversity") are involved in a civil case. The framers were concerned that an unbiased court would not exist in a diversity suit because state judges might favor citizens from their own state. Consequently, the Constitution (Article III, Section 2) empowered Congress to grant federal courts the authority to handle such cases, and in the Judiciary Act of 1789, this jurisdiction was assigned initially to federal circuit courts. Nonetheless, certain cases are exempt from diversity jurisdiction since they would be inappropriate for federal courts to decide. These cases include divorce, alimony, custody, wills, and the administration of estates. In deciding a diversity case, a federal judge will actually apply the appropriate state—not federal—law that governs the situation.

Over time, the number of diversity cases exploded to the point where the federal judiciary became overwhelmed. Congress responded by shifting less important diversity cases (currently defined as a lawsuit with less than $75,000 at stake) to state courts. If the amount in controversy exceeds $75,000, the defendant (the person being sued by the plaintiff) has a choice between taking the case to state court or to a U.S. District Court.

The relationship between state and federal courts can be summarized as follows:

- State judges must apply federal law over state law if the two are in conflict.
- Appeals from a state's judicial system are submitted from the state's highest court directly to the U.S. Supreme Court but only the parts of the case that concern federal questions.
- *Habeas corpus* petitions from prisoners convicted of a state crime can be reviewed by U.S. District Courts if the breach of a federal constitutional right is alleged.
- U.S. District Courts may hear a civil suit between citizens of different states if $75,000 or more is at stake and the defendant elects federal over state court.

While separate, state and federal courts do interact on a narrow but important range of issues.

State court systems, in contrast, are entirely independent from each other. This means that the decision of a state court rarely has an impact outside its own borders. The lone exception—mandated by Article VI, Section 1 of the U.S. Constitution—requires each state to give **full faith and credit** to the judicial decisions of other states. Thus, a decision issued in one state must be respected by all other states (*Mills v. Duryee,* 1813). The Full Faith and Credit Clause is intended to prevent a person who loses a case to avoid compliance by moving elsewhere. For example, if a defendant loses a civil case in Pennsylvania and is ordered to pay $15,000, the defendant cannot escape the decision by changing residence to Georgia. The plaintiff merely has to file suit in Georgia to have the judgment enforced against the defendant. There is no need for a new trial since a valid and final decision was already rendered. The clause is frequently used in marriage and divorce situations. If people marry in a state with lower age requirements and return to their home state, the marriage must be honored even though it would be illegal if performed in that state. The Full Faith and Credit Clause, in short, protects the integrity of each state's judicial system in making its own judicial decisions.

Federal Jurisdiction

Two conditions must be met in order for a case to be heard before a federal court: jurisdiction and justiciability. **Jurisdiction** simply means that a court has the authority to decide a case. Article III of the U.S. Constitution outlines the kinds of cases federal courts are eligible to handle, but leaves it up to Congress actually to assign each potential area of jurisdiction. Congress can only provide federal courts with the powers allowed by the Constitution; it cannot expand federal judicial jurisdiction to cases beyond those specifically authorized in the Constitution. Moreover, Congress can change federal jurisdiction at any time by removing authority it had previously awarded to federal courts (Ex *Parte McCardle*, 1869). An effort to remove an area of federal jurisdiction is typically intended to deny federal judges the power to decide controversial issues. In the past, members of Congress have introduced bills to deny federal courts the jurisdiction to hear cases involving abortion, prayer in the school, and busing to desegregate public schools. Such efforts almost always fail in Congress because they are driven by politics rather than legitimate legal concerns. The independence of the judiciary is too deeply a part of the American political culture to allow the politics of emotional causes to interfere.

The jurisdiction of federal courts can be established in one of two ways. First, the Constitution identifies certain topics (**subject matter jurisdiction**) as appropriate for federal courts: federal questions (issues arising under federal laws, treaties, and Constitution) as well as **admiralty and maritime** law (disputes involving navigation and shipping on navigable waters). The second way the Constitution allows jurisdiction to be established in federal courts is where cases are brought by certain parties (**party jurisdiction**). There are four parties with this constitutional privilege: (1) the U.S. government, (2) one of the states, (3) citizens of different states (diversity cases), and (4) foreign ambassadors and counsels. If a case involves either a subject matter or party that falls under federal jurisdiction, a judge will next examine whether the issue is justiciable.

Justiciable means that a dispute is a matter appropriate for a court to resolve. In other words, courts should not be bothered with problems where a judicial decision is not necessary. Why waste a court's time? Judges look at five factors in making this determination, any one of which could render a case not relevant for judicial consideration.

- *Case or controversy:* The dispute must involve parties with a genuine conflict. Federal courts will not answer hypothetical questions. When George Washington sought advice about American neutrality during the European wars of the 1790s, the Supreme Court in a letter (not in a judicial ruling) declined to give an advisory opinion. Until an actual controversy arose about Washington's policy on neutrality, the justices believed that federal courts would not know what was to be decided.
- *Finality:* A federal court's decision must be final. The concept of separation of powers would be violated if another body should have the authority to review and modify a judicial decision. Judges alone make judicial rulings. When a congressional statute allowed the Secretary of War to review pension decisions made by federal courts, the Supreme Court held that the federal judiciary should not become involved because the Secretary of War could overturn whatever a judge decided on an issue involving a federal pension (*Hayburn's Case*, 1792).
- *Standing*: The plaintiff must suffer personal damage to a right protected under federal law or the U.S. Constitution. When Congress enacted a law requiring mandatory drug testing to land a job at the U.S. Postal Service, the union representing postal employees sued on the grounds that the statute violated privacy rights. A U.S. Appellate Court ruled that the union lacked standing because the drug testing policy applied only to job applicants who were not yet members of the union (*American*

Postal Workers Union v. Frank, 1992). The union itself, therefore, had not suffered any damage and thus had no standing.

- *Political Questions:* A federal court will not hear an issue that can be better handled by another branch of government. Consequently, the U.S. Supreme Court refused to rule on the constitutionality of the Vietnam War by claiming that foreign policy decisions should be made by Congress and the president (*Massachusetts v. Laird*, 1970). A majority of justices argued that judges have no expertise that qualifies them as experts on international relations. The Vietnam War, accordingly, was not a legal question but a political one.
- *Timeliness*: Cases must reach federal courts at a time when the outcome of a decision could make a difference. Judges will not take cases that arrive too early (**ripe**) or too late (**moot**). When a white applicant was denied admission into the University of Washington Law School even though minority applicants with lower test scores had been admitted, a court ordered the white applicant to be enrolled pending resolution of the lawsuit. By the time the issue reached the U.S. Supreme Court, the white applicant was in the final quarter of school and would graduate no matter what happened in the case. For this reason, the lawsuit was declared moot and no ruling was made (*DeFunis v. Odegaard,* 1974). Ripeness is the reverse of moot in the sense that a case is considered premature for decision. When a federal law prohibited federal civil service employees from taking part in political campaigns, a complaint by employees was thrown out because no one had yet been arrested (*United Public Workers v. Mitchell*, 1947). According to the Supreme Court, the threat of arrest does not mean anyone would actually be arrested under the law, so that there was nothing yet to decide.

Only the requirement of a "case or controversy" is mentioned in the Constitution (Article II, Section 2); the remaining four factors have been created by the U.S. Supreme Court and are frequently used by federal courts as an excuse to dodge controversial cases. Take the Vietnam War lawsuit that was evaded for being a "political question." Justice William Douglas challenged the majority opinion in a dissent complaining the case did indeed present a justiciable issue—whether the president had the constitutional power to engage in a military action without congressional approval. Was the legality of the Vietnam War truly a "political question" or was the Supreme Court merely avoiding a problem because it was too controversial? Justiciability is clearly an ambiguous concept that can be interpreted quite freely by federal judges.

Once jurisdiction is established and a judge rules an issue justiciable, a case is eligible for a federal court to hear.

The Structure of Federal Courts

Article III of the U.S. Constitution directly mentions only the U.S. Supreme Court, but it empowers Congress to create additional federal courts as needed. Like most state systems, the federal judiciary today is divided into three levels: trial court, intermediate appellate court, and Supreme Court. The first step in bringing a case to federal court is identifying the correct trial court in which to file suit. Congress has created a host of options, with the selection of the specific trial court depending upon the issue at stake in the lawsuit. Here is a partial list of the complex alternatives: Contract claims against the federal government go to the U.S. Court of Federal Claims, international trade and customs issues are handled by the U.S. Court of International Trade, bankruptcy cases belong to U.S. Bankruptcy Courts, and federal income tax disputes are taken to the U.S. Tax Court. These courts are designed to handle narrow, highly technical issues and the judges are chosen on the basis of their background in these specialized areas of law. As shall be discussed, the trial courts with the broadest federal jurisdiction are called U.S. District Courts.

At this point, an important distinction must be made between different types of federal courts. Except for the U.S. Supreme Court, all other federal courts have been created by Congress but not under the same constitutional power. The first, and most important type, of federal courts were authorized under Article III, the section of the Constitution that deals with the judicial branch, and they are limited to exercising only judicial powers (i.e., deciding legal cases and controversies). These courts are the following: U.S. District Courts, U.S. Circuit Courts of Appeal, U.S. Supreme Court, U.S. Court of Claims, and U.S. Court of International Trade. The president nominates judges to serve on these courts, and appointment depends upon approval by the U.S. Senate. Article III judges "hold their Offices during good Behaviour," meaning they cannot be removed except by death, resignation, or impeachment by the House of Representatives and conviction by the Senate. Even senility and incompetence are not grounds that justify dismissal of an Article III judge. It is interesting to note that Article III does not spell out any specific qualifications that must be possessed to be a federal judge; not even a law degree is a necessity. Justice Hugo Black even argued that at least one non-lawyer should serve on the Supreme Court because many cases involve more politics than law.

Congress also created a second type of federal courts under Article I, the section of the Constitution dealing with the legislative branch. This section

enables Congress more flexibility in setting up courts because it is not restricted by the provisions of Article III in terms of powers and tenure. So-called Article I, or **legislative courts,** are typically assigned certain non-judicial duties, such as administrative roles, and the judges do not have a lifetime appointment. Most, but not all, Article I judges are nominated by the president and approved by the Senate to serve a specific term (8-15 years). The current list of legislative courts is the following: U.S. Magistrate Courts, U.S. Bankruptcy Courts, U.S. Court of Appeals for the Armed Forces, U.S. Tax Court, and U.S. Court of Appeals for Veterans Claims. In the past, Congress has changed the status of an Article I court to an Article III court to give the judges more independence.

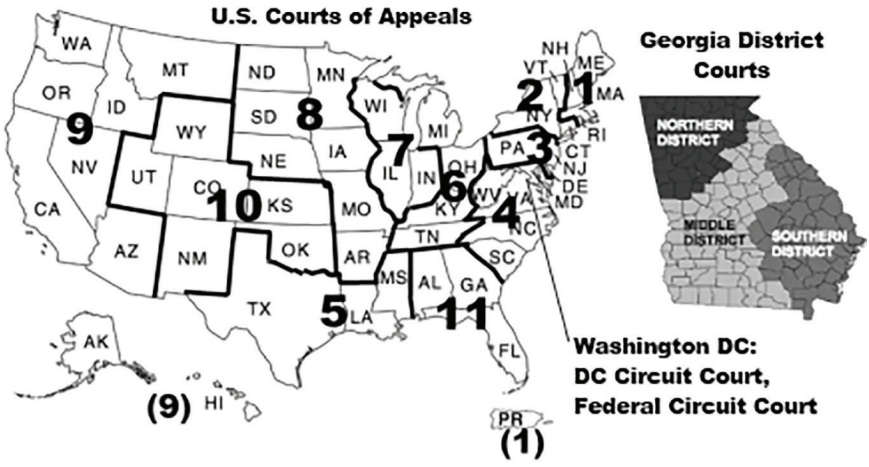
The workhorses at the federal level are the 94 U.S. District Courts. These trial courts (courts of original jurisdiction) hear all crimes against the U.S., most federal civil actions, and certain diversity cases. Each state has at least one U.S. District Court and, based roughly on population, a state may be allocated extra court(s). Georgia, for example, has three U.S. District Courts while California has four. The number of judges assigned to a district ranges from two to twenty-eight. U.S. District Courts can also be found in the District of Columbia, Puerto Rico, and in three U.S. territories: The Virgin Islands, Guam, and The Northern Mariana Islands. To relieve the heavy caseload (almost 400,000 cases are filed annually with U.S. District Courts), Congress in 1968 created magistrate judges to deal with minor matters such as preliminary hearings, warrants, bail, and lesser criminal offenses.

As a trial court, U.S. District Court judges decide cases either alone or with a jury. Federal law requires District Court judges to write an opinion explaining their decision when sitting without a jury. The Sixth Amendment awards the right to a jury trial in all federal criminal cases, but $20 must be involved under the Seventh Amendment for the right to a jury trail to apply in a federal civil case. Most federal cases are resolved at the District Court level. Only about 10 percent of decisions are appealed on the basis of a question of law.

Congress created twelve U.S. Courts of Appeal that have jurisdiction over a set of U.S. District Courts and federal agencies within a defined geographic region (called a **circuit**). Each circuit, in turn, is numbered (see Figure 10.1). Thus, the U.S. Court of Appeals for the Eleventh Circuit takes all appeals from the U.S. District Courts located in Georgia, Florida, and Alabama (nine District Courts in total). As noted, federal agencies (like the Social Security Administration) can render decisions and these too are appealed to the appropriate U.S. appellate court. A thirteenth appellate court, the Court of Appeals for the Federal Circuit in Washington, D.C., was launched in 1982 to manage appeals involving patents

from anywhere in the country as well as appeals from decisions by the Court of International Trade and the Court of Federal Claims.

Figure 10.1



A federal appellate court has from six judges (First Circuit) to twenty-eight judges (Ninth Circuit). The appellate judge in the circuit with the most seniority serves as chief judge until the age of 70, although the person can continue as a regular member of the court after reaching that age. Individual cases are generally heard in three-judge panels without juries, with judges normally assigned to a panel by the chief judge. The winning party is determined by a majority vote. In rare cases (less than 1% of the total), all judges in a circuit—a requirement relaxed by Congress for appellate courts with 15 or more members—will be present for a case in what is known as an *en banc* hearing. Such hearings tend to take place either to deal with a controversial case or to review a panel's ruling in the circuit on an important case. The fact that all, or almost all, appellate judges in the circuit are deciding the case is intended to give more weight to the eventual judgment. An *en banc* hearing may be requested by any member of an appellate court and is convened when at least a majority of judges are in favor (some circuits require less than a majority vote).

The decision by a U.S. Court of Appeal is binding on all U.S. District Courts and federal agencies in its circuit. An appellate court does not have the authority to issue compulsory orders outside its geographic jurisdiction. As a consequence, the interpretation of a federal law may vary across the nation when different U.S. Courts of Appeals deliver conflicting rulings on a law. These contradictions can

only be ironed out by the U.S. Supreme Court, if it chooses to do so. Only about 15% of decisions by U.S. Courts of Appeal are appealed to the Supreme Court.

U.S. Supreme Court

Congress determines the number of justices on the Supreme Court. Historically, the size of the Court has ranged from 6 to 10 members. The current size of nine justices was set in 1869, although President Franklin Roosevelt (FDR) in the 1930s famously threatened to increase the membership by "packing" the Court with a majority who would support his programs. FDR became frustrated when his New Deal legislation kept being declared unconstitutional by a 5-4 vote. Congress, however, was reluctant to support a proposal that would enable judicial decisions to be manipulated for political purposes, and it dropped the court-packing plan when one justice suddenly stopped opposing New Deal laws in a move sometimes called "a switch in time that saved nine." Two characteristics of the justices are worth noting. First, they tend to remain on the Supreme Court a long time, with the average tenure being seventeen years (Bialik & Gramlich, 2017). And second, they have similar backgrounds, with almost all current justices graduating from one of two law schools (Harvard or Yale).

One member of the Supreme Court is nominated by the president to serve as Chief Justice of the United States (not Chief Justice of the Supreme Court). The other eight members are known as associate justices. The chief justice has only a few formal powers not possessed by the other justices. In particular, the chief justice votes first on cases, assigns the author of the court's opinion if voting with the majority (if the chief justice is in the minority, the writing assignment is doled out by the associate justice in the majority with the most seniority), and heads the Judicial Conference of the United States that administers all federal courts.

At least six justices are needed to decide a case. If a tie vote occurs (3-3 or 4-4), the ruling of the last court to decide the case—usually a U.S. Court of Appeals or a state's highest court—is allowed to stand. It does not mean, however, that the Supreme Court is agreeing with the ruling of the lower court. It merely means that the Supreme Court itself was unable to reach a decision.

While the U.S. Supreme Court is commonly considered to take cases solely on appeal, the U.S. Constitution (Article III, section 2) assigns a limited **original jurisdiction**. In these instances, a case goes directly to the Supreme Court, and the justices serve as the trial court. The decision by the justices is final on these cases and no further appeal is possible. Four types of cases constitute the Supreme Court's original jurisdiction:

- Cases between two or more states.

- Cases between a state and the United States.
- Cases involving ambassadors and foreign counsels.
- Cases in which a state is suing a citizen of another state or a foreign nation.

Since the Supreme Court has little time to devote to an actual trial, Congress (28 U.S.C. section 1251) awarded U.S. District Courts **concurrent jurisdiction** over the last three types of cases. Concurrent jurisdiction denotes that a particular type of case can be heard by more than one court. In practical terms, most of the Supreme Court's original jurisdiction is shared with U.S. District Courts to the point where it is a waste of time to request the justices to consider a case that falls in these categories (with an appeal through U.S. Courts of Appeal to the U.S. Supreme Court still feasible). Moreover, the last category of original jurisdiction was restricted by the Eleventh Amendment (1795) to prevent a state from being sued by a citizen of another state or a foreign country under the doctrine of **sovereign immunity** (i.e., the concept that a government cannot be sued without its consent).

Only cases between two or more states remain within the Supreme Court's exclusive original jurisdiction. These cases most often involve disputes over borders or water rights, such as a dispute between New York and New Jersey over ownership rights to Ellis Island (*New Jersey v. New York*, 1998). Even here, the tradition is for the Supreme Court to appoint a **master** (usually a retired federal judge) to examine the evidence and recommend an outcome to the justices. It is seldom that more than one or two cases annually will be heard under original jurisdiction.

By far, the caseload of the Supreme Court comes from its appellate jurisdiction—over 5,000 appeals annually. Remember that, under the Constitution (Article III, Section 2, Clause 2), federal appellate jurisdiction is assigned with "such exceptions and under such regulations, as the Congress shall make." Currently, appellate cases are taken from the 13 U.S. courts of appeals, from the U.S. Court of Appeals for the Armed Forces, from U.S. District Courts (in exceptional circumstances), and from the highest state courts when a federal question exists. There are three avenues of appeal to the U.S. Supreme Court: (1) **writ of appeal** (when federal law gives the automatic right to have a certain type of case reviewed by the Supreme Court), (2) **writ of certification** (when a lower federal court requests instructions on a point of law never before decided), and (3) **writ of certiorari** (when a writ of appeal is not available). The first two avenues generate few cases, especially since Congress severely cut back on the availability of the writ of appeal in 1988.

Today, the writ of certiorari (or more commonly, *writ of cert*) is the primary means of appealing to the Supreme Court. According to Supreme Court Rule 10, "Review on writ of certiorari is not a matter of right, but a judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons" (Supreme Court of the United States, 2019, p. 5). The Supreme Court uses the *rule of four* to determine which appeals are granted; that is, the Court considers an appeal if four justices vote to accept (only three votes are necessary if six or seven justices are present). Only about 100 cases are taken annually. Denial of a writ does not mean the justices agree with the previous ruling by a court, only that not enough justices believe a substantial question was raised that is worthy of review. The justices simply do not have time to correct every error that occurred in lower courts. Moreover, the granting of the writ provides no indication of how the Supreme Court will ultimately rule on the case. The losing party in the lower court may still lose.

The Supreme Court begins its regular session on the first Monday in October and continues until late June or early July. When petitions are received, the chief justice creates the Supreme Court's agenda and places each petition either on the "discuss list" or "dead list." Petitions assigned to the dead list will routinely be denied unless any justice requests a particular petition to be shifted to the discuss list. The justices meet together in conference on Wednesdays and Fridays and, by tradition, begin with a handshake. Since 1910, only justices are allowed in the room. The associate justice with the least seniority must respond to knocks at the door or to collect books or papers sought by the other members. The chief justice is allowed to speak first on whether to accept or deny petitions on the discuss list and is followed by the associate justices in order of seniority, with voting taking place in the reverse sequence. Again, four votes are required to schedule a hearing on a case.

Oral arguments are conducted Mondays through Wednesdays beginning in early October and running through late spring. Two-week breaks are periodically arranged to enable the justices an opportunity to research and write. During oral arguments, each side is typically allocated a half-hour and justices can interrupt at any time—cutting into a lawyer's time. The **Solicitor General**, nominated by the president and confirmed by the Senate, argues cases in which the federal government is a party. Public access to oral arguments is permitted on a limited basis.

During conference, the justices discuss and vote on the cases heard at oral argument. A majority vote determines the winning party. The chief justice assigns the opinion writer only if a member of the majority side (which happens over

80% of the time). When the chief justice is on the losing side, the associate justice in the majority with the most seniority has the duty of determining the author of the court's decision. Justices circulate drafts of their opinions and must take great care to ensure that their wording does not alienate members of the majority. It has happened that an opinion begins as the majority decision but, due to the way in which the decision is written, may end up the losing side. Justices are allowed to alter their votes on a case up to the moment a decision is announced to the public.

Justices on the losing side have the option of writing a **dissenting opinion**. Since a dissenting member is speaking for no one else (although other justices can support the dissent), these opinions tend to be more candid and sometimes insulting. Even justices in the majority can write separate **concurring opinions,** and these must be read carefully to determine the extent to which the Court's opinion is supported. In a concurring opinion, a justice may merely want to elaborate on the reasons for agreeing with the majority, but a justice may also express concerns about aspects of the decision. A common situation is when a justice agrees as to the winning party but does not support the rationale behind the Court's opinion. For example, five justices could rule that a conviction should be overturned, with four believing evidence was improperly admitted while the fifth believes a juror was biased. Where concurring opinions have been written, it sometimes becomes complicated in understanding what the Supreme Court actually decided.

If a majority (five justices) does not endorse both the outcome *and* the rationale for a decision, the Supreme Court issues what is called a **judgment** (Cross, 2009, 323). Such opinions only identify the winning and losing parties and do not establish precedent that is binding on lower courts. A **precedent** requires judges to follow the ruling of a higher court in their jurisdiction when dealing with a case that presents similar facts. This doctrine (known as *stare decisis)* was created to ensure that people are treated the same in applying legal standards. An appellate court's precedent binds only the courts and agencies within its jurisdiction (circuit). The U.S. Supreme Court alone binds all courts, state and federal, when it decides a federal question.

Precedent is established when a majority agrees on the outcome as well as the rationale behind a decision. Here, the Supreme Court issues an *opinion* that is binding on all federal courts. The relationship with state courts is more complex. State judges, of course, must obey the precedents of the U.S. Supreme Court on federal questions. When a case originating in state court is decided, the Supreme Court typically **remands**, or sends the case back, to the highest court in the state to enforce its ruling. At this point, however state courts will occasionally evade a

U.S. Supreme Court ruling because a state can always "impose higher standards … than required by the Federal Constitution" so long as they are not interfering with a federal interest (*Cooper v. California*, 1967). One study found that 12 percent of the cases remanded to state courts by the U.S. Supreme Court reversed winning and losing parties (Evasion of Supreme Court mandates, 1954).

Consider an example. In 1976, the U.S. Supreme Court held a police search of an impounded car was permissible under the Fourth Amendment even though no probable cause existed that contraband was located inside the vehicle (*South Dakota v. Opperman*, 1976). On remand, the state's supreme court ruled the search unconstitutional under the state's constitution (*State v. Opperman*, 1976). In other words, the state court was able to sidestep a direct ruling by the U.S. Supreme Court by giving the citizens of South Dakota more protection than allowed under the U.S. Constitution. Police need a warrant to search an impounded car in South Dakota—but nowhere else in the country—in the absence of probable cause. The Supreme Court of the United States may not be the last word after all!

Powers of the Federal Judiciary

Aside from deciding cases and controversies, the Constitution is silent on the powers to be exercised by federal courts. This lack of clarity differs from the careful attention devoted to the enumeration of powers belonging to Congress and the president. Accordingly, the authority of federal courts had to develop over time in response to issues as they arose. It is not surprising that service on the Supreme Court was not viewed initially as too significant a position. John Jay, the first chief justice, stepped down to become governor of New York, something that surely would not happen today.

The landscape began to change when John Marshall became chief justice in 1801, and he continued serving until 1835. His influence vastly expanded the power of all federal courts. The key decision was issued in *Marbury v. Madison*, 5 U.S. 137 (1803). The case would make a good soap opera. In the 1800 election, the Federalist party lost control of the presidency and both houses of Congress. Two developments resulted from this loss that led to the *Marbury* decision. First, the chief justice of the Supreme Court resigned, and President John Adams immediately nominated Marshall, his Secretary of State, to the position. Adams requested Marshall to continue as Secretary of State for the little time remaining in his term. And second, the Federalists moved quickly to create a host of new judicial posts to which members of the party would be appointed before the new administration took office under Thomas Jefferson. The goal was to pack federal courts with Federalists who would frustrate Jefferson in any way possible. Forty-two new

Justice of the Peace positions were created for the District of Columbia. President John Adams nominated and the Senate confirmed all forty-two appointments the day before Jefferson was to assume office. Adams signed the commissions, and it fell upon Secretary of State Marshall to deliver them. Marshall worked throughout the night and managed to give out all but four of the commissions before midnight. Since the papers had been signed and sealed, Marshall assumed James Madison, the new Secretary of State, would complete the project. Jefferson, however, instructed Madison to ignore the undelivered commissions.

