# GAME OF POLITICS

## CONFLICT, POWER, AND REPRESENTATION

KENNETH BRYANT, JR.

ERIC LOPEZ

MARK OWENS

FIRST EDITION

UT TYLER

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Kenneth Bryant, Jr.

Eric Lopez

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*The University of Texas at Tyler*

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Dear Student:

The study of government is an important facet of your college education, no matter what career you choose to pursue. As you examine the American political system, which impacts nearly every aspect of our daily lives, you will gain insight into critical issues and ways in which you can play an active role in our democracy.

The University of Texas at Tyler is committed to making educational resources of the highest quality accessible and affordable. That is why UT Tyler Press is providing the electronic version of *Game of Politics: Conflict, Power and Representation* free of charge and the print version at cost.

The textbook is funded in large part by a grant from The University of Texas System in reducing the cost of required instructional materials to make college more affordable. I extend our deepest gratitude to UT System for sharing our passion for student success through affordable education and enabling us to produce a free textbook for students.

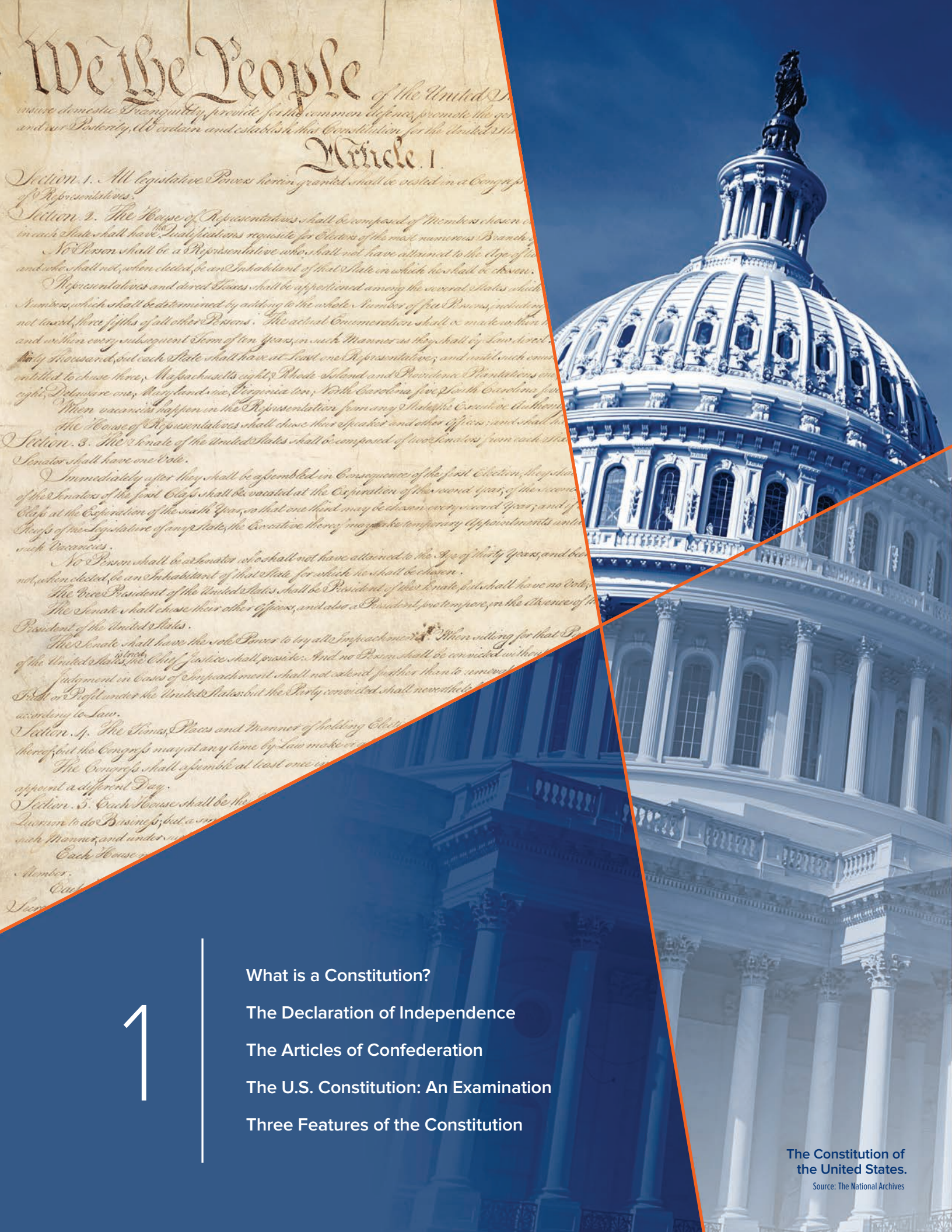
*Game of Politics: Conflict, Power and Representation* is authored by UT Tyler political science faculty and reflects their years of expertise and dedication as educators, scholars and researchers.

Kenneth Bryant Jr., PhD, teaches American government and conducts research re-examining conventional thought about historically marginalized communities. Eric Lopez, ABD, is a specialist in American politics, the federal court system, and the development of Constitutional law. Mark Owens, PhD, is an expert in American political institutions and policymaking, and his work has been published in *American Politics Research* and *Legislative Studies Quarterly*.

On behalf of UT Tyler Press and President Michael Tidwell, I congratulate Dr. Bryant, Mr. Lopez and Dr. Owens on an outstanding textbook, and I again thank UT System for their critical support of this free textbook project. We hope you find this textbook illuminating and relevant as you progress in your academic career.

All the best,

Dr. Amir Mirmiran
Provost, UT Tyler




# 1

What is a Constitution?

The Declaration of Independence

The Articles of Confederation

The U.S. Constitution: An Examination

Three Features of the Constitution

The Constitution of the United States.

Source: The National Archives

CHAPTER ONE

# The United States Constitution

*The American Constitution is a written instrument full and complete in itself. No Court in America, no Congress, no President, can add a single word thereto, or take a single word thereto. It is a great national enactment done by the people, and can only be altered, amended, or added to by the people.*

*– Frederick Douglas, "The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?"*

## Introduction: What is a Constitution?

The U.S. Constitution is a written government charter that delineates the powers and limitations of the federal and state governments. In other words, the **Constitution** is a list of rules for all officials who exercise governmental power. Whether the president of the United States takes executive action to fight the war on terrorism or the mayor of Tyler, Texas, enforces a city ordinance

***Constitution:*** *a list of rules for all officials who exercise governmental power. These rules, consequently, are a nation's ultimate law that sets forth the structure and powers of government.*

about proper protest venues, the Constitution was deliberately considered and written to enumerate the government's powers and to constrain them.

Compared to reading the sterling words and promises of the Declaration of Independence, reading the U.S. Constitution **(Figure 1.1)**—with its seven Articles and twenty-seven amendments—is quite boring. Any constitution's purpose is to set forth the structure and powers of a government, which can be arduous, tedious, and boring. For example, Article 1 creates a bicameral Congress and lists the qualifications for members of the House of Representatives and the Senate. Article 2 creates the presidency, but mostly explains the Electoral College. Article 3 creates the judicial branch, but mostly articulates the jurisdiction of federal courts and defines the crime of treason.


Source: The National Archives

**FIGURE 1.1 The Constitution of the United States**

As Frederick Douglas connotes, the Constitution is the ultimate law that structures the government's powers. By doing so, it enshrines individual rights and liberties by limiting a government's powers. Examining the Constitution's language and structure reveals that Americans' individual rights are protected as **negative rights**. That is, the founders withdrew the government's regulatory power in certain areas because they believed individual rights preexisted government and, in turn, government existed to protect them. Examine the wording of the Constitution's First Amendment: "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." This section of the First Amendment disables Congress's power by specifically prohibiting Congress from establishing a national religion or punishing speech it might find offensive. Much like a sports rulebook, the fascinating parts of government derive from how players in the political system operate under the rules. Article 1, § 1 of the Constitution reads, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," but the exact meaning of legislative power is left undefined. Why is there a bicameral legislature? How does this legislative structure impact the type of legislation eventually passed by Congress? And, although Congress is prohibited from infringing on religious rights, what happens when the government passes a valid law that serves an important governmental interest but incidentally infringes upon one's religious beliefs?

***Negative rights:*** *individual rights that are protected in a constitution by withdrawing a government's regulatory power in a particular area. For example, the First Amendment 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."*

To understand the importance of the U.S. Constitution, this chapter will discuss the Constitution's underlying philosophy and explore the institutions created by the Constitution.

Source: Yale University Art Gallery

**FIGURE 1.2** The painting *Declaration of Independence,* by John Trumbull. The drawing represents the moment the Jefferson-led committee appointed to draw up the document submitted it for the considersation of the Continental Congress.

# The Declaration of Independence

This is not a history class, but studying the U.S. Government requires a cursory understanding of American history. One such historical fact is that America was originally a colony of Great Britain. In 1776, however, the thirteen colonies (Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island) sought their formal independence from Great Britain and from monarchial (centralized) rule under King George. But why?

A plethora of history courses seek to answer this question. However, we can examine the document where the colonists, about a year after their armed conflict with Great Britain began, sought to enunciate their reasons for separation. The Second Continental Congress charged a committee led by Thomas Jefferson (John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston also served on this committee, which was known as the "Committee of Five") with crafting the **Declaration of Independence** and explaining the reasons for independence **(Figure 1.2)**. Although not a legally binding document, the Declaration serves two important historical and political purposes in our nation: it attempts to explain the colonists' reasons for separation and provides the governing philosophy for the American legal and political systems. At the time, the Declaration was an act of treason that laid out a drastic view of government and challenged the established notion that a monarchy was the proper governmental form and the source of individual liberty.

***Declaration of Independence:*** *a document, written by the Committee of Five, which explains the colonists' reasons for declaring independence from Great Britain. Also, the Declaration provides the governing philosophy of the American legal and political systems.*

The Declaration begins with this simple statement:

> *When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another...a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.*

Professor Randy Barnett makes the case that the colonists did not seek separation for mere political differences, but that the Declaration sought to convey the colonists' view that King George was purposefully scheming to violate their rights.[1] One of the colonies' main gripes about the English Parliament, for instance, was not the taxes it levied against the colonies but that it taxed them without proper representation in Parliament. Let's analyze this argument: U.S. citizens often feel that those who govern them do not look out for their interests and advance policies that are wrong (e.g., a Democrat may believe a Republican administration is carrying out immoral policies). Yet, frequent and fair elections give Americans the right to vote for members of Congress (our congressperson and two state senators) and for a president who will support citizens' preferred policies. U.S. citizens can rectify those differences by voting at the ballot box and by peacefully advocating for political causes without resorting to an armed revolution. Additionally, the government will (either purposefully or inadvertently) violate an individual's rights. When a potential legal injury arises, Americans can access an independent judiciary that ensures the government acts within its prescribed limits. Again, we as Americans have the right to peacefully resolve our legal disputes.

Regarding Barnett's argument that the Declaration showed a systematic violation of the colonists' rights in addition to listing grievances, the Declaration notes that:

> *The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.*

These facts, which make up most of the Declaration, are listed in bullet form within the document and quite clearly show the steps Great Britain took to systematically undermine the colonists' political rights. For example, the Declaration notes that:

- King George failed to enact laws for the public good, including prohibiting state governors from passing necessary laws;
- King George forced various states' representative bodies to meet in unusual places to ensure their compliance; and
- King George dissolved representative bodies and suspended state legislatures.

In total, King George's actions were meant to discourage the colonists' right to achieve political change through democratic (peaceful) means. If his actions toward political rights where reprehensible, his protection of the colonists' individual rights was not much better:

- King George obstructed justice by refusing to allow the colonists to have courts;
- King George forced colonists to quarter troops and protected the troops from legal consequences (such as for murders they committed in the colonies); and

- King George made judges serve him (i.e., judges obeyed the will of the king, not of justice) by fixing their term in office at will and paying their salary.

This part of the Declaration details the colonists' many grievances against the king. However, listing these abuses is one thing, but advancing the government's proper role in society is quite another. On this, we can examine the Declaration's second purpose: describing the governing philosophy that underlines the American political system.

First, the colonists were heavily influenced by the ideas of natural rights advocated by John Locke in his *Second Treatise of Government.*[2] Locke advanced the notion that individuals in the "State of Nature" (i.e., a society without government) were born free, with unlimited liberty to do as they pleased. Unfortunately, this freedom could not secure order and predictability, as individuals could invade another's property or take another's life. To live in an orderly and peaceful society, individuals give up some freedom and form a government primarily meant to protect the individual rights of life, liberty, and property. This contract ensures that whenever the government fails to achieve its purpose, the people have a right to alter the government or to form a new one.

***Social contract theory:*** *advanced by John Locke, this theory heavily influenced the founders' views on the relationship between government and the governed. In the state of nature, individuals are born free, with certain unalienable rights. For order and peace, individuals give up some freedom and form a government primarily meant to protect the individual rights of life, liberty, and property. Whenever the government fails to achieve its purpose, the people have a right to alter the government or form a new one.*

Locke's **social contract theory** heavily influenced the writing of the Declaration. The second paragraph reads, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness."

This line is important for two reasons. First, it reiterates Locke's philosophy and expresses the colonists' view that individual rights preexist government (i.e., do not come from a government or a king). These unalienable rights that individuals have at birth are protected within the text of the Bill of Rights and in the Constitution's Fourteenth Amendment. Consequently, the federal government and state governments are both prohibited from infringing on a person's right to life, liberty, and property—unless one is afforded due process (i.e., a proper and fair judicial proceeding that respects the individual's constitutional rights).[3]

Secondly, this is the most frustrating line of the Declaration as the colonists in 1776 believed that those entitled to legal respect were free persons, or wealthy and landowning white males. Two groups that were most egregiously left out of the Declaration's original promise were women and African Americans. In a letter to her husband, John Adams, Abigail Adams **(Figure 1.3)** implored John to:

> *Remember the Ladies, and be more generous and favourable to them than your ancestors....If particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation.*[4]

Source: National First Ladies' Library

**FIGURE 1.3 Abigail Adams**

Concerning the United States sordid history of slavery, Justice Thurgood Marshall remarked that,

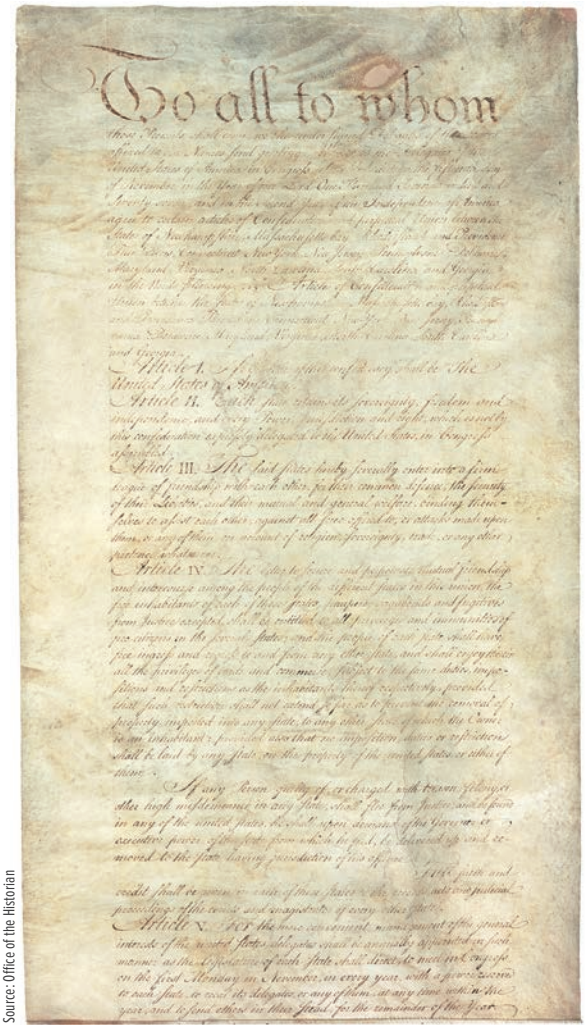
> *the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation*

***Articles of Confederation:*** *the first constitution to govern the original thirteen colonies in the Revolutionary War's late years and in the years immediately after the colonies gained independence. The Articles created a confederate system of government, with a weak centralized government. For example, the only institution of government was a unicameral Congress that relied on the states to implement the policies.*

> *to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.*[5]

In the social and protest movements that sought to include these disfavored groups in the American polity, the Declaration puts the onus on the government (and opposition groups) to argue why the Declaration did not include women and African Americans in its understanding of individual equality. America's treatment of these groups has never been perfect, but the Declaration's inspiring promise is shown in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth amendments. It continues to inspire Americans to live up to this promise for other political minorities.[6] President Barack Obama remarked on Independence Day in 2013,

> *And now we, the people, must make their task our own—to live up to the words of that Declaration of Independence, and secure liberty and opportunity for our own children, and for future generations.*[7]




Source: Office of the Historian

**FIGURE 1.4 The Articles of Confederation**

Finally, the Declaration reflects Locke's view on the relationship between a government and the people. Not only accepting the idea that rights preexist government, the Declaration echoes Locke's view that individuals create governments to secure rights ("That to secure these rights, Governments are instituted among Men..."). The Declaration does not offer a specific type of government that best achieves this goal; it simply lays the philosophical groundwork for what a "just" government looks like: one that derives its power from the people ("consent of the governed"). From this relationship, the people naturally have the right to alter or abolish any form of government when it no longer fulfills its promise to secure the rights bestowed upon individuals by virtue of their humanity ("That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it...").

## The Articles of Confederation

The U.S. Constitution is America's second attempt at a constitutional government. The **Articles of Confederation (Figure 1.4)**—ratified in March of 1781, but replaced by the U.S. Constitution in 1789—was the first constitution to govern the original thirteen colonies in the Revolutionary War's late years and in the years immediately after the colonies gained independence (the Revolution ended on September 3, 1783). Indicative of its name, the Articles created a **confederate system of government**—a governing system where separate and independent states delegate very specific powers to a (relatively) weak centralized government. As a consequence, the states, not the people, were considered sovereign under the Articles, so the protection of individual liberty would rest with the state governments.

Paulsen et al. (2010) note that the Articles read more as a treaty among independent sovereigns, ensuring their states' powers would not be abridged by the new federal government.[8] Article 3 of the Articles describes this relationship as the states entering "into a firm league of friendship with each other…" Under the Articles, the newly formed federal government only had powers that were expressly delegated to it, and the states retained the remainder of the powers and responsibilities. The federal government had full responsibility over foreign affairs and over relations with various Indian tribes, but it lacked meaningful power over domestic affairs (e.g., regulating trade and commerce).

***Confederate system of government:*** *a governing system where separate and independent states delegate very specific powers to a (relatively) weak centralized government. The Articles of Confederation created a confederation where the federal government had full responsibility over foreign affairs and over relations with various Indian tribes, but it lacked meaningful power over domestic affairs (e.g., regulating trade and commerce).*

Examining the structure of government created by the Articles reveals the states' lack of trust in a centralized government. First, the only institution of government was a unicameral Congress (i.e., there was no separation of powers). In this Congress, every state was entitled to send at least two delegates but no more than seven. Regardless of the size of its delegation, each state only had one vote. Delegates were sent (and could be recalled) by their state legislatures (and were paid by their respective states), so delegates were often more interested in polices that helped their states than in those that helped the country. Indeed, nine of the thirteen states had to approve measures for major legislation to pass. When Congress did pass laws, it relied on the states to implement the policies; when they did not, Congress had no recourse (e.g., a judicial system) to make states comply with its policies.

Let's examine this problem more closely: under the Articles, Congress did not have the power to tax individuals or the states—they could only ask the states for money. Without an independent revenue source and with states that did not regularly meet their monetary obligations, the federal government had no money to fulfill responsibilities such as paying troops during the Revolution or paying debts (which hampered the federal government's credit). Without any power to regulate trade or commerce with foreign nations, the economy suffered, causing a host of other issues within the colonies (e.g., high inflation and economic uncertainty).

One major issue with the Articles' constitutional structure was its inability to adapt to issues that arose over time; to amend the Articles, all thirteen states in Congress needed to consent. This allowed the least populous state (Rhode Island) to block an amendment the other twelve states felt was necessary (unsurprisingly, no amendments were ratified under the Articles). Thus, a convention was called for the summer of 1787 to consider what amendments and revisions were necessary to make the Articles workable. With George Washington as the chair of the Convention, the **Constitutional Convention** quickly revealed it would not revise the Articles but instead draft a whole new system of government. To ease their deliberations and to ensure a candid discussion about the new government they were creating, the delegates took a vow of secrecy.

***Constitutional Convention:*** *originally called to discuss what amendments and revisions were necessary to make Articles of Confederation workable. However, the delegates would draft a new system of government that would become the U.S. Constitution.*

## The Constitutional Convention

Sans Rhode Island, which boycotted, the Constitution's delegates hailed from states with large and small populations and from slave and non-slave states. Consequently, the U.S. Constitution represents compromises among these

***Virginia Plan:*** *a plan of government, supported by delegates of the larger states that envisioned a powerful bicameral Congress in which a state's population would determine its representation in both houses of Congress. Along with expanded federal powers, Congress would have the ability to veto laws passed by states and, once its membership was determined, the responsibility of selecting a president and judges for the federal judiciary.*

***New Jersey Plan:*** *a plan of government, supported by delegates of smaller states, that would give Congress the powers it lacked, but Congress's structure would remain a unicameral legislature in which states were equal. Further, instead of allowing Congress to veto laws passed by state legislatures, the New Jersey Plan advocated that the federal law would be considered supreme in conflicts between federal and state law. Lastly, Congress would select the president, who would in turn select judges for the federal judiciary.*

***The Great Compromise:*** *a compromise between the Virginia Plan and the New Jersey Plan, where the delegates agreed to a bicameral Congress where the population of the lower chamber (the House of Representatives) would reflect states' populations, and the population of the upper chamber (the Senate) would be equal because each state would be guaranteed two senators. In addition to providing Congress with additional powers, the delegates agreed to the Supremacy Clause, which allows federal law to trump state law in conflicts. Lastly, the delegates agreed to a president selected independently of Congress and to a federal judiciary staffed by judges appointed by the president and confirmed by the Senate.*

various interests. Law professors Michael Paulsen, Steven Calabresi, Michael McConnell, and Samuel Bay present five major decisions made at the Convention that illuminate how compromise, more than some overarching unified theory, is responsible for the U.S. Constitution.[9]

First, the delegates agreed that the Constitution's ratification would take effect when nine of the thirteen states agreed upon a method to amend the Constitution that did not require unanimous consent among all states. This decision fixed one primary defect of the Articles: that one recalcitrant state could block much-needed changes. Secondly, the delegates agreed to expand federal power by providing the federal government with the power it lacked. Under the Constitution, the federal government could establish a uniform currency, regulate foreign and domestic commerce, and tax and spend for defense and for general welfare. It also gained implied powers in Congress's ability to make laws the federal government needed to carry out its enumerated responsibilities. Under the Articles, the Congress could not pass any law unless it was expressly delegated the power to do so.

The new federal government was entrusted with the powers it had lacked, but its structure remained in question. Recall, the federal government under the Articles only had a unicameral Congress and no institutions to execute laws or to resolve conflicts that emerged when federal laws were ignored. In Congress, two factions emerged at the Convention: states that wanted their population to determine their representation in Congress and states that wanted to retain state equality as structured in the Articles. Rather than a unicameral Congress, the **Virginia Plan** (advocated primarily by James Madison of Virginia and those from the larger states) envisioned a powerful bicameral Congress in which a state's population would determine its representation in both houses of Congress. Along with expanded federal powers, Congress would have the ability to veto laws passed by states and, once its membership was determined, the responsibility of selecting a president and judges for the federal judiciary.

Given that the Virginia Plan envisioned congressional power as proportional to states' populations, the smaller states offered the alternative **New Jersey Plan** (advocated by William Patterson of New Jersey). This plan would give Congress the powers it lacked (which many delegates saw as the purpose of the Convention), but Congress's structure would remain the same: a unicameral legislature in which states were equal. Further, instead of allowing Congress to veto laws passed by state legislatures, the New Jersey Plan advocated that the federal law would be considered supreme in conflicts between federal and state law. Lastly, Congress would select the president, who would in turn select judges for the federal judiciary.

With this background, the third main decision at the Convention was the compromise between the advocates of the Virginia and New Jersey plans. Known as the **Great Compromise**, the delegates agreed to a bicameral Congress where the population of the lower chamber (the House of Representatives) would reflect states' populations, and the population of the upper chamber (the Senate) would be equal because each state would be guaranteed two senators. In addition to providing Congress with additional powers, the delegates agreed to the Supremacy Clause, which allows federal law to trump

state law in conflicts. Lastly, the delegates agreed to a president selected independently of Congress and to a federal judiciary staffed by judges appointed by the president and confirmed by the Senate.

The Great Compromise makes the fourth decision evident: separating powers into three independent and coequal branches of government. The power to create law was entrusted to a bicameral Congress, and the power to execute those laws was given to a unitary president with a four-year term who would be elected, independently of Congress, by the Electoral College. Lastly, the power to judge legal disputes surrounding these laws was entrusted to a Supreme Court and to an inferior court system created by Congress. The judges staffing these courts would be appointed by the president and subject to confirmation by the Senate.

Lastly, the delegates' fifth major decision was their compromise on America's original sin: slavery. In short, the Constitution would not have been ratified without support from southern states (where over 95% of slaves lived), whose main interest was ensuring the Constitution would protect the institution of slavery. Under the Articles, the power to regulate slavery was left to the individual states. Therefore, abolitionists and those wanting slavery's gradual eradication had to **compromise** with the mostly southern coalition.

First, the only date listed in the Constitution is 1808, the year Congress would have the authority to regulate the slave trade. This compromise was between factions that wanted the Constitution to ban the slave trade and those that wanted the Constitution to protect it. Instead of solving the issue, they left the slave trade for a future generation to settle. Secondly, while slaves had no rights (e.g., voting, civil, or political), slave states wanted to count their slave populations for representational purposes. The Three-Fifths Compromise allowed slaves to be counted as three-fifths of a person for representational purposes. This scheme gave slave states greater representation in the House, allowing their coalition to block laws they felt would intrude upon slavery. A state's Electoral College votes for president were (and still are) dependent upon their representation in Congress, so slave states had an advantage in electing the president. For example, prior to the Civil War and the election of Abraham Lincoln as president in 1861, ten of the first fifteen presidents were from southern states (seven alone were from Virginia).

Finally, the Constitution is silent on whether regulating slavery is a national or a state responsibility and on whether every state is obligated to return fugitive slaves to their owner. The lack of a decision on which governmental level would regulate slavery played an important role in the lead-up to the Civil War, as proponents on both sides could claim slavery was either a national issue (for Congress to solve) or a state issue (for individual states to regulate).

These compromises were truly as tragic; however, they were necessary to ratify the Constitution. Justice Thurgood Marshall **(Figure 1.5)** had an interesting view on these compromises:

> *When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.*

***Compromises over slavery within the Constitution:*** *this first compromise concerns the slave trade. Instead of solving the issues, the delegates prohibited Congress from having any authority over the slave trade until 1808. Secondly, while slaves had no rights (e.g., voting, civil, or political), the Three-Fifths Compromise allowed slaves to be counted as three-fifths of a person for representational purposes. Finally, the Constitution is silent on whether regulating slavery is a national or a state responsibility and on whether every state is obligated to return fugitive slaves to their owner. The lack of a decision on which governmental level would regulate slavery played an important role in the lead-up to the Civil War, as proponents on both sides could claim slavery was either a national issue (for Congress to solve) or a state issue (for individual states to regulate).*

Source: National First Ladies' Library

**FIGURE 1.5 Thurgood Marshall, center, served as Associate Justice of the Supreme Court of the United States from October 1967 until October 1991.**

For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the Framers, "the whole Number of free Persons." United States Constitution, Art. 1, 52 (September 17, 1787).

On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years, until the 19th Amendment (ratified in 1920).

» On a matter so basic as the right to vote, Negro slaves were excluded from the Constitution, although they were counted for representational purposes at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years, until the 19th Amendment (ratified in 1920).

These omissions were intentional. The record of the Framers' debates on the slave question is especially clear: The Southern States acceded to the demands of the New England States for giving Congress broad power to regulate commerce, in exchange for the right to continue the slave trade. The economic interests of the regions coalesced: New Englanders engaged in the "carrying trade" would profit from transporting slaves from Africa as well as goods produced in America by slave labor. The perpetuation of slavery ensured the primary source of wealth in the Southern States.

Despite this clear understanding of the role slavery would play in the new republic, use of the words "slaves" and "slavery" was carefully avoided in the original document. Political representation in the lower House of Congress was to be based on the population of "free Persons" in each State, plus three fifths of all "other Persons." United States Constitution, Art. 1, 52 (September 17, 1787). Moral principles against slavery, for those who had them, were compromised, with no explanation of the conflicting principles for which the American Revolutionary War had ostensibly been fought: the self-evident truths "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." Declaration of independence (July 4, 1776).

It was not the first such compromise. Even these ringing phrases from the Declaration of Independence are filled with irony, for an early draft of what became that Declaration assailed the King of England for suppressing legislative attempts to end the slave trade and for encouraging slave rebellions. See Becker, The Declaration of Independence: A Study in the History of Political Ideas 147 (1942). The final draft adopted in 1776 did not contain this criticism. And so again at the Constitutional Convention eloquent objections to the institution of slavery went unheeded, and its opponents eventually consented to a document which laid a foundation for the tragic events that were to follow.

Pennsylvania's Governor Morris provides an example. He opposed slavery and the counting of slaves in determining the basis for representation in Congress. At the Convention he objected that "The inhabitant of Georgia [or] South Carolina who goes to the coast of Africa, and in defiance of the most sacred laws of humanity tears away his fellow creatures from their dearest connections and damns them to the most cruel bondages, shall have more votes in a Government instituted for protection of the rights of mankind, than the Citizen of Pennsylvania or New Jersey who views with a laudable horror,

Source: George Washington's Mount Vernon

**FIGURE 1.6** *Scene at the Signing of the Constitution of the United States* is a 1940 painting by Howard Chandler Christy depicting the Constitutional Convention signing the U.S. Constitution at Independence Hall in Philadelphia on September 17, 1787.

so nefarious a Practice." Farrand, ad., The Records of the Federal Convention of 1787, vol. 11, 222 (New Haven, Connecticut, 1911).

And yet Governor Morris eventually accepted the three fifths accommodation. In fact, he wrote the final draft of the Constitution, the very document the bicentennial will commemorate.

As a result of compromise, the right of the southern States to continue importing slaves was extended, officially, at least until 1808. We know that it actually lasted a good deal longer, as the Framers possessed no monopoly on the ability to trade moral principles for self interest. But they nevertheless set an unfortunate example. Slaves could be imported, if the commercial interests of the North were protected. To make the compromise even more palatable, customs duties would be imposed at up to ten dollars per slave as a means of raising public revenues. United States Constitution, Art. 1, 59 (September 17, 1787).

No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.[10]

## The U.S. Constitution: An Examination

On September 17, 1787, the delegates to the Constitutional Convention sent the U.S. Constitution to the thirteen states for ratification **(Figure 1.6)**. The Constitution would officially replace the Articles on June 21, 1788, when New Hampshire became the ninth state to ratify the U.S. Constitution. This vote would set a few key events into motion:

- February 4, 1789: The Electoral College meets and elects George Washington as president and John Adams as vice president.

- March 4, 1789: The First Congress convenes.
- April 30, 1789: George Washington assumes the presidency.

In the following sections, we will examine the Constitution and the political system it established. One question should influence your review of the following sections: how did the founders believe the structure of government they created protected individual liberty?

## Preamble

The Constitution's most idealistic part is in its first paragraph,

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

There is no legal significance to the preamble, as it simply introduces the Constitution and provides the Constitution's purpose 1.1. But this romantic paragraph explains the foundations of the Constitution. The preamble emphatically declares that the people empower the federal government—the political power rests with the people. This ideal, referred to as **popular sovereignty**, is achieved by the Constitution through a **Republican government**. The heart of any representative government is the principle that people influence the government through frequent and fair elections in which they can vote for representatives. The United States is a democracy, but not in the sense that the people directly vote on legislation; it is a democracy that allows people to frequently vote for those who govern. This concept that people empower the federal government was quite revolutionary in 1788. This type of empowerment completely abandoned the Articles' structure of states pledging a "perpetual union." The preamble unquestionably clarifies that the states no longer empower the federal government and that the federal government (empowered by the people) would play an important governing role in American life and a paramount role in protecting individual rights and liberties.

1.1

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**Read along with the Constitution's Preamble.**

***Popular sovereignty:*** *the notion that political power rests with the people.*

***Republican government:*** *a governing system, whereby the people influence the government through frequent and fair elections in which they can vote for representatives of their choice.*

## Article 1: The Congress

> *All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.*
>
> *United States Constitution, Article 1, § 1*

1.2 Article 1 entrusts the power to make laws to a bicameral Congress. In *Federalist Paper #78*, Alexander Hamilton describes legislative power as the ability to "prescribe the rules by which the duties and rights of every citizen are to be regulated."[11] This power is awesome and far-reaching, so the founders believed that two distinct checks on legislative power were

1.2

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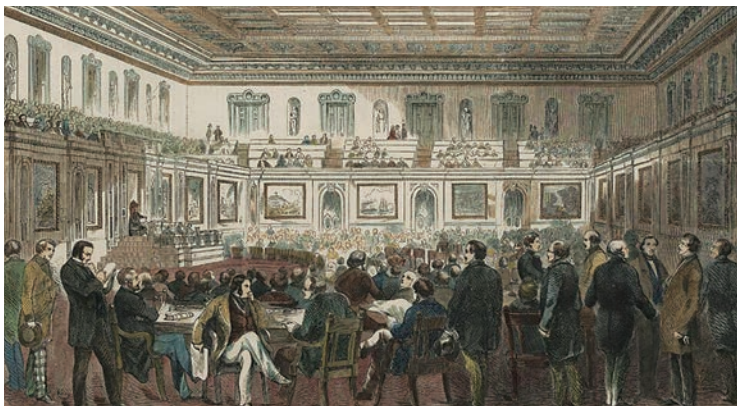
**A visual timeline of 220 years of growth on Capitol Hill.**

necessary. First, an internal check on legislative power is the bicameral legislature where both Houses (chambers) must agree on the form and language of a bill before it can be sent to the president for his signature. Second, an external check on legislative power is the president's ability to veto any bill sent to him by Congress. The legislative process may sound easy, but various electorates elect each chamber at different political times, and the requirements for office differ for each chamber. The legislative process, as described by Justice Neil Gorsuch, is "an arduous one. But that's no bug in the constitutional design: it is the very point of the design."[12]



Source: Collection of the U.S. House of Representatives

**FIGURE 1.7** ***The New Hall of Representatives, with Members in Session,*** **is a 1858 hand-colored wood engraving illustrating the newly opened House chamber.**

The full membership of the lower house, or the House of Representatives, is subject to reelection every two years within a member's congressional district.[13] Given its frequent elections, the House **(Figure 1.7)** is known as the People's House, a chamber where public passion is immediately reflected. To ensure that each House member represents approximately the same number of constituents (on average, each member of the House currently represents 700,000 constituents), Article 1 stipulates that the federal government must conduct a **census** every ten years to determine how many people live in the fifty states (and, by extension, the country as a whole).[14] From this count, the federal government determines how many congressional seats they have until the next census. In 1929, the Congress passed the Permanent Apportionment Act, which fixed the number of seats in the House at 435. Consequently, depending on the results of the census, a state may gain or lose seats in the House. After the 2010 census, Texas gained four seats but New York lost two seats in the House.

***Census:*** *Article 1 of the Constitution stipulates that the federal government must conduct a census every ten years to determine how many people live in the fifty states and, by extension, the country as a whole.*

As a check on the House's will of the people, the Senate (the upper house) guarantees that every state has two senators. It is considered the more deliberative body because senators serve a six-year term and only a third of the Senate is subject to reelection every two years.[15] James Madison explains in *Federalist Paper #62* that:

> The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.[16]

To highlight this division of legislative power, let us examine Congress's power to impeach and remove an executive or a judicial official from office. Article 1 provides the House the sole power of impeachment to determine via a majority vote whether there is sufficient evidence to subject an official to an impeachment trial in the Senate. On the other hand, the Senate possesses the actual power to remove an official from office if two-thirds of the Senate agrees to do so after conducting a trial. Three presidents in U.S. history have been impeached (Presidents Andrew Johnson, William Clinton, and Donald Trump), but the Senate failed to remove any from office.

Source: U.S. Senate Collection

**FIGURE 1.8** ***View of the Senate of the United States in Session,*** **by J. Rodgers.**

Considered the more mature and deliberative body, the Senate **(Figure 1.8)** is responsible for ratifying treaties (by a two-thirds vote) that are negotiated by the president, confirming judges who are appointed by the president to the federal judiciary, and confirming appointments made by the president to the executive branch (e.g., secretaries to the president's cabinet, ambassadors, the FBI director, and other high-ranking officials).

A state's population reflects their level of representation in the House, but the states are equal in the Senate due to Article 1's guarantee that each state has two senators. Subsequently, the most populous state (California) has the same representation in the Senate as the least populous state (Wyoming). Originally, the Senate further respected state sovereignty by authorizing state legislatures to select their own senators; citizens did not popularly elect senators until the Seventeenth Amendment was ratified in 1913.

By constitutional design, a bill must have the majority support of the people (represented in the House) and of the states (represented in the Senate) to be sent to the president. Of course, the president must sign the bill (whose constituency is the entire country) for it to become law. If a president vetoes a bill, Congress can override his veto by a two-thirds vote in both chambers of Congress. The only stipulation about where bills can be introduced (i.e., begin) are for those that raise or levy taxes.[17]

***Enumerated powers:*** *the powers of the federal government that are specifically written within the Constitution's text. Most of Congress's, and by extension the federal government's, powers and responsibilities are located in Article 1, § 8.*

***Necessary and Proper Clause:*** *Article 1, § 8 provides Congress with the power to pass any legislation that "shall be necessary and proper" to carry out its enumerated responsibilities. This clause is the source of Congress's implied powers.*

***Implied powers:*** *based on the Necessary and Proper Clause, the Supreme Court interpreted this clause as providing Congress the authority to pass any legislation that is both necessary and appropriate for Congress to implement its enumerated powers.*

**Enumerated**, or delegated, **powers** are specifically written within the Constitution's text. Most of Congress's, and by extension the federal government's, powers and responsibilities are located in Article 1, § 8. Seventeen broad issues (e.g., Congress shall have the power to lay and collect taxes, to borrow money, to regulate commerce) were entrusted to Congress to regulate. The last power listed in § 8 provides Congress with the power to pass any legislation that "shall be necessary and proper" to carry out any of the seventeen issues listed in § 8. Referred to as the **Necessary and Proper Clause** (or the Elastic Clause), the Supreme Court interpreted this clause as providing Congress with implied powers. These **implied powers** authorize Congress to

pass any legislation that is both necessary and appropriate for Congress to implement its enumerated powers. For example, § 8 gives Congress the power to raise and maintain an army but not the power to force citizens to enroll in the military (i.e., a military draft). Through the Necessary and Proper clause, however, Congress can implement a military draft because the draft is appropriate legislation for carrying out its responsibility to raise and maintain an army.

Lastly, a Constitution represents a list of things government cannot do, but Article 1, § 9 specifies the areas Congress is prohibited from regulating. Within § 9, the Writ of Habeas Corpus (the right to know whether you are being validly imprisoned) cannot be suspended unless public safety requires it during a rebellion or invasion. Congress is further prohibited from passing ex post facto laws (retroactively punishing illegal behavior that was legal at the time one engaged in it) or bills of attainder (legislative acts that specifically punish an individual person or groups of persons). Interestingly, § 9 also prohibits the government from bestowing any title of nobility on an individual.

## Article 2: The Executive

> *The executive Power shall be vested in a President of the United States of America.*
>
> *United States Constitution, Article 2, § 1*

**1.3** The president is heralded as the most powerful person in the world, so the brevity and vagueness of Article 2 is interesting (e.g., the majority of the Article details how the president will be elected by the Electoral College). Article 2 enumerates that all executive power is vested in a unitary president who serves a four-year term. Originally, the president's terms were not limited, but the ratification of the Twenty-Second Amendment in 1951 restricts a president to two terms. If the president cannot fulfill the responsibilities of his office (e.g., by death or resignation) the vice president assumes the presidency.[18]

To be president, one must be at least thirty-five years old, a U.S. resident for fourteen years, and a natural-born citizen. Secondly, one must win the **Electoral College** rather than a nationwide popular vote.[19] In the Electoral College electoral system, every state is awarded a number of electors equal to their congressional delegation in Congress (their House members plus their two senators). By virtue of the Twenty-Third Amendment ratified in 1961, Washington, D.C., is awarded three electors. Consequently, there are a total of 538 electoral votes up for grabs in a presidential election, and a successful presidential candidate must form a coalition of states (and Washington, D.C.), whose electoral votes equal at least 270. According to Article 2, the states can award their electoral votes in whatever manner they choose, and forty-eight states currently award their electoral votes to the candidate who wins their state's popular vote.[20]

As a unitary executive, the president is independent of Congress. Elected indirectly by the people through the Electoral College and entrusted with the power to veto any bills sent by Congress, the president can perform his job

**1.3**

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**A look at the West Wing renovation process at the White House.**

***Electoral College:*** *the electoral system for selecting the president where every state is awarded a number of electors equal to their congressional delegation in Congress (their House members plus their two senators). By virtue of the Twenty-Third Amendment ratified in 1961, Washington, D.C., is awarded three electors. Consequently, there are a total of 538 electoral votes up for grabs in a presidential election, and a successful presidential candidate must form a coalition of states (and Washington, D.C.), whose electoral votes equal at least 270.*

Source: Supreme Court of the United States

**FIGURE 1.9** **The Supreme Court Building in Washington, D.C.**

in the way he believes the American people want, not in a way he believes Congress desires. Of course, Congress can hold the president accountable through impeachment and conviction in the Senate on the charge of "treason, bribery, or other high crimes and misdemeanors."

The president's general executive power can be divided amongst his domestic responsibilities and his foreign responsibilities. Domestically, in Article 2, § 3, the president is entrusted to "take care" that the laws of the United States are faithfully executed, to grant pardons for violations of federal law, to nominate officials in the executive branch (e.g., the secretary of state), and to nominate judges for the Supreme Court and for all inferior federal courts (these nominations are subject to Senate approval).

In foreign affairs, the president has discretion to carry out his duties. As the Supreme Court has noted, the president's foreign responsibilities make him our nation's "sole organ" concerning his actions on the foreign stage. The president is the commander in chief of the world's most powerful armed forces, he can negotiate treaties with foreign countries (these treaties must be ratified by a two-thirds vote in the Senate to become law), and he can nominate ambassadors to foreign countries. This power of sending—and receiving—ambassadors allows the president to decide with which countries the United States has formal, diplomatic relations.

## Article 3: The Judicial Branch

> *The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.*
>
> *United States Constitution, Article 3, § 1*

Article 3 is the briefest of the Articles that created federal institutions. Certainly, the novel parts of U.S. government (a bicameral Congress and unitary executive) were adopted after compromise and careful deliberation

on how these political institutions should be structured and on what powers they should have. The founders also understood that courts were necessary in a government to resolve legal controversies because many founders at the Constitutional Convention were lawyers or judges. What the founders did not specify at the Convention, though, was the complete structure of the federal judiciary. Article 3 creates and empowers the Supreme Court **(Figure 1.9)**, but it does not specify how many justices must sit on the Supreme Court nor does it specify the lower court system. These decisions were left to the first Congress to decide.

From that perspective, we can view Article 3 as a list of protections and rules for future court systems to follow. First, federal judges nominated by the president and confirmed by the Senate are guaranteed life tenure and have a salary protection (i.e., their salary cannot be lowered while in office). Remember, one grievance listed in the Declaration was judges' dependence on the king for their job and their salary. These institutional protections ensure that federal judges are protected from political pressure and given independence to do their job. Secondly, Article 3 lists the jurisdiction—the types of cases that a court can hear—of the Supreme Court and of the future federal (inferior) courts.

Article 3 stipulates that the Supreme Court has original jurisdiction—the responsibility to be the first and only court to hear a case—in all cases "affecting ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." For all other cases, the Supreme Court has appellate jurisdiction, or the power to review a lower court's decision. Congress can regulate the Supreme Court's appellate jurisdiction by deciding which cases the Supreme Court can and cannot hear.

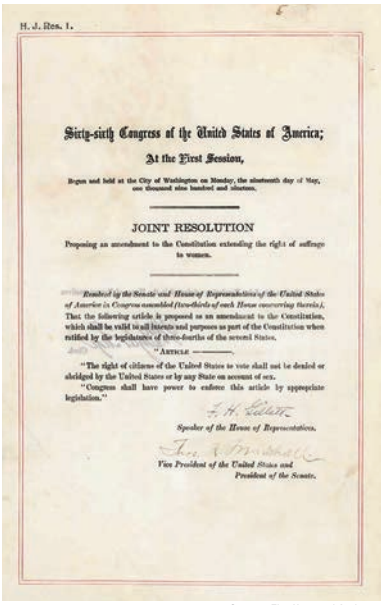
One power not specifically enumerated in Article 3 is the judiciary's power to exercise **judicial review**, which means reviewing governmental (both state and federal) actions and determining their compatibility with the Constitution. Since the Supreme Court's decision in *Marbury v. Madison* (1803), where the Court ruled an act of Congress unconstitutional, all actors in within the political system have accepted the judiciary's responsibility to "say what the law is."[21] Separating power would be meaningless without a judicial branch to enforce the Constitution's limits on governmental power. Coincidentally, Article 3, § 2 also guarantees that criminally accused people have a right to a jury trial.

***Judicial review:*** *the judiciary's power to review governmental (both state and federal) action and determine their compatibility with the Constitution. This power is not specifically enumerated in Article 3, but was formally established in* Marbury v. Madison *(1803).*

## Article 4: Relations Amongst the States

The Constitution functions as the rulebook for all players within the political system, and Article 4 details how the states must interact with each other and with residents from other states. For example, Article 4 stipulates that every state must provide "full faith and credit" to the public acts and judicial proceedings of other states. Thus, Texas must honor a couple's marriage in Arizona. Additionally, all U.S. citizens are entitled to the "privileges and immunities" of citizenship. Hence, states are prohibited from discriminating against citizens of other states. For instance, Texas cannot levy penalties on Oklahoman

***The amendment process:*** *Article 5 stipulates a two-part process to amend the Constitution: proposal and ratification. All twenty-seven Constitutional amendments have been proposed by Congress, which requires a two-thirds approval vote in the House and the Senate. Article 5 stipulates that amendments can be proposed by a constitutional convention called by two-thirds of state legislatures, but this proposal method has never been used. Next, a proposed amendment must be ratified by three-fourths of state legislatures to become part of the Constitution.*


H. J. Res. 1.

Sixty-sixth Congress of the United States of America;

At the First Session,

JOINT RESOLUTION

Proposing an amendment to the Constitution extending the right of suffrage to women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"ARTICLE ———.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

Source: The National Archives

**FIGURE 1.10** **House Joint Resolution 1 proposing the 19th amendment to the states.**

***Supremacy Clause:*** *Article 6 of the Constitution guarantees the Constitution, and all laws passed in accordance to it, are the "supreme law of the land." Consequently, states' acts are not allowed to stand if they should come into conflict.*

drivers for speeding on I-20 that are not also levied against Texas residents. In addition, Article 4 establishes extradition, the process by which a person is returned to a state where they are accused of a crime.

Article 4 also makes the federal government responsible for protecting the states and ensuring that each state has a representative government. Finally, the rules for admitting new states are found in Article 4, along with Congress's power to regulate U.S. territories (e.g., Puerto Rico).

## Article 5: The Amendment Process

One defect of the Articles of Confederation was its rigidity; amending the document required unanimous consent from all thirteen states. Article 5 makes a compromise between the Articles' strict uniformity and a system whereby a temporary public passion could be crystalized into the Constitution. The amendment system was meant to be hard, not impossible. The Constitution has been amended twenty-seven times since it was ratified in 1788, and ten of those amendments (The Bill of Rights) were ratified by December 1791.

Article 5 stipulates a two-part process to **amend the Constitution**: proposal and ratification. All twenty-seven Constitutional amendments have been proposed by Congress (see **Figure 1.10**), which requires a two-thirds approval vote in the House and the Senate. Article 5 stipulates that amendments can be proposed by a constitutional convention called by two-thirds of state legislatures, but this proposal method has never been used. Next, a proposed amendment must be ratified by three-fourths of state legislatures to become part of the Constitution. Currently, any proposed amendment would require ratification by 38 states.

Interestingly, neither the president nor the Supreme Court have a formal role in the amendment's proposal and ratification process. This should make sense, as the founders left the people (through their representatives in Congress and the in the states) with the decision of whether an amendment is necessary to alter the country's fundamental law. As Justice Scalia quipped, the amendment process was meant to be difficult because the public needs to "devote to the subject the long and hard consideration required for a constitutional amendment."[22]

## Article 6: Constitutional Supremacy

During the Convention, one compromise was how to safeguard the supremacy of the Constitution and federal law over state actions and ensure that the states could not hamper the federal government's legitimate functions. Article 6's **Supremacy Clause** handles this situation by stipulating that the Constitution, and all laws passed in accordance to it, are the "supreme law of the land." Therefore, states' acts are not allowed to stand if they should come into conflict. To further highlight this notion of constitutional supremacy, all governmental officials (whether local, state, or federal) are required by either oath or affirmation to support the Constitution.

The Constitution's last meaningful dictate ensures there will never be a religious test to hold elected office in the United States. No one can be formally barred from serving in government due to religious beliefs or practices.

### Article 7: Ratification

Nine of the thirteen original states were required to formally ratify the U.S. Constitution. As we discussed, New Hampshire became the ninth state to ratify the U.S. Constitution on June 21, 1788.

## Concluding Ideas: Three Features of the Constitution

The first seven Articles of the Constitution were sent to the states for ratification. A few distinct features of the Constitution are the separation of powers with checks and balances, federalism, and the lack of a bill of rights.

### Separation of Powers with Checks and Balances

Any government has three functions: to make laws, to enforce those laws, and to peacefully settle legal disputes that arise from those laws. The U.S. Constitution divides these powers into three separate and coequal branches of government, vesting the power to create laws with Congress, the power to execute the laws with the president, and the power to resolve legal disputes with the federal judiciary led by the Supreme Court. Each branch of government is independent and able to check the other. A few examples are that:

- Congress can pass bills, but the president can veto them;
- Congress can override a presidential veto with a two-thirds vote in both chambers;
- Congress can declare war and raise the armed forces, but the president is the commander in chief of the armed forces;
- the president can appoint justices to the Supreme Court with the Senate's approval; and
- the Supreme Court can declare laws passed by the political branches unconstitutional.

In the **separation of powers**, each institution of government is elected by different electorates at different political times. To control all the levers of political power (i.e., the House, Senate, and the presidency), the Constitution ensures that a party's political support must be translated over six years. House members are subject to reelection by voters in a Congressional district every two years, and a third of the Senate is up for reelection in the same period (senators are elected by their statewide constituencies). Every four years, the president is elected by a national election through the Electoral College. As

***Separation of powers:*** *the Constitution's division of the powers of government into three separate and coequal branches of government, vesting the power to create laws with Congress, the power to executive the laws with the president, and the power to resolve legal disputes with the federal judiciary led by the Supreme Court.*

such, even when a political party controls the levers of government, their partisan rule tends to be short. In the past ten years:

- the Democrats won control of the House, Senate, and the presidency in 2008;
- the Republicans won control of the House in 2010, which allowed them to stop legislation supported by Democrats in the Senate and by the Democratic president;
- Democrats retained control of the presidency and the Senate, and the Republicans retained control of the House in 2012;
- the Republicans took control of both the House and the Senate in 2014;
- the Republicans won control of the House, the Senate, and the presidency in 2016; and
- the Democrats won control of the House in 2018, which allowed them to stop legislation supported by Republicans in the Senate and the presidency.

## Federalism

***Federalism:*** *the Constitution's careful division of power between the states and the federal government. Federal power is limited to and defined by those powers the Constitution enumerates to it and those powers that can be reasonably implied. The states retain all powers not enumerated nor restricted to the federal government by the Constitution.*

The term **federalism** is not found in the Constitution's text, but federalism is created from the careful division of power between the states and the federal government. Defining the proper boundary of power for each level of government involves the fact that the federal government was never meant to handle all the governmental responsibilities. Truly, federal power was limited to and defined by those powers the Constitution enumerates to it and those powers that can be reasonably implied. For every action the federal government takes, it must point to a specific provision in the Constitution that authorizes its action. This careful enumeration of power reflects the founders' intention to not give the federal government authority to perform every aspect of governance. By enumerating power, the founders quite literally ensured that the federal government did not have some powers.

The states, therefore, retain all powers not enumerated nor restricted to the federal government by the Constitution (e.g., no state can enter into treaties, no state can coin their own currency, no state may deny the equal protection of the laws). This residual power, known as the police powers of the states, gives states the authority to regulate the health, safety, and morals of their citizens. In other words, the states receive the residual power to perform essential governmental functions. The states regulate their citizens' daily lives by, for example, defining when a speeding infraction occurs, running public school systems, developing educational curricula, ensuring drivers are licensed by the state and have car insurance, and prohibiting grocery stores from selling beer and wine before noon on Sundays.

This power, as described by Chief Justice John Roberts, is expansive, which informed the founders' decision to have states (instead of a centralized government) control the police power because states are the level of government

closest to the people.[23] Therefore, states do not see the Constitution as their authority when enacting policies but must analyze if policies conflict with a federal prerogative (i.e., trumped by the Supremacy Clause) or if the Constitution prohibits them from acting. If the answer to both questions is no, states can enact any policy they desire.

However, in practice, the line between the authorities of the state and federal governments is not always clear. The country has grown, society has changed, and the American people now expect more from the federal government (e.g., minimum wage, health care, and the regulation of child labor). The federal government usually addresses these expectations with laws and regulations that determine whether an issue belongs to the federal government via its enumerated or implied powers or if it belongs to the states' police power. Two views describe this inherent tension: dual and cooperative federalism.

**Dual federalism** contends that the authority of the federal and state governments is clearly divided, as the federal government is supreme over its responsibilities and the states retain sovereignty over their affairs. This arrangement creates an enclave of state power that the federal government cannot invade, nor can the federal government directly dictate what states can or cannot do.[24] For example, the Supreme Court ruled in *Murphy v. NCAA* (2018) that it is unconstitutional for the federal government to prevent states from passing laws that legalize sports betting.[25] Here, the Court rationalized the federal government invaded the sovereignty of the states by telling them what laws they could or could not pass.

***Dual federalism:*** *a view of federalism that contends that the authority of the federal and state governments is clearly divided, as the federal government is supreme over its responsibilities and the states retain sovereignty over their affairs. This arrangement creates an enclave of state power that the federal government cannot invade, nor can the federal government directly dictate what states can or cannot do.*

**Cooperative federalism**, on the other hand, views the federal government as supreme in the legitimate operations enumerated to it by the U.S. Constitution.[26] Therefore, when the federal government carries out its enumerated or implied powers, the states cannot impede the federal government's appropriate actions. For instance, a federal minimum wage was considered unconstitutional prior to 1941 because it improperly invaded the states' sovereignty to regulate workplace conditions within their borders (i.e., dual federalism). In *United States v. Darby* (1941), however, the Supreme Court took a cooperative federalism view and held that federal minimum wage laws are justified under Congress's enumerated power to regulate interstate commerce and could not be challenged by the states.[27]

***Cooperative federalism:*** *a view of federalism that contends that the federal government is supreme in the legitimate operations enumerated to it by the U.S. Constitution. Therefore, when the federal government carries out its enumerated or implied powers, the states cannot impede the federal government's appropriate actions.*

## Lack of a Bill of Rights

It should be obvious by now that the first seven Articles of the Constitution mention individual rights and liberties very little; this is because the Constitution is concerned with creating a durable governing structure. The rights we cherish as U.S. citizens (such as the right to religious freedom, the right to free speech, or the right to bear arms) were added after the Constitution's ratification. It became apparent during the ratification debates that the Constitution's major weakness was that it lacked a bill of rights.

A bill of rights defines a set of fundamental liberties so important that no government has the authority to take them away or infringe upon them for illegitimate reasons. Alexander Hamilton opposed listing a bill of rights in the

Constitution and argued in *Federalist Paper No. 84* that the Constitution itself was a bill of rights because Congress only had those powers enumerated to it. Hence, the federal government could never claim the authority to invade fundamental liberties. Additionally, he argued that listing fundamental rights was dangerous because it implied that the people did not retain those rights not listed.[28]

As we will discuss in the next chapter, this argument was fairly weak, and a bill of rights would be the price for the Constitution.

## Key Terms

**Articles of Confederation:** the first constitution to govern the original thirteen colonies in the Revolutionary War's late years and in the years immediately after the colonies gained independence. The Articles created a confederate system of government, with a weak centralized government. For example, the only institution of government was a unicameral Congress that relied on the states to implement the policies.

**Census:** Article 1 of the Constitution stipulates that the federal government must conduct a census every ten years to determine how many people live in the fifty states and, by extension, the country as a whole.

**Compromises over slavery within the Constitution:** this first compromise concerns the slave trade. Instead of solving the issues, the delegates prohibited Congress from having any authority over the slave trade until 1808. Secondly, while slaves had no rights (e.g., voting, civil, or political), the Three-Fifths Compromise allowed slaves to be counted as three-fifths of a person for representational purposes. Finally, the Constitution is silent on whether regulating slavery is a national or a state responsibility and on whether every state is obligated to return fugitive slaves to their owner. The lack of a decision on which governmental level would regulate slavery played an important role in the lead-up to the Civil War, as proponents on both sides could claim slavery was either a national issue (for Congress to solve) or a state issue (for individual states to regulate).

**Confederate system of government:** a governing system where separate and independent states delegate very specific powers to a (relatively) weak centralized government. The Articles of Confederation created a confederation where the federal government had full responsibility over foreign affairs and over relations with various Indian tribes, but it lacked meaningful power over domestic affairs (e.g., regulating trade and commerce).

**Constitution:** a list of rules for all officials who exercise governmental power. These rules, consequently, are a nation's ultimate law that sets forth the structure and powers of government.

**Constitutional Convention:** originally called to discuss what amendments and revisions were necessary to make Articles of Confederation workable. However, the delegates would draft a new system of government that would become the U.S. Constitution.

**Cooperative federalism:** a view of federalism that contends that the federal government is supreme in the legitimate operations enumerated to it by the U.S. Constitution. Therefore, when the federal government carries out its enumerated or implied powers, the states cannot impede the federal government's appropriate actions.

**Declaration of Independence:** a document, written by the Committee of Five, which explains the colonists' reasons for declaring independence from Great Britain. Also, the Declaration provides the governing philosophy of the American legal and political systems.

**Dual federalism:** a view of federalism that contends that the authority of the federal and state governments is clearly divided, as the federal government is supreme over its responsibilities and the states retain sovereignty over their affairs. This arrangement creates an enclave of state power that the federal government cannot invade, nor can the federal government directly dictate what states can or cannot do.

**Electoral College:** the electoral system for selecting the president where every state is awarded a number of electors equal to their congressional delegation in Congress (their House members plus their two senators). By virtue of the Twenty-Third Amendment ratified in 1961, Washington, D.C., is awarded three electors. Consequently, there are a total of 538 electoral votes up for grabs in a presidential election, and a successful presidential candidate must form a coalition of states (and Washington, D.C.), whose electoral votes equal at least 270.

**Enumerated powers:** the powers of the federal government that are specifically written within the Constitution's text. Most of Congress's, and by extension the federal government's, powers and responsibilities are located in Article 1, § 8.

**Federalism:** the Constitution's careful division of power between the states and the federal government. Federal power is limited to and defined by those powers the Constitution enumerates to it and those powers that can be reasonably implied. The states retain all powers not enumerated nor restricted to the federal government by the Constitution.

**Implied powers:** based on the Necessary and Proper Clause, the Supreme Court interpreted this clause as providing Congress the authority to pass any legislation that is both necessary and appropriate for Congress to implement its enumerated powers.

**Judicial review:** the judiciary's power to review governmental (both state and federal) action and determine their compatibility with the Constitution. This power is not specifically enumerated in Article 3, but was formally established in Marbury v. Madison (1803).

**Necessary and Proper Clause:** Article 1, § 8 provides Congress with the power to pass any legislation that "shall be necessary and proper" to carry out its enumerated responsibilities. This clause is the source of Congress's implied powers.

**Negative rights:** individual rights that are protected in a constitution by withdrawing a government's regulatory power in a particular area. For example, the First Amendment 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."

**New Jersey Plan:** a plan of government, supported by delegates of smaller states, that would give Congress the powers it lacked, but Congress's structure would remain a unicameral legislature in which states were equal. Further, instead of allowing Congress to veto laws passed by state legislatures, the New Jersey Plan advocated that the federal law would be considered supreme in conflicts between federal and state law. Lastly, Congress would select the president, who would in turn select judges for the federal judiciary.

**Popular sovereignty:** the notion that political power rests with the people.

**Republican government:** a governing system, whereby the people influence the government through frequent and fair elections in which they can vote for representatives of their choice.

**Separation of powers:** the Constitution's division of the powers of government into three separate and coequal branches of government, vesting the power to create laws with Congress, the power to executive the laws with the president, and the power to resolve legal disputes with the federal judiciary led by the Supreme Court.

**Social contract theory:** advanced by John Locke, this theory heavily influenced the founders' views on the relationship between government

and the governed. In the state of nature, individuals are born free, with certain unalienable rights. For order and peace, individuals give up some freedom and form a government primarily meant to protect the individual rights of life, liberty, and property. Whenever the government fails to achieve its purpose, the people have a right to alter the government or form a new one.

**Supremacy Clause:** Article 6 of the Constitution guarantees the Constitution, and all laws passed in accordance to it, are the "supreme law of the land." Consequently, states' acts are not allowed to stand if they should come into conflict.

**The amendment process:** Article 5 stipulates a two-part process to amend the Constitution: proposal and ratification. All twenty-seven Constitutional amendments have been proposed by Congress, which requires a two-thirds approval vote in the House and the Senate. Article 5 stipulates that amendments can be proposed by a constitutional convention called by two-thirds of state legislatures, but this proposal method has never been used. Next, a proposed amendment must be ratified by three-fourths of state legislatures to become part of the Constitution.

**The Great Compromise**: a compromise between the Virginia Plan and the New Jersey Plan, where the delegates agreed to a bicameral Congress where the population of the lower chamber (the House of Representatives) would reflect states' populations, and the population of the upper chamber (the Senate) would be equal because each state would be guaranteed two senators. In addition to providing Congress with additional powers, the delegates agreed to the Supremacy Clause, which allows federal law to trump state law in conflicts. Lastly, the delegates agreed to a president selected independently of Congress and to a federal judiciary staffed by judges appointed by the president and confirmed by the Senate.

**Virginia Plan:** a plan of government, supported by delegates of the larger states that envisioned a powerful bicameral Congress in which a state's population would determine its representation in both houses of Congress. Along with expanded federal powers, Congress would have the ability to veto laws passed by states and, once its membership was determined, the responsibility of selecting a president and judges for the federal judiciary.

## ENDNOTES

[1]Barnett, Randy. (2015, July 4). What The Declaration of Independence Really Claimed. The Washington Post. Retrieved from https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/04/what-the-declaration-of-independence-really-claimed/?utm_term=.dca4110aaadd

[2]Locke, John. 1632-1704. Second Treatise of Government.

[3]For example, one accused of murder cannot be deprived of her life or liberty until they are found guilty by a jury of her peers, in a fair judicial proceeding that respects their rights (such as a right to counsel). One such complaint against King George, listed in the Declaration, was the deprivation of trial by jury which put one's life or liberty in the hands of a judge that was subservient to the arbitrary wishes of the king.

[4]Adams, Abigail. (1776, March 31). Letter to John Adams.

[5]Marshall, Thurgood. (1987, May 6). Reflections on the Bicentennial of the United States Constitution.

[6]The Thirteenth Amendment, ratified in 1856, abolished slavery. The Fourteenth Amendment, ratified in 1868, ensured that citizens were treated equally by their state governments and ensures that their life, liberty, and property could not be deprived by their state governments without due process (this protection of due process is protected against the federal government by the Fifth Amendment). The Fifteenth Amendment, ratified in 1870, guaranteed that no person could be denied the right to vote on the basis of their race. The Nineteenth Amendment, ratified in 1920, guaranteed the right to vote to women.

[7]Balluck, Kyle. (2013, July 4). Obama: Live up the words of the Declaration of Independence. Retrieved from https://thehill.com/blogs/blog-briefing-room/news/309269-obama-live-up-to-the-words-of-the-declaration-of-independence

[8]Paulsen, Michael S., Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray. 2010. The Constitution of the United States. pgs. 23-24. Second Edition. Foundation Press.

[9]Ibid. pgs. 25-27.

[10]Marshall, Thurgood. (1987, May 6). Reflections on the Bicentennial of the United States Constitution.

[11]Hamilton, Alexander. (1778). Federalist #78: The Judiciary Department.

[12]Lavoie, Denise and Michael Tarm. (2017, February 4). Trump's Supreme Court pick wary of 'politicians with robes." Associated Press. Retrieved from https://www.apnews.com/a4f6dbcd739f48a69a4ea334c58548e0

[13]To be a member of the House of Representatives, one must be twenty-five years old, a resident of the state they serve, and a citizen of the U.S. for at least seven years.

[14]The Constitution guarantees that each state, regardless of population, has one House seat. Therefore, some states with populations less than 700k (e.g. Vermont and Wyoming), still have representation in the House.

[15]To be a member of the Senate, one must be thirty years old, a resident of the state they serve, and a citizen of the U.S. for at least nine years.

[16]Madison, James. (1778). Federalist #62: The Senate.

[17]Since taxes are inherently unpopular, the founder ensures the members of the House would be subject to immediate reelection after their vote to raise taxes.

[18]Interestingly, the first vice president to assume the presidency due to a death of the president was John Tyler (whom the City of Tyler is named after). He became president when William Henry Harrison died in April 1841, only a month into his administration.

[19]Historically, there were 5 instances where the candidate that received the most nationwide votes did not become president because they lost in the Electoral College: Andrew Jackson (1824), lost to John Quincy Adams; Samuel Tilden (1876), lost to Rutherford B. Hayes; Grover Cleveland (1888), lost to Benjamin Harrison; Al Gore (2000), lost to George W. Bush; Hillary Clinton (2016), lost to Donald Trump.

