Chapter 1 The More Things Change . . . The More They Stay the Same

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Learning Objectives

1.1 HISTORY REPEATS ITSELF

- Analyze current problems and issues in American government by applying historical perspectives

1.2 FORMS AND FUNCTIONS OF GOVERNMENT

- Explain the philosophical underpinnings of the American political system through the exploration of important theories such as the "social contract" theory and the concept of the "natural law"
- Compare and contrast democracy with other forms of government

1.3 AMERICAN GOVERNMENT AND POLITICS

- Assess the importance of the value of popular sovereignty, and how that value is realized through "representative democracy" in the United States

1.4 AMERICAN POLITICAL CULTURE

- Define *political culture* and describe the unique combination of political beliefs and values that forms the American political culture, including majority rule, liberty, limited government, diversity, individualism, and equality of economic opportunity

1.5 IS AMERICAN DEMOCRACY IN DECLINE?

- Assess the health of American democracy and evaluate whether the American system is in decline by applying an historical perspective on contemporary politics
- Evaluate contemporary problems by placing them in historical context

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One of the most profound developments in the recent history of the United States has been the skyrocketing growth of the nation's Hispanic population. Hispanics have expanded from what was once a small, regionally concentrated population of fewer than 6 million in 1960 to a now widely dispersed population of more than 50 million (or 16 percent of the nation's population) today. The recent explosion of immigrants from Mexico and Latin America is largely a product of the difficult economic and social conditions they face in their home countries, as well as the opportunity for a better life they believed was possible in the United States. Of course such a massive swelling in the ranks of Hispanics has the potential to create major political change in America: As depicted in Figure 1.1, in the recently concluded 2014 midterm elections, more than 25 million Hispanics were legally eligible to vote, up from just 7.5 million thirty years ago.

Marmaduke St. John/Alamy

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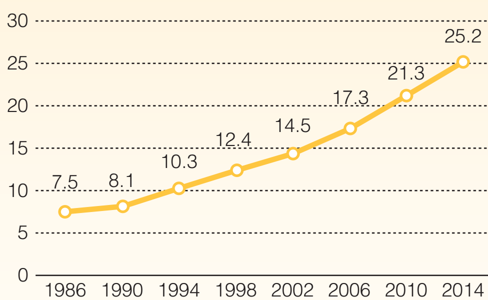


FIGURE 1.1 A Record Number of Latinos are Eligible to Vote . . .

Note: Eligible voters U.S. citizens ages 18 and older.

Sources: For the top chart, for 1986 to 2010, Pew Research Center tabulations of the Current Population Survey November Supplements; for 2014, Pew Research Center tabulations of the August Current Population Survey. For the bottom chart, Pew Research Center tabulations of American FactFinder (2012 ACS 1-Year estimates, tables B05003 and B050031).

Though both major parties have sought the endorsement of this large and growing portion of the American electorate, the Democrats have proven more successful in courting Latino voters at the national level. In presidential elections, Democratic candidate Barack Obama won more than 67% of Latino votes in 2008 and an impressive 72% in 2012. Obama's endorsement of immigration reform was popular among Hispanics, though the Democrats have yet to deliver on those promises. By comparison, low voter participation among Hispanics in midterm elections (see Figure 1.2), such as in 2010 (when the GOP won back the House of Representatives) and 2014 (when Republicans won control of the Senate), has muted the Democratic advantage provided by the Hispanic vote in presidential contests. Both parties know that the great untapped prize will come in the form of younger Hispanic voters aged 18–29, who make up a third of all eligible Hispanic voters, but lag behind most other groups in turnout. And as the Hispanic American population on the whole continues to grow, the next great ruling coalition in American politics will likely have Latino voters at its core.

Of course this modern surge in the size of the Hispanic electorate population is hardly the first case of an immigration trend impacting the American political landscape. From 1880 through 1920, a surge in immigration from southern and eastern Europe occurred, as Italians, Hungarians, Poles, and Greeks (among others) left the economic and political strife of Europe seeking jobs and opportunities in America.

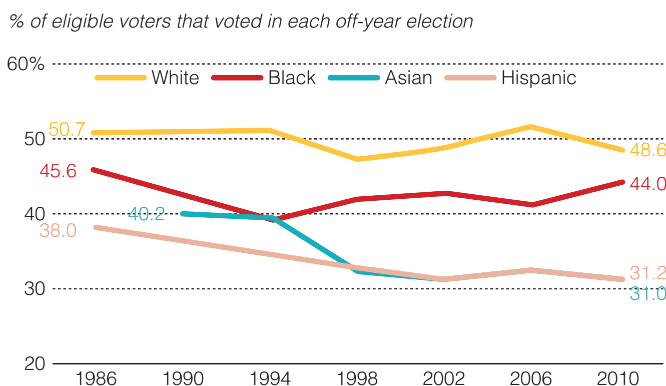
This new immigrant population settled mostly in cities, which suffered disproportionately from the Great Depression. To be sure, neither party rushed to embrace America's newest citizens at the outset, yet it was the Democratic Party that was first to formulate policies aimed at these city-dwellers. In 1932 Americans with eastern and southern European roots formed the core of Franklin D. Roosevelt's New Deal coalition, which came to dominate the American policy agenda for the next half-century.

Stagnation in economic conditions for today's working and middle class Hispanic Americans has been a source of frustration for this growing population. Exaggerating their frustration is the current gridlock in Washington over immigration reform, which Latino voters identify as their chief policy concern. Just as the southern and eastern European immigrants eventually found a home in FDR's New Deal coalition, the modern Democratic party's willingness to embrace immigration reform has sent out a warning shot to Republican leaders nationwide: ignore this group's policy demands only at the risk of finding your party on the outside looking in on the next great ruling coalition in American politics. Certainly if the Republicans place a Hispanic-American on their presidential ticket in 2016 (Senators Marco Rubio of Florida and Ted Cruz are possible contenders), the GOP would be taking an important step towards countering the Democrats' advantage to date.

FIGURE 1.2 Latino Voter Turnout Rates Consistently Below Whites, Blacks in Midterm Elections

Note: Hispanics are of any race. Whites, blacks and Asians include only non-Hispanics. Data for non-Hispanic Asians were not available in 1986.

Sources: Pew Research Center tabulations of the Current Population Survey November Supplements.



Historical context helps us understand not only how new immigrant populations help political parties forge new winning coalitions but many other aspects of American politics as well. This book explores the contemporary American political system, and uses history as a guide to understanding the present and anticipating the future.

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1.1 History Repeats Itself

The patterns of history provide a powerful tool for understanding American government today. Let's consider a few important dynamics of the political system today and the historical patterns that shed light on those dynamics.

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A New Communications Medium Paves the Way to Electoral Victory

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Many Americans, including this college student, used social media to learn about the 2012 presidential campaign and to make donations to a candidate.

The Internet and social media have revolutionized American politics. In 2008, presidential candidate Barack Obama used Facebook to build extensive volunteer networks and campaign donations to the tune of a half-billion dollars. Obama captured the attention of young people and those affected by the Great Recession of 2008, offering a message of hope and change. His campaign actively encouraged social networking to mobilize voters to his cause. The result: voter turnout and interest spiked, and helped to pave the way to victory. Other politicians have tried to duplicate Obama's model; by 2012, social media began to dominate the campaign process. Voters of all political persuasions use social media to connect with their favorite campaigns. Consider the possibilities: in 2014 Facebook subscribed 134 million voting-age users in the United States. Not only is this a massive audience, but it is an active audience, as social networks allow users to trade and share information and opinions with their friends and families. In the past, political strategists were forced to rely on the paid TV spot as the primary way to communicate with voters. Today, however, there is a noticeable shift toward using social media to send messages, raise money, and mobilize voters. Why? A message from a friend is considered much more personal, powerful, and effective than an impersonal TV spot.

Of course social network sites like Facebook are not the only type of breakthrough technology to revolutionize political campaigns. Although Barack Obama was the first candidate to win the presidency by making extensive use of social media, John F. Kennedy pioneered the use of television to win the White House over a half-century ago. When he ran for the presidency in 1960, TV was dramatically changing American society, just as social media are changing it today. As a relatively new medium with a mass audience in Kennedy's time, TV provided prospective voters with what no communications platform had offered ever before—the chance to see the candidates campaign on a daily basis. Television audiences could tune in to watch TV spots, and they could see the candidates actually debate each other live in their own living rooms; voters saw the candidates in action. Kennedy's youth and enthusiasm made effective use of television commercials touting his candidacy. His ability to "out-charisma" Richard Nixon in

LBJ Library Photo by Democratic National Committee

"Daisy Girl," featured in the 1964 political commercial of the Lyndon Johnson campaign, is shown above. The ad cut to a mushroom cloud explosion of an atomic bomb as the girl pulled off the last petal of the daisy.

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the 1960 debates led to a surge in turnout, and helped to pave the way for a Kennedy victory. Kennedy's use of this new medium provided a model for how presidents would interact with voters over the next four decades. By 1964, candidates had mastered the art of the 30-second spot, as evidenced by Lyndon Johnson and his now-famous "Daisy Girl" commercial.

Although revolutionary, TV was not the first communications medium to transform political campaigns. Radio, which by 1932 had reached most U.S. households, enabled voters to listen to the candidates' voices, instead of just reading their speeches or statements. Franklin Delano Roosevelt (FDR) and President Herbert Hoover both used radio addresses and advertising extensively during the 1932 campaign. However, whereas Roosevelt's voice on the radio inspired confidence and enthusiasm for tackling the ills of the Great Depression, Hoover's logical and monotone monologue was far less effective. From that point forward candidates could not just focus on the words that they used; they also had to excel in articulating those words with passion. FDR's use of radio eventually mobilized voters, particularly those who were most negatively affected by the economic doldrums of the Great Depression. After winning the 1932 election, FDR continued to use radio to personally connect with voters and inspire them through his "fireside chats," which he broadcast for the next 12 years.

One hundred years earlier, yet another communications revolution occurred that had a lasting impact on political campaigns. By the 1830s, newspapers were changing in a number of ways. The invention of the "rotary press" in 1815 facilitated the mass production of affordable newspapers, and eventually gave way to the so-called "penny press." A decade later, the invention of the telegraph enabled penny-press papers to quickly produce stories on breaking news events. Further, the laying of railroads to all parts of the country to accommodate rapid westward expansion paved the way for mass distribution of newspapers. Americans gobbled up this new source of information, and Andrew Jackson used this medium to engage voters, bypass the political elite, and communicate his message of rugged individualism and "the rise of the common man" to help him capture the White House in 1832. The newspaper, which became a common person's medium, enabled Jackson to distribute his message widely to an audience that was willing and eager to read what he had to say. Jackson's use of the newspaper was critical to his success, just as Obama's use of social media was critical to his own success. Never again would presidential political campaigns be targeted exclusively at political elites, thanks to Jackson's use of the penny press to effectively appeal to the masses.

JEWEL SAMAD/AFP/Getty Images

President Barack Obama campaigning in 2012 for a reelection to the White House.

The Power of Incumbency

Perhaps the most salient lesson to be learned from the 2012 presidential election concerns the power of incumbency. President Barack Obama's first term was plagued by soaring unemployment, stagnated wages, and a skyrocketing national debt. Still, the incumbent managed to secure a decisive electoral college victory. Many were skeptical that Obama would win again during such fiscally distressed times. What could possibly allow Obama to win reelection under such conditions?

A broader view of American history, however, places this incumbent president's victory into context. Just eight years earlier in 2004, President George W. Bush ran for reelection on a record that featured the decision to launch a controversial war in Iraq, one that was producing mounting numbers of casualties. And yet Bush was reelected. Similarly, Harry S Truman, thrust into the White House three years earlier upon the death of FDR, surprised pundits by winning the 1948 election. Earlier in the twentieth century, Woodrow Wilson defied

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expectations by winning reelection in 1916 amid a difficult fiscal environment and the looming threat of war from Europe.

The incumbent-favored scenario of the 2012 election is one that has played out many times before in American history. Voters may express frustration with incumbents, but when the sitting president seeks reelection, he may well receive the benefit of the doubt. Thus President Obama's success in 2012 should have surprised no one. Once elected, Americans tend to stand behind their leader—through good times and bad times as well. To be sure, some incumbents have fallen permanently out of the public's favor. Yet that happened a mere three times in the past century compared to the 11 successful incumbent reelections (see Table 1.1). Historical context helps us understand not only presidential elections, but many other aspects of American politics. This book explores the current American political system, and uses history as a guide to the future.

George Skadding/Time Life Pictures/Getty Images

President Harry S Truman, campaigning by train in 1948 as part of his successful re-election bid.

In this book we examine the major topics and concepts in American government and politics. We attempt to answer sweeping questions about how American government works: How does public policy get made? Who are the major players and institutions that make laws? How do these major players achieve their position? How do disputes get settled? What is the role of the American people in governing? In this discussion, we draw on lessons learned from nearly 250 years of nationhood, and apply those lessons to better understand contemporary issues and controversies in politics. Contemporary American government is a product of American history.