William Marbury, and the other three promised recipients of a judgeship, filed suit directly before the U.S. Supreme Court under a federal law enacted in 1789 that expanded the Supreme Court's original jurisdiction to allow suits against federal officials to perform their legal duties. Marbury, in other words, was alleging that Madison had no choice but to give him his commission since it was required by federal statute. Marshall, who was responsible for the mess, was now in position to decide the dispute as Chief Justice. The situation suddenly became even more complicated when Jefferson asserted he would not provide Marbury his commission no matter what the Supreme Court ruled. Several members of Congress additionally threatened Marshall with impeachment if Marbury won. It now seemed that Marshall was in a box with no way out. If he decided in favor of Marbury, Marshall would be defied by Jefferson and could even be impeached. On the other hand, if he decided against Marbury (who deserved to win), Marshall would be publicly humiliated for having no backbone and would also lower the prestige of the court system. The drama was made more compelling because Jefferson and Marshall were second cousins and the controversy was splitting apart the family. In a brilliant maneuver, Marshall managed not only to escape the dilemma but to enhance the power of the federal judiciary at the same time!

Marshall wrote the opinion in *Marbury v. Madison* for a unanimous Supreme Court. While acknowledging that Marbury deserved the commission and admonishing Madison for not performing his legal duty, Marshall nonetheless lamented that the Supreme Court lacked authority to order Madison to comply. The reason is that the 1789 federal law that enabled Marbury to file suit directly before the Supreme Court was not one of the four types of cases listed in Article III as part of its original jurisdiction. That is, Congress added a fifth type of case to the Supreme Court's original jurisdiction. Could a law of Congress override the Constitution? Marshall answered in the negative because "all those who have framed written constitutions contemplate them as the fundamental and paramount law of the nation." Put differently, the Constitution is superior to congressional statutes.

Only one important question remained: are courts required to follow a federal law that is inconsistent with the Constitution? In a famous sentence, Marshall concluded: "It is emphatically the province of the judicial department to say what the law is." If a law violates the Constitution, federal courts are empowered to strike down the law. Separation of powers entrusts courts with the authority to interpret laws, and the Constitution should be interpreted like any law. Consequently, Marbury was in the wrong court and would have to file suit elsewhere, an option that would not be worth his time since his term as Justice of the Peace was soon to expire. Thus, Marshall succeeded in publicly rebuking Jefferson and in making the Supreme Court a feared institution that could nullify acts of Congress. As might be expected, the decision stirred a storm of controversy, and the Supreme Court waited fifty-four years before daring to strike down another congressional statute.

Marshall, without using the term, claimed the power of **judicial review** for the court system. As it has evolved, the concept of judicial review has come to include the following elements:

- It is a power possessed by all courts, state and federal.
- It enables acts of Congress or of any public authority to be challenged.
- If found to be in violation of the federal Constitution, the law or action is voided and does not have to be obeyed.

Keep in mind that only the U.S. Supreme Court has national jurisdiction so that it alone can exercise judicial review that applies across the country. The use of judicial review by other courts is limited to the geographic area within their jurisdiction: a U.S. Court of Appeals has control over its circuit; a state's highest court controls courts in the state, etc. Moreover, it is not only legislative bodies that can be challenged but executive officials as well. It was the U.S. Supreme Court, for example, that forced President Richard Nixon to turn over the recordings made in the Oval Office in the Watergate controversy. The Court rejected Nixon's argument that a president—unlike other citizens—could withhold information demanded by a court (*United States v. Nixon*, 1974). Thus, Nixon's claim of presidential power was in violation of the Constitution, and he resigned fifteen days after the Court's decision.

Judicial review is a hotly debated topic for several reasons. First, the power is not mentioned in the Constitution itself. Marshall found the power a logical extension of the judiciary's authority to interpret laws, but the Constitution's failure explicitly to collaborate renders the rationale open to questioning. If the framers wanted the courts to utilize judicial review, critics contend that the power would have been written into directly the Constitution, especially since the issue

was discussed at the Constitutional Convention. Second, opponents warn that the power is subject to abuse with little oversight. Woodrow Wilson once described the Supreme Court as a constitutional convention in continuous session. A majority on the Supreme Court can interpret the Constitution to say almost anything, and the only way to reverse is by the grueling process of amending the Constitution. In fact, a number of amendments (Eleventh, Fourteenth, Sixteenth, Nineteenth, and Twenty-Sixth) have been adopted specifically to override decisions of the Supreme Court, although hundreds of proposals to do so have been introduced into Congress over the years. Finally, judicial review has been blamed for undermining the doctrine of separation of powers by enabling courts to write what amounts to legislation. It could be argued, for example, that the Supreme Court "legislated" when it required police to inform detained individuals of their rights before questioning them. Since the Fifth Amendment only declares that no person "shall be compelled in any criminal case to be a witness against himself," the Supreme Court could be accused of adding words to the amendment.

Judicial review is surely a potent weapon that will survive if for no other reason than its use is inevitable. The judiciary must have some way under checks and balances to protect its authority. The real debate focuses on when the exercise of judicial review is appropriate. **Judicial activists** consider the proper role of courts to include "filling in the holes" left by the Constitution's vague language. They believe it is the duty of judges to minimize potential social disruption caused by the lack of clear policy guidelines, such as when public schools were ordered to integrate flowing from the words "equal protection" in the Fourteenth Amendment. To them, the Constitution should be considered a living document that changes with society. Judicial activists, however, have been accused of promoting ideological agendas. Controversial decisions on abortion (*Roe v. Wade*, 1973), contraception (*Griswold v. Connecticut*, 1965), and contracts (*Lochner v. New York*, 1925) have been faulted for imposing the personal values of judges on society without any direct support in the language of the Constitution.

Advocates of **judicial restraint**, in contrast, contend that judges should decide cases on the basis of precedent and overturn laws only when a conflict with the Constitution is unmistakable. They believe this approach is best accomplished when judges try to remain within the original intent or meaning of the framers to avoid making up policy. While logical in theory, judicial restraint is almost impossible to practice consistently. Justice John Paul Stevens, for example, could not resist chiding Justice Antonin Scalia, the Supreme Court's most vocal champion of judicial restraint, for overturning long-standing precedent to achieve what many considered an ideological result on the Second Amendment:

"It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today" (*District of Columbia v. Heller*, 2008). The public, for its part, is slightly in favor of a more activist role for the Supreme Court. When surveyed in 2018, fifty-five percent believed the Supreme Court should interpret the Constitution on what it "means in current times," rather than what it "meant as originally written" (Bialik, 2018).

Aside from judicial review, federal courts are frequently called upon to engage in **statutory interpretation** where they attempt to understand the meaning of a law enacted by a legislature. Here, judges are not examining a law for its conformity with the Constitution but are merely trying to make sense of it (Cross, 2009). If Congress enacts a law requiring all "able bodied" males aged 18 to be subject to the military draft, for example, it is unclear whether a male is "able bodied" if having flat feet. Typically, courts decide such cases by seeking to identify the legislature's intent when the law was enacted and applying this intent to the circumstances presented by the situation. Laws are hardly written with a great deal of precision, and the opportunity for courts to interpret statutes is quite frequent. Unlike judicial review, however, Congress is able to alter court interpretations of statutes more easily. Since the courts are not interpreting the Constitution, Congress can reverse the judicial interpretation of a statute simply by re-writing the law. One study found that Congress overturned 124 Supreme Court decisions based on interpretations of federal law in a 23-year period (Eskridge, 1991, 335-341). The doctrine of checks and balances is alive and well!

Discussion Questions

1. Is the Supreme Court the "least dangerous branch," as once described by Alexander Hamilton? Justify your answer on the basis of the material in the chapter.
2. From the reading, what are the checks on the powers of the judiciary? Are the checks adequate to prevent the abuse of judicial power? Explain.
3. Which position makes the most sense to you, judicial activism or judicial restraint? Justify your position. Is a Republic or Democratic judge more likely to favor judicial restraint? Explain your answer.
4. The chapter makes a case that federalism is "alive and well" in the relationship between state and federal courts. What evidence is available to support this position?

Civic Exercise

Interview a lawyer who has argued cases before both state and federal courts and ask the following questions:

1. Do you prefer taking a case to state or federal court? Explain why.
2. Did any of your state cases involve federal questions? If so, to what extent was the state judge knowledgeable about federal law?
3. Do you prefer arguing cases before juries or judges alone? Explain why.
4. Discuss whether civil cases or criminal cases are more difficult to litigate.
5. Have you ever argued an appellate case? If so, how does the experience differ from a trial court? Explain the concept of "perfecting the record."
6. In your opinion, do federal courts have too much power? Cite examples.
7. Federal judges, for the most part, are appointed while state judges are elected. Is there a difference in the quality of judges in comparing the two selection methods?
8. In your experience, did a federal judge use the doctrine of "justiciability" to avoid hearing a case that should have legitimately been taken? Discuss the incident(s).
9. Does the option of taking a diversity case to a federal court still make sense since the original justification was the fear of not being able to find a fair forum in state court?
10. Do the decisions of the U.S. Supreme Court regularly impact your daily practice of law? Justify your response.

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11

Civil Liberties and Civil Rights

K. Michael Reese and Brian Murphy

Learning Objectives

After covering the topic of civil liberties and civil rights, students should understand:

1. The defining characteristics of civil liberties and civil rights.
2. The sources of civil liberties and civil rights.
3. The importance of civil liberties and civil rights in a functioning democracy.
4. The roles of the U.S. Supreme Court and the Congress in expanding and limiting, the scope of civil liberties and civil rights.
5. The process by which most provisions of the Bill of Rights were applied to the states.

Abstract

A representative democracy is more than governmental processes. It exists to protect certain fundamental freedoms known as "civil liberties" and "civil rights" because these freedoms are what make democracy possible. This chapter examines the sources, scope, and nature of American civil liberties and civil rights. Specific federal statutes and U.S. Supreme Court cases are cited to enrich the discussion.

Introduction

Civil Liberties and Civil Rights: Definitions and Distinctions

There is no accepted definition of what constitutes the civil liberties of American citizens. Some scholars limit these freedoms to the rights listed in the First Amendment, such as freedom of speech, freedom of the press, and free exercise of religion (Wasserman, 2004, p. 152), while others include the first ten amendments to the Constitution, called the Bill of Rights (Rush, 2003, p. 59). In this chapter, the term **civil liberties** will refer to all freedoms and protections provided anywhere in the Constitution. The term **civil rights** is narrower and applies to the rights of individuals to be free from discriminatory treatment, both public and private, based on such characteristics as race, national origin, or gender. Where civil liberties act as a shield to protect specific freedoms, civil rights are more like a sword that promote fair treatment and equality (Stephens and Scheb, 2008, p. 3). This chapter will survey the civil liberties and civil rights of American citizens.

Civil Liberties: Original Constitution

The original Constitution included a number of references to civil liberties. Article I, Sections 9 and 10 prohibit federal and state governments from passing bills of attainder and *ex post facto* laws. A **bill of attainder** is a law that declares an individual or a group guilty of a crime and imposes punishment without a trial in court. For example, the Supreme Court struck down a law that made it a crime for members of the Communist Party to serve as officers or employees of a labor union because such individuals constituted a threat to national security (*United States v. Brown*, 1965). The law was a bill of attainder since members of the Communist Party were assumed criminals prior to committing any illegal act. An **ex post facto** law is "passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed" (Black, 1968, p. 662). Laws of this kind can occur in several ways. It typically occurs when an action is made a crime that was previously legal and people who committed the act could now be prosecuted. Along the same line, *ex post facto* laws also include increasing the seriousness or punishment of a crime and altering the rules of evidence to the detriment of a criminal defendant. The right of **habeas corpus** is another civil liberty found in Article I, Section 9, and, as explained in the previous chapter, it allows an incarcerated person to challenge in court the legality of that incarceration. A final civil liberty in Article VI of the original Constitution prohibits the federal government from requiring **religious tests** for public office.

The Bill of Rights and Civil Liberties

The Original Formulation

The Founders debated whether to list, one-by-one, the rights citizens of the new national government should possess. After the experience under British rule, many at the Constitutional Convention were fearful that a strong national government would be in position to trample personal liberties (Kommers, Finn & Jacobsohn, 2010, p.111). James Madison, however, persuaded the Convention not to attempt to do so because there is no way to identify every right a citizen could potentially need. If a right was omitted, Madison argued, the government would be justified in believing that citizens were not entitled to it. So why was the Bill of Rights added almost immediately after the Constitution was adopted? The reason is that several states refused to ratify the document until it was clear what basic rights could not be violated by the new government. A compromise was reached in which the First Congress would propose amendments addressing specific fundamental rights upon ratification of the Constitution (Epstein & Walker, 2010, p.67). The task of drafting possible amendments fell to Madison. Congress eventually submitted twelve amendments to the states and ten of them—the Bill of Rights—were adopted in 1791. Madison sought to address his concern that certain important rights would be omitted through the Ninth Amendment. It reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This means, in simple terms, that American citizens have more rights than those mentioned in the Constitution. It would not be until 1965 that the Supreme Court would use the Ninth Amendment to find a right not contained in the Bill of Rights. But another battle had to be fought prior to this controversial step.

One question left unanswered after the adoption of the Bill of Rights was whether its protections applied to both national and state governments. The Supreme Court initially ruled that only the national government was forbidden from violating the rights listed in these amendments (*Barron v. Baltimore*, 1833). The Court reasoned that the language of the First Amendment, which begins with "Congress shall make no law…," clearly indicates the Founders did not intend for the Bill of Rights to apply to state governments. As such, there was no constitutional ban against states violating any of the protections in the Bill of Rights, such as free speech or the exercise of religion. States could, of course, provide similar freedoms through their own constitutions and laws, but they were not required to do so by the Bill of Rights. It was not until the twentieth century that the Supreme Court's position began to change, but the process occurred slowly.

Selective Incorporation: Application of the Bill of Rights to the States

In 1868, the Fourteenth Amendment was added to the Constitution. One section, called the **due process clause**, stated the following: "No state … shall deprive any person of life, liberty, or property, without due process of the law." Since the clause declares that states cannot deny a person liberty, did it mean they could no longer violate the Bill of Rights? The Supreme Court, at first, ruled against this interpretation by holding that the due process clause of the Fourteenth Amendment did not apply the Bill of Rights to the states (*Hurtado v. California*, 1884). In 1925, the Court partially reversed direction by acknowledging that freedom of speech and press constituted "fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States (*Gitlow v. New York*, 1925)." It is important to note that the Supreme Court refused to apply all provisions of the Bill of Rights to the states. This hesitation caused confusion since it was no longer certain whether states had to obey any other of these rights. It became cloudier when several more rights were quickly imposed against the states again through the due process clause: freedom of press (1931), right to counsel in capital crimes (1932), free exercise of religion (1934), and right to assembly (1937). It soon became necessary to provide greater clarity about what provisions of the Bill of Rights states are required to protect.

The process by which the Supreme Court applied provisions of the Bill of Rights one-by-one to the states became known as **selective incorporation**. Although certain justices, like Hugo Black and William Douglas (Epstein and Walker, 2010, p.81), supported "total incorporation" in which all provisions of the Bill of Rights should be included in due process, a majority of the Court rejected this approach in favor of a case-by-case analysis. In determining which rights should be incorporated, the Court came to assess whether a particular provision was essential to "ordered liberty and justice" (*Palko v. Connecticut*, 1937; *Duncan v. Louisiana*, 1968). Even today, however, not every protection in the Bill of Rights has been incorporated. Those that remain unenforced against the states are the following: the Third Amendment prohibition against nonconsensual quartering of soldiers in peace time, the Fifth Amendment right to a grand jury hearing, the Fifth Amendment right to due process of law (because the due process clause of the Fourteenth Amendment makes this unnecessary), the Sixth Amendment right to a jury selected from residents of the state and district where the crime occurred, and the Seventh Amendment right to a jury trial in civil cases. Selective incorporation continues to this day, with the Eighth Amendment's protection against excessive fines incorporated as recently as 2019.

The incorporation doctrine has been used solely with respect to the rights and liberties contained in the first eight amendments rather than to the entire Bill of Rights because: (1) the Ninth Amendment, as discussed earlier, makes no reference to any specific rights and (2) the Tenth Amendment is equally vague by awarding the states all powers not explicitly given to the federal government by the Constitution. Once a provision has been incorporated, however, states must enforce it in every case that occurs afterwards. They have no choice because Supreme Court interpretations of the Constitution are the supreme law of the land under Article VI, trumping state laws to the contrary. Nonetheless, states may provide greater freedoms and protections to their citizens if based on their own laws and constitutions, but *never less* than the Supreme Court's minimum.

Let's take a look at the key incorporated rights. Keep in mind that no civil liberty is unconditional. At some point, the government can constitutionally deprive citizens of any liberty in the Bill of Rights. For example, there are times when a person can be forced against religious convictions to submit to a blood transfusion even when against a person's religious beliefs. Supreme Court decisions, therefore, are about defining the point at which an individual's freedom can be restricted.

Survey of Incorporated Civil Liberties

First Amendment

The First Amendment protects freedom of speech, freedom of press, the right to peaceably assemble, and the right to petition the government for redress of grievances. Collectively, these freedoms and rights can be described as the **freedom of expression**. The Supreme Court has given a great deal of protection to freedom of expression, and that protection has on occasion been extended to **symbolic speech and symbolic actions**, often called speech plus. Examples include burning a flag (*Texas v. Johnson*, 1989), wearing a black armband to school (*Tinker v. Des Moines Independent Community School District, 1969*), and adorning one's clothing with offensive sentiments (*Cohen v. California*, 1971). While fiercely protected, the Court has sometimes allowed freedom of expression to yield in the public interest. As Justice Oliver Wendell Holmes famously put it, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic (*Schenck v. U.S.*, 1919)." The Supreme Court has employed various tests in determining when speech could constitutionally be curtailed. Holmes got the ball rolling in *Schenck* with the **clear and present danger test**. That is, words can be punished if they are likely (clear

and present) to produce harm (danger) in light of the circumstances. Thus, there is nothing dangerous in uttering the word "fire" unless said in a context—like a crowded theater—where it could lead to injury. This test has been revised over time, but its basic framework remains largely the same.

The Supreme Court has identified three kinds of expression—**obscenity** (lewd, filthy, or disgusting words or pictures), **defamation** (a false statement that harms reputation), and **fighting words** (words likely to incite immediate violence)—as having no protection of any kind under the First Amendment. Yet even here, judges have found it difficult to decide whether expression is obscene or merely offensive, whether it is defamatory or just unflattering, and whether it amounts to fighting words or simply unpopular opinions. Quite clearly, the scope of free expression is wide for American citizens across-the-board.

Freedom of press, including the broadcast medium, is somewhat different than oral speech due to the possibility of **censorship**. Censorship can occur when governmental approval is needed prior to publication. Oral speech, in contrast, is punishable only after communication has taken place. Censorship of the press is rarely upheld by the courts. When the *New York Times* began publishing top-secret documents on the Vietnam War, the Justice Department sought to censor release of further files. Even though the material was classified, the Supreme Court supported continued publication (*New York Times Co. v. United States*, 403 U.S. 713, 1971). Censorship is most likely to be tolerated, if it is tolerated at all, in a public-school environment.

The First Amendment also contains two clauses on religion, the free exercise clause and the establishment clause. The **free exercise clause** protects the freedom to worship as one sees fit, or not to worship at all. While people have the right to hold any religious belief no matter how offensive or harmful, the government may prevent the practice of the belief if a "compelling" need to do so can be demonstrated. For example, the Supreme Court allowed the government to ban the practice polygamy for religious reasons (*Reynolds v. United States*, 1878) as well as requiring Amish employers to pay into the social security system despite religious objections (*United States v. Lee*, 1982). The **establishment clause** prohibits governments from supporting a particular religion. Examples include faculty-orchestrated prayer in public schools or a government grant to a private organization to purchase bibles. On the other hand, reasonable government accommodation of religion is constitutional (Schultz, Vile, and Deardorff, 2011, p.78). In order to withstand an establishment clause challenge, the government's policy must have a secular (non-religious) purpose, must have a primary effect that neither advances nor inhibits religion, and must avoid excessive entanglement

between the state and religion (*Lemon v. Kurtzman*, 1971). The **Lemon** tests were satisfied in a case where a city's Christmas display in a public park included a nativity scene (*Lynch v. Donnelly*, 1984). Courts have experienced difficulty in applying the vague language of *Lemon* in concrete cases, with decisions even of the Supreme Court being criticized for inconsistency.

Second Amendment

The Second Amendment gives people the right to bear arms, and for a long time this right only limited the federal government. States and local governments frequently imposed restrictions on the possession and sale of guns. The Supreme Court reversed direction by ruling that the right to defend oneself was fundamental, making the Second Amendment applicable to state governments as well (*McDonald v. City of Chicago*, 2010).

Fourth Amendment

The Fourth Amendment protects individuals from **unreasonable searches and seizures** by governments. A search is unreasonable when a person's **reasonable expectation of privacy** is violated (*Katz v. United States*, 1967). For example, the Supreme Court has ruled on multiple occasions that no such expectation arises in connection with aerial surveillance (*California v. Ciraolo*; *Dow Chemical Co. v. United States*, 1986) but not when government agents conduct searches using thermal-imaging technology (*Kyllo v. United States,* 2001), attach a GPS tracking device to track a vehicle (*United States v. Jones,* 2012), or bring drug-sniffing dogs onto a suspect's front porch (*Florida v. Jardines*, 2013). A seizure involves the government taking control over a person or thing. Both searches and seizures require governmental involvement. There is no Fourth Amendment protection against private searches and seizures.

A valid warrant generally makes a search or seizure acceptable under the Fourth Amendment. Nonetheless, most searches and seizures are conducted without warrants, such as when a person gives consent or after a lawful arrest. A valid **search warrant** is issued by a judicial officer and must be supported by probable cause, describe the place to be searched and the persons or things to be seized with particularity, and include the oath or affirmation by the government agent. Let's unpack these terms. **Probable cause** means sufficient information exists to lead a reasonable police officer to conclude that evidence of a crime can be found at a location. **Particularity** means enough detail is provided about what to search for and where to search for it. The **oath or affirmation** is the officer's

sworn statement that the information is, to the best of the officer's knowledge and understanding, truthful and correct. A judicial officer, such as a magistrate, will determine if these requirements are met and either issue or refuse to issue the warrant. Unless these standards are fulfilled, evidence seized in violation of the Fourth Amendment—pursuant to the **exclusionary rule**—is inadmissible to prove the guilt of the individual whose rights were violated (*Weeks v. United States*, 1914; *Mapp v. Ohio*, 1961). There are exceptions to this rule. Under the **good faith exception**, evidence is admissible even if a warrant is later determined to be deficient so long as the officer acted upon the warrant with reasonable belief it was valid, (*U.S. v. Leon*, 1984). Georgia, it should be noted, gives its citizens greater protection by not recognizing the good faith exception to the exclusionary rule (*Gary v. State*, 1992).

Fifth Amendment

The Fifth Amendment contains several important rights. The **privilege against self-incrimination** prevents an individual from being forced to testify if any statements could lead to his or her criminal prosecution. For example, a person could "plead the fifth" when called as a witness in a trial or a hearing, or when questioned by government agents while restrained from leaving (**custodial interrogation**). Indeed, the famous *Miranda* warnings are based primarily on the privilege against self-incrimination (*Miranda v. Arizona*, 1966). These four warnings (You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you) are required if, and only if, a suspect is interrogated while in custody. The warnings are not required if there is custody without interrogation or interrogation without custody. If the warnings are not delivered when required, any incriminating statements made by a suspect will be inadmissible at a subsequent trial. Under the **public safety exception**, however, these warnings do not have to be read when a threat exists to the public well-being (*New York v. Quarles*, 1984).

The **double jeopardy** clause prohibits multiple prosecutions for the same offense. Otherwise, a state could prosecute a criminal defendant over and over for the same crime in hopes of finally getting a conviction or of obtaining a harsher punishment than what was previously imposed. In most cases, the government has one opportunity to obtain a conviction. There are some exceptions to double jeopardy. For example, the government may retry a case when the first trial ended in a mistrial, such as a "hung jury" where the jury could not agree on a verdict. The state may also retry a case if a defendant is initially found guilty but the

conviction is reversed on appeal since a reversal on appeal voids the first trial due to a legal error. The same act, however, can violate the laws of two states and lead to two prosecutions and punishments without violating double jeopardy (*Heath v. Alabama*, 1985). This could happen if a person stole a car in Alabama and drove it to Georgia. Alabama could prosecute for stealing the vehicle while Georgia could prosecute for possession of a stolen vehicle. There was one theft but two prosecutions. Each state and the federal government are considered "sovereigns" with the authority to enforce their laws under a concept known as **dual sovereignty**.