[20]Nebraska and Maine award their votes by the popular vote winner in each Congressional district.

[21]Marbury v. Madison. 5 U.S. 137 (1803).

[22]Scalia, Antonin. (1988-1989). Originalism: The Lesser Evil. University of Cincinnati Law Review, 57, 849.

[23]National Federation of Independent Business v. Sebelius. 567 U.S. 519 (2012).

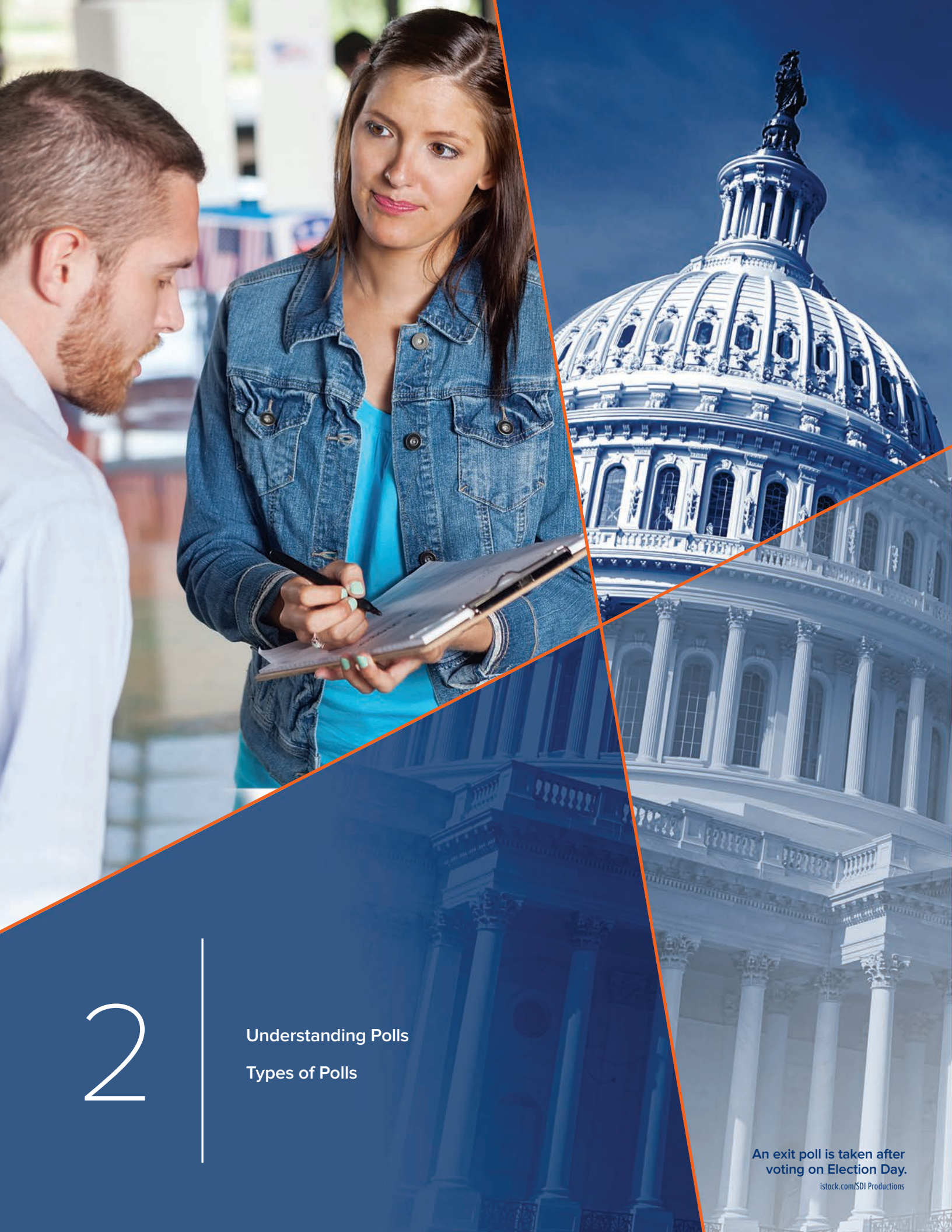
[24]Epstein, Lee and Thomas G. Walker. 2017. Constitutional Law for a Changing America: Institutional Powers and Constraints. pg. 349. 9th Edition. CQ Press.

[25]Murphy v. National Collegiate Athletic Association. 584 U.S. _ (2018)

[26]Epstein, Lee and Thomas G. Walker. 2017. Constitutional Law for a Changing America: Institutional Powers and Constraints. pg. 349. 9th Edition. CQ Press.

[27]United States v. Darby. 312 U.S. (1941).

[28]Hamilton, Alexander. (1778). Federalist # 84: Certain General and Miscellaneous Objections to the Constitution Considered and Answered.



# 2

## Understanding Polls

## Types of Polls

An exit poll is taken after voting on Election Day.

istock.com/SDI Productions

CHAPTER TWO

# Public Opinion

**THE ABILITY TO GAUGE** the collective attitudes and beliefs of the public—or, **public opinion**—is also an essential campaign endeavor. Successful candidates are able to navigate how the public feels about issues in order to mobilize their supporters and demoralize their opposition. One of the most effective tools for assessing public opinion is public opinion polls. These measures are scientific efforts to estimate what a group thinks about an issue by asking a smaller sample of the group for its opinion. Polling firms like Gallup, Pew Research, Public Policy Polling, Marist, Quinnipiac, and Monmouth University Polling Institute survey public opinion at the national and state levels. These are firms that ask a random sample of Americans around the country who they support in the upcoming presidential election. They may also ask a similarly compiled sample of Americans how they feel about issues dominating the national conversation, like healthcare or gun rights. Increasingly, these entities have become integral to media coverage of campaigns and elections, providing fodder for analysts and journalists to discuss the horse race and determine who's up and who's down.

***Public opinion:*** *the ability to gauge the collective attitudes and beliefs of the public.*

***Sample:*** *a smaller portion of the whole population needed to survey on an issue.*

Polls rely on **samples** to find results. Because it is neither practical nor affordable to survey every registered voter in the United States (or every citizen of a state) to determine how they feel at a given time, firms instead ask a smaller

portion of the population. Good, scientific samples ought to be *random and representative*. Random sampling ensures that any member of the population has a chance to be surveyed. Representative sampling ensures that your sample reflects the whole population. Ultimately, a good poll needs to be *generalized* to the whole population. Think about it, if you wanted to survey citizens from the state of Texas, and ask them whether or not they approved of the job performance of President Donald Trump, would you only ask residents of Austin and El Paso? Would you only ask East Texans? Would you fix it so that the only possible subjects of your survey are registered Democrats? If you want credible results, the answer would be, "no." In fact, when you eliminate randomness and representativeness, your results are likely to have **sampling bias**.

***Sampling bias:*** *when you eliminate randomness and representativeness from a sample.*

A classic example of bias in sampling occurred during the 1936 presidential election. The *Literary Digest* magazine was one of the most widely read publications in the country and it decided to ask Americans whom they preferred to win the presidential election. This was not their first foray into survey research. In fact, their previous surveys had correctly predicted the winners of previous elections. In 1936, their results showed Republican Alf Landon winning 57% of the vote to President Roosevelt's 43%. That November, the president won reelection with 62% of the vote compared to Landon's 38%. What went wrong? In short, sampling bias. The *Digest* thought its large sample—an unheard-of 2.4 million people—would provide robust results. Instead, its flawed survey methods, simply compounded their mistakes. Using telephone directories, lists of magazine subscribers, rosters of clubs and associations, the publication amassed a mailing list (and sample) rife with both selection and **nonresponse bias**. First, their methods for collecting a sample skewed toward middle- and upper-middle class people. These were the folks who could afford telephones in the middle of the Great Depression. They were also still a part of associations, club members, and magazine subscribers. As such, the Digest never captured the millions of Americans who were unemployed and thus rendered its sample wholly unrepresentative of the voting population. Second, while 10 million people received an invitation to participate in the survey, only 2.4 million responded. And because the people who take surveys are different than the people who will not, that large nonresponse meant that the survey results were not capturing all types of people. This sort of bias is especially prevalent when a sample wholly consists of individuals who volunteered to participate.

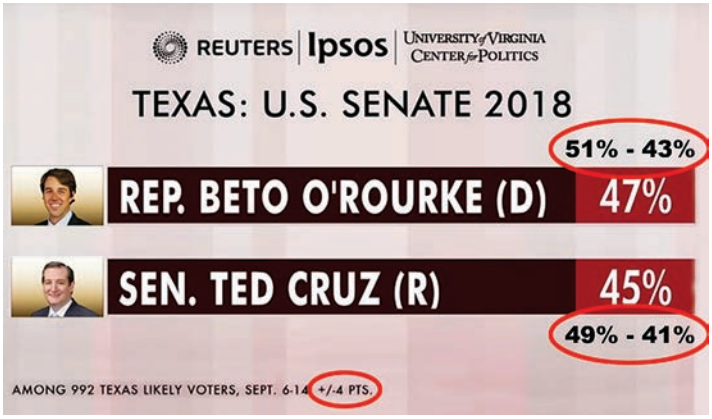
***Nonresponse bias:*** *when there is a significant difference between people who take a survey and people who did not.*

Another type of sampling bias became a prominent issue in the 2016 presidential race. Many survey respondents simply answered questions in a manner that they believed would be viewed favorably by others, but then behaved differently in the voting booth. This is called **social desirability bias**. In the case of 2016, many Donald Trump voters indicated on surveys that they would support Hillary Clinton. This was done because Trump's brand and reputation had been severely tarnished by late-breaking scandal and low-approval ratings. By November 2016, just before the election, Clinton was widely predicted to win the race and become the first woman president. This may have prompted many respondents to indicate their support for the "winning" Clinton, but then vote for Trump on election day.

***Social desirability bias:*** *when respondents answer questions in a manner that will be viewed favorably by others but behave differently when they vote.*

Because measuring public opinion is an imperfect science, survey results can never be considered 100% accurate. Statistically, polls have a built-in **margin of error**—typically +/- 3 to 5 percentage points—which means that firms are about 95% confident that the real figure for the whole population is within three to five points of their results. For instance, take the results from a Reuters/Ipsos/University of Virginia Center for Politics survey on the 2018 U.S. senate race between Congressman Beto O'Rourke and incumbent Senator Ted Cruz. The topline results suggested that O'Rourke was ahead of Cruz by two points (47% to 45%). But when you look at the margin of error at the bottom of **Figure 2.1**, you will see that these results are not only within the margin of error (+/- 4 percentage points) but could look entirely different. In actuality, O'Rourke *could have* been earning between 51% and 43% of the vote, while Cruz could have been out ahead (with 49%) or doing worse (earning 41%). This margin of error—also called *sampling error*—is important to consider when analyzing poll results. The larger the sampling error, the more likely the results look differently than the views of the general population. Conversely, a smaller sampling error should yield more confidence in the results. Typically, this error is determined by the size of the survey sample. When the sampling error is too big, increasing the sample to more closely match the attitudes of the general population is most appropriate. Remember, the objective of the poll is to accurately capture public opinion without surveying the entire public.

***Margin of error:*** *the 95% confidence that the real figure for the whole population is within 3-5 percentage points of poll results.*




Source: https://www.ipsos.com/sites/default/files/ct/news/documents/2018-09/2018_state_topline_-_texas_final.pdf

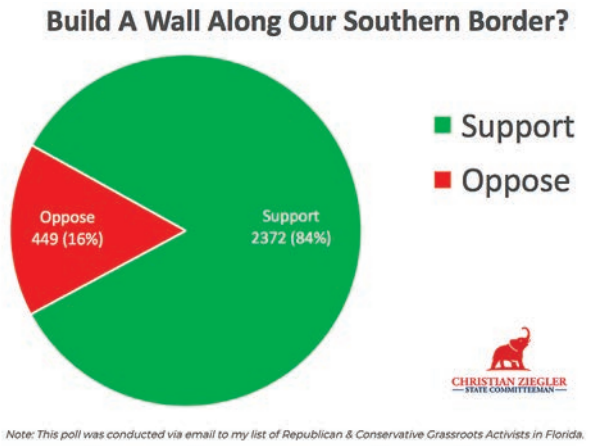
**FIGURE 2.1 Poll from the 2018 Texas U.S. senate race. The circled areas illustrate margin of error (also called sampling error).**

# Understanding Polls

As a potential consumer of public opinion poll information, it is important that you analyze these results with a savvy eye. As such, you ought to ask the following questions as you read or hear about polls.

## Who Sponsored the Poll?

Some polls are sponsored with an agenda in mind. Sometimes partisans will conduct a poll that manipulates the person being questioned. Other times partisans will interpret the polls based on their own agenda. For instance, study **Figure 2.2**, what does the sponsor of this poll tell us about the results we see? Here, the question is whether or not the United States should build a wall along the southern border, and 84% of respondents support the idea. Nevertheless, as noted in the figure, the poll was conducted via email to a list of Republican and conservative activists in Florida. This means the poll is neither random (only folks on the listserv received the question) nor representative (only conservative activists were asked to participate). There is not much one can




Source: https://www.christiangop.com/issue/immigration/poll-results-build-wall-along-southern-border/2017/07/12/

**FIGURE 2.2 Know who sponsored the poll.**

take away from these results, except *maybe* that conservative grassroots activists in Florida support a border wall.

## Is the Sample Representative?

If survey results are to reflect the attitudes of the general population, it must include a representative array of respondents. That means that results like these illustrated in **Figure 2.3** do not meet the standard. A Twitter poll (with 308 votes) asking about respondents' favorite social network *on* Twitter cannot be construed as representative of all social network users. It is also not random (because voters are asked to volunteer to be a part of the sample). Therefore, we cannot speak with any confidence that these results match a general population.

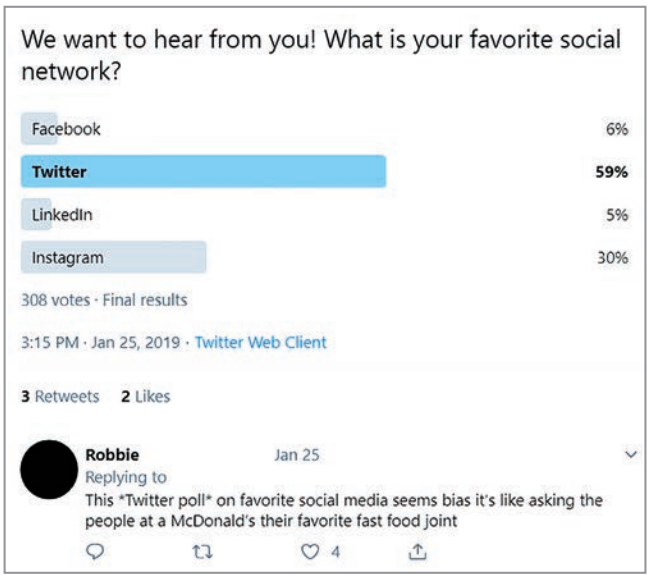



**FIGURE 2.3** Results from a Twitter poll.

## From what Population was the Sample Taken?

It is important to examine the sample population. This will give you a rough estimation of the survey's representativeness. For instance, is it a national or statewide poll? Is it a sample comprised of all registered voters or likely voters? Does it include those under the age of 18 years old? Was it conducted by telephone, online, or both?

## How are the Questions Worded? Is the Question Leading?

The wording of questions can prejudice responses, especially when the question is leading. **Figure 2.4** shows two examples that ask respondents to agree or disagree with a statement. In Example A, the statement is innocuous, using neutral words that do not compel respondents to draw conclusions before they have a chance to decide for themselves. Example B is decidedly more leading. It suggests that imported vehicles "take away American jobs," leading many respondents – who theoretically do not support the elimination of jobs in America – to disagree with the statement. This can skew survey results and deliver inaccurate findings.

## Are Loaded Terms Used?

Similarly, loaded terms can sway respondents by drawing upon implicit prejudices and stereotypes. **Figure 2.5** shows poll results from similar questions – with different wording – and suggests that when loaded words like "illegals," "prosecuted" and "deported" are used, an overwhelmingly majority favor deportation. When the question is posed differently – without the use of loaded terms – the results are the complete opposite.

FIGURE 2.4

## Leading Questions

**Example A:**

Agree or Disagree

***"Americans should be able to buy imported automobiles."***

**Example B:**

Agree or Disagree

***"Should Americans be able to buy imported vehicles that take away American jobs?"***

LEADING

FIGURE 2.5

## Loaded Terms

*"Should **illegals** be **prosecuted** and **deported** for being in the United States **illegally**, or shouldn't they?"*

Of those surveyed, **69% favored deportation.**

*"Should **undocumenteed workers** who have been in the United States for two years be given the **chance** to **keep their jobs** and eventually apply for **legal** status?"*

Of those surveyed, **62% responded "yes."**

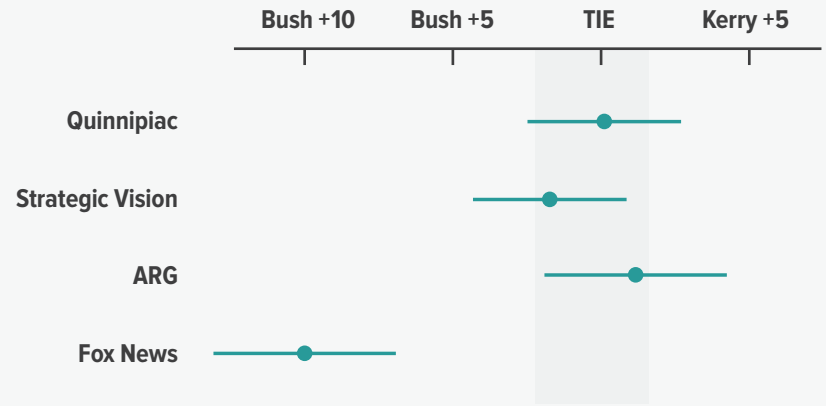
FIGURE 2.6

## Double-Barreled Question

"President Trump has called the Special Counsel's investigation a 'witch hunt' and said he's been subjected to more investigations than previous presidents because of politics. **Do you agree?**"

FIGURE 2.7

## Florida State Polls in June 2004




## Is the Question Double-barreled?

When a question touches upon more than one issue but only allows for one response, it is double-barreled. In **Figure 2.6**, the question includes several points of potential agreement, but only asks the respondent to agree or disagree once. For instance, one might agree with the president that the Special Counsel's investigation is a 'witch hunt' but *disagree* that Trump's been subjected to more investigations than previous presidents. Or the reverse. When questions are double-barreled, it is hard to draw conclusions from the results, because we do not know which part of the question a respondent is responding to.

## Does the Poll Differ from the Results of Other Polls?

***Outlier:*** *when polling firms find surprising results, especially compared with other findings on a similar race.*

Be wary of **outlier polls**. Because polling is an imperfect science, there are times when—based on disparate sampling methods—polling firms find surprising results, especially compared with other findings on a similar race. Take **Figure 2.7**, which shows four survey results from polls taken in June 2004. Three results show a statistical tie between Democratic presidential candidate John Kerry and President George W. Bush. Quinnipiac, Strategic Vision, and ARG all show the race within the margin of error. But the Fox News poll showed Bush up by 10 percentage points. These results clearly differ from the norm. Outlier results such as these could have one of a couple meanings. They could be a harbinger of results to come. Perhaps the outlier simply caught a shift in public sentiment before the other firms. Outliers could also indicate a sampling bias. The firm may have oversampled Bush supporters in the illustrated outlier, which explains why he was out ahead by so much.

**FIGURE 2.8**

### Religious Affiliation in the U.S., 2008–2015

| | Christian Religion % | Non-Christian Religion % | None % |
|---|---|---|---|
| **2008** | 80.1 | 5.3 | 14.6 |
| **2009** | 80.0 | 4.8 | 15.3 |
| **2010** | 79.1 | 4.4 | 16.4 |
| **2011** | 77.9 | 4.7 | 17.5 |
| **2012** | 77.3 | 4.9 | 17.8 |
| **2013** | 76.8 | 5.3 | 17.8 |
| **2014** | 75.7 | 5.2 | 19.0 |
| **2015** | 75.2 | 5.1 | 19.6 |

## What do the Results Mean?

When survey results are ascribed a meaning, you ought to consider who is interpreting them and why? This is important because polling results can have multiple meanings and will often be subject to political spin by interested parties. For instance, between the years 2008–2015, a polling firm asked respondents to identify their religious affiliation (or lack thereof). As illustrated, depending on who is interpreting the numbers, **Figure 2.8** can be spun into different directions. It shows a decline in Christian affiliation from 2008-2015 and an increase in no-religious affiliation over the same period. A pro-atheism group might interpret this as a trend toward atheism in America. While a pro-Christianity group might interpret this as yet another indicator that America is an overwhelmingly Christian nation. According to this data, neither group would be necessarily wrong. As such, knowing who is interpreting surveys results and why will help you understand why certain conclusions are drawn.

# Types of Polls

There are five types of polls: national (or statewide) polls, benchmark polls, tracking polls, exit polls, and push polls. Each may be used before, during, and after campaigns and elections to assess public opinion.

**National (or statewide) polls** attempt to achieve scientific, valid measures of the knowledge, beliefs, or attitudes of the national (or

statewide) adult population. They are typically used by campaigns to gauge how well a candidate is performing and where there is room for improvement. The media will often cover these polls as a part of horse-race journalism, assigning meaning to the survey results to determine which candidate is the frontrunner to win an election and which are the underdogs.

**Benchmark polls** collect baseline information on a candidate's preparation to run for office. They determine what issues a campaign should highlight, the candidate's strengths and weaknesses, as well as help to design campaign strategy.

**Tracking polls** are ongoing polls that follow changes in public opinion. Samples are often too small to be considered reliable, but once complied over time, they provide a view of shifts in voter preferences. Dramatic changes in tracking polls may indicate that an advertising campaign, for example, is helping or hurting a candidate.

**Exit polls** are election-related questions asked of voters immediately after they vote. They focus on vote choice, demographic questions, issue questions, and evaluation of candidates. Exit polls are not without controversy. Throughout election day, television media coverage often reports on election results from the East Coast, and critics argue that this can have an effect on West Coast voters who may be discouraged from participating if they see their preferred candidate is losing. Furthermore, these polls are also subject to sampling bias, as individuals who agree to answer journalists outside of polling places typically differ from the average voter.

**Push polls** are divisive, provocative and leading questions that ask respondents for reactions to hypothetical, often false, information in order to manipulate public opinion. During the 2000 Republican presidential primary election in South Carolina, Arizona Senator John McCain was the subject of a push poll that asked voters, "Would you be more likely or less likely to vote for John McCain for president if you knew he had fathered an illegitimate black child?" In fact, McCain and his wife Cindy had adopted a dark-skinned Bangladeshi orphan, Bridget, but the poll was designed to elicit any underlying prejudice within the respondent and spread the untruth.

Push polls are illustrative of the dark side of campaign politics, when political strategists and candidates appeal to our worst instincts, prejudices, suspicions, and fears.

## Key Terms

**Margin of error:** the 95% confidence that the real figure for the whole population is within 3-5 percentage points of poll results.

**Nonresponse bias:** when there is a significant difference between people who take a survey and people who did not.

**Public opinion:** the ability to gauge the collective attitudes and beliefs of the public.

**Sample:** a smaller portion of the whole population needed to survey on an issue.

**Sampling bias:** when you eliminate randomness and representativeness from a sample.

**Social desirability bias:** when respondents answer questions in a manner that will be viewed favorably by others but behave differently when they vote.

**Outlier:** when polling firms find surprising results, especially compared with other findings on a similar race.

3

Three Features of the Constitution

Separation of Powers

Internal Organizations: Committees and Parties

Stages of Lawmaking

How Does Being in Office Enhance the Chance for Reelection

A statue of George Washington stands underneath the United States Capitol dome in Washington, D.C.

istock.com/Kirkikis

CHAPTER THREE

# Congress

**ARTICLE 1 OF THE U.S. CONSTITUTION** outlines the duties of the U.S. Congress and establishes two separate chambers within the legislative body: the U.S. House of Representatives and the U.S. Senate. Both chambers are given similar and different legislative authority as enumerated in Section 8 of Article 1. These differences set the foundation for the separation of powers described in Federalist 51, which publicly outlined how the U.S. Constitution would limit federal power. To understand Congress, people must know that federal power is limited not by restricting the reach of its law, but by the multiple hurdles a law must overcome.

A piece of legislation's hurdles are also complex because the rules of the U.S. House of Representatives and the U.S. Senate are different. The differences between each chamber's internal rules have emerged over time and exist because Section 5 of Article 1 allows a chamber to set its own rules, regardless of the rules in the other chamber. Section 5 does prohibit either chamber from adjourning for more than three days without consent from the other. This emphasizes that both chambers must be in session for the U.S. Congress to conduct business. Section 5 also requires both chambers to have a minimum number of members, or a **quorum**, to make a decision. Today, there must be fifty-one senators present and voting in the U.S. Senate for a bill to pass (a majority of the chamber). Similarly, 218 representatives must be in the U.S. House for a vote.

***Quorum:*** *the constitutional requirement that a majority of legislators must be present for Congress to be in session.*

# Bicameralism

The legislative branch is comprised of two chambers that are independently elected by the people. This form of government is bicameralism, and it is used around the world to ensure debate and checks and balances when laws are written. Forty-nine states have bicameral legislatures in the state governments, with the exception of Nebraska's unicameral legislature. Some common benefits of bicameralism are separate powers, ambition among members, and stable laws over time. The House of Representatives and the Senate sometimes have distinct roles in the legislative process. This section will describe the unique powers of each chamber of the U.S. Congress to understand the separation of powers within the institution. Then, we will focus on how these two chambers make policy together.

# Separation of Powers

## Powers of the Senate

For example, when the Senate considers the appointment of a presidential nominee, it meets in an **executive session**. Confirming the president's nominees to positions in the executive and judicial branches is the second stage after receiving an appointment within the federal government. The Senate also meets in an executive session to consider treaties that the president sends to the Senate for ratification. The Senate's privilege to act on behalf of Congress in foreign policy and by approving presidential appointments gives the states, via the Senate, a chance to veto objectionable actions by the popularly elected president.

***Executive session:*** *a calendar of business in the Senate used to manage nominations and treaties where the Senate fulfills its responsibility of providing advice and consent to the president.*

***Enrolled:*** *legislation is enrolled when the House and the Senate agree to it, but it has not yet been signed into law.*

***Conference committee:*** *a meeting of selected representatives and senators to reconcile differences between the language of a bill passed by the House and the language of a bill passed by the Senate.*

***Ping-pong:*** *the iterative process to reconcile the differences between the House and Senate versions of a bill by sending amendments back and forth so that all members can vote on items instead of on one conference report from the conference committee.*

## Powers of the House

The House of Representatives has powers not given to the Senate for times when the legislative action should be initiated by officials closest to the people. Congress is the only branch that can initiate taxes, and the Constitution specifies that tax laws must originate in the House. Therefore, increases and decreases in federal taxes are proposed by the peoples' chamber.

## Resolving Differences

When a bill moves from Congress to the president to be signed into law, the bill is **enrolled** when the House and Senate pass the same language. If the House passes a bill amended by the Senate, one way to resolve the differences between the two bills is for both chambers to appoint members who meet in a conference committee. In this meeting, an equal number of representatives and senators negotiate which provisions to accept in the final draft. An alternative to a **conference committee** is for a chamber to reconsider the bill and amend it with the provisions they are willing to include. Shuttling the bill back and forth between the House and Senate is commonly referred to as resolving differences through **ping-pong**.

## Differences in Membership

Legislators in the House and Senate take oaths to protect the Constitution, and both chambers write the nation's laws, but some institutional differences explain why senators and representatives are likely to disagree. The clearest difference is that representatives serve two-year terms and represent roughly the same number of people. The terms of service for senators are quite different. Senators serve six-year terms and represent the entire state, and each seat is assigned to one of three classes to minimize the likelihood that two senators from one state will be up for election at the same time. Thus, the House of Representatives provides the closest example of one person equaling one vote, but voters from small states receive more representation with each senator's vote.

The expected influence of elections implies that the public can use elections to hold legislators accountable. Many congressional scholars argue that legislators are more responsive when they are up for election (Mayhew, 1973). All representatives are up for election every two years, so the electoral cycles are the same for all members. However, only one-third of the Senate is up for election every two years, which limits the chamber's responsiveness to policies the public cares about.

Because senators also have larger constituencies, senators are more likely to be bipartisan to balance the interests of each region of their state. With larger constituencies, senators are less politically safe and often receive more requests from concerned citizens. This gives a senator the opportunity to identify the community served by each vote they take. Senator Everette Dirksen (R-IL) frames one reason senators are more likely to be bipartisan, "I engage in deep deliberation and quiet contemplation. I wait to the last available minute and then I always vote with the losers. Because, my friend, the winners never remember and losers never forget."[1]

Senators are older (averaging 62.9 years old) than representatives (averaging 57.6 years old) for three primary reasons. First, the age to qualify to be a senator is thirty years old, and it is twenty-five years old for a representative. In the 115th Congress (2019–2021), the youngest representative was Alexandria Ocasio-Cortex (D-NY) at twenty-nine years old, and the youngest senator, Senator Josh Hawley (R-MO), was ten years older. Second, senators often serve more years in Congress because they have longer terms of service. The average tenure for a representative is 8.6 years, and senators serve an average of 10.1 years. However, the clearest explanation is that most senators (50%) served in the House before serving in the Senate.[2] Career politicians are expected to serve in the House before serving the entire state in the Senate, so electoral politics offer a third reason senators are older.

### Why Laws Don't Change Frequently

As statements by political parties criticizing laws and calling for change become frequent, a paradox in U.S. politics emerges. Why are the Democratic and Republican parties relatively ineffective at changing laws? The nation's laws change infrequently not from a lack of desire, but because institutions

matter and, specifically, because the rules that govern institutions make changing laws difficult. A bicameral institution like the U.S. Congress that has **single-member districts** increases the difficulty of one party controlling a majority of the seats in both chambers. With partisan control divided between the House and Senate, repealing the other party's major policy victory becomes difficult. During the 112th Congress and 113th Congress (2011–2015) the House of Representatives voted on fifty-four provisions to repeal or amend the Affordable Care Act, but the provisions did not pass the Senate.[3] These four years were defined by a Democratic-led Senate protecting a recent law that the Republican-led House hoped to change.

***Single-member districts:*** *each district in the U.S. House is represented by only one U.S. representative. After Wesberry v. Sanders (1964), state legislatures were no longer allowed to create multimember districts where one larger geographic area was simultaneously represented by multiple U.S. representatives.*

# Internal Organizations: Committees and Parties

To handle the large legislative workload that Congress creates, both chambers have internal organizations to coordinate legislative decisions. Understanding committees and party offices is essential to understanding legislative power's context and the division of labor that separates legislators into panels of experts on a given policy.

## Committees

***Standing committee:*** *permanent committees in Congress that have consistent policy jurisdictions over time.*

In 1816, the House of Representatives established **standing committees** to divide the labor and provide advice on frequent policy problems. Representatives were assigned to a limited number of committees based on the legislator's prior occupation and on the most important industries in the legislator's district. Soon after, the Senate also established committees. However, senators must serve on more committees (four on average) than representatives (two on average) because the chambers have similar numbers of committees, but there are fewer senators. In the House, representatives serve on fewer committees when one committee meets more frequently. The prestigious House Appropriations Committee assignment is often a Representative's only committee assignment because the committee reviews all spending requests.[4]

Today, these committee assignments recognize a legislator's expertise, as when a freshman representative is assigned to the Financial Services Committee after an accounting career, which was the case for Representative Lynn Jenkins (KS-2) from 2009 to 2019. We also recognize that legislators seek committees that provide leadership and oversight on programs important to their constituencies, which helps explain why then-Representative Bill Nelson (FL-9) from Cape Canaveral was proud to be chairman of the Space, Science, and Applications subcommittee (1985–1991) of the House Committee on Science and Technology.[5] For three terms (2001–2019), Senator Bill Nelson (D-FL) served on the Senate Commerce Committee so he could serve as a member of the Space subcommittee again.

Sorting legislators with the strongest policy interests into similar committees does not create nationally representative committees. Rather, divisions

based on expertise and interests limits legislative power to legislators' preferred policy topics and produces detailed legislation. Additionally, the bias in policies from **homogenous** committee assignments likely favors the goals of related government agencies and industries similarly for all committees. Moreover, meetings in the Capitol are more likely to involve bipartisanship in committee meetings and among colleagues who serve on the same committees because public transportation or safer food are not partisan issues.

***Homogenous:*** *a population with mostly similar characteristics. A party is considered homogenous if most members have the same ideology and policy preferences. A district is considered homogenous if most residents vote the same way or have the same demographic characteristics.*

Legislation is referred to committees based on how closely the bill's language matches the committee's policy jurisdictions. Common sense suggests that laws like the Farm Bill would be quickly referred to the Agriculture Committee—and every five years the Farm Bill is sent to that committee. However, more comprehensive laws are likely subject to multiple referrals, making two or more committees responsible for revising sections of the bill that closely match its jurisdiction.

In the 111th Congress, the House of Representatives passed the Wall Street Reform and Consumer Protection Act (H.R. 4173) in response to the 2008 stock market crash. The law popularly known as Dodd-Frank became the most comprehensive financial system reform since the Glass-Steagall Banking Act, which was passed in 1933 to separate investment and commercial banks. The bill contained sixty-one legal topics to consider, ranging from consumer protection to government revenue. When the bill was introduced in the House, sections were referred to the House committees on Agriculture, on Energy and Commerce (the Subcommittee on Consumer Protection and Commerce), on Financial Services, on Oversight and Government Reform, on Budget, on the Judiciary, and on Ways and Means. Therefore, the bill had to clear all seven committees before being sent to the House Rules Committee to be scheduled for a vote.

Each committee also has legislators assigned to subcommittees with titles that better outline the committee's jurisdiction. In the Dodd–Frank consumer protection bill, the policy's scope matched the Consumer Protection subcommittee's authority within the Energy and Commerce Committee. The activities of committees and subcommittees are often the same to ensure that the first round (a subcommittee) handles the fine details and the second round (a committee) includes experts who present a trusted recommendation to the chamber. The cycle of actions at both levels traditionally follows this order:

1. Informational hearings are held to gather information from non-committee members, and experts are invited to explain how regulations will aid or hinder an industry's technical work. Other times, hearings raise a topic's national profile by inviting celebrities to call for action before the committee.
2. A **mark-up hearing** allows members of the committee (or subcommittee) to offer necessary amendments to improve a bill or resolution before it is presented to other members. Committee members vote on amendments proposed in the mark-up to determine what parts of the original draft need to be changed.

***Mark-up hearing:*** *a hearing where members of the committee submit amendments to improve legislation. This hearing is often when the committee votes to report the bill to the floor.*

3. Once the committee has gathered information, discussed the bill's importance, and maybe amended portions of the bill, the committee members vote to report the bill or resolution to the floor. Frequently, committee staff then draft a committee report for other legislators to summarize the bill and describe why the committee supports the bill and the suggested amendments.

Members of each Congress sponsor thousands of bills, most of which are referred to a committee in the House or Senate, but committees do not have enough time to consider every bill. Thus, most legislation dies in committee. To handle the legislative workload, committee chairs prioritize legislation that must pass (reauthorizations and appropriations). Committees help Congress manage its workload by controlling the supply of legislation, which is frequently described as **gatekeeping**.

***Gatekeeping:*** *the power of a committee to stop consideration of a bill by not giving the bill a hearing or not reporting the bill to the floor; if most legislation dies in committee, the gatekeeping power is strong.*

House committees often invest their time strategically and tend not to report bills likely to be rejected by the floor—the same goes for the Senate. However, sometimes the chamber wants to vote on a bill that the committee does not. This leads House Representatives to initiate a discharge petition to motion for a bill to be removed from committee and brought to the floor. To override the committee's position, the petition must have at least 218 signatures to show support from a majority of the chamber. While the threat to discharge a bill is frequently used, collecting 218 signatures is difficult. For example, in Petition No. 5 3.1 in 2008, 190 representatives tried to discharge an immigration reform bill from eight committees in (H.R. 4088).

3.1

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**190 representatives try to discharge an immigration reform bill from eight committees in Petition No. 5.**

One unique congressional committee does not produce legislation and only exists in the House (with no similar panel in the Senate)—the House Rules Committee. The Rules Committee is the only committee stacked with more seats from the majority party. The Rules Committee works closely with the speaker of the House, and the Rules chair is sometimes considered the third most powerful member in the House. Whoever controls the rules controls the debate and, therefore, what can become law. Every bill reported by a standing committee is referred to the Rules Committee so a resolution can be passed to establish the rules of debate for the bill. The Rules Committee often issues an open-rule or **modified open rule** to allow representatives to speak in favor or in opposition of a bill and offer amendments. However, bills likely to face partisan conflict are often given a **closed rule**, which restricts representatives from offering an amendment to the bill on the floor.

***Modified open rule:*** *a special rule from the House Rules Committee that allows specific amendments to be considered.*

***Closed rule:*** *a special rule from the House Rules Committee that restricts representatives from offering any amendments to the bill being considered.*

## Party Leadership in the House

Congressional committees were the source of congressional power from 1910 through the 1980s, and party leaders selected committee chairs and scheduling votes. Through a series of high-turnover elections in 1974, 1994, 2006, 2010, and 2018, however, new representatives supported reforms to limit the autonomy of individual committee chairs and new rules to make committees a tool of the majority party (See **Figure 3.1**).

**FIGURE 3.1**

## Comparison of Past Wave Elections in the House

| Election | Freshmen Members | Nickname | Reform |
|---|---|---|---|
| 1974 | 91 Representatives (75-D, 16-R) | Watergate Babies | • Limited the seniority system<br>• Expanded subcommittees |
| 1994 | 86 Representatives (13-D, 73-R) | Republican Revolution | • Reduced the size of committees<br>• Created term limits on committee chairs<br>• Gave the speaker more power |
| 2006 | 54 Representatives (42-D, 13-R) | Blue Wave | • Added transparency in legislative management, including a 24-hour limit for voting on new legislation once it is reported from committee |
| 2010 | 94 Representatives (9-D, 85-R) | Tea Partiers | • Republicans again instituted term limits on committee chairs<br>• Stricter budget rules |
| 2018 | 90 Representatives (60-D, 30-R) | Year of the Woman | • Created leadership positions for junior members in the Democratic Caucus<br>• House Democrats adopted term limits on committee chairs |

By reducing the autonomy of committees in the House and Senate, power within Congress centralized around party leaders. The internal structure of party organizations in Congress were decentralized before the 1990s to share power within the party's factions. However, when the parties became increasingly polarized in the 1990s, 2000s, and 2010s, party leaders began prioritizing loyalty over seniority when selecting committee chairs.

The speaker of the House leads the House of Representatives, as set by the Constitution and elected by representatives at the start of each Congress. Each bill signed into law reflects the joint powers of the House and Senate because bills are signed into law by the president, the speaker of the House, and the president pro-tempore of the Senate. As the presiding officer, the speaker is essential to the House of Representatives via their power to acknowledge who speaks, to schedule legislation, and to help appoint members to committees.

The speaker's power within the institution and each leader's leverage to influence policy has evolved over time. Speaker Thomas Reed (R-ME) enhanced the speaker's power in the U.S. House by implementing rules that centralized procedural power within the speaker's position to limit debates and amendments and to count members as present. These rules helped overcome delays from disappearing quorums. Over the next twenty years, speakers of the House used their power to make rulings that made themselves

the center of the institution. By 1910, Speaker Joe Cannon (R-IL) unilaterally stripped committee chairs of their positions for voting differently than the party line. Through their frustration, rank-and-file representatives led a vote to remove Joe Cannon as speaker of the House. This "Cannon Revolt" also returned power in the House to chairs, and the speaker became a weak negotiator to coordinate policy that committees sent to the floor.

From 1910 to 1973, members of the House Ways and Means Committee selected committee chairs in the House. In 1973, the House changed its rules to assign the speaker of the House as the chair of the Committee on Committees. One year later, members of the Ways and Means Committee were stripped of their role as members of the Committee on Committees and replaced by members elected by the Democratic Party Caucus. During this period, House Republicans did not have an established rule for selecting committee chairs because House Democrats held a majority of the seats from 1955 to 1995.

From 1910 to 1995, speakers had to rely on their relationships and favors to balance regional interests within the party. One way the party balanced its factions was through the Austin–Boston Connection in the Democratic Party, which alternated the House Democratic Caucus's leadership between a northern Democrat from Massachusetts and a southern Democrat from Texas. This balanced the power because Democrats from Texas supported the same economic policies as southern Democrats, but they tended to vote with northern Democrats on civil rights issues. Therefore, Speaker Sam Rayburn (D-TX) from Bonham, Texas, became influential from years of serving as speaker and leading legislative debates in the 1940s and 1950s. While Speaker Rayburn (D-TX) ran the chamber, Representative John McCormack (D-MA), as **majority leader**, crafted the policies the Democratic Party would pursue. John McCormack became speaker when Speaker Rayburn retired, and the House Democrats elected Representative Carl Albert (D-OK) as the majority leader. This rotation of power between Massachusetts and Texas continued until Speaker Jim Wright (D-TX) left office in 1989 after succeeding Speaker Tip O'Neill (D-MA).

***Majority leader:*** *a party leader that coordinates the policy agenda of the majority party. In the House, this position of party leadership is the second most powerful position. In the Senate, this position is the most powerful position. The minority leader holds the same responsibilities but is less powerful in both chambers because the party coalition does not hold a majority of the votes.*

Historically, keeping a party coalition of northern and southern Democrats impacted the laws of the nation, specifically the federal protections against discrimination. The key issues that could have exposed a rift within the Democratic Party in Congress from 1937 to 1977 were civil rights and laws to empower labor unions. During this time, conservative Democrats voted with Republicans to block the consideration of the Fair Labor Standards Act and often used political conflict to weaken policies that limited attempts to prioritize workers. Moreover, neither the Democratic speaker of the House nor the majority leader in the Senate would push obstructionist committee chairs to report civil rights legislation from the Judiciary Committee. At that time, even if a civil rights bill did come to the floor, it would take too long to debate and left little time for other legislation. Republicans also had little success. When Majority Leader Everette Dirksen (R-IL) opened debate for the Civil Rights Act of 1957, Senator Strom Thurmond (D-SC) led a twenty-four hour filibuster against the bill. The Democratic congressional leaders' decision to not debate civil

rights legislation for decades while campaigning to reduce inequality shows unfortunate trade-offs made to preserve political power.

In both chambers, a network of **party whips** supports the party leaders (majority leader and minority leader). Whips are chosen as representatives from coalitions within the party, including large regional groups (e.g., Texas Republicans), demographic groups (e.g., Congressional Black Caucus), and ideological groups (Progressive Caucus). The whips are responsible for counting votes and sharing the party's strategic information with members. The **whip count** is important for the speaker because it identifies whether a bill brought to the floor for a vote will pass. In addition to the party leader and party whips, the party leadership's offices include the conference chair, the policy chair, and the campaign chair (for both parties). The legislators are elected by colleagues in their party to serve in these positions and to coordinate in weekly meetings and annual retreats.

***Party whip:*** *this second-highest position in party leadership is responsible for counting votes within the caucus before a vote is called. The whip also communicates with colleagues to find out why they may vote differently from the party's advice.*

***Whip count:*** *an internal list created by the majority (or minority) whip to identify how each legislator in the caucus will vote on a piece of legislation. The count provides a tally of whether a bill is likely to pass and gives party leadership a sense of which legislators are not ready to vote yea or nay.*

## Party Leadership in the Senate

The partisan organizational structure in the Senate is different than in the House because the Senate is smaller and because the Senate designates the vice president as its presiding officer. Because the Senate is designed to have an even number of senators, so the vice president becomes the deciding vote for a tie in the chamber. However, because the vice president is elected nationally on the president's ticket, senators are wary of giving the executive branch powers to manage the Senate.

The continued separation between the Senate and the vice president meant there was no focal point for leadership, as power was split among committee chairs. The Senate majority leader position was established in 1913 to manage policy in the chamber. In 1937, the Senate majority leader gained a clever power called the **right of first recognition**, which benefits the majority leader when holding the floor of the Senate for debate via the power to initiate procedural motions and direct debate. The majority leader's actions to shape debate require votes, so a floor leader only has as much power as senators are willing to give.

Majority Leader Lyndon Johnson (D-TX) became known as a powerful negotiator by persuading ambivalent senators to vote for legislation and to defy the opposition's objections. Later, Majority Leader Robert Byrd (D-WV) was revered for knowing the Senate's **precedents** and procedural motions, which gave him the ability to fast-track or block legislation by raising points of order. Majority Leaders Bill Frist (R-TN), Harry Reid (D-NV), and Mitch McConnell (R-KY) have recently become institutionally powerful by blending the strategies of Leader Johnson and Leader Byrd with the right of first recognition. By **filling the amendment tree**, a majority leader can offer three consecutive amendments—once the leader is recognized as debate begins—to block all other senators from offering an amendment to a bill.

The House and the Senate have apparently different organizational structures: the speaker of the House versus the Senate majority leader and the Rules Committee versus precedents. Through multiple institutional changes

***Right of first recognition:*** *established in 1937, the Senate majority leader will always be recognized first to speak when two senators request to speak on the floor at the same time.*

***Precedent:*** *the existing interpretation of a procedural rule in the Senate based on a previous vote on a point of order. The full list of precedents in the Senate that determine which actions are in order and which are out of order is kept by the Senate parliamentarian.*

***Filling the amendment tree:*** *the practice of offering three amendments one after the other without considering them. This starts by offering an amendment, then offering an amendment to that amendment, and finally offering a perfecting amendment to the secondary amendment. Therefore, no other amendments can be in order until the Senate votes on one of the pending amendments. When a majority leader in the Senate does this, senators cannot use the Senate's open amendment rules to change policy.*

and a combination of precedents, however, the Senate has developed a central leader who can control what bills and amendments are considered in Congress.

## Stages of Lawmaking

Amidst the political conflict where senators' influence on policy checks the ambition of representatives, the lawmaking process involves three stages to ensure informed decisions. Therefore, to enact a new policy, a member of Congress should insist the policy be included in the budget, authorized to receive funds, and have the funds appropriated for the program. The tracking programs across the stages of budgeting, authorization, and appropriation receive various levels of scrutiny.

Congress passes the budget as one resolution that sets a benchmark for all the programs the federal government pursues in the next year. The budget proposes Congress's suggested funding levels for each governmental agency. Since 1975, Congress's budget has responded to the federal budget the president has sent to Congress annually since 1922. Notably, the funding levels Congress passes each April via a **budget resolution** provide general guidelines as legislation is considered later in the year.

***Budget resolution:*** *a resolution passed by the House and the Senate to set spending targets to guide budget decisions for authorizations and appropriations later in the year.*

***Authorize:*** *legislation that proposes to create or amend federal statutes.*

***PAYGO:*** *a budget rule in Congress that requires any new proposed legislation be paid for by cutting funding from another program, shifting funds within an agency, or raising revenue.*

***Appropriation:*** *legislation that approves federal spending for the next fiscal year. The thirteen appropriation bills must pass because if a bill is not passed before the first day of the fiscal year, sectors of the government will shut down.*

Federal laws are **authorized** through individual bills focused on the policy in question. Major bills are authorized as law for a period of time specified in the legislation. The federal protections for voting in the Voting Rights Act of 1965 would be law for seven years. To continue as a law, it would need to be passed again in 1970. Other bills that authorize federal agencies' powers are passed regularly—the Defense Authorization bill is passed each year, the Water Resources Development Act every two years, and the Farm Bill passed every five years. Therefore, Congress passed the Federal Criminal Justice Reform Act in 2018 to change the law and adjust the amount of funds available to support local programs and law enforcement agencies.

To authorize a new federal program as a new authorization not included in the budget, a lawmaker must identify how to secure funds for the program. Prior to the 1990s, Congress could create new programs and appropriate funds beyond their budget—called deficit spending. Then, the Budget Enforcement Act of 1990 established **PAYGO** rules that any new program's funding must derive from cost-savings in another program or from additional taxes. These budget procedures hold Congress accountable for keeping all bills deficit neutral, which means the government can provide more services after years following higher revenues from taxes, but fewer new programs can be created when taxes are low.

The final stage of lawmaking concerns the **appropriations** bills. Each year, thirteen appropriations bills must pass before the end of the fiscal year, or unfunded government sectors must shut down until appropriations are provided. Because there are more appropriations bills than budget resolutions, opposition on one issue will not hold up progress elsewhere. Additionally, there are fewer appropriations bills than authorization bills, so Congress can adjust funding for programs within the same policy area. This allows legislators to invest more in programs the public supports by appropriating less

money to less-effective programs. This flexibility provides an important rule for the lawmaking process: the amount budgeted and authorized for a program does not always equal the funds distributed for the program.

Congress can avoid government shutdowns by passing a continuing resolution that allows funding for government programs at the same spending level as the previous year. Continuing resolutions have allowed negotiations to continue for one day, one week, or an entire year. Depending on how many individual appropriation bills are passed before the fiscal year's last day, Congress has combined multiple appropriations into **omnibus** packages so all remaining spending decisions could be made with one final vote.

***Omnibus:*** *a large bill that allows Congress to pass multiple pieces of legislation with one vote. It consolidates thirteen appropriations bills into one appropriation bill.*

Until the 1980s, Congress would defund programs they did not support but did not have the votes to repeal. This process was known as the legislative veto because federal agencies cannot implement the law without funds to employ staff or for operational expenses. By extension, this practice is unconstitutional because the Supreme Court ruled that neither chamber of Congress can direct how the executive branch implements an action Congress delegates to the president. The landmark decision in this case was *INS v. Chadha* (1983), when the House of Representatives passed a resolution to veto a suspension of the deportation of an immigrant who overstayed his visa. The Immigration and Nationality Act created this congressional power, but Chadha's appeal clarified that the power to suspend a deportation rests with the attorney general.

## Map of the Traditional Legislative Process

One important lesson of lawmaking is that bills only progress through the legislative process after a vote of support for the measure. Commonly, the measure must receive a majority vote, and a quorum must be present. Under certain circumstances, legislators can raise motions that require support from a supermajority. These supermajority votes are needed for a legislator to avoid a rule or expedite consideration. Therefore, overwhelming support is needed to bypass a regular order. Motions that require supermajority votes, like cloture and suspension of the rules, will be discussed in the next section. This section will focus on the multiple stages that define the legislative process. **(Figure 3.2)**

## Procedural Nuts and Bolts for Unexpected Circumstances

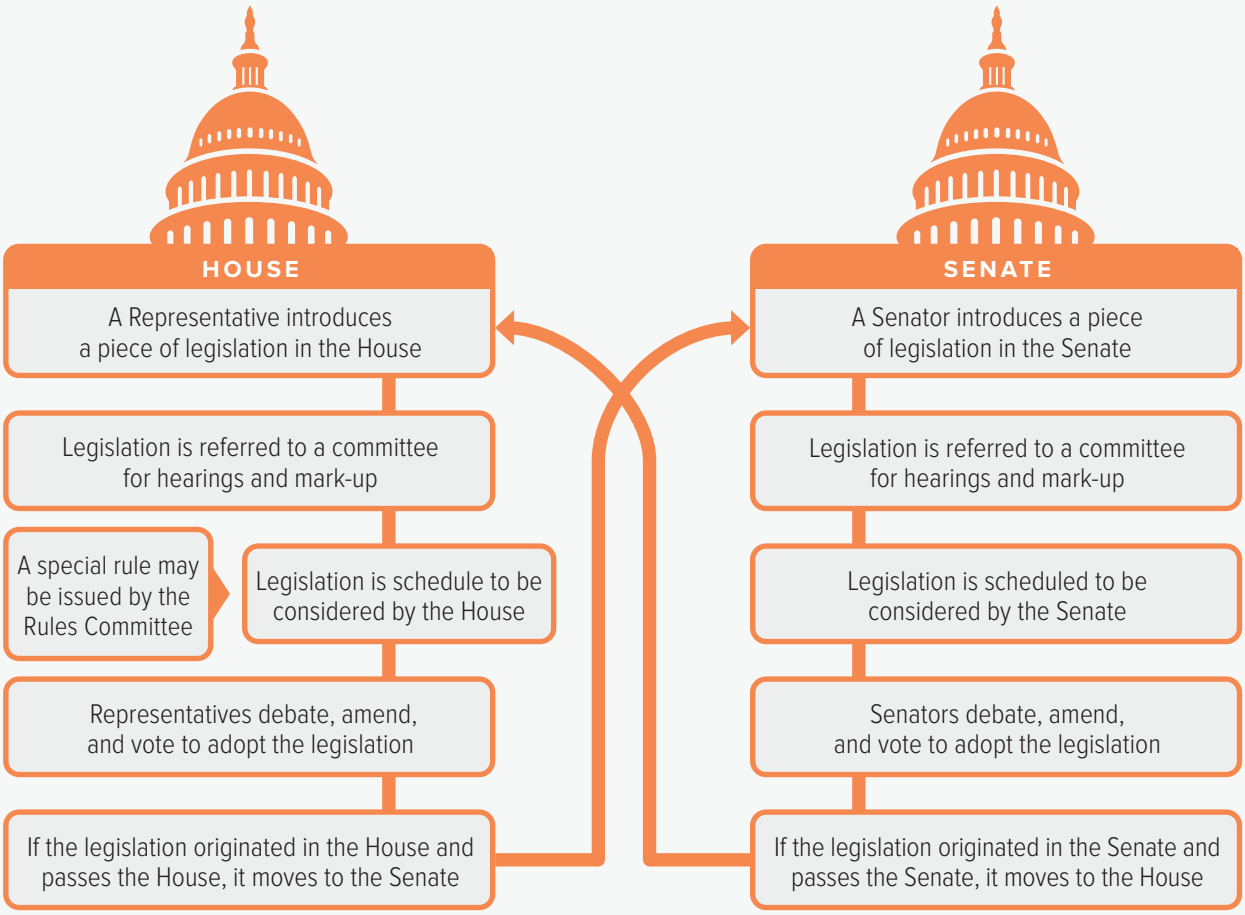
The Constitution allows the House and the Senate to create their own rules. Over time, both chambers developed different procedures to handle debates and legislation amendments. Many of these unusual procedures have been designated unorthodox because their voting rules differ from a simple decision via majority vote. Therefore, the time when a motion is raised for a vote is important because the context matters when determining what action to take.

### Special Procedures in the House

Although the House's rules structure the legislative process and how long legislators can speak during debates, a motion to suspend the rules does exist.

FIGURE 3.2

## Process for House and Senate Legislation




*If the House and Senate pass different versions of the legislation:*

One chamber may adopt the alternative version OR Conferees are appointed to draft a conference report to resolve differences OR Each chamber may adopt substitue amendments that reach an agreement

**Legislation is then presented to the President to become Law**

| THE LEGISLATION BECOMES LAW IF: | | THE LEGISLATION DOES *NOT* BECOME LAW IF: | |
|---|---|---|---|
| The bill is signed by the President | The bill is not signed by the President in 10 days and Congress is in session | The bill is not signed in 10 days and Congress is out of session (i.e. pocket veto) | The President vetos the legislation and the bill dies* |

*The House and Senate can vote to override the veto with a two-thirds vote. Of the more than 2,500 vetoes, only 5% have been overridden by Congress.

**FIGURE 3.3**

## The Budget Alternatives Presented to the House in 2015

| Versions for the Budget Resolution | Sponsor | Votes |
|---|---|---|
| Budget Committee Substitute to include an additional $2 billion for the war on terror. | Rep. Tom Price (GA-6) | 219-208 |
| Proposal from the Committee (H.C.R. 27) | Rep. Tom Price (GA-6) | 105-319 |
| Democrat Substitute | Rep. Chris Van Hollen (MD-8) | 160-264 |
| Republican Study Committee Substitute | Rep. Marlin Stutzman (IN-3) | 132-294 |
| Congressional Black Caucus Substitute | Rep. G.K. Butterfield (NC-1) | 120-306 |
| Progressive Caucus Substitute | Rep. Keith Ellison (MN-5) | 96-330 |

To expedite the consideration of legislation, the motion specifies rules the House can suspend—if two-thirds of the representatives vote to support the motion. The motion is most commonly used for legislation with universal support or for instances where legislation must be passed in one day. When a legislator moves to suspend the rules and pass a bill or resolution, the House can set aside rules for debate on the bill and pass the bill in one vote.

At times, the House Rules Committee will propose a special rule to sequentially consider multiple versions of a bill to decide if the measure will pass as reported by the committee or if new language will be substituted with an amendment. The *king of the hill* rule allows the House to debate all of the **substitute amendments** and choose the single winner. A unique twist of this rule is that the version with the most votes does not always win. The king of the hill rule means choosing to pass the last bill that receives a majority vote. Therefore, the order in which the votes are scheduled is a powerful influence on what version will succeed. The king of the hill rule was used 88 times between 1981 and 1994 to allow more representatives to bring proposals to the floor for a vote, but the House would still only vote to support one alternative.

***Substitute amendment:*** *an amendment that seeks to delete legislative language and insert new legislative language in one vote. This amendment type can revise legislation or amend the entire bill before it is approved.*

In 1995, the House Rules Committee established a new special rule similar to the king of the hill rule, but it is used less often. The *queen of the hill* rule is used sparingly by the House Rules Committee to allow different versions of a bill to be proposed and voted on by the whole House. Under this rule, the House adopts the measure that receives the most votes, which is determined after all alternatives have been voted on. In March 2015, this special rule was used to consider six budget proposals following the regular order by voting on the report from the Budget Committee and on versions from factions within the Democratic and Republican Caucuses.[6] The six versions (one bill and five amendments) in the rule accepted as H.R. 163 3.2 are shown in Figure 3.3.

3.2

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**The queen of the hill rule is used to consider six budget proposals.**

In this example from 2015, Speaker of the House John Boehner (R-OH) faced a House Republican Caucus that was divided on the budget projections for the 2016 fiscal year. There was broad support for an additional $2 billion for

overseas military operations, but representatives within the caucus disagreed on whether the spending should be offset by cuts elsewhere in the budget. In this example, only one substitute amendment received a majority vote. The measure cleared by one vote 3.3, even though twenty-six House Republicans voted against the amendment.

3.3

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Final vote results for Roll Call 141.

The queen of the hill rule is useful when the House's majority party cannot agree on which policy alternative is best. The choice then is given to the entire House and the largest coalition can make the selection, often achieving a bipartisan supermajority vote. The procedure reduces the speaker of the House's agenda-setting power and allows for a broader debate where legislators can argue their position, which builds the expectation that the best policy receives the most votes.

## Special Procedures in the Senate

The Senate has separate procedural votes. Many of these votes are designed to reduce legislative delay from a **filibuster**. These votes to limit senators from utilizing unlimited debates often require a supermajority vote. In recent Congresses, however, the chair's rulings on points of order have created precedents, like the **nuclear option**—where a supermajority vote is no longer required to end a filibuster, if senators interpret the rule as it was used in the past.

***Filibuster:*** *broadly defined as dilatory tactics to obstruct or delay the Senate from considering legislation; filibusters were ossible in the House prior to the implementation of Reed's Rules in 1890.*

***Nuclear option:*** *the precedent that debate over a nominee can be restricted to thirty hours by a majority vote, instead of the sixty votes to invoke cloture designated by Senate Rule XXII.*

## Supermajority Votes to Manage the Floor

Instead of using special rules from a Rules Committee like the House does, the Senate sets legislative debate rules for each bill using Unanimous Consent Agreements (UCAs). These agreements can be complex when they identify how few amendments can be offered and limit how long senators can debate the policy. The majority leader and the minority leader in the Senate negotiate UCAs, and they can be cancelled if one senator objects. This makes open communication between party leaders and their membership in Congress important throughout each session because, if a senator objects early, the party leader can negotiate the consideration of an amendment in the UCA.

***Cloture:*** *a motion to limit debate on a bill to thirty hours if passed with sixty votes.*

***Nongermane:*** *amendments that are unrelated to the primary policy of the underlying bill or the jurisdiction of the committee.*

The motion to invoke **cloture** was created in 1917 as part of Senate Rule XXII. When the Senate votes to invoke cloture, it sets a thirty-hour limit for senators to debate a policy. When the thirty hours have passed, the Senate often moves to vote on the legislation, and only fifty-one votes are needed. The cloture motion must receive sixty votes to end the debate, or the filibuster may continue. The current sixty-vote threshold was set in 1975 when the Senate lowered the number of votes needed from the sixty-seven votes required from 1917 to 1975. Therefore, roll call votes in the Senate are often more bipartisan because the final votes occur for bills that sixty or more senators support, and the bills without three-fifths of the chamber's support are often no longer considered.

Another procedure that requires a three-fifths vote from the chamber is a point of order to waive a budget rule. Sections 302(b) and 305(b) of the Congressional Budget Act of 1974 lists rules that require a three-fifths vote to overrule: considering a program in an appropriation bill not authorized by prior legislation or offering a **nongermane** amendment to an appropriations

bill.[7] In these motions to waive a specific rule by a supermajority vote, senators can authorize a program within an appropriations bill or include funding for a program outside of a bill's policy jurisdiction. Waiving budget rules is necessary when a senator who opposes the action makes a point of order on these grounds to make passing the new policy request more difficult.

For example, Senator Tom Cotton (R-AR) motioned to waive a budget rule in order to offer an amendment in 2015. The procedural battle concerned whether the Energy and Water Appropriations Bill should be amended to ban U.S. dollars from purchasing heavy water from Iran.[8] The words in the previous sentence seem related, but *heavy water* denotes water that includes the chemical deuterium (D2O) instead of hydrogen (H2O). Therefore, the foreign purchase of heavy water to cool nuclear reactors falls outside the jurisdiction of infrastructure investments made by the Energy and Water Appropriations Bill. Senate Democrats considered this amendment a *poison pill*, and the amendment failed because the Cotton Amendment motion fell by a vote of fifty to forty-six, ten votes shy of the sixty votes required to consider the amendment.

## Resetting Expectations for Regular Order

The threat of a filibuster that brings the Senate to a standstill has fallen in recent years because of one legislative vehicle (budget reconciliation) and one precedent (the nuclear option) that changed the number of votes needed to end a debate on a nominee. Both changes emerged from the argument that a majority vote could stop the filibuster when gridlock obstructs tax policies or nominations—two of the Senate's constitutional responsibilities.

### Budget Reconciliation: A Fast-Track Tool

In the Senate, all legislation is subject to holds and filibuster except for the **budget reconciliation** act. A reconciliation bill can only be used if the House and Senate have passed the congressional budget, and each congressional budget can use only one reconciliation bill. This is a powerful legislative vehicle that can only be used once per legislative session. Since the first budget reconciliation act was used in 1980, the reconciliation process has been used twenty times to avoid delay from a filibuster.

***Budget reconciliation:*** *a privileged bill that must be related to tax policies and cannot be filibustered; however, the bill can only occur if the congressional budget resolution has passed.*

A reconciliation bill also simplifies the legislative process in the Senate by requiring all amendments to be germane to the bill. A parliamentarian uses the Byrd Rule to rule amendments out of order for adding extraneous legislation, which can be defined in four distinct ways: (a) Does the amendment increase spending or decrease revenue beyond the budget projection? (b) Is the amendment germane to the jurisdiction of the committees the bill was reported to? (c) Does the amendment commit the government to spend funds in future years beyond the commitment of the proposed bill? (d) Will the amendment adjust mandatory spending programs? Identifying acceptable and unacceptable legislative proposals may seem complicated, but approaching these questions on a case-by-case basis and studying the language in the budget resolution and budget reconciliation act clarifies the process.

A reconciliation bill was used to pass the Bush tax cuts (2001 and 2003), the Health Care and Education Reconciliation Act (2010) that modified the Affordable Care Act, and the Tax Cuts and Jobs Act (2017).[9] These laws defined the legislative successes of recent presidential administrations when the president's party did not control sixty Senate seats.

## Nuclear Option: Expediting Nominations under Unified Government

The Constitution sets the requirements for the Senate to confirm nominees to federal agencies, commissions, and courts. The Senate's rules direct how the confirmation process moves forward with committee and floor consideration. Similar to legislation, nominations are referred to the committee with jurisdiction over that position, and all judicial nominees are referred to the Senate Judiciary Committee. Nominees are then introduced to the committee in a hearing, and they move forward if the committee reports the nomination to the floor.

However, a senator who opposes a nominee may issue a blue-slip to stop the committee from considering the nominee. After a nomination, the chairman of the Senate Judiciary Committee circulates blue slips that allow senators to object to a nominee. This process derives from the norm of Senate courtesy, and the chair is expected to keep the name of any senator anonymous if they return a blue slip to block a nominee.

The only way for the Senate to overcome such an objection is via cloture. Today, the number of votes needed to invoke cloture depends on whether the government is divided or unified. If the Senate enforces the vote requirement for Rule XXII based on the precedent that there only needs to be fifty-one votes during unified government, nominees can be confirmed faster. With a divided government, however, the Senate enforces the rule as written, requiring sixty votes to influence who the president will nominate. In 2013, Majority Leader Harry Reid (D-NV) invoked the nuclear option via a series of rulings by the chair when Senate Democrats became frustrated with the number of delayed executive and judicial nominees. Senate Democrats could then confirm more nominees in 2013 and 2014 to fill vacancies in federal agencies and courts and help President Obama implement policy. However, Senate Republicans won the majority following the 2014 election, and Majority Leader McConnell (R-KY) required sixty votes to approve any nominee.

The nuclear option became the new norm during a unified government when Senate Republicans confirmed President Trump's nominees by a majority vote in 2017. Majority Leader McConnell (R-KY) made another change in 2017 by repeating Reid's steps in 2013 to apply the nuclear option to confirm Supreme Court justices. Facing a coordinated filibuster of Supreme Court nominee Neil Gorsuch, Senate Republicans invoked the nuclear option to end the filibuster with a simple majority vote. This procedural move allowed Associate Justice Neil Gorsuch to be confirmed to fill the vacancy after Justice Antonin Scalia's death in February of 2016. The nuclear option was used again to end a filibuster of Associate Justice Brett Kavanaugh's nomination one year later.

Filibusters in the Senate can still delay the consideration of legislation at any time, but they can only delay nominees if the Senate's party differs from

the president's party. Using legislative shortcuts like budget reconciliation and the nuclear option limit the filibuster's threat to tax policy and nominations during a unified government. As elections determine the control of electoral institutions, we should expect to see the rules of the filibuster change based on how closely the president's policy platforms align with the Senate.