TABLE 1.1 Incumbent Presidents Who Secured Reelection

Those who make it to the White House have been quite successful in getting reelected. During the past 100 years, 17 different men have served as president. Two died in their first terms (Harding and Kennedy). Three assumed office and ran for reelection (Coolidge, Truman, and Ford). Among the incumbents (either elected or appointed), 11 have won reelection, and only 4 have lost. Below are the incumbents since 1916 who have successfully secured reelection:

1916 Woodrow Wilson
1924 Calvin Coolidge
1936, 1940 and 1944 Franklin Roosevelt
1948 Harry Truman
1956 Dwight Eisenhower
1964 Lyndon Johnson
1972 Richard Nixon
1984 Ronald Reagan
1996 Bill Clinton
2004 George W. Bush
2012 Barack Obama

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1.2 Forms and Functions of Government

Government is the collection of public institutions in a nation that establish and enforce the rules by which the members of that nation must live. Even the most primitive of societies have found government to be necessary. Without government, society would be in a state of **anarchy**, a situation characterized by lawlessness and discord in the political system. Thomas Hobbes, a seventeenth-century British political philosopher, wrote that without government, life would be "solitary, poor, nasty, brutish and short."[1] Government is necessary to make the rules by which citizens must abide, promoting order, stability, and protection for the society. It exists in part to resolve conflicts that naturally arise when people live in communities. Elaborating on the role of government, Jean-Jacques Rousseau, an eighteenth-century French philosopher, posited that in fact a "social contract" exists.[2] A **social contract** is an agreement people make with one another to form a government and abide by its rules and laws. In return, the government promises to protect the people's rights and welfare and to promote their best interests.

A government's **authority** over its citizens refers to the ability of public institutions and the officials within them to make laws, independent of the power to execute them. People obey authority out of respect, whereas they obey power out of fear. Numerous different forms of government with governing authority can be found around the nations of the world. One such form—the form that will receive extended attention throughout this book—is **democracy**, defined as a government in which the people, either directly or through elected representatives, hold power and authority. The word *democracy* is derived from the Greek *demos kratos*, meaning "rule by the people."

By contrast, an **oligarchy** is a form of government in which a small exclusive class, which may or may not attempt to rule on behalf of the people as a whole, holds supreme power. In a **theocracy**, a particular religion or faith plays a dominant role in the government; Iran is just one example of a theocratic nation in the world today. A **monarchy** is a form of government in which one person, usually a member of a royal family or a royal designate, exercises supreme authority. The monarch may be a king or queen, such as Queen Elizabeth II of Great Britain. In the past monarchies were quite common; today they are rarely practiced in the absolute sense. Although the United Kingdom continues to pay homage to its royalty, true political power rests in the Parliament, the members of which are elected by the people.

Many of the nations in the world today have an **authoritarian** form of government in which one political party, group, or person maintains such complete control over the nation that it may refuse to recognize, and may even choose to suppress, all other political parties and interests. The nation of Iraq, before the American military intervention in 2003, was considered by most to be an authoritarian government under the dictatorial rule of Saddam Hussein. North Korea under Kim Jong-un is an authoritarian government in existence today.

An important characteristic of any government, whether democratic or not, is its power to exercise authority over people. **Power** is the capacity to get individuals to do something that they may not otherwise do, such as pay taxes, stop for red lights, or submit to a search before boarding an airplane. Without power, it would be very difficult for a government to enforce rules. The sustained power of any government largely rests on its legitimacy. **Legitimacy** is the extent to which the people (or the "governed") afford the government the authority and right to exercise power. The more that people subscribe to the goals of a government, and the greater the degree to which that government guarantees the people's welfare (for example, by supporting a strong economy or providing protection from foreign enemies), the higher will be the government's level of legitimacy. When the governed grant a high level of legitimacy to their government, the government wields its power to make and enforce rules more successfully.

government: The collection of public institutions in a nation that establish and enforce the rules by which the members of that nation must live.

anarchy: A state of lawlessness and discord in the political system caused by lack of government.

social contract: From the philosophy of Jean-Jacques Rousseau, an agreement people make with one another to form a government and abide by its rules and laws, and in return, the government promises to protect the people's rights and welfare and promote their best interests.

authority: The ability of public institutions and the officials within them to make laws, independent of the power to execute them.

democracy: Form of government in which the people, either directly or through elected representatives, hold power and authority. The word *democracy* is derived from the Greek *demos kratos*, meaning "rule by the people."

oligarchy: A form of government in which a small exclusive class, which may or may not attempt to rule on behalf of the people as a whole, holds supreme power.

theocracy: A form of government in which a particular religion or faith plays a dominant role in the government.

monarchy: A form of government in which one person, usually a member of a royal family or a royal designate, exercises supreme authority.

authoritarianism: A form of government in which one political party, group, or person maintains such complete control over the nation that it may refuse to recognize and may even suppress all other political parties and interests.

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1.3 American Government and Politics

Politics is defined as the way in which the institutions of government are organized to make laws, rules, and policies, and how those institutions are influenced. More than 70 years ago, political scientist Harold Lasswell proposed a brief but very useful definition of politics as "who gets what, when and how." In American politics, the "who" includes actors within and outside the formal government, such as citizens, elected officials, interest groups, and state and local governments. The "what" are the decisions the government makes and take the form of what government funds, the way it raises revenue, and the policies it produces and enforces. The "when" relates to setting priorities about what government does. The concerns and issues that government addresses differ in importance, and issues of greater importance tend to be addressed more quickly. Finally, the "how" refers to the way in which the government goes about its work, based on the political institutions that exist and the formal and informal procedures and rules that define the governing process. In describing American politics, this book provides answers to Lasswell's "who gets what, when and how?"[3]

Government in the United States is especially complex. It is organized into multiple layers (national, state, and local) and contains many governing units, as shown in Table 1.2. It encompasses a number of political institutions that share power—the executive (the president), the legislature (Congress), and the judiciary (the courts); and it provides countless methods for individuals and groups to influence the decisions made by those institutions. In this book, we will examine this complex organization of American government, describe the political institutions that exercise power, and explore the varied ways that people and groups exert influence. As we sort through this complexity of American government, we will seek to explain how and why the American political system has been able to endure the conflicts, both internal and external, that it has faced and currently faces. We will attempt to show how the American government is uniquely designed to stand up to its many challenges.

The strength and stability of the U.S. government are grounded in the high level of legitimacy it maintains with the American public. Americans may disagree vehemently with public officials, but rarely do they question their claim to authority. The Framers of the U.S. Constitution were

power: The ability to get individuals to do something that they may not otherwise do, such as pay taxes, stop for red lights, or submit to a search before boarding an airplane.

legitimacy: The extent to which the people afford the government the authority and right to exercise power.

politics: The way in which the institutions of government are organized to make laws, rules, and policies, and how those institutions are influenced.

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Table 1.2 Governments in the United States

The government of the United States might be more correctly described as a system of governments. In addition to the federal government, there are 50 state governments and thousands of local governments. The 2012 U.S. Census Bureau's *Census of Government's* listed these totals for the number of governments operating throughout the nation.

Government	Number
Federal	1
State	50
County	3,013
Municipal	19,522
School district	13,051
Township/town	16,364
Special district	37,203
Total	89,004

Based on data from: U.S. Census Bureau's Census of Governments, 2012

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keenly aware of the importance of the legitimacy of the system. They knew that if the government was to withstand the test of time, it must serve the people well. These ideas about legitimacy drew largely on the theories of seventeenth-century British political philosopher John Locke (1632–1704).[4] Locke proposed that people are born with certain *natural rights*, which derive from **natural law**, the rules of conduct inherent in the relationship among human beings and thus more fundamental than any law that a governing authority might make. Government cannot violate these natural rights, which include life, liberty, and property. Therefore, government, or human law, must be based on the "consent of the governed." That is, citizens are responsible for choosing their government and its leaders. This theory loomed large in the mind of Thomas Jefferson as he drafted the Declaration of Independence to justify the American colonies' split with the British government: "All men . . . are endowed by their creator with certain unalienable rights . . . [and] whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it." A government maintains legitimacy as long as the governed are served well and as long as government respects the natural rights of individuals.

natural law: According to John Locke, the most fundamental type of law, which supersedes any law that is made by government. Citizens are born with certain natural rights (including life, liberty, and property) that derive from this law and that government cannot take away.

Drawing on this philosophy, the Framers drafted a Constitution that created a political system able to manage the inevitable conflicts that occur in any society. Mindful of Thomas Hobbes's notion that the essence of government is to manage naturally occurring conflicts, the Framers designed a government that encourages conflict and competition rather than attempting to repress it. As we shall see in the chapters that follow, the U.S. Constitution includes a number of mechanisms that allow naturally occurring conflict to play out in as productive a manner as possible. Mechanisms are also in place to resolve conflicts and arrive at consensus on issues. Those who disagree and come up on the short side of political battles are guaranteed rights and liberties nonetheless. Further, the rules by which conflicts are settled are predicated on fairness and proper procedures.

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The significance of what the Framers of the Constitution accomplished cannot be overstated. They not only addressed the short-term problems challenging the new nation, they also drafted a blueprint for how government should go about dealing with problems and conflicts into the future. The U.S. Constitution has served as the cornerstone of an American political system that routinely attempts to tackle some of the thorniest problems imaginable. In Chapter 2 of this book, we examine the enduring principles and processes outlined in the Constitution.

The Constitution provides a way for the American government to navigate through the many problems and conflicts that have faced the nation, including severe economic depressions, two world wars, nuclear confrontations with the former Soviet Union, and persisting questions of equality. Through all these difficulties, the American government has endured. The foresight of the Framers to create a Constitution that possesses the flexibility to adapt to changing times has served as a basis for the enduring democracy of the United States.

The preamble to the U.S. Constitution perhaps best summarizes the broad goals of American government:

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

popular sovereignty: The idea that the ultimate source of power in the nation is held by the people.

representative democracy: A form of government designed by the U.S. Constitution whereby free, open, and regular elections are held to allow voters to choose those who govern on their behalf; it is also referred to as *indirect democracy* or a *republican* form of government.

direct democracy: A system of government in which all citizens participate in making policy, rules, and governing decisions.

It is no accident that the first three words of the Constitution are "We the People." With this phrase the Framers acknowledged that the ultimate source of power rests with the people, a concept known as **popular sovereignty**. The U.S. Constitution provided for a form of **representative democracy**, under which regular elections are held to allow voters to choose those who govern on their behalf. In this sense, individual citizens do not directly make policies, rules, and other governing decisions (that system of government is known as a **direct democracy**). Rather, representative democracy, also referred to as *indirect democracy* or a *republican* form of government, rests on the notion that consent of the governed is achieved through free, open, and regular elections of those who are given the responsibility of governing. An important source of the legitimacy of the U.S. government is the nation's commitment to representative democracy, which features the notion of majority rule. Majorities (more than 50 percent of the voters) and pluralities (the leading

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vote getters, whether or not they constitute absolute majorities) choose the winners of election contests, and so officeholders take their positions on the basis of whom most voters prefer. If officeholders fall from public favor, they may be removed in subsequent elections.

Legitimacy is also enhanced by broad public support for the specific purposes of government stated in the preamble to the Constitution: to "insure domestic tranquility" (produce laws that maintain a peaceful and organized approach to living in the nation), to "provide for the common defense" (establish and maintain a military force to protect the nation from outside threats), to "promote the general welfare" (develop domestic policy programs to promote the welfare of the people), and to "secure the blessings of liberty" (guarantee basic freedoms, such as the rights of free expression and the ownership of property, even to those in the minority). Though people may have different opinions on how to achieve these broad goals, few in the United States would disagree with the ideals as stated in the abstract, or with the broad outlines of our republican form of government. Problems arise when public officials stray so far from these goals that their actions are deemed illegitimate by a near, if not absolute, majority. Yet the political system as a whole has been able to maintain its legitimacy, even under such trying circumstances, because it has been flexible enough to eventually rid itself of those ineffective actors, whether through elections, impeachment, or some other means. The relatively high degree of legitimacy that is maintained in the United States has helped the American government persist under the U.S. Constitution through good times and bad since 1789.

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"I agree to this Constitution, with all of its faults, if they are such: because I think a general government necessary for us, and there is no form of government but what may be a blessing to the people if well administered. I doubt too whether any convention we can obtain may be able to make a better constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me . . . to find this system approaching so near to perfection."

—Benjamin Franklin (1788)

1.4 American Political Culture

Political culture refers to the core values about the role of government and its operations and institutions that are widely held among citizens in a society. Political culture defines the essence of how a society thinks politically. It is transmitted from one generation to the next, and thus has an enduring influence on the politics of a nation. Every nation has a political culture, and the United States is no exception.

political culture: The values and beliefs about government, its purpose, and its operations and institutions that are widely held among citizens in a society; it defines the essence of how a society thinks politically and is transmitted from one generation to the next.