The Fifth Amendment additionally contains what is known as the **takings clause.** States, under the power of **eminent domain**, are allowed to confiscate private property from unwilling sellers. To be permissible, the takings clause requires that the property must be used for a **public** purpose and **just compensation** must be paid to the owner. The right to a grand jury is the final Fifth Amendment protection to be discussed. A **grand jury** is a group of people summoned by a government (state or federal) to consider evidence against a person charged with a crime. These juries do not convict individuals but determine whether enough evidence exists to conduct a trial. A government prosecutor presents its evidence to the grand jury in a private hearing. If the grand jury agrees that the accused likely committed the crime in question, an **indictment** (sometimes called a **true bill**) is issued against the accused. As previously noted, the requirement for a grand jury has not been incorporated. Thus, the Supreme Court has required use of grand juries only in federal felony crimes. States are under no constitutional obligation to provide grand juries in criminal prosecutions, although many have chosen to include such a requirement in their own constitutions.

Sixth Amendment

Most of the rights associated with the trial of a criminal defendant can be found in the Sixth Amendment. These include the right to counsel, the right to a speedy trial, the right to a public trial, the right to a jury trial, the right to confront the accuser, and the right to compulsory process. Concerning the **right to counsel**, there is usually no issue when the defendant is financially able to pay for a private attorney. The problem arises when an **indigent defendant**—one unable to pay for a lawyer—is accused of a crime. In this latter case, the rules vary depending on whether the crime is a felony or a misdemeanor. A **felony** is a crime punishable by a fine and/or a year or more in prison, while a **misdemeanor** is a crime punishable by a fine and/or up to twelve months in jail. The Supreme Court ruled that states must appoint counsel for indigent defendants in all felony cases

(*Gideon v. Wainwright*, 1963), but only in misdemeanor cases when incarceration occurs (*Argersinger v. Hamlin*, 1972; *Scott v. Illinois,* 1979; *Alabama v. Shelton*, 2002). It is important to note that the right to counsel will sometimes apply in various pre-trial and post-trial procedures.

The Sixth Amendment provides no explanation about how quickly the right to a **speedy trial** must be scheduled. Delays are quite common between an arrest and a trial due to factors such as a psychiatric evaluation or scheduling conflict. There is no bright-line rule when a delay violates the Sixth Amendment. Rather, the Supreme Court considers four factors in making a determination: the length of the delay, the reason for the delay, the defendant's assertion of the right, and any negative impact to the accused because of the delay (*Barker v. Wingo*, 1972). Perhaps for greater clarity, the federal government and most states have enacted laws that define how quickly a trail should be scheduled. The **Federal Speedy Trial Act of 1974**, for example, requires that a trial for a federal crime should commence within 100 days of an arrest or receipt of a summons.

The right to a **public trial** was a response to the old practice of conducting trials behind closed doors in which a defendant could be tried, convicted, and sentenced without anyone knowing what happened. The goal of this provision is to ensure a fair trial by allowing spectators to observe that the process operates according to the law.

The **right to a jury trial** is one of America's treasured legal traditions. It is based on the belief that ordinary citizens are better at judging innocence or guilt than those with a stake in the outcome. Although the Sixth Amendment provides for this right in "all criminal prosecutions," the Supreme Court has ruled that the right attaches only when a defendant is charged with a "serious offense" in which a **potential punishment of more than six months imprisonment** is possible *(Baldwin v. New York*, 1970). The size of a jury in criminal cases varies depending on where the trial occurs. At the time of the Constitutional Convention, a jury customarily consisted of twelve people and criminal trials at the federal level continued the practice. It was not until 1968 that the right to a jury trial was incorporated against the states (*Duncan v. Louisiana*, 1968). Two years later, however, the Supreme Court ruled that criminal cases in state courts could contain as few as six jurors (*Williams v. Florida*, 1970). In order to convict, federal juries must be unanimous, but it was not until 2020 that the Supreme Court required unanimous verdicts in state criminal trials at least for "serious offenses" (*Ramos v. Louisiana*, 2020).

Defendants have the right to confront their accusers through the **confrontation clause** of the Sixth Amendment. This right is afforded so that cross-

examination can occur allowing jurors to evaluate the reliability of witnesses. While a face-to-face confrontation is typical, the Supreme Court has relaxed the requirement in certain circumstances when in the best interest of a party, such as using a one-way closed-circuit television in a molestation case where the child is in one room while the defendant, judge, and jury observe from the courtroom (*Maryland v. Craig*, 1990).

The final aspect of the Sixth Amendment worth noting is the **right to compulsory process**. This gives a defendant the power to subpoena witnesses to testify. A **subpoena** is a summons by a court to appear and testify so that defendants have an opportunity to present their side of a case. The prosecution has a similar power of subpoena in order for its case to be fully heard as well.

Eighth Amendment

The Eighth Amendment is a single sentence, but it includes multiple provisions in protecting against excessive bail, excessive fines, and cruel and unusual punishment. Just recently (*Timbs v. Indiana*, 2019), all provisions have been incorporated against the states. Nonetheless, there is still no constitutional right to bail. The purpose of bail, if it is allowed, is to insure the appearance of a defendant at the trial. In determining whether bail is excessive, the courts consider such things as the seriousness of the crime, the risk of flight, and the community ties of the defendant.

The protection against **cruel and unusual punishment** has generated substantial case law. Punishments can be cruel and unusual in two different ways. One possibility would be a punishment that is barbaric or inhumane. Examples would be cutting the hand off of a convicted thief or poking the eyes out of a convicted "peeping Tom." Punishments can also be cruel and unusual, even if they are not barbaric, if they are excessive or too severe for the crime. In many situations, the death penalty falls into this category. The Supreme Court has never ruled that the death penalty is cruel and unusual, but this punishment has been considered excessive for most crimes. For example, the Court has held that the imposition of the death penalty for the crime of rape would violate the Eighth Amendment (*Coker v. Georgia*, 1977; *Kennedy v. Louisiana*, 2008). Clearly, it would be unconstitutional to impose the death penalty for less serious crimes, such as theft or forgery. Today, there seems to be a narrow range of crimes for which the death penalty could be imposed. These include certain criminal homicides, treason, and air piracy. The debate over the appropriateness of imposing the death penalty has been longstanding and will no doubt continue into the foreseeable future.

Civil Liberties: Beyond the Bill of Rights

Fourteenth Amendment

After the Civil War, the Fourteenth Amendment was added to the Constitution in an effort to protect the rights of former slaves. It not only grants national *and* state citizenship to all persons born or naturalized in the United States, but it also contains three clauses intended to provide additional layers of protection: the privileges and immunities clause, the due process clause, and the equal protection clause. The **privileges and immunities clause** prohibits states from infringing upon the rights of U.S. citizens. The exact meaning of the words is unclear, but many hoped they would apply the provisions of the Bill of Rights to the states. The Supreme Court rejected this interpretation by distinguishing between national citizenship and state citizenship and holding that the privileges and immunities clause only protected rights of U.S. citizenship already listed in the Constitution, such as travel between the states (*Slaughterhouse Cases*, 1873). In other words, the clause in no way imposed new limitations on state authority.

The **due process clause** has, over time, proven to be a powerful tool in the hands of courts. The clause forbids states from depriving any person of life, liberty, or property without due process of law. It has been used in two different ways. Under **procedural due process**, courts examine whether the steps required by law and the Constitution have been followed when denying a person life, liberty, or property, such as the right to cross-examine witnesses or the opportunity to be represented by counsel. The greater the potential deprivation, the more elaborate the protective procedures must be. Under **substantive due process**, governments are prevented from interfering with fundamental rights even if proper legal procedures are followed. It is a highly controversial concept because judges have been accused of imposing their own values in determining what constitutes a fundamental right.

A well-known example of substantive due process involves abortion. In 1965, the Supreme Court reasoned a constitutional **right to privacy** exists through the Ninth Amendment that allows individuals access to contraceptives (*Griswold v. Connecticut*, 1965). More recently, the Supreme Court expanded the right of privacy by focusing on the word "liberty" in the due process clause of the Fourteenth Amendment. In *Roe v. Wade* (1973), a majority concluded: "This right of privacy … is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Once the door on privacy was opened through the due process clause, it has been applied to other areas of intimate familial matters, such as marriage, rearing children, and sexual orientation.

To sum up, substantive due process focuses on what the state *intends* to do to a person, while procedural due process focuses on *how* the state intends to do it. Both, nonetheless, share a concern about ensuring fundamental fairness.

The final protection in the Fourteenth Amendment prohibits states from denying any person equal protection of the laws. In particular, the **equal protection clause** examines whether state governments have acted in a discriminatory fashion by treating **similarly situated groups** differently. Initially applied against allegations of racial discrimination, such as terminating segregation in public school systems (*Brown v. Board of Education*, 1954), the Supreme Court eventually allowed the clause to challenge discrimination more widely in areas like gender, age, and marital status.

Since the equal protection clause was adopted to safeguard the rights of newly freed slaves, the Supreme Court provides greater protection to racial groups than to claims of discrimination against other groups. The **strict scrutiny test** is used in cases involving race and later to national origin as well. Known as **suspect classifications**, the Court considers any unequal treatment in these two categories to be *presumed* unconstitutional unless a "compelling government interest" can be demonstrated justifying the unequal treatment. Racial discrimination was allowed to occur, for example, during World War II when Japanese Americans were detained in relocation centers (*Korematsu v. United States*, 1944). The Supreme Court agreed that the possibility of sabotage and espionage constituted compelling government interests supporting the detention even though German Americans were not treated similarly. The strict scrutiny test is also used when the alleged discrimination abridges fundamental rights—those rights expressly or implicitly granted by the Constitution. Voting and the right to travel between states are two such fundamental rights and, under the strict scrutiny test, are almost impossible for a state to abridge.

The Supreme Court uses the **rational basis test**, sometimes called the traditional test, in cases involving alleged discrimination outside of the two suspect classifications (*Dandridge v. Williams*, 1970). A state government has a much better chance of winning a lawsuit under this test than it does under the strict scrutiny test. Under the rational basis test, a law could be discriminatory and still be constitutional if a rational connection exists between what a government wants to accomplish (does it have a legitimate interest?) and how the state goes about accomplishing its interest (what was the means used?). Consider the case of Robert Murgia, a uniformed patrol officer, who was forced to retire at age 50 under state law (*Massachusetts Board of Retirement v. Murgia*, 1976). The state justified the mandatory retirement age because the physical abilities of individuals decline

with age to the point where a police officer might not be able to adequately protect public safety at 50. Although Murgia tested physically capable of performing the job four months before his birthday, the Supreme Court ruled Massachusetts could reasonably conclude a typical person experiences physical decline at 50, making the means (mandatory retirement) permissible. In *Murgi*a, the state had a rational way of protecting public safety even though a better means—such as physical tests of all police officers turning 50—could have been used. Unlike under strict scrutiny, laws under the rational basis test are *presumed* constitutional and given the benefit of doubt by courts.

The Supreme Court complicated analysis under the Equal Protection Clause by adding an intermediate level of scrutiny when discrimination is based either on gender or illegitimacy (children born out of wedlock). The reason is that these **quasi-suspect classifications** were not afforded enough protection under the rational basis test while the strict scrutiny went too far by presuming a law unconstitutional if impacting one of these groups. Under intermediate scrutiny, discrimination is permissible if the government is furthering an "important interest" in a way that is "substantially related" to its interest. Take the provision in the Military Selective Service Act that requires males to register for military service but not females (*Rostker v. Goldberg*, 1981). The Supreme Court upheld the law because the government had an important interest (to prepare for a possible military draft) and excluding women was substantially (not merely rationally) related to the interest because women are legally excluded from combat. The adoption of an intermediate level in equal protection has been criticized for creating unnecessary confusion, especially since the Supreme Court has not been consistent in how it has decided gender and illegitimacy cases itself.

Voting

Three constitutional amendments protect the right to vote. The **Fifteenth Amendment** was ratified in 1870. It forbids denying the right to vote based on "race, color, or previous condition of servitude." For a long time, nonetheless, states and local governments particularly in the South invented barriers that acted to prevent African Americans from voting, such as requiring literacy tests, without denying the right outright. The **Voting Rights Act of 1965** finally tackled the inventive ways developed to hinder racial minorities from voting. The two major provisions of the law outlawed the use of literacy tests and required approval by the U.S. Department of Justice before voting laws could be changed in areas where less than 50 percent of the non-white population had not registered to vote. The Supreme Court later voided the requirement of advance federal approval as

contrary to the Tenth Amendment and no longer needed after almost forty years *(Shelby v. Holder*, 2013).

The **Nineteenth Amendment** was adopted in 1920 and granted women the right to vote. The amendment produced a significant impact on elections, with females voting at higher rates than males and with different issue priorities than men. The **Twenty-Sixth Amendment**, ratified in 1971, is closely connected to the Vietnam War. The voting age in most states at the time was 21 and much protest occurred over 18-year-olds risking their lives in battle without any opportunity to have a political voice. The amendment reduced the legal voting age to 18 across the country but, unlike suffrage for women, younger voters have never exercised the right with much frequency.

Civil Rights

The Supreme Court made it clear early on that the Fourteenth Amendment did not prevent discrimination by private citizens (*Civil Rights Cases*, 1883). According to the Court, the amendment is specifically addressed to state government, not to private individuals, and this interpretation has never been overruled to this day. Hotels, restaurants, theaters, and other public spaces could constitutionally continue to discriminate on the basis of race despite the amendment. It took almost a century before another avenue was developed by which the federal government could curtail discriminatory behavior other than by the government.

The change in direction occurred in a case involving a motel in Atlanta that denied access to African Americans in defiance of the recently enacted Civil Rights Act of 1964 that forbade discrimination in public accommodations (*Heart of Atlanta Motel v. United States*, 1965). The motel owners argued that Congress had no authority over private business, but a unanimous Supreme Court ruled that the Constitution gave Congress the power to regulate business that crossed state borders (interstate commerce). Since the motel served people from out-of-state, it is considered an interstate business subject to congressional authority. In turning away individuals from outside the state, the motel would be deterring others from travelling across the country thereby hurting the national economy. This decision meant that almost no public accommodation could legally discriminate any longer.

Congress used the interstate commerce clause to end discrimination in a wide variety of areas beyond public accommodations:

- The **Equal Pay Act of 1963** prohibits unequal pay between men and women for comparable work.

- **Title VII of the Civil Rights Act of l964** forbids employment discrimination for refusing to hire or promote on the basis of race, sex, religion, or national origin.
- The **Age Discrimination in Employment Act of 1967** protects workers forty and older from discriminatory actions.
- The **Civil Rights Act of 1968** prohibits discrimination in housing on the basis of race, sex, national origin, or religion.
- The **Americans with Disabilities Act of 1990** eliminates barriers to persons with disabilities in such areas as employment, education, and transportation.

Several civil rights statutes rely upon federal financial assistance as a way to reach private organizations and institutions. The acceptance of the money is deemed as an agreement to accept its terms. **Title VI of the Civil Rights Act of 1964** bans racial discrimination in any program or activity receiving federal funding. For example, a private college that received a federal grant for scientific research would also be prevented from rejecting admission to students on the basis of race. **Title IX of the Education Amendments of 1972** prohibits sex discrimination by educational programs or activities that receive federal funding, including in athletics, housing, admission, and harassment. Similarly, **Section 504 of the Rehabilitation Act of 1973** bars federally funded programs from discriminating against an individual solely on the basis of a handicap.

These are but a few of the many civil rights laws enacted over the years. A controversial issue called **affirmative action** arose when Congress sought to compensate for past discrimination. It has taken a number of different forms such as hiring preferences, minority set-asides (a portion of a contract must be reserved for minority-owned businesses), and quotas (numerical targets for hiring, promoting, and admitting members of racial groups). Affirmative action coverage was extended to apply to women as well. The controversy over affirmative action centers around whether it constitutes **reverse discrimination** especially toward white males. It is difficult to know exactly when affirmative action is permissible because the Supreme Court has not followed a consistent path in handling these cases. The Court has, for example, sometimes allowed affirmative action in college admissions and sometimes denied it (*Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003).

It Depends Scenario

Suppose Congress disagrees with a Supreme Court decision. Does Congress have the power to reverse that decision? Well, it all depends on the basis for the

Court's ruling. If the ruling involves an interpretation of the Constitution, the answer is no. In *Texas v. Johnson* the Court held that burning of the American flag is protected under the First Amendment. Congress attempted to override the decision by passing the Flag Protection Act of 1989, which made it a federal crime to desecrate the flag, but the Court voided the Act as a violation of the First Amendment (*United States v. Eichman*, 1990). Since Congress cannot override the Constitution, the Supreme Court prevailed in this conflict between the two branches. On the other hand, if the Court's decision involved the interpretation of a congressional statute, the answer is yes. In *Grove City College v. Bell*, the Court interpreted the Education Amendments of 1972 on sex discrimination to apply to private colleges if any of their students received federal loans even if the college itself took no federal money. The Supreme Court's decision was narrow by limiting the law only to areas of an institution which actually received the federal funds and this interpretation of the law did not sit well with Congress. The Civil Rights Restoration Act was therefore enacted that made an entire institution subject to the 1972 amendments and not merely the area where funds were directed. Congress prevailed in this situation because its law did not transgress the Constitution.

Case Study: Civil Liberties for Native Americans

Native Americans enjoy the same freedoms, protections, and rights as anyone else in the United States. Yet many Native Americans are confronted by another tier of authority—their tribal governments. While state and federal governments must respect the civil liberties of Native Americans, tribal governments were not legally required to do so because (1) they are not part of the federal government and (2) selective incorporation only applies to states. Consequently, the basic rights and liberties of individual Native Americans had little or no protection in relation to their own tribal governments.

Congress enacted the **Indian Civil Rights Act of 1968** granting many of the freedoms and protections found in the Bill of Rights and the Fourteenth Amendment to tribal members. At least two noteworthy exceptions exist, however: the right to counsel in criminal cases and certain aspects of religious freedom. Remember that the Sixth Amendment requires appointed counsel for indigent (poor) defendants in all felony cases and many misdemeanor cases. The Indian Civil Rights Act provides a right to counsel, but only at the defendant's own expense (Reese, 1992, p.37). In terms of religion, the Indian Civil Rights Act includes a free exercise provision but not one for establishment issues. This omission means that individual Native Americans are free to worship as they

choose, but it also means that tribal governments can support a specific religion. In other words, there can be a tribal religion, but the tribe cannot coerce anyone into embracing that religion.

A controversial issue arose over the use of peyote, which is a hallucinogenic drug derived from a cactus, in religious rituals. The ceremonial use of peyote in the Native American Church has a long history, dating back about two centuries. Many states, nonetheless, began making the use of peyote illegal even in religious ceremonies. In dealing with this restriction on free exercise rights, the Supreme Court deviated from its prior decisions that employed the compelling interest test under which restrictions almost always were struck down as unconstitutional (*Sherbert v. Verner*, 1963; *Wisconsin v. Yoder*, 1972). For the first time in decades, the Supreme Court did not apply the compelling interest test by ruling that "a generally applicable and otherwise valid" state criminal law did not violate the free exercise clause (*Employment Division v. Smith*, 1990). Put simply, a law that did not target religion but applied to everyone (generally applicable) was acceptable under the First Amendment. Congress in the Religious Freedom Restoration Act of 1993 tried to force the Supreme Court to use the compelling interest test in all free exercise cases, but the Supreme Court held that the law violated separation of powers (*City of Boerne v. Flores*, 1997). A frustrated Congress amended the Act by limiting its coverage to the federal government, and the Supreme Court upheld the legislation with this narrowed scope (*Gonzales v. O Centro Espirita*, 546 U.S. 418, 2006). To sum up, the rights of Native Americans to practice their religion was cut back by revising long-established legal precedent.

Conclusion

The sojourn into the world of civil liberties and civil rights is done. You are now acquainted with many basic constitutional freedoms and at least a sampling of civil rights legislation. You had occasion to consider the interaction between Congress and the Supreme Court in the development of these rights and freedoms. You had the opportunity to evaluate the ebb and flow of civil liberties and civil rights as they were refined over time. Thus, you are now in position to understand how important these rights have been in protecting the nation's democracy. Two points should be emphasized in closing. First, this chapter is a survey, or a mere summary, of some critical freedoms and rights. There is so much more to learn. Second, the liberties and rights discussed in this chapter belong to you. These are your freedoms, your rights, your choices. Use them. Take care of them. Keep them safe.

Discussion Questions

1. Distinguish between civil liberties and civil rights.
2. Identify the constitutional right that you most treasure, and discuss why you feel so passionately about that particular right.
3. Concerning civil liberties, how would you change the Constitution? What would you add to it, or take from it, to make it more relevant and meaningful for you?
4. Discuss how a state might constitutionally take a criminal defendant to trial without first providing that defendant with a grand jury hearing.
5. How is it possible that a defendant in a state criminal trial could have rights that are not required by the U.S. Constitution?
6. Concerning the civil rights statutes explored in this chapter, identify and discuss any that you would modify or eliminate.

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12 Public Policy

Barry D. Friedman

Learning Objectives

After covering the topic of theories of democracy, students should understand:

1. Identify who has influence in the making of American public policy.
2. Explain the various "models" of public policy that political scientists have formulated to describe how public policy is developed in the United States.
3. Identify the assortment of instruments and devices available to the government for enforcing policies.
4. Describe the origin and implications of the national government's chronic deficit spending.

Abstract

The significant decisions that government policymakers—most prominently legislators but also executives and judges—make are described as public policies. While most of the contents of this textbook focus on the U. S. government's institutions and their political intrigue, this chapter examines the outputs of these institutions and political activities. Public policy comes about in a plethora of ways, but political scientists have developed "models" to describe the most common processes that give birth to policies. The policy-process model describes how a problem is identified, how it comes to the attention of policymakers, and how a policy to address the problem is formulated and legitimated. Other models state that policies come about through incremental change, rational analysis, pursuit of individuals' selfish interests, interest groups' competition with one another, cooperative efforts of those who specialize in a policy area, or direction by the elite class. The government possesses a range of instruments to accomplish policy execution—such as imprisonment, taxation, subsidies, and propaganda. The persistent demand from the public for services and benefits has outpaced the national government's ability to raise tax revenue to pay

for their costs, resulting in annual budget deficits. These deficits have accumulated to a staggering total of almost $30 trillion, which threatens to incapacitate the governmental system of the United States.

The Things that Government Does

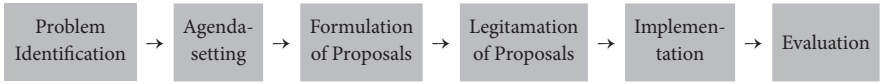
At any given time, many people have a lot of ideas about what they want government to do. Sometimes, they want the government to do certain things that are necessary to promote the public interest; for example, they may have observed a lot of accidents at certain intersections in a small town, and believe that it is time for the local government to install traffic lights. Sometimes, they want government to do certain things that will make themselves, specifically, better off. Legislators might want a new state highway, featuring a shiny new bridge that will cross a river, with the expectation that constituents will appreciate the effort and vote for their reelection. In fact, they may arrange for the bridge to be named after them. Lobbyists for an interest group may ask friendly legislators to arrange for a tax credit that benefits the businesses that are affiliated with their organization. All of this activity of demands, accommodations, and votes results in official government decisions. We often refer to such a decision or a set of decisions as a **public policy**.

The ingredients of public policies of the U. S. national government are found in documents and instruments such as these: the Constitution, the statutes, the appropriations laws that constitute the government's budget, executive orders promulgated by the president, rules and regulations promulgated by regulatory agencies, and opinions of the Supreme Court. As a result of the decisions that all of these documents and instruments reflect, the national government can be said to have public policies in such policy areas as agriculture, consumer protection, crime suppression, the economy, education, energy, environmental protection, fairness in employment, foreign affairs, forest and park preservation, housing, illicit drugs, immigration, housing, military operations and readiness, public health, relief for poor families, taxation, trade, transportation, and unemployment.

How Public Policy Comes About

Public policies come about in numerous ways. Policy experts have described a typical manner in which a policy comes about. The **model** presents a six-step **policy process**, and these steps occur in sequence as shown in the flow chart in Figure 12.1 (Dye, 2010/2011, p. 29).

Figure 12.1: Six-Step Policy Process Model



Here is an explanation of each of the steps to which the policy-process model refers:

- *Problem identification*. The process begins when someone or some group identifies a problem that some segment of the population is experiencing. For example, a member of Congress may be receiving letters from constituents that express complaints about a particular situation. Or the news media may notice some kind of difficulty being experienced by some number of people, and report the problem to their viewers, listeners, and readers.
- *Agenda-setting*. Public policy scholars have conceived of an **agenda of public policy**. On this agenda are supposedly listed policy problems that have come to the attention of public policymakers, such as the president or members of Congress, such that they now recognize the need to take some sort of actions to remedy the problems. According to this model, public policymakers are generally reluctant to acknowledge that they have to take action on some problem, because remedies cost money and money is scarce. So, the model says, it is only when the demands for action become numerous and adamant that policymakers conclude that they can no longer ignore the demands. At that point, the problem becomes an entry on the agenda of public policy. There really is no document that is entitled "The Agenda of Public Policy." However, there are certain places to which you may direct your attention for clues about what problems are on this metaphorical agenda. If you would like to know what is on the president's agenda, you might examine the content of his State of the Union message. If you would like to know what is on Congress's agenda, you might examine the legislative calendars of the Senate and the House of Representatives, respectively.
- *Formulation of proposals*. The decision by policymakers to address a problem will prompt some kind of activity to formulate specific proposals. Here are the kinds of people and institutions who, from time to time, formulate proposals:
  - ▷ Employees of the Executive Branch (bureaucrats) are known to be active in the formulation of proposals. Some of the most extensive

pieces of legislation that have made their way through the legislative process are known to have originated in the bureaucracy.