### Side-by-Side Amendments

The Senate has a procedure to consider competing proposals analogous to the queen of the hill rule called **side-by-side amendments**. This process can pair two amendments together for consideration via the details of a UCA. Each senator can then vote in favor of both policy proposals knowing that the amendment with more votes will be adopted. Therefore, electorally vulnerable senators can gain political cover, and senators with clear policy preferences can vote against a competing measure. As with other procedures that expand the number of policies a legislator votes on, politicians often use this strategy on budgetary and spending bills. Even though one amendment's consideration depends on the consideration of another, these side-by-side amendments are not always considered. Instead of accepting the House's proposal in January of 2019, Senate Appropriations Committee Chairman Richard Shelby (R-AL) and Minority Leader Charles Schumer (D-NY) each offered side-by-side amendments to vote on a Republican alternative and Democratic alternative to reopen the government. These leaders may have coordinated their actions well, but the Senate twice failed to invoke cloture to consider these amendments, and the partial government shutdown continued.

***Side-by-side amendments:*** *two amendments to be paired together for consideration; the amendment that receives the most votes will be adopted, even if both have majority support.*

## How Does Being in Office Enhance the Chance for Reelection

One way to measure constituents' quality of representation involves a legislator's voting record. Do they vote on a bill the same way most voters back home would, thereby voting as a delegate? Many would expect districts that often vote for a Democratic president to be represented by a Democratic representative in the House. However, in the words of Speaker Tip O'Neill, "all politics is local."[10] Importantly, our representation framework encourages members of Congress to put their constituents first, and it explains why the job is more than casting votes in Congress.

### Personal Vote: Taking a Position

A district's partisanship is a primary predictor of representation, but many voters like their member of Congress better than the national party. A legislator's personal vote represents the legislator's affinity after receiving more votes in their own district than national or statewide candidates. Legislators who serve in marginal districts or battleground states often brand themselves as independents, mavericks, and policy champions for their constituents by trying to nationalize policies popular in their state.

For example, Democratic legislators representing conservative districts vote against the party line on issues their voters value most. Senator Joe Manchin (D-WV) clarifies his independence by supporting coal energy. Senator Manchin's position stands out because the Democratic National Committee encourages a transition away from fossil fuels. Despite this conflict, Senator Manchin's own party gives him latitude to vote with his constituents because votes on energy and climate change comprise a small portion of all the Senate's votes during the two-year Congress.

Legislators also sponsor legislation to advertise their advocacy for a position, even if the bill has little chance of passing. Senator Ted Cruz (R-TX) exemplified this when he introduced S. 25, known as the EL CHAPO Act 3.4 (Ensuring Lawful Collection of Hidden Assets to Provide Order), to confiscate the assets of drug cartel leader Joaquin Guzman and apply the estimated $12,66,191,704 to building a wall on the U.S.-Mexico border.[11] Although federal law enforcement has not recovered the assets, sponsoring the bill shows an attempt to fund construction without using taxpayer dollars. The legislation was never considered in committee, but Senator Cruz may have never expected the bill to become law. Sponsoring the bill was a way for Senator Cruz to illustrate his commitment to reducing illegal immigration and drug cartel activities at the border.

3.4

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**Details on Senator Ted Cruz's EL CHAPO Act legislation.**

## Personal Vote: Constituency Service

Voting captures our attention, but casework is a major function of congressional offices. Through casework and constituency service, legislative staff ensure community residents get what they need from governmental agencies. To provide such services, members of Congress have district offices and employ staffers to work back home.

District offices serve as liaisons with the community to help residents navigate bureaucracies. For example, a district staff will receive a request to follow up with the Social Security Administration if a social security check was not received in the mail. District staff will also interview high school students interested in attending military academies to help the member of Congress by recommending who from the district should be appointed (admitted). Legislators have considerable influence in these decisions because Congress holds the power of the purse (budget authority) and the power of oversight (jurisdiction authority) to guide the federal agencies. Moreover, agencies trust members of Congress to make specific recommendations about implementing the federal government's priorities within the region.

## Bringing Home the Bacon

In many communities, a federal highway, bridge, or building bears the name of a former U.S. representative. Naming a public space for someone serves as a memorial but rarely signals who deserves credit. Media appearances by members of Congress, however, are explicitly designed to publicly give credit to individuals central to a project. For example, the image **(Figure 3.4)** of military

Source: U.S. Central Command Public Affairs; https://www.dvidshub.net/image/199233/us-central-command-officially-opens-joint-intelligence-operations-center

**FIGURE 3.4** Mrs. Nancy Tolbert, U.S. Army Gen. David H. Petraeus, commander, United States Central Command, Senator Mel Martinez, Mrs. Shari Tolbert and Congressman Bill Young cut the ribbon for the Lt. Cmdr. Otis Vincent Tolbert Joint Intelligence Center at MacDill Air Force Base, Florida, on August 26. Tolbert was killed in action at the Pentagon on 9/11.

and elected leaders appears at a ribbon cutting for the new Lt. Commander Otis Vincent Tolbert Joint Intelligence Center at MacDill Airforce Base in St. Petersburg, Florida—the home of U.S. Central Command (CENTCOM). The two women in the photo are the mother and wife of LTC Tolbert, representing the memorialized officer who was stationed at MacDill Airforce Base but was killed at the Pentagon on September 11, 2001. The three men in the photo represent the funding for this new building: U.S. Army General David H. Petraeus was the commander of CENTCOM (which commanded this installation), but U.S. Senator Mel Martinez (R-FL) and U.S. Representative Bill Young (R-FL-13) made the new spending possible. In this context, U.S. Representative Bill Young was key—he was the past chairman of The House Appropriations Committee and the current ranking member.

Representative Bill Young deserves credit for this building, among many others, at MacDill Airforce Base because he championed modernizing the U.S. military, especially when the jobs would move to his district. In addition to supporting bills, Representative Young would **earmark** spending projects and direct them to his own district. Even when the Democratic Party controlled the House of Representatives, as a member of the committee Representative Young could quietly direct funds to his district. For example, Representative Young used his position as ranking member of the House Subcommittee for Defense Appropriations to make thirty-six individual earmark requests that secured $83.7 million of the Defense Appropriations Bill for the St. Petersburg, Florida, area (Pineallas County). Representative Young's legacy among his constituents was his ability to deliver millions of dollars in federal money to the district to promote the Tampa Bay area's defense industry.

***Earmark:*** *a courtesy given to legislators by the appropriation committees to direct where (geographically) spending will go for a federal agency to implement a specific purpose or project.*

Earmarks exemplify distributive politics. If everyone in Congress can vote for something in a large spending bill, like the Defense Appropriations Bill (one of the twelve regular appropriations bills), it will likely pass. For many members of Congress, earmarks helped show a legislator's activities by bringing home federally funded projects, even if they were unsuccessful in

writing the nation's laws. However, earmarks were tricky because the most powerful members of Congress appeared to get more funding.[12] Those who opposed directed spending (earmarks) referred to the practice as *pork*. Although earmarks consistently made up less than 1% of annual federal spending, attacking the practices resonated with the public as ripe for corruption because of the lack of competition and transparency.

Earmarks in Congress ended in 2011 when the House's new Republican majority banned appropriations committees from soliciting or considering earmark requests from colleagues. However, the attempts to direct congressional spending have not stopped. Now, lawmakers and their staff are likely to write legislation to micromanage agency decisions and direct federal grants to their district by identifying the responsible organization within an agency. This change in the appropriations process made it more difficult for Congress to pass appropriations bills because members of the president's party are less likely to support technical restrictions on an agency. At the start of each Congress, legislators discuss whether to bring back earmarks to ease policy negotiations. Former Rep. Jim Walsh (R-NY), who became a lobbyist after he served in the House, said he could explain to his district that "I didn't like everything about the bill, but here's what we got."[13]

All the help representatives give constituents by doing casework, directing federal programs to a district, and passionately fighting for policy issues is why 90% of incumbent legislators are reelected, despite that only 14% of voters approve of how Congress does its job. Making laws in Congress is messy and conflicting because the body is designed to govern by consensus, but the institution is designed for legislators to fight for various perspectives. Overall, however, all politics is local, and our adversarial system of government incentivizes legislators to prioritize their constituents' needs above what is best for most of the nation.

» The United States conducts a Census every ten years to count the residents in each state and note where they live. These numbers determine how many U.S. House seats a state has via the reapportionment process. Determining a state's number of seats is simple. The overall number depends on a state's population size relative to the national population, divided by 435.

## Establishing Representation and One Person, One Vote in the House

The United States conducts a Census every ten years to count the residents in each state and note where they live. These numbers determine how many U.S. House seats a state has via the reapportionment process. Equalizing the population so each House member represents the same number of people became more complicated in 1929 when the House passed a law to lock the House membership to 435 representatives. Capping the size of the House raised concerns about how reapportionment affects a state's political power within the chamber and how it affects each person's representation.

Determining a state's number of seats is simple. The overall number depends on a state's population size relative to the national population, divided by 435. However, every state receives at least one representative even if its population is small. So, if the populations of California, Texas, and Florida grow faster than the rest of the nation, each state will receive a new member of Congress based on that population growth. The population's representation is equalized because states that do not grow as fast (or have declining populations) will lose a seat in the House.

Once a state's number of seats is certified, state governments redraw the lines of their congressional districts to equalize the population between Districts 1, 2, and so on. If a state gains seats in the U.S. House, the process is more favorable for incumbents as their districts will likely become geographically smaller to make space for a new district(s). For states that lose representation, however, districts must consolidate, leaving two **incumbent** legislators living within the same district.

State laws direct how states create and approve their redistricting plans. The Fair Maps movement has worked recently to pass laws in states to delegate this responsibility to **independent redistricting commissions**. In most states, however, the boundaries of congressional districts are determined by proposals passed by state legislators and signed into law by the governor. In this context, organizations like the League of Women Voters serve as monitors and sue the government for expected disenfranchisement or partisan bias in how the maps are drawn.

A series of Supreme Court cases help determine if a redistricting proposal is constitutional or not. The foundational requirement is that one population within a given state cannot have a smaller population than another, as established in *Wesberry v. Sanders* (1964). Today, a plan can be rejected if a district has over 1% more population (see *Karcher v. Daggett* 1983). A legislator must be able to walk between all geographic areas of the contiguous district because the Supreme Court rejected the requirement that communities could not be in the same district if they were not immediate neighbors (*Reynolds v. Simms,* 1964). To avoid **retrogression**, a state must also maintain the same percentage of minority representation in a district for new plans. The Supreme Court decided in *South Carolina v. Katzenbaum* (1966) that states should enhance the political power of minorities to follow the intent of the Voting Rights Act of 1965.

Other legal decisions beyond retrogression have framed how to test whether a redistricting plan is discriminatory. The first place to start is with the *Gingles* test's three elements. The Supreme Court's decision on *Thornberg v. Gingles* (1986) established that a redistricting plan could be deemed discriminatory based on measured outcomes. The three elements considered if a minority population was large enough to be its own district, if the population cohesively supported one candidate, and if that candidate won. If conditions one and two are met, the candidate preferred by a minority group will assumedly win the election. It is important to remember that the *Gingles* test is an evaluation—not a blueprint—for how to create districts, because creating districts primarily because of race is unconstitutional (*Miller v. Johnson* [1995] and *Alabama Legislative Black Caucus v. Alabama* [2015]).

***Incumbent:*** *the designation for a sitting elected official. Incumbents are often designated with an (I) on the ballot when they seek reelection, so voters know who they are currently represented by.*

***Independent redistricting commission:*** *the creation of a panel of members from both parties and independents to approve redistricting proposals. In Arizona, members of the independent commission include experts and legislators selected by the state legislature. However, in California, the independent commission is larger and made up of normal citizens.*

***Retrogression:*** *limiting the opportunity for a constituency of interest to maintain or increase its political influence in a district.*

## Redistricting Practices When Populations Must Be Equal

Because redistricting assigns voters to districts, the process can become political as parties try to manipulate the boundaries to gain an electoral advantage. All the major political parties in all regions of the country have done this because winning elections determines political survival, and the federal courts have not ruled partisan gerrymandering unconstitutional.

## Packing

Packing occurs when a district is drawn to maximize the number of people with similar demographics or ideologies. Packed districts are often electorally safe districts where incumbents easily win reelection. In states with multiple districts, creating a safe Republican district often creates a safe Democratic district, and neither party is likely to object. When multiple districts are packed to favor one party, the percentage of seats the majority party holds in the congressional delegation should be lower than the percentage of votes the party receives in a statewide election. By forgoing one more vote in Congress, however, the party can sustain a long-term majority. One consequence of this approach is that packing similar votes into one district wastes those votes and diminishes the representation of a group of voters.

District maps may receive scrutiny if a packed district is not compact, which can occur when similar but distant communities become part of the same district. In 1992, the state of Georgia worked to maximize the number of African-American districts; even drawing one district that connected majority African-American neighborhoods south of Atlanta, the city of Macon, and areas north of Savannah. The proposed district was deemed unacceptable because the primary reason for putting these distant communities in one district was to pack racially similar communities together (*Miller v. Johnson,* 1995). When the district was drawn again, the district became more compact and centered only on communities in Atlanta and Macon.

## Cracking

Because districts must have equal populations, lines will divide neighborhoods. However, a city (or neighborhood) that is split to reduce its influence on electing their representative raises concern. From the perspective of partisan redistricting, districts can become more competitive if one homogenous area is split and then paired with communities that vote for the other party. Cracking can manufacture electoral competition in districts that are evenly split between parties. Many incumbents oppose this strategy because competitive districts reduce their job security. Party strategists may suggest cracking because it allows a party to control a higher percentage of the seats than the percentage of votes that party receives across the state.

## Incumbency protection

When legislators draw redistricting plans, a norm is established to protect colleagues (incumbents) before trying to gain a partisan advantage. Incumbents can be protected in two ways. First, a district's boundaries should not change so that an incumbent's residence is no longer within the district. Second, changes to the district's core constituency should be minimal, meaning most of the voters who elected the incumbent in 2020 should still be in the district in 2022. Members can easily consider the first step, but each member measures changes in the core constituency differently based on the levels of population change in a community from one Census to the next.

Recently, decisions to protect incumbents have been less popular. In 2010, Florida voters amended the Florida constitution to remove any consideration of incumbency protection when drawing maps. Removing incumbent protections is one reform associated with the fair redistricting movement that has created circumstances where incumbent legislators end up in the same compact district.

## Conclusion

The institutional differences within each chamber of the bicameral U.S. Congress strengthen the internal checks and balances of this constitutional framework. The goals of representatives and senators often differ because they are motivated to represent their constituents as best they can. Consequently, a representative advocates for the needs of one community within the state while a senator considers if a policy will help most communities in the state. In that context, a senator may vote differently than a representative even when they share the same party.

Electoral accountability motivates most arguments about legislative behavior in the House because representatives must campaign for reelection every two years. The people whom members of the House represent also change every ten years after reapportionment declares the number of seats a state will have and redistricting plans set the boundaries for the next election. Moreover, a constitutional mandate requires that representatives are always voted for by the people. This federal mandate requires a special election when a vacancy occurs in Congress due to death or resignation. In the Senate, however, unexpected vacancies can be filled by an appointment from the governor, and special elections only occur if required by state law.

In contrast, most studies of the Senate are based on the procedural complexity of its legislative behavior because the Senate has fewer written rules than the House. As rules and precedents change, the procedural constraints a senator must follow to effectively pass legislation evolve. Therefore, it is important to recognize that senators can use multiple procedural options, and that the reforms to allow the Senate to expedite legislation are only available for certain votes. This way, we can appropriately evaluate whether legislation is being considered in the Senate in a way that is likely to represent the nation or to pass quickly.

### Key Terms

**Appropriation:** legislation that approves federal spending for the next fiscal year. The thirteen appropriation bills must pass because if a bill is not passed before the first day of the fiscal year, sectors of the government will shut down.

**Authorize:** legislation that proposes to create or amend federal statutes.

**Budget reconciliation:** a privileged bill that must be related to tax policies and cannot be filibustered; however, the bill can only occur if the congressional budget resolution has passed.

**Budget resolution:** a resolution passed by the House and the Senate to set spending targets to guide budget decisions for authorizations and appropriations later in the year.

**Closed rule:** a special rule from the House Rules Committee that restricts representatives from offering any amendments to the bill being considered.

**Cloture:** a motion to limit debate on a bill to thirty hours if passed with sixty votes.

**Conference committee:** a meeting of selected representatives and senators to reconcile differences between the language of a bill passed by the House and the language of a bill passed by the Senate.

**Earmark:** a courtesy given to legislators by the appropriation committees to direct where (geographically) spending will go for a federal agency to implement a specific purpose or project.

**Enrolled:** legislation is enrolled when the House and the Senate agree to it, but it has not yet been signed into law.

**Executive session:** a calendar of business in the Senate used to manage nominations and treaties where the Senate fulfills its responsibility of providing advice and consent to the president.

**Filibuster:** broadly defined as dilatory tactics to obstruct or delay the Senate from considering legislation; filibusters were possible in the House prior to the implementation of Reed's Rules in 1890.

**Filling the amendment tree:** the practice of offering three amendments one after the other without considering them. This starts by offering an amendment, then offering an amendment to that amendment, and finally offering a perfecting amendment to the secondary amendment. Therefore, no other amendments can be in order until the Senate votes on one of the pending amendments. When a majority leader in the Senate does this, senators cannot use the Senate's open amendment rules to change policy.

**Gatekeeping:** the power of a committee to stop consideration of a bill by not giving the bill a hearing or not reporting the bill to the floor; if most legislation dies in committee, the gatekeeping power is strong.

**Homogenous:** a population with mostly similar characteristics. A party is considered homogenous if most members have the same ideology and policy preferences. A district is considered homogenous if most residents vote the same way or have the same demographic characteristics.

**Incumbent:** the designation for a sitting elected official. Incumbents are often designated with an (I) on the ballot when they seek reelection, so voters know who they are currently represented by.

**Independent redistricting commission:** the creation of a panel of members from both parties and independents to approve redistricting proposals. In Arizona, members of the independent commission include experts and legislators selected by the state legislature. However, in California, the independent commission is larger and made up of normal citizens.

**Majority leader:** a party leader that coordinates the policy agenda of the majority party. In the House, this position of party leadership is the second most powerful position. In the Senate, this position is the most powerful position. The minority leader holds the same responsibilities but is less powerful in both chambers because the party coalition does not hold a majority of the votes.

**Mark-up hearing:** a hearing where members of the committee submit amendments to improve legislation. This hearing is often when the committee votes to report the bill to the floor.

**Modified open rule:** a special rule from the House Rules Committee that allows specific amendments to be considered.

**Nongermane:** amendments that are unrelated to the primary policy of the underlying bill or the jurisdiction of the committee.

**Nuclear option:** the precedent that debate over a nominee can be restricted to thirty hours by a majority vote, instead of the sixty votes to invoke cloture designated by Senate Rule XXII.

**Omnibus:** a large bill that allows Congress to pass multiple pieces of legislation with one vote. It consolidates thirteen appropriations bills into one appropriation bill.

**Party whip:** this second-highest position in party leadership is responsible for counting votes within the caucus before a vote is called. The whip also communicates with colleagues to find out why they may vote differently from the party's advice.

**PAYGO:** a budget rule in Congress that requires any new proposed legislation be paid for by cutting funding from another program, shifting funds within an agency, or raising revenue.

**Ping-pong:** the iterative process to reconcile the differences between the House and Senate versions of a bill by sending amendments back and forth so that all members can vote on items instead of on one conference report from the conference committee.

**Precedent:** the existing interpretation of a procedural rule in the Senate based on a previous vote on a point of order. The full list of precedents in the Senate that determine which actions are in order and which are out of order is kept by the Senate parliamentarian.

**Quorum:** the constitutional requirement that a majority of legislators must be present for Congress to be in session.

**Retrogression:** limiting the opportunity for a constituency of interest to maintain or increase its political influence in a district.

**Right of first recognition:** established in 1937, the Senate majority leader will always be recognized first to speak when two senators request to speak on the floor at the same time.

**Side-by-side amendments:** two amendments to be paired together for consideration; the amendment that receives the most votes will be adopted, even if both have majority support.

**Single-member districts:** each district in the U.S. House is represented by only one U.S. representative. After Wesberry v. Sanders (1964), state legislatures were no longer allowed to create multimember districts where one larger geographic area was simultaneously represented by multiple U.S. representatives.

**Standing committee:** permanent committees in Congress that have consistent policy jurisdictions over time.

**Substitute amendment:** an amendment that seeks to delete legislative language and insert new legislative language in one vote. This amendment type can revise legislation or amend the entire bill before it is approved.

**Whip count:** an internal list created by the majority (or minority) whip to identify how each legislator in the caucus will vote on a piece of legislation. The count provides a tally of whether a bill is likely to pass and gives party leadership a sense of which legislators are not ready to vote yea or nay.

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4

The Single Executive

Divided Government

Winning the Election

Term Limits and the Lame Duck

Presidential Power

Strategies to Lead

The Lincoln Memorial in Washington, D.C.

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CHAPTER FOUR

# The Presidency

**THE PRESIDENCY'S ROLE** in the Constitution is remarkable because the United States of America did not have an executive leader from 1776 to 1789. In Federalist 69 4.1, Alexander Hamilton argued why a single executive (the president) should have less power than the king of England and more than the governor of New York. At the time, a popularly elected leader who would regularly stand for reelection was a new idea.

The president of the United States is the only official who appears on every ballot in the nation. Therefore, Article 2 of the U.S. Constitution gives the executive branch distinct powers to ensure that laws reflect the nation's will. These distinct powers do not allow the president to make laws, but the president can decide what will become law by signing or vetoing legislation. As the commander and chief of the national military, the president is also a national representative who meets with distinguished leaders from other nations and informs Congress about the people's needs through the State of the Union address.

This chapter explains how the nation selects presidents and their powers via rules and processes that constrain the office's powers. Studying the Constitutional amendments that detail how presidents are chosen and the statutory laws that give them additional powers can help in understanding

4.1

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**The full Federalist 69 essay by Alexander Hamilton, published in March 1788.**

the executive branch. Other valuable topics include the president's unique political leverage and how the bureaucracy's size and structure enhance the power of the executive branch.

## The Single Executive

The decision to select a single executive sets American politics apart from the politics of other nations with a parliamentary system (e.g., Belize, England, Germany, India, and Nigeria). The parliamentary system and presidential system are the most popular systems of government among Republics where the public selects its leaders. The primary difference between the two systems of government is that the presidential system is more likely to limit the government, as presidential systems often involve a divided government and two-party politics.

## Divided Government

In a parliamentary system, the nation's leader (typically the prime minister) is chosen by members of Parliament. England's Prime Minister Boris Johnson was selected in July 2019 by a coalition of members of Parliament after Parliament failed to agree to a Brexit plan and Theresa May resigned. The transition of power occurred without an election. Johnson then became more powerful when the UK's Conservative Party won a clear majority on December 12, 2019 allowing members of Parliament to select Johnson to continue as the Prime Minister. This is different from U.S. elections, because in a parliamentary system choosing an executive occurs in two stages. Voters select the party they support. Then members from the party's list of candidates are chosen to closely match a ratio based on the percentage of votes a party receives. As a result of the rules, parliamentary systems do not have a divided government, because legislators are elected by a party and the executive is chosen by the legislators."

In contrast, the president of the United States is chosen by the people in an election separate from the elections for the U.S. House and the U.S. Senate. The president's four-year term means the office is not always up for election when the public votes for members of Congress. As a result, congressmen elected on a president's **coattails** may later lose, giving the opposite party the chance to win a majority of the seats in the House or the Senate. Therefore, a **divided government** occurs when one party controls the executive branch and the opposing party controls at least one chamber of the legislative branch. Parties often have competing priorities and policy views, so a divided government is a large hurdle for a president trying to enact new and uncompromising policies.

***Coattails:*** *the additional support candidates on the ballot receive from running during a presidential year. This can be calculated by subtracting the percentage of support a candidate received from the percentage of support the president-elect received in the same area.*

***Divided government:*** *when control of the government is shared by more than one political party. For example, the president may be a Republican and the House may be governed by a majority of Democrats.*

### Two-Party Politics

A leading reason third parties are less successful in the United States is because only one party wins in the executive elections. Parliamentary systems often have multiple political parties because one party can rarely control a majority of the votes. Therefore, power is created through coalitions

in a parliament. In the United States, however, the president is elected by winning the majority of votes in the Electoral College (with 538 electors). To get these electoral votes, a candidate only needs the most votes in an area—not a majority. In past presidential elections, third-party candidates only sought to spoil the Electoral College and win the presidency through a vote by the House.

Article 2 establishes the Electoral College as the process for electing the president; it is unique because it uses a specific formula to distribute votes across states. A state receives at least three electors in the Electoral College. States receive more than three electors according to how many U.S. Representatives and U.S. Senators the state has. Because Article 1 gives each state two senators, the total electors only changes based on the number of U.S. Representatives. It is readjusted every ten years after population counts provided by the Census.

## What Are the Limitations to Becoming President?

The Constitution's qualifications to become president are indeed more restrictive than those for the House and the Senate. Both have age and residency qualifications, but the hurdles are higher to become president. When inaugurated as the president, a candidate must be at least thirty-five years old. Additionally, a person must have been a resident of the United States for 14 years prior to becoming a presidential candidate. The third requirement states that any president must be a **natural-born citizen**. Although the Constitution clarifies these requirements, presidential candidates are often older and less representative of the country. For that reason, it is valuable to recognize the political factors that shape presidential elections and the leadership characteristics the public demands.

***Natural-born citizen:*** *a constitutional requirement that the president of the United States must be born in the U.S. or to parents who are citizens of the nation.*

The natural-born citizen requirement has caused debate as diversity in America continues to grow. In 1952, the Immigration and Nationality Act 4.2 was passed into law to clarify this process. Territories had become states, and an expanding military presence across the world meant U.S. citizens were regularly born outside of the country. The Republican nominee for president in 2008, Senator John McCain (R-AZ), was eligible despite being born in Panama. Senator McCain's citizenship was clear because he was the child of two American citizens and was born in the Panama Canal Zone (an area managed by the United States from 1903 to 2000). Another example occurred in 2016 when Senator Ted Cruz (R-TX) sought the Republican nomination for president. Senator Cruz was born in Canada to parents who held a Cuban citizenship (father) and a U.S. citizenship (mother). As a child, Ted Cruz became a citizen through his mother's citizenship, and the family did not need to apply for his asylum. These examples clarify that the requirement to be a natural-born citizen sets a generational limit on who can be president. Therefore, popular elected officials like Governor Jennifer Granholm (D-MI), Chairwoman of the House Foreign Relations Committee Rep. Illena Ros-Lehtinen (R-FL), and Representatives Lincoln and Mario Diaz-Balart—two brothers representing Florida in Congress—are not eligible to run for president.

**4.2**

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**The Immigration and Nationality Act was enacted in 1952.**

***Inauguration:*** *an event where the president-elect is sworn into office and gives a speech to set the new administration's agenda.*

The age requirement to be president refers to a person's age on the **inauguration** date. A person is still eligible to be president if they are thirty-four years old during the campaign and have a birthday before January 20. However, the youngest person to assume the presidency was Vice President Theodore Roosevelt after the assassination of President William McKinley in September 1901. He was forty-two years old. The oldest president at the start of their term was Ronald Reagan, who was s years old when he started his second term in 1985. The notoriety and accomplishments that attract voters explain why a young contender would be rare. Still, it is important to recognize the public's evaluation of the candidates as an additional restriction that is subject to political forces.

**FIGURE 4.1**

### Line of Succession if the Presidency is Vacant

1. Vice President
2. Speaker of the House
3. President Pro-Tempore of the Senate
4. Secretary of State
5. Secretary of Treasury
6. Secretary of Defense (previously War)

Another requirement that reinforces a president's record of service is that a person must have resided in the United States for the previous fourteen years. People with previous experience, such as governors, senators, or vice presidents, usually meet this requirement. However, prior to being elected president in 1908, William Howard Taft had spent much of his recent political career as the Governor-General of the Philippines (1901–1903) and even as the Governor of Cuba (1906) for a short stint. Taft was also secretary of war. For Taft to still qualify for president, we must recognize that the Philippines were an American territory then and Taft was appointed as governor-general by President McKinley. Even when President Theodore Roosevelt sent him to Cuba, Taft was still a U.S. resident. Although Taft was not as visible in domestic politics during these years, his loyalty to the previous Republican presidents made him a trusted leader.

The underlying reason the Constitution requires a separation between presidents and other nations for fourteen years is simple patriotism. Time spent in the United States reduces the likelihood that another nation could influence the sole executive of the United States. This attempt to preserve the president's independence is also present in the emolument clause (Article 2, Section 1, Clause 7), which limits the gifts or profit a president can receive from foreign leaders.

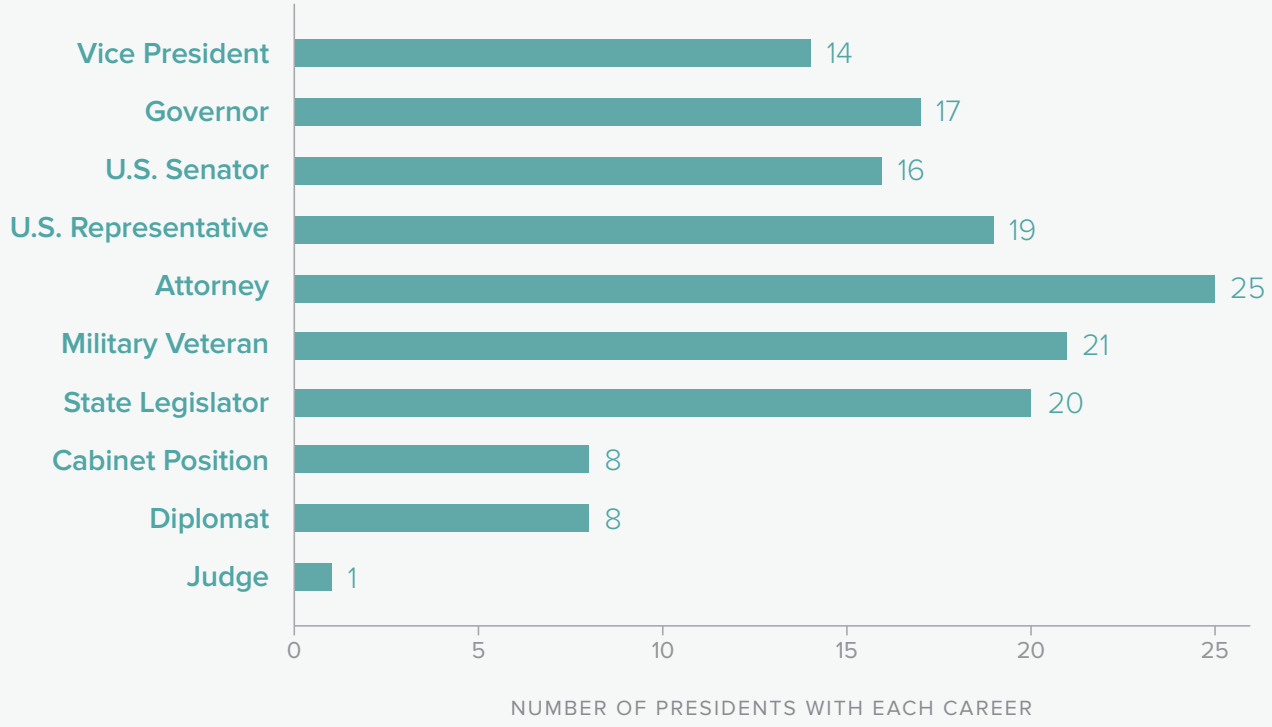
## Paths to the Presidency

Article 2, Clause 6 of the Constitution, later amended by the Twenty-fifth Amendment, offers the most explicit instruction about who becomes president when the position is vacated. However, this only applies when a president dies, resigns, or is removed. In the line of succession **(Figure 4.1)**, the vice president becomes president if the office is vacant between elections. This is how John Tyler, Calvin Coolidge, Theodore Roosevelt, Harry Truman, and Lyndon Johnson began their presidencies; they completed their predecessor's existing term.

Comparing past presidents shows a few trends in the careers and positions that candidates use to show that they have the leadership capacity the

**FIGURE 4.2**

## Number of Presidents with Prior Experience in a Given Area




Source: "Research on U.S. Presidents," by InsideGov, 2016.

public wants. Before considering a presidential run, many ambitious candidates hold numerous positions to increase their experience in domestic and foreign affairs. **Figure 4.2** counts up each position a president has held. For example, President Jimmy Carter served as a state senator (1963–1967) and then as Georgia's governor (1971–1975), so he is counted in both columns.

Strikingly, there is no dominant path to the White House among the forty-five presidents. A starting career as an attorney is the only career path most presidents have chosen. The last president to serve in the military was George W. Bush, who served in the Texas Air National Guard. As new generations of candidates not subject to the draft emerge to run for president, the number of presidents with military service may decrease. The last party nominee for president with extensive military experience was John McCain in 2008, who was a pilot in the U.S. Navy during the Vietnam War.

When choosing a president, voters consider the strengths of each candidate and how the candidate's strengths match those of the previous president. Professor Stephen Skowronek studied presidential history and found a **political time** cycle where the nation's politics chooses which characteristics

***Political time:*** *a theory that the public prefers presidents with various leadership styles based on the political climate and the former president's leadership style.*

voters will most likely prefer (see **Figure 4.3**). As expected, popular presidents can often handpick their successors. However, the amount the nation changes course in its policy direction is based on how voters view the previous administration's success with the economy or with national security threats.

Interestingly, each administration's likely leadership type depends on the popularity of the president's party across the nation and the relationship each presidential candidate has with their party's establishment. Stephen Skowronek's study of presidential transitions identifies four broad categories for what type of leadership is likely from a president—be it offering a new vision for the presidency, articulating the current goals of the president, defying past expectations, or offering a new policy agenda.

When this typology is matched with political time cycles, a distinct sequence predicts an administration's tone based on the preceding election. The cycle begins anew with a reconstructive president whose personality and vision transform national politics. The vice presidents of reconstructive administrations are frequently elected later to continue the new and popular vision (Roosevelt & Truman; Reagan & Bush). However, a party has difficulty holding the presidency for more than three terms because challengers attempt to preempt an established regime by pointing out policies the current administration neglects (Eisenhower, Nixon, Clinton, and Obama). The election following a preemptive presidency tests the long-term strength of the previous reconstructive presidency. If affinity for a recent transformative leader exists, the nation may elect a faithful servant, as happened in 2000 when George W. Bush was elected to carry Ronald Reagan's torch. Alternatively, an election could reject the agendas of the previous president and of the opposition party's establishment and instead elect a disjunctive president. Donald Trump's candidacy in 2016 signaled a disjunctive presidency because Trump was outside of the party's establishment and Reagan's orthodoxy, and he was a clear alternative to continuing President Obama's policies.[1]

**Figure 4.4** shows how recently presidential candidates served in a position before becoming president. Although most presidents were experienced politicians, five presidents have been political amateurs with no prior elected experience. Among those five, Zachary Taylor (Whig), Ulysses Grant (R), and Dwight Eisenhower (R) were generals in the U.S. Army. Herbert Hoover served as the secretary of commerce before becoming president. In 2016, Donald Trump was elected and became the first individual to become president without prior governmental service.

## Winning the Election

A presidential election is a two-stage competition occurring in all fifty states to select one winner. In 1845, Congress set a first stage that involves counting all the ballots in a state on the first Tuesday of November. To be elected president, a candidate must then receive a majority of the votes from the Electoral College. Electors for the Electoral College meet within each state in December, usually in the state's capitol, to cast the state's votes for president. The

FIGURE 4.3

## Cycles of Presidencies in Political Time

| Category | Description | Example |
|---|---|---|
| **Reconstructive Presidency** | Reconstructive presidents come to office with a wide mandate after winning numerous states in the Electoral College that their party had not previously won.<br>• *They are popular enough to defeat the prior majority party and have long coattails to bring new members to Congress.* | These presidents are often seen as great because they are popular and give their political party a new vision.<br>• *Franklin D. Roosevelt*<br>• *Ronald Reagan* |
| **Articulation Presidency** | Articulation presidents are faithful to the party and gain popularity by delivering policies that bring the vision of reconstructive presidents to life.<br>• *Harry Truman*<br>• *George H.W. Bush* | These presidents are often close to the party establishment and are powerful in Washington. |
| **Preemptive Presidency** | A preemptive president often comes to power from the fringe of the party not in power to defeat the party in power.<br>• *The new president offers a different perspective than the status quo.*<br>• *The new president's ideology is not clearly articulated but disrupts the normal order of national politics.* | These presidents often serve one term because they struggle to find support from the party establishment and the electorate.<br>• *Jimmy Carter*<br>• *William J. Clinton*<br>• *Barack Obama* |
| **Faithful Servant Presidency** | A faithful servant president returns to the policies of previous reconstructive and articulation presidencies.<br>• *The president is likely well connected to the previous administrations.*<br>• *However, the president does not begin with the same electoral mandate their predecessors had.* | The presidents' views may appear to be orthodoxies aligned with past administrations.<br>• *Lyndon B. Johnson*<br>• *George W. Bush* |
| **Disjunctive Presidency** | Disjunction presidents are supported by party elites, but the presidents' views do not match most of the electorate.<br>• *Political competition and the party's changing views often challenge the power of the sitting president.* | These presidents represent shifting party priorities and may be the end of a regime.<br>• *Richard Nixon*<br>• *Donald Trump* |

FIGURE 4.4

## Office Held Prior to Presidency or Nomination

The following information shows how recently presidential candidates served in a position before becoming president. The left column identifies the most recent president to hold such a position, and the right column provides similar details for party nominees who were not elected.

| Service/Office | Most Recent Example to Become President | More Recent Presidential Nominee |
|---|---|---|
| Vice President | George H.W. Bush was vice president from 1981 to 1989 and became the 41st president after winning the 1988 election. George H.W. Bush was deemed the most qualified candidate for president because he had served as a U.S. Representative, ambassador to the UN, ambassador to China, director of the CIA, and vice president. | Al Gore was the Democratic nominee in the 2000 election after serving eight years as vice president (Joe Biden is a candidate). |
| Cabinet | Herbert Hoover was the secretary of commerce in the Harding and Coolidge administrations (1921–1928). | Hillary Clinton was secretary of state from 2009 to 2017. |
| Diplomat | George H.W. Bush was the liaison in Beijing for President Gerald Ford (1974–1975). | |
| Federal Judge | Before becoming president in 1909, William Taft served eight years as a federal judge on the Sixth Circuit Court of Appeals. | In 1916, Charles Hughes resigned from the U.S. Supreme Court to accept the Republican nomination for president. |
| Governor | George W. Bush (R-TX) was in his second term as governor of Texas when he was elected as the 43rd president in 2000. | Mitt Romney (R-MA) was governor of Massachusetts (2003-2007) prior to winning the Republican nomination in the 2012 election. |
| Senator | Senator Barack Obama (D-IL) became the 44th president after being a senator for four years. | Hillary Clinton was a senator of New York. |

Electoral College has always held the authority to choose who a state will support for president, and each state has rules that govern how votes are distributed. The following describes some rules to know.

## Selection of Electors

Each state legislature can select the members of the Electoral College on behalf of its citizens. Early on, the electors were trusted to select the most worthy president regardless of public input. This was a solution to select the best leader among multiple candidates and to limit the decision to individuals with the best knowledge of the candidates. However, the process did not

always respond to the public's wishes. People were concerned that a state legislature that was controlled by a party that differed from the candidate who won the popular vote would choose electors who would select a candidate supported by most state legislators. This concern increased when party machines were strong and tried to manufacture election outcomes.

Today, state legislators propose slates of electors. Depending on which candidate wins the state's popular vote, the corresponding slate of electors will be seated at the Electoral College meeting. This way, state legislators can select the Electoral College, and the Electoral College participants reflect the wider public vote. This process is handled independently by the states, so the Electoral College cannot coordinate to select a specific winner.

In the presidential election of 1824, the Electoral College did not select a winner because none of the four leading candidates received a majority of the votes. The candidate with the plurality of the votes was Andrew Jackson, followed by John Quincy Adams, William Crawford, and Speaker of the House Henry Clay. When the Electoral College fails to give one candidate a majority of the votes, the House of Representatives can select the next president. In 1824, the House considered the top three candidates. This meant the fourth-place candidate, Henry Clay, could return to his post as speaker of the House and lead the vote for president. This episode receives a lot of attention among historians because the House elected John Quincy Adams (second place) over the more controversial General Andrew Jackson (first place).

In close elections, the state must also certify the election before the **safe harbor** deadline so the state legislature knows which slate of candidates to seat. During the 2000 election, Florida's results were so close that some counties were asked to have mandatory recounts. Miami-Dade County conducted an electronic recount whereas Broward, Palm Beach, and Volusia counties initiated a slower hand recount to evaluate each ballot. A number of lawsuits ensued the month after the election to speed up and to slow down the recount, but a decision needed to be made before the safe harbor deadline. An extended recount would have proven to the public who received the most votes, but Florida would not have been able to vote in the Electoral College. Rather than giving the presidency to Vice President Al Gore, that would have sent the vote to the House of Representatives—which was controlled by a Republican majority.

***Safe harbor:*** *the deadline by which a state's election results must be certified so that electors in the state's Electoral College meeting can cast their votes.*

## Counting Electoral College Votes

In many states, counting votes in the Electoral College's December meeting is a formality. These thirty states have strict laws that force electors to follow the people's wishes. In Washington state, if an elector who pledged to vote for a candidate does not support that candidate, they are deemed a faithless elector. The punishment for being a faithless elector in Washington state is a $1,000 fine, and an alternate elector will replace the vote. This risk is relatively low regardless of each state's rules because state leaders choose loyal partisans, and most of the time the party's base supports the party's nominee.

Among the thousands of past electoral votes, only 157 votes nationwide have ever been cast differently than how the public voted.

In Maine and Nebraska, the Electoral College's outcome is also easy to predict based on the popular vote. These states distribute their Electoral College votes in a more representative way by dividing the votes based on which presidential candidate won each congressional district. The two additional votes go to whomever won the statewide average. The Obama-Biden campaign clearly exemplified this when it followed the **electoral college strategy** of winning every elector possible and expended considerable effort to win votes in Omaha, NE. By winning the most votes in the congressional district with the state's largest city in 2008, Barack Obama became the first Democratic nominee for president to gain an Electoral College vote from Nebraska since 1964.

***Electoral College strategy:*** *a campaign strategy to give the candidate the best opportunity to win enough votes in the Electoral College by winning states that traditionally support the party and battleground states that prefer the candidate.*

Another important part of the 538 votes in the Electoral College are the three votes given to the District of Columbia. Washington, D.C.'s representation in the vote for president was established by the Twenty-third Amendment (1961), which gives D.C. citizens the same Electoral College v otes as if it was a state. Since the 1964 election, D.C. has been given three votes to cast for a candidate, and the population has never grown large enough to demand a fourth vote.

## Electoral College Strategy

Of the 538 available votes in the Electoral College, a winner must gain 270 to become president. Forty-eight states use a winner-take-all rule to distribute their votes—Maine and Nebraska distribute their votes based on who won congressional districts. Knowing these rules, presidential candidates often adopt broad strategies to strengthen their likelihood of victory. These strategies often reflect each state's political climate and the candidate's evaluation of their own leadership characteristics.

### Battleground States

***Swing state:*** *a state that has voted for either of the two major parties in the past five elections.*

Political scientists identify **swing states** based on their voting history for each party's presidential nominee in the last five elections (see **Figure 4.5**). A state that supports the same party nominee for five consecutive elections is considered a safe state. States that supported candidates from multiple parties are considered swing states. States can also be classified as base, marginal, or battleground based on how political experts evaluate the long-term competitiveness of past elections in the state and how political opinions and participation may change to make a state more competitive. A **battleground state** designation can change from year to year, so these lists may include states where a party has a chance even if it has not won for a decade. In 2016, for example, Pennsylvania had long been considered a battleground state because it was competitive, despite not having voted for a Republican since 1988 (for six elections).

***Battleground state:*** *a state that is electorally competitive during the presidential election.*

To win elections, candidates spend more time and expend more resources campaigning in swing states and battleground states. To engage the base, candidates invest resources to persuade voters in states that marginally

**FIGURE 4.5**

## List of Swing States in 2020

*Electoral votes allocated to each state and D.C. in parentheses*

| Safe Democratic | Swing State | Safe Republican |
|---|---|---|
| California (55) | Arizona (11) | Alabama (9) |
| Connecticut (7) | Colorado (9) | Alaska (3) |
| Delaware (3) | Florida (29) | Arkansas (6) |
| Washington, D.C. (3) | Indiana (11) | Georgia (16) |
| Hawaii (4) | Maine (4) | Idaho (4) |
| Illinois (20) | Michigan (16) | Iowa (6) |
| Maryland (10) | Missouri (10) | Kansas (6) |
| Massachusetts (11) | Nebraska (5) | Kentucky (8) |
| New Jersey (14) | Nevada (6) | Louisiana (8) |
| New Mexico (5) | North Carolina (15) | Montana (3) |
| New York (29) | Ohio (18) | North Dakota (3) |
| Oregon (7) | Pennsylvania (20) | Oklahoma (7) |
| Rhode Island (4) | Virginia (13) | South Carolina (9) |
| Vermont (3) | Wisconsin (10) | South Dakota (3) |
| Washington (12) | | Texas (38) |
| | | Tennessee (11) |
| | | Utah (6) |
| | | West Virginia (5) |
| | | Wyoming (3) |

support their party and historically vote for the party's nominee. If a candidate cannot expect to earn 270 votes from safe and marginal states, candidates often campaign in all battleground states that are swing states to improve their chances of winning.

A candidate's aggressiveness in their Electoral College depends on the candidate's resource advantage and the risks the candidate is willing to take. In 2008, the Obama campaign tried to win every vote possible in the Electoral College. Remember the story about campaigning in Omaha, NE? In the same campaign, Obama's team was very active in safe Republican states like North Carolina and Georgia. When John McCain's lead in these safe Republican states started to diminish, the McCain–Palin campaign reallocated resources from swing states into keeping their leads in Georgia, North Carolina, and Virginia. Obama's extra focus on energizing new voters helped him win all of the Electoral College votes in Virginia and in North Carolina. This was historic

because Virginia had not voted for a Democratic nominee since 1964, and North Carolina—a state Obama won with 14,000 more votes than McCain—had not voted for a Democratic nominee since 1976.

## Balancing the Ticket

Since the ratification of the Twelfth Amendment (1804), the Electoral College has voted on nominees for president and vice president as if they were on one ticket. This prevented the past difficulties of political rivals serving together, as President John Adams and Vice President Thomas Jefferson did. Thus, citizens had to choose a team to trust with executive leadership instead of one individual. Candidates have designed their Electoral College strategies using the choice of a vice president to enhance regional representation and to bolster the public's trust in a nominee.

In 1960, the Democratic Party had two factions that represented the ideological differences between two regions where the party was strong (the North and the South). Junior Senator John F. Kennedy (D-MA) was leading the race to become the Democratic nominee for president. The party leaders were mainly concerned that Kennedy would not be electable if he could not win southern states. Kennedy's solution in 1960 was to ask his opponent for the nomination, Senate Majority Leader Lyndon Johnson (D-TX), to be his running mate. The strategy successfully persuaded undecided voters to vote for Kennedy and Johnson, especially those impressed by Johnson's leadership in the Senate and his close relationships with other Democratic leaders in the South.

Using Johnson to balance the ticket with regional appeal and experience proved successful. The Kennedy-Johnson ticket won 303 Electoral College votes in twenty-two states (including Alabama, Arkansas, Georgia, Louisiana, North Carolina, South Carolina, and Texas). The Nixon-Lodge ticket won twenty-six states, but without the support of southern states Nixon only won 219 Electoral College votes. The 1960 election also reaffirms that the percentages of each candidate's Electoral College votes are not comparable to the percentage of votes cast for a candidate. This election was among one of the closest in American history, with Kennedy-Johnson winning only 112,827 more votes than Nixon-Lodge.

Recently, President George W. Bush, President Barack Obama, and President Donald Trump also selected running mates whose leadership experiences complemented their own inexperience. As an outsider, how can a governor of Texas best gain the public's trust to manage the large federal bureaucracy and military? George W. Bush nominated Dick Cheney as his running mate. Cheney had previously been appointed as the chief of staff to president and secretary of defense in previous Republican administrations. Senator Obama faced similar questions about trusting a young legislator to understand the nuances of diplomacy. As the Democratic nominee for president, Obama selected Senate Foreign Relations Committee Chairman Joe Biden as his running mate. Most recently, Donald Trump, a businessman without political experience, selected Governor Mike Pence (R-IN) as his running mate because of Pence's experience as an executive and as a legislator, specifically Chair of

the House Republican Conference (2009–2011). In each case, the choice of running-mate signaled that an advisor would help the president with issues the public cares about.

### Is the Electoral College Representative?

The Electoral College can appear dated, but it was designed so states could select the president and provide another role for federalism in the U.S. political system. As more people received the right to vote and elections have become more fair, states changed their laws so the Electoral College's outcome reflects fifty-one elections for president. However, when citizens vote for president every four years, they cast a ballot to support the slate of electors selected to support that candidate. Moreover, the Electoral College is not designed to select the candidate with the most votes. The candidate with the most votes from people has lost the presidency four times (in 1876, 1888, 2000, and 2016). In each case, the election was competitive between the leading candidates. Only Samuel Tilden in 1876 won a majority of the popular votes cast in addition to winning the most votes of the people of those that lost the presidential election.

Some arguments claim that the Electoral College doesn't reinforce Democracy.

- Each state receives three Electoral College votes regardless of size, so small states receive greater representation.
- The winner-take-all rules of most states mean candidates give less attention to safe states, so the policies important to swing states are more likely to be national priorities.
- The Electoral College does not always produce a winner (e.g., 1824).

However, dismantling the Electoral College would require three-fourths of the states to ratify a Constitutional amendment. Alternatively, states have begun passing laws to compel state legislators to select electors who will vote for the candidate who wins the national popular vote, regardless of how the state votes. This movement is the National Popular Vote Compact. Fifteen states have passed a law instructing their Electoral College meetings to support the popular vote winner as long as there are enough states to control 270 Electoral College votes **(Figure 4.6)**. Maine and Nevada voted on the National Popular Vote Compact in 2019, but it did not pass.

**FIGURE 4.6**

**States Supporting the NPVC**

*(196 Electoral Votes)*

California
Colorado
Connecticut
Delaware
District of Columbia
Hawaii
Illinois
Maryland
Massachusetts
New Jersey
New Mexico
New York
Oregon
Rhode Island
Vermont
Washington

## Term Limits and the Lame Duck

How long does a president serve? Two examples and the Twenty-second Amendment to the Constitution can provide the answer. President George Washington set the norm of presidents serving only two terms when he declined to seek a third term and allowed power to be given to a newly elected leader. However, no rule restricted a president from seeking another term. President Franklin D. Roosevelt ran for the presidency and won in 1932, 1936, 1940, and 1944—becoming the only president who will ever be elected four consecutive times. In 1951, the states ratified the Twenty-second Amendment to ensure that any incumbent

Source: "President Obama with Cuban President Raúl Castro at Estadio Latinoamericano in Havana, Cuba," by U.S. Department of State, 2016

**FIGURE 4.7** President Barack Obama and Cuban President Raúl Castro watch the Cuban national team and the Tampa Bay Rays play an exhibition game in Havana during a visit to normalize relations between the two counties in 2016.

president only ran for reelection once. Any former president could run for office again, but they would need to leave the White House for at least one term.

A political consequence of limiting presidents to two terms is the president's lack of public accountability in the second term. Moreover, after the first two years of a second term, presidents have less political leverage to pressure Congress into action. As passing new reforms in domestic politics becomes more difficult, many presidents spend their last two years in office building their legacy by working on foreign policy goals. In 2014—the sixth year of his presidency—President Obama and Cuban President Raul Castro announced a two-year goal to allow U.S. investments in Cuba to promote its economy **(Figure 4.7)**. President Obama could not completely lift the embargo between the U.S. and Cuba that started in 1961, but a deadline for a formal agreement was set for March 2016—the last year of President Obama's second term.[2] This executive agreement reopened the United States' embassy in Cuba, opened tourism to the island, and allowed U.S. tourists to bring a limited amount of Cuban cigars and rum to the United States. The travel and trade embargos with Cuba are still active, but President Obama's executive action brought the U.S.–Cuba relationship from the Cold War to the modern era.

A lame duck period can be seen from various perspectives during a president's term in office. For a one-term president, the lame duck period begins when people officially know the president will not stay in office. This often occurs the day after an election is lost because the president remains in office from Election Day until the next inauguration on January 20 to facilitate the transition to the next president. Of the forty-five presidents, fourteen have been elected to a second term, and the lame duck period emerges in two waves. As with President Clinton, the president's power to persuade Congress initially diminishes during years seven and eight. Then, the final lame duck session begins when the president's successor is known—as also happens for one-term presidents—when the president will start handing off power during the transition.

# Presidential Power

The presidency is central to the federal government's activities because presidents initially implemented the laws passed by Congress and represented state interests if Congress passed objectionable laws. Article 2, Section 1 denotes that the president is chosen by the states, although Section 4 states that Congress may remove the president via impeachment. Because the Constitution gives states and other institutions considerable oversight of the presidency, the president's authorities given in Sections 2 and 3 are vague. Therefore, presidential power has expanded incrementally through the popularity of leaders and the inability of Congress and the states to limit executive power.

The constitutional presidency offers a basic framework for exceedingly limited presidential power. Within the term of office, a president cannot initiate wars or policy. However, a president is trusted as the commander in chief to implement a strategy to keep the public safe within the boundaries that Congress allows. As the only recognized leader of the country, the president can also negotiate treaties with leaders of foreign nations, even though such treaties must be ratified by the Senate. Similarly, the president can nominate leaders to run the agencies tasked with implementing policy and nominate judges to fill vacancies on the federal court. Again, these nomination powers are only influential if the Senate confirms the president's nominees. The president's single unchecked power is the ability to **pardon** a federal criminal from their sentence.

***Pardon:*** *the executive power to end the sentence for a criminal.*

The powers of the presidency may appear benign and unattractive, but experience has taught presidents where Congress will delegate additional powers to the presidency. As the commander in chief and the head of state, presidents have strong relationships with foreign leaders and access to information regarding foreign policy. Congress began to defer to presidential recommendations on foreign policy more often than on domestic policy because voters likely have stronger opinions about national taxes and workplace regulations than about foreign aid. Thus, presidents began proposing domestic policy separate from foreign policy, creating a **dual presidency** where presidents can count foreign policy among their contributions.

***Dual Presidency:*** *the theory that presidents have more latitude in leading foreign affairs than in domestic policy.*

## Leveraging Power from a Few Tools

Although presidents have fewer enumerated powers than Congress, presidents can expand their power via their reputation and interpretations of the law. A frequent and successful argument for expanding executive powers is that the **Take Care Clause** compels the president to act in times of crisis or new policy decisions. Under the Take Care Clause (Article 2, Section 3), the president shall faithfully execute the laws of the United States. This allows a president to cite existing law to resolve a problem without Congress passing a new law. Before the 1940s, presidents were frequently free to make policy decisions if Congress was not in session, which created precedents for executive action before federal agencies took on even more responsibility to interpret how policies should be implemented.

***Take Care Clause:*** *a clause in Article 2 of the Constitution that states the president can implement the nation's laws. The clause's broad language has been interpreted to support centralizing power within the presidency in the event of a national crisis.*

Presidents also have the power to negotiate with Congress about how laws should be written. This is how a president's power reflects the president's reputation for holding consistent views. The **veto** is one legislative power Article 1 gives to a president, but it is a negative power that can only reject a potential law. The president's veto can be overridden if the House and the Senate pass the bill again with over a two-thirds vote. To negotiate a law's writing with Congress, presidents issue a veto threat to oppose a certain proposal, so the issue can be changed before the bill is passed. A **veto threat** suggests that the bill will be vetoed if the president's objection is not corrected. Therefore, members of Congress must use presidents' reputations to judge their commitment to certain policy actions.

***Veto:*** *the president's rejection of legislation that has been passed or enrolled by the House and the Senate.*

***Veto threat:*** *a rhetorical statement or formal Statement of Administration Policy where a president's administration outlines why the president will likely veto a bill. A veto threat while the House and Senate are debating a bill is a negotiation tactic to encourage legislators to amend the bill in a way the president would support.*

Should a president decide Congress's bill is flawed but a veto would not be the appropriate action, the president still has options. An executive **signing statement** gives the bureaucracy explicit directions on how to implement a policy. When presidents add a signing statement to a law, they frequently identify a constitutional reason for ignoring a section of the law. These signing statements do not allow presidents to revise the law Congress passes, so the next president can implement the law as it is written or as it was interpreted by the previous administration. Signing statements are not formal documents, but they are legitimate legal documents because they offer judges a written description about a president's intent to implement a law, which is the executive's role under Article 2.

***Signing statement:*** *an additional letter that presidents draft when they sign a bill into law that clarifies how the president wants the bureaucracy to interpret the new law. Although signing statements are not legal documents, the administration can identify a constitutional reason the administration will not follow specific sections of the law.*

## Power Delegated by Congress

**Statutory law** has delegated some congressional authority to the president, increasing the executive's power. Throughout history, the delegated authority has been most commonly related to budget policy and national security. The presidency took on more responsibility between 1921 and 1973, when Congress increased the president's staff to strengthen the executive's power during crises.

***Statutory law:*** *federal statutes are laws passed by Congress and approved by the president.*

Congress established the Bureau of the Budget within the U.S. Treasury in 1921 to help establish annual budgets for federal spending. The crisis at the time related to the national debt after World War I and the inability of representatives and senators to cut federal programs because many programs were tied to jobs in their districts. Later, the Bureau of the Budget became part of the **Executive Office of the President** and its name changed to the Office of Management and Budget. This office currently produces the federal budget, which is the president's request to Congress for federal spending. The federal budget is not a piece of legislation, but it does reveal to legislators the president's policy priorities and where cuts in federal spending are possible.

***Executive Office of the President:*** *the staff who work for the president and are not subject to Senate confirmation. These offices include the White House Office, the Office of Management and Budget, and the Office of the Vice President.*

In 1973, Congress passed the War Powers Act in the wake of the Vietnam War to curtail the president's power as commander in chief. Under the law, presidents must alert Congress of any troop deployment within forty-eight hours. Troop deployments without congressional approval were not to last more than sixty days. Presidents saw a loophole in these limitations and began initiating small-scale military actions without formally declaring war.

As necessary, the commander in chief could deploy troops to other counties to bring peace to a region before informing Congress of the decision. The law unintentionally flipped the pressure of troop deployments from presidents asking for permission to Congress having to vote to bring them back. Thus, the last time Congress approved military action prior to deployment was the Gulf of Tonkin Resolution in 1964. From now on, America is unlikely to declare war but instead will authorize the use of military force.[3]

A major constitutional question arose in 1996 when a Republican Congress delegated the power of the **line-item veto** to President Bill Clinton. The Line Item Veto Act allowed a president to strike certain spending programs without vetoing the entire bill. This power could be used to reduce deficit spending. The law did not allow presidents to add programs, but they could eliminate provisions that the House and Senate could not agree to cut. However, the law was ruled to be unconstitutional in *Clinton v. City of New York* (1999) because Congress cannot delegate legislative authority under the Constitution to the executive branch.

***Line-item veto:*** *the president's power to strike spending programs from legislation after the bill is enrolled by the House and Senate. This power was ruled unconstitutional because the president cannot write legislation (*Clinton v. New York *(1998)).*

## Strategies to Lead

Presidents use multiple effective leadership styles to manage the responsibilities of leading the nation and often leverage other institutions to act as the president would like. For example, President Obama began his term with the goal to enact a new law to expand access to health care. This task proved difficult because only Congress can write legislation, initiate new taxes, or regulate interstate commerce. To fulfill his pledge to the American people, President Obama had to persuade members of Congress to draft a bill, and he had to persuade Speaker of the House Nancy Pelosi (D-CA) and Senate Majority Leader Harry Reid (D-NV) to help pass this landmark bill. The Obama administration planned to persuade legislators by meeting with them directly, by travelling the country to speak to the people, and—when necessary—by taking unilateral executive action. Each of these three actions match the most common theories of presidential behavior.

One point to remember is that the presidency has modernized as an institution. Prominent presidential scholar Richard Neustadt (1976) defines the modern presidency as starting with Franklin D. Roosevelt's administration.[4] The presidency specifically changed with the expansion of the executive branch through the Administrative Procedures Act of 1939, which enacted solutions from the Brownlow Committee to enhance the size and expertise of agencies to meet the country's complex needs. Scholars agree that reorganizing agencies and creating new ones started the modern era of the presidency, but the change did not occur overnight. The White House Office's staff continued growing through the 1970s, even though Congress was the center of power in Washington. Therefore, executive powers have grown over time via the president's ability to bargain with Congress and use the executive branch's size to leverage additional power.[5]

## Power of Persuasion

As the head of the party, a president often has a central role in negotiating the goals of individual representatives and senators while trying to implement a major policy. Historical accounts from Johnson's presidency note that the president often kept a list of each legislator's requests and what he could provide. By allying with legislators or extending favors, presidents can encourage Congress to prioritize the issues the president campaigned on (Neustadt, 1960).

In 2009, President Obama identified Senator Arlen Spector (R-PA) as a potential ally in passing a new health care law partly because President Obama had won Pennsylvania in the 2008 election and Senator Spector would seek reelection there in 2010. In addition, Senator Spector was known as a moderate committed to pragmatic improvements in U.S. health care. The president and the senator from Pennsylvania frequently met in the White House to discuss Senator Spector's possible vote to support the Affordable Care Act. Spector was not quick to agree because he faced opposition from some Pennsylvania Republicans, but his visits to the White House enhanced his reputation as a prominent leader in Washington. For President Obama, finding a bipartisan ally was worth waiting for. These intimate meetings allowed Obama to get Senator Spector to vote for the Affordable Care Act, and expectations were exceeded when Senator Spector switched parties to become a Democrat in 2009.

Presidents do not always have time to individually persuade legislators to support agendas, so it typically happens only for the most important issues. One way to identify issues in the president's agenda is to see what policy issues the president introduces in the State of the Union speech. Each year, the president can address both chambers of Congress to declare what has been accomplished and what goals lie ahead.

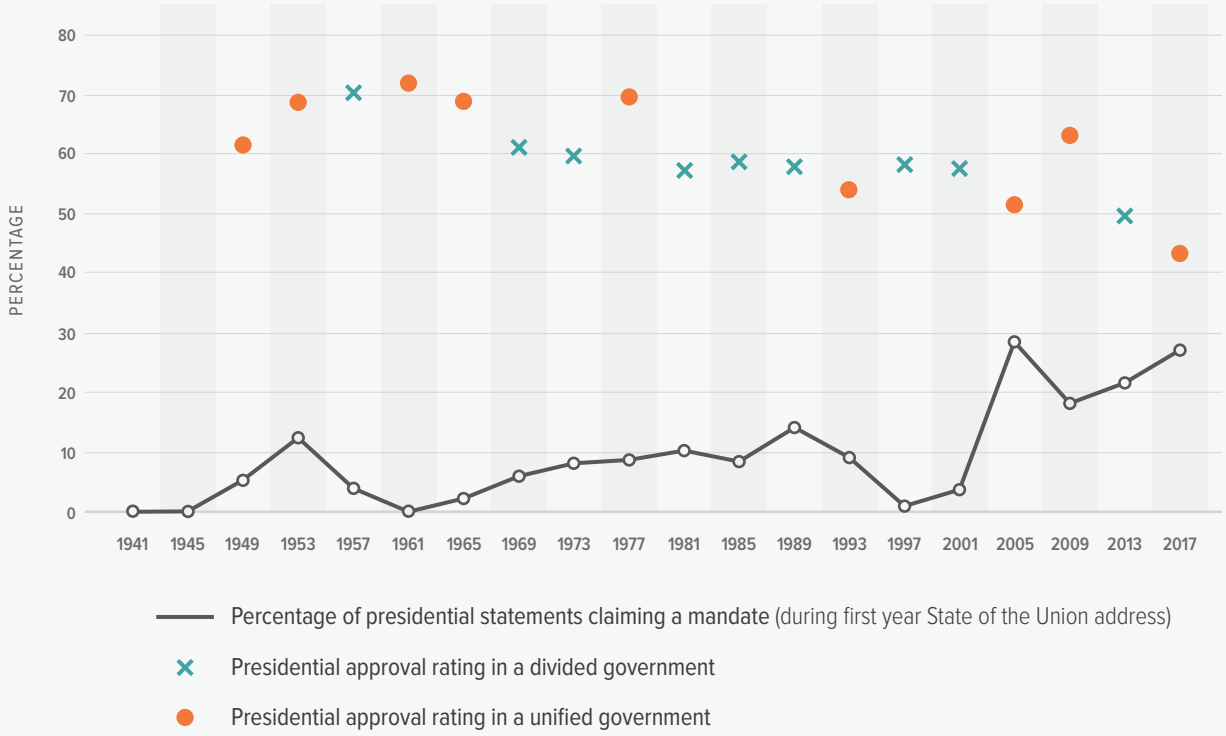
Presidents are most successful when they are popular and their requests can be justified as campaign promises. Therefore, new presidents may not be able to establish a clear agenda if they made multiple campaign promises. Less-popular presidents are more likely to have to remind Congress and voters that the president has a mandate to enact new policies (Azari, 2014). This trend becomes clear when studying how many presidential statements in a State of the Union during a president's first term claim that a president has a mandate to take action **(Figure 4.8)**.

## Timing and Presidential Popularity

Presidents typically have a limited window to enact policies they feel mandated to pursue. A president's first one hundred days in office are critical to setting the agenda for an administration's first two years. Reconstructive presidents frequently come into office with large electoral mandates and a new large majority in Congress. This means freshman legislators who benefitted from their affiliation with the new president's party are expected to be loyal to the administration in Congress, which adds pressure to congressional leaders and increases the likelihood Congress will defer to the executive. Thus, while they can use

**FIGURE 4.8**

## Mandate Statements in Each President's State of the Union Address




Source: Gerhard Peters and John T. Woolley. "The State of the Union, Background and Reference Table," by The American Presidency Project. Ed. John T. Woolley and Gerhard Peters. Santa Barbara, CA: University of California. 1999-2019.[6] "Presidential Job Approval Center," by Gallup, 2019.

electoral mandate as leverage, presidents send Congress their highest policy priorities on the first day of office and expect swift action to pass legislation.

The first one hundred days also represent a **honeymoon period** for presidents and the nation. The honeymoon relationship results from the added popularity and legitimacy the president-elect receives following the inauguration. During these months, Congress members are likely to defer to the president to build a relationship with the new executive and signal their power in Washington. A president's popularity during the honeymoon period diminishes due to political battles while the president tries to enact policy priorities.