Whereas common ancestry characterizes the core of the political culture of many other nations, the United States has no common ancestry. Most other nations around the world, such as France, Britain, China, and Japan, are bound by a common birth lineage that serves to define the cultural uniqueness of the nation. For example, the Russian people share common political values and beliefs as part of their ancestors' historical experiences with czars, and then later with the communist regime. Britain, despite being a democracy, retains a monarchy as a symbolic gesture toward its historical antecedents. In many nations rich with such common ethnic traditions, these routines often serve to underscore the political culture of the nation.

The United States has no such common ancestry to help define its political culture. Its land was first occupied by many different Native American tribes, and then settled by people from many different parts of the world. Most of the immigrants who settled the colonies were seeking a better life from the political or religious persecution they experienced in their native countries, or they were seeking improved economic opportunities for themselves and their families. As America continued to grow through the centuries, it attracted immigrants from around the world, anxious to find a better life. These circumstances had a profound influence on the core values that have become engrained in the American political culture. The ideas

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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Constitutional Amendments That Have Extended Voting Rights in the United States

In several states, approval of the new U.S. Constitution drafted in 1787 hinged on adding a bill of rights. Supporters of the Constitution agreed, and the first 10 amendments, which compose the formal Bill of Rights, were formally added to the Constitution in 1791. Since then, the Constitution has been amended 17 times. Six of these 17 amendments extend Americans' voting rights, and no amendment has ever in any way restricted voting rights. Over the years, changes to the original Constitution have led to greater empowerment of the American people in determining the direction that government takes.

1870 1913 1920 1961

In 1870, the Fifteenth Amendment provided that the right to vote may not be denied on the basis of race.

In 1913, the Seventeenth Amendment changed the method of selection of U.S. senators from having state legislatures choose senators to having senators directly elected by the voters of a state.

In 1920, the Nineteenth Amendment provided voting rights to women by not allowing states to deny women the right to vote.

In 1961, the Twenty-third Amendment provided residents of the District of Columbia with electoral votes in presidential elections.

1962 1971

In 1962, the Twenty-fourth Amendment prevented states from levying a tax on people in order for them to vote in federal elections. Some states used a poll tax to discourage poor people and African Americans from voting.

In 1971, the Twenty-sixth Amendment provided voting rights to those who are 18 years of age by not allowing states to deny the franchise to those who have obtained this age.

For Critical Thinking and Discussion

1. What are the values in American political culture that have spurred constitutional changes promoting the extension of the franchise?
2. Can you think of any other possible amendments that might further promote voting rights?

generated by democratic political philosophers such as Thomas Hobbes and John Locke also significantly contributed to American political culture. These ideas were used by the Founders to justify the Declaration of Independence and the U.S. Constitution, and they continue to underlie American political culture today.

majority rule: The notion that the will of the majority should guide decisions made by American government.

The circumstances surrounding America's first and current immigrants, as well as the great ideas generated by Enlightenment philosophers, form the core set of values that define the American political culture. One of these core values is **majority rule**. From its earliest times, the American nation has been committed to the notion that the "will of the people" ought to guide public policy, thus underscoring the importance of popular sovereignty in the thinking of the Founders. Majority rule is the way in which popular sovereignty is actually exercised. Rarely will all of the people agree all of the time; and so it is what the majority of people prefer that generally guides decision making. Early local governments, such as town governments in some of the New England colonies, relied on town meetings, where all citizens were invited to attend, discuss, and vote, to make governmental decisions. Elections for most local and state offices, and elections for the U.S. Congress, are all based on the idea that those who make and enforce laws are duly elected by majorities. A more recent aspect of U.S. commitment to

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majority rule is its heavy reliance on public opinion polling as a gauge for assessing the performance of elected leaders, and to ensure that leaders respect public preferences for certain policy positions.

Although the preferences of the majority rule the day, another core value in the American political culture is minority rights. Those in the minority enjoy certain rights and liberties that cannot be taken away by government. The idea of the natural law (e.g., that people are "endowed by their creator with certain unalienable rights" that government cannot deny) is an important corollary to majority rule. The rights to speak freely, to choose a religion, or to decide not to practice religion at all are among the many liberties that are protected by the U.S. Bill of Rights, and are widely endorsed by the American public.

These rights are intended to inspire debate on issues, to guarantee religious freedoms, and to afford due process rights to those accused of crimes. The American political culture places a high value on individual liberty. The fact that many immigrants came to this country for the promise of greater freedom adds further credence to this proposition. Certainly there are some terrible black marks in American history that belie this claim. Among them are the perpetuation of slavery in the country up until the Civil War, the internment of Japanese Americans during World War II, and the treatment of early 1960s civil rights protesters in the South. Still, many Americans today view their nation as the world's "garden" of freedom and liberty, even if it has come to this status only slowly and sometimes with reluctance during its more than two centuries of existence.

Another core value in American political culture is the idea of **limited government**. Americans have generally supported the idea expressed by Thomas Jefferson that "the government that governs least governs best." From the days of the American Revolution, the colonists believed that the corruptive power of King George III and the British Parliament led to unfair treatment of the colonies. Suspicion of the government and those with power is firmly rooted in the psyche of American political culture. The "watchdog" function of the press, the separation of powers and the system of checks and balances among political institutions, and the rather negative connotation of the word "politics" all reflect an appreciation for limits and checks on those with authority. Corresponding to the value of limited government is the notion that communities and the private sector should take a role in helping

limited government: The value that promotes the idea that government power should be as restricted as possible.

Table 1.3 Daniel Elazar's Typology of American Political Culture

Many observers of American politics have used different approaches and typologies to describe American political culture. The late political scientist Daniel Elazar described three competing political subcultures, which he believed differentiated American political culture from that found in any other country in the world:*

Subculture	Description
Individualistic Subculture	Is skeptical of authority, keeps government's role limited, and celebrates the United States' general reliance on the marketplace
Moralistic Subculture	Has faith in the American government's capacity to advance the public interest and encourages citizens to participate in the noble cause of politics
Traditionalistic Subculture	Maintains a more ambivalent attitude toward both government and the marketplace, believing that politicians must come from society's elite, whereas ordinary citizens are free to stand on the sidelines

According to Elazar, different subcultures can be found in different geographic areas, and sometimes within a single area itself. For example, he described the political subculture in Texas as part traditionalistic (as manifested in the long history of one-party dominance in state politics) and part individualistic (as seen in the state government's commitment to support for private business and its opposition to big government).

*See Daniel J. Elazar, *American Federalism: A View from the States* (New York: Thomas Y. Crowell, 1966).

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SAUL LOEB/AFP/Getty Images

President Barack Obama speaks to a gathering of the National Association for the Advancement of Colored People (NAACP) at the group's 100th anniversary celebration in July 2009.

fellow citizens. Problems that may be solved without government should be solved that way. The French journalist Alexis de Tocqueville observed this tradition when he visited the United States in the early 1800s and credited the success of the American political system in part to citizens' strong interest in community and helping one another apart from government.[5]

Because the United States has no common ancestral or cultural bloodline, American political culture recognizes the value and strength derived from the diversity of its population—another important core value. At the base of the Statue of Liberty in New York Harbor is inscribed a poem by Emma Lazarus beginning with the phrase "Bring me your huddled masses, yearning to be free." Until the U.S. government adopted a restrictive immigration policy in the early 1920s, those huddled masses arrived in waves from different parts of the world, as the United States became the chosen destination for those seeking a better life. Joining freed African American slaves who were originally brought here against their will were legions of Italians, Irish, Germans, and other immigrants from Europe and elsewhere. The United States today is one of the most racially and ethnically diverse nations in the world. Integrating these many people into a united nation has not come easy; in fact, resistance to the notion of a "melting pot" has been common. The nation has been wracked at times with racial and ethnic strife to a degree that more homogeneous countries can more easily avoid. Government officials occasionally exacerbate these tensions by promoting policies that discriminate against various groups, including Native Americans, African Americans, Asian Americans, and Hispanic Americans. No stranger to ethnic and racial tensions himself, German dictator Adolph Hitler calculated that the diversity of the United States would eventually hamper its resistance against Germany's totalitarian aggression; in fact, American soldiers of different backgrounds, ethnicities, and religions fought in World War II. Much to Hitler's chagrin, U.S. diversity proved to be a source of strength, rather than weakness. Indeed, many Americans today believe that the heterogeneity of our society enhances the quality of our culture and helps guarantee the fairness of the government.

individualism: The value that individuals are primarily responsible for their own lot in life and that promotes and rewards individual initiative and responsibility. This value underlies America's reliance on a capitalist economy and free market system.

Americans also generally subscribe to the notion that individuals are primarily responsible for their lot in life—a value referred to as **individualism**. The seeds of this value were sown hundreds of years ago with the Puritans and their commitment to a strong work ethic that stressed that "what one sows determines what one reaps." In other words, hard work and intelligence should be rewarded. Although the U.S. government has assumed some responsibility to provide a safety net for citizens who suffer economically, the American political culture, through its primary reliance on a capitalist economic system, free markets, and individual effort, is one that promotes individual initiative and responsibility. Figure 1.3 depicts the heightened importance of the value of individualism in the American political culture, compared to other European democracies.

The value of individualism promotes another core value—equality of opportunity, or the idea that the role of government is to set the stage for individuals to achieve on their own, and that everyone should be given the same opportunity to achieve success. Indeed, America has been an attractive place for highly motivated individuals from around the world to immigrate so that they might have a fair chance of achieving personal success. Many immigrants today, particularly from Asia and Latin America, are attracted to the United States for the opportunities to achieve individual success.

The United States has long set itself apart from those nations whose histories include traditions of a rigid class system of privileged aristocracies and oligarchies and peasants with few or no rights or freedoms. In the United States there is no formal recognition of a class system; nor

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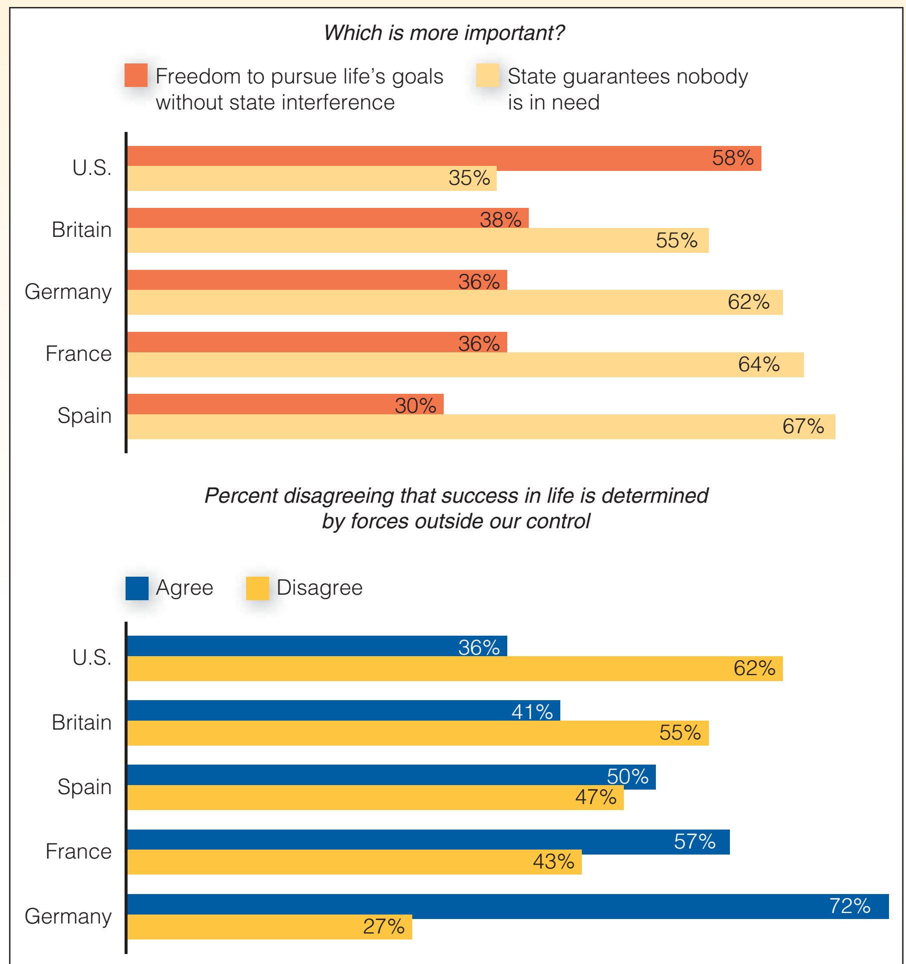
FIGURE 1.3 Individualism as a Value in the United States Compared to Other Democracies

A recent Pew Global Survey shows that Americas are more likely than their European counterparts to believe that "it is more important to pursue life's goals without government interference" and to disagree with the statement "success in life is determined by forces outside our control."