- ▹ Congressional staff members—those who work for senators and representatives in their own offices or who work for congressional committees—are known to be prolific authors of legislation.
- ▹ Interest groups may employ individuals, such as lawyers, who understand the legislative process and will deliver proposed bills to members of Congress and congressional committees.
- ▹ **Think tanks** often develop policy ideas. A think tank is an institution that employs scholars who develop policy proposals based on their knowledge in their respective fields of study. The think tank will make the policy proposals available to policymakers who are looking for solutions to problems on the agenda of public policy.

- *Legitimation of proposals*. In a democratic system like that of the United States, policies must be made legitimate before they can be put into effect. Here are some ways in which policies are legitimated:
  - ▹ When Congress enacts a bill, it provides legitimacy to the bill's purpose and content. The public understands Congress to be the legitimate representative of the public, which elected the legislators, pursuant to Article I of the Constitution.
  - ▹ When presidents sign an act of Congress into law, they add to the perception of the enactment's legitimacy. The public acknowledges the president's unique position as the only nationally elected official (along with the vice president), and respects the president's signature on the newly minted law.
  - ▹ On occasion, a lawsuit that challenges the constitutionality of a law will be considered by the Supreme Court. When the court declares the law to be constitutional, the declaration causes the law to take on a virtually impenetrable aura of legitimacy.
  - ▹ Policymakers depend on the Executive Branch officials who administer a law to do so in a way that supports the appearance of legitimacy. For example, when an agent of the Federal Bureau of Investigation explains to a suspect that the suspect has been arrested for disobeying a specific law enacted by Congress and signed by the president, the agent is indicating that the arrest is occurring in accordance with the law and is not an arbitrary and capricious action by the bureau and other officials of the criminal-justice system.

- *Implementation*. Once a policy has been enacted and signed into law, the executive branch is responsible for administering the law.
- *Evaluation*. At some point, and, policy specialists hope, at regular intervals, the execution and results of a policy will be evaluated to determine whether the policy is beneficial and the execution is effective. If not, the policy should be reconsidered and either redesigned or abandoned.

More Specific Models of How and Why the Participants Make Public Policy

Supplementing the policy process model that the previous section of the chapter described are a number of other models that explain more specifically who are influential in making policy and what their motivations are when they participate in the policymaking process. The following list presents some of the most well-known models to which modern literature about American government often refers.

Incrementalism Model

In 1959, Charles E. Lindblom published the first description of the **incrementalism model of public policy**. Lindblom explained that most policy that the national government implements in a given year is simply the previous year's policy with small (incremental) modifications made to it. The logic is difficult to challenge. Such an approach to policymaking saves time as well as the arduous effort to innovate new policy technologies. This approach also allows the full use of existing organization, equipment, and other infrastructure, without having to acquire new kinds of resources to support a radically different policy approach. The government's—particularly the bureaucracy's—familiarity with the ongoing policy approach allows for the development of experience that contributes to efficiency and gradual refinement of implementation methods. Few political scientists argue with the conventional wisdom that the incrementalism model is the best single explanation of policymaking in the national government.

Rationalism Model

If incrementalism is the preferred method of policymaking, then the **rationalism model of public policy** is its theoretical antithesis. The rationalism model contends that the fundamental criterion for sound policy is the realization of the greatest possible net benefit (i.e., difference between benefit and cost)

to society. The rationalism model proposes that policymakers who are trying to design a policy should consider the principles that society values, develop an assortment of policy alternatives that would satisfy society based on those principles, evaluate the policy alternatives, and then compare the alternatives and select the one best alternative (i.e., the optimal choice).

If there is one evaluation method that the largest number of proponents of the rationalism model advocates, it is the method of "cost-benefit analysis." In evaluating a policy alternative, one would utilize cost-benefit analysis by listing and quantifying the costs associated with the alternative and then listing and quantifying the benefits associated with the alternative. A value of net benefit can be computed by subtracting the sum of the costs from the sum of the benefits. An alternative whose net benefit is less than zero could be eliminated without further thought. A value of benefit-cost ratio can be computed by dividing the sum of the benefits by the sum of the costs. An alternative whose benefit-cost ratio is less than one could be eliminated without further thought.

We know that incrementalism comes naturally to public policymakers. In so far as rationalism does *not* come naturally, the model has to have advocates who try to persuade policymakers to actually try to utilize it. This effort by the advocates is an uphill battle, because of the complications associated with the rationalism model. Some of the complications are as follows:

- The analytical process is exceptionally time consuming. Some of this time inevitably involves the acrimonious policy arguments (i.e., in the legislature) that deliberations about newly conceived policy proposals provoke.
- Because of the model's methodological requirements that call on policy designers to list the possible policy alternatives, these policy designers are challenged to conceive of a number of currently nonexistent policy technologies. This process strains the human imagination.
- The radical redesign of policy may require existing organization, equipment, and other infrastructure to have to be replaced with new organization, equipment, and other infrastructure, at significant cost.
- Replacing policy approaches with which we have years of experience with newly designed approaches with which we have *no* experience introduces the significant threat that we will encounter unwelcome surprises when the new approaches are implemented. Such unanticipated consequences can be very costly and can agitate the general public, clients of agencies, and the government officials who have to try to appease those who have

suffered from the problems that were not foreseen.

Public-Choice Model

Credit for the **public-choice model of public policy** is given to James M. Buchanan, Jr., who won the 1986 Nobel Prize in Economic Science for developing it. Buchanan explained that decisions about public policymaking are made by a wide range of individuals, all of whose actions are oriented toward the realization of their self-interests. The model traces these self-interest-oriented actions all the way back to each voter, who, as Anthony Downs (1957) explained, makes decisions about which candidates to vote for based on whose policy platforms will result in the most gratification (especially wealth) for that individual. Downs similarly explained that political-party leaders in the United States prefer the development of party platforms that will appeal to the largest number of voters, so that their political parties can win the upcoming elections. As Chapter 7 of this book explains, members of Congress decide how to vote on bills based on whether the bills establish policies that will appeal to their constituents (i.e., policies that offer entitlement programs to the entire public or groups within the population and policies that supply "pork" to the senators' states and the representatives' congressional districts).

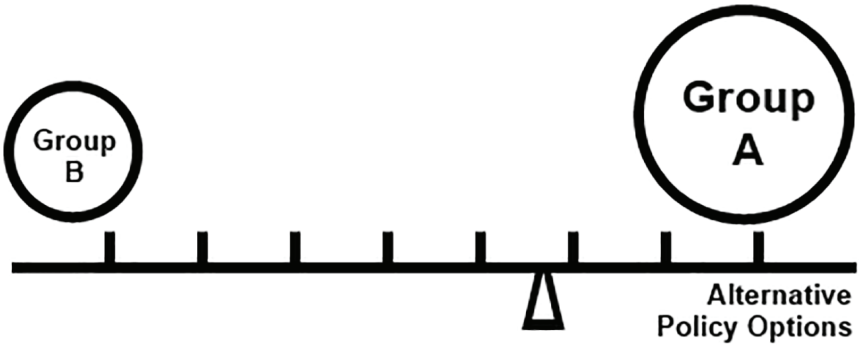
In summary, the public-choice model conceives of the arena of public policymaking as a giant marketplace of ideas, including policy proposals, in which government officials and individual citizens "shop" for policies that will benefit them and then support them. The question of whether such self-interest-oriented decisions in the public policy arena can be aggregated to create any kind of coherent, productive result for society resembles the question of whether the self-interest-oriented decisions of business owners, employees, and shoppers can be aggregated to create any kind of coherent, productive result in the commercial and industrial marketplace. The capitalist economist Adam Smith (1776) argued that "the invisible hand" guides participants in the commercial and industrial marketplace to make self-interest-oriented decisions that, in the final analysis, benefit society. The same logic can be applied, by analogy, to argue that self-interest-oriented decisions by individuals in the policy arena can similarly benefit all.

Group-Theory Model of Public Policy

Based on David B. Truman's classic monograph, *The Governmental Process: Political Interests and Public Opinion* (1951), in which he describes the influential

role of interest groups in the American political system, policy scholars such as Dye (2010/2011, pp. 19-20) have conceived of a **group-theory model of public policy**. Dye presents a diagram that illustrates, for a theoretical policy matter, a scale of alternative policy options on which the existence of competing special-interest groups is noted. On this diagram (see Figure 12.2), the existence of two such groups is indicated by circles that are drawn (1) at the groups' respective positions on the scale of alternative policy options and (2) in relative proportion to the groups' influence (in terms of number of members, wealth, connection to influential decision-makers, and so on).

Figure 12.2: Scale of Alternative Policy Options for Competing Groups



The triangle (analogous to a fulcrum that balances a see-saw or other lever) is placed under the scale at a location that "balances" Group A and Group B's respective interests. Note, on this theoretical example, that the fulcrum is located closer to the larger Group A's position in deference to A's size, but not completely at A's extreme position in deference to Group B's existence.

Accordingly, this model states that policymakers determine where to set policy based on the competition of the interest groups that are active in the particular task environment for the policy area.

As an example, consider the policy area related to abortion. In 1973, the U. S. Supreme Court handed down its opinion in the case of *Roe v. Wade*, 410 U.S. 113 (1973). Confronted with a heated policy debate involving the pro-life and pro-choice groups, the court handed neither group a conclusive victory. Instead, it split the difference, prohibiting state legislatures from outlawing abortion during the first trimester of a pregnancy and allowing state legislatures to outlaw abortion (with certain specific exceptions) in the third trimester. Of course, the court, in its opinion written by Associate Justice Harry A. Blackmun, did not

explain its rationale in these pragmatic terms, in accordance with its practice of citing provisions of the Constitution and the laws. But the effort to provide some sort of satisfaction to both sides is unmistakably identifiable.

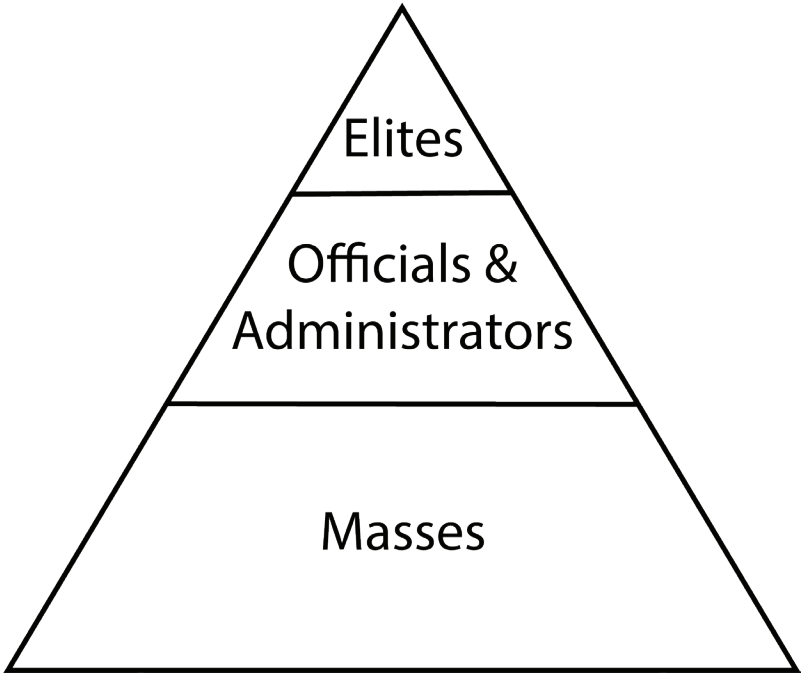
Subgovernment Model of Public Policy

The **subgovernment model of public policy** states that, in any particular policy area, there is an "iron triangle" partnership involving the congressional committees, executive department or agency, and interest groups active in that policy area that dominates policy in that policy area. This influential model of public policymaking has already been described in Chapter 5.

Elitism Model of Public Policy

In 1956, the sociologist C. Wright Mills published a memorable work titled *The Power Elite*. Mills states the disconcerting fact that wealthy Americans have a disproportionate amount of influence in the determination of what public policy will be. In interpreting Mills's theory, Dye (2010/2011, p. 21) produces this diagram (Figure 12.3):

Figure 12.3: Elitism Model of Public Policy



According to this **elitism model of public policy**, the elites provide policy direction to the officials and administrators. The population of officials and administrators includes elected and appointed government officials, such as the employees of the bureaucracy. The officials and administrators impose policy execution upon the masses. Mills dismisses the question of whether elections allow the masses to control the policy decisions of officials and administrators by characterizing American elections as a sham. In the final analysis, Mills insists, the officials and administrators will do what the elites require. The possession of enormous wealth seems to guarantee the aristocrat a position of influence. Really, what does any ordinary person do when he meets a wealthy person: challenge him or try to charm him?

Other Models of Public Policy

The list of models that appears above includes some of the most popular models. This chapter does not list and describe the other models. Policy scholars believe that the incrementalism model is the best explanation for policy decisions, but others may very well be useful in describing how policy develops in certain circumstances. Being aware of these models can help an observer of politics and government to explain how some of the most visible policies arise in the American system.

Instruments of Public Policy

Max Weber (1918) wrote that government has "a monopoly of the legitimate use of physical force." While private-sector organizations have no mechanisms for compelling the public to act in accordance with their preferences, obviously the range of instruments available to the government to influence citizens' behavior is much wider than the range of those available to other entities. A list of the instruments of public policy that government can use follows.

Imprisonment and Capital Punishment

The government has the unique capacity to punish disobedience to government policy by an individual through taking away his liberty by imprisoning him or through taking his life by executing him. In a liberal society like the United States, the government exercises restraint in taking such action. For example, the Bill of Rights requires that an accused individual be accorded due process before a prison sentence or capital punishment can be inflicted on him, and limits, to some degree, the kinds of actions for which a person may

be punished. Nobody may be punished for exercising civil liberties; the First Amendment, for example, guarantees that nobody will be imprisoned solely on account of making unpopular political statements.

Fines

While not quite so severe as the penalties of imprisonment and execution, fines may be imposed by the government as the consequence of disobedience to public policies. Speeding tickets and parking tickets are examples of misdemeanor offenses that may result in fines. The punishment for many felonies involves imprisonment or fines or a combination of the two.

Conscription

When it needs personnel for such purposes as to staff the Army to prepare for or wage military conflict, the government has the power to conscript (draft) individuals for certain periods of time, taking them from their homes and relocating them to a place—in the United States or elsewhere—that the government finds convenient.

Taking of Property

The government has the impressive power to condemn an individual's property and to convert the property to the government's use. This power is known as **eminent domain**. The Fifth Amendment requires that the government pay for the property, but, in the final analysis, the amount of the payment will ultimately be determined by the government's judiciary if the individual and the government do not reach a mutually agreeable settlement. A common reason for the government to take somebody's property would be to obtain the land necessary to build a new interstate highway.

Taxation

Another government power—one that citizens dislike but tolerate—is the government's power to tax a variety of items and activities. The national, state, and local governments tax earned income (payroll tax), total amounts of earned and unearned income (income tax), profits resulting from the appreciation of value of property and investments (capital-gains tax), property such as real estate and automobiles (property tax), retail purchases according to price (sales tax), retail purchases according to quantity of an item (excise tax), gifts (gift tax), and inheritances (estate tax). Although an income tax will tend to discourage some

people from earning income, in so far as a tax is a penalty on the thing being taxed, the national government has greatly complicated the income-tax law (the Internal Revenue Code) to encourage certain behaviors. The mechanisms of the income-tax law that encourage behaviors are known as loopholes, deductions, and credits. An example is the government's desire to encourage home ownership. In order to persuade more people to buy a home, Congress inserted a provision in the Internal Revenue Code to allow taxpayers to deduct the mortgage tax that they pay from their individual amount of income when they calculate how much tax they must pay on that income. Another example is the government's desire to encourage people to donate to charities. A person's donations to charities are deductible, just as mortgage tax is deductible.

User Fees

The government may charge individuals who use certain government services for the use of those services. Such charges are called **user fees**. An example is a toll that might be charged for operating a motor vehicle on a highway. Government corporations such as Amtrak and the Postal Service support themselves mostly through the collection of user fees.

Subsidies

The government may endeavor to influence individuals' behavior by offering a subsidy. For example, Congress has offered subsidies to farmers who plant certain crops or who refrain from planning certain crops, depending on how the national government has wanted to affect the supply of such crops. The farmer simply receives a check from the U. S. Treasury to pay him for his cooperation.

Benefits, Including "Entitlements"

For the purpose of helping a disadvantaged group, or for the purpose of helping some constituency whose favor legislators would like to curry, the government may bestow a benefit. Medicaid—health care paid for by the government—is offered to poor people so that they do not find medical assistance to be inaccessible. Veterans receive an array of benefits, many of which are administered by the Department of Veterans Affairs; these benefits include health care and college tuition assistance. There are some benefits that are awarded selectively to applicants in accordance with the discretion of government officials. For example, the secretary of the Department of Housing and Urban Development may have the discretion to decide whether to provide funding to a

community for a proposed housing project. On the other hand, some benefits are known as **entitlement** programs. In the case of these programs, the law describes the qualifications for obtaining the benefit, and every individual who qualifies is entitled to the benefit; program officials do not have the discretion to deny the individual's application for the benefit to which he is legally entitled. Therefore, the entitlement benefit is, under the law, the qualified individual's property. He is entitled to the benefit as long as he continues to satisfy the criteria of the program.

Adjusting Monetary Variables

The Federal Reserve Board affects the economy by adjusting the nation's monetary arrangements. For example, the board may adjust the discount interest rate—the rate at which it loans money to banks—or adjust the money supply, for the purpose of causing interest rates on loans to rise or fall.

Propaganda and Persuasion

The government may attempt to affect the public's behavior through propaganda—rhetoric designed to influence how people think about politics, government, and society. Government agencies generate colossal amounts of written and oral communication to try to obtain support and influence behavior. This and other efforts at persuasion are designed to cause the public to act in a certain way without using policy instruments that involve the use of more forceful government power. Governments have sometimes used persuasion to try to influence people to carpool to work, refrain from littering, join the volunteer Army, and mail Christmas gifts weeks before the holiday.

Laissez Faire Inaction

Lastly, the government may decide to do nothing about a problem along the lines of the approach of *laissez faire*. This is still considered a public policy. There are many public health activists who encourage the national government to provide free needles to drug addicts because such a program could arguably suppress the spread of the HIV virus. Congress has received this advice and made a conscious decision to do nothing about it. This, too, is a policy.

Public Policy and Money

Obviously, there is a close association between public policy and money. Hardly any public policy to accomplish something can be implemented without

money. It is the duty of the legislature to arrange for the Executive Branch to have funds so that the laws can be administered. Congress enacts laws for such purposes as to impose taxes so that revenue can be raised. Then, Congress enacts **appropriation** laws to appropriate money for the use of the Executive Branch. The U. S. Constitution states, in Article I, Section 9, "No money shall be drawn from the treasury, but in consequence of appropriations made by law. . ."

Each January, the president presents to Congress the proposed budget of the national government, which the Office of Management and Budget has developed under the president's supervision, for the fiscal year that will begin later that year on October 1. Much of Congress's attention for the nine months that follow is directed toward considering the president's proposed budget, deciding on Congress's own preferences for how money should be spent, and enacting a set of appropriation laws. Once Congress has enacted, and the president has signed, these laws, the national government has a budget for the upcoming fiscal year.

The national government's budgeting process is guided by the incrementalism model of public policy that is discussed above. That is to say, the most important determinant of the budget of a particular bureau is how much the bureau was awarded for the preceding fiscal year. Routinely, the president and Congress will provide for a bureau the appropriation amount that it received for the previous year plus a modest increase. Only a specific change in policy would tend to significantly change the size of a bureau's budget either upward or downward.

A government bureau must exercise discipline in ensuring that it will not overspend its appropriation. If OMB officials determine that a bureau is failing to "live within its means," the officials may proceed to intervene in the bureau's managerial processes. There is, however, one glaring exception, which involves the entitlement programs discussed above. An entitlement program cannot "run out" of money. The president is obligated to ensure that funds are made available for entitlement programs, without limit, even as new applicants come forward and demonstrate their eligibility. For example, if a veteran is qualified for a tuition benefit that is an entitlement under the law, no government official can tell the veteran that a quota has been reached. The official must award the benefit, and the president and his subordinates must ensure that the money is available to fund it.

Entitlement programs grow, but they never go away. As James Q. Wilson explains, "An entitlement, once bestowed, cannot easily be withdrawn" (1975, p. 89). The beneficiaries of an entitlement program will fight like lions if their entitlement is threatened. The late House Speaker Thomas P. "Tip" O'Neill Jr. observed ruefully that Social Security is "the 'third rail' of American politics," so dangerous is it for elected officials to even speak about decreasing the program's

benefits. (O'Neill's "third rail" metaphor refers to the high-voltage rail that powers electrified railroad trains, such as most subway trains.)

You have probably heard the news that the national government has been spending more for programs than it is collecting in revenue. Every year, the national government operates "in the red"—with a deficit. The national government's deficit in a given fiscal year adds to the accumulated amount of the government's debt. In 2021, the debt is surpassing the astronomical sum of $28 trillion. Comparing this amount to the real gross domestic product of the United States in 2019—$19.0 trillion—should make the problem clear to any astute observer. The national government's debt is now larger than the size of the nation's entire economy!

In Chapter 7, there is a discussion of the strategies that members of Congress use to get reelected. These strategies include insertions in laws of provisions for "pork" projects for members' states and congressional districts. They also include the creation of entitlement programs, and assortments of other kinds of benefits. Members of Congress—regardless of their political-party affiliation—have been so determined to ensure their reelection that they have been indiscriminate in creating and expanding these programs. The national government reached the point that no more programs could be funded with current-year tax revenues. Undeterred, members of Congress proceeded to fund new programs and program expansions with **deficit spending**, as a way of life. By now, the debt that has accumulated is beyond the nation's ability to repay. Much of this debt is owed to foreign investors, who will—sooner or later—want to be repaid with interest.

Aggravating the problem of deficit spending has been the nation's continuing involvement in extraordinarily expensive military operations in such places as Afghanistan and Iraq. During previous military operations, such as World Wars I and II, the United States undertook two or four years worth of warfare, financed by debt. The Global War on Terrorism—a real war with sprawling and active U. S. military involvement—is approaching its 20th very expensive year. Any official who might have fantasized about balancing the national government's budget would have thrown in the towel upon realizing that these expenditures are an apparently permanent component of the budget.

At this point, no reputable economist will deny that there will be consequences for this decades-long, reckless spending spree. Economists do argue about what the consequences will actually be. One consequence is already recognizable: The hands of national-government policymakers are clearly tied by the monstrous debt. Many proposed programs that might really be needed today to respond to real problems are being set aside because the national government is broke.

President Donald Trump promised during his 2016 campaign that he will "Make American Great Again" and that "we will have so much winning" once he is elected and inaugurated. No American in her right mind would root for the president to fail on such promises. Obviously we would like to have prosperity. But, in trying to make a nation whose government is over $28 trillion in the red prosperous, Mr. Trump took on the challenge of his life—and four years later, he passed it on to his successor, Joseph Biden. The cold reality is that it is much easier to build a skyscraper than it is to balance the federal budget. One of the sad facts of the government's indebtedness is that our college-age population, younger children, and children not even born yet will not be able to escape the consequences of our presidents' and Congress's lamentable irresponsibility. For years, critics warned policymakers that they were "mortgaging our children's future." Presidents and members of Congress ignored these critics. But, without a doubt, the bill will come due.

Discussion Questions

1. Is the process of public policymaking in the United States one that is dominated by a few influential decision-makers or that results from widely dispersed opportunities to participate? Explain.
2. Which model of public policymaking do you consider to be most persuasive?
3. What factors lead Congress to use the threat of imprisonment as an instrument of policy in some cases, and persuasion in other cases?
4. If you were president, what would you do about the national government's $28-trillion debt? What implications of your approach might you anticipate?

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13 State and Local Government

Ross C. Alexander

Learning Objectives

After covering the topic of state and local government, students should understand:

1. The structure, functioning, and common components of state governments in the U.S.
2. The structure and functioning of the various types of local governments in the U.S.
3. The degree to which state and local government affects the lives of citizens on a daily basis.
4. How states and local governments experience continually evolving and difficult funding pressures and priorities.

Abstract

There are over 89,000 (U.S. Census Bureau, 2012) governments in the United States—one federal government, 50 state governments, and tens of thousands of local governments (cities, townships, counties, special districts, etc.), yet we often overlook these vital governmental entities that impact our lives on a daily basis. In addition to exploring the basic composition, administration, and functioning of state and local government, this chapter explains how individuals can become more involved and engaged in the public policy decisions of their communities. Then, this chapter addresses the various funding strategies that states, counties, and cities have had to devise and employ to deliver services in the current economic crisis, many of which are innovative, non-traditional, and driven by necessity.

Introduction

Former Speaker of the U.S. House of Representatives Thomas "Tip" O'Neill once famously quipped that "All politics is local." Whether or not this statement is entirely accurate is open to debate, but the notion that state and local government has an effect on the daily lives of citizens is undisputable. Most government exchanges and interactions are with agents of state and local government and include such offices and officials as: public school teachers, police officers, social workers, county commissioners, city councilors, city and county managers, building inspectors, city planners, parks and recreation directors, firefighters, tax assessors, code enforcers, economic developers, city engineers, city and county clerks, state regulators, park rangers, bus drivers, and more. Elected and appointed officials at the state and local level make policy decisions in the areas of education, transportation, taxation, land use, growth and development, health care, emergency management, social services, immigration, and environmental protection, among others. They shape and control budgets and expenditures ranging from the small (tens of thousands of dollars) to the large (tens of billions of dollars).