Unexpected events can also temporarily elevate a president's popularity. If the economy destabilizes or falters (e.g., the Great Depression or Great Recession), the public often blames the president and his or her popularity will decrease. However, the public more carefully evaluates the president with respect to unpredictable crises and idiosyncratic events, such as terrorism, violence, and natural disasters. The nation often turns to the president for direction during crises, which is known as the **rally-around-the-flag** phenomenon. People are socialized to reflect on priorities during a crisis, so some

***Honeymoon period:*** *the beginning of a presidency (often the first one hundred days) when a president gains popularity and legitimacy as a new leader and has not angered a section of the electorate with specific decisions.*

***Rally-around-the-flag:*** *the increase in public approval for the president following an unexpected and tragic event that catches the nation's attention. Extended popularity follows the public's approval of the president's response to a crisis.*

people temporarily support presidents when they help victims heal or identify a problem within our culture. presidents are the focus of national political discussions, so they are also likely to receive appreciation for healing the nation—not Congress. Like the honeymoon period, a rally-around-the-flag effect appears as a sharp increase in the president's popularity that later decays.

## Going Public

If more Americans can name the president of the United States than their local representative, then which voice determines what the public thinks is important? President Theodore Roosevelt used the attention he received to raise public awareness of political corruption and encourage progressive reforms in government. Theodore Roosevelt referred to this power as the bully pulpit because newspapers would print his statements because of the office he held. The media often relies on the executive branch for expert analyses and information about future actions. The White House strategically uses the president's voice to frame what information the media receives and what the public learns about policy.

Despite the bully pulpit's power, presidents depend on what stories and information the media outlets choose to share. Therefore, presidents often try to speak directly to the people. One traditional strategy is for presidents to address the nation from the White House to signal their administration's strength. Presidents have used these formal addresses to share breaking news, which is why President Franklin D. Roosevelt interrupted radio broadcasts to announce the bombing of Pearl Harbor. Presidents also speak from the Oval Office after major achievements, like when President Nixon spoke from the Oval Office about the moon landing. Similarly, President Obama confirmed the death of Osama Bin Laden from the West Wing. These speeches capture the United States' attention but offer few opportunities for presidents to present other goals.

Presidents have also sought ways to speak directly to citizens without the filters and time restrictions of the media. President Franklin D. Roosevelt debuted his fireside chats in March 1933 as a radio address to speak directly to the public about the banking crisis. This speech followed up his inaugural address, and he would go on to give thirty similar addresses to tell the public how the administration was improving the nation. As internet video streaming expanded, the Obama administration established a YouTube channel for the president to give a weekly address about the president's accomplishments and goals. The professional production of President Obama's videos addressing the nation could be used by news channels, and supporters could share them on social media. Regardless of the type of media, presidents have clearly successfully served as the face of national agendas. This gives the president more power to speak as the head of the party and focus how party members in the House and Senate speak about their policy priorities.

Presidents found ways to direct the media's attention, and they cultivated what information to share. These strategies may appear more subtle than the bully pulpit, but both direct the public's focus. Advanced technologies may

suggest presidential behavior has evolved, but finding ways to communicate with voters remains the same. This also explains why President Trump uses Twitter daily to communicate with the public, which differs from how past presidents have worked with advisors to craft intentional messages.

Travelling outside of Washington, D.C., is another tool presidents use to leverage their popularity among the electorate. As the head of the party, presidents shape a party's policy priorities and can raise new policy ideas to win more elections. If a policy is introduced to appeal to new voters, the president will often travel outside of Washington to promote policy ideas. Where a plan or program is announced often reveals who the policy is expected to benefit—probably the voters the party intends to persuade. A recent example comes from President Trump's first year in office when he travelled to Detroit, Michigan. President Trump used Detroit to appeal to Michigan voters (a battleground state he won) by announcing his plan to help companies hire more workers within the United States. President Trump visited on the same day the Ford Motor Company pledged it would not move operations for assembling trucks from Detroit to Mexico. The president's plan and Ford's pledge were not directly related, but making the announcement in Michigan was more likely to capture the public's attention than a statement made in Washington, D.C. This trip to Michigan made constituents and the media compel Senator Debbie Stabenow (D-MI) to work with President Trump for the good of Michigan.

## Unilateral Presidency

The unilateral presidency reflects the governmental actions the president can take without cooperation from Congress. The key is understanding what actions only require executive action and the limits associated with those actions. The key also requires knowing the executive branch's capacity to implement new rules and why a large staff reports directly to the president instead of the office acting as an independent agency.

For domestic policies, unilateral action often involves presidents signing **executive orders** to implement a law in a certain way. To draft an executive order, presidents should cite the statutory law or constitutional responsibility that gives them the authority to take action. The executive order's impact is restricted to the executive branch's reach. For example, President Obama established E.O. 13665 to protect federal employees and private businesses that receive federal contracts or grants if the employees inquire about their pay. The goal was to reduce gender pay inequities where possible, but compliance was contingent on whether a business was also working for the federal government. Another weakness of this order is that the regulation's duration is unknown because an executive order lasts until a law nullifies it or a future president cancels the order.

A similar unilateral action in foreign policy occurs when presidents issue **executive agreements** to formalize diplomatic or trade agreements with foreign nations. An increase in executive agreements has led to a decline in treaties because the United States can enter into international agreements if both nations support it. An instructive example is Agreement 19-315 4.3, where

***Executive order:*** *a unilateral action to instruct federal agencies on how to implement laws.*

***Executive agreement:*** *a unilateral action by the president to sign an agreement with another nation to provide foreign assistance.*

**4.3**

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**Agreement 19-315 between the United States and the Netherlands in regard to land and facility use on Curacao.**

the United States and the Netherlands agreed in March 2019 that the United States can use land and facilities on Curacao island in lieu of foreign assistance for citizens affected by unrest in Venezuela. In this case, neither country knows when the region will be stable, and the Netherlands are not committed to providing the United States with benefits when Curacao no longer needs assistance.

Another unilateral power that avoids checks and balances is the recess appointment. However, a recess appointee's service expires on the last day of the current congressional session. In the 1800s, recess appointments allowed presidents to fill positions in federal agencies to implement national laws if Congress was on an extended break. Therefore, this practice had precedent, but recess appointments have more recently been used to bypass political gridlock. Recess appointments by President George W. Bush and President Obama were controversial because the positions were given to individuals whom senators had objected to via a filibuster. However, the practice has essentially ended because legislators hold pro-forma sessions to avoid recesses if the government is divided and the Senate could confirm nominees with a majority vote. The Supreme Court ruled in *NLRB v. Canning* (2014) that the president could not fill vacancies during pro-forma sessions because the president cannot define a congressional recess.

One unique difference between executive orders, recess appointments, and executive agreements is that presidents have no specific instructions on when to inform Congress about international agreements. The Administrative Procedures Act of 1939 did not specify restrictions on foreign policy, further emphasizing the dual presidency and the executive's diplomatic freedom.

» Even accomplished individuals elected president have found it difficult to lead the nation. In the cycle of presidencies, some presidents' failures to reach their potential are understandable.

## Conclusion

The presidency, like the other branches of government, operates as an institution. Therefore, as interesting as one person's leadership characteristics may be, we must understand the institution that selects the leader—the Electoral College—and the institutional rules that limit a president's ability to immediately respond to public demand. Article 2 of the U.S. Constitution gives the president broad powers, but it is important to remember that the executive branch grew in distinct phases (1789–1938, 1939–1973, and 1974–today) that were shaped by laws Congress passed. The Constitution, statutes, and past executive actions give presidents a basis to interpret the boundaries of possible solutions. What is beyond that presidential power often depends on the political environment. For example, the rally-around-the-flag phenomenon and the deference given to the president during a crisis give presidents opportunities to extend their power when reacting to unexpected events.

Even accomplished individuals elected president have found it difficult to lead the nation. In the cycle of presidencies, some presidents' failures to reach their potential are understandable. First, a president's initial success is tied to the size of their electoral victory. When assigning blame and credit for political achievement, a president's influence is difficult to identify when one person raises the idea, another perfects the vision, and a later president solidifies

the policy. Finally, with today's frequently divided government, presidents no longer get long electoral coattails and large majorities in both chambers of Congress to ease negotiation. Today's politics are rooted in conflict, but presidents have multiple tools to build relationships with legislators and even take action without Congress.

## Key Terms

**Battleground state:** a state that is electorally competitive during the presidential election.

**Coattails:** the additional support candidates on the ballot receive from running during a presidential year. This can be calculated by subtracting the percentage of support a candidate received from the percentage of support the president-elect received in the same area.

**Divided government:** when control of the government is shared by more than one political party. For example, the president may be a Republican and the House may be governed by a majority of Democrats.

**Dual Presidency:** the theory that presidents have more latitude in leading foreign affairs than in domestic policy.

**Electoral College strategy:** a campaign strategy to give the candidate the best opportunity to win enough votes in the Electoral College by winning states that traditionally support the party and battleground states that prefer the candidate.

**Executive agreement:** a unilateral action by the president to sign an agreement with another nation to provide foreign assistance.

**Executive Office of the President:** the staff who work for the president and are not subject to Senate confirmation. These offices include the White House Office, the Office of Management and Budget, and the Office of the Vice President.

**Executive order:** a unilateral action to instruct federal agencies on how to implement laws.

**Honeymoon period:** the beginning of a presidency (often the first one hundred days) when a president gains popularity and legitimacy as a new leader and has not angered a section of the electorate with specific decisions.

**Inauguration:** an event where the president-elect is sworn into office and gives a speech to set the new administration's agenda.

**Line-item veto:** the president's power to strike spending programs from legislation after the bill is enrolled by the House and Senate. This power was ruled unconstitutional because the president cannot write legislation (Clinton v. New York (1998)).

**Natural-born citizen:** a constitutional requirement that the president of the United States must be born in the U.S. or to parents who are citizens of the nation.

**Pardon:** the executive power to end the sentence for a criminal.

**Political time:** a theory that the public prefers presidents with various leadership styles based on the political climate and the former president's leadership style.

**Rally-around-the-flag:** the increase in public approval for the president following an unexpected and tragic event that catches the nation's attention. Extended popularity follows the public's approval of the president's response to a crisis.

**Safe harbor:** the deadline by which a state's election results must be certified so that electors in the state's Electoral College meeting can cast their votes.

**Signing statement:** an additional letter that presidents draft when they sign a bill into law that clarifies how the president wants the bureaucracy to interpret the new law. Although signing statements are not legal documents, the administration can identify a constitutional reason the administration will not follow specific sections of the law.

**Statutory law:** federal statutes are laws passed by Congress and approved by the president.

**Swing state:** a state that has voted for either of the two major parties in the past five elections.

**Take Care Clause:** a clause in Article 2 of the Constitution that states the president can implement the nation's laws. The clause's broad language has been interpreted to support centralizing power within the presidency in the event of a national crisis.

**Veto:** the president's rejection of legislation that has been passed or enrolled by the House and the Senate.

**Veto threat:** a rhetorical statement or formal Statement of Administration Policy where a president's administration outlines why the president will likely veto a bill. A veto threat while the House and Senate are debating a bill is a negotiation tactic to encourage legislators to amend the bill in a way the president would support.

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# 5

Bureaucratic Organizations

Role of the Bureaucracy

Bureaucratic Characteristics

Iron Triangle

President Donald Trump speaks during a cabinet meeting on October 21, 2019, in the Cabinet Room of the White House.

https://www.flickr.com/photos/whitehouse/48937871657

CHAPTER FIVE

# The History of Bureaucratic Principals

**THE CONSTITUTION** does not specify the role or power of the **bureaucracy**. Throughout U.S. history, bureaucratic accountability has included noted (and evolving) public and official responsibilities. Early bureaucratic behavior revolved around a **spoils system** based on familial ties, political favors, and friendships. Prior to the **Pendleton Act**, the bureaucrat's role was mostly seen as part of the "democratization of public service," a process that allowed the voting classes to participate in and benefit from governing.[1]

The law may not dictate bureaucratic subordination to elected officials, but it existed because of the patronage system—a president would not appoint someone who might defy his requests. Conversely, without the protections that came with civil service reforms, bureaucrats might prove more subordinate when their employment depends upon following orders. Nevertheless, the Pendleton Act implemented those reforms, offering a slew of arguments for professionalizing the bureaucracy and enhancing expertise via competitive, merit-based hiring practices. This became especially important as the

***Bureaucracy:*** *a structure of rules that organizes people and is characterized by rule-following, hierarchy, and relationships.*

***Spoils system:*** *the practice of rewarding political supporters with public office.*

***Pendleton Act:*** *a civil service reform that required merit-based hiring and firing for public office positions.*

Source: Andrew Harnik/AP; https://www.wbur.org/onpoint/2017/06/13/piling-on-praise-president-trump

**FIGURE 5.1** President Donald Trump speaks during a cabinet meeting, Monday, June 12, 2017, in the Cabinet Room of the White House in Washington.

national government grew after the Civil War, and both bureaucratic power and expertise were prominent by the time Franklin Roosevelt assumed office. Alas, this development altered the relationship between bureaucrats, elected officials, and the public.

Civil service as a neutral instrument dissolved the old partisan selection process and reversed the legitimizing effect of popular participation in the bureaucracy. As the government's and the bureaucracy's power grew, concerns about bureaucratic legitimacy (and accountability) also grew after World War II. Furthermore, bureaucratic behavior became less accountable to elected officials.

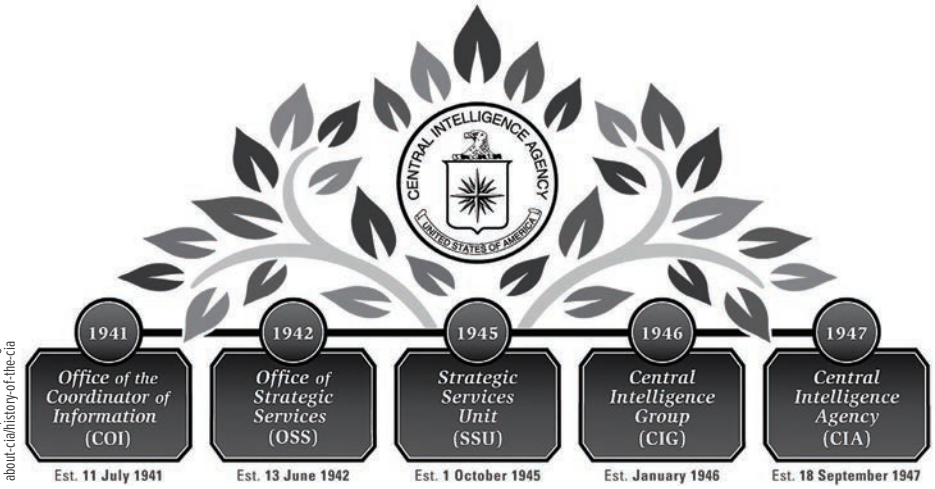
***Neutral competence:*** *the belief that bureaucrats should be hired for being qualified, credentialed, and professional and not their personal allegiances.*

**Neutral competence** was supposed to solve the problem of bureaucratic behavior. Its accountability, legitimacy, and credibility, however, came into question. Some argued that neutral competence may not be realistic, specifically when a bureaucrat pursues the president's agenda. For instance, the New Deal exemplifies how neutrality was used to push agenda-based initiatives. Scholars argue that Progressive-era assumptions of neutrality are flawed because they assume that politics and administrations are mutually exclusive, that bureaucrats are only motivated by competence and efficiency, that bureaucrats are not strategic or human actors, and that bureaucrats avoid responding to elected officials. However, bureaucrats can (and do) respond to politicians, as they sometimes engage in politicized behavior.

Ultimately, accountability derives from rules. A clearly defined policy helps to tell if bureaucrats are doing their job or abusing their power. Consequently, bureaucrats can become rule-bound, which stifles creativity in the job and applies the law more rigidly. This often results from how bureaucracies are organized.

## Bureaucratic Organizations

There are four types of federal bureaucratic organizations: executive departments, independent agencies, regulatory agencies, and government corporations.[2]




Source: https://www.cia.gov/about-cia/history-of-the-cia

**FIGURE 5.2** History of the Central Intelligence Agency (CIA).

## Executive Departments

Fifteen federal executive departments comprise the president's cabinet **(Figure 5.1)**. These include Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Labor, State, Transportation, Treasury, and Veterans Affairs. Cabinet secretaries—presidential appointees—lead each department. The secretaries oversee large, complex federal agencies made up of political appointees and career civil servants.

## Independent Agencies

Independent agencies are congressionally established and independent of executive departments. These organizations typically have a narrow policy focus and are structured similarly to cabinet-level posts—for instance, the president appoints the head. Sometimes, however, they have important autonomy from executive authority. Because Congress establishes them, political reasons often explain the various level some agencies are more (or less) controlled by the president. For example, the president can fire some agency heads at any time (e.g., the director of the CIA), and other leaders have fixed, staggered terms (Federal Reserve Board) designed to overlap presidential administrations. Similarly, some budgets are removed from the control of the Office of Management and Budget, and Congress has established that some—but not all—agencies may be challenged in courts. Independent agencies include the Central Intelligence Agency (CIA) **(Figure 5.2)**, the National Labor Relations Board, and the Federal Reserve Board.

## Regulatory Agencies

Independent regulatory agencies regulate business, industry, and other economic sectors. There are thirty-eight agencies today, including the Consumer Financial Protection Bureau founded in 2011. Most of these organizations are run by a commission of three or more people who serve fixed,

overlapping terms. The president nominates commissioners who are approved by Congress and cannot be fired by the president. This makes these agencies extremely powerful and influential.

### Government Corporations

Government corporations are companies created by Congress to provide public goods that private enterprises cannot profit from. They include AmeriCorps, the Peace Corps, and the United States Postal Service.

## Role of the Bureaucracy

Bureaucrats have latitude in molding laws and rules of governance, and they write the rules for implementing them. Defining and measuring their accountability to the public they serve is an enduring debate. Bureaucrats' power to effectively pursue their own agenda is particularly important in street-level bureaucracy, where discretion is an important facet of the job.

Rulemaking is also an important feature of the bureaucracy. Congress will often pass laws with abstract language, relying on bureaucratic experts to read between the lines and **fill in the gaps** in the implementation's details. As such, rulemaking has a practical impact on how a law works, and these rules rarely come from elected officials. As concerns about accountability have mounted, some argue that Congress has sought to control bureaucracy by imposing procedures that "stack the deck" in favor of constituencies that Congress favors. Congressional dominance theory posits that **fire alarm** oversight (as discussed later) also restricted bureaucratic discretion during rulemaking, as people say agency officials have an aversion to being called before Congress. Notice and comment sessions were designed to include the public during bureaucratic decisions, thus increasing legitimacy and decreasing agencies' risk of future legal challenges. Administrative agencies perform strategic cost–benefit analyses of implementation strategies, including notice and comment sessions and judicial opinions.

***Fill in the gaps:*** *bureaucratic experts read between the lines and write details for policy implementation.*

***Fire alarm oversight:*** *reactive, indirect, and decentralized congressional oversight of bureaucratic agencies.*

### Street-Level Bureaucracy

Lipsky (1980) defines **street-level bureaucrats** as low-level employees who work on the front lines (unlike, for example, career bureaucrats in the federal state department) as the first bureaucrats to face the public.[3] They include teachers, social workers, and the police.

Street-level bureaucrats need a great deal of **bureaucratic discretion** because their work is more than simply applying the law. They exercise informal and discretionary practices to effectively make laws. For example, caseworkers have the discretion to determine eligibility for government services. Other street-level bureaucrats, like the police, use an immense discretion. Formal and informal rules govern police conduct, and behaviors such as arrests are often left to the individual officer's discretion. Officers decide whether someone looks suspicious and ought to be arrested, stopped, or even given a ticket. With

***Street-level bureaucrats:*** *low-level employees who work on the frontlines and are the first to face the public.*

***Bureaucratic discretion:*** *informal and discretionary practices that effectively make the law.*

constant scrutiny, any one of these tasks may prove cumbersome or (perhaps) impossible to perform, which is why the public entrusts them with discretionary privileges. For instance, an **investigatory stop** predicated on reasonable suspicion rather than a traffic violation depends on the officer's actions. Some argue that this power often includes **implicit bias** (i.e., unconscious attitudes and beliefs) and that bureaucratic discretion allows this potential bias to manifest on the streets. These stops are not extralegal because the courts have deemed them constitutional, but they are not written law and in many ways are a creation of law. These discretionary privileges presume that street-level bureaucrats have the power to effectively pursue their own agenda.

***Investigatory stop:*** *a traffic stop predicated on reasonable suspicion of the driver, not necessarily on a traffic violation.*

***Implicit bias:*** *unconscious attitudes and beliefs.*

## Representative Bureaucracy

Donald Kinglsey (1944) created the phrase **representative bureaucracy** to describe the advantages of a civil service that reflects the population it serves.[4] After the Civil Rights movement of the 1950s and 60s, federal policymakers saw the diversification of civil service as a necessary good for implementing Great Society programs.[5]

***Representative bureaucracy:*** *a civil service that reflects the population it serves.*

Since Kingley's publication, scholars expounded upon his idea, adding nuanced arguments about how bureaucrats engage disadvantaged groups and the different forms of representation. Representative bureaucracy traditionally concerns two theories: **active representation** and **passive representation**. Active representation assumes that racial-, ethnic-, or gender-minority bureaucrats will act on behalf of their demographic. Passive representation, however, merely refers to a bureaucrat's demographic trait.

***Active representation:*** *the assumption that a racial, ethnic, or gender-minority bureaucrat will act on behalf of the group they represent.*

***Passive representation:*** *a bureaucrat's demographic trait.*

Over the years, studies have shown that active representation is purposive and true. For instance, bureaucracies that proportionally reflect the population they serve are more likely to be politically responsive. Race has been found to be the "fundamental determinant of the link between passive and active representation."[6] In most instances, minority bureaucrats act to improve conditions for people of their race.

Many studies link passive and active representation. Studies have found that black schoolteachers improve education and expand opportunities for black schoolchildren, that multiracial staffs were essential for successful integration, and that black educators make the best role models for black students.

Selden (1997), however, identifies a more nuanced category of representative bureaucrat. His concept of a  asserts that some bureaucrats see themselves as advocates for disadvantaged groups. In turn, they try to act in the group's interest. Interestingly, the bureaucrat does not have to share a common trait with the group, which can include nonminorities. He found that these "minority representatives" acted in the interests of these groups more consistently than other representatives. Attitudes, values, and beliefs lead individuals to identify as "minority representatives."

Nonetheless, bureaucratic agencies are unique, and some tend to confound this narrative of active representation. Research has found that a political agency's real structure and politics matter. Institutional boundaries often restrict active engagement between bureaucrats and citizens, despite sharing

a common social group.[7] For example, police departments with proportional black representation are *more* inclined to perform controversial practices like racial profiling.[8] Many argue this is because police institutions socialize black officers to eliminate the link between race and representation.[9] This implies that bureaucratic culture replaces the salience of race with police status in the officer's personal identity. This significant discretionary shift is a necessary condition for bureaucrats to act on policy, and the shift indicates a break between certain bureaucrats and active representation.

In recent years, scholars also studied gender's role and its link between passive and active representation. They found that schools with more female administrators and teachers were associated with "higher ACT, SAT, and advanced placement rates for girls."[10] Similarly, female victims of domestic violence are more likely to cooperate with female officers, an important factor in domestic violence cases.

People see a representative bureaucracy as more legitimate and trustworthy. Representative agencies empower a constituency, increase its belief in the system, encourage political and civic participation, strengthen citizens' stakes in their community, and make constituents more compliant.

# Bureaucratic Characteristics

## Culture

Bureaucrats chiefly aim to increase their own power, so they build their culture and characteristics around this aim. Organizations and agencies carry out tasks based on their accepted values and procedures.

Bureaucrats want to maintain their power without appearing imperialistic. They do not want to overreach, preferring instead to concentrate on one mission. Few, if any, want to complicate their job. Organizational culture defines tasks and limits the bureaucracy. Accordingly, an important element of bureaucratic culture is specialization and expertise. Tasks are delegated to experts in a given field, and bureaucrats rely on them (and others) to get the job done. Because many bureaucrats are specialists who care about the work, they have a commitment to policy. Furthermore, they are also expected to adopt the behavior of the agency they work for and ultimately identify with it. For instance, the FBI's depiction in popular media is based on the culture implemented by the agency's first director, J. Edgar Hoover. He required agents to "wear dark suits, white shirts, striped ties, wing-tip shoes and, for a time, hats. They could not grow beards or moustaches."[11] This helped create a culture of conformity. The design formed an identity within the agency, remembered today as "G-Men."

***Agency capture:*** *the process whereby regulatory agencies become influenced by the industries they were established to regulate and start protecting them.*

**5.1**

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**What is Regulattory Capture? Discover who really benefits from regulations.**

## Capture

In the **agency capture** **5.1** process, regulatory agencies become influenced by the industries they were established to regulate and start protecting them. Also called *client politics*, this occurs when "most or all of the benefits

of a program go to some single, reasonably small interest (an industry, profession, or locality) but most or all of the costs will be borne by a large number of people (for example, all taxpayers)."[12]

People debate several benefits and drawbacks of agency capture. Some argue the benefits of (a) more competent regulators, (b) better communication between policymakers and stakeholders, (c) and better candidates for otherwise low-paying public sector work (with possible private-sector work later) outweigh the cons of (a) having private industries hire individuals not for their expertise but for their connections and access to government agencies and (b) giving private industries financial benefits (i.e., rising stock value) when former employees become regulators.

## Oversight

Bureaucrats avoid risk, as it may threaten their power. So, most avoid conflict with political actors or the public. This is why whistleblowers are so rare and receive so much attention. **Whistleblowers** are individuals who publicize corruption or other wrongdoing in the bureaucracy. The most famous whistleblowers include Daniel Ellsberg 5.2, Mark Felt 5.3, Chelsea Manning 5.4, and Edward Snowden 5.5.

Whistleblowers often operate outside normal mechanisms for exposing bureaucratic misconduct. Traditionally, **congressional oversight** is used to monitor agencies' rulemaking, enforcement, and implementation. Bureaucracies are unelected actors, so this system allows the people's representatives to ensure their interests are met.

The two types of congressional oversight are police patrols and fire alarms. **Police patrol oversight** is active (legislators constantly monitor bureaucratic activity), direct, and centralized within congressional committees. Congress rarely employs this form of oversight as it takes time away from policymaking and reelection endeavors. Instead, legislators rely on fire alarm oversight, which is reactive, less direct, and decentralized. In other words, it occurs when something goes wrong.

One example of fire alarm oversight occurs when Congress holds public hearings. This form of oversight benefits the lawmaker because it allows them to take credit for successes (even when agencies' successes are not in the news) and publicly assign blame (and focus attention on the agency) for failures, scandals, or mistakes. Bureaucrats want to avoid public hearings altogether because, as stated, they are risk-averse. They want to avoid public blame for mistakes, for improper public comments, or for appearing incompetent by drawing unwanted attention to their agency. Any of this could risk their power and threaten agency funding.

Various forms of citizen oversight also exist. Citizen advisory councils consider agencies' policy decisions, holding the agency accountable to the public. A **notice and comment** period solicits the public for input on how the agency should write a rule before implementing it. The process **(Figure 5.3)** begins with Congress passing a statute (or law). This law grants a specific agency the authority to regulate certain activities or to accomplish a goal. In

***Whistleblowers:*** *individuals who publicize corruption or other wrongdoing in the bureaucracy.*

**5.2**

**UTTyler.edu/AmGovBook**

**Daniel Ellsberg discusses his role in the movie "The Most Dangerous Man in America."**

**5.3**

**UTTyler.edu/AmGovBook**

**Discover how Mark Felt (disguised as Deep Throat) helped trace the Watergate scandal back to Nixon.**

**5.4**

**UTTyler.edu/AmGovBook**

**Learn about the significance of Chelsea Manning's release from prison.**

**5.5**

**UTTyler.edu/AmGovBook**

**How did Edward Snowden leak NSA documents?**

***Congressional oversight:*** *a system used to monitor agency rulemaking, enforcement, and policy implementation.*

***Police patrol oversight:*** *active, direct, and centralized congressional oversight of bureaucratic agencies.*

***Notice and comment:*** *period by which the public is asked for input on how the agency intends to write a rule before it is implemented.*

FIGURE 5.3

## The Notice and Comment Process

**CONGRESS PASSES LAW**
Law gives an agency authority to regulate activities.

**AGENCY GATHERS INFORMATION**
Information and stakeholder consultation is used to draft a regulation proposal.

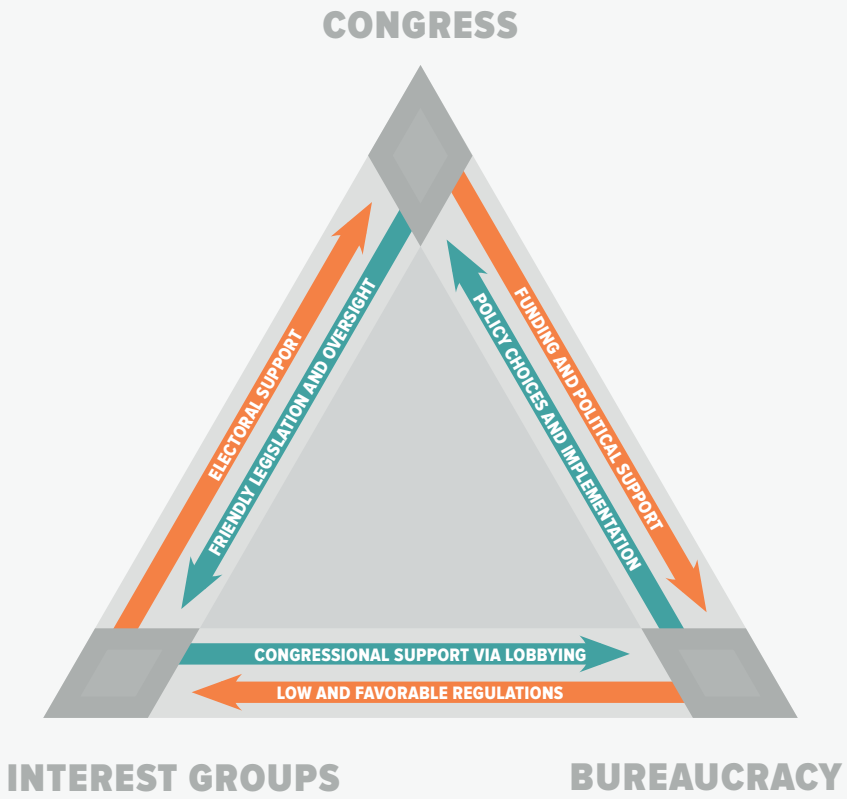
**NOTICE**
The proposal is published on the *Federal Register* to collect comments from the public.

**COMMENT**
The regulation is revised based on substantive public comments.

**AGENCY DECISION**
Rule is published and implemented.

FIGURE 5.4

## The Iron Triangle



fact, the statute may specifically direct that agency to solve a problem through regulation and rulemaking. As such, an agency will gather information and consult with internal and external stakeholders when drafting a new rule or regulation. After collecting the necessary data, the agency will draft a proposed rule or regulation. As a citizen oversight, that proposed rule is then published on the *Federal Register* and the public can comment on it. After a comment period, the regulation or rule may be revised (based on substantive comments given to the agency), finalized, and then published.

**Sunshine laws** open the policymaking process to the public, the **Freedom of Information Act (1966)** allows citizens to obtain copies of most public records, and the **Privacy Act of 1974** gives citizens access to government files on them.

***Sunshine laws:*** *opens the policymaking process to the public by making public documents accessible.*

***Freedom of Information Act (1966):*** *allows citizens to obtain copies of most public records.*

***Privacy Act of 1974:*** *allows citizens access to personal government files.*

## Iron Triangle

The **iron triangle** **(Figure 5.4)** portrays the mutually beneficial, special relationship between Congress, interest groups, and the bureaucracy. Interest groups offer Congress members electoral support (i.e., campaign contributions, voter mobilization, and political advertisements) in exchange for legislation that serves the interests of group members and creates oversight of bureaucratic rulemaking. The bureaucracy offers interest groups favorable regulations in exchange for lobbying support in Congress. Conversely, Congress provides funding and political support for agencies in exchange for policy information, alternatives, and implementation of Congressional lawmaking.

***Iron triangle:*** *the mutually beneficial and special relationship between Congress, interest groups, and the bureaucracy.*

### Key Terms

**Active representation:** the assumption that a racial, ethnic, or gender-minority bureaucrat will act on behalf of the group they represent.

**Agency capture:** the process whereby regulatory agencies become influenced by the industries they were established to regulate and start protecting them.

**Bureaucracy:** a structure of rules that organizes people and is characterized by rule-following, hierarchy, and relationships.

**Bureaucratic discretion:** informal and discretionary practices that effectively make the law.

**Congressional oversight:** a system used to monitor agency rulemaking, enforcement, and policy implementation.

**Fill in the gaps:** bureaucratic experts read between the lines and write details for policy implementation.

**Fire-alarm oversight:** reactive, indirect, and decentralized congressional oversight of bureaucratic agencies.

**Freedom of Information Act (1966):** allows citizens to obtain copies of most public records.

**Implicit bias:** unconscious attitudes and beliefs.

**Investigatory stop:** a traffic stop predicated on reasonable suspicion of the driver, not necessarily on a traffic violation.

**Iron triangle:** the mutually beneficial and special relationship between Congress, interest groups, and the bureaucracy.

**Minority representative role:** the idea that some bureaucrats see themselves as advocates for disadvantaged groups who should act in the group's interest.

**Neutral competence:** the belief that bureaucrats should be hired for being qualified, credentialed, and professional and not their personal allegiances.

**Notice and comment:** period by which the public is asked for input on how the agency intends to write a rule before it is implemented.

**Passive representation:** a bureaucrat's demographic trait.

**Pendleton Act:** a civil service reform that required merit-based hiring and firing for public office positions.

**Police patrol oversight:** active, direct, and centralized congressional oversight of bureaucratic agencies.

**Privacy Act of 1974:** allows citizens access to personal government files.

**Representative bureaucracy:** a civil service that reflects the population it serves.

**Spoils system:** the practice of rewarding political supporters with public office.

**Street-level bureaucrats:** low-level employees who work on the frontlines and are the first to face the public.

**Sunshine laws:** opens the policymaking process to the public by making public documents accessible.

**Whistleblowers:** individuals who publicize corruption or other wrongdoing in the bureaucracy

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# 6

Creating the Federal Judiciary

Current Structure of the Federal Judiciary

Judicial Power

The U.S. Supreme Court: A Closer Look

The Importance of Federal Judges

Columns on the facade of the United States Supreme Court building in Washington, D.C.

istock.com/Stephen Emlund

CHAPTER SIX

# The Federal Judiciary

*It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.*

*—Marbury v. Madison (1803)*

**OF THE THREE COEQUAL AND COORDINATE BRANCHES** of government, the judicial branch is the least followed and least understood by the American people—despite its responsibility to interpret the law. A C-SPAN poll in March 2017 found that 57% of Americans could not name one justice sitting on the U.S. Supreme Court.[1] Most of the media, pundits, and American people regularly focus on the political branches, but the Supreme Court and the federal judiciary play equally important roles. Given the federal judiciary's grand responsibilities in our democracy, Article 3 of the Constitution uniquely provides federal judges with life tenure, making them unaccountable to the electorate.

Although the Constitution makes it a counter-majoritarian institution, the federal judiciary is essential to American democracy. When they pass legislation, the political branches expect the courts to peacefully settle legal disputes that arise from its public policy choices (i.e., laws). As the unelected branch, the judiciary is expected not to judge the wisdom of those laws but to settle legal disputes by providing a neutral forum for adversaries to present their cases. Most importantly, the judiciary ensures the various limits on governmental power are enforced (e.g., stopping Congress from establishing a national religion or ensuring that states protect their citizens equally), even for political majorities. The courts "were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[2]

To understand the judicial process, this chapter analyzes the federal judicial system created by Article 3 of the Constitution. This chapter will then examine the power of judicial review and why this power is important in a system of checks and balances. Finally, this chapter will review current political controversies concerning the federal judiciary, with a detailed look at the U.S. Supreme Court.

# Creating the Federal Judiciary

## Article 3 and the Federal Judiciary

The Constitution contains a series of compromises on the federal government's power and structure. This perspective helps explain why the delegates at the Constitutional Convention argued for days over the organization of Congress and the presidency—they lacked firsthand knowledge of these new political institutions. Articles 1 and 2 of the Constitution detail who can serve in these branches, the terms of office, the powers of each branch, the limits on their power, and their structure.[3] Article 3, on the other hand, represents a governmental institution the founders thoroughly understood. Most of the delegates were lawyers, and the states and Great Britain both had functioning court systems. This experience informed them about the general role courts should play in a political system.[4]

***Judicial independence:*** *the structural protections in Article 3 that all federal judges appointed by the president and confirmed by the Senate are guaranteed to hold their office during "good Behaviour" (i.e., they are granted life tenure) and their salary cannot be diminished once in office. These protections ensure the judiciary can carry out its responsibilities free from political pressure.*

One grievance listed in the Declaration of Independence was the lack of judicial independence for colonial judges, as they depended on the king for their jobs and their salary. To ensure **judicial independence**, the delegates enumerated in Article 3 that all federal judges appointed by the president and confirmed by the Senate were guaranteed to hold their office during "good behaviour" and their salary could not diminish once in office.[5] In other words, once confirmed by the Senate, federal judges are granted life tenure and can retain their position until they retire or die, and the political branches can never reduce their salary (e.g., as punishment for a judicial decision). Interestingly, Article 3 does not provide any qualifications (or limitations) to be a federal judge; the Senate confirmation process is the "check" on the president's appointment of unqualified judges. 6.1

**6.1**

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**Ruth Bader Ginsburg states at her Supreme Court confirmation hearing: "no hints, no forecasts."**

The most pressing argument about the federal judiciary at the Convention, concerned its organization and structure. Professors Lee Epstein and Thomas

Walker explain that delegates advocating for a strong federal government (e.g., the Virginia Plan) proposed creating a Supreme Court while allowing Congress to create the remaining lower court system. Some even advocated creating the entire lower court system in Article 3. Delegates favoring states' rights over an expansive federal government agreed that a Supreme Court was necessary, but they felt that an entire layer of lower courts was equally unnecessary. They proposed empowering state courts to hear constitutional disputes and legal issues concerning federal law, with the opportunity to appeal their decisions to the Supreme Court.[6]

Both sides compromised on vesting judicial power in one Supreme Court and in all "inferior courts" that Congress, at its discretion, creates via Article 3. Congress would decide later whether to create independent federal courts or to authorize state courts to adjudicate federal claims. The only court established by Article 3 is the Supreme Court. Congress also decides the structure of the lower court system and how many judges sit on the lower courts and on the Supreme Court.

The delegates broadly agreed on the role of courts, so Article 3, § 2 carefully details the **jurisdiction** of these future courts. Jurisdiction refers to a court's authority to hear and decide a case. Article 3 details two types of jurisdiction for the Supreme Court: original and appellate. The Supreme Court's **original jurisdiction** includes issues in which the Supreme Court is the only judicial body to hear a case (i.e., litigants take their claims directly to the Supreme Court). Cases that fall under the Supreme Court's original jurisdiction are "Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party."[7] In all other cases, the Supreme Court has appellate jurisdiction that is subject to Congressional regulation. **Appellate jurisdiction** is a court's authority to review a lower court's decision to ensure that the law was applied and interpreted correctly (i.e., a litigant's last chance for a favorable judicial decision is an appeal to the Supreme Court, which is the last judicial body that can review a case).

Consistent with checks and balances, Congress can check the Supreme Court by regulating the types of cases it can hear under its appellate jurisdiction. During the Reconstruction Era, Congress removed the Supreme Court's appellate jurisdiction over *habeas corpus* petitions from civilians who were jailed, tried for offenses, and punished by military tribunals.[8]

## The Judiciary Act of 1789

Article 3 defines the jurisdiction of all federal courts and authorizes Congress to create all inferior courts below the Supreme Court. One initial act of the First Congress was organizing the federal judiciary by passing the **Judiciary Act of 1789**. With Federalist majorities in Congress and with a Federalist president (George Washington), the Judiciary Act of 1789 created a judiciary with independent lower federal courts staffed by federal judges to interpret the Constitution and federal law.

Congress set the number of Supreme Court Justices at six with this act: one Chief Justice and five Associate Justices 6.2. Congress can regulate the Supreme Court's appellate jurisdiction, so it gave the Court jurisdiction

***Jurisdiction:*** *a court's authority to hear and decide a case. This authority is bestowed by either the Constitution, or Congress.*

***Original jurisdiction:*** *a court's authority to hear a case first (i.e., the court a legal controversy begins). For instance, Article 3 defines the issues that are assigned to Supreme Court's original jurisdiction, making the Supreme Court the only judicial body to hear a case (i.e., litigants take their claims directly to the Supreme Court).*

***Appellate jurisdiction:*** *a court's authority to review a lower court's decision to ensure that the law was applied and interpreted correctly. For instance, a litigant's last chance for a favorable judicial decision is an appeal to the Supreme Court, which is the last judicial body that can review a case.*

***Judiciary Act of 1789:*** *one of the initial acts of the First Congress, which created a judiciary with independent lower federal courts staffed by federal judges to interpret the Constitution and federal law. In this Act, Congress set the number of Supreme Court justices at six, created thirteen district courts and three circuit courts. Additionally, Congress defined the jurisdiction of each of these courts.*

**6.2**

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**Who were the first six Supreme Court justices?**

Source: Library of Congress

**FIGURE 6.1 Oliver Ellsworth (1745-1807) was a framer of the United States Constitution, a United States Senator from Connecticut, and the third Chief Justice of the United States. In 1796, after the Senate rejected the nomination of John Rutledge to serve as Chief Justice, President George Washington nominated Ellsworth to the position. Ellsworth was unanimously confirmed by the Senate, and served until 1800, when he resigned due to poor health.**

over the states' supreme courts if these state tribunals ruled that a state law was either valid or unconstitutional according to their interpretation of the Constitution or federal law.

Regarding the inferior courts, the Judiciary Act created thirteen district courts and three circuit courts. Respecting state boundaries, each of the eleven states that had ratified the Constitution by 1789 received a district court with one judge presiding. The judge had to be a resident of the state. Additional district courts were given to Maine and Kentucky, which were parts of Massachusetts and Virginia, respectively, at the time.[9] The district courts were established as **trial courts** and could hear minor violations of federal law that occurred in their respective states. In trial courts, adverse parties present evidence for their case in a legal controversy. A judge presides over the trial to ensure the trial's rules are followed (e.g., what evidence can be offered or how legal rules apply to particular situations). A neutral party, usually a jury, weighs the evidence and accepts one party's case based on the evidence offered.

The three circuit courts also act as trial courts empowered to hear major federal issues. For instance, circuit courts had jurisdiction over any legal controversy involving citizens from two different states. The circuit courts were grouped geographically into the Eastern, Middle, and Southern circuits **(Figure 6.2)** (e.g., litigants involved in a legal controversy in South Carolina would file their claim in the Southern Circuit). The cases in the circuit courts were heard by three-judge panels that consisted of a district court judge from the geographic circuit and two Supreme Court Justices. The justices' involvement in the circuits established the term *rode circuit,* as justices "went around the circuit, usually on horseback or in a buggy, hearing cases."[10]

Because of **riding circuit**, justices spent most of their time as a circuit judge hearing cases and riding long hours to hear them. Unsurprisingly, a justice's job in the early days of the new Constitution was not as prestigious as it is today. This led to frequent turnover on the Supreme Court because justices would usually leave the Supreme Court for other government positions or for other careers. The first chief justice of the Supreme Court, John Jay, served slightly over five years before stepping down to become the governor of New York. When Jay was asked to serve as chief justice again in 1801, he declined because he felt the job was "irksome and unimportant."[11]

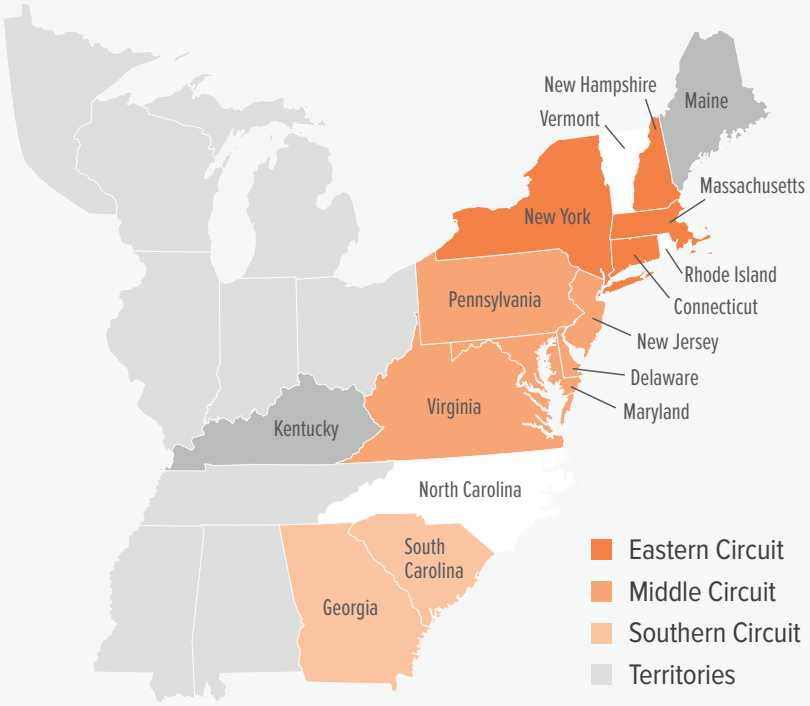
The three circuit courts received appellate jurisdiction over the district courts in their geographic circuit for particular civil and admiralty disputes. As **appellate courts**, the circuit courts did not seek new facts in legal controversies but instead heard arguments about whether the laws and procedures governing a trial were done correctly (i.e., they supervised the district courts). The Judiciary Act of 1789 made circuit courts appellate courts in these limited issues. The Supreme Court was still the main appellate court for the federal judiciary and for the states' supreme courts when they interpreted the Constitution and federal law.

***Trial courts:*** *a court where adverse parties present evidence for their case in a legal controversy. A judge presides over the trial to ensure the trial's rules are followed. A neutral party, usually a jury, weighs the evidence and accepts one party's case based on the evidence offered.*

***Riding circuit:*** *beginning with the Judiciary Act of 1789, Supreme Court justices would also hear and decide cases as circuit court judges. Consequently, justices spent most of their time as a circuit judge hearing cases and riding long hours to hear them (within the circuits).*

**FIGURE 6.2**

## Judicial Circuits of the United States in 1789




*Rhode Island and North Carolina had not yet ratified the Constitution. Vermont had not yet joined the Union. Maine, still part of Massachusetts, and Kentucky, still part of Virginia, were formed into separate judicial districts, not included in any circuit.*

Source: United States District Court, Middle District of Louisiana

***Appellate courts:*** *a court where arguments are heard concerning a lower court's decision to ensure that the law was applied and interpreted correctly (i.e., appellate courts review the decisions of courts below them in the judicial hierarchy).*

# Current Structure of the Federal Judiciary

The Judiciary Act of 1789 provides the current federal structure's skeleton because the judiciary still has district courts (that respect state lines), regional circuit courts, and the Supreme Court. However, each court has evolved since 1789.

## United States Supreme Court

The Supreme Court **(Figure 6.3)** sits atop the federal judiciary, but it now consists of nine justices: one chief justice and eight associate justices. Congress established these numbers in the Judiciary Act of 1869. Because Article 3 allows Congress to control the number of justices on the Supreme Court, the Supreme Court's membership has fluctuated, primarily for political reasons:

> It has been fixed at nine since 1869, though it has varied from six to five (to prevent Thomas Jefferson from filling a vacancy), back to six (to allow him a nomination), to seven and then to nine (to accommodate political

istock.com/ Bill Chizek

**FIGURE 6.3 The Supreme Court building in Washington, D.C.**

interests in the West), to eleven (to allow Abraham Lincoln to put loyal Union men on the bench during the Civil War), and then back to nine again (to prevent Andrew Johnson from making any nomination). [12]

Since its inception, the Supreme Court has matured into a prestigious and powerful institution. Hence, a successful nomination to the Supreme Court rewards a person's successful career in the law (i.e., justices no longer leave the Supreme Court for other government positions). In 2017, the average age that a justice left the Supreme Court due to retirement or death was eighty-three, about a ten-year increase from the average departure age of a justice in the 1950s.[13] When a vacancy arises, presidents use judicial nominations to influence the output of the Supreme Court. Accordingly, a president will appoint a justice who shares a similar legal philosophy, since justices will influence both law and public policy long after a president leaves office.

Some factors have increased the importance and prestige of the Supreme Court. First, the Supreme Court formally possesses the power of judicial review, a power not enumerated in Article 3 or in the Judiciary Act of 1789. Judicial review is the judiciary's power to review the actions of state and federal governments to determine their compatibility with the Constitution. Secondly, the Supreme Court has significant discretion over the cases they hear. On average, the Supreme Court receives 8,000 requests a year but decides less than 1% of those appeals, selecting the cases that are politically and legally salient (interesting). Since 1912, justices also no longer ride circuits.

## United States Circuit Courts of Appeals

In 1912, justices were relieved of riding circuits because Congress formally transformed the circuit courts from trial courts into independent appellate courts staffed with judges specifically nominated to serve on the circuit courts.

Currently, 179 active circuit judges are divided unequally amongst twelve regional circuit courts and one appellate court for the Federal Circuit (e.g., the First Circuit has six judges, and the Ninth Circuit has twenty-nine).[14] If a vacancy exists, the president can nominate any person who lives in a circuit court's region to serve on the circuit court. Of course, all federal judges must be confirmed by the Senate.

As the intermediate appellate courts in the federal judiciary, the circuit courts have **mandatory appellate jurisdiction** over all cases appealed to them from the district courts (i.e., they must hear every case appealed to them). The thirteen circuit courts hear and dispose of 60,000 cases a year. As regional appellate courts, the circuit courts can only review the decisions of district courts within their geographic circuit, and their decisions are only binding in the region over which they have appellate jurisdiction. The circuit courts primarily supervise the district courts in their region, ensuring that cases with similar facts and issues are decided consistently. For example, the Fifth Circuit has appellate jurisdiction over all appeals from district courts in Texas, Louisiana, and Mississippi.

***Mandatory jurisdiction:*** *jurisdiction in which a court must hear and decide a case presented to them.*

Every case appealed to a circuit court is heard by a randomly drawn three-judge panel. If a litigant loses their case in front of their initial three-judge panel, they can either file an appeal to the Supreme Court or request an **en banc hearing**. With an *en banc* hearing, a litigant asks all the active judges on a circuit court to review the panel's decision and determine whether the three-judge panel erred. If the full circuit declines *en banc* review, the original decision stands, and the litigant may file an appeal with the Supreme Court. If an *en banc* review is granted, the full circuit will hear the case again and make a judgment. The loser of an *en banc* hearing can file an appeal to the Supreme Court.

***En banc hearing:*** *every case appealed to a circuit court is heard by a randomly drawn three-judge panel. If a litigant loses their case in front of their initial three-judge panel, they can request that all the active judges on a circuit court review the panel's decision and determine whether the three-judge panel erred.*

## United States District Courts

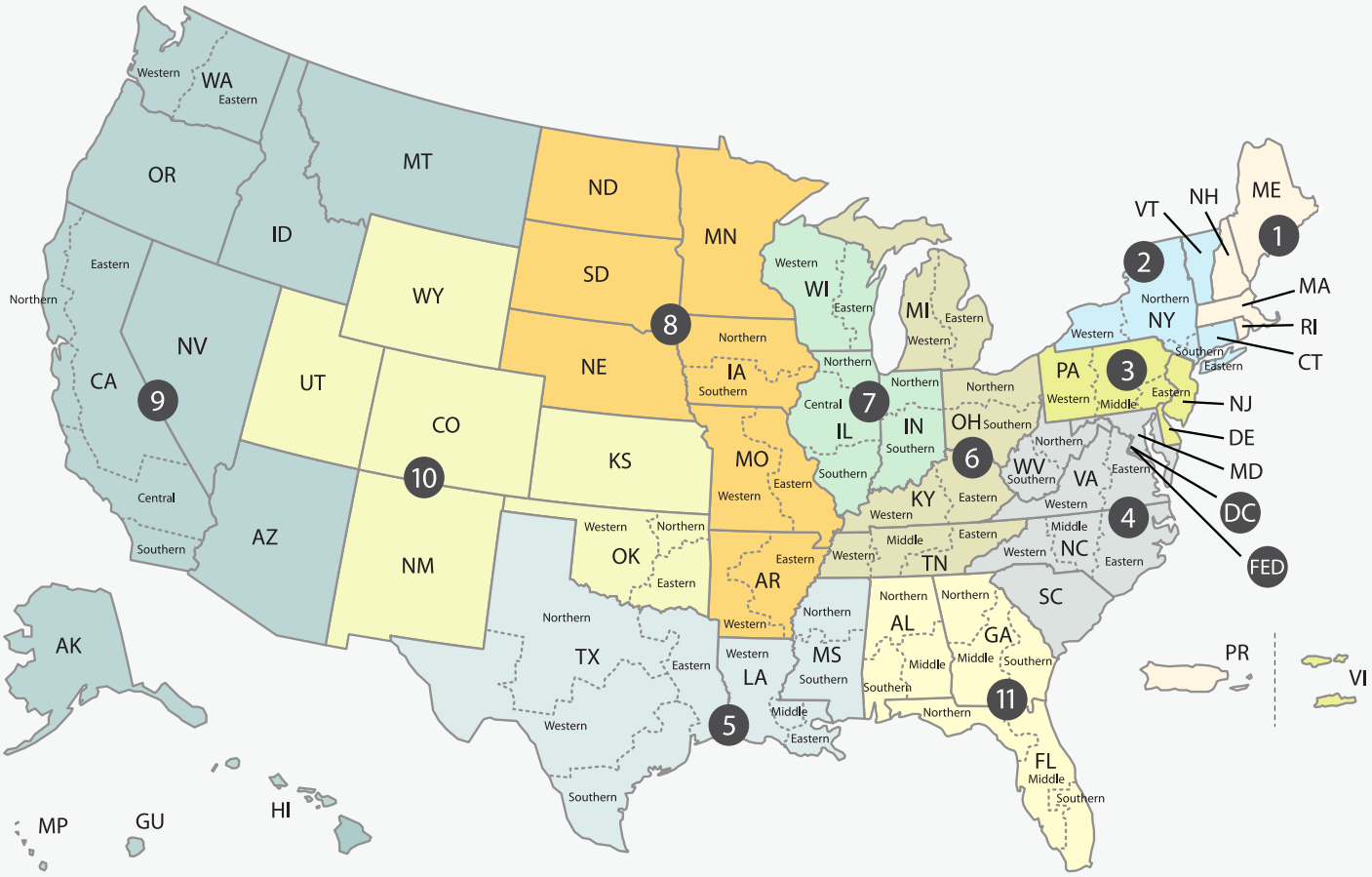
Each state is still guaranteed one district court, but Congress may grant states additional district courts depending on various political factors. Texas's size justifies the need for four district courts spread throughout the state (the Western, Eastern, Southern, and Northern districts), but the much smaller Oklahoma has three district courts. In all, ninety-four district courts throughout the United States are staffed by 667 judges **(Figure 6.4)**. The president can nominate any person to serve on a district court, provided there is a vacancy to fill and the judge lives in the state where the district court is seated. Again, all federal judges must be confirmed by the Senate.

Aside from issues that arise under the Supreme Court's original jurisdiction, the district courts are the primary entry point for litigants in the federal judiciary. Accordingly, the district courts are the only trial courts for the federal judiciary empowered to hear constitutional disputes and federal law issues. The district courts have mandatory jurisdiction and hear about 220,000 cases a year. Their decisions are subject to review by the circuit courts with appellate jurisdiction over them.

FIGURE 6.4

## Geographic Boundaries of Federal Courts

The locations of the 13 United States Courts of Appeals and 94 United States District Courts are represented.




Source: Federal Bar Association

# Judicial Power

## Judicial Review

Courts are necessary to peacefully resolve legal disputes amongst individuals (civil cases) or when the government accuses someone of violating a law (criminal cases). The investment of judicial power in Article 3 allows the judiciary to decide legal cases by applying established Constitutional laws or applicable federal laws and precedents.[15] In a civil case, for instance, someone is found culpable of a civil infraction if a jury believes the preponderance of evidence at trial shows culpability. This standard—the preponderance of evidence—is applied by trial courts in civil cases to award damages to the aggrieved party.

In criminal cases, the government accuses people of violating its law, so the government bears the burden of proving one's guilt beyond all reasonable doubt. That is, the government's evidence must overwhelmingly prove an individual's guilt, ensuring that no reasonable explanation for a defendant's innocence exists. In a criminal trial, of course, courts must uphold the constitutional rights of the accused, such as their right to public and speedy trial, their right against self-incrimination, their right to confront witnesses, and their right to counsel. Consequently, a judge in a criminal case must ensure that these various precedents are followed while resolving the case. These examples highlight the essence of judicial power codified in Article 3.

An interesting question concerns whether the judicial power to decide legal cases includes the power to review governmental actions (laws or actions taken by both state and federal governmental officials) and determine their compatibility with the Constitution. In other words, does judicial power include the power of **judicial review**? One authority on this question is Alexander Hamilton **(Figure 6.5)**. In *Federalist Paper No. 78*, he forcefully argued that the federal judiciary, staffed with life-tenured judges, was designed as an intermediate body between the people and Congress. Hamilton argued that the people's will is codified in the Constitution, and the government cannot violate this will (i.e., the Constitution). If so, the judiciary's duty is to declare these actions void.[16]

***Judicial review:*** *the power of the judiciary to review governmental actions (laws or actions taken by both state and federal governmental officials) and determine their compatibility with the Constitution.*

Source: National Gallery of Art

**FIGURE 6.5 Alexander Hamilton portrait by John Trumbull, 1806.**

In the U.S. government's structure, judicial review presents a paradox: the unelected branch of government can nullify laws passed by the democratically elected branches at the state and the federal level. One would expect such an awesome power to be explained in Article 3 (e.g., Article 1, § 7 specifies the president's power to veto legislation), but it is not. Theoretically, judicial review is implicit in countries with a written constitution as its fundamental law that dictates all governmental action. This is known as **constitutional supremacy**. A constitution must also clearly define the powers of each governmental institution. John Gibson, a former justice of the Pennsylvania Supreme Court, argued that the Supreme Court's judicial review power makes it a "peculiar organ" because it exercises a power not written in the Constitution.[17]

***Constitutional supremacy:*** *the notion that a constitution is the fundamental law that dictates all governmental action. Consequently, government can take no action that violates the commands of a constitution.*

## *Marbury v. Madison* (1803): Establishing Judicial Review

The Supreme Court's low prestige in the early years of the Constitution prevented constitutional questions from reaching the judiciary. In 1796, *Hylton v. United States* became the first case in which the Supreme Court was asked to exercise judicial review. In *Hylton* (1796), the Supreme Court upheld the constitutionality of a federal carriage tax, causing the political system not to decide if judicial nullification was a power granted to the judiciary.[18]

The first time the Supreme Court reviewed an action of Congress and ruled the law unconstitutional was in *Marbury v. Madison* (1803). This case involved Section 13 of the Judiciary Act of 1789, which empowered the Supreme Court, under its original jurisdiction, to issue **writs of mandamus**. Thus, Section 13 allowed litigants to initiate a legal proceeding in the Supreme Court to compel a government official to act in her official capacity.

***Writ of mandamus:*** *a judicial command that compels a government official to act in her official capacity.*

Late in the Adams administration, William Marbury was appointed by President Adams and confirmed by the Senate to be a justice of the peace in Washington D.C. Marbury did not receive his commission for his judgeship when Adams's administration ended at noon on March 4, 1801. It was assumed that the Jefferson administration's incoming secretary of state, James Madison, would deliver Marbury's commission (along with other commissions from recently confirmed judges). In one of his administration's first acts, President Jefferson ordered Madison to not deliver these commissions. Per Section 13, Marbury filed suit in the Supreme Court, asking that they issue a *writ of mandamus* compelling Madison to deliver his commission. The Supreme Court was led by Chief Justice John Marshall (who, incidentally, was the Adams administration's secretary of state who failed to deliver Marshall's commission) and he questioned whether Section 13 was constitutional.

Examining the Supreme Court's original and appellate jurisdiction in Article 3, Chief Justice Marshall ruled that Congress can regulate the Supreme Court's appellate jurisdiction but not its original jurisdiction. Therefore, any changes to the Supreme Court's original jurisdiction must come from a constitutional amendment instead of from a legislative act. Because the Supreme Court ruled that Section 13 unconstitutionally expanded the Supreme Court's original jurisdiction, Marbury could not use this law to force Madison to deliver his commission.

To justify the Supreme Court's nullification of Congress's act, Chief Justice Marshall argued that judicial power involves applying and interpreting the Constitution. Federal judges take an oath to support the Constitution, so a law becomes unenforceable anytime they judge that the law violates the Constitution (i.e., the law must be ruled unconstitutional). Chief Justice Marshall further elaborated:

> *The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society.*[19]

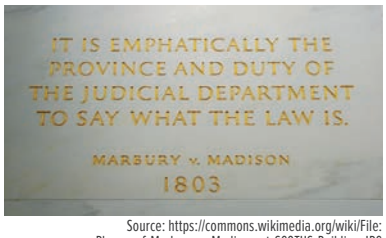
***Applications of judicial review:*** *in the American political system, the judiciary 1) determines whether government officials have taken an action that exceeds their power under the Constitution or applicable law, 2) federalism ensures that the judiciary will police the distribution of powers between the federal government and the states, and 3) separation of powers ensures the judiciary can nullify a law that violates the Constitution.*

## Purpose and Application of Judicial Review

*Marbury* (1803) established the precedent that the Supreme Court could nullify an act of Congress. This precedent allowed the Supreme Court to further nullify the president's actions (e.g., executive orders) and the actions of the

state governments (e.g., state constitutional provisions, state laws, gubernatorial actions, and city ordinances). Beginning with *Marbury* (1803), all actors in the political system accepted the Supreme Court's authority to review governmental action and to invalidate actions they judge to be unconstitutional **(Figure 6.6)**.

Hamilton's justification of judicial review in *Federalist Paper No. 78* and Chief Justice Marshall's reasoning in *Marbury* (1803) put forth that a written constitution prescribes limits on governmental power. As the branch with the power to judge, the judiciary must enforce those constitutional limits when laws conflict with the Constitution. Hamilton and Marshall's argument also implies that democracy is incomplete without judicial protection of political minorities. Elected political branches represent the will of the people, but political majorities will often use their power to invade the rights of minorities (political, religious, or ethnic). The electoral branch of government has no electoral connection, so the judiciary can adjudicate whether elected majorities have violated constitutionally proscribed limits.[20]




Source: https://commons.wikimedia.org/wiki/File:Plaque_of_Marbury_v._Madison_at_SCOTUS_Building.JPG

**FIGURE 6.6** Inscription on the wall of the United States Supreme Court.

In the American political system, judicial review applies to three legal situations:[21]

1. Determining whether government officials have taken an action that exceeds their power under the Constitution or applicable law.

   For example, President Donald Trump issued an executive order in June of 2017 that suspended the entry of foreign nationals from Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen for ninety days. During this ninety-day suspension, President Trump ordered the federal government to review the admission procedures for foreign nationals from these countries to stop potential terrorists from entering the United States. President Trump claimed the authority to enact this ban via the Immigration and Nationality Act. Legal arguments arose that President Trump abused his statutory authority with his previous statements about the Muslim faith. To prove his discriminatory intent, challengers pointed out that five of the listed countries were Muslim-majority countries. The Supreme Court disagreed, ruling in *Trump v. Hawaii* (2018) that President Trump could legally enact the ban because the Immigration and Nationality Act "exudes deference to the president in every clause" for decisions about foreign nationals entering the United States.[22]

2. Federalism ensures that the judiciary will police the distribution of powers between the federal government and the states.

   In *South Carolina v. Katzenbach* (1966), for example, the Supreme Court upheld the constitutionality of Sections 4 and 5 of the Voting Rights Act against a challenge that these provisions invaded a state's right to conduct elections. Section 4 of the Voting Rights Act specified a formula that would subject particular states to Section 5's preclearance authority, which is the federal government's power to approve or reject proposed changes to a state's election laws. The Supreme Court ruled that the Fifteenth Amendment allowed Congress

to scrutinize particular states with a history of discriminatory practices aimed at preventing African Americans and other racial minorities from voting. The Supreme Court reasoned that the "Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[23]

3. The separation of powers ensures the judiciary can nullify a law that violates the Constitution.

   For instance, Greg Johnson burned an American flag to protest the Republican National Convention held in Dallas, Texas, in 1984. Johnson was charged with violating a Texas law that criminalized desecrating the American flag or the Texas flag. Johnson took his case to the Supreme Court, arguing that his First Amendment right to free speech and expression, which is incorporated against Texas through the Fourteenth Amendment, protects his right to burn an American flag in a political protest. In *Texas v. Johnson* (1989), the Supreme Court agreed that no government can "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[24]

## Limits on Judicial Power

***Structural limits on judicial power:*** *Article 3 creates a judiciary that lacks enforcement power and is reactionary. That is, cases must be brought to the judiciary's attention through the judicial process.*

### Structural Limits

Remarkably, the Supreme Court and the federal judiciary's inferior courts can influence the political system and the legal system by resolving legal disputes and determining the constitutionality of governmental actions. Like any branch of government, there are constitutional and structural limits on its power. For instance, Congress can pass a bill, but the executive branch must enforce it. The president can enforce laws but cannot create them. The Supreme Court can issue a ruling, but the other political branches must enforce and follow its decisions. Lacking enforcement power, Hamilton in *Federalist Paper No. 78* considers the judiciary to be the governmental branch "least dangerous" to political rights:

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse.... It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[25]

Further, Article 3 stipulates that judicial power extends to cases and controversies that arise under the Constitution and under federal law. Thus, an existing legal controversy must be brought to the judiciary for resolution by adverse parties. The judiciary lacks active resolution—it is the only reactionary institution of government, which means it cannot go into the country to actively solve problems. It must react to cases brought to its attention through the judicial process.


Source: https://commons.wikimedia.org/wiki/File:56.ElectionProtest.USSC.WDC.11December2000_(21752049743).jpg

**FIGURE 6.7** Al Gore supporters protest the controversial Supreme Court decision that George W. Bush won the state of Florida and its twenty-five electoral college votes during the 2000 presidential election, which earned Bush the presidency.