Based on data from Pew Global Survey, 2011.

is there a tradition of royalty, nobility, or monarchy. Indeed, Article I of the Constitution specifically prohibits both the federal government and the state governments from granting any title of nobility upon its citizens. Instead, American political culture values the so-called Horatio Alger myth. Alger was a popular writer in the late 1800s whose characters came from impoverished backgrounds but through pluck, determination, and hard work achieved huge success. Although this idealistic rags-to-riches notion often ignores the many harsh economic disparities that exist in the United States, it remains central to the American political culture. The stories of Benjamin Franklin and Abraham Lincoln exemplified this road to success, as do the more recent examples of Presidents Bill Clinton and Ronald Reagan, both of whom came from less-than-privileged circumstances to win the nation's highest political office and become leaders of the free world. Perhaps it is because of these success stories that so many Americans believe that they have boundless opportunities to better their lot on the basis of diligence and hard work.

These core values provide a window into American political culture. To be sure, there is plenty of room for disagreement as to how these values might be applied to specific situations, which we address in Chapter 10. In addition, these values are often in conflict. At the heart of the debate over affirmative action, for example, lies the value conflict pitting individualism against equality of opportunity. Those who oppose affirmative action in hiring claim that individuals should be evaluated exclusively based on who they are and what they can do rather than on their gender, race, or other demographic characteristic. Those supporting affirmative action claim that historical discrimination has led to a current job market that provides unequal opportunities for certain groups, such as racial minorities and women. Although these values do not always solve problems and policy debates, they do lay the groundwork for how American politics goes about settling problems and debating issues.

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1.5 Is American Democracy in Decline?

The old saying that "those who ignore the problems of the past are destined to repeat them" holds as true in American politics as it does in any other context. Certainly new issues and problems may arise, requiring innovative new thinking to address them. But many other difficulties the United States faces can be effectively addressed by casting an eye on the distant or not-so-distant past. A historical view can help place modern dilemmas in proper perspective.

The Case for Decline

Some recent observers of American politics have suggested that the American political system is in decline. Are we currently witnessing a deterioration of democracy in the United States? Is the American political system in jeopardy? Are the problems that the American system of government faces today beyond repair? To try to answer these questions, let's first look at the factors some cite as contemporary indicators of the decline of American democracy.

1. **The decline of the United States as an economic superpower?** The growth of the national economy from the Industrial Revolution through the post–World War II era established the United States as the preeminent fiscal power in the world for much of the twentieth century. This fiscal strength enabled the United States to establish the dollar as the benchmark unit of currency for the world, to defeat the Soviet Union in the Cold War, to build a military capability vastly superior to that of other nations, and to provide the leadership that brought democracy to many other nations. However, the significant growth of the Chinese economy over the past decade, coupled with the exploding U.S. national debt (and the willingness of China to underwrite much of that debt) has raised serious questions about the future of U.S. dominance over the world's economy. Concerns over the economic rise of China and decline of the United States are summarized in a recent study by the Congressional Research Service: ". . . the emergence of China as a major economic superpower has raised concern among many U.S. policymakers . . . that China will overtake the United States as the world's largest trade economy in a few years and the world's largest economy within the next two decades. In this context, China's rise is viewed as America's relative decline."[6] This report offers evidence of a decline in economic power citing projections of U.S. and Chinese gross domestic product (GDP), depicted in Table 1.4.

Table 1.4 Projections of U.S. and Chinese Gross Domestic Product (GDP), in Billions (from Global Insight)

	China	U.S.
2015	22,210	20,169
2020	35,734	27,584
2025	57,145	35,963

Congressional Research Service report "Is China a Threat to the U.S. Economy," January 23, 2007, page 15, Table 8 from Global Insights data.

2. **The death of capitalism?** The collapse of many of the largest financial institutions in the United States in 2008, and the subsequent "Great Recession," has raised questions about the viability of the free market system in contemporary society. In large part, the financial industry's drive in the 1990s and 2000s to capitalize on rising real estate markets drove financial institutions to rely on increasingly risky lending practices. Risky loans were bundled and sold off to investors in the form of real estate securities. Multibillion-dollar financial institutions, such as Citibank, Morgan Stanley, Lehman Brothers, Countrywide Mortgage, and AIG, among many others, found themselves in the red at the exact same time that the real estate market collapsed, thus freezing credit in the United States. The stock market tumbled, and the U.S. government needed to bail out many of the largest financial institutions just to keep the nation's financial system from collapse.

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The frantic drive for profits among the largest of these companies was identified as the source of economic ills not only in the United States, but around the world. Greed, inspired by capitalism, seemed to be the culprit of the world's economic woes, thus leading to questions about the viability of the free market system in the modern age.

3. **Policy paralysis caused by partisan gridlock?** Relations between the two major parties tend to ebb and flow with changing political moods and circumstances. Still, cross-party relations between Republicans and Democrats seemed to have reached such a low by 2011 that policymaking ceased to function. In recent years, whichever party has carried the White House has been forced to brace for a Senate opposition that uses the filibuster freely and without any limitation to impose a supermajority requirement of 60 senators for all legislative enactments. Many other bills can never even get out of committee. Meanwhile, in the House of Representatives, the president's opposition has ruled with an iron hand, rendering matters that had in the past proven perfunctory (such as the routine raising of the nation's debt ceiling) into a knockdown, drag-out fight between the two parties in Congress. The prospect of a government shutdown has loomed over every budget fight, and in October of 2013 partisan tensions did in fact lead to a shutdown of many federal government functions for more than two weeks. Party-line votes in Congress on most major legislative initiatives indicate a lack of any common ground whatsoever.
4. **Weak candidates for high office?** The relentless media hordes, 24-hour news cycles, and other impositions on the privacy of public figures has scared off nearly all of the most qualified public servants from seeking high public office. Whereas the prospect of a reduced income was once the primary disincentive to individuals taking on the burdens of public service, today a prospective politician must live a perfect life or risk being raked over the coals by his or her political rivals, media figures, and others. With so many experienced public servants reluctant to run, it is no wonder that a movie star (Arnold Schwarzenegger) and a WWF wrestler (Jesse Ventura) could rise to power in two of the most populated states in the union. Those Democrats who were looking for an alternative to Barack Obama in 2012 had to accept the reality that Obama had scared off all potential party challengers. Republican constituents who expressed frustration with their choice of candidates in the Republican primaries of 2012 were left to wonder why such popular Republican figures as New Jersey Governor Chris Christie and Indiana Governor Mitch Daniels never even joined the 2012 race. Democrats saw numerous party luminaries such as New Mexico Governor William Richardson and former Senate Majority Leader Thomas Daschle banished from the Obama administration for transgressions that might have been ignored in years past. Americans used to celebrate the proposition that in this country "anyone can grow up to be president"—today perhaps what's wrong with America is that "anyone can grow up to be president." Among the most qualified individuals, few do.
5. **Has money ruined American politics?** "Big money" now dominates American elections, in the form of contributions from those who seek to influence future officials, personal expenditures from candidates themselves, and general expenditures by political parties. The Supreme Court's landmark decision in *Citizens United v. FEC* (2010) seemed to cement the role that big money plays in determining election outcomes, paving the way for independent-expenditure political action committees (often called "super-PACs") to accept unlimited contributions from individuals, unions, and corporations for the purpose of making so-called "independent expenditures" on behalf of candidates; it thus enabled wealthy individuals to dominate the process. In 2011, just 22 donors provided the money for half of the $67 million funded by super-PACs! In some instances, anonymous outside groups poured millions of dollars into the process. Others were willing to stand up and be counted: consider that billionaire Sheldon Adelson singlehandedly kept Newt Gingrich's struggling presidential campaign afloat in 2012 with his donation of $10 million to a pro-Gingrich super-PAC. With a handful of individuals responsible for a large percentage of the donations in these campaigns, the corruptive influence of money appears to have reached new, dangerous heights.

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But Do These Problems Really Signify a Decline?

If we reexamine some of the criticisms of contemporary American politics with the benefit of historical perspective, we may reach far different conclusions about whether American democracy is now in a state of decline.

1. **The U.S. will remain an economic superpower.** Challenges to U.S. fiscal dominance, such as the current challenge of China, are nothing new. Forty years ago, for example, many policymakers expressed similar concerns about the imminent decline of U.S. economic power. In this era the concern was focused not on China, but on Japan. The Japanese economy flourished in the decades after World War II. A latecomer to modernization, Japan was able to avoid the pitfalls of industrialization experienced by the United States and other advanced democracies prior to World War II. Once converted to a free market system after the war, Japan's economy took off quickly. By the 1970s, Japan had the world's second largest economy and appeared to be closing in on the United States. Gross domestic product (GDP) in Japan grew from $8 billion in 1955, to $32 billion in 1965, to $148 billion in 1975, to $323 billion in 1985. By 1990 Japan's per capita GDP exceeded per capita GDP in the United States. The sharp upward trajectory alarmed many U.S. policymakers, who felt that Japan's rise would ultimately derail the U.S. dominance of world fiscal policy. Yet today Japan offers no significant threat to the economic power of the United States. The rapid rise of Japan's economy left it unable to effectively deal with a recessionary period of any length. Consequently, the dire predictions of the U.S. economic fall to Japan were never realized. Furthermore, in 2014 China's economy was already showing signs of slower growth, leading economists to recognize the likely continued dominance of the United States well into the twenty-first century.[6]
2. **Capitalism is not dead.** The Great Recession of 2008 and the events that led up to it certainly do not mark the first time that speculation in free markets led to economic catastrophe. A panic in 1837 led to stymied economic growth for more than three years, a severe recession in 1873 retracted growth for six years, and an economic panic in 1893 set off a series of bank failures. A stock market crash in 1929 produced a decade-long

Stan Honda/AFP/Getty Images

Trading on the floor of the New York Stock Exchange remains an important symbol of American capitalism.

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"Great Depression." These and many other economic downturns in U.S. history, aggravated by speculation and overly exuberant investors, have led to extremely tough economic times. But the ills of the free market have never limited the ability of capitalism to provide the medicine for recovery, and then some. Panics, recessions, and depressions have always been corrected by bull markets, opportunities, and resurgences. Capitalism has been declared dead many times in U.S. history. The approach of each economic downturn was accompanied by claims that the U.S. experiment with a free market system had finally failed. In fact, the free markets operate in natural cycles of growth and retraction. Just as the free market system was declared dead at earlier times in American history, so too were many claiming that the Great Recession of 2008 was the last nail in the coffin of American capitalism. However, just as the cyclical nature of free market growth calmed the fears of the skeptics before, so too has the recent growth of the U.S. stock market and decline in unemployment quieted the naysayers once again.

3. **The polarization of the two major political parties has not paralyzed the lawmaking process.** The political parties' recent polarization is hardly unprecedented: at various times in history (e.g., during the Civil War, the New Deal) the parties have stood in stark contrast on nearly all the major issues of the time. Some democratic theorists argue that a marked differentiation between the two parties may actually contribute to democracy under a "responsive theory of democracy": the two parties disagree on the issues and then allow the public to express its opinion through elections. For all the talk of polarization, the 111th Congress passed 43 major pieces of legislation in 2009–2010, including the Obama administration's centerpiece, health care reform. Since the 2010 midterm elections, Republicans and Democrats have managed to approve hundreds of bills and resolutions. The parties may be growing more distinct, but government continues to make decisions.
4. **The pool of candidates who run for high office is strong.** The dream of exercising political power continues to attract many of the most qualified individuals to run for president and other powerful positions in government. In recent years the Senate has been described as an institution of 100 men and women, "all of whom want to be president," and many have tossed their hats in the ring only to be rejected by voters. Meanwhile, those who are successful can hardly be deemed unqualified for the position: Of the last five men to hold the presidency, four sported degrees from Harvard or Yale; two of those chief executives (Reagan and George W. Bush) sported experience running two of the largest states in the nation (California and Texas, respectively). That elite group also included among them a Rhodes Scholar (Clinton) and a two-term vice president (George H. W. Bush). Americans frustrated with the choice of candidates must face up to the reality that stars of the two political parties tend to lose their luster the moment they run for high office. Consider that public opinion polls showed Rudolph Giuliani as a popular candidate for the presidency in 2008; yet when Giuliani finally joined the fray during the early primary season, Republican primary voters soured on his candidacy. Perhaps the grass always seems greener somewhere else . . . in truth, candidates for the presidency today are as qualified as ever.
5. **The influence of money does not spell the end of American politics.** American elections have always been dominated by individuals with immense power and influence. For much of this nation's history, political machines all but controlled the nomination process and wielded heavy influence on politicians who benefitted from their respective handouts and other forms of largesse. Whether it was Boss Tweed and Tammany Hall in New York City, the Thomas Prendergast political machine in Missouri, or the Daley machine in Chicago, power has always been wielded by a relatively few, elite individuals. The recent dominance of money in politics has shifted the source of power from those machines to the extremely wealthy, but that may actually represent a positive development of sorts, as both parties have enjoyed their share of big donors and fundraising prowess in recent years. Those who think money corrupts politics might want to consider the far less attractive alternative that used to mark the elections process.