Increasingly, as citizens clamor for more government services delivered more efficiently and effectively (without tax increases), state and local governments must devise strategies to generate revenue and meet citizen demands. Voter turnout for state and local elections is less than turnout in national level, especially presidential, elections. Traditionally, the lower the level of government, the lower the rate of voter turnout, which is unfortunate considering that these "lower" levels of government are closest to the people. It is not uncommon for voter turnout for primary elections at the local level to be in the single digits (Holbrook and Weinschenk, 2013).

State Governments

Constitutional Authority

The Tenth Amendment to the United States Constitution reads, "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." This so-called **Reserved Powers Clause**, although simply-written, is the constitutional basis for federalism and has resulted in a great deal of controversy and strained relations between the federal government and the states (as described in detail in earlier chapters). Nevertheless, state governments were created as co-equal entities by the framers of the Constitution and are therefore constitutionally-

legitimate. Article I, Section Eight of the U.S. Constitution explains in detail powers given to the federal government (specifically Congress), powers shared by the federal government and state governments (called **concurrent powers**), and powers given exclusively to the states. Examples of powers given to the federal government and Congress solely include regulating interstate commerce, coining money, declaring war, raising an army, and making laws "necessary and proper." Examples of concurrent powers that the federal government shares with the states include collecting taxes, establishing courts, borrowing money, making and enforcing laws, and chartering banks and corporations. Finally, powers that states possess exclusively include establishing local governments, regulating intrastate commerce, conducting elections, and ratifying amendments to the U.S. Constitution. As society has become more complex and as citizens have demanded more services, government has expanded exponentially at all levels. Today, states make policy decisions affecting millions of people, concerning potentially billions of dollars.

State Constitutions

Because of federalism, states are constitutionally-legitimate entities and each state, therefore, has its own constitution. Many **state constitutions** (such as those of Virginia, South Carolina, and New Hampshire) existed prior to the writing of the U.S. Constitution in 1787 and were models and guides for the delegates to the Constitutional Convention. James Madison, in fact, utilized the Virginia constitution of 1776, written by Thomas Jefferson, as a template for the Virginia Plan which greatly influenced the U.S. Constitution. The U.S. Constitution is brief (roughly 7,400 words including the Bill of Rights) in comparison to most state constitutions, which are longer and more detailed, averaging roughly 26,000 words, and therefore less flexible. For example, Alabama's constitution adopted in 1901 is over 300,000 words. Even Vermont's constitution, which is the shortest, is over 8,300 words–longer than the U.S. Constitution (Hammons, 1999, 840). While the hallmark of the U.S. Constitution is its flexibility and endurance, having only been amended 17 times since 1791, state constitutions are amended much more frequently (115 times on average), or as is the case with many states, re-crafted altogether.

Most states have had several constitutions since 1776. An exception is the Massachusetts constitution, ratified in 1780, which is the longest-enduring written constitution in the world (Kincaid, 1988, 13). The current Georgia constitution was ratified in 1983, is the "newest" state constitution, and, in fact, is the 10th constitution in the state's history. The original U.S. Constitution has

endured since it was ratified in 1789. On the contrary, there have been 145 different state constitutions since 1776 (Hammons, 1999, 838). Louisiana has had 11 constitutions; Georgia 10; South Carolina 7; Florida, Alabama, and Virginia 6; and Arkansas, Texas, and Pennsylvania 5 (Hammons, 1999, 841). Another primary difference between the U.S. Constitution and state constitutions is the location of the Bills of Rights. In the national version, the Bill of Rights is not a formal component of the document itself, but rather the first 10 amendments. In most state versions, the Bill of Rights is found in the beginning and often in the very first section (which is true for the Georgia Constitution). Because state constitutions are longer, more detailed, amended more frequently, and less flexible, they can provide additional protections for citizens, something which has led to judicial evolution at the state level, influencing the actions of lawmakers and the decisions of judges (Kincaid, 1988).

How Institutions Function in the States

Like the federal government and the U.S. Constitution, state governments and constitutions outline separate branches of government with checks and balances that share power. In every state, the chief executive is the governor. The lawmaking body is the state legislature, often called the General Assembly. 49 states utilize a bicameral legislature. Nebraska's unicameral legislature is the only exception. The highest courts in the states are referred to collectively as "courts of last resort" because not every state refers to its highest court as the "supreme" court (the Georgia Supreme Court is the highest court in the state). Just as the framers intended that Congress be the strongest branch of government, state legislatures, as described by most state constitutions, are intended to be the strongest entity in state governments. However, just as has been the case with the evolution of presidential power, governors in the states have gained a tremendous amount of power at the expense of state legislatures over time. As a result, governors today are probably much stronger than intended in many cases.

The traditional powers of **governors**, those usually listed explicitly in state constitutions, are similar to the powers of the president (Beyle, 1968). Governors traditionally possess the power to appoint officials in the Executive Branch, oversee state agencies, veto legislation, call the state legislature into general session, dispatch the National Guard in times of crisis and emergency, and craft the budget, among others. In an informal sense, governors also serve as chief of their respective parties, spokespersons and ambassadors for their states, and chief lobbyists with their state legislatures, putting pressure on members to enact their agendas and policies. In terms of length of gubernatorial terms and re-eligibility, states vary

tremendously. Most governors serve four-year terms, but a few serve two-year terms, as is the case in New Hampshire and Vermont. Governors in 38 states are limited to two terms of office, the Governor of Virginia is limited to one term of office, and the remaining are not term-limited (National Governors Association, 2020). The Governor of the State of Georgia is limited to two four-year terms.

As the federal government has devolved power back to the states since 1980 or so, governors have become more powerful, many even possessing name recognition on a national and international scale. Governors today are proactive policy entrepreneurs (Beyle, 1995), aided in no small part by the power of the **line-item veto**, whereby they can veto parts of legislation, but not the entire bill (44 governors possess this power). The president does not possess the line-item veto. In generations previous, the path to the U.S. presidency was through the Senate (John F. Kennedy, Harry Truman, Lyndon Johnson), but many recent presidents and presidential candidates previously served as governor (Jimmy Carter, Ronald Reagan, Bill Clinton, George W. Bush), demonstrating their ability to oversee state agencies, manage budgets, handle crises, and win elections on a smaller scale, yet fulfilling duties similar to that of the president. Not surprisingly, gubernatorial elections can cost tens of millions of dollars, looking very much like presidential elections and are marked by extensive television advertising, usage of professional campaign advisers, and negative campaign ads.

The composition, functioning, and especially size of **state legislatures** vary tremendously across the states. Nebraska's unicameral legislature has 49 members. The smallest bicameral legislature is Alaska's with 60 members. The Georgia legislature has 236 members with 180 in the lower house and 56 in the Senate. Oddly enough, the largest state legislature is found in one of the smallest states—New Hampshire—which has a 424 seat body with 400 members serving in the lower house and has one representative per approximately 3,000 citizens. Contrast that with California, which has 80 members in its lower house, each representing roughly 450,000 people (National Conference of State Legislatures, 2020). Most states utilize four-year **terms of office** for both the lower and upper houses of their legislatures, although 12 states utilize two-year terms. All members of the General Assembly in Georgia serve two-year terms. Since 1990, many states have enacted **term limits** for state legislators; 15 states currently do so. Legislators in these states are limited from 6 to 12 years in office, depending on the state. State legislators in Georgia are not term-limited (National Conference of State Legislatures, 2020).

There is also a tremendous amount of variation among the states with regard to full-time versus part-time legislatures (or "hybrid"), which is determined by both compensation and number of days in session. Many states pay legislators

well over $60,000 per legislative session, with California providing the highest pay at over $110,000. Conversely, many states pay their legislators less than $20,000 per legislative session, including Georgia, where legislators are paid $17,342 for the forty-day session. Not surprisingly, those states with longer legislative sessions (several months) provide greater compensation and more staff to its members. (National Conference of State Legislators, 2020). All states except Texas meet in yearly sessions. Women are better represented in state legislatures than in the U.S. Congress, where women currently comprise roughly 23% of the 535-member body. In 2020, there were 2,145 women serving in state legislatures (29%), including a low of 14.2% in West Virginia, to a high of 52.4% in Nevada (in Georgia, women comprise 30.5% of the legislature). This 29% number has increased nearly four percent in the last two years (National Conference of State Legislatures, 2017).

The financing of state legislator campaigns does not reflect the campaign finance model at the national level, where members of Congress are restricted by the Federal Election Campaign Act of 1974 and the Bipartisan Campaign Reform Act of 2002 which limit direct contributions to members of Congress by individuals and groups, though subsequent legislative and judicial actions allow virtually unlimited direct spending by outside groups. Campaign contribution limits vary greatly across the states; seven states have no limits on campaign contributions whatsoever. In Georgia, candidates for state legislature can receive $2,600 for primary and general elections. Limits on **campaign contributions** (or lack thereof) can have implications, most notably the degree to which special interests have access to lawmakers and the extent to which they influence public policy. Furthermore, states with low campaign contribution limits tend to have more competitive elections with challengers winning at a higher rate (Hamm and Hogan, 2008).

In terms of daily functioning and policymaking, state legislatures function very similarly to the U.S. Congress, working primarily in **committees**. Legislators will serve on several permanent or standing committees and perhaps other ad hoc or temporary committees as well. Traditionally, seniority rules with longer-serving members holding positions on the more prestigious committees. These long-held legislative traditions and folkways may erode as state legislators are subjected to term limits.

The operation of the **judicial system** (the courts) differs somewhat throughout the states. As mentioned previously, not all states refer to their highest court as the Supreme Court. In some states, judges are elected on partisan ballots, in others on non-partisan ballots. Other states appoint their judges to all levels of

courts, while others still utilize the Missouri Plan, which involves a combination of appointments and elections. The primary difference is that judges who must run for election, especially those on partisan ballots, must concern themselves with political issues and variables like those governors and legislators face, most notably fundraising. Today, competition for judicial seats is fierce and can cost candidates hundreds of thousands of dollars per election cycle (Bonneau, 2007). What is common among all the states is the amount of judicial business or cases heard by state courts in comparison with the federal court system. State courts are busier, including the state courts of last resort, which hear many more cases than the U.S. Supreme Court.

Local Governments

Authority

Local governments (counties, townships, cities, school districts, etc.) are not mentioned in the U.S. Constitution and, therefore, their power and authority is not constitutionally-based. Rather, as the U.S. Supreme Court decision that came to be known as **Dillon's Rule** clarified in 1868, local governments are creations of the state, subject to the authority and oversight of individual states, not the federal government. However, as counties, townships, cities, and other units of local government have expanded, they have become responsible for delivering more services to more people. As a result, they function almost as a third level or layer in the system of American federalism, even if they lack authority from the U.S. Constitution. It should be remembered that almost all units of government are local units of government.

Counties

Counties are subdivisions of states delivering state services at the local level including, but not limited to record-keeping, licensing, transportation, economic development, law enforcement, water management, elections, planning and zoning, child protection, education, and parks and recreation. Counties exist in 48 states, with county-like entities called boroughs found in Alaska and parishes found in Louisiana. Texas boasts the most counties with 254. There are only three counties found in both Hawaii and Delaware. There are 159 counties in Georgia, the second-most of any state (National Association of Counties, 2020). Counties vary tremendously in size, from less than 100 square miles to over 10,000 square miles. Arlington County, Virginia, the smallest county in the United States, is only 26 square miles. Conversely, San Bernardino County, California, the

nation's largest, is over 26,000 square miles. In terms of population, many rural counties throughout the United States have less than 5,000 residents while many urban counties have over a million people, including over five million in Cook County, Illinois and over 10 million in Los Angeles County, California (National Association of Counties, 2020). This urban/rural distinction is important for counties because people living in rural areas rely more so on county government and the services it provides because those services are not provided or duplicated by other governments, most notably cities. Many people live in rural, unincorporated areas where government services are provided solely by the county.

Historically, counties have been governed by an elected **commission**, which served as the legislative, policymaking entity for the county as well as the executive entity. In effect, each elected commissioner was responsible for overseeing a particular policy area. Relatively few counties still utilize this arrangement today due to the complex nature of modern county government and the potential for corruption that occurred before the era of professionalization spurred by the institution of the merit system at the county level in the early 20th century. Rather, the commission system of government has evolved over the years and today, counties are governed most often by the **commissioner-administrator** or **commission-manager** system whereby the elected commission chooses a professional manager or administrator to oversee the day-to-day operations of the county. In this system, the commission fulfills its traditional legislative, policymaking function, but the manager or administrator is responsible for budget oversight, personnel administration, strategic planning, and other daily government functions. The commissioner-administrator/commissioner-manager system is the most commonly-used system of county governance today because of its relative efficiency and professionalism (Svara, 1993).

Yet other counties employ a **commission-executive** whereby the county executive is a separately-elected official functioning similarly to a county manager or administrator. The advantage to the commission-executive system is true separation of powers (National Association of Counties, 2020).

The least-utilized system of county governance is the **sole commissioner** model, found only in only nine counties in Georgia and nowhere else. In these rural Georgia counties, the commissioner is a single person who functions as both the legislative and executive body for the county. As counties have grown, this system of government has become less appropriate and therefore rarely used. County commissioners and executives run on partisan ballots in most cases.

Finally, over 30 cities and counties in several U.S. states have consolidated into one governmental entity. **Consolidated governments** deliver services as

one government, rather than duplicating city and county services, theoretically increasing efficiency of service delivery and saving money. New York City, Philadelphia, Indianapolis, Louisville, Nashville, and Jacksonville all operate as consolidated governments. Three consolidated governments are found in Georgia—Columbus-Muscogee, Athens-Clarke, and Augusta-Richmond (U.S. Census Bureau).

Townships

Just as counties are subdivisions of states, **townships** are subdivisions of counties, providing similar services to people living in mostly rural, unincorporated areas. Townships are found in 20 states primarily in the eastern United States and throughout the Midwest. Many states in the South and West do not utilize townships as a separate government entity (there are no townships in Georgia). Townships are traditionally governed by a Board of Trustees or Board of Supervisors serving as the legislative body and may utilize a town manager or administrator to oversee the daily operation of the township (National Association of Towns and Townships, 2020). Townships, like other units of government, function most effectively when their actions and delivery of services is well-coordinated with other levels of government in the region, including counties and cities. Otherwise, their mere existence can be viewed by groups and citizens alike as duplicitous in nature, providing services that are already administered by counties, cities, or states (Visser, 2004).

Cities

There are over 19,000 municipal governments in the United States (U.S. Census Bureau), referred to here as **cities**. Cities vary tremendously in size and population, from literally a few dozen people to several million. Over 60% of all Americans live in cities (National League of Cities, 2020). Cities are "incorporated" or established by receiving a **charter** from the state legislature.

"A city charter is the basic document that defines the organization, powers, functions and essential procedures of the city government. It is comparable to the State Constitution and to the Constitution of the United States. The charter is, therefore, the most important single legal document of any city" (National League of Cities, 2020). Charters differ somewhat from state to state, depending on individual state constitutions, but traditionally, there are three different types of municipal charters: **special or specific charters**, **general or classified charters**, and **home rule charters**. Cities are granted a charter depending on population,

proposed government structure, and other variables (National League of Cities, 2020). Those cities with **home rule** can make minor changes to their charters without receiving approval from the state legislature, most notably adjusting the local income tax rate. All cities in Georgia possess home rule.

Like counties, cities are governed by various systems, depending on tradition, era of incorporation, and state and regional political climate. The oldest form of city government is the **mayor-council** form of government whereby the mayor functions as the chief executive and the city council functions as the legislative body. A distinction in the mayor-council form of government is the "strong mayor" versus "weak mayor" classification. In those cities possessing "strong" mayors, the executive possesses greater authority with regard to budgetary and personnel decisions. Atlanta functions as a "strong" mayor system. Candidates for mayor and city council in mayoral systems tend to run on partisan ballots with candidates declaring a party affiliation. Other cities, albeit very few, utilize a **commission system** that looks similar to the county commission system, where the commission functions as both the legislative and executive entity. The most common form of city government is the **council-manager** or **council-administrator** system where the elected city council functions as the legislative policymaking body but selects a professional manager or administrator to oversee the day-to-day operation of the city (similar to the county commission-manager or administrator system described above). Candidates for city council in council-manager systems tend to run on non-partisan ballots, which usually results in lower voter turnout. Finally, the **town meeting** form of government exists only in New England and is not pervasive throughout the region. In a municipality utilizing the town meeting form of government, the entire electorate is allowed to participate in an annual meeting, the primary purpose of which is to pass the budget for the upcoming fiscal year. Policy administration is undertaken by select people, chosen by the electorate (DeSantis and Renner, 2002). The town meeting form of government is hampered by very low voter turnout.

Arguments exist on both sides for **partisan** and **non-partisan** elections. Advocates for partisan elections contend that party labels guide or aid voters in making candidate decisions and voter turnout is usually higher in partisan elections. Advocates for non-partisan elections contend that party labels are antiquated and do not aid professionals in providing city services to the public. The trend is towards non-partisan elections as the council-manager system of government becomes more pervasive, even in large cities that have traditionally possessed the mayoral form of government (Svara, 1999). With regard to term length and term limits of office-holders serving in city government, the

overwhelming majority serve four-year terms of office and are not term-limited; less than 10% of cities limit the terms of office-holders (Svara, 2003, 14). It should also be noted that minority representation on city councils is higher for communities utilizing the council-manager form of government (Svara, 2003, 7).

Other Local Governments

Myriad other local governments exist in the United States and are too numerous to address in detail, although a few merit further investigation. **Councils of Governments** (COGs) are voluntary associations of communities in metropolitan areas and exist to address issues and concerns that may affect several jurisdictions in a given region, such as land use, traffic and congestion, transportation, water use, and emergency management. COGs have little formal power but can be effective for strategic, long-term planning. The most successful COG is the one in the Minneapolis-St. Paul area (National League of Cities, 2020). **School districts** are an important unit of local government that make policy for schools in a given jurisdiction, such as a county, township, or city. School districts are governed by the school board, which functions as the legislative, policy-making body. The school board chooses a superintendent to oversee the daily operation of the district. School board members usually run on non-partisan ballots and serve four-year terms. School board politics can become contentious at times because boards oversee the curriculum for school children, making decisions about what children will learn, who will teach it to them, and which subjects should be emphasized (Land, 2002). There are over 13,000 school districts in the United States. The largest is the New York City district, which has nearly a million students (Selected statistics on enrollment, teachers, dropouts, and graduates in public school districts enrolling more than 15,000 students, by state: 1990, 2000, 2006, 2020).

Finally, about one-third of all local governments are **special districts**. Special districts are created to regulate and manage specific services such as water and resources, fire prevention, emergency services, transportation, and even stadiums. These special districts encompass a defined geographic area and have significant taxing and regulating authority, their primary purpose being raising funds. For example, if a city desires to build a new professional sports franchise, a special stadium district will be created and businesses and individuals owning property or buying goods in that geographic area will pay "tax" to fund that endeavor.

State and Local Government Financing Options in the Modern Era

Unlike the federal government, states cannot pass a yearly budget with a deficit and incur debt over many years or even generations. 49 states have some type of **balanced budget** requirement in their state constitutions (National Conference of State Legislatures, 2020). During times of business and economic prosperity and boom, states often produce a surplus, allowing them to increase funding for existing programs and creating new programs, even refunding taxpayers some of their contributions in rare occasions. Conversely, during economic recessions, depressions, and crises, states are often faced with a budgetary shortfall, resulting in deep, dramatic, and permanent cuts to state programs; the result is less money for such things as education, transportation, public health services, and law enforcement. This situation has been the case nationwide since the Great Recession of 2008 and the COVID19 pandemic of 2020 (see below case study). While states have undergone difficult economic times previously, these recent crises are unmatched since the Great Depression of the 1930s. In previous downswings in the economy, states began to devise non-traditional methods of raising revenue to fund government services. Beginning in the 1980s and 1990s, several states instituted first a state-sanctioned lottery and later state-sanctioned, legalized casino gambling as a means of generating much needed revenue. The results of these measures have been mixed, although the lottery in Georgia is the primary funding mechanism for the HOPE Scholarship (Alexander, 2008; Alexander and Paterline, 2005).

Case Study: The Impact of the COVID-19 Pandemic on State Funding for Higher Education

The Great Recession of 2008 had a profound and lasting impact on funding for higher education nationally, but especially for the states. States enacted numerous and varied strategies to attempt to mitigate that funding shortfall, but invariably, most involved shifting the cost burden to students in the form of higher tuition and fees (Leonard, 2014; Barr and Turner, 2013; Danziger, 2013; Ellis, 2018). Some states, including Georgia, implemented novel and unprecedented strategies in an attempt to reduce administrative costs and improve efficiencies, with varying success. The Georgia model and response included consolidating multiple University System of Georgia (USG) campuses into newly-formed and larger entities and universities. Gainesville State College and North Georgia College & State University became the new University of North Georgia. Georgia

Perimeter College was consolidated with Georgia State University to create the largest university in the state, with degrees ranging from the Associate's through doctoral level. Southern Polytechnic University was merged with Kennesaw State University. Armstrong Atlantic University was consolidated with Georgia Southern University, and so on.

Whatever sets of strategies implemented by the states, a common denominator was less state funding post-Recession than pre-Recession (Seltzer, 2019; Whitford, 2020; Barrett, Gaskins and Haung, 2014). In the early 2000s, it was not uncommon for a 75% or more of a state university's budget to be derived directly from state allocated funds. Today, that percentage is most likely the exact inverse. This author works as a senior leader at a state university in Alabama whose state funding comprised nearly 80% of the total institutional budget in 2006, but now that percentage is approximately 25. The most glaring example may be South Carolina, where most state institutions derive only between 5-10% of their total university budgets from state allocations.

So, if funding levels for public universities (including in Georgia) never returned to their pre-Recession levels, how has and will the COVID-19 pandemic impact funding future funding levels? The answer and outlook may be grim. The "double-whammy" of the 2008 Great Recession and the uncertain timeline of the 2020 COVID-19 pandemic may alter the landscape of American higher education—particularly for public institutions—forever. Simply, it is an environment for which few, if any are prepared. Funding cuts, faculty and staff furloughs, program cuts, campus closures, institutional consolidations, reductions-in-force, permanent spending cuts, shuttering of athletics programs, and a host of other measures may be widely implemented across most if not all states (Bauman, 2020; Friga, 2020; and Whitford, 2020). Georgia, for example, at the time of this writing has already announced a sweeping and widespread budget reduction and cost savings plan affecting all 26 USG institutions. This plan involves pay cuts and furloughs for all USG employees, including faculty members (University System of Georgia, 2020). The Georgia plan is not an outlier, as multiple states and university systems have enacted similar cost-savings measures as a direct result of the COVID-19 pandemic.

Crises and challenges also produce opportunities for innovation. Shrewd universities will respond to the demands of a diverse constituency of students and learners to deliver instruction in multiple modalities (with a heavy emphasis on online education and credentialing versus degree programs). The landscape will only become more competitive as universities vie for student tuition and fee dollars, which will become even more vital to the sustainability and success

of individual universities. This could produce an educational environment that gives learners more options. It will also produce "winners" and "losers" among institutions, with campus closures perhaps occurring with greater frequency. So, ultimately, what will these mean for students, faculty, staff, taxpayers, and universities? In a word, uncertainty.

Post-Great Recession, state legislatures, taxpayers, and parents increasingly demanded more "workforce-focused" degree programs from universities that lead directly to jobs upon graduation. Some responded well, some poorly. That demand will only intensify during and after the COVID-19 pandemic. Many predict the shuttering of degree programs in the Arts, Humanities, and Social Sciences, which often struggle to articulate a vision or path to students for job placement upon graduation. Rather, the emphasis on and demand for degrees in technology, science, engineering, business, and the healthcare will only intensify. That continuing paradigm shift will have a seismic impact on many universities that have not changed their educational model for decades or even centuries. It will certainly be interesting to witness. Simply, the university of "tomorrow" may look radically different than the university of "today;" and that may not be a bad thing.

A Civic Engagement Challenge: Becoming Involved in Local Government

One of the basic themes of this chapter has been that it is easier for citizens to get involved in "lower" levels of government, which is true for students as well. Students often have difficulty applying theories, themes, and lessons of government to their daily lives. One way in which they can better understand how government affects them is to become more involved. The civic engagement challenge for this chapter is for students to get involved with a local campaign in one of two ways: either by volunteering for a candidate for city council, county commission, school board, or another local office, or by running themselves. While the first option may be less difficult, the second option is certainly realistic. In many college towns, students have gained election to the city council or county commission. Students underestimate their political power. In a small or mid-sized college community, students comprise an overwhelming portion of the electorate. In most states, including Georgia, students can register to vote in the cities where they go to school. As a result, a candidate for office who is able to harness the political power of the campus and motivate students to vote would have a very good chance of winning an election. City council elections tend to have low voter turnout, and a few dozen votes could very well determine the

outcome. A successful student-candidate would have to make sure he or she filed for the election on time, established his or her residency in the community, and drummed up support on campus. So, get going!

Discussion Questions

1. How do state constitutions differ from the U.S. Constitution? Which format is better? Why?
2. How does the composition and functioning of state legislatures differ across the states? In terms of size, term length, and structure, which model is best? Why?
3. Compare and contrast the various forms of local government structure. Which offers the best service delivery to citizens? Why?
4. How can and should states generate much needed revenue to fund essential programs and policy priorities during economic downturns?

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Supplement

Georgia Public Policy

Maria J. Albo and Mary Catherine Beutel

Introduction

In recent decades, Georgia's state government has emerged as a policy cue giver for both the South and the nation. In 1995, President Bill Clinton modeled his America's Hope program, a tax credit for the cost of two years of education beyond high school, after Georgia's HOPE Program. According to the Peter Applebome (1996) of *The New York Times*, former Georgia Governor Zell Miller, a political ally of Clinton, said in a telephone interview that he and President Clinton had long discussed ways to make college affordable and called the initiative "a classic case of a government program to address fundamental voter concerns" (para. 5). This is just one example of the state serving as national policy leader.