The Supreme Court has been criticized for ending a recount in Florida during the 2000 presidential election between George W. Bush and Al Gore. As a result of their decision, Florida certified that Bush won the state and its twenty-five electoral college votes, earning him the presidency. Critics argue that the Supreme Court had no authority to hear and decide the case in the first place **(Figure 6.7)**. Addressing criticism about the Supreme Court's decision, Justice Scalia noted that Al Gore was the litigant who brought the recount to the judiciary's attention:

> *So you know if you don't like it (the decision), don't blame it on me. I didn't bring it into the courts. Mr. Gore brought it into the courts. So if you don't like the courts getting involved talk to Mr. Gore.*[26]

### Self-Imposed Limits

The Supreme Court interpreted Article 3's command that judicial power should only extend to cases and controversies by limiting the federal judiciary's exercise of judicial power. First, any litigant who invokes the judiciary's power must have **legal standing** to bring a case. To establish standing, a litigant must show that they personally suffered a concrete legal injury from the alleged conduct of the party being sued. Plus, the litigant must show how a favorable judicial decision will redress their legal injury. Greg Johnson established standing in *Texas v. Johnson* (1989) because his legal injury (punishment for exercising a constitutional right) resulted from a Texas law that punished flag desecration. The legal injury was redressable, because the Supreme Court ruled the law unenforceable (i.e., the law was unconstitutional).

Once standing has been established, a litigant must show that a court has jurisdiction and that the case is justiciable.

***Self-imposed limits on judicial power:*** *the Supreme Court's interpretation of Article 3's command that judicial power should only extend to cases and controversies. Thus, for any litigant to invoke the judiciary's power they must have the legal standing to bring a case. Once standing has been established, a litigant must show that a court has jurisdiction and that the case is justiciable.*

***Legal standing:*** *to establish standing, a litigant must show that they personally suffered a concrete legal injury from the alleged conduct of the party being sued. Plus, the litigant must show how a favorable judicial decision will redress their legal injury.*

## Jurisdiction

Jurisdiction refers to a court's authority to hear and decide cases, as bestowed by Congress or by the Constitution. District courts have jurisdiction over legal controversies in their respective states. Circuit courts only have appellate jurisdiction over the decisions of district courts in their geographic circuit; the

Supreme Court has appellate jurisdiction over the thirteen circuit courts and over states' supreme courts. For instance, a district court in Louisiana would not have jurisdiction over a federal crime committed in Texas. Similarly, a litigant who loses in a district court in Texas cannot file an appeal in the Ninth Circuit, as they have no jurisdiction over Texas district courts.

## Justiciability

***Justiciability:*** *this self-imposed constraint guarantees that judicial power is applied to a concrete legal dispute between two adverse parties. The five issues related to justiciability ensure that federal courts do not issue advisory opinions, that both parties want different outcomes in a legal controversy, a case is not moot, a case is ripe for judicial resolution, and the issue is not a political question.*

The self-imposed **justiciability** constraint guarantees that judicial power is applied to a concrete legal dispute between two adverse parties. In other words, justiciability ensures an actual case or controversy exists for the judiciary to resolve. Five issues relate to justiciability.

First, federal courts do not issue advisory opinions. Advisory opinions occur when the courts are asked for their opinion on a governmental action's constitutionality before it is enacted. Reasoning that the federal judiciary's judicial power only applies to concrete cases and controversies, the Supreme Court has held that advisory opinions are abstract and hypothetical. Thus, advisory opinions offer no actual legal dispute for federal courts to settle.[27] Chief Justice Jay established this principle in 1793 when the Supreme Court refused Secretary of State Jefferson's request for the Court's view on the United States' role in the British-French War.[28]

The second constraint reflects the judicial system's adversarial nature by ensuring that both parties in a lawsuit have legal adversity. In other words, both parties must want different outcomes in a lawsuit (which is why cases are styled as *litigant v. defendant*). If both parties want the same outcome or display no legal adversity, then the controversy is considered a collusive suit and courts will dismiss the case because there is nothing to resolve.

The third and fourth constraints are mootness and ripeness. Mootness ensures that a legal controversy still exists when the court hears and decides a case. If a legal controversy is settled prior to a judicial hearing due to the length of the judicial process, the court cannot resolve any controversy (i.e., a court cannot provide the relief sought). Thus, the legal issue is moot. Conversely, ripeness ensures that a case is ready for judicial review and has not come to a court's attention too soon. For example, the case of a speeding ticket on Old Omen cannot be taken directly to the Supreme Court. The Supreme Court justices will quickly dismiss the case because it is not ripe for their review.

Lastly, federal courts will not decide political questions. Political questions are controversies that the courts believe the Constitution entrusts to other governmental branches because the resolutions are inherently political—not judicial. Issues related to war and foreign affairs, for example, are political questions because the Constitution clearly gives Congress and the president the power to resolve these matters.

The Supreme Court recently ruled that legal challenges over partisan gerrymandering conducted by state legislatures are political questions. A partisan gerrymander is when a state legislature purposely draws a legislative district to discriminate against a particular political party, thereby diluting the party's voting power in certain legislative districts. The Supreme Court ruled

Source: Fred Schilling, Collection of the Supreme Court of the United States

**FIGURE 6.8** **U.S. Supreme Court Justices:** *(front row, left to right)* **Associate Justice Stephen G. Breyer, Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Ruth Bader Ginsburg, Associate Justice Samuel A. Alito** *(back row)* **Associate Justice Neil M. Gorsuch, Associate Justice Sonia Sotomayor, Associate Justice Elena Kagan, Associate Justice Brett M. Kavanaugh.**

in *Rucho v. Common Cause* (2019) that constitutional challenges to partisan gerrymandering is a political question for two reasons. First, the Constitution clearly entrusts redistricting to state legislatures in Article 1, suggesting that the process was never meant to be free from politics. Second, as redistricting is entrusted to political institutions (state legislatures), the Supreme Court cannot develop a legal standard to identify a partisan gerrymander.[29]

## The U.S. Supreme Court: A Closer Look

Even if a party's tangible injury raises a justiciable issue (and the Supreme Court has jurisdiction), the Supreme Court **(Figure 6.8)** may not hear the case. Litigants who seek the Supreme Court's review face daunting odds because the Supreme Court only hears (on average) about eighty cases a year from the approximately 8,000 requests. In their 2018 term, for instance, the Supreme Court heard and decided sixty-seven cases. Consequently, circuit courts become important tribunals in the judicial hierarchy because they are effectively the last resort for many litigants and legal issues in the federal judiciary.

In the few cases the Supreme Court reviews, the Court's decisions have profound legal and political consequences. At the apex of the federal judiciary, the Supreme Court plays an important role in society throughout U.S. history. From egregious decisions, such as *Scott v. Sanford* (1857), to momentous decisions, such as *Brown v. Board of Education* (1954), the Supreme Court's interpretation of the Constitution and of federal law limits (and accepts) the policy choices of the political branches, and it secures individual rights.

Because adversity between parties is necessary in the judicial process, any judicial decision will favor one legal argument over the other. Therefore, interpreting the Constitution and federal law is not a straightforward application of neutral principles. Insulated from the electorate, judges' personal preferences influence how they apply the law to legal controversies. For example, when the issue of same-sex marriage came before the Supreme Court in

*Obergefell v. Hodges* (2015), the justices considered two competing arguments: Did the states' traditional power to regulate marriage allow them to deny marriage licenses to same-sex couples? Or, did the Fourteenth Amendment's Due Process and Equal Protection Clauses guarantee same-sex couples the right to marry by constraining state power over marriage? In a five to four vote, the Supreme Court agreed with the latter argument, paving the way for same-sex marriage in all fifty states.[30]

This example highlights the Supreme Court's power and the Court's important role in our political system because most political disputes (e.g., should same-sex couples be able to marry?) are also legal controversies (e.g., the Fourteenth Amendment's reach). Alexis de Tocqueville noted: "There is hardly any political question in the United States that sooner or later does not turn into a judicial question."[31] Other questions arise too: Which cases does the Supreme Court hear? How does the Supreme Court make decisions? Who sits on the Supreme Court? The remainder of this chapter seeks to answer these questions by examining the "least dangerous" branch of government.

## Getting to the Supreme Court

### Original jurisdiction

***Discretionary docket:*** *in the federal judiciary, the Supreme Court is the only court that can choose which cases it hears.*

The Supreme Court has a **discretionary docket**, meaning it can choose which cases it hears under its original and appellate jurisdictions. The Supreme Court's original jurisdiction is defined in Article 3, but the Court can decide to hear the case or to send the case to a lower court. Cases that arise from the Supreme Court's original jurisdiction comprise a tiny fraction of the Court's docket in a given year (usually less than 1% of cases). The Federal Judicial Center notes:

> Between 1789 and 1959, the Court issued written opinions in only 123 original cases. Since 1960, the Court has received fewer than 140 motions for leave to file original cases, nearly half of which were denied a hearing. The majority of cases filed have been in disputes between two or more states. The Court has generally accepted state party cases dealing with boundary and water disputes, but it has been much less likely to field original cases dealing with contract disputes and other subjects not deemed sufficiently substantial for the Court's resources.[32]

***Appeal as a matter of right:*** *particular instances where Congress mandates the Supreme Court to review the decision of a lower court. For example, in any legal dispute over the Voting Rights Act, a three-judge district court panel is empowered to hear the case. After the panel's decision, the case is automatically appealed to the Supreme Court, and they must hear and decide the case.*

### Appellate jurisdiction

Cases overwhelmingly reach the Supreme Court via appellate jurisdiction, either through an **appeal as a matter of right** or a *writ of certiorari*.[33] As Congress regulates the Supreme Court's appellate jurisdiction, it has provided mandatory appeals in limited circumstances. These mandatory appeals are known as appeals as a matter, and most arise over legal disputes from the Voting Rights Act **(Figure 6.9)**. For example, in any legal dispute over the Voting Rights Act, a three-judge district court panel is empowered to hear the case. After the panel's decision, the case is automatically appealed to the Supreme Court, and they must hear and decide the case.

Source: AP Photo; https://www.politico.com/story/2017/08/06/lbj-signs-voting-rights-act-aug-6-1965-241256

**FIGURE 6.9** President Lyndon B. Johnson signs the Voting Rights Act of 1965 in a ceremony in the President's Room near the Senate Chambers on August 6.

Litigants most commonly reach the Supreme Court through a *writ of certiorari*. Any litigant who loses at the circuit level or in their state's Supreme Court can petition the Supreme Court to review their case. This petition, known as a **writ of certiorari**, depends on four justices agreeing to hear the case. If four justices agree to grant cert, the case is given full review by the Supreme Court. If the Supreme Court denies cert, the lower court's decision stands. A denial of cert does not mean the Supreme Court agrees with the lower court's decision (i.e., a denial of cert does not establish precedent), only that fewer than four justices believed the case worthy of review. The rule of four guarantees that a minority of justices can influence the docket of the Supreme Court.

***Writ of certiorari:*** *any litigant who loses at the circuit level or in their state's Supreme Court can petition the Supreme Court to review their case. This cert petition depends on four justices agreeing to hear the case. If four justices agree to grant cert, the case is given full review by the Supreme Court.*

Political scientists and legal scholars have examined the *cert* process to develop a list of characteristics that explain the justices' decisions to grant *cert*. The first characteristic concerns a circuit-split on a legal issue. Circuit court decisions are only binding in their geographic circuit, so the Supreme Court attends to situations where one circuit interprets a law or constitutional clause differently than another circuit does. For example, the Tenth Circuit ruled in 2014 that the Fourteenth Amendment secured same-sex couples' right to marry in the states of their circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming). Later that year, the Sixth Circuit ruled that states in its circuit could ban same-sex marriages (Kentucky, Michigan, Ohio, and Tennessee). Thus, a circuit-split causes the Constitution to mean one thing in one area of the country but another thing elsewhere. Hence, this is a case characteristic the justices are highly attentive to.

Second, justices are not immune to the political world and tend to grant cert in cases important to the political and legal worlds. For example, cases like *Brown* (1954) ordered the desegregation of public schools, and *D.C. v. Heller* (2008) ruled that the Second Amendment protects the right to own a firearm for self-defense. These issues are important legal questions, and their resolutions impact society immensely.[34] Two legal factors inform a case's potential salience. First is the federal government's participation via the solicitor general's office urging the Supreme Court to grant *cert*. The solicitor general **6.3**, a member of the president's administration and the lawyer for the United States represents the interests of the federal government. Thus, the solicitor

**6.3**

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general's participation in a case signals the justices about its importance to the federal government. The Supreme Court grants *cert* in less than 1% of cases, but the Solicitor General has a 70% to 80% success rate when urging the Court to grant *cert*.[35]

Third, outside groups (i.e., groups with an interest in the case but no direct involvement) can petition the Supreme Court to support or to oppose the granting of *cert*. To do so, these groups can file **amicus curiae briefs** that convey a group's view on a particular case and why the Supreme Court should grant or deny cert. Research shows that amicus briefs increase the likelihood of review because these briefs reflect a case's broader societal importance.

***Amicus curiae briefs:*** *briefs filed by outside groups with an interest in a case, but they themselves have no direct involvement in the legal controversy. These briefs can be filed to petition the Supreme Court to support or to oppose the granting of cert. Further, if the Supreme Court grants cert, outside groups can file briefs to convey a group's legal view of the case and why they believe the law supports their side.*

Lastly, the Supreme Court's ideology will influence the Court's decision to grant cert. In a given term, those cases heard and decided by the Supreme Court are likely a reversal of the lower court's decision (e.g., in its 2017 term, the Supreme Court reversed approximately 70% of lower court decisions). This data suggests that justices notice lower court decisions they disagree with and look to grant cert in these cases. For instance, in the Supreme Court with a liberal majority under Chief Justice Earl Warren, the justices would likely grant cert when a lower court made a conservative decision. Conversely, the Supreme Court's current conservative majority is more likely to grant cert in cases where a lower court casts a liberal decision.

## Briefing and Oral Argument

By law, the Supreme Court's term begins on the first Monday in October and runs until the end of June. When the Supreme Court is in session, oral arguments 6.4 are heard on Mondays, Tuesdays, and Wednesdays. Throughout the year, justices consider *cert* petitions and decide the cases in which to grant cert. Once cert is granted, both parties are notified, and the case is scheduled for oral argument. Prior to oral argument, both parties must submit a legal brief that conveys a party's legal argument based on the law and precedent. During this time, outside groups can file *amicus* briefs. *Amicus* briefs filed at this stage in the judicial process convey a group's legal view of the case and why they believe the law supports their side.

6.4

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**Supreme Court hears oral argument on the right to same-sex marriage.**

Source: The Supreme Court Historical Society

**FIGURE 6.10** **The Supreme Court Justices conference room.**

By the time of oral argument, the justices have a good understanding of the case and how they will rule. After all, they have read *cert* petitions, legal briefs, *amicus* briefs, and have done their own independent research to prepare for the case. Consequently, oral argument has little to no effect on the case's outcome; however, oral argument is the first time the justices hear their fellow justices' views on the case. During oral argument, lawyers receive thirty minutes to present their case (this time can be increased depending on the importance of the case). Oral argument is the only Supreme Court procedure open to the public, but it is not televised nor is same-time audio of the argument available. The moment a lawyer begins their argument, they are subject to questions by the justices and must respond to these questions. Lawyers will not get through much of their prepared remarks; instead, they must prepare for the questions and hypotheticals the justices will ask. In these exchanges, justices gain insight into their colleagues' perspectives on a particular case.

## Conference and Opinion Writing

On Wednesday afternoons after oral argument and on Fridays, the justices will meet to discuss the cases in which they recently heard oral argument. This **conference (Figure 6.10)** allows justices to vote in each case so a justice can be assigned to write the **Supreme Court's opinion** (also known as the majority opinion). The majority opinion explains the Supreme Court's ruling. Unlike the political branches, the Supreme Court must justify their every decision so that the political system can understand the legal reasoning. As offensive as people might find burning the American flag, anyone can read the majority opinion in *Texas v. Johnson* (1989) to understand what constitutional principles justified the decision.

Only the justices are present at conference, and their deliberations are kept secret to allow a candid exchange of viewpoints. Notes from retired justices describe a collegial discussion that is led by the chief justice, whose position makes him the most senior justice on the Supreme Court. He begins the discussion by presenting the case and providing his vote. Then, from the longest tenured justice to the least senior justice, the remaining justices do the same. Once all nine justices present their views and how they will vote, the chief justice tallies the votes to see what legal position the majority (at least five justices) supports.

If the chief justice is part of the majority coalition, he can either author the majority opinion himself or assign the opinion to another member of the majority coalition. Because there is consensus in a vast majority of Supreme Court opinions (e.g., 68% of cases in the Supreme Court's 2018 term were decided with at least six justices in the majority), the chief justice will assign authorship in a way that ensures each justice authors a similar number of opinions. In the Supreme Court's 2018 term, Justice Ruth Bader Ginsburg wrote the least majority opinions (six), and the most opinions written by a justice was eight.

If the chief justice is in the minority, the majority coalition's most senior member gets to decide to either write the decision herself or to assign the opinion to another justice in the majority. The author of *Obergefell* (2015), Justice Kennedy, assigned himself the opinion because he was the most senior member of that five-justice majority (Chief Justice Roberts was one of four justices in dissent).

Any justice in the majority coalition not assigned to write the majority opinion can write a **concurring opinion**, in which justices explain why they agree with the outcome for a legal reasoning that differs from the majority opinion's reasoning. A justice may also author a concurring opinion in response to any arguments raised in a dissenting opinion. Justices not in the majority can use a **dissenting opinion** to express why they believe the majority opinion is wrong. In his dissenting opinion on *Obergefell* (2015), Chief Justice Roberts explained his legal judgment that denying marriage licenses to same-sex couples was fully within the purview of states.

A justice's vote at conference is not final, and the Supreme Court's decision is not final until the Court publicly announces 6.5 the opinion in open court. Although the conference is a collegial discussion about the case, the

***Conference:*** *when the Supreme Court is in session on Wednesday afternoons after oral argument and on Fridays, the justices will meet to discuss the cases in which they recently heard oral argument. This conference allows justices to vote in each case so a justice can be assigned to write the Supreme Court's opinion.*

***Supreme Court's opinion:*** *also known as the majority opinion, the opinion details the reasons for the Supreme Court's ruling by specifying the constitutional and legal principles that justify the opinion. The majority opinion also establishes guidelines that actors in the judicial and political systems must follow.*

***Concurring opinion:*** *a separate opinion authored by a Supreme Court justice to explain why they agree with the outcome of a case for a legal reasoning that differs from the majority opinion's reasoning. A justice may also author a concurring opinion in response to any arguments raised in a dissenting opinion.*

***Dissenting opinion:*** *a separate opinion authored by a Supreme Court justice not in the majority coalition to express why they believe the majority opinion is wrong.*

**6.5**

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**A timeline of executive orders suspending entry to the U.S for foreign nationals from several countries labeled "high risk."**

time after—in which the justices discuss the writing of the majority opinion and share comments (suggestions)—leads to arguments and compromises over a case's resolution. During this back and forth, justices can change their votes as the majority opinion and the concurring and dissenting opinions are circulated amongst the justices.

In *Casey v. Planned Parenthood* (1992), at least five justices voted at conference to overturn *Roe v. Wade* (1973), which would have allowed states to heavily regulate or ban abortion. The chief justice at the time, William Rehnquist, assigned himself the opinion at conference, but Justices O'Connor, Kennedy, and Souter changed their votes during the circulation of drafts and joined their liberal colleagues to uphold the central holding of *Roe* (1973).[36]

## The Majority Opinion

***Seriatim:*** *the practice of opinion writing prior to the tenure of Chief Justice Marshall where each justice on the Supreme Court would author opinions that explained their rationale in a given case.*

Prior to Chief Justice Marshal's tenure in 1801, the Supreme Court would decide cases **seriatim**. That is, each justice would author an explanation of their rationale for their votes. This process was time consuming (justices also had responsibilities as circuit judges), and it affected the prestige of the institution because no single opinion spoke for the Supreme Court. As part of his plan to enhance the Supreme Court's prestige, Chief Justice Marshall ended the practice of deciding cases seriatim and instituted the practice of authoring one majority opinion to represent the Court's opinion. With one majority opinion, the Supreme Court's policy-making role (i.e., writing opinions explaining their decisions) is unified in one clearly written opinion.

The majority opinion details the reasons for the Supreme Court's ruling by specifying the constitutional and legal principles that justify the opinion.[38] The majority opinion also establishes guidelines that actors in the judicial and political systems must follow. As the head of the federal judiciary, the Supreme Court's opinions set judicial precedents that must be followed and applied by district courts and by circuit court judges. Regardless of how a lower court judge views a precedent set by the Supreme Court, they must follow the precedent when they hear and decide cases. The only judicial body that can overturn these precedents is the Supreme Court itself (in a later case).

Notably, the majority opinion's precedent must be followed by all actors in the political system (e.g., Congress, the president, and state governments). The Supreme Court lacks any ability to enforce its decisions, but historical practice and the institution's legitimacy induce compliance.[39] Importantly, checks and balances would be meaningless if political actors could openly defy constitutional limits and the Supreme Court's decisions.

# Conclusions: The Importance of Federal Judges

This chapter presented the federal judiciary as a unified body entrusted to interpret federal law and the Constitution, as is their responsibility in the U.S. political system's rulebook. However, interpreting the law is not straightforward.

Ultimately, federal judges must make these decisions and, like any governmental official, their philosophy matters. A judicial value important to Justice Neil Gorsuch's **(Figure 6.11)** jurisprudence (the original public meaning of the Constitution) may be less important to Justice Elena Kagan **(Figure 6.12)** (viewing the Constitution in light of today's society). Because the Constitution establishes a political system to select judges, individuals are selected based on their judicial philosophy and on politics. We may strive for impartial judges free from political bias, but Democratic and Republican presidents and senators have vastly different expectations for judges (and vice versa). These different views lead to vastly different outcomes when settling legal disputes—outcomes that profoundly affect society (e.g., outlawing prayer in public schools, upholding the military draft's constitutionality, and ensuring a right to privacy).

In the perfect political environment, presidents would appoint federal judges who align perfectly with their policy goals. Judicial appointments are the only way presidents can alter the composition and output of the federal judiciary.[40] Yet, the amount of vacancies in lower courts compared to the rare openings on the Supreme Court means that presidents will focus on the latter. Substantively, this makes sense as lower court judges are bound by Supreme Court precedent, and their jurisdiction is limited (e.g., district courts by their state and circuit courts by their geographic regions). Further, district court nominations are largely influenced by **senatorial courtesy**. For a district court vacancy in a state in which one senator, or both, share the president's political party, the president must get their courtesy on a judicial appointment. Without their approval, the Senate will not begin the confirmation process. For circuit courts, senatorial courtesy applies to seat vacancies that belong to a particular state.

The Supreme Court is the most significant judicial tribunal in the United States because its decisions are binding over the entire country. President Trump has aptly described this power: "Outside of war and peace, of course, the most important decision you make is the selection of a Supreme Court judge."[41] In these appointments, presidents try to advance distinct goals. First, presidents pursue justices who share their ideological and policy agendas. Simply, Republican presidents seek to appoint conservative judges, and Democratic presidents look to appoint liberal judges. The reason, clearly, is that justices (guaranteed a life tenure) will have a tremendous impact on American society long after a president leaves office.[42]

These ideological expectations have led to profound changes in the confirmation of justices: no Supreme Court nominee can expect to receive overwhelming bipartisan support (which was seen as recently as the 1980s and 1990s). Justice Antonin Scalia was viewed as eminently qualified for the Supreme Court and considered one of the most conservative nominees when President Reagan appointed him in 1986. He was confirmed ninety-eight to zero in the Senate and lived up to his conservative reputation during his tenure on the Supreme Court. The most recent Supreme Court appointment, Justice Brett Kavanaugh in 2018 **(Figure 6.13)**, was confirmed fifty to forty-eight. The basis for political opposition to Justice Kavanaugh was his judicial philosophy, not necessarily his qualifications to sit on the Supreme Court.

Source: Franz Jantzen, Collection of the Supreme Court of the United States - https://www.oyez.org/justices/neil_gorsuch

**FIGURE 6.11 Justice Neil M. Gorsuch**

Source: Supreme Court of the United States

**FIGURE 6.12 Justice Elena Kagan**

***Senatorial courtesy:*** *for a district court vacancy in a state in which one senator, or both, share the president's political party, the president must get their courtesy on a judicial appointment. Without their approval, the Senate will not begin the confirmation process. For circuit courts, senatorial courtesy applies to seat vacancies that belong to a particular state.*

Source: Supreme Court of the United States

**FIGURE 6.13 Justice Brett Kavanaugh**

***Nuclear option:*** *prior to November 2013, all federal judges needed bipartisan support because 60 votes were needed to break a judicial filibuster (i.e., once cloture is invoked, a filibuster ends and a judicial nominee receives a final confirmation vote on the Senate floor). In November 2013, with Democrats in control of the senate, Majority Leader Harry Reid lowered the cloture threshold to a simple majority (fifty-one votes) to break a filibuster for lower court judges (e.g., district and circuit court judges). In April 2017, with Republicans in control of the Senate, Majority Leader Mitch McConnell lowered the cloture threshold to a simple majority (fifty-one votes) to break a filibuster for Supreme Court justices.*

**6.6**

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**The Senate votes to invoke the "nuclear option" to limit debate in the Supreme Court nomination process in 2017.**

The increasingly polarized confirmation process also influenced the Senate to change their rules. Prior to November 2013, all federal judges needed bipartisan support because sixty votes were needed to break a judicial filibuster. Once cloture is invoked, a filibuster ends and a judicial nominee receives a final confirmation vote on the Senate floor. In November 2013, with Democrats in control of the Senate, Majority Leader Harry Reid invoked the so-called **"nuclear option,"** lowering the threshold to a simple majority (fifty-one votes) to break a filibuster for lower court judges. Democrats argued that Republicans were opposing President Obama's nominees to the district and circuit courts for purely partisan reasons by refusing to vote to invoke cloture.

When Justice Scalia died in February 2016, Republicans had control of the Senate and vowed that President Obama would not be allowed to name his successor. The new majority leader, Mitch McConnell, argued that, in the middle of presidential election, the American people should decide at the ballot box which party would fill the vacancy via the presidential election. In January 2017, one of President Trump's first announcements was nominating Neil Gorsuch to fill Justice Scalia's seat. However, Senate Republicans did not have enough votes to break a judicial filibuster, and not enough Democrats were willing to cross party lines. Majority Leader McConnell invoked Nuclear Option 2 in April 2017 **6.6**, which allows a simple majority of senators (fifty-one) to break a filibuster for Supreme Court nominees. Republicans argued that Democrats opposed Justice Gorsuch for purely political reasons, not because he lacked the qualifications to sit on the Supreme Court. Justice Gorsuch would eventually be confirmed by the Senate, fifty-four to forty-five.

Justices now serve long tenures on the Supreme Court, making a vacancy a rare event that garners attention in the political system. An appointment's rarity coupled with the awareness these appointments generate means presidents use nominations to appeal to particular voting blocs. Responding to polls showing Ronald Reagan was losing women to President Carter during the 1980 presidential campaign, he vowed to appoint the first woman to the Supreme Court.[43] With his first vacancy as president in 1981, President Reagan fulfilled his campaign promise by nominating Justice Sandra Day O'Connor.

Today, Republicans use judicial appointments to appease social conservatives and Evangelical voters. For instance, to solidify this voting bloc during the 2016 presidential campaign, President Trump publicized a shortlist of nominees he would appoint to the Supreme Court (e.g., Justices Gorsuch and Kavanaugh were on the list). Because women and minorities are a major base of support for the Democratic Party, President Obama unsurprisingly nominated two women to the Supreme Court (Justices Sonia Sotomayor and Elena Kagan), and Justice Sotomayor was the first Hispanic person to sit on the Court.

Federal judges are immune from electoral and political pressure, but there are clear ideological differences in judges appointed by Republicans and those appointed by Democrats. This dynamic has played out in the partisan bickering over judicial appointments in recent years. As citizens, the only mechanism to influence the federal judiciary is by voting for a president who will appoint judges congruent to your political values and by voting for senators who will confirm those nominees.

## Key Terms

**Amicus curiae briefs:** briefs filed by outside groups with an interest in a case, but they themselves have no direct involvement in the legal controversy. These briefs can be filed to petition the Supreme Court to support or to oppose the granting of cert. Further, if the Supreme Court grants cert, outside groups can file briefs to convey a group's legal view of the case and why they believe the law supports their side.

**Appeal as a matter of right:** particular instances where Congress mandates the Supreme Court to review the decision of a lower court. For example, in any legal dispute over the Voting Rights Act, a three-judge district court panel is empowered to hear the case. After the panel's decision, the case is automatically appealed to the Supreme Court, and they must hear and decide the case.

**Appellate courts:** a court where arguments are heard concerning a lower court's decision to ensure that the law was applied and interpreted correctly (i.e., appellate courts review the decisions of courts below them in the judicial hierarchy).

**Appellate jurisdiction:** a court's authority to review a lower court's decision to ensure that the law was applied and interpreted correctly. For instance, a litigant's last chance for a favorable judicial decision is an appeal to the Supreme Court, which is the last judicial body that can review a case.

**Applications of judicial review:** in the American political system, the judiciary 1) determines whether government officials have taken an action that exceeds their power under the Constitution or applicable law, 2) federalism ensures that the judiciary will police the distribution of powers between the federal government and the states, and 3) separation of powers ensures the judiciary can nullify a law that violates the Constitution.

**Concurring opinion:** a separate opinion authored by a Supreme Court justice to explain why they agree with the outcome of a case for a legal reasoning that differs from the majority opinion's reasoning. A justice may also author a concurring opinion in response to any arguments raised in a dissenting opinion

**Conference:** when the Supreme Court is in session on Wednesday afternoons after oral argument and on Fridays, the justices will meet to discuss the cases in which they recently heard oral argument. This conference allows justices to vote in each case so a justice can be assigned to write the Supreme Court's opinion.

**Constitutional supremacy:** the notion that a constitution is the fundamental law that dictates all governmental action. Consequently, government can take no action that violates the commands of a constitution.

**Discretionary docket:** in the federal judiciary, the Supreme Court is the only court that can choose which cases it hears.

**Dissenting opinion:** a separate opinion authored by a Supreme Court justice not in the majority coalition to express why they believe the majority opinion is wrong.

**En banc hearing:** every case appealed to a circuit court is heard by a randomly drawn three-judge panel. If a litigant loses their case in front of their initial three-judge panel, they can request that all the active judges on a circuit court review the panel's decision and determine whether the three-judge panel erred.

**Judicial independence:** the structural protections in Article 3 that all federal judges appointed by the president and confirmed by the Senate are guaranteed to hold their office during "good Behaviour" (i.e., they are granted life tenure) and their salary cannot be diminished once in office. These protections ensure the judiciary can carry out its responsibilities free from political pressure.

**Judicial review:** the power of the judiciary to review governmental actions (laws or actions taken by both state and federal governmental officials) and determine their compatibility with the Constitution.

**Judiciary Act of 1789:** one of the initial acts of the First Congress, which created a judiciary with independent lower federal courts staffed by federal judges to interpret the Constitution and federal law. In this Act, Congress set the number of Supreme Court justices at six, created thirteen district courts and three circuit courts. Additionally, Congress defined the jurisdiction of each of these courts.

**Jurisdiction:** a court's authority to hear and decide a case. This authority is bestowed by either the Constitution, or Congress.

**Justiciability:** this self-imposed constraint guarantees that judicial power is applied to a concrete legal dispute between two adverse parties. The five issues related to justiciability ensure that federal courts do not issue advisory opinions, that both parties want different outcomes in a legal controversy, a case is not moot, a case is ripe for judicial resolution, and the issue is not a political question.

**Legal standing:** to establish standing, a litigant must show that they personally suffered a concrete legal injury from the alleged conduct of the party being sued. Plus, the litigant must show how a favorable judicial decision will redress their legal injury.

**Mandatory jurisdiction:** jurisdiction in which a court must hear and decide a case presented to them.

**Nuclear option:** prior to November 2013, all federal judges needed bipartisan support because 60 votes were needed to break a judicial filibuster (i.e., once cloture is invoked, a filibuster ends and a judicial nominee receives a final confirmation vote on the Senate floor). In November 2013, with Democrats in control of the senate, Majority Leader Harry Reid lowered the cloture threshold to a simple majority (fifty-one votes) to break a filibuster for lower court judges (e.g., district and circuit court judges). In April 2017, with Republicans in control of the Senate, Majority Leader Mitch McConnell lowered the cloture threshold to a simple majority (fifty-one votes) to break a filibuster for Supreme Court justices.

**Original jurisdiction:** a court's authority to hear a case first (i.e., the court a legal controversy begins). For instance, Article 3 defines the issues that are assigned to Supreme Court's original jurisdiction, making the Supreme Court the only judicial body to hear a case (i.e., litigants take their claims directly to the Supreme Court).

**Riding circuit:** beginning with the Judiciary Act of 1789, Supreme Court justices would also hear and decide cases as circuit court judges. Consequently, justices spent most of their time as a circuit judge hearing cases and riding long hours to hear them (within the circuits).

**Self-imposed limits on judicial power:** the Supreme Court's interpretation of Article 3's command that judicial power should only extend to cases and controversies. Thus, for any litigant to invoke the judiciary's power they must have the legal standing to bring a case. Once standing has been established, a litigant must show that a court has jurisdiction and that the case is justiciable.

**Senatorial courtesy:** for a district court vacancy in a state in which one senator, or both, share the president's political party, the president must get their courtesy on a judicial appointment. Without their approval, the Senate will not begin the confirmation process. For circuit courts, senatorial courtesy applies to seat vacancies that belong to a particular state.

**Seriatim:** the practice of opinion writing prior to the tenure of Chief Justice Marshall where each justice on the Supreme Court would author opinions that explained their rationale in a given case.

**Structural limits on judicial power:** Article 3 creates a judiciary that lacks enforcement power and is reactionary. That is, cases must be brought to the judiciary's attention through the judicial process.

**Supreme Court's opinion:** also known as the majority opinion, the opinion details the reasons for the Supreme Court's ruling by specifying the constitutional and legal principles that justify the opinion. The majority opinion also establishes guidelines that actors in the judicial and political systems must follow.

**Trial courts:** a court where adverse parties present evidence for their case in a legal controversy. A judge presides over the trial to ensure the trial's rules are followed. A neutral party, usually a jury, weighs the evidence and accepts one party's case based on the evidence offered.

**Writ of certiorari:** any litigant who loses at the circuit level or in their state's Supreme Court can petition the Supreme Court to review their case. This cert petition depends on four justices agreeing to hear the case. If four justices agree to grant cert, the case is given full review by the Supreme Court.

**Writ of mandamus:** a judicial command that compels a government official to act in her official capacity.

## ENDNOTES

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[4]Farber, Daniel A. and Suzanna Sherry. 2005. A History of the American Constitution. pg. 65. 2nd Edition. Thomson/West.

[5]United States Constitution. Article 3, Section 1.

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[8]See, Ex parte McCardle. 74 U.S. 506 (1869).

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[10]Murphy, Walter F., C. Herman Pritchett, Lee Epstein, and Jack Knight. 2005. Courts, Judges, and Politics: An Introduction to the Judicial Process. pg. 80. 6th Edition. McGraw-Hill.

[11]Paulsen, Michael S., Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray. 2010. The Constitution of the United States. pg. 141. Second Edition. Foundation Press.

[12]Ibid. pg. 79.

[13]Ingold, David. (2017, April 7). "Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer." Bloomberg. Retrieved from https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure/

[14]The Federal Circuit has nationwide jurisdiction "in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims." Retrieved from http://www.cafc.uscourts.gov/the-court/court-jurisdiction

[15]Paulsen, Michael S., Steven G. Calabresi, Michael W. McConnell, and Samuel L. Bray. 2010. The Constitution of the United States. pg. 487. Second Edition. Foundation Press.

[16]Hamilton, Alexander. (1778). Federalist #78: The Judiciary Department.

[17]Eakin v. Raub. 12 Sargent & Rawle 330. (PA 1825). (Justice Gibson dissenting opinion)

[18]Hylton v. United States. 3 U.S. 171 (1796).

[19]Marbury v. Madison. 1 Cranch 137 (1803).

[20]Murphy, Walter F., C. Herman Pritchett, Lee Epstein, and Jack Knight. 2005. Courts, Judges, and Politics: An Introduction to the Judicial Process. pg. 51. 6th Edition. McGraw-Hill.

[21]Ibid. pg. 46.

[22]Trump v. Hawaii. 585 U.S. ¬_ (2018).

[23]South Carolina v. Katzenbach. 383 U.S. 301 (1966).

[24]Texas v. Johnson. 491 U.S. 397 (1989).

[25]Hamilton, Alexander. (1778). Federalist #78: The Judiciary Department.

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[27]Some states allow their state supreme courts to issue advisory opinions for matters concerning state law.

[28]Murphy, Walter F., C. Herman Pritchett, Lee Epstein, and Jack Knight. 2005. Courts, Judges, and Politics: An Introduction to the Judicial Process. pg. 276. 6th Edition. McGraw-Hill.

[29]Rucho v. Common Cause. 588 U.S. _ (2019).

[30]Obergefell v. Hodges. 576 U.S. _ (2015).

[31]Tocqueville, Alexis de, 1805 – 1859. 1838. Democracy in America. New York: G. Dearborn & Co.

[32]"Jurisdiction: Original, Supreme Court." Federal Judicial Center. Retrieved from https://www.fjc.gov/history/courts/jurisdiction-original-supreme-court

[33]One method of invoking the Supreme Court's appellate jurisdiction is known as certification. Certification involves circuit judges asking the Supreme Court to "certify" questions of federal law (i.e. provide clarity). Since only appellate judges can invoke this, it is used infrequently.

[34]Perry, H.W. 1991. Deciding to Decide. Cambridge, MA. Harvard University Press.

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[36]Thomas, Evan. 2019. First: Sandra Day O'Connor. New York, New York. Random House.

[37]Segal, Jeffrey A., Harold J. Spaeth, and Sara C. Benesh. 2005. The Supreme Court in the American Legal System. New York, New York. Cambridge.

[38]For example, the Supreme Court ruled in Casey (1992) that Roe's (1973) central holding would be upheld which protects the constitutional right of woman to have an abortion prior to viability. Under this precedent, no state government is allowed to impose an undue burden on a women's right to choose. In all cases that have arisen since Casey (1992), lower court judges must apply this precedent to judge whether a state's abortion regulation has gone too far. For those judges that are opposed to Casey (1992), you will usually see language along the lines of, "While I believe the Supreme Court's jurisprudence is misguided, I am bound by their precedent."

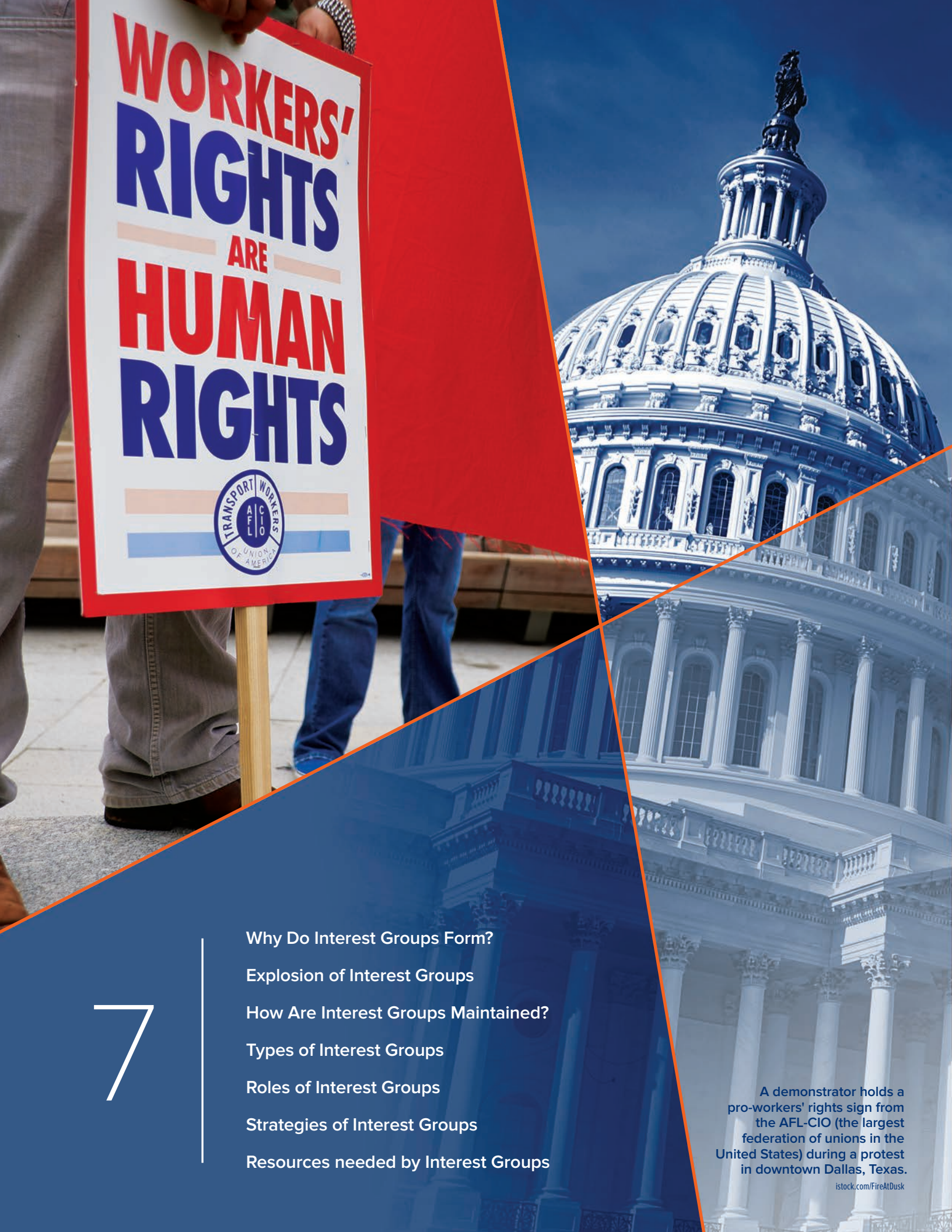
[39]Cooper v. Aaron. 358 U.S. 1 (1958).

[40]Epstein, Lee and Jeffrey A. Segal. 2005. Advice and Consent: The Politics of Judicial Appointments. New York. Oxford University Press.

[41]Rucker, Philip and Seung Min Kim. (2018, June 30). "'We have to pick a great one': Inside Trump's plan for a new Supreme Court justice." Washington Post. Retrieved from https://www.washingtonpost.com/politics/we-have-to-pick-a-great-one-inside-trumps-plan-for-a-new-supreme-court-justice/2018/06/30/610dcd4e-7bb0-11e8-80be-6d32e182a3bc_story.html?utm_term=.9a94d2c9b688

[42]Plus, Senators will confirm Justices that are not only qualified but also share a similar ideology as them. Thus, Senators are likely to vote no a nominee whom they perceive to be too ideologically distant from them.

[43]Thomas, Evan. 2019. First: Sandra Day O'Connor. New York, New York. Random House.




7

Why Do Interest Groups Form?

Explosion of Interest Groups

How Are Interest Groups Maintained?

Types of Interest Groups

Roles of Interest Groups

Strategies of Interest Groups

Resources needed by Interest Groups

A demonstrator holds a pro-workers' rights sign from the AFL-CIO (the largest federation of unions in the United States) during a protest in downtown Dallas, Texas.

istock.com/FireAtDusk

CHAPTER SEVEN

# Interest Groups

**PEOPLE IN THE UNITED STATES** believe that representing citizens' interests through group membership enhances democracy, which is called **pluralism**. In turn, the distribution of government resources (which are scarce and highly sought) generates political activity from interest groups.

***Pluralism:*** *the belief that democracy is enhanced when citizens' interests are represented through group membership.*

**Interest groups** consist of individuals who share a common political or economic goal and unite to influence government decisions. They are large, small, wealthy, and poor. Many interest groups are highly influential, and others are largely ignored. Their interests vary from provincial to global concerns, and examples of these groups abound. Perhaps the country's most widely discussed interest group is the National Rifle Association (NRA), but it is hardly the only one. Other examples include the American Association of Retired Persons, the National Education Association, Emily's List, the American Federation of Labor and Congress of Industrial Organizations, Tea Party Patriots, and Black Lives Matter. These groups endeavor to influence governmental policies on local, state, and federal levels.

***Interest groups:*** *organizations of individuals who share a common political or economic goal and unite for the purpose of influencing government decisions.*

In this chapter, we will discuss why interest groups form and how they maintain themselves as well as their types, roles, strategies, and resources.

## Why Do Interest Groups Form?

With a working definition of *interest group*, we should consider why they form. The answer may not be obvious. Political scientists attempted to develop an overarching theory on why interest groups form. Prior to the 1960s, most studies focused on how groups lobbied and used lawsuits and other activities to persuade or pressure the government. This approach explained what groups do once formed. For example, Arthur Bentley's description of successful groups (including their size, intensity, and technique) was a blueprint for future studies. Indeed, Bentley's argument—that no interests exist without groups and that interests and groups are not mutually exclusive—is now taken for granted, but it does not explain why groups form. As such, we must discuss theories developed after Bentley's groundbreaking work: the disturbance theory, the exchange theory, and the patron theory.

***Disturbance theory:*** *groups form because their interests have been jostled by societal changes.*

David Truman argued that groups form because their interests are affected by societal changes, which is called the **disturbance theory**. Groups are created by a synergy of passion, intensity, and opportunity and then become political and begin making claims through government reforms to effect policy changes. For example, Truman created the "Farm Bureau" in 1919 as a direct response to the fall of the cotton industry. Over a few decades, farmers associations formed a powerful political bloc in Congress to effectively advocate for farmers interests.

Fundamentally, Truman's theory has merit, but it is incomplete. The historical record can reveal any number of powerful interests that were formed because of exogenous events within society: the National Association for the Advancement of Colored People (NAACP), almost every civil rights organization of the mid-twentieth century, women's suffrage and liberation groups, abolitionist groups, and anti-abolitionist groups. However, disturbance theory does not explain group sustainability, it does not illuminate how groups are governed, and it does not tell us much about how they are organized.

***Exchange theory:*** *groups form because organizers (or entrepreneurs) invest heavily in a group and recruit members (or customers) by offering benefits for their participation.*

Robert Salisbury's **exchange theory** distinguishes between interest groups' organizers and members. It posits that organizers (or entrepreneurs) invest heavily in a group and recruit members (or customers) by offering benefits for participation.

***Patron theory:*** *groups form and are maintained by patrons.*

**Patron theory**, as conceived by Jack Walker, concludes that groups are created and maintained by outside funds. That is, patrons of a cause invest money to form a group, and the group can only be sustained if they continue to give. Organizers must secure both start-up and maintenance funds. Some broad-based organizations arise after Congress passes major legislation, groups form in response to the new law (particularly representing people who will be affected by the legislation). This theory's major issue is its limited scope. There are too few cases of groups formed and maintained solely via patronage. Furthermore, it is unclear whom Walker considers a patron.

It is difficult to argue for one theory over another because they all make good claims. It is thus better to incorporate them all in a general explanation of interest group dynamics. For example, the disturbance and exchange theories

could be called origin theories. They make great cases for why societal disturbances prompt enterprising individuals to form interest groups in response to shifts. These individuals market their groups to members by offering benefits. Exchange and patron theories could be called maintenance theories. Entrepreneurs exchange benefits for continued membership, but they also seek outside funding from interested patrons (both high- and small-dollar patrons) to receive a return on their investment. Explaining interest groups dynamics on a continuum (or a process) may prove more helpful than struggling to apply a limited-scope theory to all groups.

## Explosion of Interest Groups

Theories exist for why interest groups form, but the recent proliferation of interest groups in the United States began after the two American wars in the mid-twentieth century. For years, particularly between the Great Depression and the wars, citizens with discretionary money focused on maintaining their well-being and keeping the peace. Thus, monies that would be spent on individual self-interests were instead dedicated to national endeavors. For example, individuals (and corporations) would purchase war bonds to help finance the war efforts.

After the wars, affluent people were now free to resume spending on self-interests. Furthermore, the newly expanded (and entrusted) federal government and its expanding scope of programs created constituencies interested in influencing it. For instance, millions of GIs receiving veterans' benefits after WWII and the Korean War created interest groups to protect veterans. In addition, social security benefits resulted in citizen groups designed to defend retirees and seniors. Some groups formed as a direct result of government intervention (such as with the Farmers Bureau), and sometimes the government encouraged interest groups to form with its policies (e.g., labor unions after the passage of pro-labor legislation in the late 1930s). Indeed, 70 percent of interest groups were established in Washington between 1960 and 1970.

## How Are Interest Groups Maintained?

Interest groups have a built-in problem because people are rational actors who will try to benefit from a group without having to pay any of the costs, if they can. What does it mean to be a rational actor? Simply put, **rational actors** pursue **private goals**. These goals do not require the consideration of others and are the opposite of **public goals**, which require collective attention and persuasion. A private goal is a self-interest, and rational actors only pursue public goals to realize private ones. Public goals are jointly supplied, and no one can be excluded from the benefits of these goals once they are achieved. These benefits cannot be crowded, or used up by one individual or an elite few. Interest groups often work for the public good while struggling to maintain themselves because mobilizing individuals beyond their self-interests is difficult.

***Rational actors:*** *individuals who are driven by the pursuit of private interests.*

***Private goals:*** *individual self-interest that does not require the consideration of others.*

***Public goals:*** *jointly supplied, public goods or services that require collective action and cannot be denied to anyone.*

**FIGURE 7.1**

## Prisoner's Dilemma

| | **SUSPECT 2** STAYS QUIET | **SUSPECT 2** SNITCHES |
|---|---|---|
| **SUSPECT 1** STAYS QUIET | **SUSPECT 1** SERVES 1 YEAR<br>**SUSPECT 2** SERVES 1 YEAR | **SUSPECT 1** SERVES 10 YEARS<br>**SUSPECT 2** SERVES NO TIME |
| **SUSPECT 1** SNITCHES | **SUSPECT 1** SERVES NO TIME<br>**SUSPECT 2** SERVES 10 YEARS | **SUSPECT 1** SERVES 5 YEARS<br>**SUSPECT 2** SERVES 5 YEARS |

***Prisoner's dilemma:*** *example of why rational actors might not cooperate collectively, even when it is in their best interests.*

A famous game theory called the **prisoner's dilemma** can help explain why rational actors do not always work collectively, even when it is in their best interest. In **Figure 7.1**, two suspects were apprehended for a serious crime. They face three choices: a) they can become a witness for the state and turn in other suspects to get no time in prison while their accomplice gets ten years; b) they can both remain quiet and only receive one-year sentences for a minor crime; or c) they can turn each other in and each get a five-year sentence.

From the suspect's perspective, the best option is to inform on each other because the cost of remaining quiet (while the other suspect turns them in) could mean ten years in prison. In this scenario, the individual and collective goals do not match. If both suspects prioritize their private goals, they each receive five years in prison. If they prioritize their collective goal and remain quiet, they would receive one-year sentences.

***Collective action problem:*** *when rational actors exploit a common resource without limits.*

In another example, you and a group of friends share a lake for fishing. Everyone involved is a rational actor, so everyone is inclined to maximize the lake's benefits. That means everyone will fish a lot. If everyone fishes in the lake as much as possible without regard for sustainable behavior (as the lake has a finite amount of fish), however, your common resource could be destroyed. This is called a **collective action problem**.

To further describe this collective action problem, keeping a clean living space is perhaps a more relatable example. Let us assume you have roommates. Most homes have dirty dishes, laundry, and clutter, so unless people are comfortable living with a mess, someone must maintain the space. If only your roommates volunteer to wash the dishes, do the laundry, and pick up the clutter, you are a **free rider** because you enjoy a clean space without helping to maintain it. Interest groups often face this problem. For instance, a community group that wants to maintain clean parks does so by recruiting volunteers to walk the parks and pick up trash every weekend. Meanwhile, community citizens who do not volunteer get trash-free public parks without the cost of volunteering their time and energy. They are free riders. Members of that community group may be okay with this arrangement for a while, but it could prove difficult to grow their numbers or maintain enough members to effectively clean the parks if more citizens do the rational thing and ride for free.

***Free rider problem:*** *when individuals enjoy the benefits of collective efforts without having to share in the cost.*

These scenarios describe the built-in challenge for interest groups. To maintain itself, an interest group must solve this collective action versus free rider problem. Rational actors must participate in order to thrive, but individuals and their private goals must also benefit somehow.

To compel participation, interest groups offer members **selective benefits** (material, solidary, and expressive benefits). **Material benefits** are tangible rewards that members can use. For instance, the American Automobile Association and the American Association of Retired Persons offer members a discount card for shopping, dining, and traveling expenses. The NRA gives members free tickets to annual meetings and exhibits. Mancur Olson's *Logic of Collective Action* argued that tangible benefits are central to getting individuals to freely exchange their free-rider status for a membership. Are tangible benefits the sole means of enticing individuals to join (and remain) in a group? Not exactly.

***Selective benefits:*** *exclusive benefits offered by interest groups to compel participation among members.*

***Material benefits:*** *tangible rewards that members can use.*

Benefits may also be **solidary**. These benefits refer to interacting and bonding among group members. Belonging to a church offers these effects through time spent worshipping, fellowshipping, and serving alongside members of your faith. Members of Greek organizations have bonding rituals, group events, and a shared history. Activists receive the benefits of standing, marching, strategizing, and protesting with fellow activists for a common cause. Interest groups provide a selective opportunity to stand in solidarity with likeminded folks.

***Solidary:*** *the benefits of interacting and bonding among group members.*

Additionally, interest groups deliver **expressive (or purposive) benefits**. These are the intangible good feelings that come from contributing to a cause people believe in. Groups allow people to civically participate beyond voting, and they offer a platform for people to express their sentiments. Some groups do public demonstrations, and others lobby legislators. Many do both. These activities can be very beneficial for many, which is another bonus for participating in an interest group. Groups with members who only want to enjoy selective benefits are at a disadvantage. These groups are unlikely to mobilize members into action.

***Expressive (or purposive) benefits:*** *rewards that come from expressing your values and beliefs.*

Beyond collective action problems, interest groups have a few other notable characteristics. Small groups have some organizational advantages. Groups

intensify rather than lessen individual passions. Some groups are more equal than others, in that a hierarchy of access and influence exists among interest groups. Business and professional organizations tend to be more influential than citizen action groups.

## Types of Interest Groups

There are three types of interest groups (economic, equal opportunity, and public). **Economic interest groups** influence policymakers for economic benefit. These group pursue favorable regulations, lower taxes, strengthened (or weakened) collective bargaining rights, higher wages, and government subsidies. These groups include corporations, unions, and professional and business associations like the United States Chamber of Commerce.

***Economic interest groups:*** *groups that form to influence policymakers for their own economic benefit.*

**Equal opportunity interest groups** promote civil and economic rights for underrepresented groups. These are also known as citizen groups.

***Equal opportunity interest groups:*** *groups that form to promote civil and economic rights for underrepresented groups.*

Citizen groups must maintain their membership to remain viable, so they must consider members' concerns before pursuing a policy agenda, and they must preserve membership incentives. These incentives may be expressive, material, or solidary. As a result, these groups' policy agendas are often stymied. For example, although churches are intuitional organizations, they are subject to congregational (or membership) demands. Churches are structurally hierarchical but rely upon membership fees (or tithes) to function. A church leader's policy agenda that contradicts the beliefs of a large bloc of congregants could invite revolt or outright flight. The United Methodist Church's split over marriage equality is a prime example. Consequently, citizen groups must focus on maintaining their membership, which does not require winning a lobbying battle. It simply means they must fight the good fight. It also means their policy goals do not have to revolve around legislative victory. Access is most important to these organizations, and access to legislators is relevant to the legislative process. Groups use this access to convince membership that their policy agendas influence policymakers. Some citizen groups pursue legislative victories more aggressively than others (for example, Americans for Tax Reform or the NRA).

**Public interest groups** convince policymakers to produce collective public goods. Their work cannot limit benefits to members and is typically noneconomic. Groups like the American Civil Liberties Union endeavor to "fight government abuse and to vigorously defend individual freedoms including speech and religion, a woman's right to choose, the right to due process, citizens' rights to privacy,"[1] and more. No member of the public can be excluded from their legal victories, making them a high-profile example of public interest groups. Interest groups also pursue issues like clean air and water.

***Public interest groups:*** *groups that form to convince policymakers to produce collective public goods.*

## Roles of Interest Groups

Interest groups have several primary roles. We will highlight six: representation, participation, education, agenda building, alternative policy provision, and program monitoring.

At their core, interest groups must represent members' interests to influence peddlers, the public, and policymakers. They utilize strategies (as discussed later) to achieve common interests, including interests from geographic regions (Southwest Regional Council of Carpenters), political ideologies (Americans for Prosperity and Campaign for America's Future), professions (Teachers of English to Speakers of Other Languages), environmental concerns (Sierra Club), civil rights and liberties (League of Women Voters and National Organization for Women), and others.

Interest groups also offer opportunities to civically participate beyond voting. They "provide a mechanism for people to pool their resources and channel their efforts collectively."[2] This collective action is far more likely to yield policy changes and political success, and this action is a foundational principle of pluralist democracy.

Policymakers do not (and cannot) know everything about every issue. Indeed, they rely on interest groups that specialize in policy areas to inform and educate them. They also look to these groups for alerts on important issues that they may not have noticed and for myriad policy alternatives once an issue is on a legislature's political agenda. Last, interest groups track laws passed and inform policymakers on their intended and unintended consequences.

## Strategies of Interest Groups

Before choosing the most effective strategies, interest groups must consider their size, resources, membership, discipline, and goals. A group is open or limited to certain methods based on these characteristics. Interest groups with many resources and high visibility are more inclined to directly petition policymakers. They also receive more representation in the media. Other groups, with limited resources and a lack of visibility, resort to demonstrations and protests to gain the attention of media and policymakers. An organized interest group chooses one method over the other mostly based upon its makeup and goals.

A group's lobbying methods reflect the group itself. **Lobbying** is attempting to persuade policymakers to support the group's issue positions. Large and powerful institutional groups (like a chamber of commerce) can pressure legislators from within an institution because few citizen groups can rival their credibility and respect. As such, these groups often use **direct lobbying**—a direct interaction—with policymakers to influence their decisions.

***Lobbying:*** *attempts to persuade policymakers to support a group's issue positions.*

***Direct lobbying:*** *a direct interaction with policymakers for the purpose of influencing their decisions.*

Direct lobbyists are heavily involved in the legislative process, but institutional and citizen organizations play different roles. An institutional (or producer) group invests in political representation with policy outcomes in mind. It will not see a return on its investment unless its goals are met and policy changes to its benefit. A citizen group has policy goals too, but it must chiefly maintain itself by offering incentives to its members. Its return on investment is a satisfied membership.

Scandals from the past several decades have forced Congress to revise its rules on direct lobbying. In 1995, Congress passed the Lobbying Disclosure

Act (1995), which required lobbyists to report how much they were paid, who paid them, and the issues they were promoting. By 2005, a bribery scandal involving gifts given to Representative Randy "Duke" Cunningham (R-CA) and a fraud and bribery scandal connecting prominent Washington lobbyist Jack Abramoff to several House members compelled Congress to tighten restrictions on travel and gifts. Thus, Congress passed the Honest Leadership and Open Government Act (2007).

Large, institutional, and powerful interest groups can access public resources and power without a full-scale electoral mobilization[3] via financial contributions. While some argue that money's influence is overrated in terms of changing legislative votes, interest group contributions are important in matters such as issue visibility (the fact that contributions matter when issues are less known). They require groups to understand the institution, its rules, the lobbyists who can disseminate information and pressure the legislator, and how to access the legislators—all of which entails a level of credibility and visibility mostly attributed to hefty resources. Consequently, this method appears to exclude smaller organizations with limited resources.

A small group with limited resources is forced to acknowledge its invisibility and counter it through other means. Mass media's representation of well-resourced, well-funded interest groups and those groups that lack both is biased. Scholars call it **biased pluralism**—mass media's policy coverage "sings with an upper-class accent." Coverage favoring large business interests, as opposed to citizen organizations, is lopsided. Smaller citizen groups must utilize media differently in order to gain attention. This often requires the use of protests and demonstrations.

***Biased pluralism:*** *policy advocacy through the mass media tends to favor business interest groups over citizen interest groups.*

***Indirect lobbying:*** *any attempt to influence policymakers by encouraging the general public to pressure them.*

***Paid media:*** *when groups pay to advertise issues through television, social media, and print.*

***Earned media:*** *when groups attract media attention through efforts that are deemed "newsworthy" or "attractive" to journalists and editors.*

Accordingly, citizen groups like Black Lives Matter use different tactics to gain visibility. They can mobilize a passionate membership and attract media attention via protests and demonstrations. Social media has also given these groups more visibility and an easier means of communication. Their ability to encourage members to pressure legislators with a tweet or a Facebook post—and gain media attention in the process—is called **indirect lobbying**, which refers to influencing policymakers by encouraging the general public to pressure them.

Successful leaders of organizations that protest and demonstrate must discipline their membership. According to Chong (1991), leaders must manipulate the media and the masses a fair amount to secure enthusiasm among members. They must inflate their membership and attendance at demonstrations, quickly secure smaller victories, diversify tactics, and maintain a reputation for toughness, success, and endurance. These methods often receive media attention, and an organization's lack of monetary resources can be balanced by membership enthusiasm.

Interest groups attempt to gain media presence through **paid media** and **earned media**. Groups often pay to advertise issues via television, social media, and print. Some use advertorials, opinion articles written in a news-magazine format, to influence policymakers and the public on a policy change. The tobacco industry notoriously used paid advertisements and physician endorsements to suggest that the public smokes "without fear." 7.1 Conversely, anti-smoking groups used the same approach to reeducate citizens about

7.1

**UTTyler.edu/AmGovBook**

**"Smoke Without Fear" – a book written to details the benefits of smoking.**

Source: Phil Roeder; https://commons.wikimedia.org/wiki/File:March_for_Our_Lives_(41019933602).jpg

**FIGURE 7.2** Hundreds of thousands of people gathered in Washington, D.C., on March 28, 2019, for the March for Our Lives rally, protesting gun violence and demanding action by elected officials to enact common sense gun control laws.

the dangers of tobacco products.[4] Nevertheless, paid media has benefits and drawbacks. Interest groups can control the content that the public consumes this way, but it is perceived as less legitimate because of its bias.

In lieu of paying for media attention, groups also attempt to earn it. This is done through efforts that journalists and editors deem newsworthy or attractive. These efforts often use **social protests**—demonstrations, boycotts, and strikes—to attract publicity. The 2011 Occupy Wall Street 7.2 protests in New York City's Zuccotti Park exemplify protests that attract massive media attention. Earned media has pros and cons that are the inverse of paid advertising. Interest groups cannot control the content and information disseminated nor the public's reaction, which could mean potentially negative coverage and counterproductive results. Nonetheless, the group's activities are covered by a third party, so the content receives more trust and legitimacy.

***Social protests:*** *group activities that include demonstrations, boycotts, and strikes.*

7.2

UTTyler.edu/AmGovBook

**What is Occupy Wall Street? The history of large-scale leaderless movements.**

Many interest groups result from widespread public concern. In turn, the public drives the group's lobbying to force policymakers to reflect the public's sentiments as they choose issues for the policy agenda. Interest group efforts that spring from mass mobilization (from the bottom up) are called **grassroots lobbying**. The implication is that real people with real problems collectively work to solve them. A good example of a grassroots movement is the national March for Our Lives rallies held in the winter of 2018 **(Figure 7.2)**. After a school shooting at Stoneman Douglas High School, student activists and survivors hosted massive rallies from Washington, D.C., and Dallas to Los Angeles and New York City to urge lawmakers to pass gun control legislation. Organized by the student-led group Never Again MSD, the demonstrations were called "one of the biggest youth protests since the Vietnam War."[5] Conversely, some groups are set up to appear as a grassroots movement. These groups use large financial backers to create public sentiment (from the top down). This is called **Astroturf lobbying**. 7.3

***Grassroots lobbying:*** *Interest group effort that springs from mass mobilization – or from the bottom up.*

***Astroturf lobbying:*** *when large financial backers attempt to create public sentiment - from the top down.*

7.3

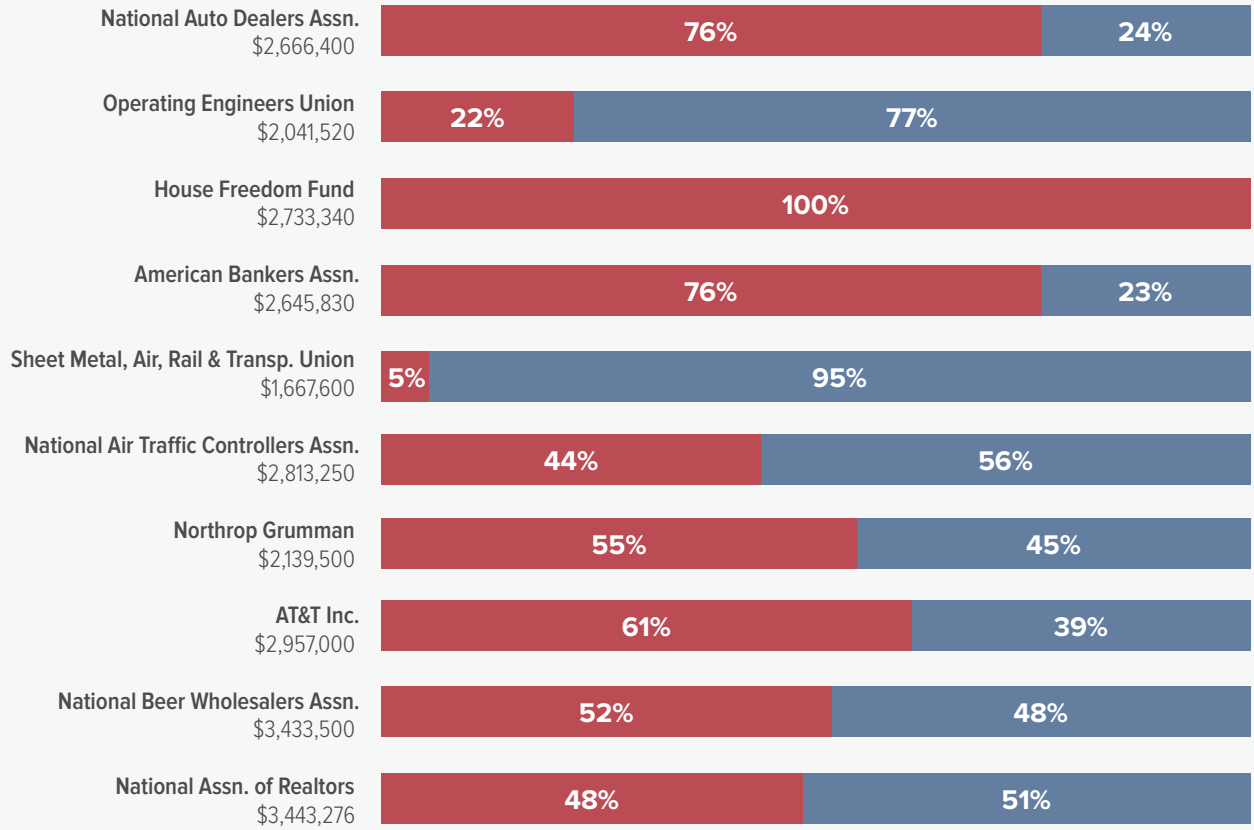
UTTyler.edu/AmGovBook

**John Oliver explains how astroturfing can warp the public perception of anything.**

Scholars debate whether citizen groups are more disadvantaged than institutional or economic groups. Because they are smaller, have fewer resources,

FIGURE 7.3

## Top Interest Group Contributions to Candidates in the 2018 Midterm Elections




Source: https://www.opensecrets.org/pacs/index.php?party=A&cycle=2018.

are less visible, and must adhere to group maintenance practices, citizen groups are assumed to be less competitive than institutional organizations. They are typically involved with various issues that stretch their resources. They cannot attend all committee and subcommittee meetings or thoroughly monitor activity on these issues, and they lack the technical information needed to persuade lawmakers. Policy issues are continuous, however, and the total resources on either side of an issue are about equal (despite the relative limitations of one group), so citizen groups do not directly compete with institutional organizations. Any given side of an issue will contain institutional and citizen groups who share resources, lobbying costs, and information.