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FROM YOUR PERSPECTIVE

Courting the Youth Vote

Candidates and political parties often try to increase turnout as a means of enhancing their prospects in an election. However, numerous nonpartisan organizations also engage in special efforts to encourage the so-called youth vote in particular. These organizations may target young voters primarily for two reasons: (1) young voters represent the future of American democracy, and (2) youth turnout has tended to be lower than turnout among older Americans. Even in 2008 and 2012—when the youth vote increased substantially as compared to past presidential elections—barely more than half of eligible voters aged 18 to 29 voted, leaving that group well behind turnout rates of the electorate as a whole (more than 60 percent or more of eligible Americans voted in 2008 and 2012).

Ann Hermes/The Christian Science Monitor/Getty Images

Pictured here are college students participating in the "Rock the Vote" campaign in 2012.

Among the many organizations that run programs to encourage young voters to exercise their voting rights are the following:

- Rock the Vote, which claims to have registered more than 2 million new voters in 2008 alone (see rockthevote.com);
- CIRCLE (Center for Information and Research on Civic Learning and Engagement), which conducts research on the dynamics of young people's voting behavior (see www.civicyouth.org); and
- Youth Vote.org, a Web site that provides a plethora of information for young people to learn how to register to vote and why it is important to do so.

For Critical Thinking and Discussion

1. Which of the presidential candidates do you think won the vote among college students in 2012? Why did this candidate appeal more to students?
2. Why do you think college-age students turn out in relatively lower numbers, as compared to older voters?
3. How effectively did the candidates in 2012 address issues that were important to college students?

* * * * * *

History does not literally repeat itself. The specific people, circumstances, and events certainly change. But history can help us identify patterns, recurring problems, and trends in how the American political system functions and resolves conflicts. The preceding discussion of some of the contemporary arguments for why American democracy may be in a state of decline helps us frame current conditions. In doing so, we may gain a greater understanding of the challenges facing the nation today. Certainly, many contemporary challenges are no less daunting than problems the nation has encountered over the past two centuries. Throughout this book, a historical perspective on contemporary problems offers a sense of how the past might help us understand politics today.

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SUMMARY: PUTTING IT ALL TOGETHER

1.1 History Repeats Itself

- The patterns of history provide a powerful tool for understanding American government today.

1.2 Forms and Functions of Government

- The development of the American political system is grounded in the philosophy of John Locke and Jean-Jacques Rousseau, who argued that government is necessary and that it exists for the purpose of protecting the people that it serves. The "social contract" theory states that natural law gives people certain unalienable rights that government cannot take away, and that the people give government authority to rule, but the people can withdraw that authority if government does not serve the people's interests.
- Democracy may be distinguished from other forms of government in that it is a form of government in which the people, either directly or through elected representatives, hold power and authority.

1.3 American Government and Politics

- Democracy includes at its core the idea of popular sovereignty. The United States practices a form of democracy known as "representative democracy," where the people indirectly rule by electing leaders who are responsible for making and carrying out policies and laws.

1.4 American Political Culture

- The political culture in America is reflected in the Constitution and the way in which the political system deals with and decides political debates. Among the core values guiding the American political culture are majority rule, liberty, limited government, diversity, individualism, and equality of economic opportunity.

1.5 Is American Democracy in Decline?

- Although the current American government has been in place for more than 200 years, questions have been raised about whether this political system is in a state of decline. Lower voter turnout, confusing election outcomes, negativity in politics, and the influence of money in policy outcomes have been offered as evidence of a decline. However, a review of historical patterns in American politics suggests that these seemingly contemporary problems are chronic, and the American political system has effectively dealt with these and many other problems in the past.
- Viewing American government from a historical perspective may enrich our understanding of how the political system works. History can help us identify patterns, recurring problems, and trends in how the American political system functions and resolves conflicts. Many contemporary challenges are no more significant than problems the nation has encountered over the past two centuries.

KEY TERMS

anarchy (p. 8)
authoritarianism (p. 8)
authority (p. 8)
democracy (p. 8)
direct democracy (p. 10)
government (p. 8)
individualism (p. 14)
legitimacy (p. 8)
limited government (p. 13)
majority rule (p. 12)
monarchy (p. 8)
natural law (p. 10)
oligarchy (p. 8)
political culture (p. 11)
politics (p. 9)
popular sovereignty (p. 10)
power (p. 8)
representative democracy (p. 10)
social contract (p. 8)
theocracy (p. 8)

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TEST YOURSELF

1. The "social contract" theory between the governing and the governed was first developed by
   a. Thomas Jefferson.
   b. Socrates.
   c. Thomas Hobbes.
   d. Jean Jacques Rousseau.

2. A form of government in which one political party, one group, or one person maintains control and suppresses the views of outsiders is
   a. theocracy.
   b. an oligarchy.
   c. authoritarian.
   d. in anarchy.

3. Distinguish between the political concepts of "power" and "legitimacy."

4. The form of government that best describes that in the United States is
   a. direct democracy.
   b. representative democracy.
   c. oligarchy.
   d. monarchy.

5. Which of the following documents establishes the principle of popular sovereignty?
   a. The preamble to the Constitution
   b. The Bill of Rights
   c. The Declaration of Independence
   d. Article I of the Constitution

6. What did John Locke mean by the term *natural law*, and how is that concept reflected in the Declaration of Independence?

1. d. (LO 1-2); 2. c. (LO 1-2); 4. b. (LO 1-3); 5. a. (LO 1-3);
7. a. (LO 1-4); 8. d. (LO 1-4); 10. c. (LO 1-5); 11. a. (LO 1-5)

7. Which of the following of Elazar's "subcultures" in the United States is characterized by a skeptical view of authority and a desire to limit the role of government?
   a. Individualistic
   b. Moralistic
   c. Traditionalistic
   d. Rationalistic

8. The notion of popular sovereignty is best supported by which of the following values?
   a. Minority rights
   b. Diversity
   c. Individualism
   d. Majority rule

9. Individualism and equality are two values that underlie the American political culture. Define each and describe how these values may come into conflict on a specific policy issue.

10. Today many policymakers are concerned that China will soon overtake the role of the world's leading economic power. In the 1970s and 1980s, which nation was the subject of similar fears?
   a. Germany
   b. Brazil
   c. Japan
   d. Pakistan

11. The U.S. Supreme Court ruling in 2010 that paved the way for the so-called "super-PACs" was
   a. *Citizen's United v. F.E.C.*
   b. *Miller v. California.*
   c. *Miranda v. Arizona.*
   d. *U.S. v. Davis.*

12. What are the key arguments in support of and in opposition to the notion that partisan gridlock has paralyzed policymaking over the past few years? Which side of the argument do you support? Why?

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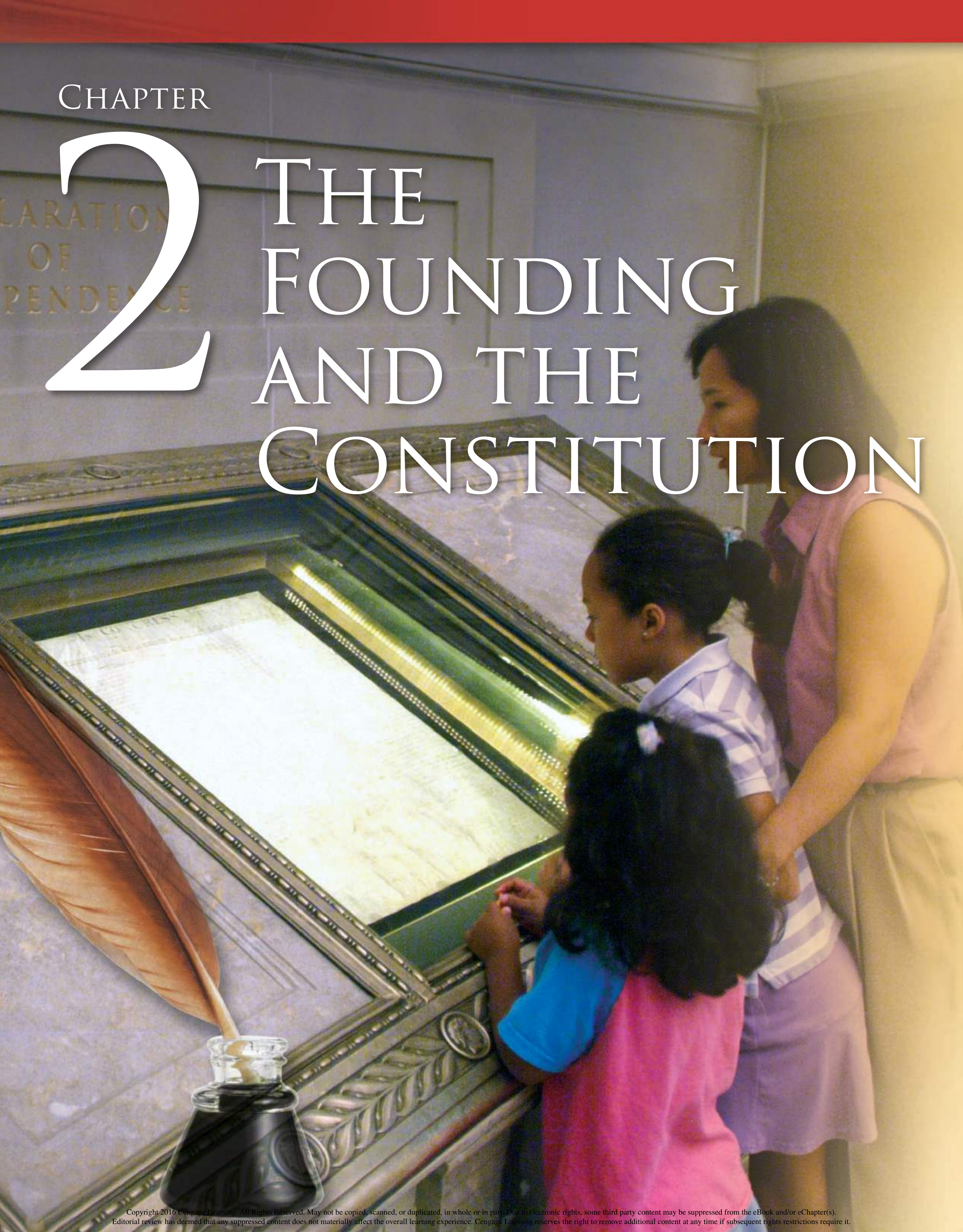

Chapter 2 The Founding and the Constitution

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LEARNING OBJECTIVES

2.1 THE BEGINNINGS OF A NEW NATION

- Discuss the origins and causes of the American Revolution
- Describe the first national government under the Articles of Confederation, including its strengths, weaknesses, and struggles

2.2 THE CONSTITUTIONAL CONVENTION

- Compare and contrast the various plans for the new constitution and the obstacles to agreement among the different colonies

2.3 THE NEW CONSTITUTION

- Explain the principles incorporated in the new constitution, including popular sovereignty, the separation of powers, federalism, and limited government

2.4 THE RATIFICATION BATTLE

- Evaluate the advantages enjoyed by those seeking to ratify the new constitution
- Assess the role that the Federalist Papers played in ratification
- Explain the origins of the Bill of Rights and its role in securing ratification

2.5 CHANGING THE CONSTITUTION

- Describe the process of amending the Constitution
- Outline the informal types of constitutional change, including different forms of constitutional interpretation

WATCH & LEARN MindTap® **for American Government**

Watch a brief "What Do You Know?" video summarizing The Constitution.

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The U.S. Constitution has governed the United States continuously since 1789; it is the longest-lasting governing document in the world today. Thus the enduring capacity of the U.S. Constitution to govern for better than two centuries represents something of a miracle: by one estimate, the average lifespan of national constitutions over this same period was just 17 years. Other countries' constitutions have been especially vulnerable during crises; by contrast, the U.S. Constitution has survived many such crises, including the Civil War of the 1860s, the Great Depression of the 1930s, two world wars, the Cold War against the Soviet Union, and the 9/11 terrorist attacks. How has the American constitutional experiment succeeded for so long? The secret lies in its capacity to serve two functions at the same time: it provides stability (just 17 amendments passed during the last two centuries), while at the same time offering the flexibility to adapt to changes in America's political culture. Woodrow Wilson addressed this when he wrote: "the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."

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1754–63
French and Indian War waged between Great Britain and France, resulting in significant debts for Great Britain and later efforts by England to exact revenue from the colonies

1776
Continental Congress consisting of delegates from all 13 colonies adopts the Declaration of Independence

1787
Constitutional Convention meets in Philadelphia to draft new constitution; Great Compromise featuring a bicameral legislature balancing interests of large and small states forges consensus among the delegates

1787–88
Federalist Papers published, outlining philosophy and justification of proposed Constitution

Then

1933

Bettmann/CORBIS

Franklin Delano Roosevelt, signing into law emergency economic relief legislation in May 1933, during the first 100 days of his administration.