Georgia experienced a major economic boom in the 1990s because of its business-friendly laws and relatively inexpensive housing. Atlanta gained worldwide attention in 1996 by hosting the Olympics. Once part of the Democratic "Solid South," Republicans gained the majority in the late 1990s with the "Republican Revolution" dominating Peach State politics (led in part by Georgian Newt Gingrich with his election as Speaker of the House in 1995 and his popular "Contract with America"). Former Governor Nathan Deal offers a first-hand account of the pivot in the Foreword of this textbook.

In 2002, Sonny Perdue was the first Republican elected governor of Georgia since Reconstruction, followed by Nathan Deal in 2010. Deal formerly represented Georgia's 9th Congressional District (which includes the University of North Georgia) in the U.S. House of Representatives. Elected to Congress in 1993 as a Democrat, Deal changed his party affiliation to Republican in 1995. Georgia's third consecutive Republican governor, Brian Kemp, took office in 2019. Kemp served as Georgia Secretary of State from 2010 to 2018. He was also a member of the State Senate from the 49th district from 2003 to 2007. Kemp's simple promise to

"Put Georgians First" along with support from President Donald Trump led Kemp to victory. As governor he has pursued his mandate, specifically in budgetary matters, and has maintained his commitment to principles of limited government. He earned high remarks from Benita M. Dodd, vice president of the pro-capitalist Georgia Public Policy Foundation, who stated, ". . . Kemp has given more Georgians a reason to hope. . . . [His health-care plan] would help ensure [that] low-income Georgians, as well as those with the highest medical bills, can access affordable, quality healthcare without creating an unsustainable taxpayer burden. . . . [T]he governor's Georgians First Commission is working to achieve his goal of making Georgia the best state for small business" (Dodd, 2019, para. 9).

An advocate for limited government and local control, Governor Kemp vetoed fourteen bills passed by the General Assembly during his first year in office, including the popular "recess bill" (a vague 30-minute-school-recess mandate for grades K to 5) and the Keeping Georgia's Schools Safe Act (which would have mandated safety drills in schools). Governor Kemp believed that the "well intentioned" pieces of legislation would result in loss of local control and create unfunded mandates. Georgia Public Broadcasting's Steven Fowler (2020) reported that Governor Kemp's priorities were clearly reflected in "the amended FY2019 budget, which included $69 million in school security grants for every public school in Georgia to use as they see fit" (para. 14) and in numerous line-item vetoes. He also moved toward fulfilling his campaign promise to increase teacher pay. The line-item veto—which allows a governor to excise parts of legislation as opposed to vetoing an entire bill—has empowered many contemporary governors, turning many into policy entrepreneurs (Beyle, 1995; see also Chapter 13 in this text). Line-item veto authority gave Governor Kemp the ability to pursue his policy agenda and fulfill his campaign promises. The manner in which he used the line-item veto as a sharp scalpel to excise what deviated from his vision and leave intact what fit his vision presented a clear statement of his priorities.

The goal of this supplement is to provide an overview of recent policy issues in Georgia and attempt to demonstrate how the state acted as a policy innovator with ambitious and creative initiatives. Governor Deal's two terms in office gave us a linear path to understand the development of Georgia public policy. This supplement features a case study written by UNG alumna Mary Catherine Beutel who served as an intern in the Deal administration. In this edition, we are pleased and honored to include a personal response written by Governor Deal. As Governor Deal articulated in his response, when conducting research, authors are "limited in their access to behind-the-scenes information, since the State does not have the equivalent of the federal Congressional Record that would provide

better insight into the thinking and discussions that accompanied the policies and legislation they sought to explain." The Governor's personal response aims to provide us with some of that behind-the-scenes information.

We hope our readers will benefit from these exclusive insights from Governor Deal. The Deal legacy, specifically in criminal-justice reform, was spotlighted in the national FIRST STEP (formerly Incarcerated Re-enter Society Transformed, Safely Transitioning Every Person) Act of 2018, which was inspired by the Deal Administration's criminal justice reforms (Sam, 2018). Introduced into Congress by Georgia's U.S. Representative Doug Collins, the bill received broad national bipartisan support. As Benita Dodd (2019) explained,

> *Georgia is a national role model for alternatives to incarceration, community-based treatments, special courts, and juvenile justice, with a focus on reducing recidivism. Education and training opportunities help prepare inmates to return to their communities and families as productive citizens. The formerly incarcerated who seek a second chance have more opportunities than ever, and advocates continue to work to improve those opportunities* (para. 4).

We hope that our state will continue to innovate and serve as model for other states.

Public Policy in Georgia

Georgia has emerged as an important player in policy decisions over the past several decades. Georgia experienced a major population (and economic) boom in the 1990s with its business-friendly laws and relatively inexpensive housing. The capital city of Atlanta gained worldwide attention in 1996 hosting the Olympics. The state at one time leaned Democratic, but Republicans gained the majority in the late 1990s. Today the "right" dominates Peach State politics with political powerhouses like Representative Newt Gingrich leading the "Republican Revolution" with his election as Speaker of the House in 1995 and his popular "Contract with America".

In 2002, Sonny Perdue was elected to serve as the first Republican governor since the Reconstruction Era, further strengthening conservative ideology within the state. Current Governor, Nathan Deal, is also a Republican who formerly represented Georgia's 9th Congressional District (which includes the University of North Georgia) in the U.S. House of Representatives. Nathan Deal was elected to Congress in 1993 as a Democrat and then switched to a Republican in 1995 (reportedly because he was inspired fellow Georgian Gingrich's "Contract with

America"). Deal took office in 2010 as Governor of Georgia and was reelected in 2014 (Office of the Governor, 2016a). Despite his party allegiance, Deal has at times moved away from the conservative agenda and has acted as a trustee of the state (see chapter seven) in his role as Governor.

In 2008, Democratic Senator Barack Obama was elected president and reelected in 2012. Despite the changes in Washington, Georgia remained a predominately red state with Republican David Perdue's election in 2014 (replacing Republican Saxby Chambliss) and joining fellow Republican Johnny Isakson in the Senate. Republicans also maintained a solid majority of Georgia's U.S. House delegation, holding ten of fourteen districts in 2017. In the 2016 presidential election, however, Georgia was not a predominantly red state. It was uncertain how Georgia would vote until very late in the election process. Two of Georgia's most populous counties, Cobb and Gwinnett, actually went blue and voted for Hillary Clinton rather than Donald Trump. Some estimated that within the next few years Georgia could change from a red to a purple state (Lutz & Wickert, 2016). This was prescient, as Joseph Biden became the first Democratic presidential candidate to win the state since 1992. Important changes are occurring in major counties in Georgia, which may affect future House elections. In large counties like Cobb and Gwinnett, there have been significant population changes—most notably an increase in minorities. If this continues, it could have significant effects on the state legislature. Changes happening not only at the state level but on the federal level as well. When President Trump nominated Tom Price to become Health and Human Services Secretary in 2017, a vacancy opened in Georgia's 6th congressional district. A Democratic victory could have moved the state closer to becoming a blue state (Stracqualursi, 2017). Republican Karen Handel won the special election, but subsequently lost to Democrat Lucy McBath in 2018—an indication of the changes occurring.

This supplement provides an overview of some recent policy issues in the state of Georgia and highlights how the state has acted as a public policy innovator with aggressive and creative policy initiative.

Business

After the "Great Recession" in 2008, many Georgians wondered if the economy would ever bounce back. Since 2011, one of Governor Nathan Deal's top priorities has been jobs and the economy. Under the Deal Administration, the state weathered the Great Recession and was then named the number one state in the nation in which to do business. According to the Georgia Governor's Office, Georgia was also ranked "number one state in the country to do business"

(Office of the Governor, 2015). Georgia's strong economic position has been related to partnerships with the film, automotive and agribusiness industry who were encouraged by tax credits; the state's AAA bond ratings also has expanded businesses in the state. Georgia is also attractive to employers as a "Right to Work" state, which favors business development. According to the National Right to Work Legal Defense Foundation (2017), a right to work law "guarantees that no person can be compelled, as a condition of employment, to join or not to join, nor to pay dues to a labor union" (para. 5).

The film industry has expanded in Georgia with the state coming in third in the nation in movie production (behind California and New York). According to the Governor's office, "The film industry generated an economic impact of more than $7 billion during fiscal year 2016" (Office of the Governor, 2016c). Films including *The Walking Dead*, *Anchorman 2*, *Captain America: Civil War*, and *Stranger Things* were all filmed partially or completely in Georgia (see: https://georgia.org/film). This expansion was related to the Governor's workforce development program in collaboration with the Georgia Film Academy described on the Governor's website as "a collaboration between the University System and the Technical College System of Georgia to give students opportunity to work in the film and movie industry". According to the Governor's Office, "this initiative allows students to work in the film industry and gain skills that will be valuable to employers while remaining in school" (Office of the Governor, 2016c).

Another important industry in Georgia is the Automotive Industry. Encouraged by Georgia's AAA bond rating and tax credits in the technology sector, over 250 automotive facilities are currently operating in Georgia, including Kia, Caterpillar, Porsche, and Mercedes which provide over 20,000 in the state (Office of the Governor, 2016d). Georgia offers many incentives to automotive companies; these include tax exemptions, competitive cost of labor, a reliable workforce with low turnover rates, and the third-lowest manufacturing unionization rate in the country. Another advantage that Georgia offers is the coastline and its ports. Twenty percent of all East Coast automotive-related exports leave through the Georgia ports of Savannah and Brunswick. This represents $9.58 billion dollars a year that benefits Georgia's economy (Georgia Department of Economic Development, 2016a).

According to Georgia's Department of Economic Development, another industry that represents $74.3 billion dollars to Georgia's economy is Agribusiness (which includes Georgia breweries and brew pubs). There are several benefits that the state offers to agribusiness, including efficiency and profitability with a robust transportation network. Georgia also offers one of the nation's top ranked

workforce training programs called Quick Start. This program helps the state find solutions to the challenge of finding both seasonal and year-round work to help in the many different sectors of agribusiness. This is a signature Georgia workforce training program and the oldest of its kind in the U.S. It helps companies remain competitive by preparing workers for skill sets needed in particular companies (Georgia Department of Economic Development, 2016b). Breweries and Brewpubs are areas within Agribusiness that have seen a lot of growth in the last several years. This innovative industry allows entrepreneurs to create and craft their own brews from local ingredients and then share their products with the community. There has been recent legislation in Georgia that is supposed to help state breweries. With the passage of SB 63 in 2016, breweries in the state will be able to sell directly to customers from their own facilities (Before the passage of this bill, breweries had to apply a three-tiered sale model that consisted of producers, distributors, and retailers). This sale model was originally created to keep large breweries from creating monopolies and hurting small businesses (Senate Bill 63, 2016). With the passage of SB 63, breweries in the state of Georgia hope to be able to generate more income and increase their profit all while benefiting the economy. Currently, Georgia is ranked nationally 44th out of 50th in terms of economic impact that the craft brew industry has nationally. Breweries and Brew Pubs hope to change this. A study shows that "if Georgia were able to raise its per capita beer production up to the national average (currently, the Peach State is 47th out of 50), that uptake in production would result in a projected 1,459 jobs, and a $375 million economic impact" (Wiggins, 2015, para.7).

Education

For the state to have a good economy, it must have an educated and successful workforce. Georgia became an innovator in education when numerous other states adopted versions of Governor Zell Miller's 1993 "Hope Grant", which was fully funded by the state lottery, provided a reasonable alternative to federal financial aid, and encouraged enrollment in state institutions. Worldwide, the United States ranks 15th for the number of young adults with college degrees, with Georgia ranking among the bottom fifteen states for adults with degrees (University System of Georgia, 2011).

In order to meet this need for a more educated state, Georgia adopted the Complete College Georgia (CCG) plan in 2011 with a focus on college retention, affordability and access. With this mission in mind, in 2014 the University System of Georgia's Board of Regents "issued a resolution supporting an expansion that would make eCore's [the system's online core course initiative] online general

education offerings available to students at all USG comprehensive universities, state universities, and state colleges" (eCore, 2016). Since then, it has continued to grow. eCore offers students an opportunity to complete the core curriculum completely online. This, according to the eCore website, provides university system

> *students the opportunity to successfully and affordably complete the first two years of their collegiate careers in an online environment. eCore Support Services delivers effective and efficient overall program management, including support for: student success; faculty recruitment, support and training; course development; evaluation, and marketing* (eCore, 2016, para.1).

Once students at all university system institutions were allowed to enroll directly into eCore courses, participation increased from 9,200 students in 2013 to more than 15,000 in 2014. This represents a 76% increase in enrollment. Students who use eCore are more likely to graduate on time and save thousands of dollars in the process (University System of Georgia, 2015, p.9-10).

Investment in education has been a top priority for the Deal administration. According to the Governor's Office, "Governor Deal has devoted a higher percentage of the state's budget to K-12 funding than any other governor in the past 50 years" (University System of Georgia, 2011). Since 2011, the high school graduation rate has steadily increased. In 2011, the rate was 67.4%. In 2013 the rate was 71.8%. The most recent rate in 2016 was 79.2% (Georgia Department of Education, 2016). Though this has steadily been increasing, some would say it is still not high enough. In 2015, Education Week rated Georgia a C- in their K-12 achievement (Education Week, 2015). Some of the things that can bring this rating down are failing schools in the state of Georgia. These are schools that have chronically received a failing grade ("F") on their College and Career Performance Index (CCRPI). This index is used by the Department of Education in the state as accountability for schools and their overall academic performance.

Governor Deal proposed that Georgia establish an Opportunity School District (OSD) to try and fix this problem of failing schools. Opportunity School Districts have been developed in other states with success. The OSD was on the ballot as Amendment 1, in 2016, for Georgians to vote on; however, it did not receive enough votes and the OSD failed to be implemented. Many Georgians felt as if the OSD would take control of schools away from local school boards and the community. Parents and teachers felt as if this would be a government takeover of schools and that it was a power grab for the Governor, who would

appoint a superintendent to oversee all changes. The OSD would have been an organizational unit of the Governor's Office of Student Achievement (GOSA), established and administrated by the superintendent of the OSD for the purpose of providing oversight and operation of failing schools assigned to the Opportunity School District.

There are 127 of 2089 (6%) schools in Georgia that have received an "F" for three consecutive years in a row to qualify for the OSD (Office of the Governor, 2016b, p.2). Out of these schools, the state would have selected no more than 20 to add to the OSD at any given time. The OSD maximum capacity would have been 100 schools to keep the OSD on a scale where full attention and resources could have been directed to these schools. A school selected for the OSD would have remained in the district for a minimum of five consecutive years and a maximum of 10 consecutive years. For a school to exit the OSD, they would have had to receive a grade higher than an "F" for three consecutive years. Once the school attained these grades for a specified amount of time, the OSD would engage the school, the school community, and school's district in a negotiation to determine the best transition plan for the school to make a successful exit from the OSD (Office of the Governor, 2016b, p.3).

Criminal Justice Reform

Education is something that is being used to reform the prison system as well. In 2016, the Georgia General Assembly along with Governor Nathan Deal passed SB367. According to Governor Nathan Deal, "This bill increased access to charter schools in Georgia's prison system and seeks to address the 'school to prison pipeline.'" Also according to Governor Deal, "If a minor enters the correction system and is sent to a youth detention center, even just once, they are significantly more likely to offend again" (Deal, 2016a). The purpose of this bill is to keep offenders from the prison system and give them a second chance with the means to contribute to society and live a productive life.

One section of SB367 addresses education for juveniles who are in the system. SB367 would authorize a state charter school to enter into a contract with the Department of Corrections to operate a school as well as give educational services to any youths who are currently incarcerated in any facility of the Department of Justice (Senate Bill 367). For funding purposes, the charter schools within the Department of Corrections would be considered a special school district and be given the same federal funds as other special school districts. These schools would be expected to meet the same rules and regulations that all other public schools within the state must meet. This ensures that the quality of education would

be the same for those youths incarcerated as it is for any other public school in Georgia (Senate Bill 367).

This bill seeks to make it easier not only for youth to transition back into society and live a beneficial life but for adults in the prison system to make a smoother transition as well. SB367 updates Georgia's First Offenders Law that was created in 1968. This law was also known as the Second Chance Law, and it allows "certain first-time offenders to avoid both a conviction and a public record if they successfully complete their sentence". The law also protects these individuals from employment discrimination on the basis of the charge(s). The intent of the law is to give some first-time offenders a chance to learn from their mistake and move on with their lives without the burden of a conviction" (Georgia Justice Project, 2016a). "Ban the box protections" is one way that SB367 gives ex-inmates this opportunity. "Ban the box" protections "prohibit the use of a criminal record as an automatic bar to employment" (Executive Order, 2015). SB367 also allows for the reinstatement of driver's licenses that were revoked for non-related drug offenses. This allows for a smoother transition where now-free men and women can drive to and from jobs, drop their kids off at school, and go to the store. This bill also lifts the lifetime ban on food stamps for people with felony drug convictions. This not only keeps society healthier but also lessens the chance of theft due to hunger. Lastly, it promotes the hiring of parolees by employers by offering a $2,500 income tax credit to the employer. (Georgia Justice Project, 2016b).

Georgia will likely remain in the policy spotlight with prominent Georgians serving the Trump administration along with major policy initiatives slated to come out of the 2017 legislative session. The evolving political makeup of the state may see urban areas become less conservative and more populous, but regardless, the future looks promising for our historically progressive state.

Case Study: Campus Carry (written by Mary Catherine Beutel)

In Georgia, laws concerning gun control have been on the books since 1833. The first license to carry a firearm in Georgia resulted from the Supreme Court of Georgia's 1911 decision in *Strickland v. State*, making it legal to openly carry a firearm with a license—which lasted for three years and cost fifty cents (Menkus, 2011). The next major change in gun legislation occurred in 1968 when the entire criminal code was re-written, making it legal to carry a concealed weapon in a car (Menkus, 2011). In 1976, the fingerprinting process was added to license requirements and a significant re-write of the law was passed allowing for an expanded definition of a "public gathering" and clearer rules about places that

served alcoholic beverages (Menkus, 2011, p.35). Major changes occurred in 1996 when license holders were allowed to carry a loaded firearm anywhere in their vehicle (Menkus, 2011). In 2014, Governor Nathan Deal signed into law HB 60, which was an expansive new gun bill that would broadly allow gun owners to carry in bars, government buildings, places of worship, and on school safety zones, school functions, or school provided transportation (Chokshi, 2014). Governor Deal has a strong record of supporting and passing pro-gun legislation, so why then, in 2016, did he veto HB859 Campus Carry? HB859, Campus Carry, would have made it legal for students who were over 21 and had a concealed carry permit to conceal carry on a college campus. This, however, did not mean that if you qualified, you could conceal carry anywhere on campus or at any time. There were restrictions on both. For example, you could not conceal carry in the dorms, at athletic events, or at fraternity or sorority housing.

I had the opportunity to intern at the Governor's Office during the time that Campus Carry was proposed and then vetoed by Governor Nathan Deal. I personally heard from both sides, those who favored the bill and those who opposed it. The National Rifle Association (NRA) was of course strongly for the bill and sent out emails, voicemails, and mail to encourage their members to call and say that they wanted the Governor to sign HB859. On the other hand, as a whole, the State Department of Education and the University System were strongly against HB859. The University System was represented by administrators, faculty and student organizations who reached out and encouraged the Governor to veto the bill. Those who supported Campus Carry expressed that they believed it was a student's right, if over 21, to be able to protect themselves on campus if any situations arose where they felt like their lives were in danger. Those who were against Campus Carry believed that it would be dangerous for students to conceal carry guns on campus. They believed that schools were "sensitive" areas where students should not have to wonder if their classmates were carrying a concealed weapon. Those against Campus Carry worried that academic debate in the classroom could become heated and, if tempers were lost, could then result in possible gunfire by those carrying concealed weapons.

Many were shocked when Governor Deal vetoed Campus Carry. Throughout his first term as Governor and into his second term, the Republican Governor had pushed for Pro-gun legislation. Many did not understand why he would sign into law HB60 which was called the "Guns Everywhere Law" and not sign into law Campus Carry. In his veto statement, Deal quotes Supreme Court Justice Antonin Scalia who stated in the case of *District of Columbia v. Heller* "nothing in our opinion should be taken to cast doubt on…laws forbidding the carrying

of firearms in sensitive places such as schools and government buildings…". Deal also quoted James Madison and Thomas Jefferson when they said that "No student shall, within the precincts of the University, introduce, keep or use any spirituous or venomous liquors, keep or use weapons or arms of any kind…" The Governor finished his veto statement with "From the early days of our nation and state, colleges have been treated as sanctuaries of learning where firearms have not been allowed. To depart from such time-honored protections should require overwhelming justification. I do not find that such justification exists. Therefore, I VETO HB 859." (Deal, 2016b).

After advancing gun rights legislation in the past, Governor Deal chose to veto Campus Carry. Because HB859 would affect professors, students, and all others who worked at a University in Georgia, in a much more direct manner that the rest of the state, perhaps the Governor looked more closely at their opinion and weighed it more heavily than those who were unconnected with the University System. Public opinion is very important and sharp divisions in public opinion on an issue makes it impossible to please everyone. No matter his decision, the Governor would make different groups angry. One of his main points and concerns was that campus carry would put school and campus daycare centers at particular risk.

With this veto of a pro-Second Amendment Rights bill in the Republican state of Georgia, does that mean in the future we should expect to see a more liberal leaning state? It is doubtful. After the bill was vetoed, state legislators stated that this would not be the last of it and plan on introducing further Second Amendment legislation next session. As of the 2017 legislative session, there was another campus carry bill that was introduced. It was passed by both houses of the legislature and sent to the Governor to sign or veto at the time of this writing. This bill closely resembles HB 859, but on-campus daycares are on the list of places where concealed carrying is prohibited (Elliot, 2017).

However, the Governor's veto of HB859 goes to show how much public opinion and your vote matters. Governor Deal, in the case of Campus Carry, was an excellent example of delegate representation (see Chapter 7). He listened to the students, professors, and workers of the University System in Georgia and heard them when they said they did not want Campus Carry at their universities. Having a State Representative who will bring forth legislation that you favor and then expressing your displeasure at legislation is something that every citizen can do. Examples include writing, calling, or signing petitions. All of these actions can either encourage legislation or, in the case of Campus Carry, discourage it.

Response by Governor Deal

I am impressed with the work of Maria J. Albo and Mary Catherine Beutel in the compilation of the Supplement on Georgia Public Policy, which I have been asked to respond to. I recognize that the authors were limited in their access to behind-the-scenes information, since the State does not have the equivalent of the federal Congressional Record that would provide better insight into the thinking and discussions that accompanied the policies and legislation they sought to explain. As a result, the public media becomes the major source of information along with the propaganda of special interest groups. Unfortunately, sometimes this results in a skewed view of policies and the intent of legislation. Therefore, in this review of the Supplement, I will attempt to respond to certain conclusions with which I disagree, and in doing so, provide vital information that may not have been available to the authors.

Business

In attempting to overcome the effects Of the Great Recession on Georgia, which were devastating our economy in 2011 when I became Governor, we approached it in a methodical manner. Our goal was to grow our State out of the recession without raising taxes. With the advice of the business community, which was collected from town hall meetings in every region of the state, we actually cut sales taxes on equipment and energy that was used for manufacturing. These taxes were totally eliminated over a four-year period. As a result, we saw the manufacturing sector of our economy grow. This included the automotive industry that was referred to in the Supplement. After numerous overseas visits by me and the professionals in our Georgia Department of Economic Development, Mercedes Benz moved its national headquarters from New Jersey to Atlanta, and Porsche built its North American headquarters near the Atlanta Hartsfield Jackson Airport. Kia, a South Korean manufacturer, which was already in Georgia, continued its growth in the Western side of our State, and is one of the larger employers in Georgia.

Another important element of our strategy of growing out of the recession was the improvement of our workforce. I asked if there were jobs available in Georgia when our employment rate was 10.6%. The answer was "yes," because there were not enough of our citizens with the skills necessary to fill those jobs. We set about to train more Georgians with the skills that were necessary to claim those jobs. In short, we used the HOPE Career Grant to pay 100% of the tuition costs for students who would obtain the necessary training in our Technical

College System of Georgia. We began with four areas and when I left office in early 2019, there were 17 areas that met the requirement of jobs available and not enough trained Georgians to take them.

This concentrated effort to develop a trained workforce has paid great dividends. We are generally regarded as the state with the best trained workforce in the nation. This is part of the reason our state has been ranked the No. 1 state in which to do business for seven consecutive years, an outstanding achievement considering the fact that before 2013, Georgia had never been No. 1. It is also one of the reasons there were over 800,000 new private sector jobs created in Georgia over the eight years I was Governor.

Education

Under this section of the Supplement, I will only address one subject, the Opportunity District which failed as a proposed constitutional amendment. I felt that it was regrettable that most of the recognized Teachers Organizations rejected this amendment, which was aimed at improving chronically failing schools that had never scored above an "F" on the state's rating system for three or more consecutive years. In other states where similar approaches had been used, the head of their state system was appointed by the Governor as a part of his or her cabinet, and such reforms were done as policy of the state agency, not by a constitutional amendment. In Georgia, The State School Superintendent is elected as a Constitutional Officer and is independent of the Governor's Office.