Interest groups use the path of least resistance, so, unlike many actors in Washington, they are not necessarily beholden to partisan affiliations. Instead, interest groups often rely on bipartisanship to most effectively pass beneficial rules, regulations, and legislation. For instance, business and corporate interests routinely contribute to Democratic and Republican candidates **(Figure 7.3)**. In

**FIGURE 7.4**

## Key Judicial Cases for the National Association for the Advancement of Colored People (NAACP)

| Significant NAACP Cases | Judicial Decision |
|---|---|
| *Murray v. Maryland (1936)* | Desegregated the University of Maryland's Law School. |
| *Missouri ex rel. Gaines v. Canada (1938)* | Ordered the admission of a black student to the Law School at the University of Missouri. |
| *Morgan v. Virginia (1946)* | Struck down a state law that enforced segregation on buses and trains that were interstate carriers. |
| *Shelley v. Kraemer (1948)* | Ended the enforcement of racially restrictive covenants. |
| *Sweatt v. Painter (1950) & McLaurin v. Oklahoma (1950)* | Struck down Texas and Oklahoma laws requiring segregated graduate schools. |
| *Brown v. Board of Education of Topeka, Kansas (1954)* | Held that segregation in public education violated the Equal Protection Clause of the Fourteenth Amendment. |

2018, groups like the National Thoroughbred Racing Association, the National Beer Wholesalers Association, and the National Air Traffic Controllers Association gave nearly even amounts to both parties.

Even organizations that are often associated with partisan politics endorse across the aisle. In 2008, for example, fifty-eight Democratic House candidates received contributions from the NRA. Due to increased political polarization, however, heavily-politicized groups like the NRA are decreasingly bipartisan (i.e., it only contributed to five Democratic House candidates by 2018).

The judiciary's role is also important for interest groups' strategies and behaviors. Historically, many interest groups were formed as a response to judicial action. In the wake of *Roe v. Wade* (1973), conservative Protestants formed groups like the Christian Coalition and the Moral Majority to combat further legal, political, and cultural socio-progressive advances in the United States. Groups have also devised litigation strategies to advance their cause.

Interest groups' litigation strategies are an important measure of a group's effectiveness. These careful legal strategies, by which groups select cases to litigate, eventually lead to landmark decisions. These endeavors have advantages and drawbacks. Judicial decisions offer rapid change, which contrasts with the slow, labyrinthine legislative process. For example, the NAACP won significant cases **(Figure 7.4)** to systematically topple de jure segregation in the southern education system much faster than if it had relied on public opinion and policymakers. LGBTQ groups similarly won important advances through the courts **(Figure 7.5)**.

FIGURE 7.5

## Key LGBTQ Judicial Cases

| Significant LGBTQ Cases | Judicial Decision |
|---|---|
| *One, Inc. v. Olesen (1958)* | Provided constitutional protection for a gay magazine. |
| *Bowers v. Hardwick (1986)* | Ruled that Georgia's criminal sodomy law was constitutional. |
| *Romer v. Evans (1996)* | Struck down a Colorado amendment that banned cities from passing antidiscrimination laws that protected gay and bixexual people. |
| *Bragdon v. Abbott (1998)* | Ruled that the A.D.A. protected people living with HIV against discrimination. |
| *Lawrence v. Texas (2003)* | Ended sodomy laws nationwide, reversing 1986 ruling. |
| *United States v. Windsor (2013)* | Agreed with lower courts that the ban on federal recognition of same-sex couples was unconstitutional. |
| *Obergefell v. Hodges (2015)* | Struck down all same-sex marriage bans nationwide. |
| *Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018)* | Ruled that showing "hostility" to religious people in applying nondiscrimination laws violates the First Amendment's free exercise clause. |

A legislative agenda creates change relatively quickly and with costs lower than maintaining legislative lobbyists, but it has two chief risks. First, judicial decisions favorable for the group may prompt public scorn and widespread backlash. This leads to potential setbacks on alternative fronts. For instance, *Brown v. Board of Education* (1954) was a huge win for the NAACP and the civil rights cause, but it provoked massive resistance via the “Southern Manifesto.” This document written and signed by many national lawmakers articulated their defiance of the Court’s decision to end segregation in public schools, and it acted as a blueprint for southern state nullification for the next several decades. Second, judicial decisions unfavorable for the group may undermine (i.e., stall or halt) the entire litigation strategy. The *Bowers v. Hardwick* (1986) decision exemplified this as a noteworthy setback for LGBTQ rights. The Court’s affirmation of Georgia’s criminal sodomy law stalled LGBTQ legal privacy rights for twenty years.

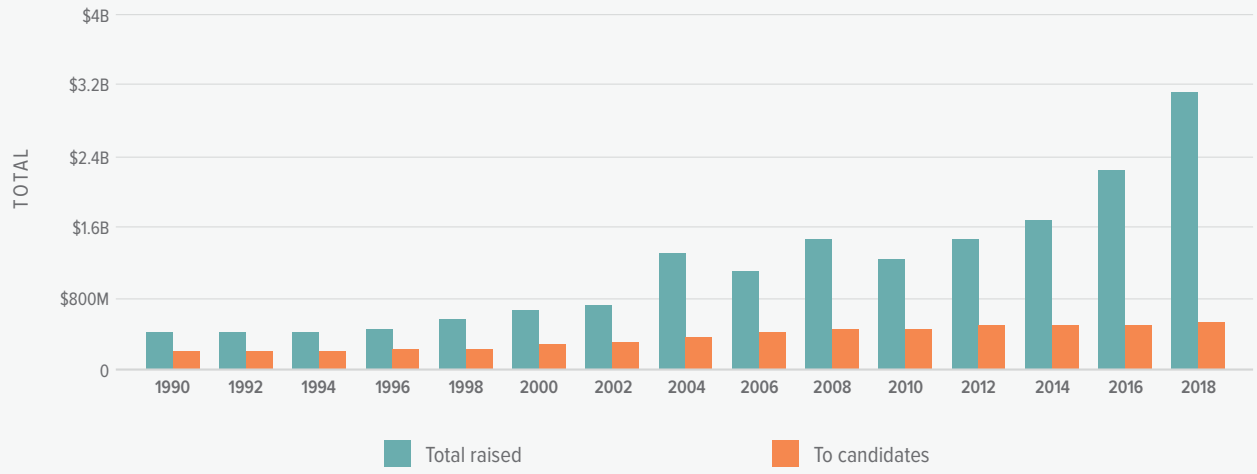
# Resources Needed by Interest Groups

Effective interest groups require resources. They need members, money, and research to build and maintain a lobbying operation.

Members are the backbone of an interest group who perform tasks like letter-writing, canvassing, and protesting. A group cannot exist without members, so people are the most important resource of interest groups.

**FIGURE 7.6**

## PAC Summary: Total Raised and Total to Candidates




Source: https://www.opensecrets.org/pac/

Recruiting members and compelling them to participate is difficult, however, which potentially limits a group's ability to utilize members.

The size and intensity of the membership is also paramount. More members equals more people to mobilize. The larger and more spread out the membership, the more policymakers can be influenced by their constituency. For instance, an interest group focused on the fishing industry, no matter how large its membership, is likely to only influence policymakers who serve districts with many people who fish. A group like the NRA, with gun owners and members across the nation and in every conceivable congressional district, has far more impact on policymakers. Furthermore, an intense membership is more dedicated to the group's cause, which means less focus on selective benefits and easier mobilization.

Interest groups do several things with money. First, they need to raise it. Most groups are classified as **501(c) organizations** to allow for tax-deductible donations to the group, but their political activities are limited. Thus, they will often form separate organizations known as **political action committees (PACs)**, which raise campaign contributions to buy advertising for issues and for candidates (with limits on individual donors) **(Figure 7.6)**. A **527 organization**, however, has no restrictions on individual donor amounts and is allowed unlimited spending on ads, but they cannot directly endorse specific candidates for office. Direct contributions are regulated because of the **Federal Election Campaign Act of 1974** (individual donors can directly give up to $2,800, a couple up to $5,600, and a PAC up to $5,000).

A recent Supreme Court decision in *Citizens United v. FEC* (2010) removed all limitations on expenditures by corporate and union PACs. This ruling

***501(c) organizations:*** *tax-exempt nonprofit organizations.*

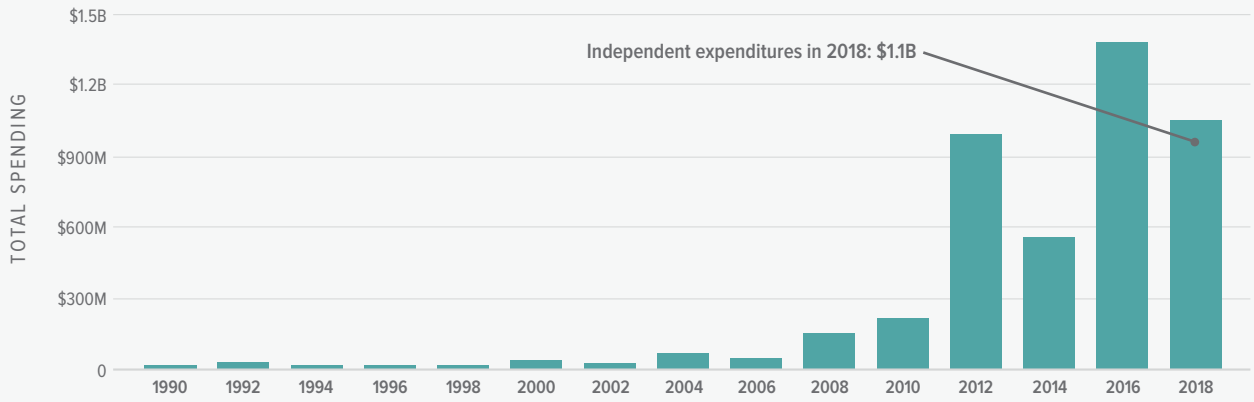
***Political action committees (PACs):*** *organization that privately raises money to make campaign contributions.*

***527 organization:*** *tax-exempt organizations that have no restrictions on individual donor amounts, as long as the money is not spent to directly endorse specific candidates.*

***Federal Election Campaign Act of 1974:*** *federal law that regulates campaign spending and fundraising.*

**FIGURE 7.7**

## Total Outside Spending by Election Cycle, Excluding Party Committees




Source: https://www.opensecrets.org/outsidespending/cycle_tots.php

created Super PACs that accept unlimited individual, corporate, and union donations if there are no direct contributions to candidates or parties. In 2016, Super PAC spending was $1.4 billion[6] **(Figure 7.7)**. Critics lament the role of PACs in our political campaigns, and many candidates (particularly from the Democratic Party) refuse any corporate PAC contributions. Nevertheless, the "Democratic National Committee did away with the Obama-era ban on corporate PAC donations"[7] in 2016 and voted against reinstating the ban for the 2020 election cycle.

Campaign contributions do not necessarily buy votes, and scholars have not found a quid pro quo relationship between group contributions to a lawmaker and their voting behavior. However, giving to interest groups can buy access to the policymaker. It gets people a seat at the table, a place in the room, and the ability to directly persuade policymakers on a given issue.

***Revolving door:*** *the practice of public officials, journalists, and lobbyists moving between public, government positions and private lobbying firms.*

Groups also use money to hire a well-trained and expert staff, outside professional assistance, and the best lobbyists. To pursue legislative priorities, interest groups want a staff with connections and with institutional knowledge. Thus, they often recruit public officials. The practice of public officials, journalists, and lobbyists moving between public and governmental positions and private lobbying firms is called the **revolving door**.

## Key Terms

**501(c) organizations:** tax-exempt nonprofit organizations.

**527 organization:** tax-exempt organizations that have no restrictions on individual donor amounts, as long as the money is not spent to directly endorse specific candidates.

**Astroturf lobbying:** when large financial backers attempt to create public sentiment - from the top down.

**Biased pluralism:** policy advocacy through the mass media tends to favor business interest groups over citizen interest groups.

**Collective action problem:** when rational actors exploit a common resource without limits.

**Direct lobbying:** a direct interaction with policymakers for the purpose of influencing their decisions.

**Disturbance theory:** groups form because their interests have been jostled by societal changes.

**Earned media:** when groups attract media attention through efforts that are deemed "newsworthy" or "attractive" to journalists and editors.

**Economic interest groups:** groups that form to influence policymakers for their own economic benefit.

**Equal opportunity interest groups:** groups that form to promote civil and economic rights for underrepresented groups.

**Exchange theory:** groups form because organizers (or entrepreneurs) invest heavily in a group and recruit members (or customers) by offering benefits for their participation.

**Expressive (or purposive) benefits:** rewards that come from expressing your values and beliefs.

**Federal Election Campaign Act of 1974:** federal law that regulates campaign spending and fundraising.

**Free rider problem:** when individuals enjoy the benefits of collective efforts without having to share in the cost.

**Grassroots lobbying:** Interest group effort that springs from mass mobilization – or from the bottom up.

**Indirect lobbying:** any attempt to influence policymakers by encouraging the general public to pressure them.

**Interest groups:** organizations of individuals who share a common political or economic goal and unite for the purpose of influencing government decisions.

**Lobbying:** attempts to persuade policymakers to support a group's issue positions.

**Material benefits:** tangible rewards that members can use.

**Paid media:** when groups pay to advertise issues through television, social media, and print.

**Patron theory:** groups form and are maintained by patrons.

**Pluralism:** the belief that democracy is enhanced when citizens' interests are represented through group membership.

**Political action committees (PACs):** organization that privately raises money to make campaign contributions.

**Prisoner's dilemma:** example of why rational actors might not cooperate collectively, even when it is in their best interests.

**Private goals:** individual self-interest that does not require the consideration of others.

**Public goals:** jointly supplied, public goods or services that require collective action and cannot be denied to anyone.

**Public interest groups:** groups that form to convince policymakers to produce collective public goods.

**Rational actors:** individuals who are driven by the pursuit of private interests.

**Revolving door:** the practice of public officials, journalists, and lobbyists moving between public, government positions and private lobbying firms.

**Selective benefits:** exclusive benefits offered by interest groups to compel participation among members.

**Social protests:** group activities that include demonstrations, boycotts, and strikes.

**Solidary:** the benefits of interacting and bonding among group members.

## ENDNOTES

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8

Economic Policies

Types of Public Policies

Who Makes Public Policy?

How is Public Policy Made?

A homeless man panhandles in Seattle, Washington.

istock.com/njpPhoto

CHAPTER EIGHT

# What is Public Policy?

**PUBLIC POLICY** is a government's plan of action to solve a problem. These problems could be large (e.g., the American healthcare system) or small (e.g., street repairs), but public policy addresses only public problems and not private ones. What is the difference? A public problem involves public and collective goods that cannot be produced by individuals. For example, no individual could successfully resolve poverty, low test scores, or teacher's pay, nor could one person build and administer a social security program. These are all public problems (which may also include environmental factors, foreign affairs, and hazardous retail products) that require a collective plan of action.

***Public policy:*** *a government plan of action to solve a problem.*

There are three purposes of public policy. First, public policy resolves conflict over scarce resources. These resources may include (but are not limited to) water, food, forestry, land, and oil. Because these goods are finite and in high demand, government often plays a role in settling who gets what and how. Second, public policy regulates behavior. The safest and most ethical decisions are not always the most profitable or expedient, so policies are designed to regulate how individuals and businesses behave (e.g., ensuring the safety of products sold to the public). Third, public policy can motivate collective action. Some problems require a collective effort to solve, and public policies are created to incentivize these endeavors.

Governments can deal with public problems directly—for example, by building schools, prisons, and programs—or it can do so indirectly through incentives—for example, by using public grants to encourage behavior via the Common Core curriculum program. However, public problems are extremely difficult to solve. First and foremost, Americans have differing ideas on what constitutes a public problem. For instance, is climate change real? Many within the scientific community, as well as many progressive policymakers, argue it is real and the most important impending crisis of our time. Others, typically conservatives, believe that the climate change problem (to the extent that it is one) is greatly exaggerated. That gulf between people who think, "climate change is the crisis of our time" and those who think, "climate change is not a big deal" is vast, and arguments over policy prescriptions are equally disparate. Progressive lawmakers have recently proposed a Green New Deal, a collection of economic programs that aim to address climate change and income inequality. This proposal contains ambitious plans to alter the way Americans power vehicles, which reintroduces questions about whether governments should modify entire industries to address the issue of climate change.

» American history is rife with political conflict over the government's role and over public policy. The policy battle largely begins over the government's role in the economy. Some believe the government should actively protect, evolve, and build collective goods. Others believe the government should not influence free market capitalism.

Public problems are also difficult to solve because solutions cost money. Finding the money to address these problems usually requires shifting resources away from one entity to another, which often creates conflict. Indeed, entrenched interests feel disrupted when a new issue takes resources away from a current issue. Within our environmental theme, the conflict over governments shifting focus from fossil fuels to alternative energy sources (like wind or electric) is a classic example. This conflict is why proponents and opponents of alternative energy spend billions of dollars to persuade the public and policymakers to either embrace fossil fuels or their alternatives.

American history is rife with political conflict over the government's role and over public policy. The policy battle largely begins over the government's role in the economy. Some believe the government should actively protect, evolve, and build collective goods. Again, proponents of the "Green New Deal" exemplify public policymakers who advocate forceful government intervention in economic (and environmental) matters. Conversely, others believe the government should not influence free market capitalism. They believe that collective goods can (and will) be efficiently produced with as little government involvement as possible. These policymakers believe the free market is more equipped to address an impending climate crisis.

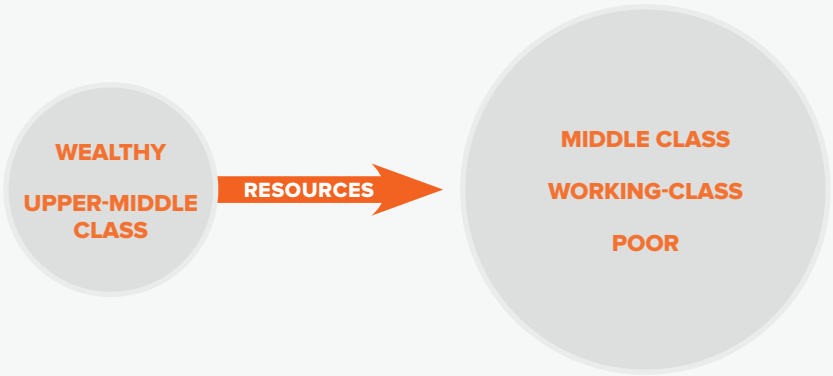
These dichotomized schools of thought animate and frame the U.S. debate over public policy.

## Economic Policies

Economic policies are developed to address the country's economic security. For most of American history, policymakers have supported hands-off economic policies, preferring to allow the free market to govern itself. After the 1929 stock market crash and the proceeding Great Depression, however, the American public and lawmakers adjusted to favor more government

FIGURE 8.1

## Redistributive Policies




intervention. Since the 1930s, economic policymakers have aimed to control the dramatic cycles of inflation and recession without undermining free-market capitalism. Nonetheless, policymakers disagreed on how to approach these cyclical problems. As such, two schools of thought emerged: Keynesian fiscal policy and the Austrian school of economic theory.

During the 1930s, many states embraced a **Keynesian fiscal policy**. With this approach, the government regulates the economy through its power to tax and spend. When the economy is in recession, the theory assumes that increasing spending and cutting taxes will stimulate growth. Once the economy recovers, Keynesians believe governments should cut spending and raise taxes to raise revenue.

Opponents of Keynesian policy (many subscribing to the **Austrian school of economic theory**) argue that the economy is too complicated for government involvement and that the free market is ultimately efficient. They believe these policies create unintended consequences that could exacerbate problems. In short, government should not try to regulate the economy. These two schools of economic policy have consistently struggled 8.1 for the past 80 years, as evidenced by fights over the following types of public policies.

***Keynesian fiscal policy:*** *economic theory that posits that government could stimulate the economy by increasing spending and cutting taxes during recessions or by cutting spending and raising taxes during expansion.*

***Austrian school of economic theory:*** *economic theory that posits that the economy is too complicated for government to involve itself and that the free market is ultimately an efficient entity. It asserts that government intervention can create unintended consequences that could make the problems worse.*

8.1

**UTTyler.edu/AmGovBook**

**A one-minute video which explains Austrian Economics and Keynesianism.**

# Types of Public Policies

Public policies can be categorized in three ways: redistributive policies, distributive policies, and regulatory policies.

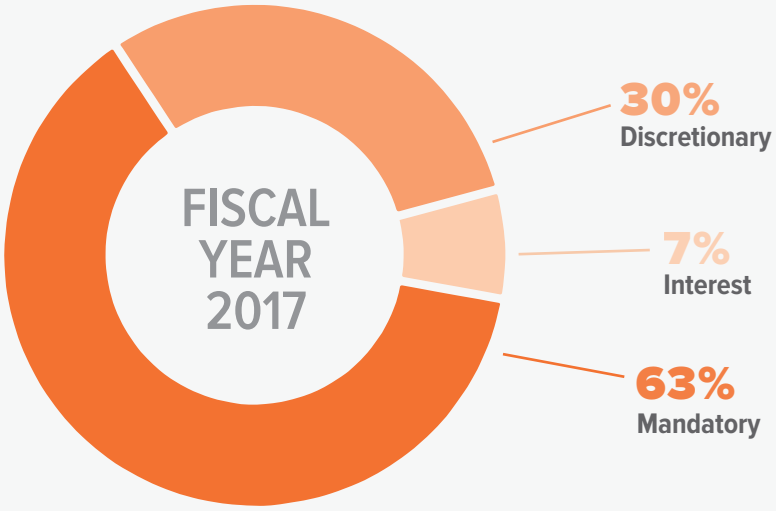
## Redistributive Policies

Perhaps the most contentious of the three types, **redistributive policies** shift resources from one party to another (from the haves to the have-nots). For example, the progressive income tax is structured so wealthier individuals pay more taxes and is a tool to fund redistributive programs. The revenue

***Redistributive policies:*** *programs and policies designed to shift recourses from the one party (typically the wealthy) to another (typically the poor and working-class).*

FIGURE 8.2

## Total Federal Spending




Source: Congressional Budget Office (2018)

from taxes goes to government programs like Medicare, Medicaid, and the Supplemental Nutrition Assistance Program (SNAP). All programs aim to principally assist poor and working-class Americans. **Figure 8.1** illustrates how these policies work.

Redistributive policies are extremely difficult to implement because they often move resources away from more affluent citizens, who happen to be the most politically active citizens. When policy proposals are introduced, citizens with a higher socioeconomic status (and thus a higher chance of paying more taxes) typically voice concerns about changes to existing policy. They may influence the policymaking process via political campaign contributions and higher voter turnout, but the potential recipients of redistributive policies wield neither of these tools.

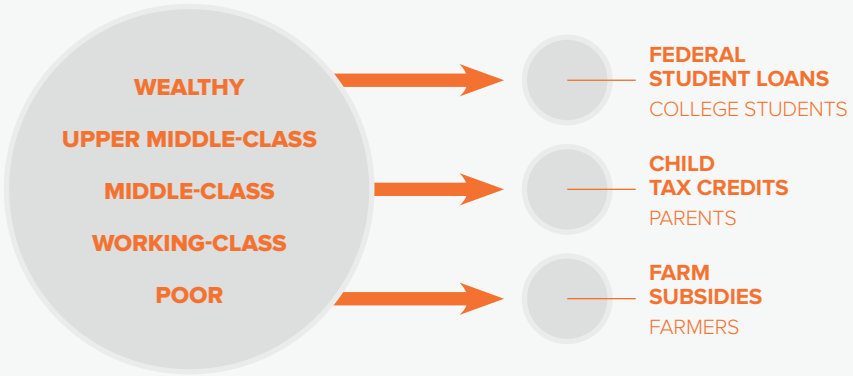
That said, redistributive policies do have advocates. Interest groups like the American Association of Retired Persons (AARP), which addresses the needs of senior citizens in the United States, champion redistributive healthcare programs like Medicaid and Medicare because they serve many low-income, elderly Americans living on fixed incomes. Professional organizations like the National Association of Social Workers lobby legislators to favor child welfare programs. Many members of Congress also majorly promote these policies, writing and sponsoring legislation that protects or expands these policies and programs.

A great deal of redistributive programs are also a part of **mandatory federal spending**. That is, outlays for these programs are controlled by laws other than congressional appropriations acts. According to the Congressional

***Mandatory federal spending:*** *spending outlays for these programs are controlled by laws other than congressional appropriate acts.*

FIGURE 8.3

## Distributive Policies




Budget Office (CBO), mandatory spending has grown from around 31% in the 1960s to over 60% in 2017 **(Figure 8.2)**.

Major influencers in the political and policymaking process are equipped to fight redistributive policies, so these programs are rarely passed or expanded.

## Distributive Policies

The whole taxpayer base funds **distributive policies**, which address the needs of specific groups **(Figure 8.3)**. Think of farm subsidies, federal student loans and grants, child tax credits, or mortgage interest deductions as prime examples of distributive programs. Every taxpayer contributes, but only agricultural farmers, college students, parents, and homeowners can benefit. However, these policies and programs are easier to implement than redistributive measures. Costs are widely shared and everyone foots the bill, so no one group feels especially targeted to bear the brunt of the expenses.

***Distributive policies:*** *programs and policies funded by the whole taxpayer base but used to address the needs of specific groups.*

## Regulatory Policies

**Regulatory policies** can be seen as the most contentious of the three policy types. These policies are designed to restrict or change the behavior of certain groups or individuals. As a result, they often breed resentment and pushback from individuals and from groups. Thus, regulatory measures are highly controversial and confrontational.

***Regulatory policies:*** *designed to restrict or change the behavior of certain groups, businesses, or individuals.*

Many Americans take the impact of regulatory policies for granted. In fact, we often do not realize when something is regulated. For example, teenage employees working as retail associates, baristas, or fast food staff have a limited number of hours they can legally work because of regulation. Furthermore, regulatory policies established a minimum wage, workplace safety standards, and collective bargaining rights. The effect of regulations is embedded

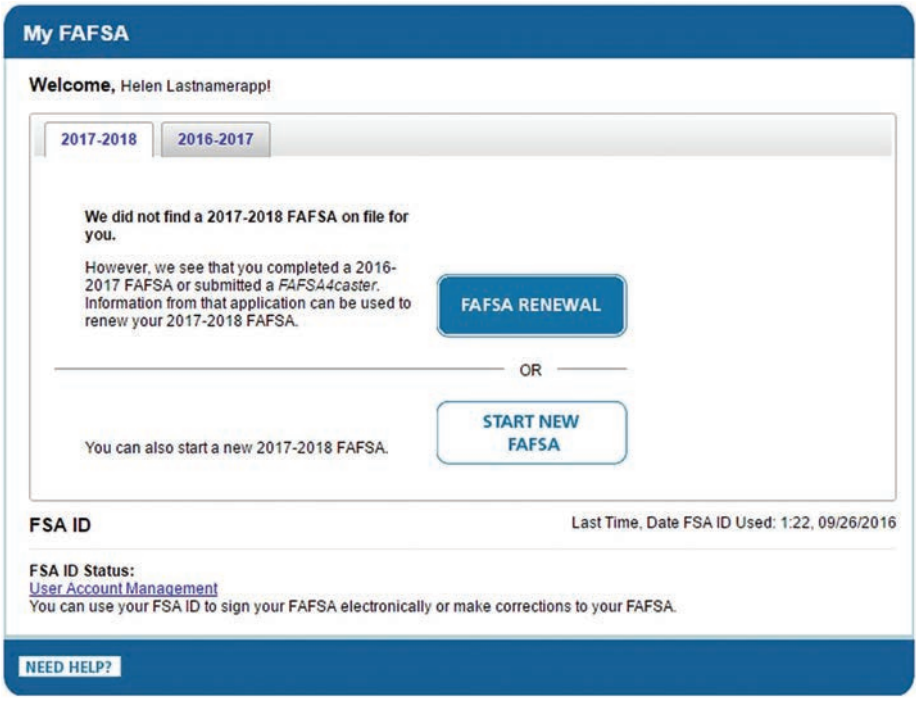



**FIGURE 8.4 An example of an encouraging nudge.**

in our everyday lives—including the safety of the air we breathe, the water we drink, and the food we eat. Each regulation influences behavior at an individual level, a business level, or both.

Why do these policies elicit such strong reactions? Because no one likes being told what to do, and the burden of regulation is sometimes perceived as unfair and costly. Car manufacturers, for instance, pay to ensure that their newest automobiles meet environmental standards. Contractors may be forced to purchase more expensive building materials because of safety regulations. To accommodate Americans with disabilities, public buildings require infrastructure changes and routine inspections. In short, regulations can influence the bottom line.

But individuals can incur costs, too. To curb growing obesity rates, Mayor Michael Bloomberg (backed by research conducted by the Center for Disease Control) infamously proposed banning large sugary drinks in New York City. This ban would have forced restaurants to sell smaller sizes of soft drinks to customers, and many in the public were outraged. Charges of a "nanny-state" government were lobbed at the mayor, and citizens resented being forced to change their behavior (by either consuming less soda or by purchasing smaller cups more than once). Although the cost of the drinks would not rise, the behavioral changes and inconvenience were enough to invite disdain.

When actual costs rise, pushback also occurs. Initially, proponents wanted to ban plastic bags in grocery stores to encourage customers to purchase paper or reusable bags because they have less of an environmental footprint. Again, limiting choices, changing behavior, and adding costs often upsets the public.

Political actors have also railed against regulations in campaigning and governing, fostering a perception that regulatory policies are needlessly cumbersome and represent governmental overreach. Early in his presidency,

Ronald Reagan released a statement on regulations that read, "Excessive and inefficient Federal regulations place an undue burden on our society. They limit job opportunities, raise prices, and reduce the incomes of all Americans."[1] This was normal anti-regulation rhetoric that was popularly accepted by millions of Americans.

## Nudges

Other (less contentious) examples of regulatory policies are called **nudge policies**. These aim to alter people's behavior without significantly changing their economic incentives. As Cass Sunstein puts it, "Putting fruit at eye level counts as a nudge. Banning junk food does not."[2] Accordingly, governments use four types of nudges: mindful, mindless, encouraging, and discouraging.

***Nudge policies:*** *subtle policies created to alter people's behavior without significantly changing their economic incentives.*

**Mindful nudges** aim to make people more aware of their choices (such as eating unhealthy foods or smoking). For instance, the illustration of total calories per meal at a fast food restaurant is a mindless nudge designed to catch a consumer's attention and maybe encourage them to select a meal with fewer calories. At the very least, it may inform their opinion about how many calories they plan to consume. Thus, governments compel businesses to provide nutritional information and encourage consumers to be mindful about their behavior.

***Mindful nudges:*** *policies aimed at guiding people to be more aware of the choice they are making.*

**Mindless nudges** work differently and use emotion or framing to sway decisions. The calculation is that subtle changes in presentation can significantly impact our choices. For instance, a surgeon general's warning on a pack of cigarettes informs consumers of smoking's worst-case scenarios. Theoretically, no one wants lung cancer, heart disease, or emphysema, so framing tobacco products as causing these ailments should deter their usage. Similar mindless nudges appear on alcoholic beverage containers.

***Mindless nudges:*** *policies that use emotion or framing to sway decisions.*

**Encouraging nudges** are subtle policy changes designed to continue behavior. For instance, major changes were made to the annual Free Application for Federal Student Aid (FAFSA) renewal process to improve college and university student matriculation in the fall semester. First, researchers found that the window to complete the FAFSA application was too small, so the launch date is now earlier. Second, first-generation and low-income students were falling prey to the "summer melt" (where students who intend on returning to college in fall do not—largely due to financial burdens). Universities and the federal Department of Education tried to nudge these students into reapplying for financial aid by sending personalized text messages and increasing accessibility to informational resources. Third, the long and complicated annual renewal application (which required students to find information about their parent's most recent taxable income) often discouraged students from reapplying. Research showed that many students avoid complex and arduous processes like financial aid applications and delay action, often failing to complete it. As such, the changes allowed students to use prior-year income (using an IRS data-retrieving tool) to complete the FAFSA without having to wait until their family's current-year tax returns are filed in April. Within a few clicks, students can reapply for financial aid with little effort **(Figure 8.4)**. These subtle changes in the application process are encouraging nudges.

***Encouraging nudges:*** *subtle policy changes designed to continue behavior.*

***Discouraging nudges:*** *policies created to hinder or prevent behavior that is believed to be undesirable.*

Conversely, **discouraging nudges** are created to hinder or prevent undesirable behavior. Cigarette smoking, for example, is considered a public health crisis. According to the Center for Disease Control (CDC), hundreds of thousands of Americans die annually from cigarette-related deaths. As such, government and health-care officials discourage the consumption of cigarettes by, for example, implementing cigarette taxes. The Congressional Budget Office notes that increases in cigarette taxes lowers consumption among Americans under the age of eighteen and among all adults **(Figure 8.5)**. In addition, American smokers are progressively concentrated in states where cigarette taxes have not increased. It is no coincidence that the state with the highest rate of smokers—Kentucky—is also one with exceedingly cheap cigarettes.[3] These taxes (also known as sin taxes) are discouraging nudges.

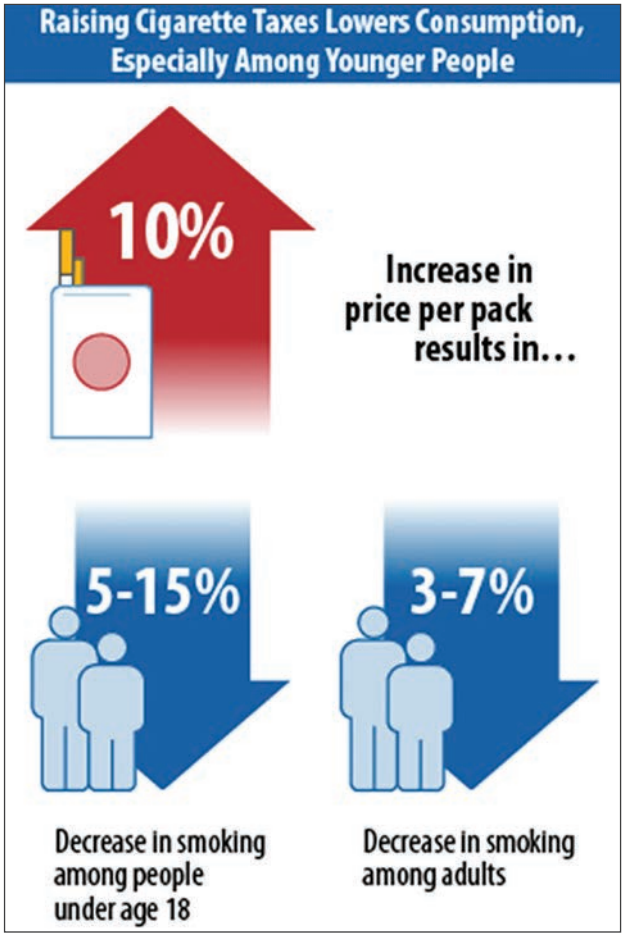



**FIGURE 8.5 An example of a discouraging nudge.**

## Social Policy

In the United States, **social policies** (usually distributive or redistributive) exist to improve people's standards of living.[4] When analyzed, social policies often seek to address the difficult issue of income insecurity in America. One way the government has sought to tackle the issue is through distributive and redistributive **social welfare policies** (also called *social safety net programs*). Social welfare programs seek to provide necessary food, shelter, clothing, jobs, education, old age care, and health care. They are typically **means-tested programs** that require beneficiaries to demonstrate their need in order to qualify.

***Social policies:*** *distributive or redistributive policies created to improve people's standards of living.*

***Social welfare policies:*** *programs or policies seeking to meet citizen needs for food, shelter, clothing, jobs, education, old age care, and health care.*

***Means-tested programs:*** *social programs requiring beneficiaries to demonstrate their need in order to qualify.*

We are all familiar with social welfare policies, even if we have never benefited from them. Millions of low-income Americans rely on the SNAP to feed their families. According to Pew Research, one in five Americans has participated in the food stamp program.[5] The Children's Health Insurance Program (CHIP) insures low-income kids, and Medicaid covers low-income people, families and children, pregnant women, the elderly, and people with disabilities. Because these are redistributive programs, however, they are often lightning rods whenever political leaders argue over federal spending. For example, some policymakers argue for cutting these programs' funding. They contend that assistance programs "mistreat" and "disrespect... hard-working taxpayers."[6] Others argue that programs like SNAP assist the most vulnerable and support the economy. Indeed, the United States Department of Agriculture (USDA) estimates that "every dollar in SNAP spending generates $1.79 in economic activity."[7]

Political leaders and the public disagree regarding support for social welfare programs. Republican lawmakers have proposed trimming the federal deficit by cutting spending on Medicare, Medicaid, and welfare programs. They posit that slashing costly entitlement programs is economically necessary because

U.S. taxpayers cannot afford the country's rising debt. Their Democratic colleagues have rejected this premise, arguing that too many Americans rely on these programs—which need increased funding, not the opposite. According to a Kaiser Family Foundation survey, few Americans (12%) support decreasing spending for programs like Medicaid, but (as **Figure 8.6** illustrates) parties clearly disagree on decreasing federal spending for various programs (including "assistance to needy in the world," "government assistance to the unemployed," and "assistance to needy in the U.S.").

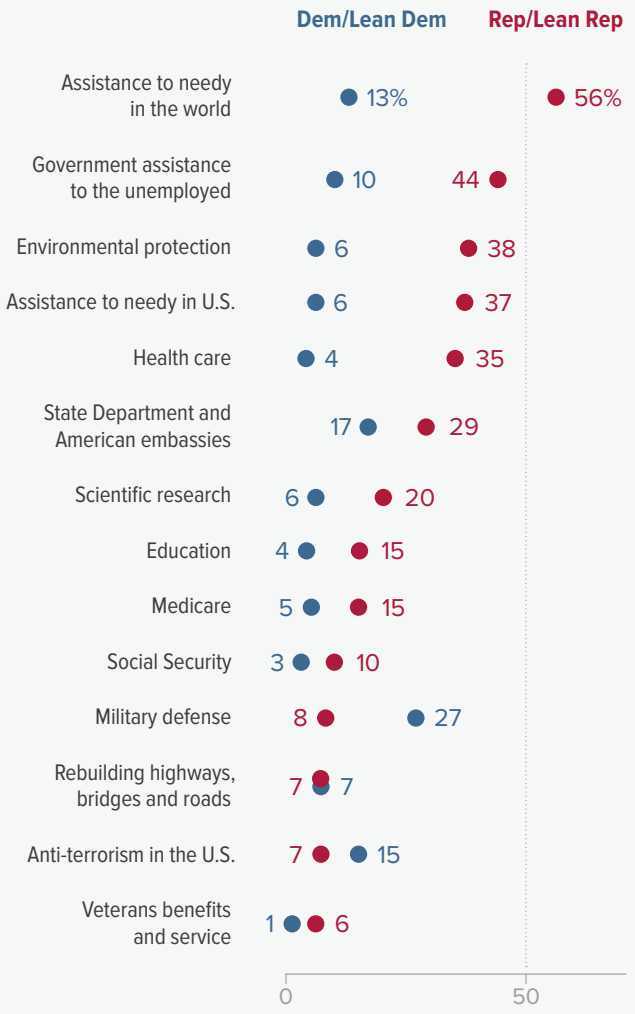
Further complicating opinions on social welfare, many Americans who need assistance do not qualify because of rigid eligibility calculations. Policy requirements that define "need" are subjective, and millions of working-poor and working-class people do not meet eligibility requirements often written by state-level bureaucrats. Millions of Americans do not consistently have access to adequate food, for instance, but one in four are ineligible for governmental food assistance, frequently because they make too much money.[8] Robert Farrington, a contributor to Forbes Magazine, provides another possibly familiar example:

> The news is constantly buzzing about the disappearing middle class, and nothing illustrates this better than the college financing problem. Too poor for college, too rich for financial aid. It's a problem plaguing millions of families across the country, and it's due to a combination of issues including rising college costs, smaller amounts of financial aid available, and difficult financial aid calculations that put the burden of paying for college on parents that can't afford it.
>
> It starts with joy! Your child gets accepted into their dream college and you're so excited for them to be able to pursue their dreams. Then the acceptance packet comes and you see the cost of going to college. Your heart sinks.
>
> This is what happened to Richard Morais. His daughter was accepted into Johns Hopkins University and the entire family was overjoyed! Then the admissions packet came, including the cost of attendance and financial aid award. The cost of attending Johns Hopkins for just one year was going to be $54,470, including room and

**FIGURE 8.6**

## Republican and Democratic Public Opinion on Federal Spending Cuts

*% who say they would decrease federal spending on...*




Source: Pew Research Center; survey conducted April, 2017; https://www.people-press.org/wp-content/uploads/sites/4/2017/04/04-24-17-Spending-release.pdf

board. And the total financial aid package amounted to just $6,000. That left $48,470 for the family to have to pay for, or for their daughter to get student loans for.

What's a family to do? Forty-eight thousand dollars is a lot of money—just shy of the median household income in the United States. If she takes out student loans, she'll have close to $200,000 in debt when she graduates, which is outrageous. This is what makes families too poor for college.

On the flip side, families in this situation are too rich for financial aid. Most financial aid is based on the FAFSA (Free Application for Federal Student Aid), which is then used to calculate the Expected Family Contribution. This is essentially how much the government thinks that families can afford to pay for their child's college education. It's based on a complex formula that takes into consideration income, assets, and more.

Using this formula, schools calculate how much need-based financial aid a student should receive. For example, if the cost of attendance is $54,470, and the parent's Expected Family Contribution is $48,470, the student won't qualify for more than $6,000 in financial aid, like in Richard Morais' example above.

The problem is that this formula doesn't take into consideration your family expenses, your needs for saving for retirement, and possibly the costs of saving for your other kid's college education. So, while the government may think you could contribute thousands of dollars, you may not be able to.

This is what makes families too rich for financial aid.[9]

Some situations affect people described by Farrington and people who are ineligible (despite their need) for other governmental social welfare and means-tested aid programs. This is another reason these programs, especially redistributive ones, can be extremely divisive and exceedingly difficult to implement. Many Americans feel left out and resent the implication that others benefit without working as hard.[10]

***Social insurance programs:*** *programs like Social Security that offer benefits in exchange for contributions.*

Along with social welfare policies, the government also mitigates economic insecurity through **social insurance programs**. These programs offer benefits in exchange for contributions.[11] Unlike social welfare programs, social insurance programs are designed to cover long-terms needs. The best example of these programs is Social Security. Prior to its passage in 1935, Americans were expected to build up their own retirement savings during their working years. During the height of the Great Depression when millions lost savings, homes, and pensions and faced unspeakable deprivation, Franklin Delano Roosevelt's New Deal administration sought to pass a program that would act as guaranteed pension for workers. Social Security was designed to benefit workers by asking them to contribute part of every paycheck with the promise they would be guaranteed an income when they qualified for retirement. Importantly, Social Security is a distributive program, so everyone contributes. If you work, look at your next paycheck. You may

#1092 EARNINGS STATEMENT

| COMPANY NAME | COMPANY ADDRESS | | | |
|---|---|---|---|---|
| Beauty Saloon | 339 Downtown Road, Chicago, IL 60603 | | | |
| **EMPLOYEE NAME** | **SSN** | **MARITAL STATUS** | | **EMPLOYEE NO.** |
| Hannah Jole | xxx-xx-1932 | Single | | LA-0191 |
| **PAY DATE** | **PAY PERIOD** | **PAY MODE** | **PAY TYPE** | **EXEMPTIONS** |
| 03/08/2016 | 03/01/2016 - 03/07/2016 | Weekly | Hourly | 0 |

| INCOME | RATE | HOUR | CURRENT TOTAL | DEDUCTIONS | CURRENT TOTAL | YTD TOTAL |
|---|---|---|---|---|---|---|
| GROSS WAGES | 15 | 40 | 600.00 | FICA-MEDICARE | 8.70 | 78.30 |
| | | | | FICA-SOCIAL SEC. | 37.20 | 334.80 |
| | | | | FEDERAL TAX | 75.10 | 675.90 |
| | | | | STATE TAX | 28.50 | 256.50 |

Regular Pay Stub Sample

| YTD GROSS | YTD DEDUCTIONS | YTD NET PAY | TOTAL | DEDUCTIONS | NET PAY |
|---|---|---|---|---|---|
| 5,400.00 | 1,345.50 | 4,054.50 | 600.00 | 149.50 | 450.50 |

**FIGURE 8.7** Paycheck stub example with FICA withholdings.

notice a deduction called FICA, the Federal Insurance Contributions Act (as shown in **Figure 8.7**). This is your contribution to Social Security.

You may also notice the FICA-Medicare deduction, which is your contribution to the federal Medicare program. Medicare was an amendment to the Social Security Act in the 1960s, added during President Lyndon Johnson's push for a "Great Society," which provides health care benefits for the elderly.

Laws like the Social Security Act are promises to pay now and take later. Unless the law changes, the government must pay benefits to those who paid into the system. In other words, these are **entitlement programs**, or benefits guaranteed to qualified recipients. Entitlement programs are heavily protected by powerful interest groups and the public. Everyone invests in the promise to receive a return on these investments, so the American public expects lawmakers to responsibly administer them. Unfortunately, entitlement programs are expensive. When Social Security (and Medicare) were originally passed, there were fewer retirees. Thus, more Americans were working and contributing to the program than were retired and taking from it. Americans are also living longer than when the Act was originally passed; because the program offers lifetime benefits to eligible people, retirees are taking from the system for longer periods of time. These features mean that Social Security makes up about 22% of the federal budget, with entitlement programs in whole comprising around 40%.[12] Nevertheless, despite their (rising) costs, entitlement programs like Social Security remain popular with the public and, importantly, are seen as distinct from social welfare programs. In other words, people feel entitled to these government benefits because they believe they earn them, rather than believing the government is giving them something.

***Entitlement programs:*** *programs that guarantee benefits to qualified recipients.*

Other social policy programs increase the quality of life for middle-class Americans and corporations. These policies and programs usually encourage certain activities like homeownership, college attendance, job creation, or research and development. They often exist as **subsidies**, which are financial incentives given by the government to corporations or individuals. Subsidies can be direct grants or loans (e.g., student financial aid), or they can be tax credits, exemptions, and deductions (e.g., mortgage interest tax deductions or the Ethanol Excise Tax Credit).

***Subsidies:*** *financial incentives given by the government to corporations or individuals.*

As a form of government assistance, subsidies are sometimes characterized as indirect government intervention. In recent years, some scholars in political science and related fields have studied the prevalence of indirect government intervention in the United States. These scholars have used several terms to refer to this phenomenon: "delegated governance," "the hidden welfare state," "the divided welfare state," "the Rube Goldberg state," "the kludgeocracy," and **the submerged state**. Indeed, political scientist Suzanne Mettler has written about Americans' general ignorance of how much government is involved with providing benefits, especially when they are hidden or submerged within policy programs. This explains research showing that many citizens who advocate reducing government and eliminating assistance programs have benefitted from these services themselves. Mettler states:

***The submerged state:*** *Suzanne Mettler's argument that Americans are generally unaware of how much government is involved with providing benefits, especially when they are hidden or submerged within policy programs.*

> *The people who participate the most in politics, usually people with more education and more resources, rely on plenty of social benefits from government, but these benefits are often hidden in the tax code or are disguised in other ways. So, they don't think of government as having done much for them personally.*

But the people who are most aware that government has helped them tend to be people who've used more visible policies like food stamps or subsidized housing or Medicaid. The reasons for this are straightforward.[13]

This partially explains why more direct, visible "welfare" programs are perceived as detrimental to the federal budget, but indirect, submerged welfare policies are not. It also explains why specific welfare policies are unpopular (44% of Americans view social welfare programs unfavorably[14]) and why the government itself has such low approval ratings. As Mettler puts it, "When government is invisible, it is no surprise that people feel they cannot trust it and that it is ineffective."[15]

## Foreign Policy

***Isolationism:*** *foreign policy belief that Americans should put themselves and their problems first and not interfere in global concerns.*

***Interventionism:*** *foreign policy belief that America must be actively engaged in shaping the global environment and be willing to intervene in order to shape events.*

Foreign policy is the United States' official policy for solving problems between it and actors outside its borders.[16] Generally, the president (as commander in chief) and his small group of advisors (including the National Security advisor, the Secretary of State, and the Secretary of Defense) make foreign policy, especially during national crises. Career bureaucrats in the state department and in the intelligence community make strategic policy, plotting and devising American stances on issues on the international stage. Congress crafts structural defense policy and uses its powers to choose military base sites and determine levels of defense spending.

American leadership does not always agree on how to approach matters of foreign policy. Throughout its history, and particularly during the twentieth and twenty-first centuries, the United States' approach has vacillated between **isolationism** and **interventionism**. Isolationism was widely embraced after the brutal toll of World War I, and isolationist leaders sought to avoid foreign entanglements altogether. In the 1920s, the United States refused to join the League of Nations, restricted immigration, and imposed high tariffs on imports.

This was done because many Americans believed they should put themselves and their problems first, without interfering with global concerns. These attitudes changed by the 1940s when foreign aggression in Europe and Asia proved that global happenings do relate to domestic happenings. The attacks on Pearl Harbor, World War II, and post-war communist expansion convinced many leaders of interventionism, that idea America must actively shape the global environment and willingly intervene to shape events.

For a period, especially after the September 11 terrorist attacks, **neoconservatism** became a popular interventionist policy. Neoconservatives see America as "good" and meant to combat "evil" in the world. Boston Globe columnist Jeff Jacoby writes, "Our world needs a policeman. And whether most Americans like it or not, only their indispensable nation is fit for the job."[17] It was the Bush administration's chief rationale for invading Iraq in 2003. But **noninterventionism** emerged in response to the Iraq War's failures. Libertarian and progressive Americans and politicians (like Rep. Ron Paul) espoused the idea that the United States should refrain as much as possible from intervening in the affairs of other countries. Importantly, noninterventionism is not isolationism and does not suggest the economic strictures of the latter.

***Neoconservatism:*** *foreign policy belief that America is a "good" in the world that ought to combat "evil."*

***Non-interventionism:*** *foreign policy belief that the United States should refrain as much as possible from intervening in the affairs of other countries.*

There is often a foreign policy tension between the president and Congress. What is this tension? Why does it exist? Despite its constitutional authority to do so, Congress has not declared war since 1941. Nonetheless, the president has committed American troops to Korea, Vietnam, Iraq, Libya and other foreign conflicts without a declaration of war. In the aftermath of the Vietnam War, Congress sensed that the presidency had undermined its authority and passed the **War Powers Act of 1973**. This resolution limited the president's ability to send troops into combat areas without congressional approval. The resolution resulted in the congressional "authorization to use military force" instead of declaring a "state of war." Why has Congress not declared war when the president wanted to use military force? The Congressional Research Service (CRS) explains:

***War Powers Act of 1973:*** *resolution that put limits on the president's ability to send troops into combat areas without congressional approval.*

> *A formal war declaration triggers a large number of domestic statutes, like the ones that took place during World War II.*
>
> *"A declaration of war automatically brings into effect a number of statutes that confer special powers on the president and the executive branch, especially about measures that have domestic effect," the statute says.*

These include granting the president the direct power to take over businesses and transportation systems as part of the war effort; the ability to detain foreign nationals; the power to conduct spying without any warrants domestically; and the power to use natural resources on public lands.

"An authorization for the use of force does not automatically trigger any of these standby statutory authorities. Some of them can come into effect if a state of war in fact comes into being after an authorization for the use of force is enacted; and the great majority of them, including many of the most sweeping ones, can be activated if the president chooses to issue a proclamation of a national emergency," says the CRS.

FIGURE 8.8

## Steps of the Policymaking Process


"But an authorization for the use of force, in itself and in contrast to a declaration of war, does not trigger any of these standby authorities."[18] [19]

For more information on Congress's and the president's roles in foreign policy, see 8.2.

8.2

UTTyler.edu/AmGovBook

Watch a summary on the role of Congress and the president in foreign policy.

## Who Makes Public Policy?

You could safely argue for all of the above. Congress literally creates and legitimizes policy by writing and passing bills. The president creates policy by putting issues on the national agenda. Courts change policies and determine what the government can, should, or should not do as it relates to policy implementation. Bureaucrats enhance policy through their powers to write rules and to regulate. Policymakers are pressured by interest groups (who often write the language of bills proposed in legislative bodies) to pursue specific policies. The media influences the **policymaking process** by indirectly exerting pressure on policymakers via public opinion. And members of the public can assemble, protest, propose, and change policies.

***Policymaking process:*** *consists of agenda-setting, policy formation, policy adoption, and policy implementation.*

## How is Public Policy Made?

The study of the policy process is a study of political power.[20] It is a labyrinthine process that can only be handled by savvy and powerful policymakers. These individuals pursue how things ought to be, what society should value, what behavior is right or wrong, and which matters are good or bad. In other words, making public policy is a normative process. It is ultimately about achieving value-based ends. The process itself consists of four major steps: agenda-setting, policy formation, policy adoption, and policy implementation **(Figure 8.8)**.

To solve a public policy problem, it must first be brought to the attention of policymakers, which is no easy task. Congress members are busy with tight schedules and myriad interests. But the mission is not impossible.

There are effective strategies, such as inviting congressional staffers on "field trips," inviting them to organization events, or sending personal letters to a congressperson's state office. Other methods of getting their attention involve using influential interest groups, the president, or media coverage to

highlight the problem and cue policymakers. After successfully convincing the Congress member to take up the policy problem, the process moves to the next stage: policy formation.

Forming solutions to a policy problem can be contentious. There may be political, ideological, or practical disagreements about how to fix an issue. The policy formation stage is about developing these competing solutions and debating them in the legislature. For instance, as health care reemerges as a national policy problem, lawmakers will propose several paths to solve it. Progressives may argue that the country needs universal health care, either as Medicare-for-all 8.3 or as a public option. Conservatives will propose market-based alternatives. These options are often competing bills, and a preferred solution must be legitimized through formal government action.

The next step is policy adoption, which means passing legislation that legitimizes the policy solution. Once adopted, the policies must be implemented—another complex stage. Policy implementation happens when federal or state agencies interpret the policy by writing regulations and guiding documents. This process is neither easy nor guaranteed, and those in charge of implementing a policy can often derail it by not enforcing it. 8.4

**8.3**

**UTTyler.edu/AmGovBook**

**A two-minute summary on how single-payer health care systems work.**

**8.4**

**UTTyler.edu/AmGovBook**

**An urgent grassroots effort to publicize Obamacare open enrollement.**

## Key Terms

**Austrian school of economic theory:** economic theory that posits that the economy is too complicated for government to involve itself and that the free market is ultimately an efficient entity. It asserts that government intervention can create unintended consequences that could make the problems worse.

**Discouraging nudges:** policies created to hinder or prevent behavior that is believed to be undesirable.

**Distributive policies:** programs and policies funded by the whole taxpayer base but used to address the needs of specific groups.

**Encouraging nudges:** subtle policy changes designed to continue behavior.

**Entitlement programs:** programs that guarantee benefits to qualified recipients.

**Interventionism:** foreign policy belief that America must be actively engaged in shaping the global environment and be willing to intervene in order to shape events.

**Isolationism:** foreign policy belief that Americans should put themselves and their problems first and not interfere in global concerns.

**Keynesian fiscal policy:** economic theory that posits that government could stimulate the economy by increasing spending and cutting taxes during recessions or by cutting spending and raising taxes during expansion.

**Mandatory federal spending:** spending outlays for these programs are controlled by laws other than congressional appropriate acts.

**Means-tested programs:** social programs requiring beneficiaries to demonstrate their need in order to qualify.

**Mindful nudges:** policies aimed at guiding people to be more aware of the choice they are making.

**Mindless nudges:** policies that use emotion or framing to sway decisions.

**Neoconservatism:** foreign policy belief that America is a "good" in the world that ought to combat "evil."

**Non-interventionism:** foreign policy belief that the United States should refrain as much as possible from intervening in the affairs of other countries.

**Nudge policies:** subtle policies created to alter people's behavior without significantly changing their economic incentives.

**Policymaking process:** consists of agenda-setting, policy formation, policy adoption, and policy implementation.

**Public policy:** a government plan of action to solve a problem.

**Redistributive policies:** programs and policies designed to shift recourses from the one party (typically the wealthy) to another (typically the poor and working-class).

**Regulatory policies:** designed to restrict or change the behavior of certain groups, businesses, or individuals.

**Social insurance programs:** programs like Social Security that offer benefits in exchange for contributions.

**Social policies:** distributive or redistributive policies created to improve people's standards of living.

**Social welfare policies:** programs or policies seeking to meet citizen needs for food, shelter, clothing, jobs, education, old age care, and health care.

**Subsidies:** financial incentives given by the government to corporations or individuals.

**The Submerged State:** Suzanne Mettler's argument that Americans are generally unaware of how much government is involved with providing benefits, especially when they are hidden or submerged within policy programs.

**War Powers Act of 1973:** resolution that put limits on the president's ability to send troops into combat areas without congressional approval.

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9

- Era of the Partisan Press
- Era of the Commercial Media
- Era of the Objective Media
- Era of Interpretive Journalism
- Era of Media Fragmentation
- Traditional Media
- New Media
- Bias and Trust in the Media

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CHAPTER NINE

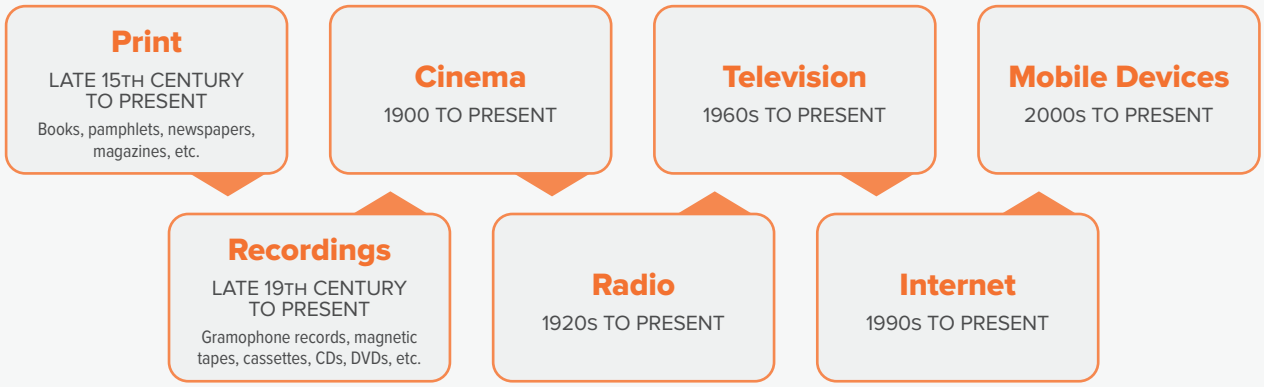
# The Media

**OUR AMERICAN DEMOCRATIC SYSTEM** demands an informed citizenry. Americans must be able to criticize, contemplate, and change their government. Therefore, citizens require a steady stream of information to gauge the efficacy of their leaders. In short, information is power. Theoretically, if a government fails to achieve its promised policy goals or if scandal plagues its leadership, informed citizens may make changes. This theory assumes that citizens a) pay close attention to government actions, b) understand the actions of political leaders, c) develop fully informed opinions based on these actions, and d) act according to these informed judgements. Indeed, this ideal scenario fails to acknowledge an important bridge between the citizen and its government: the mass media.

Citizens depend on the mass media to connect them to the government via its three important functions within the democratic process: it is a *platform*, a *conduit*, and a *monitor*.[1] First, the media platform provides a space for candidates, officials, and political parties to communicate political messages and policy preferences to a mass audience. Second, the media conduit acts as a smorgasbord of opinions, perspectives, and beliefs on important issues. Last, as a monitor, the media serves as a watchdog to deter public officials from violating the public trust by exposing their misdeeds. It is safe to say that without the media pursuing these purposes, an informed citizenry would be impossible.

FIGURE 9.1

## Evolution of Media Technology




Of course, Americans have historically depended on new technologies to transmit and receive their information. From the late fifteenth century to the present, information distribution has evolved from partisan pamphlets and newspapers to radio and television advertisements to today's social media tweets **(Figure 9.1)**. The following section will identify five key eras of mass media[2] and how they use technology to convey information to the public.

## Era of the Partisan Press (1787–1832)

Early American media might look familiar to many today. It was characterized by strident partisanship and snide rebukes of the opposition **(Figure 9.2)**. Indeed, the early press was an extension of the unofficial political parties of the day. Newspaper editors were hired by party officials, and the papers were typically financed by the parties. These newspapers were not widely circulated (due to high costs and illiteracy), but they were widely read by political elites and served as early conduits for party **talking points**. There was also obviously no attempt at objective reporting.

***Talking points:*** *statements designed to persuasively support a political argument, political party, issue, or political figure.*

One typical example of this early era is the media feud between Thomas Jefferson and John Adams in 1800. Neither Jefferson nor Adams campaigned for president that year, but both urged friendly newspapers to support them. Prominent journalist John Callender, Jefferson's hired hand, wrote a pamphlet called "The Prospect before Us" **(Figure 9.3)** in which he savaged John Adams. He wrote, "The reign of Mr. Adams has, hitherto, been one of continued Tempest of malignant passions." Future historians, he predicted, "will enquire by what species of madness America submitted to accept, as her president, a person without abilities, and without virtues: a being alike incapable of attracting either tenderness, or esteem." Adding further insult, he called

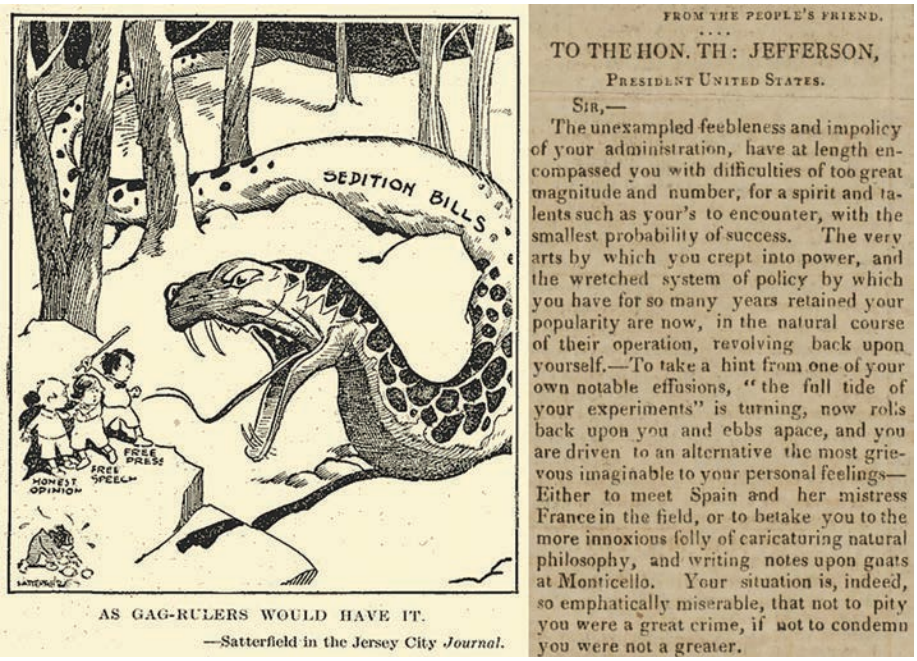
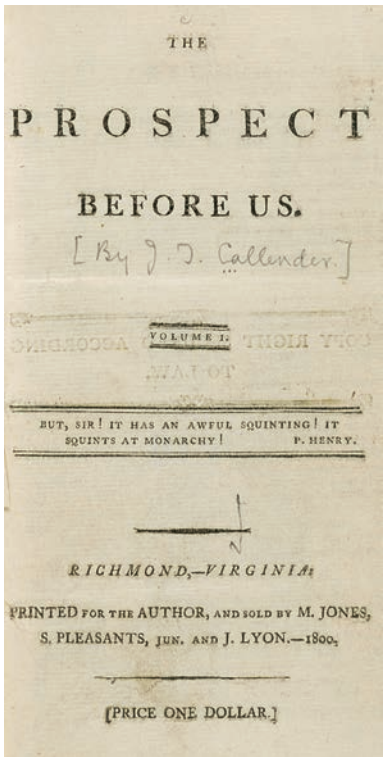



**FIGURE 9.2** Early newspapers (Jersey City Journal cartoon and article addressed to Thomas Jefferson).




Source: James T. Callender; Beinecke Rare Book & Manuscript Library, Yale University

**FIGURE 9.3** Cover of Callender's "The Prospect Before Us."

Adams "a hideous hermaphroditical character which has neither the force and firmness of a man, nor the gentleness and sensibility of a woman." Finally, he offered readers with a "choice" between "Adams, war, and beggary" or Jefferson, "peace, and competency."[3] The New England Palladium, a Federalist paper, responded to the anti-Adams pamphlets by spreading similarly harsh rumors that Jefferson was an atheist who would snatch Bibles.