The Constitution's capacity to evolve with changing times is hardly a given: when change does occur it takes place slowly, and often with numerous starts and stops along the way. As the United States sank further into the Great Depression during the early 1930s, certain principles of government relations remained essentially unchanged from the early days of the republic. That included the "non-delegation doctrine," which prohibited Congress from passing its constitutionally prescribed lawmaking powers to other branches. Beginning in 1933, a forceful new chief executive, Franklin Roosevelt (FDR), offered new and innovative solutions to the nation's economic woes. Rejecting the laissez-faire approach to government's role in the economy, FDR encouraged the promulgation of new rules for industries that had never been regulated before, as the unwieldy size of Congress left that branch largely powerless to effectively hold those businesses accountable with detailed regulations. FDR had already pressed Congress to pass broad economic regulations under an expanded definition of the interstate commerce clause. Next, he planned to stretch the Constitution further than ever before. Specifically, on June 16, 1933, he signed into law the National Industrial Recovery Act (NIRA), by which Congress authorized the chief executive to approve codes generated by trade associations regarding maximum hours of labor, minimum rates of pay, and working conditions in different lines of business. The Roosevelt administration approved over 700 industry codes in all before the Supreme Court invalidated portions of the NIRA in *Schechter Poultry Corp v. U.S.* (1935). Still, even that legal setback could not stop the growth of the welfare state under Roosevelt and his successors: Between 1935 and 1980 the federal government grew exponentially on the backs of executive agencies issuing rules and regulations that clearly amounted to lawmaking. The Constitution's capacity to stretch eventually afforded the federal government more flexibility to offer innovative solutions for an increasingly complex society.

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1788
Constitution ratified by required three-fourths of state ratifying conventions

1791
Bill of Rights ratified

1972
Congress (by two-thirds vote of both houses) proposes the Equal Rights Amendment for women (it failed to garner the support of the required 38 state legislatures necessary for ratification)

1992
The Twenty-Seventh Amendment is ratified 203 years after being proposed by the first Congress

Now

2011

AP Images/J. Scott Applewhite

President Barack Obama, addressing the "Families USA Health Action Conference" on January 28, 2011.

A decade into the twenty-first century, the promise of universal health care remained unfulfilled despite the efforts of several earlier presidents to shepherd such legislation through Congress. The election of President Barack Obama gave new hope to universal care advocates that their day might finally arrive. In 2010 the Democratic Congress abided by Obama's wishes when it narrowly passed health care reform that approached a universal care standard by requiring all individuals to purchase some form of health insurance by January 1, 2014, or be subject to financial penalties. The so-called "individual mandate" had enjoyed the support of conservatives two decades earlier; but now it was opposed vehemently by Republicans in Congress, conservative interest groups, and, perhaps most notably, many constitutional traditionalists. Obama's critics claimed that the mandate was a symbol of "social totalitarianism"; meanwhile, defenders of the law argued that fairness dictated such a requirement, given that any individual may find him- or herself in need of expensive emergency care at some point. Lower courts divided on the issue: while a handful of appellate courts upheld the law, the U.S. Court of Appeals for the 11th Circuit ruled that the mandate represents "a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy. . . ." In short, President Obama was trying to stretch the Constitution in new and unprecedented ways. On June 28, 2012, the Supreme Court accepted President Obama's argument that the individual mandate was constitutional on the ground that it was a valid exercise of Congress's taxing power. The federal government's efforts to offer innovative solutions to modern problems will continue to push traditional constitutional principles in new directions. In that sense, the battle over policy initiatives such as health care reform remains inextricably bound to a larger battle over the nature of the Constitution itself, and its capacity to adapt to changing times.

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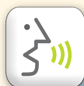
2.1 The Beginnings of a New Nation



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Throughout the seventeenth and early eighteenth centuries, thousands of people migrated to North America. Many came in search of greater economic opportunities; others fled to escape religious persecution and sought freedom to worship as they pleased. Slowly, a culture dedicated to the protection of social and civil rights began to take shape in the colonies.

The political structures that governed the colonies up through the early 1760s roughly paralleled those of England during the same period: (1) royal governors served as substitutes for the king in each individual colony; (2) a governor's council in each colony served as a mini House of Lords, with the most influential men in the colony serving effectively as a high court; and (3) the general assembly in each colony was elected directly by the qualified voters in each colony and served essentially as a House of Commons, passing ordinances and regulations that would govern the colony. Up until the middle of the eighteenth century, the colonies' diverse histories and economies had provided little incentive for them to join together to meet shared goals. In fact, those in Great Britain feared other European powers attempting to encroach on their American holdings far more than they feared any form of uprising on the part of the colonists.

The French and Indian War that was waged in the colonies from 1754 through 1763 was a significant turning point in British–colonial relations.[1] For nearly a decade, the French, from their base in Canada, fought the British in the colonies for control of the North American empire. Both nations were interested in rights to the territory that extended west of the colonial settlements along the Atlantic seaboard and over the Appalachian Mountains into the Ohio Valley. Britain defeated France, and under the terms of the Treaty of Paris (1763), which settled the war, all territory from the Arctic Ocean to the Gulf of Mexico between the Atlantic Ocean and the Mississippi River (except for New Orleans, which was ceded to Spain, an ally of Britain during the war) was awarded to Britain. But along with the acquisition of all this new territory came a staggering debt of approximately 130 million pounds. Administering its huge new North American empire would be a costly undertaking for Britain.

British Actions

Following the war, Britain imposed upon its colonies a series of regulatory measures intended to make the colonists help pay the war debts and share the costs of governing the empire. To prevent colonists from ruining the prosperous British fur trade, the Proclamation of 1763 restricted them to the eastern side of the Appalachian chain, angering those interested in settling, cultivating, and trading in this new region. The Sugar Act (1764) was the first law passed by Parliament for the specific purpose of raising money in the colonies for the Crown. (Other regulatory acts passed earlier had been enacted for the purpose of controlling trade.) The Sugar Act (1) increased the duties on sugar; (2) placed new import duties on textiles, coffee, indigo, wines, and other goods; and (3) doubled the duties on foreign goods shipped from England to the colonies. The Stamp Act (1765) required the payment of a tax on the purchase of all newspapers, pamphlets, almanacs, and commercial and legal documents in the colonies. Both acts drew outrage from colonists, who argued that Parliament could not tax those who were not formally represented in its chambers. Throughout late 1765 and early 1766, angry colonists protested the Stamp Act by attacking stamp agents who attempted to collect the tax, destroying the stamps, and boycotting British goods. When English merchants complained bitterly about the loss of revenue they were suffering as a result of these colonial protests, Parliament repealed the Stamp Act in March 1766.[2]

Colonial Responses

As a result of the Stamp Act fiasco, positions on the state of British rule were articulated both in the colonies and in Parliament. Following the lead of the Virginia assembly, which sponsored

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Patrick Henry, a leading revolutionary who coined the phrase "Give me liberty or give me death," speaking before the Virginia House of Burgesses in 1775.

the Virginia Resolves that had declared the principle of "no taxation without representation," an intercolonial Stamp Act Congress met in New York City in 1765. This first congressional body in America issued a Declaration of Rights and Grievances that acknowledged allegiance to the Crown, but reiterated the right to not be taxed without consent. Meanwhile, the British Parliament—on the same day that it repealed the Stamp Act—passed into law the Declaratory Act, asserting that the king and Parliament had "full power and authority" to enact laws binding on the colonies "in all cases whatsoever."

Despite the colonists' protests, Parliament continued to pass legislation designed to raise revenue from the colonies. The Townshend Acts, passed in 1767, imposed duties on various items, including tea, imported into the colonies and created a Board of Customs Commissioners to enforce the acts and collect the duties. When the colonists protested by boycotting British goods, in 1770 Parliament repealed all the duties except that on tea. The Tea Act, enacted in 1773, was passed to help the financially troubled British East India Company by relaxing export duties and allowing the company to sell its tea directly in the colonies. These advantages allowed the company to undersell colonial merchants. Angry colonists saw the act as a trick to lure Americans into buying the cheaper tea and thus ruining American tea sellers. On December 16, 1773, colonists disguised as Mohawk Indians boarded ships in Boston Harbor, and threw overboard their cargoes of tea. Outraged by this defiant Boston Tea Party, Parliament in 1774 passed the Intolerable Acts (known in the colonies as the Coercive Acts), designed to punish the rebellious colonists. The acts closed the port of Boston, revised the

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Massachusetts colonial government, and required the colonists to provide food and housing for British troops stationed in the colonies.

The colonists had had enough. In September 1774, 56 leaders from 12 colonies (there were no delegates from Georgia) met in Philadelphia to plan a united response to Parliament's actions. This First Continental Congress denounced British policy and organized a boycott of British goods. Although the Congress did not advocate outright independence from England, it did encourage the colonial militias to arm themselves and began to collect and store weapons in an arsenal in Concord, Massachusetts. The British governor general of Massachusetts ordered British troops to seize and destroy the weapons. On their way to Concord, the troops met a small force of colonial militiamen at Lexington. Shots were exchanged, but the militiamen were soon routed and the British troops marched on to Concord. There they encountered a much larger group of colonial militia. Shots again were fired, and this time the British retreated. The American Revolution had begun.

The Decision for Independence

Despite the events of the early 1770s, many leading colonists continued to hold out hope that some settlement could be reached between the colonies and Britain. The tide turned irrevocably in early 1776, when one of the most influential publications of this period, *Common Sense*, first appeared. In it, Thomas Paine attacked King George III as responsible for the provocations against the colonies, and converted many wavering Americans to the cause of independence.[3]

On June 7, 1776, Richard Henry Lee, a delegate to the Second Continental Congress from Virginia, proposed a resolution stating that "these United Colonies are, and of right ought to be, free and independent States." Of course the Congress needed a formal document both to state the colonies' list of grievances and to articulate their new intention to seek independence. The Congress thus appointed a committee to draft a document that would meet those objectives.

The committee, consisting of Thomas Jefferson, John Adams, Roger Sherman, Robert Livingston, and Benjamin Franklin, appointed Jefferson to compose the document. At first, Jefferson may have seemed an unlikely choice to produce such a declaration. The 33-year-old lawyer and delegate to the Continental Congresses of 1775 and 1776 had played a relatively minor role in those bodies' deliberations. But according to historian David McCullough, Adams initially believed that the document was really just a symbolic "side show," and quickly justified the choice of Jefferson over himself as follows: "Reason first: you are a Virginian and a Virginian ought to appear at the head of this business. Reason second: I am obnoxious, suspected and unpopular. You are very much otherwise. Reason third: You can write ten times better than I can." Later, Adams fumed for decades over the larger-than-life reputation Jefferson gained on the basis of authoring the nation's first great political document.[4]

Declaration of Independence: Formal document listing colonists' grievances and articulating the colonists' intention to seek independence; formally adopted by the Second Continental Congress on July 4, 1776.

The committee submitted its draft to Congress on July 2, 1776; after making some changes, Congress formally adopted the document on July 4. The **Declaration of Independence** restated John Locke's theory of natural rights and the social contract between government and the governed.[5] Locke had argued that although citizens sacrifice certain rights when they consent to be governed as part of a social contract, they retain other inalienable rights. In the Declaration, Jefferson reiterated this argument with the riveting sentence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." Jefferson went on to state that whenever government fails in its duty to secure such rights, the people have the right to "alter" or "abolish" it and institute a new one. Through the centuries, America's political leaders have consistently invoked the Declaration of Independence as perhaps the truest written embodiment of the American Revolution. Before independence could become a reality, however, the colonists had to fight and win a war with Great Britain.

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The First National Government: The Articles of Confederation

The colonies also needed some sort of plan of government to direct the war effort. The Second Continental Congress drew up the **Articles of Confederation**, a written statement of rules and principles to guide the first continent-wide government in the colonies during the war and beyond. Although the document was initially adopted by Congress in 1777, it was not formally ratified by all 13 states until 1781. The Articles of Confederation created a "league of friendship" among the states, but the states remained sovereign and independent, with the power and authority to rule the colonists' daily lives. The sole body of the new national government was the Congress, in which each state had one vote. As shown in Table 2.1, the Congress enjoyed only limited authority to govern the colonies: it could wage war and make peace, coin money, make treaties and alliances with other nations, operate a postal service, and manage relations with the Native Americans.[6] But Congress had no power to raise troops, regulate commerce, or levy taxes, which left it dependent on state legislatures to raise and support armies or provide

Articles of Confederation: The document creating a "league of friendship" governing the 13 states during and immediately after the war for independence; hampered by the limited power the document vested in the legislature to collect revenue or regulate commerce, the Articles eventually proved unworkable for the new nation.