Rather than spending time on this subject, I would suggest that some researchers should attempt to determine what has happened to the 127 schools that qualified as chronically failing schools, since they have the futures of thousands of young Georgians under their control. This task will be more difficult since the Georgia Department of Education has changed the way schools are graded. If an "F" is no longer an "F", what is it? Has the Department changed anything other than the grading system that will make a meaningful difference in the education of these children? These are questions that deserve to be answered.

Criminal Justice Reform

Under this section, there are many facts that deserve to be stated, but space does not allow for that. These reforms were initiated by the Criminal Justice Reform Council that I appointed in 2011. Beginning the next year, legislative reforms were presented to the General Assembly for seven consecutive years and were all approved by overwhelming margins. As a result, thousands of Georgians

have been given a second chance. In accountability courts, inmates in our prison system are educated with vocational skills, and our overall prison system has fewer inmates than when the reforms began and about fewer inmates than when the reforms began and about 6,000—8,000 fewer inmates than would have been the case without the reforms.

In reviewing the Case Study: "Campus Carry" written by Mary Catherine Beutel, I want to compliment her for undertaking to explain a very difficult subject. It is complicated by the fact that it involved a great deal of behind-the-scenes negotiations with the legislators who were introducing these bills. Even so, I vetoed one version of the bill when my advice was ignored. I must take exception to one statement in Ms. Beutel's review, and that is the statement that I "had pushed for pro-gun legislation" in my first and second term as Governor. Such legislation was never a part of my agenda; it was always the object of certain legislators who were being pushed by outside interest groups. While I have had a long record as a legislator at the state and national levels as a guardian of Second Amendment rights, it became very important that it be recognized that those rights have limits when it comes to "sensitive areas" such as schools and churches. That was the message of my veto of HB 859 in 2016. The difficult part is identifying the parameters of those "sensitive areas". So, when the legislature recognized that the areas where a weapon could be carried were too broad in HB 859, and narrowed the area considerably in H8 280 of 2017, I signed it. It is instructive to note that excluded areas under this bill included the following: buildings on property used for athletic events, student housing including fraternity and sorority houses, pre-school and childcare spaces, areas where college and career academies and dual enrolled high school students were located, faculty or administrative offices, and rooms where disciplinary proceedings are conducted. On all other non-excluded areas, the person must have a weapons carry license and the weapon must be concealed. The result is that the sensitive areas may be more restricted and better defined, but it balances the concerns of most people. As I pointed out in my veto message in 2016, the most justified reason for not restricting all areas on or near college campuses is the continuing assaults and robberies of college students who are walking to and from their classes. Many of these occur on property under the jurisdiction of local police and sheriff departments.

Another area where the commentary on gun legislation is misleading in the Supplement is the description Of HB 60 that was signed in 2014. While the bill does expand the areas in which a weapon may be carried, there is one essential pre-requisite, the individual *must have a weapon carry license*. In order to obtain such a license from a Probate Court, the individual must be at least 21 years of

age, or at least 18 if he or she is in the armed forces of the United States or has completed basic training in the armed services. The applicant must also submit to a proper fingerprint exam and pass a background exam from law enforcement.

There are also provisions in H8 60 which recognize the rights of private property owners who can refuse to allow any weapons on their property. Also, since churches are no longer per se off limits to weapon carriers, such weapons must be affirmatively approved by the church in order to be legal.

Another provision of HB 60 was to clarify the status of a licensed carrier of a weapon who drives a vehicle onto a school zone to transport children to or from the school. It allows this without it being a violation of the law.

The media attempted to cast a bad light on HB 60 and the State of Georgia by calling it "The Guns Everywhere Bill", but thoughtful examination of this legislation should reveal the clarification of existing law so that law abiding licensed gun owners and parents who are picking up their children from school with a gun in the glove box of their car, will not be harassed by any over zealous authority.

It can be said with reasonable certainty that the meaning and application of our rights under the First, Second and Fourteenth Amendments will be fertile fields in which legislators and judges will plow for many years to come.

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14 U.S. Foreign Policy

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Learning Objectives

After covering the topic of U.S. foreign policy, students should understand:

1. The general elements of a foreign policy, and why every country has a specific policy that serves their best interests.
2. The important political and social actors who make U.S. foreign policy.
3. How history and current domestic and international issues shape U.S. foreign policy.
4. How the conflict in Iraq is a result of U.S. foreign policy.

Abstract

One of the most important areas of public policy in which the American government must engage is relations with other countries in the international system. U.S. foreign policy entails developing and advancing American national interests abroad by using all the tools and abilities of government and society. This chapter fits well toward the end of this volume as many of the subjects studied so far (the president, Congress, judiciary, bureaucracy, state and local governments, political parties, mass media and general public) have a prominent role in the process of making U.S. foreign policy. In this chapter, a discussion of the nuts and bolts of foreign policy is coupled with an analysis of the specific actors who make and implement U.S. foreign policy, a survey of its prominent historical themes, and a contemporary application of this process to the current crisis in Iraq.

Introduction

For much of the last two decades, the media has detailed explosions in Iraq and Afghanistan which kill United States military personnel and innocent civilians. As people watch these reports, many ask obvious questions, such as, why are we there? What does the United States have to gain that justifies fighting two wars in Iraq and Afghanistan that cost billions of dollars and the lives of Americans? The short answer is simple—September 11, 2001. Since the attacks on New York, Washington, and Pennsylvania the United States has been in the Middle East fighting terrorism and protecting the homeland from those who wish to attack once again. As President Bush declared in his first address to the nation on September 20, 2001, "Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done" (Avalon Project, 2008).

While this short and definitive explanation may make logical sense, the long answer as to why the United States is involved in the Middle East is much more complex. A more complete explanation involves answering some of the following questions, such as, how does a response to the 9/11 tragedy become a U.S. foreign policy? What reasons could the U.S. possibly have to send troops so far away to such an unstable place for more than a decade? Who actually makes these decisions, and why do I not feel involved in making them? Why is this important to me anyway? How can I have my thoughts and opinions known and noticed by policy makers? This chapter answers these questions by bringing together many of the concepts and ideas you have learned in this reader and applying them to events that happen outside the United States. It also helps answer them by explaining how issues important to Americans at home become U.S. foreign policy abroad, what foreign policy actually is, who makes it, what it tries to accomplish, and why it is extremely important to each and every American citizen.

The final part of the chapter helps illustrate the making of U.S. foreign policy by applying these ideas to American intervention in Libya in 2011. The decision to use the American military to protect against a humanitarian crisis was based upon a number of long-standing core values and priorities American foreign policy makers have applied to events all over the world throughout our history: **security**, **democracy**, **freedom**, **military superiority, trade** and **international leadership** (Greathouse and Miner, 2008). By understanding the connection between these ideas and the actions taken in Libya, students will be able to better understand how American political issues become U.S. foreign policy and will have the tools to understand any U.S. foreign policy implemented in any part of the world.

What is foreign policy?

Foreign policy can be explained as "the scope of involvement abroad and the collection of goals, strategies, and instruments that are selected by governmental policymakers" (Rosati and Scott, 2007, p.4). In other words, foreign policy represents the different needs, interests, and reasons for United States involvement abroad and the ways and means chosen to achieve those goals. Foreign policy is based upon the interests of a particular country, in this case the United States. Whether these interests involve the export of products made in the U.S. or the importation of oil, a worry about terrorism, global pollution, or the drug trade, the foreign policy of the United States is determined by the issues and concerns most important to our country as a whole (Greathouse and Miner, 2010).

U.S. foreign policy is made by the government, but not the government alone. The president often leads in foreign policy making, but is influenced and supported by Congress, the military, the media, the State Department, intelligence community, interest groups, the bureaucracy, and the public, among others. It is a bargaining process in which every interested person and group participates in the making of a foreign policy on a particular issue, using all of the power and skills they possess to shape a policy that is in their best interest and in the interest of the United States as a whole (Allison and Zelikow, 1999). One might think of this process as a board meeting; the president sits at the head of a conference table, and all around him sit representatives of all the interested parties on a given issue, such as terrorism or international trade.

U.S. foreign policy is the result of all interested parties discussing a particular national goal or interest and bargaining over the best way to achieve it abroad. A policy is agreed upon, and then carried out by each of those parties at the table: the president announces it, the government as a whole oversees and carries it out, and American citizens in the media, military and business, interest groups, and voters participate in its implementation. Foreign policies in other countries are different than U.S. foreign policy; while Canada and Mexico are both democracies and are neighbors of the U.S. and located in the North American continent, each has different national interests and political systems with its power distributed differently than in the U.S. Therefore, their "board room meetings" and the foreign policies that result are not the same as those of the United States. While this chapter explores only the U.S. foreign policy making process, it is important for students to understand that each country has a unique way of making such policies, and part of the U.S. foreign policy process is to understand and respond to other countries' policies and recognize that they are made in a different way.

Why is it important?

Foreign policy is important because it has an impact on the ability of the United States to provide for its citizens. Businesses care about foreign policy because they want to sell their products abroad. Ordinary people wish to remain safe from outside threats, such as terrorism and disease, and all Americans wish to buy foreign goods, such as cars from Germany and TVs from Japan. Americans need to be able to buy gasoline to power their cars, and the U.S. government wants to maintain good relations with each of the oil producing countries so that each of these goals (and many others) can be achieved for the benefit of all. Lastly, U.S. foreign policy is important because each American citizen has an impact on how policy is made and carried out. While it appears that foreign policy is made solely by the government, this chapter will show that this is not nearly the truth; all Americans participate in the making and implementation of U.S. foreign policy.

Basic elements

U.S. foreign policy is the result of bargaining and cooperation regarding a particular issue or need in the United States. But whether that issue is oil, trade, or nuclear weapons, its components are more basic: **power**, **wealth**, and common **values**. The identity and capabilities of each country determine what kind of foreign policy it can develop; a poor country with few resources or people, a weak economy, or small military finds it more difficult to develop a foreign policy similar to a country that possesses each of these qualities in abundance (Rourke, 2007).

As Americans, we are extremely fortunate to have many natural resources, a large middle class, well-educated citizens, an open and democratic society, and a strong degree of national pride. In fact, as of 2021, the United States has among the largest economies in the world at $21.4 trillion, a large and powerful military at 1.39 million active duty personnel (Central Intelligence Agency, 2021), and a set of national ideals and beliefs spelled out in the Constitution and Bill of Rights which guide our actions both at home and abroad. These characteristics separate the U.S. from its neighbors, Canada and Mexico, and become the basic elements for an individual and unique foreign policy that is made and carried out by our government and society.

Who Makes U.S. Foreign Policy?

The President and Executive Branch

The president is the undisputed leader in U.S. foreign policy. Article II of the Constitution grants the president the powers of commander-in-chief, chief diplomat, chief administrator, chief of state, chief legislator, chief judicial officer, and voice of the people (Rosati and Scott, 2011). These powers establish a constitutional basis for the president to lead in overseas matters such as fighting wars, negotiating treaties, trade agreements, and diplomatic relations. Presidents are the leaders in making foreign policy in the U.S. and the official representatives of America overseas.

In addition to a legal basis, the president also derives a great deal of this power from his professional prestige and ability to persuade others to his line of thinking (Neustadt, 1960). The president is only one individual, but he has the most power and influence of any member of the U.S. government, and the entire country will listen to him if he chooses to exercise those powers. By using his standing as the most recognized and influential American, the president's "bully pulpit" (named after President Theodore Roosevelt's aggressive use of presidential power) enables extensive influence over the nation. Foreign policy is often made during times of crisis such as war or natural disaster, and it is at these times where presidential power is at its maximum as everyone looks to their top elected official for leadership in trying times.

It is due to the many situations of crisis in the 20th century that the Executive Branch has greatly expanded to grant the president additional powers in foreign policy making (Yergin, 1978). The National Security Council, a cabinet of executives including the Secretaries of State, Defense, Homeland Security, and the Chairman of the Joint Chiefs of Staff (the top military officer) was created to work hand-in-hand with the President in making and carrying out foreign policy decisions (Rothkopf, 2005).

It is at these "boardroom" meetings where the tough decisions are made during times of crisis. For example, in the lead-up to the Iraq War (2003), President Bush worked very closely with Secretary of Defense Donald Rumsfeld, Vice President Dick Cheney, and National Security Advisor Condoleezza Rice in formulating the decision to invade based upon U.S. foreign policy interests. During the 1962 Cuban Missile Crisis, President John F. Kennedy spent two tense weeks in constant consultation with Secretary of State Dean Rusk, Secretary of Defense Robert McNamara, National Security Advisor McGeorge Bundy, and Attorney General Robert Kennedy regarding the proper way to handle the crisis

(Allison and Zelikow, 1999). Each of these presidents relied on the powers of the National Security Council, Executive Branch and individual policy-makers to analyze, debate, and develop U.S. foreign policy regarding the crisis at hand. In response to each and every crisis the current administration convenes a set of people, holds debates and negotiations, and eventually arrives at U.S. foreign policy decisions based upon the winning arguments (Woodward, 2008).

In addition, presidential decision-making depends upon the personality, beliefs, and leadership style of the president and the supporting people and institutional departments at the "boardroom" meetings (Rosati and Scott, 2011). The beliefs and opinions of, say, George W. Bush or Donald Trump differ from Barack Obama or Joseph Biden (Elovitz, 2008; Allison and Zelikow, 1999), as do the opinions of Secretaries of State Hillary Clinton or General Colin Powell. So when students of American politics and US foreign policy think about a specific US foreign policy they must also consider what president made that decision, what were their beliefs and opinions, and what were the beliefs and opinions of those with whom that policy was made? How the policy is made by the unique groups of foreign policy makers is as important as the resulting U.S. foreign policy itself.

The Bureaucracy

Decision making is a crucial part of the U.S. foreign policy process, but implementation by the bureaucracy is what actually makes those decisions a reality by putting them into practice. Without the bureaucracy, foreign policies remain words on presidential letterhead. Each senior American leader heads a specific body of the U.S. government, and whether it is the Department of Defense, State Department, Treasury, FBI, or Homeland Security, each has a bureaucratic staff which is in charge of carrying out the specific U.S. foreign policies.

The implementation of leadership decisions sounds simple, but the reality is far from it (Allison and Zelikow, 1999). The bureaucracy is immense, complex, and composed of different organizations with their own work cultures and individuals with their own career goals. A fitting example of these difficulties is the lack of cooperation between the FBI and CIA prior to the attacks of September 11, 2001. The entire intelligence community had produced a great deal of information regarding possible attacks by Al-Qaeda and Osama bin Laden, but these two lead organizations failed to cooperate, share information, anticipate the attacks, and notify senior American leadership in advance. Their effectiveness in protecting the homeland was significantly reduced by the competition between the FBI and CIA, a competition based upon different interests, goals, and ways of operation.

This failure was widely seen as the reason the attacks could not be stopped in advance and resulted in a full-scale congressional investigation that culminated in the "9/11 Report: The National Commission on Terrorist Attacks upon the United States" (Kean and Hamilton, 2004). Bureaucracy consists of many layers necessary to carry out U.S. foreign policy decisions, but it also provides the opportunity to modify or even change the original presidential decisions. In the aftermath of 9/11, the U.S. foreign policy process changed significantly to better serve American interests.

The State Department

One of four original cabinet departments of the United States government in 1789, the State Department has figured prominently in the making of U.S. foreign policy. The State Department is the most public and visible part of U.S. foreign policy, charged with taking the directives of the Executive branch to the peoples of the world. Located in embassies and consulates around the world, Foreign Service officers in the State Department communicate U.S. foreign policy to our allies (and enemies) and aim to achieve the policies which the President has created (Rosati and Scott, 2011).

The top diplomat at State is called the Secretary of State, a position directly appointed by the President and whose actions and words are considered to be the President's "mouthpiece". An effective and influential Secretary of State understands all of the issues important to U.S. foreign policy and has hundreds of diplomats around the world attempting to gain acceptance of those policies and to implement them. The Secretary of State is often the first to respond to an international crisis and is responsible for sending diplomats to represent the United States and coordinate, aid, negotiate, and generally influence the outcome. Whether dealing with the security of the United States, its economy, treaties or political issues, the Secretary of State and State Department have traditionally taken the lead in U.S. foreign policy.

The Military and Intelligence Communities

Since the creation of the National Security Act of 1947, however, the military and intelligence communities have increasingly taken power and influence away from the State Department. State has often been seen as ineffective and inefficient throughout history: President John F. Kennedy once called it a "bowl of jelly" while President Lyndon Johnson saw State as "sissies, snobs, and lightweights" (Rosati and Scott, 2011). With a combined military and intelligence budget of

over 500 billion dollars, the Executive branch and President have increasingly taken the role of away from the State Department and placed it in the hands of the Secretary of Defense (Rosati and Scott, 2011).

The NSA of 1947 created a department which placed the Army, Navy (and Marines), Air Force, and sixteen separate intelligence agencies under the control of the Secretary of Defense. The Central Intelligence Agency, National Security Agency and many others work together to protect the United States and carry out U.S. foreign policy under his leadership. In addition, after the attacks of September 11, 2001, the federal government created the Department of Homeland Security, housing the FBI, Coast Guard, Secret Service, and other agencies designed to create a more unified effort protect the homeland. Lastly a Director of National Intelligence (DNI) was created in 2004 in an effort to help each of these parts work more smoothly together and prevent another 9/11. While another attack on this scale has not occurred and the mainland United States has escaped any large attacks, the military, intelligence and State departments remain separate and competitive with one another. The DNI has not been given the full authority to manage all these disparate agencies and they remain competitive with one another, seeking their own spin and implementation of U.S. foreign policy, and, ultimately, competing against one another almost as much as they work together (Rosati and Scott, 2011). This problem of competition is similar to the one outlined earlier in discussing the role of the bureaucracy, and is a similar problem in each part of the process of making and carrying out U.S. foreign policy.

Congress

It is true that in the 20th century, the power to make U.S. foreign policy was increasingly transferred into the hands of the President and Executive Branch. This does not mean, however, that the other institutions of government do not retain power in the policy making process. Congress remains influential in the making of U.S. foreign policy because it retains the power of oversight and the power of the purse. These powers enable the House of Representatives to regulate foreign policy decisions by controlling the funding and the Senate to regulate them by ratifying treaties. Whether sending troops or diplomatic missions overseas, funding projects, or granting aid, the House and Senate retain crucial powers in the making and implementation of U.S. foreign policy (Rosati and Scott, 2011).

Oversight by Congress is another of its powers in U.S. foreign policy making, taking many forms including formal and informal hearings and the aforementioned 9/11 Report. Article II of the Constitution gives Congress the duty to investigate actions of the Executive Branch when they are seen to be

contrary to the interests of the American public. As a result of the Vietnam War, the War Powers Resolution of 1973 placed a series of reporting limitations on actions of the president overseas, requiring him to report back to Congress every 90 days to receive authorization for a further dispersal of funds and political permission to continue its activities overseas. Congress can also investigate any action of the government, and it is during such hearings that attention to foreign policy decisions of the Executive Branch is subjected to public scrutiny and often changed.

Interest Groups, the Media, and Public Opinion

The American public also has a crucial role to play in U.S. foreign policy making as the national barometer for presidential decisions and the focal point for interest groups and the media to draw attention to the leaders in Washington, D.C. Congress and the public, the media, and interest groups have an almost symbiotic relationship in that congressional leaders cannot get elected without constituents (voters), and the two groups cannot communicate without a third party, the media. In their book, *While Dangers Gather: Congressional Checks on Presidential War Powers*, William G. Howell and Jon C. Pevehouse (2007) discuss the two-way relationship of the media and Congress and the effectiveness of each actor to influence the public, and therefore U.S. foreign policy.

Public media outlets, talk radio, and network and cable news programs are also influential in communicating U.S. foreign policy to the public at large. In today's world, Americans receive their news from countless online and written sources, and this information comes with every conceivable opinion and bias. From conservative to liberal, anti-war to pro-business, news media and interest groups seek to inform ordinary citizens using their own unique take on the issue and to motivate them to support or oppose the government policy. From voting, picketing, and protesting to letter-writing campaigns and petitions, Americans have a direct impact on the making of U.S. foreign policy and the ways the government implements them.

Traditional foreign policy themes / issues

American foreign policy has at its core four themes which influence how decisions are made and which issues are considered most important. These themes have developed since the founding of our country and continue to influence how the president, congress, and all the actors explained above make U.S. foreign policy. The four themes are: **security**, **trade/economic growth**,

morality/American exceptionalism, and **isolationism versus internationalism**. What makes these four themes unique is that they can at times be contradictory and create difficult decisions for leaders as to how the United States should act in any particular situation.

Security through either Global Isolationism or Internationalism

Security is, first and foremost, the theme that underlies American foreign policy. A primary goal of every administration is to ensure the physical security of the American state, and this can be seen by examining important documents like the U.S. Constitution, Monroe Doctrine, and Gettysburg Address, which show that at every point in our history, there is a focus on security of the state (Greathouse and Miner, 2008). An early approach to ensuring the security of the state was to remain outside of the alliance system of Europe—a policy called isolationism—which regularly drew states into conflict. George Washington in his farewell address argued "it is our true policy to steer clear of permanent alliances with any portion of the foreign world" (Avalon Project, 2008). According to Washington, the U.S. needed to maintain a defensive posture and only become linked to others in extraordinary circumstances. The Monroe Doctrine continued to advocate that an intentionally separate America would remain safe and secure outside of the wars of the Europeans. The Senate's rejection of the treaty bringing the U.S. into the League of Nations after World War I can be seen as a continuation of that policy. This approach of ensuring the security of the U.S. by remaining outside of European alliances continued through the end of World War II.

With the end of World War II, the need for security brought America fully into the international system by participating in the United Nations (UN) and the North Atlantic Treaty Organization (NATO). Given the technology of the time and the need to limit the expansion of the Soviet Union, remaining outside of permanent alliances was no longer a viable option to ensure American security. The United States had changed its approach from isolationism to internationalism, a conscious effort to achieve security through international cooperation. By joining NATO and engaging in the strategy of containment during the Cold War period, U.S. foreign policy adopted an outward and international stance to ensure that neither its physical safety nor that of its allies would be threatened by the Soviet Union.

One element built into this theme is the willingness of America to use force to achieve the goal of security (Dunn, 2003 p.286) and a key change after World War II is the conscious choice to employ that force abroad. During the Cold War, containment was the American foreign policy used to keep the Soviet Union

and its allies limited to the areas of influence they gained at the end of World War II and not to allow them to control or influence other states in the system. The changes in the international system forced the U.S. to be proactive as the physical barriers which had previously protected it from overseas threats were lessened. No longer could distance and water ensure American security, thanks to the development of airplanes and missiles. The attempts to contain the Soviet Union and its communist allies during the Cold War forced the U.S. to take action in Korea, Vietnam, Nicaragua, Greece, Germany, and numerous other places around the globe to protect its security (Yergin, 1978).

Inevitably, this internationalist U.S. foreign policy would have some negative consequences which would increase the public desire to retreat again to isolationism. The reaction to American casualties during the 1965-75 Vietnam War, the deaths of 242 Marines during a 1983 peace-keeping mission in Lebanon, and 18 American soldiers during 1994 deployments into Somalia (captured in the 2001 movie "Black Hawk Down") resulted in significant pressure to bring most troops home and limit American military and political actions to a very clearly defined area of influence in the Western Hemisphere. The 1991 end of the Cold War saw the resurgence of a significant element within the United States that believes that the U.S. should withdraw from the world to protect itself from outside influences.

Despite some Americans' desire to retreat into isolationism at this time, the fall of the Berlin Wall in 1989, the Gulf War in 1990, and the break-up of the Soviet Union in late 1991, were crises that forced the U.S. to reconsider what it meant to be secure. As the sole remaining **superpower**, it faced widespread local and regional conflict brought on by the end of the contest between Americans and Russians in the Cold War. The countries of the world were free of the threat of nuclear annihilation which hung over them during the Cold War, and were exercising that freedom by fighting for their own rights. Civil wars and international conflicts proliferated worldwide, creating an entirely new security environment, and threat, from that of the Cold War.

The Gulf War saw the first large-scale U.S. military involvement in the Middle East, an action which was as much to retain access to oil as to restore the sovereignty of Kuwait. In addition to the Persian Gulf, conflicts in the former Yugoslavia and between Israel and Palestine indicated a return to an internationalist foreign policy in which the United States focused on cooperative action abroad to protect not only the physical but the economic security of the country and its allies. The attacks on 9/11 reinforced this internationalist foreign policy. For the first time significant damage was done to the U.S. by an outside terrorist organization,

which resulted in deployment of American troops into Afghanistan and Iraq in the early 2000s under the banner of preventing future terror attacks on the U.S. (Afghanistan) and to prevent weapons of mass destruction (WMDs) from being directed towards the U.S. (Iraq).

While security is most definitely a constant theme in U.S. foreign policy, the means by which it is achieved varies and is often contradictory. The isolationist streak in U.S. foreign policy routinely comes into conflict with international crises which push the United States into the international system (Papp, Johnson and Endicott, 2005). For most of its history, the U.S. has tried to segregate itself from linkages and interactions from those outside of the Western Hemisphere. Up to the attack on Pearl Harbor, there was an extremely strong sentiment towards isolationism within the country, and remnants of those feelings and policies still exist today. When the U.S. considers its relations with other states and decisions about possible actions in the international system, it always includes security concerns within its dealings, but a cyclical conflict continues to rise as to how to best accomplish this goal.

Trade/Economics and Internationalism

From its earliest history, the welfare and prosperity of the United States has been based on economic growth and trade with other countries, a reality which shows the US has *always* engaged in internationalism (Mead, 2002). There is an underlying assumption that by trading with other countries, the U.S. will benefit and the productivity of the country and the wealth of its citizens will increase. The creation of the American colonies was driven by economic growth concerns, and many of the underlying reasons leading to the American Revolution were based on economic concerns. Once free of British economic control, the importance of trade and economic growth has continually been considered by American leaders.