Fortunately, major technological advancements made printing and production less costly, and voting rights expanded by the 1830s to include non-land owning white men while literacy rates rose. This meant publishers could now reach a larger audience and would no longer rely on political parties to finance their newspapers. These developments were the beginning of the end for the partisan press era.

## Era of the Commercial Media (1833–1899)

By the 1830s, newspapers grew more popular because of the penny press. Cheaper subscriptions and rising literacy allowed for mass circulation. In 1848, the Associated Press (AP) was organized to gather and share worldwide information between newspapers. This sped up the circulation of news from around the country among local newspaper editors.

Importantly, because newspapers now relied on buyers and subscriptions, they expanded their coverage by focusing less on **hard news** and by incorporating human interest stories (also known as **soft news**) as well as sensational criminal and disaster reporting. These changes helped newspapers earn substantial profits, become financially independent, and break away from party control.

Helming the booming newspaper industry were powerful newspaper editors like William Randolph Hearst (whose life was loosely depicted in the 1941 classic film Citizen Kane 9.1). Their new editorial control and central

***Hard news:*** *news stories that feature "serious" topics such as world affairs, politics, and business.*

***Soft news:*** *news stories that feature "routine" topics such as entertainment, human-interest stories, lifestyle, and the arts.*

**9.1**

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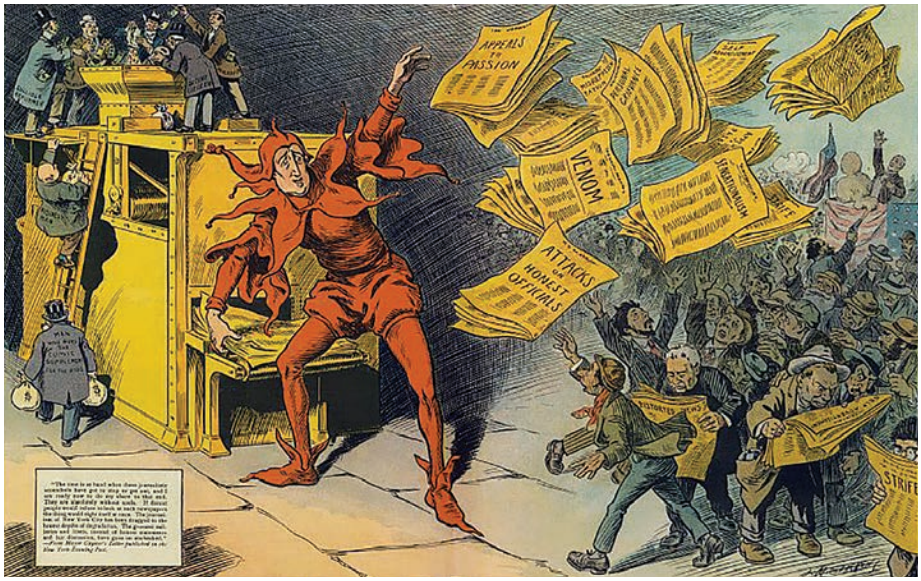
**A collection of all the scenes in Citizen Kane relating to yellow journalism and sensationalism.**




Source: from "The yellow press/L. M. Glackens." by L.M. Glackens, 1910. [Photograph] Retrieved from the Library of Congress, https://www.loc.gov/item/2011647630/

**FIGURE 9.4** Cartoon depicting yellow journalism.

***Yellow journalism:*** *a strongly partisan and/or sensationalistic packaging of news stories.*

focus on succeeding financially and amassing power led to **yellow journalism (Figure 9.4)**. This form of journalism tells strongly partisan and/or sensationalistic news stories. Yellow journals like the New York World and the New York Journal sold millions of newspapers by relying on dramatic headlines and sometimes manufactured stories to draw attention. Today, these publications (and their headlines) would be called "click-bait." However, the downside of printing fabricated and sensationalist stories is that the public soon viewed these publications as less than credible. Of course, a news source must maintain credibility, or it loses its ability to perform its democratic functions.

## Era of the Objective Media (1900–1979)

As newspapers became more profitable and politically independent, editors clamored for credibility and began to professionalize journalism. In 1908, revered journalist Walter Williams started 9.2 the world's first school of journalism at the University of Missouri. More schools of journalism followed.

**9.2**

**UTTyler.edu/AmGovBook**

**News professionals share their thoughts on the Journalist's Creed written by Walter Williams.**

In direct response to the preceding eras of journalism and their negative impact on the profession's credibility, journalists in this era were trained to practice objectivity. That is, they sought to report the news without partisan bias. To do so, journalists would report arguments from both sides without personal commentary. They aimed to be perceived by the public and political actors as neutral conveyors of news. This decision helped stabilize the industry by providing a norm for conduct that would help journalists focus on their primary functions (i.e., platforming, processing, and monitoring) rather than on political allegiances.

Nevertheless, the decision to hold steadfastly to objectivity was not without controversy within the profession. During the McCarthy era at the height of the Red Scare, journalists like Edward R. Murrow **(Figure 9.5)** wrestled with the notion that they were required to echo the sentiments of Senator Joseph McCarthy **(Figure 9.6)** and his opponents equally, even when McCarthy's

statements were veritably false or exaggerated and his critics' comments were truthful. This introduced the concept of **both-siderism**—the idea that every story has two equal and logical sides to an argument. Critics of this concept contend that it often results in **false equivalence**, when opposing sides appear logically equivalent but are not.

New technology also characterized this era as radio increased in popularity and became a major public news source in the 1920s. Radio journalists like Murrow (whose importance the 2005 drama Good Night and Good Luck depicted 9.3) became trusted household names who only became more prominent after transitioning to television in the 1950s.

In the 1950s, broadcast television replaced print as the most prominent news carrier. By 1969, the audience for the major television networks ABC, NBC, and CBS was larger than the subscribers to the top twenty daily newspapers combined.[4] The news and, more generally, the media became national.

Consider the trends here. First, early news media was provincial, with a localized spin on statewide, national, and international news. News media then became regional, and editors bought and used newspapers for commercial appeal. Next, news media became national. Newspapers were nationalized (bought by major chains and filled with content from national wire services like the Associated Press), and then the national radio and network television media became the dominant news carriers. In short, news consumption went from local to national—keep that in mind.

## Era of Interpretive Journalism (1980–Present)

By the late 1980s, the journalism profession began questioning its principal of neutrality. A newfound belief held that journalists were not autonomous if they simply echoed political figures' messages. Furthermore, allowing politicians to convey objectively untrue or exaggerated messages would undermine journalists' roles of protecting the public trust and holding leaders accountable for their words and deeds. As such, journalism took a more analytic approach to covering political figures.

The key features of this interpretive journalism include a) skepticism of traditional journalistic objectivity, b) facts contextualized for the audience, c) journalists as **gatekeepers** between the public and politicians, and d) ambiguous political messages that are translated for mass consumption.

These modern journalistic tenets introduced **news analysts** and made their role more significant. These specialists often frame news stories, which makes journalists central figures. One framing method is the **strategy frame**, or an analysis of the rationale and strategy underlying a politician's rhetoric and positions.[5] For example, a Republican politician might have a less-than-stellar rating from the National Rifle Association (NRA). To stave off competition from within the party during the next election, that politician could publicly support the NRA's new push to eliminate gun regulations. An analyst could use a strategy frame, instead of simply covering what that politician said, to explain that

***Both-siderism:*** *the idea that every story has two equal and logical sides to an argument.*

***False equivalence:*** *when two opposing sides appear logically equivalent but are not.*

**9.3**

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**Edward Murrow speech in the movie "Good Night, and Good Luck."**

**FIGURE 9.5 Edward R. Murrow**

**FIGURE 9.6 Senator Joseph McCarthy**

***Gatekeepers:*** *professional journalists act as a conduit to the public for the opinions, perspectives, and beliefs of politicians, interest groups, and business interests.*

***News analyst:*** *media specialists who help to frame important news stories.*

***Strategy frame:*** *analysis of the rationale and strategy underlying a politician's rhetoric and positions.*

the politician is strongly supporting the NRA to protect themselves from political challengers. In short, using this frame means the news can report what someone is saying as well as why they are saying it.

An extension of this frame (and perhaps this era's most prominent feature) is **horse race journalism**. This journalism frames an election not as a contest of ideas or policy positions but as a race between two teams. This frame is popular with journalists because it is easy to report and it draws a large audience. Horse race coverage is compelling, and the fixation on public opinion polls and their results makes an election more interesting. These tight races draw coverage because the constant fascination with who is up and who is down sells newspapers, attracts listeners, and draws viewers.

***Horse race journalism:*** *framing an election not as a contest of ideas or policy positions, but as a race between two teams.*

Why focus on opinion polls instead of the issues? Because issues are complex, and it is difficult for journalists to cover issue positions without being accused of bias. Today's journalists no longer echo political messages, they interpret them. If a journalist contextualizes a political message and thus undermines it with objective facts, the coverage is swiftly charged with bias. To avoid these accusations, the issues are given a lower priority.

Instead, the media is often drawn to **feeding frenzies**, or excessive coverage of embarrassing or scandalous subjects. When a politician makes a gaffe or experiences a sex scandal, massive coverage is easier and more commercially appealing for audiences. Media critics often decry this approach and argue that it demeans the press and wastes valuable time on trivial matters. Professor Thomas Patterson argues that feeding frenzies increase negativity and cynicism in the media because they incentivize adversarial journalism (to get the scoop) in lieu of investigative and deliberative journalism.[6] Feeding frenzies can certainly become trivial and absurd. In 2016, for example, Melania Trump gave a speech at the Republican National Convention that allegedly plagiarized First Lady Michelle Obama's speech at the Democratic National Convention in 2008. The allegation became headline news and was inordinately covered for days, sometimes instead of more consequential events at the national political convention.

***Feeding frenzies:*** *excessive press coverage of an embarrassing or scandalous subject.*

**9.4**

**UTTyler.edu/AmGovBook**

**Media personalities discuss how journalism has evolved since the Watergate scandal.**

**9.5**

**UTTyler.edu/AmGovBook**

**Crooked lobbyist Jack Abramoff explains how corruption in Congress continues today despite ethics reform.**

Political scientist Larry Sabato has argued since the early 1990s that feeding frenzies could negatively affect our political system. Among his assertions, he notes that "Watergate gave birth to the 'character issue,' and broadly defined, character can cover everything. The press has had a permanently adversarial relationship with every president since Nixon." As such, "Nothing is off-limits; the news cycle never ends." Because we know everything there is to know about public officials, we are likely more critical of them. The consequence of this is that the "best people" don't run for public office anymore." He states, "It is extremely difficult today to convince the most successful individuals to become candidates for anything," because they are averse to the kind of media scrutiny that could result in a feeding frenzy.[7]

Feeding frenzies may not be all bad. Scandals relevant to the public official's job can help expose their misdeeds and inform the public. Examples include the Watergate scandal 9.4 and the Jack Abramoff lobbying scandal 9.5.

Journalists also try to keep politicians off-message via combative stories that may contradict or expose political **spin** on issues, policies, or events. Political

***Spin:*** *propaganda that attempts o persuade an audience via biased interpretations of issues, policies, or events.*

spin is propaganda that attempts to persuade an audience through biased interpretations of issues, policies, or events. For example, a national unemployment rate of 7% is a relatively high figure and would be unflattering for an incumbent president. To deflect from this fact, an incumbent president (and spokespersons from his administration) could attempt to spin the news. When asked about the unemployment rate, they may cite statistics showing high national wages. The president may also tout low interest rates. This spin strategy gets journalists and the public to focus on more flattering numbers (e.g., wage earning and interest rates) than on unflattering ones (e.g., unemployment).

## Era of Media Fragmentation (2000–Present)

The current era is one of fragmented media, and the number of American news sources is no longer limited. With media deregulation and advanced technology, the number of news sources has increased in recent years. The nightly news on ABC, NBC, or CBS used to have a monopoly on information with no alternative viewing options. Today, cable news networks like Fox News, CNN, and MSNBC along with social media platforms like Facebook, Twitter, and blog sites offer Americans more news choices than ever before.

Proponents of this increase in choices argue that the media has been democratized—readers, listeners, and viewers no longer have to consume media from self-ordained gatekeepers (i.e., the elite news media). Instead, average Americans can become media sources without being corrupted by market pressures facing the mainstream media. Opponents argue that the increase of sources has reduced the quality of the news (i.e., nonprofessionals operating outside of time-honored journalistic standards), and that market pressures caused by the increase in competition decrease the in-depth coverage of issues. Furthermore, these proliferating choices have eroded what Sunstein (2009) calls an architecture of serendipity. In other words, if news comes from sources that share someone's agendas, it eliminates serendipitous encounters with opposing topics and points of view. This creates a silo effect that potentially creates groupthink (i.e., stifled dissent, consensus valued over correctness, and a failure to examine alternative opinions and consequences of belief).[8]

Furthermore, this fragmented media landscape in many ways resembles the partisan era. Americans can now ideologically customize their sources of political information, which is also known as **selective media exposure**. A progressive Democrat may only watch MSNBC or read *The New York Times*. Conversely, a conservative Republican may only consider Fox News a trusted news source. In 2017, Pew Research released survey results 9.6 that showed CNN, MSNBC, *The New York Times*, and National Public Radio were the main news sources for consistent progressives; Fox News was the only trusted source of news for consistent conservatives.

Perhaps consumers should have the option to choose their own news sources. The answer is debatable, but one thing is indisputable: relying on reaffirming sources intensifies and reinforces opinions rather than

***Selective media exposure:*** *the process of ideologically customizing one's sources of news media and political information.*

**9.6**

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**Political polarization and media habits for liberals and conservatives.**

providing a balanced and healthy media diet. This phenomenon occurs whether the biased source is credible (i.e., honest) or not.

Issue priorities are another important consequence of selective media exposure. People may not seem well-informed on issues emphasized in the mainstream media because they selected a source that prioritizes different issues. After all, different sources often highlight different issues. For example, data from the TV News Archive via the GDELT Project's Television Explorer reveal differing points of emphasis between CNN, MSNBC, and Fox News over a twelve-month period (June 2017 to May 2018). It found 9.7 that CNN and MSNBC were significantly more likely than Fox News to cover the Robert Mueller investigation and Russian collusion stories. Conversely, Fox was more likely to cover stories about "fake news" in the mainstream media.[9] It stands to reason that viewers will prioritize issues that their primary media source covers. This is called a **priming effect**.

9.7

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**The stories Fox News covers extensively—and those it ignores—compared to other cable news coverage.**

***Priming effect:*** *a process by which news coverage influences the importance one assigns to opinions on issues.*

The media's expansion has also decreased political information. Because everyone has choices, many people choose not to watch any news. This creates a political information gap between Americans knowledgeable in politics and voluntarily ignorant people who do not care about politics. People's ability to ignore the news also impacts the power of the president's and most political leaders' "bully pulpit," which is used to hold the public's attention.

One explanation for these media changes is the United States' deregulation of the media. For the past forty years, the United States government's **Federal Communications Commission (FCC)** has endorsed limited regulation of the media. Proponents of deregulation have argued that the free market should dictate the media industry, but opponents believe the government has a role as a pubic trustee to ensure that the media offers diverse perspectives and substantive content.

***Federal Communications Commission (FCC):*** *an independent government agency founded in 1934 to regulate communications by radio, the internet, satellite, television, and cable.*

When broadcast networks argued that the early FCC and its regulations violated the First Amendment, the courts generally agreed with the government, citing its role as a public trustee. The FCC commissioners' ideological changes, however, brought shifts toward the **marketplace approach**—an argument that competitive media outlets were enough to serve the public interest.[10] This policy change precipitated a systematic rollback of specific programming standards and of restrictions on the concentration of ownership in broadcast media. The rules that promoted diverse perspectives in the news were also weakened. For instance, the **Fairness Doctrine** required broadcast stations to give free airtime to issues that concerned the public and to cover opposing sides when controversial issues were covered. It was repealed in 1987. The **equal-time rule** directs stations to allow airtime opportunities for all candidates if they purchased it. This rule still exists, but it has many exceptions and is thus inconsequential to broadcasters.

***Marketplace approach:*** *a belief that competitive media outlets were sufficient to serve the public interest.*

***Fairness doctrine:*** *the federal legal requirement that broadcast stations give free airtime to issues that concerned the public and opposing sides when controversial issues were covered.*

***Equal-time rule:*** *the federal rule directing broadcast stations to allow all candidates opportunities for airtime if they purchase it.*

To recap the evolution of the media: early news media was local, then news coverage became regional, and then news reporting became national. Now, news media has returned to a form of provincialism as a media source may only speak to a particular group. In the way the media used to only reflect a local and geographically homogeneous community, it now reflects a national or international ideologically homogenous community.

According to Barbour and Wright (2017), **mass convergence** characterizes the media. Mass convergence is the merging of traditional and digital media platforms.[11]

***Mass convergence:*** *the merging of traditional and digital media platforms.*

## Traditional Media

Think about the last time you read a physical newspaper or consider your most recent experience listening to news on the radio. If you can remember neither occurrence, you reflect the trajectory of these traditional media platforms. **Traditional media** includes radio, newspapers, magazines, and television.

***Traditional media:*** *sources of information that include radio, newspapers, magazines, and television.*

Alas, traditional media is an information tool in crisis. Few people read newspapers and magazines. The old relationship between newspapers, magazines, and the public has been threatened by the Internet and by social media. Previously, Americans would subscribe to local papers, and the revenue would be used to hire reporters and journalists to investigate and write stories for local readers. With the Internet, citizens could acquire information online without paying subscription costs, which directly impacted how newspapers and magazines could successfully function. As a result of readers' changing habits and fewer paying subscribers, many newspapers had to scale down operations. In fact, to lower operating costs, most local newspapers now simply collect and publish stories written by the Associated Press or Reuters without hiring or paying reporters. Consequently, most American readers get their daily news from only two sources. Mainstream traditional information has become nationalized.

Radio has been central to national communication since the mid-1920s. It was used by President Franklin Roosevelt during his "fireside chats" 9.8 and served as an early pivot toward nationalized media by the mid-twentieth century. Today, almost all Americans own a radio, but its influence has lessened. For disseminating information, radio has become a niche tool. For example, political talk radio replaced the newspaper as an information source for many Americans, specifically conservatives. The most popular figures are conservative voices like Rush Limbaugh, Mark Levin, Sean Hannity, and Laura Ingraham. Three possible reasons for this phenomenon exist, two of which further explain the role of selective media exposure and polarized media in the U.S. today. First, demographics explain that potential progressive audiences for radio are diluted because racial minorities (who comprise a large contingent of liberals and Democrats) prefer ethnic radio. For instance, Spanish-language radio is popular among Hispanic and Latino listeners. Second, as described before, survey data show that progressives trust and value media institutions like *The New York Times* and *The Washington Post*. Conservatives do not. As such, talk radio has become an important alternative for conservatives to acquire political information. Last, white liberal and Democratic listeners have embraced National Public Radio as their preferred radio source, further negating the need for alternative progressive talk radio sources.

**9.8**

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**President Franklin D. Roosevelt delivers the first of thirty "fireside chats" in 1933.**

In terms of traditional media, television is still a vital medium and has been the chief mode of communication for the past fifty years (most Americans have

9.9

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**Pathways to news: how Americans prefer to get their information.**

more than one television in their household). In 2016, Pew Research found 9.9 that 57% of Americans still often get their news from television. Its impact on our politics cannot be understated. Television is still the primary platform used by presidents "going public," and political campaigns still purchase advertising time during election season. Television can still capture the American zeitgeist via late-night comedy hosts like Stephen Colbert, Jimmy Kimmel, Samantha Bee, and John Oliver. Although television viewership has balkanized, national tragedies like 9/11 or the Parkland shootings still reveal Americans' continuing reliance on television for information and images.

However, most Americans avoid politics and hard news on television. Many people choose soft news and entertainment programs instead. That said, the impact of *Ellen* or *The View* on viewers is underestimated. Many viewers may only be exposed to an issue or a candidate if it appears on one of those shows. If this exposure helps form political opinions, Iyengar (2016) calls this **incidental learning**.[12] For many people, this can be a positive aspect of soft news programming, even without an in-depth analysis of political issues. Unfortunately, these outlets can reduce political accountability because the hosts of these shows are often unwilling or incapable of asking political officials tough, pointed, and informed questions.

***Incidental learning:*** *the process by which soft news programs present political issues in an entertaining format, giving political information to individuals who would otherwise be politically inattentive.*

That said, breaking down the numbers from the same Pew Research survey reveals that older people rely on television (and traditional media in general) for most news. In other words, 85% of Americans sixty-five and older often get news from television, but only 27% of Americans eighteen to twenty-nine years old answered similarly. Newspaper readership is also linked to age. Although 48% of people sixty-five and older often get news from newspapers, a mere 5% of those eighteen to twenty-nine years old do the same. Similar statistics apply to radio.

## New Media

***New media:*** *sources of information that include the Internet and social media.*

Perhaps the most interesting result from the Pew Research survey shows that, although older Americans still use traditional media, **new media** (e.g., the internet and social media) appeals to the youth. Indeed, 50% of the eighteen- to twenty-nine-year-old demographic get most of their news online. That figure is only 20% among people sixty-five and older.

The Internet has revolutionized the way people obtain information. Citizens can now answer complicated questions with a simple Google search and access government documents, political speeches, prominent publications, online journals, and like-minded communities that discuss relevant issues.

In many ways, the Internet has democratized the media. Anyone can start a blog or a vlog, create a Facebook page or a Twitter handle, and shop their political analysis to anyone willing to follow them. Media elites who see themselves as gatekeepers no longer control every platform for disseminating information, and a national debate continues as to whether this is good or bad. On one hand, democratizing the media allows more voices to be heard. In a democratic society, we idealize the right of all Americans to freely speak

and express themselves, especially in service to the nation. On the other hand, individuals who do not value professional ethics or rules of conduct when spreading information are given an influential platform, allowing them to publish harmful propaganda unchecked.

An integral aspect of new media is social media, an extension of the Internet. A Pew Research survey found 9.10 that 68% of Americans get news on social media. This medium is popular because it is individualistic (i.e., we can tailor what we follow to our individual tastes), personal (i.e., we can share our views and read opinions from friends and family), and a convenient, as simply scrolling through Facebook or Twitter reveals countless news stories. Yet, these very characteristics of social media uniquely influence behavior and further illustrate the selective media phenomenon. Our increasingly partisan and polarized beliefs precipitated the rise of **homophily**. Often translated as "birds of a feather flock together," *homophily* describes our tendency to only follow and friend like-minded individuals. For instance, a conservative user is likely to only follow personalities like Ben Shapiro on Twitter and remain friends with their conservative colleagues on Facebook. In fact, another Pew Research survey (refer to 9.6) found that "consistent conservatives" are likely to hear political opinions similar to their own on Facebook, and "consistent liberals" are likely to defriend someone on a social network because of politics. These tendencies lead to isolated and biased information, the hallmark of selective media exposure.

Bias is a funny thing. Americans seem to both abhor bias and actively seek it out to reaffirm their own beliefs. Bias is undermining trust in American media today, and it fuels selective media habits.

**9.10**

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**A study on news use across social media platforms in 2017.**

***Homophily:*** *describes tendencies to only follow and friend other like-minded people.*

» Bias is a funny thing. Americans seem to both abhor bias and actively seek it out to reaffirm their own beliefs. Bias is undermining trust in American media today, and it fuels selective media habits.

## Bias and Trust in the Media

Before discussing trust in the media and the role of bias, read the following anecdote from a professor of American politics:

> This semester I'm teaching an introduction to American government class with fifty first-year students. Yesterday, before beginning my lecture on "the media," I asked them three questions:
>
> 1. What comes to mind when you hear a blanket phrase like "the media"?
> 2. Ideally, what role should "the media" play in our democracy?
> 3. Do you trust "the media"?
>
> The first question elicited expected responses. The students have come to view social media as paramount for acquiring information. Twitter, Facebook, and Snapchat were all mentioned as sources of news. No one mentioned local or national newspapers, cable or nightly news. No one listens to NPR or conservative talk radio. The "press" to them exists at their fingertips.
>
> One student nailed the second question right off the bat. As he explained, "the media" is our main source of information, especially as it relates to

government. His colleagues agreed. They argued that there's a reason why we have “freedom of the press and speech.” Every student who spoke up acknowledged the importance of “the media” as an institution.

But when I asked whether they trusted “the media,” it was a resounding "no." Out of fifty students, three admitted (tentative) trust. Why so much distrust? They recognize that so much of the information they're fed is “biased” and thus illegitimate. They don't feel equipped enough to weed out the fact from the fiction, so they reject it all.

So, the very thing they're exposed to daily—that they acknowledge has an extremely important role in our democracy—they believe cannot be trusted.

The students in this introductory American government class accurately reflect the American public. A 2015 Gallup survey showed 9.11 that just 40% of Americans have a great deal or a fair amount of trust and confidence in the media. This is down from over 70% trust and confidence in the mid-1970s. The decline resulted from perceived bias. When people perceive news reports as biased and untrustworthy, they are more likely to not take it seriously. As discussed in this chapter, bias is central to a selective media environment. Unfortunately for the media, its credibility is predicated on the public’s overall confidence and trust, which increasingly depend on partisan identification. In other words, Democrats and Republicans will trust media sources that reaffirm their beliefs. This is called the **friendly media phenomenon**.[13] Because citizens increasingly rely on a chosen few sources, however, they only trust those sources when evaluating the media. Research has shown that most people perceive bias when it comes to information from distrusted sources. For instance, people with opposing viewpoints who view the exact same news report will each believe the report is biased in favor of the other side. This is called the **hostile media phenomenon**.[14]

Survey data indicate that Republicans are far more skeptical of the media than Democrats—so much so that a 2018 Quinnipiac University poll 9.12 shows that Republicans are more likely to trust news from President Donald Trump (75%) than the news media (20%). Unsurprisingly, the opposite was true for Democrats, who trusted the news media (80%) more than Trump (5%). Furthermore, a 2017 Gallup poll found 9.13 that 72% of Democrats have a great deal or fair amount of trust in the news media, but only 14% of Republicans agree. Indeed, trust and confidence in the media has become another partisan issue. And a Pew Research survey shows that, in all, progressives trusted twenty-eight of the thirty-six sources surveyed and conservatives distrusted twenty-four of the thirty-six sources.

Why is trust in the media important? Journalists act as gatekeepers who determine what is covered. Trust is important because it maintains their legitimacy, which is what a gatekeeper needs if a viewer is going to consume their product. The constitutionally mandated role of the press (or the media) is to keep the government honest by holding it accountable for its actions. This often comes in the form of exposing misdeeds or corruption (e.g., the Pentagon Papers and Watergate) by publishing public stories. Theoretically, this allows the public to

**9.11**

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**Americans' trust in mass media sinks to a new low.**

***Friendly media phenomenon:***
*trusting and deeming credible media sources that reaffirm one’s beliefs.*

***Hostile media phenomenon:***
*People with opposing viewpoints who are shown the exact same news report will each believe the story is biased in favor of the other side.*

**9.12**

**UTTyler.edu/AmGovBook**

**Three-quarters of Republicans trust President Trump over the media.**

**9.13**

**UTTyler.edu/AmGovBook**

**Democrats' confidence in mass media rises sharply from 2016.**

either support these government actions at the ballot box or to refuse support and replace leaders at the next election. If the public no longer trusts stories published by the press, the chief mechanism for accountability is lost. The relationship between the media and the public is built on trust. Once trust is gone (and it is vanishing at an increasing rate), the stories no longer matter.

## Key Terms

**Both-siderism:** the idea that every story has two equal and logical sides to an argument

**Equal-time rule:** the federal rule directing broadcast stations to allow all candidates opportunities for airtime if they purchase it.

**Fairness doctrine:** the federal legal requirement that broadcast stations give free airtime to issues that concerned the public and opposing sides when controversial issues were covered.

**False equivalence:** when two opposing sides appear logically equivalent but are not.

**Federal Communications Commission (FCC):** an independent government agency founded in 1934 to regulate communications by radio, the internet, satellite, television, and cable.

**Feeding frenzies:** excessive press coverage of an embarrassing or scandalous subject.

**Friendly media phenomenon:** trusting and deeming credible media sources that reaffirm one's beliefs.

**Gatekeepers:** professional journalists act as a conduit to the public for the opinions, perspectives, and beliefs of politicians, interest groups, and business interests.

**Hard news:** news stories that feature "serious" topics such as world affairs, politics, and business.

**Homophily:** describes tendencies to only follow and friend other like-minded people.

**Horse race journalism:** framing an election not as a contest of ideas or policy positions, but as a race between two teams.

**Hostile media phenomenon:** People with opposing viewpoints who are shown the exact same news report will each believe the story is biased in favor of the other side.

**Incidental learning:** the process by which soft news programs present political issues in an entertaining format, giving political information to individuals who would otherwise be politically inattentive.

**Marketplace approach:** a belief that competitive media outlets were sufficient to serve the public interest.

**Mass convergence:** the merging of traditional and digital media platforms.

**New media:** sources of information that include the Internet and social media.

**News analyst:** media specialists who help to frame important news stories.

**Priming effect:** a process by which news coverage influences the importance one assigns to opinions on issues.

**Selective media exposure:** the process of ideologically customizing one's sources of news media and political information.

**Soft news:** news stories that feature "routine" topics such as entertainment, human-interest stories, lifestyle, and the arts.

**Spin:** propaganda that attempts to persuade an audience via biased interpretations of issues, policies, or events.

**Strategy frame:** analysis of the rationale and strategy underlying a politician's rhetoric and positions.

**Talking points:** statements designed to persuasively support a political argument, political party, issue, or political figure.

**Traditional media:** sources of information that include radio, newspapers, magazines, and television.

**Yellow journalism:** a strongly partisan and/or sensationalistic packaging of news stories.

## ENDNOTES


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[3]Ibid.

[4]See Chapter 2 of Iyengar, S. (2016). Media Politics: A Citizen's Guide (Third Edition). New York, New York: W. W. Norton & Company

[5]Ibid.

[6]See Chapter 13 of Barbour, C, & Wright, G.C. (2017). Keeping the Republic: Power and Citizenship in American Politics. 6th ed. Washington, DC: CQ.

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[11]See Chapter 13 of Barbour, C, & Wright, G.C. (2017). Keeping the Republic: Power and Citizenship in American Politics. 8th ed. Washington, DC: CQ.

[12]See Chapter 8 of Iyengar, S. (2016). Media Politics: A Citizen's Guide (Third Edition). New York, New York: W. W. Norton & Company

[13]Ibid.

[14]Ibid.


# 10

Party Systems in America's History

What Party Eras Teach Us

Why Do We Have Two Parties?

The House of Representatives Chamber in the United States Capitol building in 2015.

Source: Collection of the U.S. House of Representatives

CHAPTER TEN

# Political Parties in America

**POLITICAL PARTIES APPEAR ESSENTIAL** in today's politics. In fact, political parties help organize politics by connecting officials who serve at the local, state, and federal level. Parties also give the public an identity, which mitigates the government's fragmentation that results from federalism. A formal system of political parties was not established in the United States until 1796, when Thomas Jefferson created the Jeffersonian Republican party to run for president against Vice President John Adams. At this early stage, political parties represented diverse coalitions with different views on governing the nation.

Early U.S. leaders understood how political parties would operate from England's Tory and Whig parties, which existed since 1679. For example, people frequently described colonists loyal to England as Tories—an intentional label to identify political competition.

If the Federalists and Anti-Federalists at the Constitutional Convention were factions and not parties, what is a political party in the United States? A political party is an organization of citizens with common interests who support candidates for office and collaborate in government to implement policy. The definition must be generalizable because national political parties like

the Democratic National Committee and others exist only in specific states or counties. Because a political party aims to control politics by engaging the public, we analyze the political parties in three distinct venues. First, we observe how parties shape political institutions like Congress, the presidency, and state governments. Second, we should identify how political parties organize themselves because one party that gains an advantage over other parties can more easily influence policy. Third, partisanship links elected leaders and voters in the electorate. One way to identify a political party's strength is to measure what percentage of the electorate identifies with the party. Elections delegate power, and partisanship is a choice to be part of a group.

Thomas Jefferson's political success, his presidency in 1800, and his lasting impact on American politics is partly because he developed a party organization by recruiting candidates who were well known in their communities. He found likeminded candidates and developed a brand (or label) the public could identify with, so voters in early elections could see a vision of the country that differed from what the first administration articulated. The success of the Jeffersonian Republican Party endured because it could outlast the public service of Jefferson—the former secretary of state and author of the Declaration of Independence.

## Party Systems in America's History

***Realigning elections:*** *a realignment is a disruption in what policies and leaders define the establishment of a party, and a realignment identifies a major shift in which party most Americans identify with.*

To understand the complexity of American political parties, we should understand their development. Traditionally, parties are evaluated via large blocks of time defined by **realigning elections**. Just as historians describe the reentry of Confederate states into the United States as Reconstruction, they also describe eras of party politics, such as the Era of Good Feelings and the New Deal. These descriptions distinguish between a party's identity then and the party's identity now. Each era also shows how the action of political parties changed with each new disruption throughout history.

Each break in the timeline represents a presidential election. Political scientists evaluate elections to whether a shift has occurred in what factions support a party, because all states generally voted the same way for multiple elections. Within each state, the time when each party came into power typically differs within the eras. However, parties still need to acquire enough support across most states to constitute a national phenomenon.

Party systems are a tool to describe how parties' policy stances shift over time. The strongest example of a realigning election occurs when a party comes back to power by advocating for new policy ideas or by applying a different **ideology**. Major electoral gains can be led by certain individuals, but a realignment happens when the party holds power and promotes a consistent new vision for the country.

***Ideology:*** *a belief system of consistent attitudes of a person about policies, be they libera or conservative.*

### First Party System: 1800 to 1828

In *Federalist Paper No. 10*, James Madison advised against established factions that would encourage leaders to provide benefits to a political organization

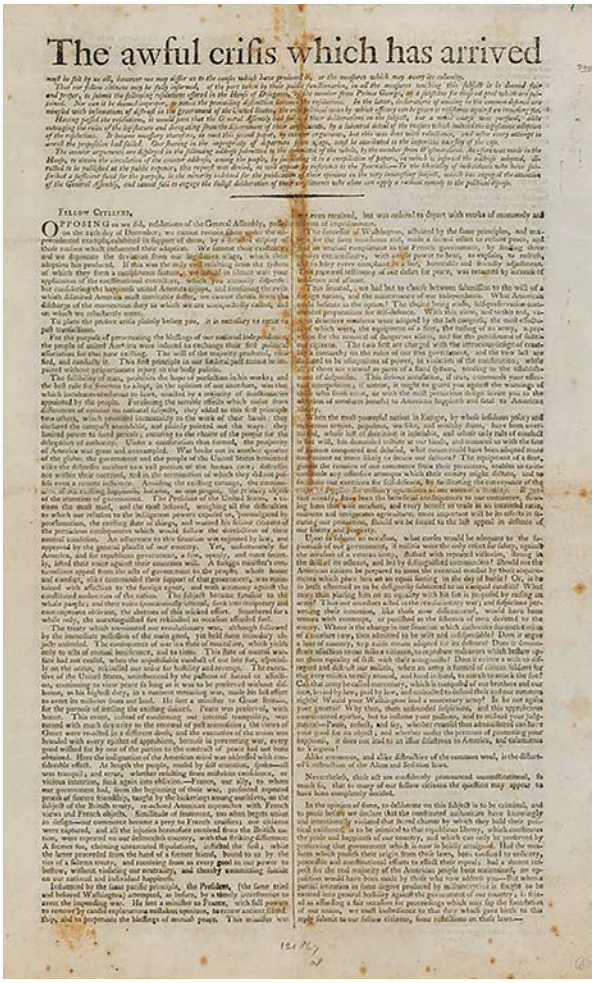
when those leaders should focus on representing their constituents and leading the nation. However, leaders must find ways to keep their office, so politicians often form long-term alliances where members can trust each other to share the risks and rewards of collective political decisions. Seven years after the U.S. Constitution was ratified, the Federalists in office became the target of a new political organization of national leaders.

## Party in Government: One Party Forced Another

The Jeffersonian Republicans posed a strong challenge to the loose Federalist alliance in government because the new party was better organized and recruited candidates to challenge vulnerable Federalists. Jefferson's campaign for president in the 1796 election tested whether the nation wanted to share more power with the states to protect against a strong federal government. The timing was important for the nation's vision as it selected a successor to George Washington.

Vice President John Adams won the 1796 presidential election, but Jefferson received the second-highest number of votes and became vice president. Thus, the nation elected two leaders with opposing ideologies about how the government should operate to share power in the executive branch. However, Federalists still held a majority in the House and in the Senate while the Democratic-Republican opposition party looked for a way to expand its regional influence.

As the vice president, Jefferson realized he could not change the nation by trying to influence elected leaders' votes. To develop an opposition party, Thomas Jefferson and allies recruited candidates to run against Federalist candidates in the 1800 election.[1] Another source of support came from newspapers that were run by party allies. The goal was to build an organization that could help Thomas Jefferson win the presidency in 1800 and ensure that he would have a Congress willing to work on his **agenda**.


The awful crisis which has arrived

Source: Retrieved from the Library of Congress; https://www.loc.gov/item/rbpe.18001800/

**FIGURE 10.1** Nicolson, T. (1799). The awful crisis which has arrived must be felt by us all, however, we may differ as to the causes which have produced it, or the measures which may avert its calamity. Richmond.

***Agenda:*** *the short-term list of policy priorities that a political party hopes to accomplish.*

## President Adams Signs Law to Help Federalists Stay in Power

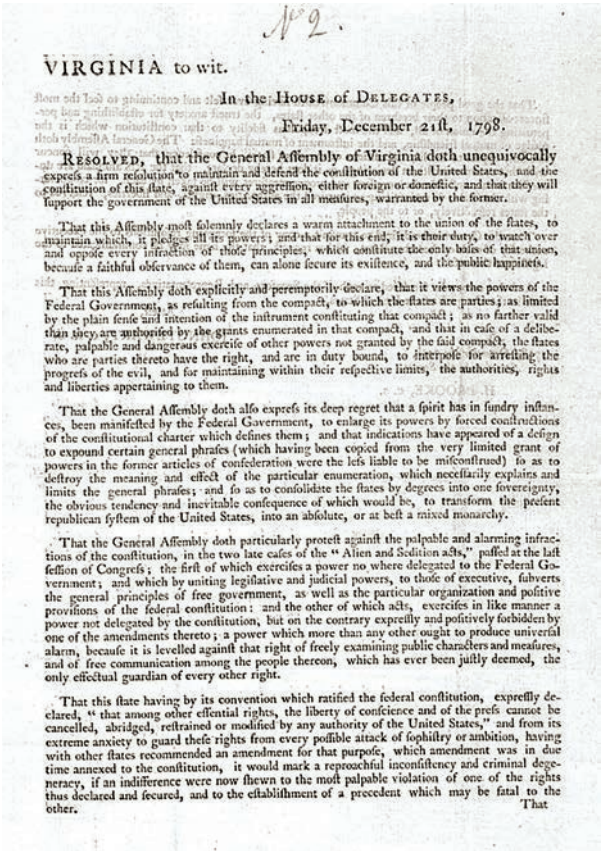
Two years after the 1796 election, four laws known as the Alien and Sedition Acts of 1798 were signed into law **(Figure 10.1)**. The law was meant to enhance order in a nation concerned with war with France. The law increased the federal government's powers to regulate voting requirements and to limit free speech.

This included increasing the years of residency before becoming a citizen from five to fourteen years, which limited the voter population of new immigrants who owned land. The law also elevated the crime of publishing false or malicious claims about the government during war time to the level of treason. The commander in chief could decide when to enforce these powers.

These laws used the crisis of war to centralize power within the federal executive branch and to silence dissent. This begs the question, what was the risk of allowing wealthy recent immigrants to vote and of publishing propaganda

against the government? The Federalist leaders were concerned about establishing America's strength as a young nation while simultaneously hindering their political opposition, the Democratic-Republicans.

The Alien and Sedition laws spoke to the differences between Federalists and Democratic-Republicans regarding powers centralized within the federal government. Members of the Democratic-Republicans sought to raise national awareness about these changes and to encourage states to challenge these actions. Jefferson and James Madison authored the Virginia Resolution, which was adopted by the House of Delegates to protest the laws. Jefferson did the same for the state of Kentucky, but in secret.



№ 2.

VIRGINIA to wit.

In the HOUSE of DELEGATES,

Friday, December 21st, 1798.

RESOLVED, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the constitution of the United States, and the constitution of this state, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures, warranted by the former.

That this Assembly most solemnly declares a warm attachment to the union of the states, to maintain which, it pledges all its powers; and that for this end, it is their duty, to watch over and oppose every infraction of those principles, which constitute the only basis of that union, because a faithful observance of them, can alone secure its existence, and the public happiness.

That this Assembly doth explicitly and peremptorily declare, that it views the powers of the Federal Government, as resulting from the compact, to which the states are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

That the General Assembly doth also express its deep regret that a spirit has in sundry instances, been manifested by the Federal Government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

That the General Assembly doth particularly protest against the palpable and alarming infractions of the constitution, in the two late cases of the "Alien and Sedition acts," passed at the last session of Congress; the first of which exercises a power no where delegated to the Federal Government; and which by uniting legislative and judicial powers, to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the federal constitution: and the other of which acts, exercises in like manner a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.

That this state having by its convention which ratified the federal constitution, expressly declared, "that among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States," and from its extreme anxiety to guard these rights from every possible attack of sophistry or ambition, having with other states recommended an amendment for that purpose, which amendment was in due time annexed to the constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shewn to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other. That

Source: Rare Book and Special Collections Division, Library of Congress (091.07.00) [Digital ID# us0091_07]

**FIGURE 10.2 Virginia to Wit. Friday, December 21st, 1798. Richmond, 1798. Leaflet.**

The media and the public recognized the Acts as overreaches of federal authority and examples of a federal government's willingness to disregard checks and balances. Although Adams did not write the legislation—because he was the leader of the Federalists and signed bills into law—he was burdened with most of the blame during the two years prior to the 1800 elections. The Supreme Court never tested the constitutionality of these concerns because the laws were repealed after the Democratic-Republicans won elections in 1800.

## Partisanship in the 1800 Election

The public did not vote for president in 1800—instead, the state legislatures met between October 31, 1800, and December 3, 1800, to vote on which candidate to support.

When electors met in the Electoral College in their states, Jefferson won by defeating incumbent President Adams. The 1800 election is remembered because of a tie in the Electoral College, but it was also the first time majorities of American voters chose the opposition party to lead. The choice was even stronger because voters chose the candidates who articulated a flexible policy agenda that allowed states to choose laws that were best for them.

The outcome of the 1800 election exemplifies many early party strategies. In its third presidential election, America witnessed the first tie in the Electoral College even though only four candidates were running: two Federalists (President Adams and his running mate for vice president, Charles Pickney from South Carolina) and two Jeffersonian Republicans (Vice President Jefferson and his running mate for vice president, Aaron Burr). In a strategic twist, one elector in the Electoral College who supported the Federalist Party voted for John Jay, who was not an active candidate. The one vote for John Jay forced a tie in the Electoral College between Thomas Jefferson and fellow party member Aaron Burr. Thus, the U.S. House of Representatives had to meet and break the tie. That allowed the Federalist Party to choose the next president because their president had not been eliminated.

Many U.S. representatives who were members of the Federalist Party disliked Thomas Jefferson for his views and for his active support of candidates who challenged them for office. Although Burr stated that he would not

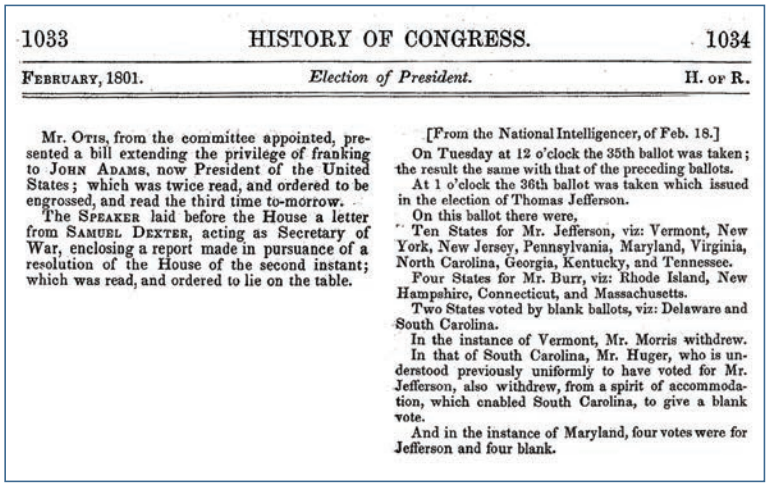
FIGURE 10.3

## Partisanship of the Electoral College Vote in 1801

| Partisan of a State | Thomas Jefferson | Aaron Burr | No Vote |
|---|---|---|---|
| Federalist | Maryland<br>Vermont | Connecticut<br>Massachusetts<br>New Hampshire<br>Rhode Island | |
| Democratic - Republican | New York<br>New Jersey<br>Pennsylvania<br>Virginia<br>North Carolina<br>Georgia<br>Kentucky<br>Tennessee | | Delaware<br>South Carolina |

actively seek to take the election from Jefferson, the Federalists in the House of Representatives could declare the winner.

In the House's first vote to select the president, neither Jefferson nor Burr won a majority. Eight states supported Jefferson, but all six states with a Federalist majority voted for Burr. Two other states did not cast a ballot. The state delegations in the U.S. House voted thirty-four more times before one candidate earned enough support to win. During the sixteen days between the first and last vote, Alexander Hamilton counted on votes among the Federalist coalition to support Jefferson over Burr, a fellow New Yorker. This bipartisan move convinced representatives from Maryland and Vermont who were Federalists to abstain from their state's vote. That allowed the Jeffersonian Republicans from Maryland and Vermont to cast ballots for both states in favor of Jefferson **(Figures 10.3 and 10.4)**.



1033 HISTORY OF CONGRESS. 1034

FEBRUARY, 1801. *Election of President.* H. OF R.

Mr. OTIS, from the committee appointed, presented a bill extending the privilege of franking to JOHN ADAMS, now President of the United States; which was twice read, and ordered to be engrossed, and read the third time to-morrow.

The SPEAKER laid before the House a letter from SAMUEL DEXTER, acting as Secretary of War, enclosing a report made in pursuance of a resolution of the House of the second instant; which was read, and ordered to lie on the table.

[From the National Intelligencer, of Feb. 18.]

On Tuesday at 12 o'clock the 35th ballot was taken; the result the same with that of the preceding ballots.

At 1 o'clock the 36th ballot was taken which issued in the election of Thomas Jefferson.

On this ballot there were,

Ten States for Mr. Jefferson, viz: Vermont, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Georgia, Kentucky, and Tennessee.

Four States for Mr. Burr, viz: Rhode Island, New Hampshire, Connecticut, and Massachusetts.

Two States voted by blank ballots, viz: Delaware and South Carolina.

In the instance of Vermont, Mr. Morris withdrew.

In that of South Carolina, Mr. Huger, who is understood previously uniformly to have voted for Mr. Jefferson, also withdrew, from a spirit of accommodation, which enabled South Carolina, to give a blank vote.

And in the instance of Maryland, four votes were for Jefferson and four blank.

Source: Sixth Ballot: Page 1033 of the Annals of Congress, House of Representatives, 6th Congress, 2nd Session.

**FIGURE 10.4 Electoral College Vote in 1801.**

### Limited Party Organization

Between 1789 and 1800, a strong coalition of Federalist leaders were elected to office after the Constitution was adopted. Their identity clearly extended from the two competing philosophies that split the Constitutional Convention into Federalists and Anti-Federalists. In their simplest form, the

parties exist as the majority and its opposition, but neither became a formal organization outside of those votes.

Jefferson and Madison recruited new candidates to challenge elected leaders who supported Federalists like Adams and Hamilton, adding a new level to the party's structure. The Jeffersonian Republicans allowed new candidates to be involved and create competition that would shape how parties interact in communities. In American politics' first partisan system, however, the parties were not well-organized or well-funded by today's standards.

Pursuing shared control between the states and federal government, the Democratic-Republican Party led the nation for a total of four presidencies. Three of those presidents (Jefferson, Madison, and Monroe) were reelected to a second term. The first party's ability to organize candidates to win elections and achieve long-term policy changes shapes how we study the differences between party systems. The Democratic-Republicans also show a party brand's power when running for president because the fourth president elected from the party was John Quincy Adams—the son of John Adams.

## Second Party System: 1828 to 1860

Between the 1824 and 1828 elections, a major change in American politics ushered in the second life of American political parties. In this time, more than 700,000 new voters became engaged in politics. This was the largest progressive expansion of voters across the country before the Fifteenth Amendment.

This expansion of the electorate occurred first in southern states that wanted an expanded electorate to empower candidates who believed in states' rights. Similar to Jefferson's strategy of using newspapers to share a message, Andrew Jackson is credited with leading the first major wave of new voter registration by encouraging states to allow people beyond property owners to vote. The movement to eliminate the land ownership requirement continued into the 1840s until 90% of white men were registered to vote.

The surge in voters resulted from the tension between strong and weak government factions within the Democratic-Republican Party. Citizens with fewer financial resources could now vote, and they were initially loyal to the Jacksonian-Democrat coalition because of that opportunity. As Democratic candidates won elections, the northern faction of the Democratic-Republicans joined with the remaining Federalist coalition to create a new party called the Whigs, which would rival the Democratic Party until the 1850s. In this early era of political parties, numerous third parties emerged to support popular single issues that were not getting attention from the party in power.

### Partisan Government: Spoils and Rotten Boroughs to Keep Power

***Patronage:*** *a system in which successful party candidates reward supporters with jobs or favors.*

Jackson became president in 1828, bringing a sense of giving the government back to the people. President Jackson reorganized many agencies in the government to remove government officials from the Adams administration. These positions were then filled by individuals who could provide political favors to Jackson and by candidates who supported his organization. This **patronage** to party members created the "spoils system."

During this era, party control appeared divided among regions in the country. This pattern of sectionalism, where Democrats controlled the South and Whigs controlled the North, would influence American politics throughout the following decades. The Compromise of 1850, for example, set a geographical line to separate free states from slave states. This simplified the process of admitting territories as states, which was previously pairing one free state and one slave state together to balance power in the Senate.

### Partisan Organizations with Power to Guide Politics

American parties were decentralized at this time, but networks of individuals within states and counties would coordinate get-out-the-vote efforts for candidates who invested government resources into their community. None of these **party machines** were as notorious as New York City's Tammany Hall, which influenced elections for decades.

***Party machine:*** *mass-based party systems in which parties provided services and resources to voters in exchange for votes.*

One reason local party bosses could influence voters was the lack of secrecy in the voting process. In the nineteenth century, the earliest form of voting was verbally telling the election judge whom you supported. The election judge would then tally the votes. In this era, people were concerned that election judges, as patronage positions, would tally votes in their own self-interest. People were also concerned that election observers from parties would make people from their neighborhoods vote the way they pledged to. Even as people began counting paper ballots for elections, parties (not the government) would print their own ballots. A voter would select one party's ballot—like straight-ticket voting—but voters could rarely vote for one party's candidate and then for another party's candidate for another office.

### The Expanded Partisan Electorate

In multiple campaigns in this party system, candidates would try to win by any means necessary. The smear campaigns between John Quincy Adams and Jackson in 1828 show how negative personal attacks—however false—can shape voter perceptions. Moreover, voter perceptions were easier to manipulate because so many people were voting for the first time.

Stories of voter turnout in these elections describing the electorate's class and ethnicity still influence how we think about elections. The Democratic Party became associated with fighting for the working class's rights, and the Whigs began supporting policies that benefited corporations and wealthy individuals.

## Third Party System: 1860 to 1896

The Republican Party's emergence in 1858 marks the third party system in American politics and the codification of two-party politics at the federal level. The Republican Party was one of multiple small parties formed to end slavery. Other abolitionist parties included the Free-Soil Party, the Know-Nothing Party, and the Liberty Party. The core difference between the new Republican Party and those that came before was that Whigs helped create the party to oppose slavery.

The election of Republican nominee Abraham Lincoln as president in 1860 is something other third parties had not previously achieved. Northern states

supported Lincoln as the Republican nominee while southern states were still the base for Jackson's party. Therefore, identifying the sectional divide of the parties helped to explain why the parties survived beyond the Civil War. Similarly, the way southern states were readmitted into the union during Reconstruction helps explain why the young Republican Party could control the federal government for as long as it did.

### Increased Party Control in Congress

The Republican majority in the House of Representatives in 1890 significantly changed how politicians shared power in the institution. The House adopted new rules to centralize power within the office of Speaker Thomas Brackett Reed (R-ME). These new rules included limits on how long representatives could speak, which ended filibustering in the House. Other changes allowed the majority party to limit amendments to a bill during its debate. Limiting the participation of Democrats and Republicans alike in the legislative process gave the majority party a significant advantage because it controlled the schedule of bills to be voted on.

### Creating a Partisan Advantage in the Electorate

The federal oversight of elections in southern states (unique to this era) allowed freed slaves to register to vote and to participate in elections after the Fifteenth Amendment. These additional voters brought new candidates, and African Americans were elected in southern states almost immediately. This was consequential because those new voters and elected officials overwhelmingly identified as Republicans. These numbers strengthened the Republican Party in northern states. The Democratic Party, however, had been weakened in its core region of support, and third parties still took votes away from the Democratic Party nationally.

## Fourth Party System: 1896 to 1932

It is hard to see how electing Republican nominee William McKinley as president would not continue the third-party system. However, this complex election was the second close presidential race (in the popular vote), and the biggest change was the Democratic Party's realignment and the growing faction of populists who supported William Jennings Bryan for president. Both political parties saw deference to elites as unpopular, and candidates won elections by reaching out to voters. At this time, the pomp and circumstance often associated with candidates on the campaign trail begins to appear. Prior to this time, candidates rarely campaigned themselves. Surrogates commonly spoke on behalf of nominees at rallies, but an increasingly educated electorate and better transportation led candidates to visit multiple states.

### Party and the President

President Woodrow Wilson studied democracies across the world, particularly parliamentary regimes. He wanted to see if an American political party could be as effective as European parties with members who were loyal to the prime

minister. President Wilson expected congressional Democrats to support the president's vision as the nationally elected leader and focal point of the party. This expanded the presidency's power and enhanced the development of parties in Congress. For his legislative goals, President Wilson needed to communicate well with Congress. As a result, the Democratic Party established a new position in the Senate called the floor leader who scheduled legislation and shared information with party members.

### Partisan Cooperation and Infighting

The popularity of progressive ideas during this era created factions within both parties. In the Republican Party, Teddy Roosevelt and the Trust-Busters fought big corporations. In the Democratic Party, William Jennings Bryan contrasted with the Dixiecrats. Party caucuses also split over the question of bi-metalism: should the federal currency be set to the price of gold or to silver?

In the 1896 election, Bryan outperformed the expectations for a Democratic nominee because he was also a candidate on the Peoples-Populist Party ballots as their nominee for president. One person as the nominee for two parties is a **fusion ticket**. In this case, Bryan deliberately collaborated to attract votes in states across the Midwest. A person identifying as a member of multiple political parties creates a legal question about the First Amendment and the right of association. Similarly concerns exist about how political parties might limit their membership by enforcing requirements to be a nominee.[2] Minor parties could select a major party candidate as their nominee until 1997.[3]

***Fusion ticket:*** *allows a candidate to be the nominee of a major and minor party at the same time.*

### Changing the Electorate

The electorate in the fourth party system was unique because the number of voters did not increase, as it did in the second and third system. Previously, federal control over elections in the South expanded the electorate to include all men, and it offered protection to any African-American male who wished to vote. After the Reconstruction, states became responsible for enforcing the Fifteenth Amendment. This aligned with the ideological lineage of Anti-Federalists, Jeffersonian-Republicans, and Democrats, but it allowed states to enact Jim Crow Laws that added new barriers to voting. This eliminated the nation's voter registration gains that occurred after 1865.

Despite the expansion of progressive ideas, party machines still held power in large cities and rural areas. These political networks looked for advantages to maintain their power, so political machines would often try to alleviate the burden of poll taxes in the South. In Memphis, the Democratic Party boss E.H. Crump influenced state and national politics because the candidate he endorsed would often win.

## Fifth Party System: 1932 to 1980

The Democratic Party's outreach efforts to become a national coalition of progressive voters became more organized in Washington during the fifth party system. Franklin D. Roosevelt aimed to create a New Deal for America and built a coalition that spread across the nation by working with the government to

give people what they most needed. The New Deal coalition led to the longest era that one party controlled the presidency, from 1932 to 1952. In those years, Franklin D. Roosevelt was elected president four times, and Harry Truman was elected president once. The New Deal Coalition's strength in the Democratic Party is further highlighted by the historic majorities the party held in the House from 1932 to 1994. Republicans controlled only two Congresses in that time.

## Party in Government: Guards Against Polarization

The Austin–Boston Connection became the Democratic Party's strategy to select party leaders in Congress by choosing them from the two distinct regions of the broad coalition. The factions intended to share power in the party to keep liberals and conservatives in one party. A pattern was set to appease the progressive northern faction of the large Democratic Party, starting with a speaker of the House from the Boston area because it was a safe Democratic city. To alleviate concern that conservative southern Democrats would not have a voice, the party would then select a representative from Texas to be the majority leader.

The pattern would continue to alternate for each position in the party's hierarchy. Overall, this was acceptable because the current majority leader was strongly expected to be elevated to the speaker of the House when the current speaker would retire. Assuming a long-term Democratic majority in the House and a commitment to taking turns, the Democratic Party would share power between the southern and northern factions for blocks of time.

***Party polarization:*** *when two parties are different enough from one another that there is no overlap in the ideologies of their members.*

***Conference:*** *the members of a political party in the House or in the Senate.*

***Conservative Coalition:*** *a bipartisan coalition of legislators who voted together in favor of state control and against laws to help unions.*

This era is thought to have the lowest **party polarization** in U.S. history. However, two primary reasons explain why Republicans and Democrats did not always vote the party line. First, the relatively small share of seats for the Republican minority in the House meant that Republicans would often support the Democratic agenda so they would also receive benefits. Second, conservative Democrats and Republicans voting together on an issue would make a group larger than the Democratic **conference** in the House or Senate. The group was commonly called the **Conservative Coalition** because they would vote based on their ideology. For southern Democrats, their choice in party affiliation was not based on matching their ideology to a party—their interest was to be part of the majority.

## The Umbrella Organization of Diverse Factions

Prior to this era, partisan elites held tight control over who the party would nominate. With the party controlling who was nominated, people could expect nominees committed to the party platform to be selected. Late in this era, however, ambitious candidates like John F. Kennedy challenged the idea that party nominees must fit a safe and predictable model.

As Senator Kennedy ran for the Democratic nomination for president in 1960, there were concerns in the party about whether he was electable. The nation had never elected someone from an Irish-Catholic background as president, and the South would likely not support Kennedy. This candidacy changed American politics in many ways, illustrating how candidates had to broker within the party to become a nominee.


Source: Photograph by Warren K. Leffler

**FIGURE 10.5** Aaron Henry, chair of the Mississippi Freedom Democratic Party delegation, speaks before the Credentials Committee at the Democratic National Convention. Atlantic City, New Jersey, August/WKL, 1964.

At the 1960 Democratic Convention, Kennedy won on the first ballot (52.9%). The victory was particularly decisive considering that Franklin D. Roosevelt took four ballots to win at the 1932 Democratic Convention. Moreover, Roosevelt had to promise to select the opposing candidate, Speaker of the House John Nance Garner (D-TX), as the nominee for vice president to attract the delegates previously pledged to Garner. Kennedy achieved this feat by campaigning for months before the convention and by winning primary elections in states across the country. Thus, delegates would be pledged to him, which took power away from established party leaders like former President Harry Truman and Speaker of the House Sam Rayburn (D-TX).[4]

The 1964 Democratic Convention reminds us of the racial divisions within party organizations. Two delegations from Mississippi arrived in Atlantic City to attend the Democratic Convention. One all-white delegation represented the Mississippi Democratic Party. Aaron Henry and Fannie Lou Hamer led the second delegation, named the Mississippi Democratic Freedom Party (MDFP), and it gave representation to African Americans from the state **(Figure 10.5)**. The racially integrated Mississippi Democratic Freedom Party contested the legitimacy of Democratic delegates from Mississippi because of racial discrimination related to voting in the state. As civil rights were part of the Democratic Party's national platform, the Democratic National Committee decided to seat both delegations from Mississippi at the 1964 Convention.

At this time, national political parties controlled large sums of money to support candidates who would likely win and expand their majorities. The Federal Elections Act of 1971, however, further regulated fundraising and donation requirements for these committees. This law, amended through the 1970s, allowed parties to raise and spend unlimited amounts of money to develop party organizations and to register voters via **soft money**, as long as funds did not directly support a candidate.[5] The campaign finance laws limit how much money individuals could give to a political party for **electioneering** and how much a political party could contribute to a candidate (**hard money**). These limits were

***Soft money:*** *unregulated campaign contributions by individuals, groups, or parties that promote general election activities but do not directly support individual candidates.*

***Electioneering:*** *the process of getting a person elected to public office.*

***Hard money:*** *spent to cover the costs of running an election including advertisements and staff salaries.*

set to prevent excessive influence by select constituencies, but the law also sought to reduce corruption by disclosing who made direct donations and how large each donation was (for donations over $100). The new campaign finance laws forced national parties to become more professional and to operate like a regulated business.

## Sixth Party System: 1980 to Today

The Conservative Coalition's power revealed deep wedges within the Democratic Party, which offered the Republican Party a chance to grow by aligning with an ideologically consistent **platform**. Republican nominee Ronald Reagan's election signaled the vision of a "big tent" party with nominees that national conservatives could support. This way, the national Republican Party became a foil to the progressive Democratic Party that had emerged after Reconstruction and had been preserved through the New Deal.

***Platform:*** *a document that outlines the policies that a party hopes to achieve. The platform is a representative document of the party, because delegates at the convention vote to adopt the platform.*

This era began with flashes of bipartisanship from Reagan-Democrat voters. These were Democratic voters who would elect Democrats locally but supported Republican presidents nationally. As Reagan's popularity grew, however, those voters began to change their party affiliation to the Republican Party if its agenda and platform aligned with the voter's ideology. This **sorting** of American voters into one of two parties based on ideology helps parties identify their base. If the ideological distance between each base increases, the polarization can create tension and gridlock in U.S. politics.

***Sorting:*** *an effect when many individuals decide to identify with a party that matches their geography or ideology.*

### Frequent Turnover for Party Control of Government

If the measure of a party's success is how long it remains in power, recent decades suggest that parties are weak. The current era is defined by a divided government and greater electoral competition between the Democratic and Republican parties. As voters are sorted into one of these two parties, leaders are elected to be ideologically different. One result has been the return of polarized parties in Congress.

As these parties fight to expand their bases, they both craft messages that differentiate their party from the opposition. For example, consider how both parties approach the issue of violence prevention. Since the 1990s, the Democratic Party has emphasized gun control for preventing gun violence. In 2000, however, the Republican National Convention adopted a policy to its platform that focused on public safety via harsher penalties for crimes and promoting the rights of victims. Minority parties are more likely to use rhetoric to highlight public disapproval of how the current party in power handles a policy problem because the party could gain back control in the next election.

The party caucuses in the House and Senate have also increasingly used congressional committees to help incumbent legislators raise funds to stay in office. On the Hill, these groups are known as the Democratic Congressional Campaign Committee, the National Republican Campaign Committee, the National Democratic Senatorial Committee, and the National Republican Senatorial Committee. Each of these organizations is headed by a sitting member of Congress who raises money for colleagues and for the organization to buy

campaign advertisements that support their party's members. In the 2000s, these organizations also began attacking incumbents from the other party who served in swing districts where their party had a chance to win the election.

### Weaker Party Organizations—Stronger Candidates

In this era, national political parties continue to loosely hold together allied factions. Because partisans have sorted into ideological camps, however, parties are becoming less important when candidates develop policy views and even when they fundraise. Senate Republican Leader Mitch McConnell has led the fight to overturn campaign finance laws because limiting the coordination between parties and candidates reduces the party's power. In his view, a strong party can more effectively legislate. However, since *Citizens United v. Federal Election Commission* (2010), interest groups can donate more resources to candidates, giving them an advantage against parties.

Like in the past, today's national party committees handle most operations related to presidential campaigns. One primary feature of a national party convention has been transferring all the party's resources and staff to the nominee to help them win the general election. This norm made the early partnership between the Republican National Committee and President Donald Trump's Reelection Committee even more surprising. The mega-collaboration allowed the Republican Party's staff and Trump's campaign to coordinate and share office spaces in New York and in Washington under the Trump Victory Committee.[6] The party's flexibility to accommodate the incumbent's needs shows why scholars have difficulty determining whether political parties are the source of power behind elections or if the political parties have lost their coherence by connecting too closely to candidates.