Table 2.1 The Articles of Confederation and the U.S. Constitution: Key Features

Articles of Confederation Provisions	Problems Generated	1787 Federal Constitution
Unicameral (one-house) Congress with each state having one vote, regardless of population	Gave smaller, less populated states disproportionate power in lawmaking	Bicameral (two-house) legislature with one house apportioned by population (House of Representatives) and second house (Senate) apportioned equally among states (two senators from each state)
Approval by 9 of 13 states required for most legislative matters	Restricted lawmaking by simple majorities, halting the legislative process in most cases	Approval of simple majority (one-half plus one) of both houses required for most legislation
No separate executive or judiciary	Legislative abuses went unchecked	Three separate branches of government: legislative, executive, and judicial
Congress did not have the power to regulate foreign or interstate commerce	States negotiated separately among themselves and with foreign powers on commercial matters, to the detriment of the overall economy	Congress given power to regulate interstate and foreign commerce
Congress did not have the power to levy or collect taxes	Suffering from the economic depression and saddled with their own war debts, states furnished only a small portion of the money sought by Congress	Congress given power to levy and collect taxes
Congress did not have the power to raise an army	Once the war with Britain had ended, states were reluctant to provide any support for an army	Congress given power to raise and support armies
Amendments to Articles required unanimous approval of state legislatures	Articles were practically immune from modification, and thus inflexible to meet changing demands of a new nation	Amendments to Constitution require two-thirds vote of both houses of Congress, ratification by three-fourths of states

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other services. Congress's inability to raise funds significantly hampered the efforts of George Washington and the Continental Army during the war against Britain. Although Congress employed a "requisition system" in the 1780s, which essentially asked that states voluntarily meet contribution quotas to the federal government, the system proved ineffective. New Jersey, for example, consistently refused to pay such requisitions. Reflecting the colonists' distrust of a strong centralized government, the Articles made no provision for a chief executive who could enforce Congress's laws.

The limited powers of the central government posed many problems, but changing the Articles of Confederation to meet the needs of the new nation was no easy task. The Articles could be amended only by the assent of all 13 state legislatures, a provision that made change of any kind nearly impossible. Wealthy property owners and colonial merchants were frustrated with the Articles for various reasons. Because Congress lacked the power to regulate interstate and foreign commerce, it was exceedingly difficult to obtain commercial concessions from other nations. Quarrels among states disrupted interstate commerce and travel. Finally, a few state governments (most notably, that of Pennsylvania) had come to be dominated by radical movements that further threatened the property rights of many wealthy, landowning colonists.

These difficulties did not disappear when the war ended with the Americans' victory in 1783. Instead, an economic depression, partially caused by the loss of trade with Great Britain

North Wind Picture Archives

Daniel Shays leads a rebellion of farmers to a Massachusetts courthouse in 1786 to protest the state legislature's inaction.

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and the West Indies, aggravated the problems facing the new nation. In January 1785, an alarmed Congress appointed a committee to consider amendments to the Articles. Although the committee called for expanded congressional powers to enter commercial treaties with other nations, no action was taken. Further proposals to revise the Articles by creating federal courts and strengthening the system of soliciting contributions from states were never even submitted to the states for approval; congressional leaders apparently despaired of ever winning the unanimous approval of the state legislatures needed to create such changes.

Then in September 1786, nine states accepted invitations to attend a convention in Annapolis, Maryland, to discuss interstate commerce. Yet when the Annapolis Convention opened on September 11, delegates from only five states (New York, New Jersey, Delaware, Pennsylvania, and Virginia) attended. A committee led by Alexander Hamilton, a leading force at the Annapolis meeting, issued a report calling upon all 13 states to attend a convention in Philadelphia the following May to discuss all matters necessary "to render the constitution of the federal government adequate to the exigencies of the Union." At the time, few knew whether this proposal would attract more interest than had previous calls for a new government.

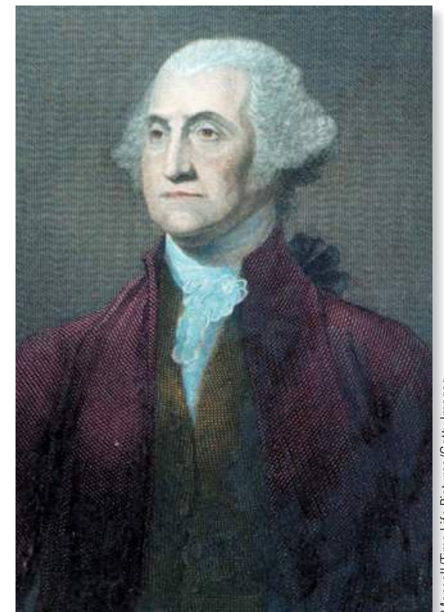
Events in Massachusetts in 1786–1787 proved a turning point in the creation of momentum for a new form of government. A Revolutionary War veteran, Daniel Shays was also one of many debt-ridden farmers in Massachusetts, where creditors controlled the state government. Shays and his men rebelled against the state courts' foreclosing on the farmers' mortgages for failure to pay debts and state taxes.[7] When the state legislature failed to resolve the farmers' grievances, Shays's rebels stormed two courthouses and a federal arsenal.[8] Eventually the state militia put down the insurrection, known as **Shays's Rebellion**, but the message was clear: a weak and unresponsive government carried with it the danger of disorder and violence. In February 1787, Congress endorsed the call for a convention to serve the purpose of drafting amendments to the Articles of Confederation, and by May 11 states had acted to name delegates to the convention to be held in Philadelphia.

Shays's Rebellion: Armed uprising by debt-ridden Massachusetts farmers frustrated with the state government.

Constitutional Convention: Meeting of delegates from 12 states in Philadelphia during the summer of 1787, at which was drafted an entirely new system to govern the United States.

2.2 The Constitutional Convention

The **Constitutional Convention** convened on May 25, 1787, with 29 delegates from 9 states in attendance. Over the next four months, 55 delegates from 12 states would participate. Fiercely resistant to any centralized power, Rhode Island sent no delegates. Some heroes of the American Revolution like Patrick Henry refused appointments due to their opposition to the feelings of nationalism that had spurred the convention to be held in the first place. Meanwhile, lending authority to the proceedings were such well-known American figures as George Washington, Alexander Hamilton, and Benjamin Franklin. (The 36-year-old James Madison of Virginia was only beginning to establish a reputation for himself when he arrived in Philadelphia; meanwhile, John Adams and Thomas Jefferson were both on diplomatic assignment in Europe.)



Mansell/Time Life Pictures/Getty Images

Portrait of George Washington, circa 1775. Washington was elected president of the Constitutional Convention in Philadelphia.

The delegates, who unanimously selected Washington to preside over the convention, were united by at least four common concerns: (1) the United States was being treated with contempt by other nations, and foreign trade had suffered as a consequence; (2) the economic radicalism of Shays's Rebellion might spread in the absence of a stronger central government; (3) the Native Americans had responded to encroachment on their lands by threatening frontiersmen and land speculators, and the national government had been ill-equipped to provide citizens with protection; and (4) the postwar economic depression had worsened, and the national government was powerless to take any action to address it.[9] Of course, on many other matters the delegates differed. Those from bigger, more heavily

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populated states such as Virginia and Pennsylvania wanted a central government that reflected their larger population bases, whereas those from smaller states like Georgia and Delaware hoped to maintain the one-state, one-vote principle of the Articles.

Plans and Compromises

It quickly became evident that a convention originally called to discuss amendments to the Articles of Confederation would be undertaking a more drastic overhaul of the American system of government. Members of the Virginia delegation got the ball rolling when they introduced the **Virginia Plan**, also known as the "large states plan," which proposed a national government consisting of three branches—a legislature, an executive, and a judiciary. The legislature would consist of two houses, with membership in each house proportional to each state's population. The people would elect members of one house, and the members of that house would then choose members of the second house. The legislature would have the power to choose a chief executive and members of the judiciary, as well as the authority to legislate in "all cases to which the states are incompetent" or when the "harmony of the United States" demands it. Finally, the legislature would have power to veto any state law. Under the plan, the only real check on the legislature would be a Council of Revision, consisting of the executive and several members of the judiciary, which could veto the legislature's acts.

Virginia Plan: A proposal known also as the "large states plan" that empowered three separate branches of government, including a legislature with membership proportional to population.

To counter the Virginia Plan, delegates from less populous states proposed the **New Jersey Plan**, which called for a one-house legislature in which each state, regardless of size, would have equal representation. The New Jersey Plan also provided for a national judiciary and an executive committee chosen by the legislature; expanded the powers of Congress to include the power to levy taxes and regulate foreign and interstate commerce; and asserted that the new constitution and national laws would become the "supreme law of the United States." Both the Virginia and New Jersey plans rejected a model of government in which the executive would be given extensive authority.

New Jersey Plan: A proposal known also as the "small states plan" that would have retained the Articles of Confederation's principle of a legislature where states enjoyed equal representation.

By July 2, 1787, disagreements over the design of the legislature and the issue of representation had brought the convention to a near dead end. The delegates then agreed to submit the matter to a smaller committee in the hope that it might craft some form of compromise.

The product of that committee's deliberations was a set of compromises, termed the **Great Compromise** by historians. (Formally proposed by delegate Roger Sherman of Connecticut, the agreement is also known as the Connecticut Compromise.) As shown in Table 2.2, its critical features included (1) a bicameral (two-house) legislature with an upper house or "Senate" in which the states would have equal power with two representatives from each state, and a lower House of Representatives in which membership would be apportioned on the basis of population; and (2) the guarantee that all revenue bills would originate in the lower house. The convention delegates settled as well on granting Congress the authority to regulate interstate and foreign commerce by a simple majority vote, but required that treaties be approved by a two-thirds vote of the upper house. The Great Compromise was eventually approved by a narrow 5–4 margin of the state delegations. Connecticut, New Jersey, Delaware, Maryland, and North Carolina approved; Pennsylvania, Virginia, South Carolina, and Georgia opposed; New York and New Hampshire were absent, and the Massachusetts delegation was deadlocked. Thus a vote margin of just one state paved the way for the creation of a new federal government.

Great Compromise: A proposal also known as the "Connecticut Compromise" that provided for a bicameral legislature featuring an upper house based on equal representation among the states and a lower house whose membership was based on each state's population; approved by a 5–4 vote of the state delegations.

Compromise also resolved disagreement over the nature of the executive. Although rejecting the New Jersey Plan's call for a plural executive—in which officials would have exercised executive power through a multi-person council—the delegates split on whether the executive should be elected by members of Congress or directly by the people. The agreement reached called for the president (and vice president) to be elected by an electoral college. Because the number of electors equaled that of the number of representatives and senators

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TABLE 2.2 The Virginia Plan, the New Jersey Plan, and the Great Compromise

The Virginia Plan	The New Jersey Plan	The Great Compromise
Introduced on May 29, 1787, by Edmund Randolph of Virginia; favored initially by delegates from Virginia, Pennsylvania, and Massachusetts	Introduced on June 15, 1787, by William Paterson of New Jersey; favored initially by delegates from New Jersey, New York, Connecticut, Maryland, and Delaware	Introduced by Roger Sherman of Connecticut; approved at the convention by a narrow 5–4 vote on July 16, 1787
Bicameral legislature with one house elected by the people and second house chosen by the first	Unicameral legislature elected by the people	Bicameral legislature with one house elected by the people and second house chosen by state legislatures
All representatives and senators apportioned by population	Equal representation among states	Members of one house (representatives) apportioned by population (five slaves counted as three free men); members of second house (senators) apportioned equally among states
Singular executive chosen by the legislature	Plural executive chosen by the legislature	Singular executive chosen by the "electoral college" (electors appointed by state legislatures choose president; if no one receives majority, House chooses president)
Congress can legislate wherever "states are incompetent" or to preserve the "harmony of the United States"	Congress has the power to tax and regulate commerce	Congress has power to tax only in proportion to representation in the lower House; all appropriation bills must originate in lower House

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from each state, this system gave disproportionately greater influence to smaller states. As chief executive, the president would have the power to veto acts of Congress, make treaties and appointments with the consent of the Senate, and serve as commander-in-chief of the nation's armed forces.

The Slavery Issue

The issue of representation collided with another thorny issue looming over the convention proceedings: the issue of slavery. Four Southern states—Maryland, Virginia, North Carolina, and South Carolina—had slave populations of more than a hundred thousand each. Meanwhile, as shown in Figure 2.1, two New England states, Maine and Massachusetts, had already banned slavery and another four Northern states—Vermont, New Hampshire, Rhode Island, and Connecticut—maintained extremely low concentrations of slavery within their borders. The steady march of abolition in the North was matched by a Southern slave population that had been doubling every two decades. The convention delegates who advocated a new form of government were wary of the role slavery would play in this new nation, but they were even more wary of offending Southern sentiments to the point that consensus at the convention would be endangered.