From the beginning, American presidents have acted to ensure that U.S. businesses would have access to markets to help promote growth in the American economy. Thomas Jefferson's decision to deploy ships from the American Navy to address piracy in the Mediterranean and the consideration of conscripting American sailors into the British navy (which was one of the issues leading to the War of 1812) are examples of American foreign policy actions to protect trade and commerce. American actions to expand the country westward and wars fought against Native American tribes were based on the potential economic returns of growing American territory. The Monroe Doctrine, Mexican American War of 1846-1848, and Spanish American War of 1898 were all U.S. foreign policy efforts designed to keep Europeans out of the Western Hemisphere and to protect and

control economic development within the region. Similarly, the entrance of the United States into World War I was in part because of threats to American trade by German U-boats.

Following World War II, the government focused on building strong economic linkages between countries to prevent a future economic collapse of the level of the Great Depression and future conflict between trading partners. American foreign policy leaders assumed that states who engaged in trade would not fight each other, so if Germany and Japan could be quickly rebuilt economically and linked to the world economic system of trade the chances of a future conflict would diminish. Underlying this idea was the thought that the U.S. would dominate world trade. With the fall of the Communist Bloc between 1989 and 1991, the focus on economic growth became even more pronounced. States which previously had not been part of the capitalist trading block were now open to trade which would in turn lessen the chances of war.

Modern foreign policy continues to show the importance of protecting American economic interests. The Gulf War in 1990/91 was driven (at least in part) by concerns over an Iraqi threat to oil supplies, and its possible impact on economic growth. Current U.S. relations with China are driven by the economic interests; the American government does not want to limit access of American goods to the Chinese markets due to the potential for economic growth in the U.S. that China provides. In sum, American policymakers cannot take action within the system without considering the impact on economics. The demand for expanding the economy and creation of more wealth forces policy makers to allow other issues to fall away if the economic returns are high enough.

Morality/American Exceptionalism

Americans have always viewed their country as special (Talbott, 2003; Papp, Johnson, and Endicott, 2005; Mead, 2002). While this idea is not unique within the international system (people in most countries believe theirs is "the best"), the level of belief that the American way of life is superior has and continues to influence how the U.S. acts within the system. It has resulted in an American foreign policy pressing other actors to abide by American morals and follow American leadership due to its exceptional nature.

An early manifestation of this idea was the concept of Manifest Destiny, that America was rightly entitled to the stretch from the Atlantic all the way to the Pacific and to introduce its way of life and system of government. This attitude is seen in how America deals with countries in Latin America such as Mexico, Panama, Colombia, and Venezuela, pushing those countries to adopt political

and economic systems which are similar to ours. From the administration of Theodore Roosevelt to the Fourteen Points of Woodrow Wilson, American exceptionalism has advocated that other states adopt democracy and American style economic structures and frequently acted as the "world's policeman." It pushed states to adopt an American political and economic model following World War II to prevent the threat of communism. Official American Cold War strategy, as advocated by National Security Council Report 68 (NSC-68), argued that the U.S. and its values represented freedom and growth while Communism, as represented by the U.S.S.R., represented slavery and a lack of societal progress.

Since the creation of the United States, its foreign policy has continually cited security and the defense of values and ideals as the basis for action in the international system. Both a retreat from international politics manifested as isolationism and the internationalist deployment of peace keepers in Lebanon, the former Yugoslavia, and Somalia were all justified by references to domestic security and values of the nation. These themes can be seen in U.S. involvement abroad, from the failure to ratify the League of Nations and the reluctance to enter both World Wars, to efforts at containment of the Soviet Union in Korea, Vietnam, Latin America, Eastern Europe, and the current conflicts in the Middle East. American foreign policy is based on recurrent themes developed as the country grew. In the following case study we will discuss an example of how these themes work in more detail during a recent and specific example of U.S. foreign policy in action: the Iraq War. It is intended to provide the student with a real-world application of the themes presented thus far in this chapter.

Case Study: Libya

Introduction

In 2011, the state of Libya was divided by a civil war which required international intervention to prevent a humanitarian disaster. The ultimate outcome of the international intervention allowed rebel groups within the state of Libya to overthrow Muammar Qaddafi. The chain of events which led to the removal of Qaddafi emerged from the "Arab Spring" revolutions which swept across the Middle East during 2011 and led to the removal of leaders in Egypt, Tunisia, and eventually civil war in Syria. The complexity of events which confronted the American government during this time, created a difficult situation in which the President chose to act in a limited capacity and where significant concerns were raised domestically about those actions. In this case study, we apply the ideas and themes of the chapter to the decision to use military

force in Libya to support the rebel forces trying to overthrow Qaddafi in order to better illustrate how U.S. foreign policy decisions are made and implemented. Unlike other uses of military force, the U.S. was only actively engaged in combat at the start of the operation and then pulled back to support allies who engaged elements of the Libyan government.

History

To understand the decision by President Obama to use military force in Libya, and the domestic and Congressional reactions to that choice, it is necessary to understand some general history about the U.S. relations with Libya, the context of the Arab Spring, issues related to the wars in Iraq and Afghanistan, and the domestic opinions within the U.S. Each of these influences affected the actions and choices of the President and the reactions within Congress.

Muammar Qaddafi came to power in 1969 and ruled as a dictator for 41 years until his removal. During his rule, Libya's government was based on a complete hierarchical model of governance with Qaddafi as the leader supported by strong security services, which punished dissent by Libyans both within and outside the country. Under his guidance, Libya was able to gain control of its oil revenues from outside companies, support militant groups, and engage in activities which were classified as terrorism. In 1986, following a bombing at a German nightclub, President Reagan ordered the U.S. military to bomb Libya in retribution for its support of that attack. In 1988 a Pan Am jet exploded over Lockerbie Scotland, the attack was traced back to Libyan operatives. Until Qaddafi allowed the Libyan operatives to stand trial and his renunciation of Libya's nuclear and chemical weapons programs, relations with the U.S. and the West were difficult; this renunciation in 2003 opened the West to more engagement by Libya.

In late 2010, the initial events which would come to be known as Arab Spring began with protests in Tunisia over jobs and the economy. Further protests begin in Egypt and other states as information spread about the initial demonstrations by social media and through global news coverage. The escalation in protests forced the Tunisian president to flee to Saudi Arabia in January of 2011. This was the first of many regime changes as a result of massive demonstrations against governments in the Middle East. While demonstrations happened in Lebanon, Jordan and Yemen, the most significant actions occurred in Egypt. From late January 2011 until February 11, 2011, massive protests forced Egyptian President Hosni Mubarak to step down and a military government to be appointed. The ouster of the Egyptian leader encouraged further protests in Algeria and Libya.

The conflict between the Libyan regime and the protesters began in late February 2011 and escalated as security forces used violence to break up large protests across Libya. In response to violence from the Qaddafi government, rebel groups formed to fight against the Libyan state and begin a campaign to overthrow the government. With the growth in violence against civilians, the U.N. Security Council referred Qaddafi's government to the International Criminal Court (ICC) and ordered an arms embargo against Libya in UN Security Council Resolution 1970 which was passed on February 26, 2011. The escalation of violence between the rebels and Libyan security forces caused civilian casualties to mount, which led in early March of 2011 for President Obama to call for Qaddafi to step down while the ICC declared that it would investigate Qaddafi for crimes against humanity. Throughout March, the Libyan military and hired mercenaries rolled back rebel advances and pushed towards areas held by rebels containing large numbers of innocents, including the city of Benghazi. Given the actions of Libyan forces and the unwillingness of Qaddafi to stop, the U.N Security Council passed Resolution 1973 on March 18, 2011 authorizing the creation of a no-fly zone over Libya and also for members "to take all necessary measures…to protect civilians and civilian populated areas under threat of attack…while excluding foreign occupation force". This Resolution's adoption led to air attacks by coalition members designed to prevent attacks on innocent civilians and which would eventually assist in the removal of Qaddafi from power.

The American decision to engage in air strikes against Libya must be addressed in the context of the Presidential election of 2008 and American public opinion. By 2011, the United States had been at war in Afghanistan for nine years and in Iraq for eight. Billions of dollars had been put into the campaigns, along with thousands of killed and wounded members of the American military. The American public was extremely weary of war, and the level of support they were willing to give for a new military campaign was limited. Under this environment, the American government had to make a decision about how to address the situation in Libya in March 2011.

Public Opinion

A constraint which affected President Obama's decision making can clearly be seen in the mood of the public toward the use of the American military abroad. The issue of America being tired of war was a major campaign issue for Obama in 2008, and through his first two years in office, he worked to scale back American military commitments both in Iraq and Afghanistan. The attitudes in the country regarding possible deployment of American forces according to

Pew Survey taken March 10-13, 2011 found a majority of American's opposed to military involvement in Libya. Sixty-three percent of those surveyed found that the U.S. did not have a responsibility to act in Libya, while only 27% did. Only 51% favored increasing sanctions against Libya, with the favorable plummeting to 16% supporting bombing of Libyan air defense and 13% sending troops (Pew Research Center, 2014). Fifty-one percent of the public argued that the U.S. military was already overcommitted in places around the world. These numbers are a far cry from the level of support that President Bush had in terms of support for Afghanistan and even Iraq where public opinion was more divided. According to Gallup in 2003, 76% of Americans approved of military action against Iraq, and in 2001, the support for action against Afghanistan was at 90% (Gallup, March 22, 2011). The Pew poll was taken immediately prior to the passage of UNSC resolution 1973 which authorized military force.

With American military action starting on March 19, 2011, Gallup did a poll to gauge American reaction on March 21. The question asked by Gallup was whether people approved or disapproved of U.S. military action towards Libya. 47% of those surveyed approved of the action, with 37% against and 16% with no opinion (Gallup, March 22, 2011). This represented a significant shift in terms of support; however, it still was less than half of Americans who were willing to support the President's actions. By March 28, 2011, in a follow up survey, Gallup found that 44% of Americans approved of President Obama's handling of Libya, while 44% disapproved with 12% not having an opinion. On June 24, 2011, Gallup asked Americans whether they approved or disapproved of military action against Libya; 39% approved, 46% disapproved, and 15% had no opinion. Between March and June, more Americans were opposed to action in Libya, with about the same amount not having opinion. The soft level of support within the American electorate constrained the decision making of American government.

The President and the Executive Branch

The final decision for any foreign policy decision must be made by the President, and in 2011 that was President Obama. In the case of deciding about whether to intervene, the pace of events in Libya was very quick. In late February, the administration was taking a wait and see position, but on March 19, 2011, American warplanes attacked Libya. Making the decision more difficult for President Obama was the fact that the security of the United States was not at risk. His decision to act was based purely on humanitarian reasons rather than traditional economic or military rationales. The consideration of values and humanitarian issues had been laid out by the Obama administration in its 2010

National Security Strategy (NSS). This document argued that universal values existed (National Security Strategy, 2010 p. 35) and the U.S. would provide leadership to ensuring those values existed throughout the world. In a speech on March 18 in the White House, President Obama stressed that the action was to protect innocents from the actions of Qaddafi and hold the regime in Libya accountable (White House, 2011) Many label the action in Libya the Obama Doctrine, where the US would move towards a more multilateral form of action in the international system (Murray, 2013), unlike the previous administration of President Bush which was willing to engage in unilateral action. One element of this approach was that the U.S. President only intervened when international "law" as represented by UN Security Council Resolution 1973 was in place as well as support from regional powers and significant allies (Tardelli, 2011, p. 22).

While the President originally spoke out for the rights of the Libyan people, he did not press for military action in an address on February 23, 2011. As the situation deteriorated on the ground as the Libyan military pushed the rebels back, there were calls for actions including a no-fly zone. Secretary of Defense Robert Gates, as the primary spokesman for the Executive branch, argued that military action was premature in February. Gates argued that a no-fly zone would require attacks against the air defense network of Libya and the administration did not want to engage another Islamic country with violence (Chivvis, 2015 p. 15). Also he had a concern about the lack of post war planning if the campaign enacted regime change. However, within the administration, there were several voices supporting intervention, including U.S. Ambassador to the UN Susan Rice, Samantha Power of the NSC, and eventually Secretary of State Hillary Clinton (Owen, 2015 p. 74). The decision to engage in military action only came after there was clear legal support from UNSC Resolution 1973 on March 17th. During a roughly three week period, there were significant disagreements within the Obama administration at the highest levels about how to react to the situation in Libya. Only when Libyan forces were massed against civilians and when the UN provided a legal basis was the President willing to order military action.

Congress

The Libyan Intervention provides for an important case about the interplay of Congress and the Executive when it comes to foreign policy. In terms of this particular event, the issue at play revolved around the War Powers Resolution. The War Powers Resolution was originally passed by Congress, overriding a presidential veto by Richard Nixon, in 1973. This act was passed in response to the actions of then President Lyndon Johnson who got the U.S. involved in

the Vietnam War without any Congressional approval. Congress did pass the Gulf of Tonkin Resolution in 1964, which provided Congressional approval for an expansion to the Vietnam War; it also continued to provide funding for American forces in Vietnam during the entire time of the conflict. However, by 1973 Congress created and passed the War Powers Resolution to ensure that Congress would have an explicit say on the use and deployment of American military forces abroad in the future. The reporting conditions in the War Powers Resolution include notification of Congress within 48 hours after American troops have engaged in contact, and deployment can be for no longer than 60 days without Congress declaring war, authorizing the use of force, or extending troop deployments for another 60 days.

In the Libyan crisis, the initial reporting as required by the War Powers Resolution occurred on March 21, 2011, in accordance with the requirements. However, American forces were still actively engaged in supporting the NATO mission in Libya past the 60-day mark. For the most par,t American forces were supporting allied strike forces through intelligence, command and control aircraft, and air to air refueling; however, the U.S. was flying Predator drones in engaged active missions over Libya (Crook, 2011a). The questions raised were whether the President was actually following the War Powers Resolution. While the actions of the President created concerns in the Legislative Branch, this was exacerbated by the fact that Congress never was able to take a clear position on what it should do in relation to Libya. For example, Senator Richard Lugar, the ranking Republican on the Senate Foreign Relations Committee, raised questions about the legal standing of the intervention (Crook, 2011a). The President was supported in his actions at times by Conservative Republicans while at other times during the crisis there was a lawsuit by a Liberal Democrat in a Federal Court who sought to have President Obama's actions declared unconstitutional. The diversity of views shows the difficulties of dealing with Constitutional issues in foreign policy.

In March 2011, during a speech to the American Society of International Law, the State Department's Legal Advisor Harold Koh laid out the case for President Obama's actions being legal. The military mission was limited in its scope, was directed at unique targets, and transfer of command would be passed to NATO. In addition, there was strong international legal support for the action based on Articles 41 and 42 of the UN Charter which supported UNSC Resolution 1973. The President, according to Koh, had the power to act based on the Constitutional duties of Commander in Chief and Chief Executive and that these powers had significant precedent. In addition, he argued that the Executive Branch had met the necessary criteria under the War Powers Resolution (Crook, 2011a).

During the Libyan intervention, the Senate Foreign Relations committee led by Senators John McCain and John Kerry passed a resolution allowing the President to continue operations (Crook, 2011b). The House of Representatives rejected a resolution to support continued military operations; however, they also rejected two attempts to remove funding from American military forces operating to support the Libyan intervention (Crook 2011b). In June of 2011, the House passed a resolution rebuking the President for not getting Congressional authorization for Libyan operations. Part of the problem was that a key term in the War Powers Resolution is not well defined, that of American forces engaging in hostilities. The Obama administration, against the advice of legal opinions within the Executive Branch, argued that the time limits within War Powers did not apply as American forces were not engaged in hostilities. The activities of American forces are "unique" from hostilities, since U.S. forces are supporting combat operations not engaging in direct combat (Crook 2011b).

The complexities of the relationship between Congress and the Executive branch are clearly illustrated within the Libyan intervention. The competition between the Commander in Chief power of the President and the power to declare war and provide appropriations by Congress in this situation were in direct conflict. President Obama initially met the conditions laid out in the War Powers Resolution but was able to continue his preferred course of action due to a divided Congress. Congressional control of the President in the realm of foreign policy are only viable if it has a majority of support and a willingness to check the actions of the President.

The Bureaucracy: Department of Defense and State Department

While elements within the Department of Defense were hesitant about the use of force (Chivvis, 2015), the Secretary of State Hilary Clinton was pursuing support among allies in the Middle East and Western Europe to support possible military action (Chivvis, 2015). The decision of the President to launch Operation Odyssey Dawn initiated attacks into Libya on March 19, 2011 and committed the United States military, specifically the Air Force and missiles launched from the U.S. Navy. By March 25, there were eleven states, along with the U.S., who were operating under U.S. command on strikes. These states included the United Kingdom, Italy, France, Belgium, Canada, Denmark, the Netherlands, Spain, Qatar, and the United Arab Emirates (Chivvis, 2015).

The United States worked through Secretary of State Clinton to convince European allies that command of the mission should pass from the United States to NATO. This change allowed the United States to reduce its assets directly involved

in combat but at the same to provide the logistical support necessary for NATO to continue the attacks which would eventually roll back the Qaddafi regime. The change of command transferred to NATO on March 31, 2011. While the United States continued to support NATO strikes until the fall of the Libyan government in October 2011, it focused mainly on finding a diplomatic conclusion to the conflict within the framework of the U.N. (Chivvis, 2015).

Conclusion

The decision to intervene in Libya shows the complexity that the United States has to address when it contemplates actions in the international system. This particular case illustrates the complex dynamic between domestic considerations and the capacity to act in the international system. The President was constrained in terms of the freedom to act due to domestic opposition both within the general electorate and also in Congress. Without support domestically, presidents do not have the freedom to act. The limitation on Presidential action such as the Vietnam War continued would be another example. In addition, the grey areas of the U.S. Constitution matter within foreign policy. The President has significant latitude to act given his Commander in Chief and Chief Executive roles, but Congress through its ability to declare war and control the finances for any action are at play as well. The framers of the U.S. Constitution extended the ability of branches to limit each other to the realm of foreign as well as domestic policy. This understanding shows the importance of all elements of the American government within foreign policy when important decisions must be made. No one branch or bureaucratic structure can operate in isolation, preventing one branch from becoming dominant. While foreign policy operates differently from domestic governance, the same foundations exist for both.

A Civic Engagement Challenge—Becoming Involved in Foreign Policy Decisions

Two of the basic goals of this chapter are to de-mystify the U.S. foreign policy making process and to show that the ordinary American citizen has a real place in influencing how decisions are made and implemented. Students sometimes do not realize the impact they can have on a given issue of importance to them, especially so if that issue is international and seems both complicated and remote from any power they might have. Now that the reader has a better idea of how they fit into this process and who has the most influence, they can assert themselves into foreign policy making in a number of ways.

"All politics is local" as the saying goes, and support or opposition for any U.S. foreign policy begins in a local arena, such as your university or local community. The civic engagement challenge for this chapter is for students to get involved with a local campaign to support or oppose an issue of U.S. foreign policy. This involvement can be from within a university-sponsored club or organization that promotes awareness or action, with a purposeful vote for a local or national candidate that supports your position, a protest, petition drive, phone call, or letter to your local representative. While students cannot right now hope to have the power to make U.S. foreign policy decisions, they most definitely can influence how those issues are perceived by their peers in the local community. So, recognize what international issue stirs a passion inside you, and get involved!

Discussion Questions:

1. What is a foreign policy and why is it important that each country has one?
2. Who are the primary actors in U.S. foreign policy?
3. What themes matter when discussing the content of American foreign policy?
4. The U.S. president is considered by most to be the dominant actor within the foreign policy process, but other actors have significant power to influence how policy is made. Who are these actors and how can they influence this process?
5. How was the U.S. foreign policy made in deciding to use for against Libya in 2011? What actors were involved and influential in making that policy?
6. Given the events following 9/11 (including terrorism and wars in Afghanistan and Iraq), is foreign policy going to become easier or more difficult for the country to make?

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Dr. Ross C. Alexander earned a Ph.D. in Political Science with majors in public administration and American politics, and a minor in political theory, from Northern Illinois University, in addition to an MPA from Arizona State University. He currently serves as Provost and Executive Vice President for Academic Affairs at the University of North Alabama, where he also holds the position of Professor of Political Science. He previously held a number of academic and administrative positions at Indiana University East, including Dean of the School of Humanities and Social Sciences, Associate Vice Chancellor for Academic Affairs and Dean of Graduate & Continuing Education, and Professor of Political Science. Prior to IU East, Dr. Alexander was a faculty member and administrator at the University of North Georgia for many years. A university faculty member since 1999, Dr. Alexander has authored numerous peer-reviewed journal articles, chapters, and books in the areas of state and local government, American politics, public budgeting and finance, gambling policy, information literacy, general education, and online teaching and learning.

Dr. Carl D. Cavalli, professor of political science, earned an M.A. and Ph.D. in political science from the University of North Carolina at Chapel Hill with specializations in American politics, comparative politics, and political theory. He has published several peer-reviewed articles on the presidency along with a book on presidential-congressional relations, authored several chapters for the Georgia eCore® online American government course, and written several episodes for the Georgia Globe American government video course. Dr. Cavalli currently teaches courses on the Presidency, Congress, Legislative Process, Political Parties and Elections, congressional and presidential elections, and American Government, which he has been teaching for over 30 years. Dr. Cavalli is an expert in the field of American politics.

Dr. Barry D. Friedman, professor emeritus of political science, is a graduate of the University of Connecticut where he earned M.B.A. and M.P.A. degrees and a Ph.D. degree in political science with concentrations in public administration, American politics, and public policy. He has authored numerous books and articles in the fields of federal regulation, nonprofit administration, and public policy. As a member of North Georgia's political science faculty from 1992-2021, Dr. Friedman taught courses on the topics of public and nonprofit management, public policy analysis, American politics, ethics, and research in political science.

Dr. Craig Greathouse, professor of political science, earned a Ph.D. in political science with specialties in international relations and comparative politics from Claremont Graduate University in addition to an M.A. and B.A. in Political Science from the University of Akron. Dr. Greathouse has published peer-reviewed journal articles addressing European foreign policy, American strategic culture, and cyber war. His teaching experience includes the following courses: Introduction to the European Union, International Political Economy, International Relations Theory, Global Issues, International Security, European security, National Security Policy, and American Government. He has twice been recognized with Information Literacy grants for innovative teaching within the classroom. Dr. Greathouse has helped design and present simulations of the international system to the National Defense University, teachers groups, and elements of the U.S. military.

Dr. Jonathan Miner, professor of political science, possesses a Ph.D. in international studies with specializations in foreign policy, international law and organizations, and comparative politics from the University of South Carolina

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Dr. Brian M. Murphy, professor emeritus of political science, received M.A. and Ph.D. degrees in political science from Miami University. Prior to taking a position as Dean of the College of Liberal & Applied Arts at Stephen F. Austin State University, he was Co-Director of the European Union Center for the University System of Georgia, which was housed at Georgia Institute of Technology, as well as professor of political science at North Georgia College & State University. His administrative positions at North Georgia included head of the Department of Political Science & Criminal Justice, Director of the Honors Program, Coordinator of International Programs, and Associate in the Office of Academic Affairs. From 1997-2007, Dr. Murphy directed the University System of Georgia's program on European Union Studies. In 1998, he was appointed General Secretary of the Transatlantic Information Exchange Service, a program launched by the European Commission and United States Information Agency. In 2006, Dr. Murphy was appointed to a strategic planning committee for the University System of Georgia to prepare higher education in the state to leverage competition in the global economy. He also served as a Senior Fellow at the Southern Center for International Studies.

Dr. K. Michael Reese, professor emeritus of criminal justice, possesses a J.D. from the University of Alabama, an LL.M. from Emory University, and a Ph.D. from Georgia State University. Dr. Reese practiced law in both the public and private sectors for a number of years before forging a career in higher education. At North Georgia, he taught courses in Criminal Law, Constitutional Rights, and Evidence. Dr. Reese published several journal articles, dealing primarily with civil liberties, criminal law and procedures, and Native American law.

Dr. Charles H. "Trey" Wilson III, professor of political science, earned a Ph.D. in social science education from the University of Georgia, in addition to an M.A. in history from the University of Georgia; an M.S. in the History of Technology from the Georgia Institute of Technology; an M.P.A. from North

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Nathan Deal served as Governor of Georgia from 2011 to 2019. "Deal served in the U.S. Army at Fort Gordon in Augusta after graduating with college and law degrees with honors from Mercer University. He then began a private law practice in Gainesville, the hometown of his wife, Sandra Deal. While his wife taught in Hall County public schools, Deal began a career in public service, working as a prosecutor, judge, state senator and U.S. Congressman for Georgia's 9th District. He was elected Georgia's 82nd governor in 2010 and re-elected in 2014." (from https://nathandeal.georgia.gov/biography-2/). In 2019, Deal accepted a position as a Regents professor at the University of North Georgia, guest lecturing in a variety of courses, and teaching a course titled "Politics in the Peach State".

Mary Catherine Beutel (student contributor) earned a Bachelor of Science in political science from the University of North Georgia, graduating in the spring of 2017. She was a Dean's list student and graduated with honors. She was a member of the political science organization of Pi Sigma Alpha. During her time at UNG she interned at the Governor's Office, the Office of U.S. Representative Doug Collins, and also worked in the Planning Department of Lumpkin County. She is interested in perusing a master's degree in public administration and pursuing a career in public service.