## What Party Eras Teach Us

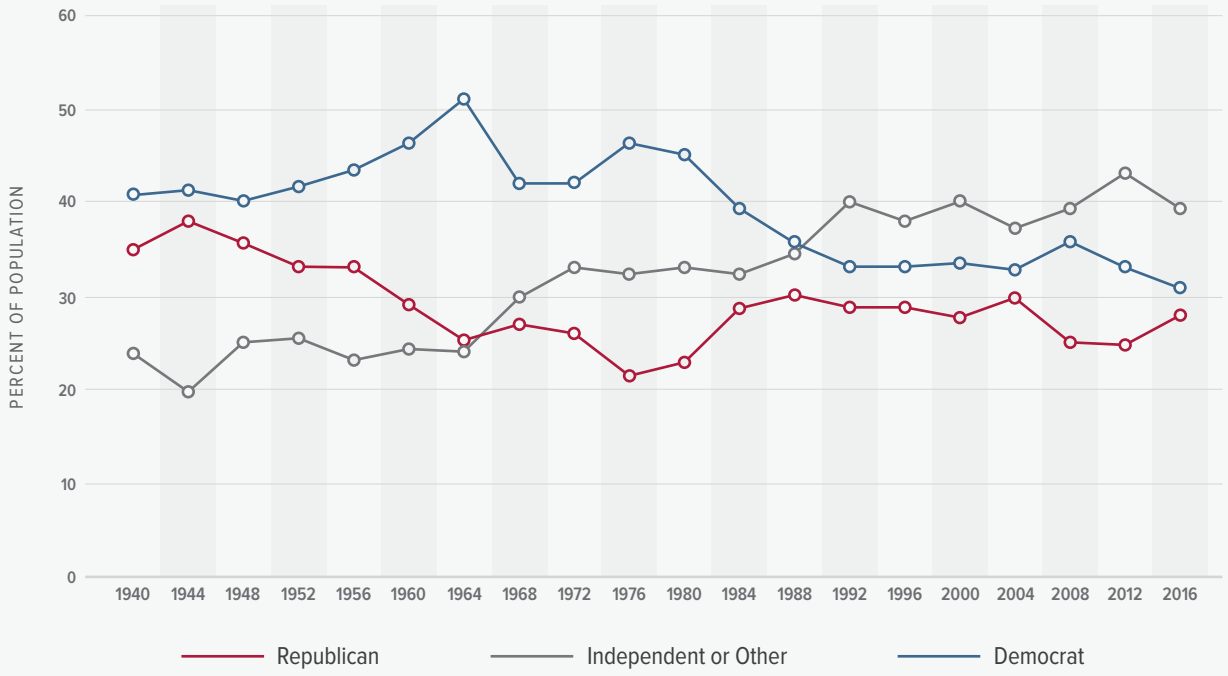
1. Parties do whatever it takes to win in the long term, including adapting platforms.
2. Opposing parties adopt strategies that made the other party successful.
3. Parties have not always held the same views.
4. Third parties have influenced national elections in the past, but their candidates have not become president.

## Who is a Party Member?

Political parties are organized to provide a simple yet complex answer to this question. Put simply, voters, candidates, and party leaders are members of these unique institutions. People can be active members of a party by serving as chair of the county parties or on the state executive committee. These positions within the party build a state party's grassroots connections. Then by

FIGURE 10.6

## Partisan Identification in America, 1939-2017




Source: the 1939–1989 yearly averages are from the Gallup Organization interactive website. The 1990–2017 yearly totals are from Pew Research Center aggregate files.

***Delegates:*** *to national conventions vote for the party's nominee for president.*

***Closed primary:*** *only voters who have registered as a member of a given party can vote in that party's primary.*

serving in those capacities, individuals can run to be elected to the national party committee. Party activists also could become involved in the party as **delegates** to the state or national convention.

As a broad organization for those interested in politics, a party allows people who identify with its platform to be members. In states that offer party identification with voter registration, a public record of party members exists. This is particularly meaningful when states use **closed primaries** to select party nominees. Party membership can also be voluntary when people join a political party's local chapter in a city or county. In a state like Texas, county parties register with the secretary of state's office in each of the 254 counties. Therefore, people can be an elected chair of the Democratic, Green, Libertarian, and Republican parties in their community.

## History of Party Identification

The public's commitment to political parties has varied over the years **(Figure 10.6)**.[7] Consider the results of Gallup's annual survey of party identification in America. Since 1986, a majority of Americans identified as Independent or as a member of a third party. This measurement explains why many people believe that parties are weaker in the sixth party system. Throughout

**FIGURE 10.7**

### Results of the Maine Gubernatorial Elections in 2010 and 2014

| | | | |
|---|---|---|---|
| **2010** | Paul LePage (R) | Libby Mitchell (D) | Eliot Cutler (I) |
| | 37.6% | 18.8% | 35.9% |
| **2014** | Paul LePage (R) | Michael Michaud (D) | Eliot Cutler (I) |
| | 48.2% | 43.4% | 8.4% |

Source: Election totals come from the Bureau of Corporations, Elections, and Commissions. "General and Referendum Election Results." State of Maine.

American history, however, one party has never had a majority of voters identify with its platform. Candidates have always relied on support from a party's core supporters and on independent voters with their own ideologies and policy preferences.

## Why Do We Have Two Parties?

The strength of political parties in making policies goes beyond access to money and past success with policies that improved society. Maurice Duverger studied counties and states with two parties and with multiple parties. He found that plurality voting in the United States—where the candidate with the most votes wins—gives an inherent advantage to whomever has the largest base of supporters.[8] Moreover, a U.S. House election can have only one winner in each race. Thus, party loyalty in each district likely affects the outcome of elections with multiple candidates.

Duverger 10.1 also considers what a voter thinks about when casting their vote. Knowing that, in the United States, the candidate who gets the most votes wins, do voters consider the risks of voting for their favorite candidates even if they have little chance of winning? In an election with three candidates, where the third-party candidate is behind the two major party nominees, a vote for the third party could allow a more objectionable candidate to win. This is a classic question for individuals who join smaller groups but only have one vote. They could at least consider voting strategically for the least-worst option.

In the state of Maine, independent candidates like Senator Angus King (I-ME) have historically won elections without being a member of either major party. Therefore, many statewide elections have a Democratic, Republican, and Independent candidate. The 2010 and 2014 gubernatorial elections in Maine show how the same popular independent candidate influenced an election win for Governor Paul LePage (R-ME) despite his low approval ratings **(Figure 10.7)**.

**10.1**

**UTTyler.edu/AmGovBook**

**What is Duvergers Law?**

## Political Parties and Representing the People

Political parties today appear adversarial because each organization's success depends on its ability to obtain and maintain power. The importance of majority rule to govern in the United States clearly encourages parties to attract more supporters than the other side does. Therefore, a **unified government** creates an opportunity for broad changes by adopting new laws. Additionally, the parties' ambition to gain power is greatest during a **divided government**, which enhances the power of the constitutional checks and balances systems in the federal government.

***Unified government:*** *occurs when one party holds majorities in the House and Senate, while also holding the presidency.*

***Divided government:*** *occurs when one party controls one of the two chambers of Congress or the presidency, but the party does not control Congress.*

The common identity as a member of a political party allows activists and elected officials to articulate policy goals in ways that exceed their own ideas to try and attract voters. The ways parties contribute to American politics is largely conditional on the political context. When American political parties are electorally competitive, they moderate the policy decisions of the other and offer more representation to the public. When one party has a strong advantage over the other, parties are rarely complacent and often expend considerable effort to serve the needs of a broad constituency. Although partisan politics can be unattractive, does party conflict spoil democracy?

## Key Terms

**Agenda:** the short-term list of policy priorities that a political party hopes to accomplish.

**Closed primary:** only voters who have registered as a member of a given party can vote in that party's primary.

**Conference:** the members of a political party in the House or in the Senate.

**Conservative Coalition:** a bipartisan coalition of legislators who voted together in favor of state control and against laws to help unions.

**Delegates:** to national conventions vote for the party's nominee for president.

**Divided government:** occurs when one party controls one of the two chambers of Congress or the presidency, but the party does not control Congress.

**Electioneering:** the process of getting a person elected to public office.

**Fusion ticket:** allows a candidate to be the nominee of a major and minor party at the same time.

**Hard money:** spent to cover the costs of running an election including advertisements and staff salaries.

**Ideology:** a belief system of consistent attitudes of a person about policies, be they liberal or conservative.

**Party machine:** mass-based party systems in which parties provided services and resources to voters in exchange for votes.

**Party polarization:** when two parties are different enough from one another that there is no overlap in the ideologies of their members.

**Patronage:** a system in which successful party candidates reward supporters with jobs or favors.

**Platform:** a document that outlines the policies that a party hopes to achieve. The platform is a representative document of the party, because delegates at the convention vote to adopt the platform.

**Realigning elections:** a realignment is a disruption in what policies and leaders define the establishment of a party, and a realignment identifies a major shift in which party most Americans identify with.

**Soft money:** unregulated campaign contributions by individuals, groups, or parties that promote general election activities but do not directly support individual candidates.

**Sorting:** an effect when many individuals decide to identify with a party that matches their geography or ideology.

**Unified government:** occurs when one party holds majorities in the House and Senate, while also holding the presidency.

## ENDNOTES

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[2]Rosario v. Rockefeller (1973)

[3]Timmons v. Twin Cities Area New Party, No. 95-1608 (1997)

[4]Lawrence, W.H. 1960. "Kennedy Nominated on First Ballot; Overwhelms Johnson by 806 Votes to 409. New York Times, July 14, 1960.

[5]The Bipartisan Campaign Finance Reform Act of 2002 ended the ability of political parties to use soft money.

[6]Isenstadt, Alex. "Trump Launches Unprecedented Election Machine," POLITICO, December 12, 2018.

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# 11

Expanding the Right to Vote

Evaluating Campaigns

Funding the Campaign

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CHAPTER ELEVEN

# Campaigns and Elections in America

**IN ELECTIONS AND CAMPAIGNS,** the candidate's behavior, the voters' behavior, and the election's rules determine the final outcome. In this chapter, we will focus on all three areas and identify how candidates' behavior, voters' behavior, or the rules of an election can change patterns and create unexpected outcomes that do not represent the public's intention. Sometimes the logic may seem circular, but the points of reference for describing the context of an election will always be the candidates, voters, and rules.

In today's politics, national campaign activities are among the most frequently discussed topics. However, this was not always the case. The **Electoral College** **(Figure 11.1 and 11.2)** was an elite institution before electors ceremoniously voted to certify the results of elections in their state, making voter participation more important in each presidential election. In the early 1900s, states across the nation adopted an Australian election system and used a **ballot** with all candidates listed for each office—rather than listing candidates on separate partisan ballots. Given the importance of

***Electoral College:*** *the indirect mechanism for electing the president of the United States, which is outlined in Article 2 of the Constitution. Voters vote for president to inform which slate of electors to the Electoral College in their state is seated. Then those electors cast their vote for president at a later date.*

***Ballot:*** *official document to vote and identify candidates a voter supports. When states adopted the Australian ballot, voters could choose among all candidates running for office in secret.*

**FIGURE 11.1**

### Electoral College Formula

A state's allocation of electors matches the number of U.S. Congressional districts in the state plus two senators.

The 435 Representatives, 100 senators, and three District of Columbia delegates add up to 538 electors for each presidential election since 1964.

*Note: After the Census and after congressional districts are reallocated based on population changes, a state may lose or gain electors. However, a state (or D.C.) will have at least three electors.*

voter participation and of voters' ability to select candidates from different parties for each office, candidates started campaigning differently by emphasizing what voters wanted instead of the national party's platform.

After recognizing that voters have changed how they cast their ballots, we can understand why campaign activities tend to be categorized into various eras. By focusing on specific points in time, we can ask what requirements someone needs to meet to be a candidate or a voter at that time. The vast diversity in U.S. election systems exists due to the **devolution** of control over state elections. In fact, a clause in Article 1 of the United States Constitution allows each state to determine the "times, places, and manner" of congressional elections. The only caveat is that Congress may also add requirements to those state regulations, as they apply to voting for federal offices. The exception to allow for the oversight of federal elections becomes influential with the Voting Rights Acts.

Article 2, Section 1 of the Constitution creates the Electoral College and determines the number of electors a state receives. Further decisions about the presidential election, however, are left to the states. Therefore, political strategists with national campaigns plan presidential campaigns as a series of fifty-one different elections for one specific office.

***Devolution:*** *transfer of power to a lower level of government.*

## Expanding the Right to Vote

Voting in the United States has been a progressive right. That means new voting laws expanded the right to vote and blocked actions that would exclude eligible citizens from voting. Constitutional scholars debate whether or not voting is a right because the U.S. Constitution does not directly list this individual right the same way civil liberties are enumerated in the Bill of Rights. For example, the First Amendment clearly protects the right to freedom of speech, to petition the government, and to freedom of religion. Unpacking the evidence that voting is a right involves multiple decisions people made to amend the U.S. Constitution, decisions leaders made to change voting laws, and judges' interpretations of the language in those voting laws when they are applied to specific contexts.

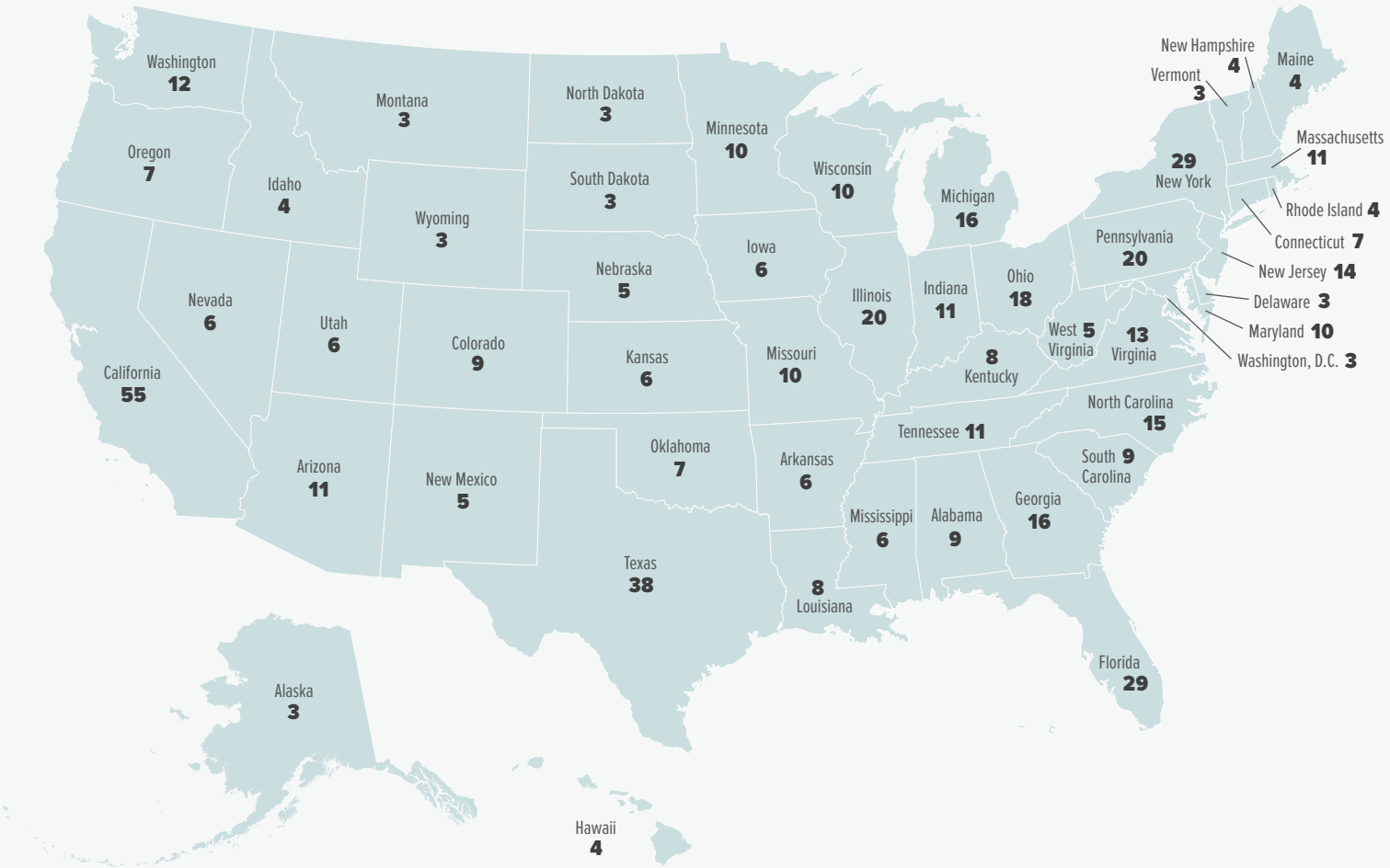
Reflecting upon each change and the chronology of choices that helped define voting as a right can reveal trends that expose the American people's intent. If each change to the status quo is seen as a step towards more inclusive procedures and the right to vote is not limited, then each change implies that eligible citizens have a right to vote. These historical changes also create an identifiable framework that citizens can use to certify their qualification to vote in an election.

### Constitutional Rights

The U.S. Constitution sets elections as the center of our government system, which implies that voting is a fundamental right meant to be detailed by the states. The Constitution defers to the states until the Fifteenth Amendment, which directly mentions voting rights and gives slaves freed under the

FIGURE 11.2

## Electors Allocated for the Electoral College From 2004 to 2020




Source: from "Electoral College," 2011; https://www.usa.gov/election

Thirteenth Amendment the right to vote. Among the amendments added after the Civil War, however, the Fourteenth Amendment continually protects voters when voting laws change. The Fourteenth Amendment also **incorporated** civil liberties within the U.S. Constitution. Incorporation means the constitution would—from then on—protect citizens from improper actions by the federal and state governments. Today, legal arguments about inequal representation frequently begin with the Fourteenth Amendment's equal protection clause.

***Incorporated:*** *the process of extending the civil liberties residents in America receive from the U.S. Constitution to protect residents from state laws.*

***Suffrage:*** *the right for individuals to vote. Also referred to as franchise.*

## Who Can Vote?

Constitutional amendments have also extended **suffrage**, or voting rights, to women and to poor and young voters. The Nineteenth Amendment was ratified on August 26, 1920, and gave all female citizens the right to vote. The Seneca

FIGURE 11.3

## Where Women Had Voting Rights Before 1920

1. Wyoming, 1869
2. Colorado, 1893
3. Utah, 1895
4. Idaho, 1896
5. Washington, 1910
6. California, 1911
7. Oregon, 1912
8. Arizona, 1912
9. Kansas, 1912
10. Alaska, 1913
11. Montana, 1914
12. North Dakota, 1917
13. Arkansas, 1917
14. New York, 1917
15. Michigan, 1918
16. South Dakota, 1918
17. Oklahoma, 1918

FIGURE 11.4

## Did Women Get Suffrage Because of Civic Action or Because of World War I?

Women did not serve as soldiers in World War I, however women did work in factories as men in their communities went off to combat in Europe from 1914 to 1918. The dependence of the nation on women civilians to keep the economy going has been cited as a strong argument to why a nation of male leaders would be open to giving women the right to vote. While we look back and think the Nineteenth Amendment was a long time coming, reflect on how women transformed America by being policy advocates before being given the right to vote.

- Thirteenth Amendment to abolish slavery
- Eighteenth Amendment to prohibit the sale of alcohol
- Achieved the right to vote in 17 states before the Nineteenth Amendment

Falls Convention organized the fight for women's voting rights in 1848. Women from New York state, like Elizabeth Stanton, met to advocate for abolishing slavery. Women were becoming more politically active, and they declared that women should also be given the right to vote. When the Fifteenth Amendment was ratified twenty years later, advocates like Elizabeth Stanton and Susan B. Anthony saw an opportunity to argue for women's suffrage. The narrow language of the Fifteenth Amendment excluded women, so suffragettes opposed ratifying this amendment and argued that all citizens should be given the right to vote.

### Who Were the Suffragettes?

The National Woman Suffrage Association was established in 1869 with Elizabeth Stanton as the first president. The organization strategically stopped arguing that women should be able to vote because men and women are equal. They instead argued that women should be able to vote because they are different from men. Suffragettes emphasized that women were the caretakers of the home and would vote for leaders who would bring morality back to society. After women campaigned against political corruption, racial discrimination, and even the sale of alcohol, progressives in both political parties lobbied for women's right to vote. Progressives knew women would become a major voting bloc in elections **(Figure 11.3 and Figure 11.4)**.

In the decades-long fight for suffrage, women first gained the right to vote out West. Politics were more progressive in western states, and female populations were smaller. Advocates for women's suffrage, like Susan B. Anthony, travelled west to give speeches and ask states to give women the right to vote. In states with populations of 6,000 men and 1,000 women, suffrage was even used to encourage women to move to the West (specifically Wyoming).

Source: Collection of the U.S. House of Representatives.

**FIGURES 11.5** Rep. Jeannette Rankin, from *Jeannette Rankin*, by Sharon Sprung, 2004.

In the South and in the East, where the populations of women and men were equal, Carrie Chapman Catt utilized a grassroots approach and established local organizations of women to promote suffrage.

In 1917, before women had the right to vote, Jeannette Rankin **(Figure 11.5)** became the first woman to serve in Congress. Representative Rankin won her election to become a U.S. Representative in 1916 as a member of the Republican Party. She is best known for voting against the two world wars. In fact, she was the only representative to vote against declaring war on Japan after Pearl Harbor, citing that she was a pacifist. In her first term, she also introduced a resolution that was later used to draft the Nineteenth Amendment.

The Constitution's Twenty-fourth Amendment offered more evidence that citizens have a right to vote. In response to Jim Crow laws targeting populations to keep them from voting, **poll taxes** became unconstitutional in 1964. Prior to this amendment, states had implemented laws forcing voters to pay a fee to vote, arguing that fees were necessary to pay for an election. When poll taxes were applied equally to all voters, not all voters could pay and were therefore disqualified from voting. The constitutionality of poll taxes had been tested in Breedlove v. Suttles (1937), but the court ruled that a small fee to vote did not **disenfranchise** voters based on wealth.

In the American South, the poll tax was used to manipulate election outcomes in multiple ways. A poll tax suppresses voters, specifically those unable or

***Poll tax:*** *the financial requirement for an individual to vote in an election. This became unconstitutional after the Twenty-fourth Amendment.*

***Disenfranchised:*** *when a voter is no longer eligible to vote. Some states have laws that exclude felons from voting for a period of time or even indefinitely.*

Source: From Bluff City Collection, Digital Image POL003, 2011, at the Memphis Public Library.

**FIGURES 11.6** **A portrait of Edward Hull "Boss" Crump.**

unwilling to pay. Thus, anyone who paid the poll tax had a larger voice in elections than other registered voters. Another example of election manipulation via poll tax occurred in Memphis, Tennessee. Mayor E.H. Crump **(Figure 11.6)** would pay poll taxes for African Americans and poor immigrants who were registered voters if they pledged to support specific candidates. Subsidizing the poll taxes for voters helped E.H. Crump build Tennessee's largest political machine. His ability to control who got the most votes in Memphis allowed him to influence who would win statewide elections while both parties were competitive in Tennessee.

Importantly, the Twenty-fourth Amendment only ended poll taxes for federal elections. That limitation allowed some states to keep imposing poll taxes for state and local elections. The argument went that states should collect revenue to pay for the elections. The Commonwealth of Virginia's state elections occur on odd years, completely separating federal and state elections. Therefore, Virginia voters did not have to pay a poll tax in 1964, but a poll tax was applied in the 1965 elections for state office.

The use of the poll tax in 1965 led to *Harper v. Virginia Board of Elections* (1966), a case heard by the Supreme Court. The Supreme Court ruled six to three in Harper that a poll tax in state elections violated the Fourteenth Amendment's equal protection clause. Although the Twenty-fourth Amendment gives an apparently clear analogy for why the poll tax is unconstitutional, the amendment's limited language means it does not apply to state elections. The reasoning of most of the Supreme Court justices for using the Fourteenth Amendment's broad language to protect voters reveals why that amendment is so powerful in arguments related to election law.

The Twenty-sixth Amendment increased the eligible voting population by allowing all men and women over the age of eighteen to register to vote. The Twenty-sixth Amendment was ratified on July 1, 1971, and lowered the voting age from twenty-one to eighteen. The recognition that U.S. citizens could be drafted to serve in the Vietnam War at eighteen but could not select the commander in chief fueled the nationwide movement to make this change. The Constitution does not determine the voting age, so this amendment preempted state laws that set the voting age at twenty-one years old. Therefore, eighteen is the national minimum standard for when someone can vote. Individual states could lower the voting age further.

Legislation to allow sixteen-year-old citizens to vote has been introduced in Washington, D.C. (2018) and in Oregon (2019). These potential laws seek to introduce voting to people at an earlier age and to promote lifelong voters. Lowering the voting age to 18 did not increase voter turnout, but it did make more people eligible to vote. Therefore, accounting for changes to the voting age is important when considering the percentage of the voting age population that participates in an election.

## Who Can You Vote For?

Amendments to the U.S. Constitution have changed elections by allowing registered voters to vote for specific offices. The Seventeenth Amendment allowed

voters to elect U.S. senators. Before the amendment was ratified on April 8, 1913, voters could vote in primaries to select which senate candidates a state legislature should support. Remember that Article 1, Section 3, says that state legislatures vote to elect the state's senators. This system for electing senators separated voters from the vote for senators by placing the state's legislative body in the middle.

Because elected leaders were selecting each state's senators, skepticism grew over the merits of the process. The Progressive movement advocated breaking up party machines, exposing corruption, and directly electing senators to limit collusion between monopolies and elected representatives. Concerns grew after three investigations into corrupt practices for selecting senators between 1857 and 1900. Another common concern was that the senator would be from the majority party in the state legislature rather than being the constituents' preferred candidate. The Seventeenth Amendment ensured that all senators since the 1914 elections have been directly elected by the people.

The United States ratified the Twenty-third Amendment in 1961, which allowed the District of Columbia's citizens to have electors in the Electoral College. For Washington, D.C., residents, this was a meaningful step towards representation because D.C. had been the only place in America where citizens could not vote in the presidential election. Despite attempts to amend the Constitution in 1978 to allow D.C. to have a representative in Congress and a proposal in 2007 to temporarily expand the size of Congress and give the delegate from the District of Columbia a vote in Congress, the area still lacks direct representation **(Figure 11.7 and 11.8)**.


Source: Becker, Ralph E., National Museum of American Histo, Smithsonian Institute

**FIGURE 11.7 A "We Want to Vote" lapel pin.**


Source: National Museum of American History. Smithsonian Institute.

**FIGURE 11.8 A bumper sticker promoting D.C. Voting Rights, 1981.**

Representation concerns are not limited to the District of Columbia. Citizens living in territories such as American Samoa, Guam, Puerto Rico, and the Virgin Islands are also supported by nonvoting delegates in the U.S. Representatives. These differences highlight how the U.S. Constitution focuses on states and how unintended gaps in representation have required amendments throughout the United States' history.

## Rights Given by Congress

Expanding voting rights can occur outside of a constitutional amendment. Presidents have signed into law multiple statutes to add details that protect voting rights. These statutory laws include provisions related to Native Americans, Chinese Americans, and the military. They also offer federal programs to facilitate free and fair elections in states.

The Indian Citizenship Act of 1924 gave all Native Americans the right to vote. When President Calvin Coolidge signed the bill into law, the effect seemed limited because more than two-thirds of Native Americans in the United States were already citizens. However, federal law had not clarified the rights of indigenous people in federal elections. In addition, states did not immediately

implement the law with respect to state and local elections. The movement to extend voting rights to all Native Americans lasted until 1957, due to laws in some states that blocked Native Americans from voting in local elections.

The Repeal of the Chinese Exclusion Act of 1943 (or the Magnuson Act) also illustrates how new laws were necessary to interpret—via citizenship requirements—certain populations' right to vote. Prior to this law and since 1882, Congress had not allowed immigration visas to be granted to Chinese immigrants. The new law allowed current Chinese residents to become naturalized citizens and set a cap of 105 visas per year for Chinese immigrants. Shortly after this bill passed, the limits on the number of immigrants from other Asian countries each year also increased. The Magnuson Act allowed Chinese immigrants to become citizens and opened a new opportunity for Asian immigrants to become voters. This example illustrates how hurdles to citizenship further delay ethnic groups' chances to register to vote in the United States.

A landmark voting statute is the Voting Rights Act, which President Lyndon B. Johnson signed into law in 1965. This law set forth expansive programs to protect voters from discrimination when they registered to vote or when they cast their ballot. The Voting Rights Act was a key objective of the civil rights movement, as civil rights advocates sought to reduce voter suppression so that racial minorities could actively participate in the democratic process. Section 4 of the law included a precisely defined formula for whether state elections would be regulated by the federal judicial system. Section 4 established a **preclearance** requirement for new state laws related to elections if:

***Preclearance:*** *the process of applying federal oversight by the Department of Justice of U.S. District Courts for any proposed election change in a community that has a history of voter discrimination.*

- the state used a test or device to restrict citizens from voting on November 1, 1964;
- the state used a test or device to restrict citizens from voting on November 1, 1968;
- less than 50% of the voting-age population was registered to vote on November 1, 1964;
- less than 50% of the voting-age population was registered to vote on November 1, 1968;
- less than 50% of the voting-age population voted in the 1964 presidential election; or
- less than 50% of the voting age population voted in the 1968 presidential election.

When the Voting Rights Act was renewed for another five years in 1970 with details for the 1968 elections, ten states met the preclearance requirement. These states, primarily in the south, had to prove that any future election change was not intended to discriminate, and the state had to obtain federal approval before the law could be implemented. After black voter registration rebounded, the Voting Rights Act of 1975 reauthorized voting rights laws for seven more years. One significant addition in the 1975 law protected citizens in states where a non-English speaking minority made up more than 5% of the voting-age population by requiring ballots to be provided in the appropriate language. The

language provision expanded voter protections to states like Arizona, Alaska, and Texas. These states were forced to comply with the preclearance requirements, as were counties in California, Florida, New York and elsewhere.

Finally, the right to vote in U.S. elections exists even for citizens who do not currently reside in the United States. The passage of the Uniformed and Overseas Citizens Voting Act of 1986 majorly benefited citizens with respect to election administration. The law provides resources that allow military personnel to vote while they are deployed overseas, and they allow civilians working abroad adequate time to get a ballot and vote in elections local to where they are from. This law further clarifies whether voting is a right by identifying that the right to vote is tied to eligibility based on where people are registered to vote—it is not conditional on where you reside at the time of the election. These examples show why voting is a protected right that is fundamental for the equal treatment of American citizens.

## Supreme Court Decisions that Define States' Role

Regarding the degree to which voting is a right, the Supreme Court has heard many cases. We will focus on a couple of examples that examine the importance of an individual's right to vote as it relates to a) an organization's right of association and b) the use of a state's past behavior and regulations to define today's elections.

The case *Smith v. Allwright* (1944) helps explain how the right to vote is prioritized over groups' right of association under the First Amendment, especially when considering a political party's intent. As private organizations, political parties can define who can select the party's nominee for the general election. In Texas, the Democratic Party established an all-white primary to select nominees back when Texas was a one-party state and Democrats almost always won. That black Democrats were disenfranchised from the primary election was proven by an internal rule adopted in 1923. The Supreme Court ruled that the white primary in Texas was unconstitutional because excluding black voters denied them equal representation (or protection) in selecting leaders. Texas delegated the selection of candidates to political parties, so excluding a group of voters from the primary violated the Fourteenth Amendment.

A recent landmark case that redefined the Voting Rights Act's role in the modern era was *Shelby County v. Holder* (2013). In Shelby, the plaintiffs challenged the constitutionality of forcing only nine southern states to participate in preclearance because of past discrimination in 1964 and 1968. Another consideration was that the highest levels of voter turnout among African-American voters in the 2008 and 2012 elections were in the states subject to preclearance because of their history of voter discrimination. In their ruling, the Supreme Court decided (five to four) that, after generations with no evidence of voter discrimination, Congress no longer had reason to keep enforcing Section 4 of the Voting Rights Act.

After 145 years of expanding the right to vote at the national level through Constitutional amendments, federal statutes, and Supreme Court precedents, the decision in *Shelby County v. Holder* (2013) gives states more autonomy

in governing their elections. However, states must still honor the rights and protections given to each eligible voter. Thus, the actions that define citizens' right to vote establish parameters that new laws cannot violate. Should any state program discriminate against a citizen's right to vote, the state will be subject to preclearance under another section of the Voting Rights Act.

# Evaluating Campaigns

Becoming a candidate for office appears to be a straightforward process with three distinct stages. Candidates eligible to seek elected office must first file to run as a candidate before the state's deadline. The election filing deadline is earlier for candidates seeking a party's nomination than it is for independents to allow for time to compete for the party's nomination. Therefore, a candidate running for office as a member of a party often must win the party's nomination to become a candidate on the ballot for the general election. Candidates can then assume office after winning a **plurality**, or majority, of the votes. The election's stakes increase as the number of candidates running for an office increases.

***Plurality:*** *an election rule where the candidate that receives the most votes wins.*

Beyond the institutional requirements, first-time candidates often face contextual factors that decrease their chances of success. On average, 90% of the members of the U.S. House of Representatives who seek reelection will win. In wave elections—particularly during presidential election years—winners typically favor the party that wins the White House. These broad trends are why scholars debate whether campaigns matter.

## Do Campaigns Matter?

A key to answering this question is to understand the patterns in which voters typically react to events surrounding an election. Voters in **homogenous districts** are more likely to support whomever wins the nomination of the party that fits the district. These safe districts perpetuate the number of safe districts in Congress. However, incumbents are not always safe under the expectation of **economic voting**, because voters often reward or punish the party in power based on how they perceive the strength of the economy. Voters also often turnout to vote when there is something at stake in an election, no matter how strong a campaign is.

***Homogenous district:*** *a district where residents are overwhelmingly similar. This can be measured as ideologically similar, ethnically similar, or culturally similar.*

***Economic voting:*** *when voters determine which candidate to support based on the expected economic benefit the voter may receive by policies supported by the candidate.*

***Special election:*** *an election that is scheduled to fill a vacancy due to the death or retirement of the incumbent during their term in office.*

## Contextual Factors

Voters in a representative democracy are expected to reward good representatives with additional terms in office. Incumbent elected officials have an inherent advantage because they won a prior election and have greater name recognition than candidates with less experience. In many districts, an incumbent's advantage from the district's partisanship deters strong opponents from challenging that official. The same party wins 80% of **special elections** after an incumbent retires, providing further evidence that outcomes are likely to reflect a district's characteristics, regardless of the candidate.

When Democratic nominee Bill Clinton said, "It's the economy stupid" in 1992, he expected voters to select candidates based on the state of the economy. If voters cannot decide which candidate they prefer, they will evaluate the incumbent party's nominee the same way they evaluate the economy, as the 2008 election confirms. The Obama-Biden campaign had charisma and grassroots mobilization, but the economy was voters' major concern following the "Great Recession" that September. The Democratic nominee Barack Obama argued that he would govern differently than President George W. Bush and restore the economy's strength. At the same time, voters blamed Republican nominee John McCain for supporting policies promoted by the Bush administration. The trend is so strong that presidential election forecasters use the previous summer's economic conditions to predict who will win the campaign.

Turnout is key to winning an election, but voters do not consistently turn out to vote in every election. The fluctuation in voter turnout influences elections and is one characteristic to consider in districts. The **surge and decline** phenomenon refers to a repeated pattern of high turnout in presidential elections and lower turnout in **midterm** elections. Presidential elections promote higher turnout because the public recognizes that national elections are often more competitive. However, the competitiveness of statewide races and the number of offices to vote for will vary in other elections.

***Surge and decline:*** *the observed trend that voter turnout is higher in presidential elections than midterm elections.*

***Midterm:*** *when states vote for U.S. House elections and scheduled statewide elections, but the president is not at the top of the ticket. Recent examples include 2010, 2014, and 2018.*

## Candidate Factors

A campaign only makes a difference if a candidate can generate an advantage over their opponent. However, in the months of campaigning, candidates put maximum effort into getting slightly ahead of their opponent. Each successful rebuttal to a candidate's advantage hinders a campaign's benefit. The **median voter theorem**[1] builds on the rule that a winner is selected by the number of votes and suggests that candidates will only appeal to the number of voters they need to win. In this strategy, the following must be considered:

***Median voter theorem:*** *a set of conditions to explain why the candidate who gets a majority of the votes will win.*

- the winner will be selected through a majority vote.
- the campaign consists of two or more candidates.
- voter turnout is predictable.
- voters will select the candidate that best represents them.

The Green candidate in the two diagrams **(Figure 11.9)** changed her position to move closer to the median voter. Typically, this happens when a candidate adds a new policy promise to their campaign or has an excellent debate performance. Appealing to voters is the objective of campaigning. Therefore, we can use this simple model to predict which candidate is likely to win if no campaigning happens at all. This visualization also helps explain what a candidate must do to attract more voters. Another example **(Figure 11.10)** shows that the median voter is not always a centrist ideology or centrist view on a policy. Due to district conditions, one candidate is likely to start with an advantage because of the alignment between their views and the district.

FIGURE 11.9

## Would the Green or Orange Candidate Win?

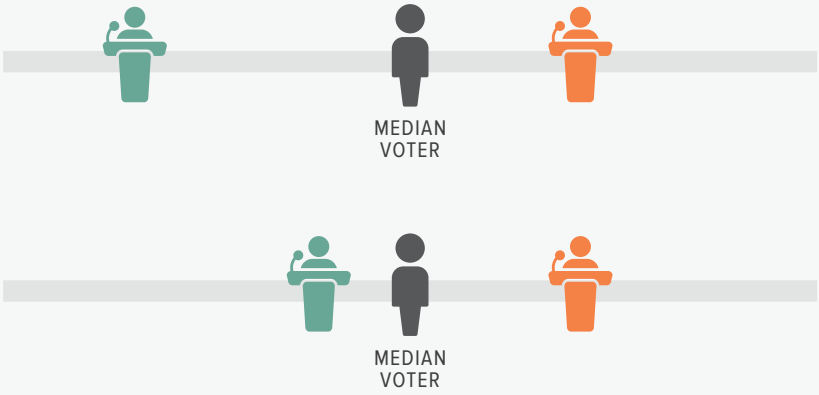



FIGURE 11.10

## Would the Green or Orange Candidate Win?

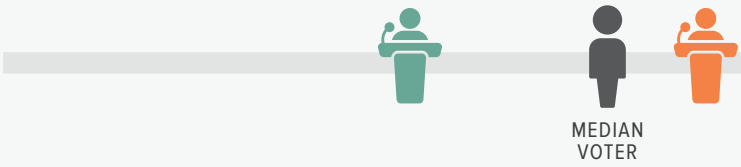



**Figure 11.10** illustrates an election with a centrist Green candidate and an Orange candidate with an ideology that is further right than the median voter's ideology. However, the median voter's location indicates that the **constituency** is, on average, more conservative compared to the national average. The pattern is symmetrical, so a non-centrist candidate should be more likely to win in districts with a median voter further to the left (as long as the candidate is closest to the median voter).

Overall, the logic places voters at the center of any election prediction because the public can select its representation. Therefore, candidates define issue positions so they match the district they seek to represent. This raises a question that was explored by the philosopher and member of the British House of Commons, Edmund Burke. He considered whether voters are best served by representatives who act as **delegates** or as **trustees**. Delegates vote based on what the majority of the constituency prefers. In contrast, trustees vote based on their own personal values, which the voters knew ahead

***Constituency:*** *all residents in a geographic district.*

***Delegate model of representation:*** *a style of representation where the official votes in line with the majority of the constituency.*

***Trustee model of representation:*** *the leadership style of elected officials voting consistently with their own beliefs, even in the case where the constituency may disagree.*

of time. This remains a major question for voters and for candidates because voters want to know what type of representation they will get.

In extreme contexts, a delegate's voting record may appear inconsistent to the nation when the legislator's votes support the views of the community's citizens. Therefore, the inverse would be true for a trustee. In extreme contexts, the voting record of a trustee appears consistent across multiple votes, but the votes may not reflect short-term requests by constituents. These two dominant styles of representation often underlie how candidates will govern. A successful candidate will choose a representation style that is most likely to reflect the preferences of voters based on their level of political engagement and knowledge. Ultimately, systems of governance in a representative democracy are not set up to provide one person with 100% representation. They focus on providing communities with the best representation, which means balancing the complex views of many individuals.

## When Context Determines Campaign Messages

To this point, two basic rules for campaigns have been established. One—the candidate with the most votes wins. Two—voters will select the candidate that best matches their views on policy and representation. However, we know candidates enter the same election with different experience levels. Candidates may be running for reelection (incumbents) or for an office they do not currently hold. Therefore, candidates focus on the voters, their surroundings, and their opponents' experience. To introduce themselves to the electorate, candidates craft messages that draw from these contexts.

To their benefit, candidates who receive a political party's nomination can use issues to contrast themselves from the other candidate. Political parties aim to acquire **issue-ownership** of the electorate's salient concerns, so the candidate can attract voters who care about a policy simply because of their party's long history of success leading on the issue.[2] This happens today when candidates who prioritize climate change solutions align with one party more than the other. Therefore, we expect a Democratic candidate to frequently reiterate their support for climate change where voters are more likely to prioritize environmental protection. Thus, the opposite should hold in predicting how frequently a Democratic candidate will discuss gun control in a majority-Republican district. By speaking about policies that national parties claim issue-ownership of, candidates can easily distinguish themselves from local opponents and simultaneously motivate their core supporters, even if they do not have a substantive voting record.

***Issue-ownership:*** *when members of one party are known as having a consistent position on an issue that matches the majority of voters' preferences and is still distinct from other parties.*

Candidates craft their image through messages that depend on their position relative to other candidates and how well the voters know them. Messages are likely to change throughout a campaign because the context changes due to various factors related to the campaign or totally unrelated to either candidate. People who follow campaigns can gauge a campaign's level of perceived competition based on the rhetoric of candidates. See **Figure 11.11** for slogans candidates used based on how they saw themselves in the race.

FIGURE 11.11

## Slogans Candidates Used Based on How They Saw Themselves in the Race

| Context | Winning Slogans | What was going on at the time? |
|---|---|---|
| Incumbent seeking reelection in turmoil | ***"Don't change horses midstream."***<br>*President Abraham Lincoln in 1864*<br>*President Franklin D. Roosevelt in 1944*<br>***"A safer world and a more hopeful America."***<br>*President George W. Bush in 2004* | President Lincoln was seeking reelection during the Civil War. President Roosevelt was seeking reelection during WWII. In 2004, President Bush was seeking reelection after September 11, 2001. Both slogans support a trustee style. |
| A viable candidate without experience in a time of prosperity | ***"Vote yourself a farm."***<br>*Republican Nominee Abraham Lincoln in 1860*<br>***"A chicken in every pot and a car in every garage."***<br>*Republican Nominee Herbert Hoover in 1928* | In both instances, the candidate promised to share the prosperity of a strong economy with the public. In 1860, farmers were among the most wealthy people in the nation. In 1928, the nation was experiencing the economic boom that preceded the Great Depression. Both slogans support a delegate style. |
| Challenging an incumbent in a bad economy | ***"Happy days are here again."***<br>*Democratic Nominee Franklin D. Roosevelt in 1932*<br>***"A time for greatness."***<br>*Democratic Nominee John F. Kennedy in 1960*<br>***"Are you better off now than you were four years ago?"***<br>*Republican Nominee Ronald Reagan in 1980* | FDR first ran for president in the wake of the Great Depression. JFK was elected during the Cold War, a time of high economic inequality in America. Reagan was elected at a time with energy shortages and high gas prices. All three candidates used the context of the time to suggest that anyone was better than their opponent, the president of the United States. |
| Running when trust in politics was low | ***"A leader for change."***<br>*Democratic Nominee Jimmy Carter in 1976*<br>***"Let's make America great again."***<br>*Republican Nominee Ronald Reagan in 1980*<br>***"Change we can believe in."***<br>*Democratic Nominee Barack Obama in 2008*<br>***"Make America great again."***<br>*Republican Nominee Donald Trump in 2016* | Both Jimmy Carter and Ronald Reagan ran for president in the two presidential elections following the Watergate scandal and President Richard Nixon's resignation. For their candidacies, it was important to portray each candidate as a strong leader from outside Washington. Barack Obama and Donald Trump ran for president when the other party had held the presidency for eight years before. Therefore, both candidates emphasized the value of change. |

FIGURE 11.12

## The Flip-Flops Voters Remembered[3]

**PRESIDENT GERALD FORD**
RUNNING FOR PRESIDENT IN 1976

After Richard Nixon resigned the presidency, Gerald Ford became president. Ford commented in November 1973 that "I don't think the public would stand for [a pardon of Nixon]" (see Reston, 1976).

In September 1974, however, President Ford pardoned former President Nixon of his election crimes.

**SENATOR JOHN KERRY**
RUNNING FOR PRESIDENT IN 2004

Kerry ran against President George W. Bush.

Kerry opposed the controversial war in Iraq.

About funding for the wars in Iraq and Afghanistan, Kerry said: "I actually did vote for the $87 billion before I voted against it" (see Roselli, 2004).

**GOVERNOR MITT ROMNEY**
RUNNING FOR THE NOMINATION IN 2008

As governor of Massachusetts in 2004, Mitt Romney said, "I will preserve and protect a woman's right to choose."

In 2007, as a candidate for the Republican Party's nomination for president, Mitt Romney changed his position. He stated, "The right next step in the fight to preserve the sanctity of life is to see *Roe v. Wade* overturned" (see Kessler, 2011).

Reviewing the candidate slogans suggests that campaigns create few slogans the public has not heard before. Each slogan is a slight variation on what has worked in the past during a similar political climate. These broad slogans help voters assess how each candidate differs from their opponent based on basic comparisons. As questions about policy views become more specific, voters are more likely to disagree with each candidate. Therefore, candidates promote their issue positions on topics they believe most voters agree with. If a candidate promotes policies that voters disagree with, the candidate may have to flip their position to win the election **(Figure 11.12)**.

## How Campaigns Affect Elections

Campaigns inform the public and drive discussions about what voters want from their representation. In the United States, the single-member district election system means more candidates run for office for voters to select from. Each campaign is supported by a staff and volunteers who are driven to win.

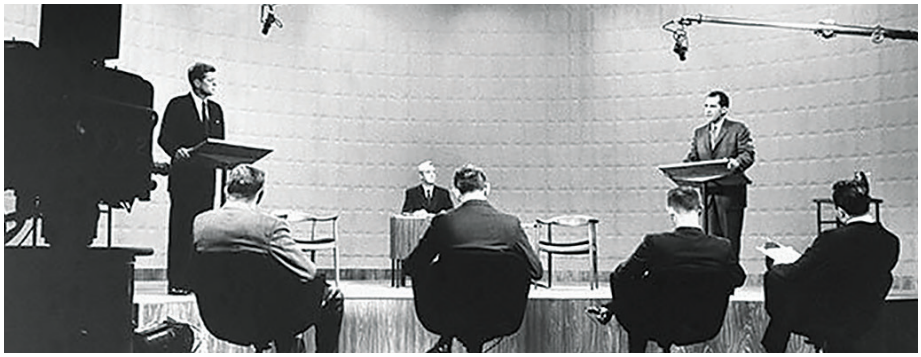
All measures of campaign effects capture a campaign's influence on votes. Campaigns are specifically interested in **vote choice** and **voter turnout**. Campaign activities, such as debates and advertisements, are designed for candidates to influence who voters will choose. Other campaign activities are designed to gain an edge by influencing how many people participate in an election. To win an election, many tactics can help a campaign keep up its momentum and excitement.

***Vote choice:*** *the selection of which candidate or initiative to vote for.*

***Voter turnout:*** *the individual action of going to the polls to vote and the overall count of how many registered voters participated.*

### Debates

Candidate debates are a tradition in American politics that allow voters a unique opportunity to compare candidates at the same event. Debates are organized



Source: Maynard, W. Barksdale 2010. Smithsonian Magazine

**FIGURE 11.13** Nixon and JFK debate in 1960; from "Debating on Television: Then and Now," 2010.

to inform voters about each candidate by asking both candidates the same question. Once the nominees for president are selected by both parties, the nonpartisan Commission on Presidential Debates invites the leading presidential candidates to participate in a series of debates. The events are frequently hosted at universities and moderated by a journalist.

Despite the media's and public's interest in discussing who won the debate, debate performances have rarely changed an election's outcome. Only in the 1960 and 1980 presidential debates did winning the debate apparently help win the election. The debate on September 26, 1960, between Vice President Richard Nixon and Senator John F. Kennedy was the first nationally televised political debate **(Figure 11.13)** **11.1**. Most of those who listened to the debate on the radio believed Vice President Nixon gave the strongest answers and projected the leadership necessary to win the election. However, Vice President Nixon was sick that evening, and his sweat—from the hot lights illuminating the debate stage—was visible to those who watched the debate on television. Senator Kennedy's youth and energy, as well as his choice to speak to the camera, created a stark contrast between the two candidates. In the very first televised presidential debate, the public was more interested in how the candidates looked than in the nuance of their answers.

**11.1**

**UTTyler.edu/AmGovBook**

**Video from behind the scenes at the Kennedy-Nixon Debate in 1960 on C-SPAN.**

The debate between President Jimmy Carter and the Republican nominee Governor Ronald Reagan on October 28, 1980, also impacted the election, but for a different reason. Their final debate took place seven days before the election. This is the latest that a presidential debate has occurred in the election cycle, and it provided Governor Reagan one final opportunity to contrast himself with President Carter. The debate with Carter was crucial for Reagan, who had lost the first debate and improved in the second. Studies of public opinion over decades of campaign events show that voters typically remember an event's or story's importance for two weeks.[4] After fourteen days, undecided voters will likely notice something else that changes which candidate they prefer. The third debate in 1980 revealed that a debate's timing matters **11.2**. Now that candidates know how the public reacts, another debate in the final week of a campaign is unlikely.

**11.2**

**UTTyler.edu/AmGovBook**

**President Jimmy Carter and Republican presidential nominee Ronald Reagan meet for their third and final debate seven days before the election in 1980.**

## Campaign Advertisements

Recorded campaign advertisements on television and social media allow candidates to communicate directly with voters and articulate why they deserve votes **(Figure 11.14)**. Advertisements to persuade voters to choose a certain candidate are categorized based on the advertisement's objective.

FIGURE 11.14

## Categories of Campaign Advertisements

**INTRODUCTION**

***"Man From Hope."***

Bill Clinton, 1992

11.14.1 UTTyler.edu/AmGovBook

**ENDORSEMENT**

***"Yes We Can."***

Barack Obama, 2008

11.14.2 UTTyler.edu/AmGovBook

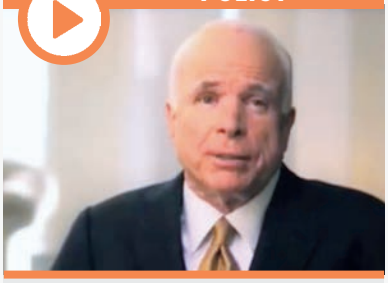
**TESTIMONIAL**

***"Home."***

Mitch McConnell, 2014

11.14.3 UTTyler.edu/AmGovBook

**POLICY**



***"Fight."***

John McCain, 2008

11.14.4 UTTyler.edu/AmGovBook

**POSITIVE**


***"Proud of Texas."***

Rick Perry, 2006

11.14.5 UTTyler.edu/AmGovBook

**CONTRAST**

***"3 A.M."***

Hillary Clinton, 2008

11.14.6 UTTyler.edu/AmGovBook

**NEGATIVE**


***"Windsurfing."***

George W. Bush, 2004

11.14.7 UTTyler.edu/AmGovBook

**STRONG REBUTTAL**


***"Nobody."***

John Barrow, 2012

11.14.8 UTTyler.edu/AmGovBook

**POOR REBUTTAL**

***"I am not a witch. I'm You."***

Christine O'Donnell, 2010

11.14.9 UTTyler.edu/AmGovBook

Early in a campaign, candidates run introduction advertisements to establish who they are and why they are running. To develop a candidate's credibility, they will then share testimonial advertisements that describe a major accomplishment of the candidate. Many of these ads may also include endorsements from high profile individuals (a president, governor, or celebrity) or influential organizations (a police union, the National Education Association, etc.). Other advertisements react to the campaign's context and either promote the positive change the candidate will advocate for or point out an opponent's flaws in a negative advertisement.

Candidates "go negative" because it works. Professor John Geer says, "Negative ads can be good because they generate a conversation."[5] Voters pay attention to conflict in the election, but polls often show that voters dislike negative campaigning. This paradox suggests that negative campaigning hurts the targeted candidate and the candidate who sponsors the advertisement. Therefore, candidates frequently attack their opponent with an issue on which voters already agree with them. They expect voters will repel the flawed candidate and support the candidate that ran the advertisement. 11.3

11.3

**UTTyler.edu/AmGovBook**

**Democratic presidential nominee Hubert Humphrey laughs at Richard Nixon's choice for vice president in a TV ad in 1968.**

If negative advertisements change who voters support, why do candidates who run negative ads often paradoxically lose? This occurs because frontrunners do not need to run negative ads unless they need to make a potentially competitive candidate appear unattractive. Considering the probability of winning the election, candidates who are behind in the polls are more likely to receive criticism for running negative campaign advertisements to make an election more competitive.

## Get Out the Vote

***Electioneering:*** *activities in a campaign where the intent is to persuade voters to choose a specific candidate.*

**Electioneering** is the legal definition for activities directly related to a campaign, including asking people to vote for a candidate and getting people to the polls. You have likely participated in a campaign if you have:

- volunteered to walk with a candidate in a parade to hand out stickers and buttons,
- volunteered to walk door-to-door to canvass a neighborhood and distribute flyers,
- stamped envelopes to mail flyers to voters,
- attended a campaign rally,
- put a candidate's yard sign in front of your home, or
- volunteered to call supporters and remind them to vote for a candidate.

***Canvass:*** *walking door-to-door to share information about a candidate and ask people to vote. This is often done in specific precincts by volunteers to educate voters about where they can vote.*

***Precinct:*** *the smallest political subdivision used to tally votes and report the outcome of an election.*

Each of these electioneering tactics is designed to increase voter turnout and a candidate's name recognition. Local parties can lead activities such as **canvassing** and phone banking throughout the campaign to support multiple candidates running in a **precinct**. Campaigns can lead the activities independently if no local party organization exists. Campaigns are most active in the final weeks of the election when absentee and early

**FIGURE 11.15**

### Jay-Z and Beyoncé Fundraiser for Barack Obama

Source: Tufankjian, Scout, © 2012 by Scout Tufankjian for Obama for America

To attend the dinner Beyoncé and Jay Z hosted in September 2012 for President Obama's reelection, tickets cost $40,000. The event raised $4 million dollars. During the fundraising trip President Obama asked donors to give by saying: "These people have Super PACs that are writing $10 million checks and are going to bury us under advertising like you've never seen before, we can't match these people dollar for dollar."[6]

voting begins, and the final push comes in the last three days before Election Day—known as the "seventy-two-hour campaign."

The seventy-two-hour campaign is the final blitz to rally supporters and make sure they vote. Rallies on a Saturday morning before elections engage the party base with exclusive opportunities to meet and hear from the candidates. The excitement at the meeting encourages partisans to volunteer, donate, and spread the word about why voting for their candidate is important. In 2000 and 2004, this strategy was often regarded as why the Republican Party won elections in areas where Democrats had a small advantage among registered voters. Therefore, the Obama campaign used a similar grassroots campaign approach in 2008 by tapping into peer-to-peer networks to promote candidates. Many stories documented the importance of social media in the 2008 election, but we should also recognize that major recording artists strategically held concerts near voting precincts in highly populated areas.

## Funding the Campaign

Becoming a candidate for office is similar to starting a corporation. A candidate files paperwork with the state or federal agency that oversees an election to gain access to a campaign account and to receive funds that support electioneering. State laws establish specific dates when candidates can enter the race and when they should file reports.

- In Ohio, a candidate must declare their candidacy ninety days before a primary election.
- In Texas, a candidate must hire a treasurer to manage the campaign's donations and spending. This applies to elections overseen by the Texas Ethics Commission and Federal Elections Commission.

***Political action committees:*** *political organizations created for the purposes of making campaign contributions to candidates to win elections.*

**FIGURE 11.16**

## Another Example of Bundling

To attend a dinner with President Donald Trump in Los Angeles in 2019, supporters had to raise money for President Trump's reelection fund:

- $15,000 to attend the dinner,
- $50,000 to take a picture with President Trump, and
- $150,000 to participate in a roundtable discussion with President Trump

All of these values are greater than the FEC limits for one person ($2,700) or one organization ($5,000). Therefore, some coordination among multiple donors is implied.

***Bundling:*** *the process of compiling campaign donations from multiple individuals that are within the individual donation limit so that one supporter can raise more money for a candidate.*

***Money bomb:*** *intentionally coordinating fundraising activities to receive funds on one day to attract more attention to the viability of a candidate.*

Candidates disclose donations quarterly through transparent reports that are made public throughout the campaign. Such reports fuel media analyses about a campaign's performance as compared to other candidates running for a similar office. Reports also show the direct donations given by **political action committees** (PACs), parties, and individuals along with coordinated expenditures, where an individual or organization outside the campaign purchases an item that supports the campaign.

Between disclosure reports, candidates use many tactics to raise funds and attract additional donations. Traditionally, candidates hold fundraisers where supporters gather for a meal and donors make direct contributions to the candidate **(Figure 11.15)**. The fundraising events range from meet and greets at coffee shops to formal dinners, and candidates will even travel to locations that will encourage donors to give more. Candidates also call donors during the week to directly ask for pledged contributions. However, asking for money is difficult, and many candidates are not comfortable doing it. If a candidate rejects fundraising, they can self-finance their own election by contributing to their own campaign account or making a loan to their campaign.

Given the complexity of campaign fundraising and its laws, political consultants have emerged to help candidates effectively attract donations and spend funds. The Federal Election Commission limits individual contributions for federal elections to $2,700 per election cycle. Thus, one person can give a maximum contribution of $5,400 to one candidate by giving the highest donation before the primary election and again before the general election. However, campaigns ask supporters to pledge donations beyond the legal limit, and one supporter can legally **bundle** together donations from other supporters to do this **(Figure 11.16)**. As part of the FEC disclosure requirements, the FEC reports bundled donations in two ways. First, the FEC documents the contribution of the primary individual who made the contribution. Then, the FEC documents how many dollars were collected by a campaign consultant who is registered with the FEC to bundle donations. This way, the total amount raised by a campaign reflects the sum of all individual donations, and the public can see how donations were raised to prevent one person from having too much influence on a candidate.

Another recent fundraising tactic is the **money bomb**. While running for the Republican nomination for President, U.S. Representative Ron Paul (TX-14) raised $6 million in one day a month before the Iowa Caucuses at the start of the primary season **(Figure 11.17)**. Using e-mail and web advertisements, Paul's campaign encouraged supporters to make their collective donations on one day. The possibility of Paul attracting more donations than any other candidate during that fundraising period helped his campaign in two ways. First, the excitement of contributing to one large gift was a novel fundraising strategy that looked to maximize the impact of many donors making small contributions. Second, raising more money than all of the other candidates in the three-month period gave Ron Paul more legitimacy as a candidate.

**FIGURE 11.17**

### Largest Reported Fundraising on a Single Day

| | | |
|---|---|---|
| **John Kerry** | $5.7 Million (2004) | To start the general election campaign Democratic nominee John Kerry raised $5.7 million the day after the Democratic Convention. |
| **Ron Paul** | $6 Million (2007) | Ron Paul invented the money bomb to attract attention to his campaign with the single largest day for contributions to a candidate. |
| **Beto O'Rourke** | $6.1 Million (2019) | On the day Beto O'Rourke announced he would run for the Democratic nomination for president, his campaign received over $6 million in direct donations. |

## Clean Election Laws

The idea of publicly funding elections began at the national level in 1976 as part of the Federal Election Campaign Act of 1972. The goal was to allow candidates who are not wealthy nor a major party nominee to run for president. The program supports candidates by matching the donations to a candidate with additional funds from voluntary $3 contributions that tax payers give to support fair elections. Before assuming that the government gives candidates $96 million to run for office, recognize that candidates must follow specific rules if they accept the money.

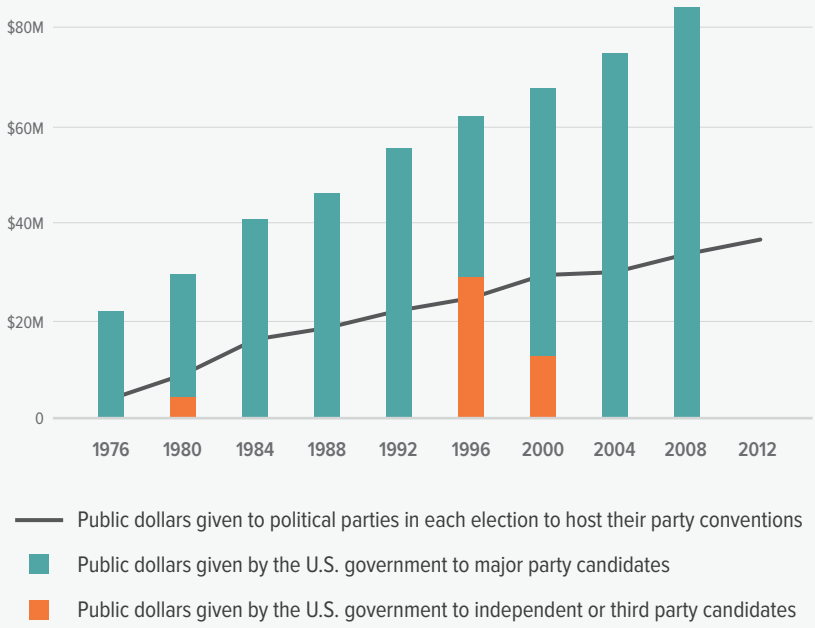
Candidates who ran for president from 1976 to 2008 used this benefit to build their national campaigns and help fund national party conventions. In 2008, however, then-candidate Barack Obama declined the matching funds from the federal government. His campaign reasoned that they could raise more money without the governmental limitations and run a more effective campaign. The Obama campaign was concerned with these restrictions:

- Mandatory audits in the primary and general elections.
- Limiting campaign spending in each state based on the number of voting age individuals.
- In 2016 a candidate was only able to spend $961,400 in Wyoming and $23 million in California.
- Limiting the candidates' own contribution to their campaign to $50,000.

Given Obama's fundraising success and his campaign's goal to be competitive in every state, he was the first major party nominee to decline public funding

**FIGURE 11.18**

## Public Funds Received by Candidates and Given to Party Conventions, 1976–present




Source: "Public Funds Received by Candidates and Given to Party Conventions, 1976-present," by Federal Election Commission, 2017.

to run for president. Since then, Mitt Romney (R) in 2012, Hillary Clinton (D) in 2016, and Donald Trump (R) in 2016 turned down additional funds because of the campaign limits. The available grant for candidates grows each year because it offers any major party candidate $20 million plus a cost of living adjustment for the nation. Following this formula, candidates in 1976 received $21.8 million, and both candidates in 2016 were eligible for $96.14 million.

Public funding's prevalence in presidential elections is also decreasing **(Figure 11.18)**—the two major parties are no longer given funding for their conventions since the program was cancelled by a law in 2014. This change marks a reliance on donations from private organizations to host major events tied to a campaign, which some think contradicts attempts to keep money out of politics.

## Clean Election Laws at the State Level

Elections are also publicly funded at the state level in Arizona and Maine. Candidates running for the state legislature in Arizona and Maine do not need to raise funds because the state allocates funds to run a campaign. If candidates refuse the public support, they are not subject to spending or fundraising limits they must follow if they accept.

Some states also implement fair and clean election laws for judicial elections, barring candidates running to be a judge from accepting donations from attorneys who work in their court rooms. Furthermore, some states prohibit corporations from donating directly to candidates running for state office. Legislators are also commonly prohibited from accepting campaign contributions while the legislature is in session and when they are voting on legislation. Each rule identifies what is acceptable and unacceptable in politics to reassure the public that corruption does not exist.

Even with numerous federal and state campaign finance reforms to limit loopholes, money in politics continues to grow. One reason is the increasing cost of campaigns as television ads, billboards, campaign staff, and consultants become more expensive. However, the recent reforms also mean that the public knows more about who contributes to candidates and how much money is given because of disclosure requirements.

# Conclusion

Campaign activities and strategies change frequently. Election reforms bring new innovations to make it easier for people to vote. When a candidate sees an opportunity to gain an edge in an election, their campaign will devise a strategy to implement a new change. Campaigns also know that they work within a defined election calendar with consistent dates for candidates' entries (filing deadlines) and exits (primary and general election days). Campaigns can thus assess their chances of winning based on their support within the constituency they seek to represent. A candidate's necessary support is a simple function of the election rule that determines who will win (a plurality or majority) and how many opponents the candidate has.

## Key Terms

**Ballot:** official document to vote and identify candidates a voter supports. When states adopted the Australian ballot, voters could choose among all candidates running for office in secret.

**Bundling:** the process of compiling campaign donations from multiple individuals that are within the individual donation limit so that one supporter can raise more money for a candidate.

**Canvass:** walking door-to-door to share information about a candidate and ask people to vote. This is often done in specific precincts by volunteers to educate voters about where they can vote.

**Constituency:** all residents in a geographic district.

**Delegate model of representation:** a style of representation where the official votes in line with the majority of the constituency.

**Devolution:** transfer of power to a lower level of government.

**Disenfranchised:** when a voter is no longer eligible to vote. Some states have laws that exclude felons from voting for a period of time or even indefinitely.

**Economic voting:** when voters determine which candidate to support based on the expected economic benefit the voter may receive by policies supported by the candidate.

**Electioneering:** activities in a campaign where the intent is to persuade voters to choose a specific candidate.

**Electoral College:** the indirect mechanism for electing the president of the United States, which is outlined in Article 2 of the Constitution. Voters vote for president to inform which slate of electors to the Electoral College in their state is seated. Then those electors cast their vote for president at a later date.

**Homogenous district:** a district where residents are overwhelmingly similar. This can be measured as ideologically similar, ethnically similar, or culturally similar.

**Incorporated:** the process of extending the civil liberties residents in America receive from the U.S. Constitution to protect residents from state laws.

**Issue-ownership:** when members of one party are known as having a consistent position on an issue that matches the majority of voters' preferences and is still distinct from other parties.

**Median voter theorem:** a set of conditions to explain why the candidate who gets a majority of the votes will win.

**Midterm:** when states vote for U.S. House elections and scheduled statewide elections, but the president is not at the top of the ticket. Recent examples include 2010, 2014, and 2018.

**Money bomb:** intentionally coordinating fundraising activities to receive funds on one day to attract more attention to the viability of a candidate.

**Plurality:** an election rule where the candidate that receives the most votes wins.

**Political action committees:** political organizations created for the purposes of making campaign contributions to candidates to win elections.

**Poll tax:** the financial requirement for an individual to vote in an election. This became unconstitutional after the Twenty-fourth Amendment.

**Precinct:** the smallest political subdivision used to tally votes and report the outcome of an election.

**Preclearance:** the process of applying federal oversight by the Department of Justice of U.S. District Courts for any proposed election change in a community that has a history of voter discrimination.

**Special election:** an election that is scheduled to fill a vacancy due to the death or retirement of the incumbent during their term in office.

**Suffrage:** the right for individuals to vote. Also referred to as franchise.

**Surge and decline:** the observed trend that voter turnout is higher in presidential elections than midterm elections.

**Trustee model of representation:** the leadership style of elected officials voting consistently with their own beliefs, even in the case where the constituency may disagree.

**Vote choice:** the selection of which candidate or initiative to vote for.

**Voter turnout:** the individual action of going to the polls to vote and the overall count of how many registered voters participated.

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