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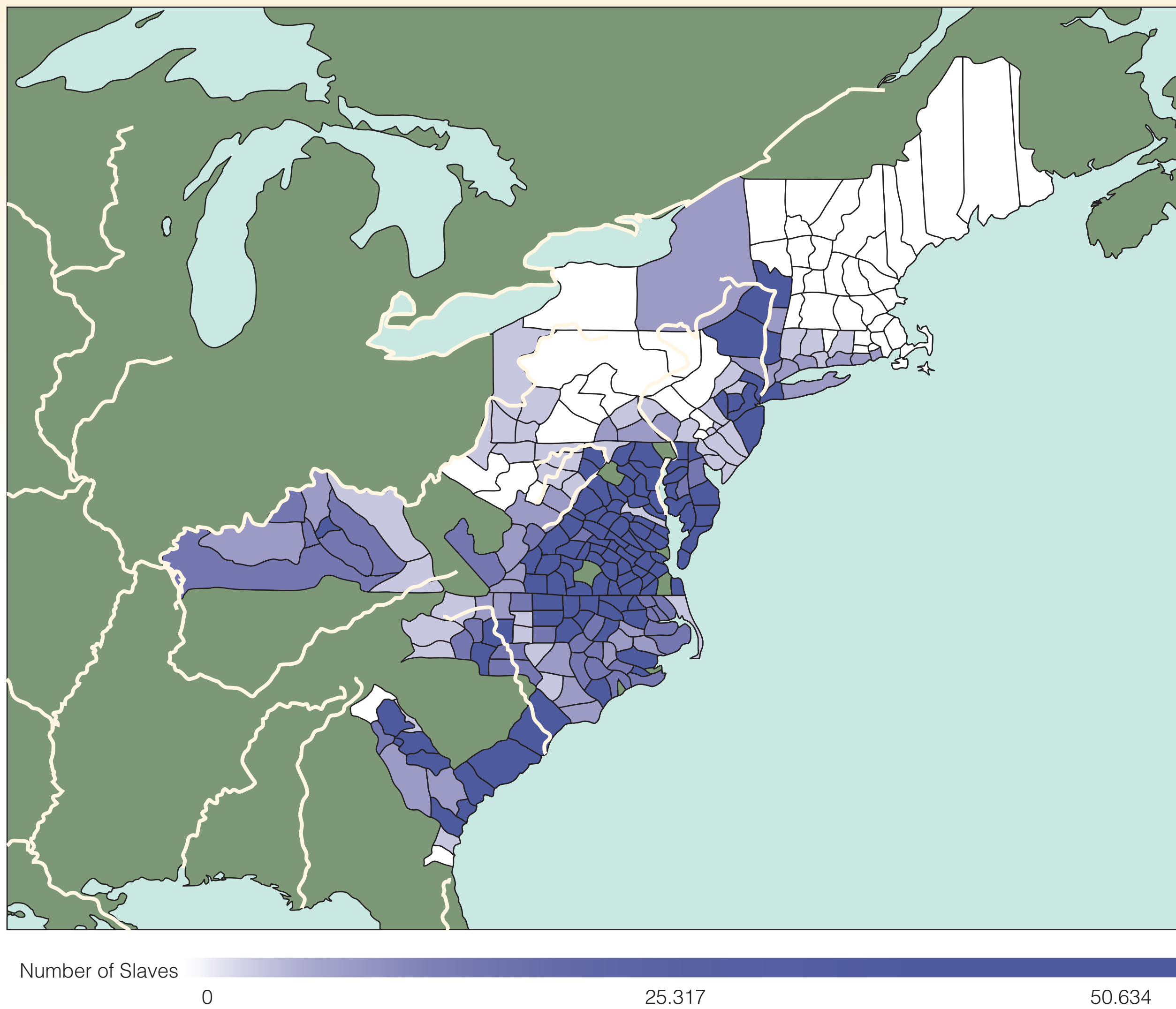

FIGURE 2.1 Concentration of Slavery (by County), Circa 1790

Source: Rendered based on "GIS for History" project at the University of Illinois at Chicago, http://gis.uchicago.edu/data.htm

Some delegates from the Northern states who had already voted in favor of banning slavery sought a similar emancipation of slaves in all the colonies by constitutional edict. Southerners hoping to protect their plantation economy, which depended on slave labor, wanted to prevent future Congresses from interfering with the institution of slavery and the importation of slaves. Moreover, even among Northerners there was disagreement on how emancipation should proceed: some favored outright freedom, whereas others argued for some form of colonization of the slaves, which would in effect ship them back to Africa. Many delegates feared that any extended discussion of slavery at the convention would become so divisive that it might bring the entire gathering to a standstill.

Three-Fifths Compromise: A compromise proposal in which five slaves would be counted as the equivalent of three free people for purposes of taxes and representation.

Southern delegates also wanted slaves to be counted equally with free people in determining the apportionment of representatives; Northerners opposed such a scheme for representation because it would give the Southern states more power, but the North did want slaves counted equally for purposes of apportioning taxes among the states. In an effort to forestall the convention's collapse, the delegates crafted a series of compromises that amounted to misdirection, and in some instances outright silence, on the issue of slavery.[10] By the agreement known as the **Three-Fifths Compromise**, five slaves would be counted as the equivalent of

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three "free persons" for purposes of taxes *and* representation. Delegates from Southern states also feared that a Congress dominated by representatives from more populous Northern states might take action against the slave trade. Most Northerners continued to favor gradual emancipation. Once again, neither side got exactly what it wanted. The new constitution said nothing about either preserving or outlawing slavery. Indeed, the only specific provision about slavery was a time limit on legislation banning slave importation: Congress was forbidden from doing so for at least 20 years. In 1807, however, with the slave population steadily outgrowing demand, many Southerners allied with opponents of the slave trade to ban the importation of slaves. Not until the Civil War decades later would the conflict over slavery be finally resolved.

On September 17, 1787, after four months of compromises and negotiations, the 12 state delegations present approved the final draft of the new constitution. By the terms of Article VII of the document, the new constitution was to become operative once ratified by 9 of the 13 states.

2.3 The New Constitution

As a consequence of the many compromises in the draft constitution, few of the delegates were pleased with every aspect of the new document. Even James Madison, later heralded as the "Father of the Constitution" for his many contributions as a spokesman at the convention, had furiously opposed the Great Compromise; he hinted at one point that a majority of the states might be willing to form a union outside the convention if the compromise were ever approved, and he convinced the Virginia delegation to vote "no" when it came up for a formal vote.

Nonetheless, the central desire of most of the delegates to craft a new government framework did lead them to consensus on a set of guiding principles evident throughout the document. The following principles continue to guide politicians, lawyers, and scholars today as they study the many ambiguous provisions of the U.S. Constitution:

- Recognizing that calls for fairer representation of colonists' interests lay at the heart of the Declaration of Independence, popular sovereignty was a guiding principle behind the new constitution. The document's preamble beginning with "We the People" signified the coming together of people, not states, for the purposes of creating a new government. Under the proposed constitution, no law could be passed without the approval of the House of Representatives, a "people's house" composed of members apportioned by population and subject to reelection every two years. Of even greater significance, the delegates agreed that all revenue measures must originate in the House, an explicit affirmation of the principle that there would be "no taxation without representation."
- The delegates recognized the need for a **separation of powers**. The Founders drew upon the ideas of the French political philosopher Baron de Montesquieu, who had argued that when legislative, executive, and judicial power are not exercised by the same institution, power cannot be so easily abused. Mindful of the British model in which Parliament combined legislative and executive authority, the drafters of the new constitution assigned specific responsibilities and powers to each branch of the government—Congress (the legislative power), the president (the executive power), and the Supreme Court (the judicial power). In the new government, individuals were generally prohibited from serving in more than one branch of government at the same time. The vice president's role as president of the Senate was a notable exception to this rule.
- While establishing separate institutions, the drafters of the new constitution also created a system of **checks and balances** to require that the branches of government would have to work together to formulate policy (see Figure 2.2). This system of "separate institutions sharing power" helped ensure that no one interest or faction could easily dominate the government. Through the exercise of presidential vetoes, Senate advice and consent, and judicial interpretations and other tools, each institution would have an opportunity to contend for influence.

separation of powers: The principle that each branch of government enjoys separate and independent powers and areas of responsibility.

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checks and balances: A system of limits imposed by the Constitution that gives each branch of government the limited right to change or cancel the acts of other branches.

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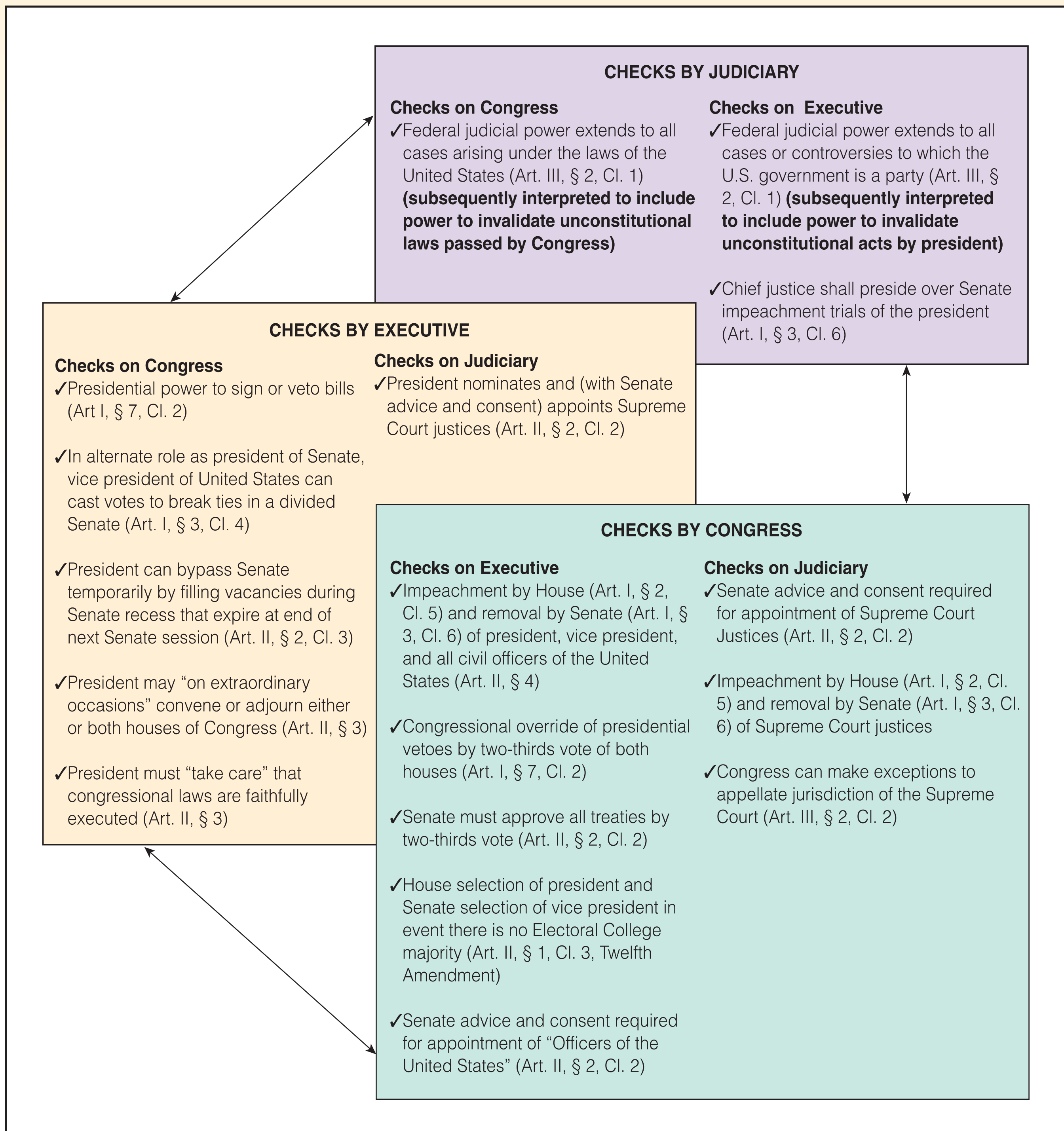

FIGURE 2.2 Checks and Balances in the U.S. Constitution

- Dividing sovereign powers between the states and the federal government—a system later termed *federalism*—is also a defining characteristic of the government framework established by the new constitution. Rather than entrusting all powers to a centralized government and essentially reducing the states to mere geographical subdivisions of the nation, the convention delegates divided powers between two levels of government: the states and the federal government. The distinction drawn between local concerns—controlled by state governments—and national concerns—controlled by the federal government—was

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as confusing then as it is today. But the delegates determined that such a division was necessary if they hoped to achieve any consensus. It would be politically impossible to convince the states to become mere geographic subdivisions of a larger political whole.

- Although united by the belief that the national government needed to be strengthened, the framers of the new constitution were products of a revolutionary generation that had seen governmental power abused. Thus, they were committed to a government of limited or **enumerated powers**. The new constitution spelled out the powers of the new federal government in detail, and it was assumed that the government's authority did not extend beyond those powers. By rejecting a government of unlimited discretionary power, James Madison argued, individual rights, including those "inalienable rights" cited in the Declaration of Independence, would be protected from the arbitrary exercise of authority.

enumerated powers: Express powers explicitly granted by the Constitution, such as the taxing power specifically granted to Congress.

- Finally, some delegates believed that the new constitution should be a "living" document; that is, it should have some measure of flexibility in order to meet the changing demands placed on it over time. Perhaps the most frustrating aspect of the Articles of Confederation was the near impossibility of any sort of modification: because any change to the Articles required the unanimous consent of the states, even the most popular reform proposals stood little chance of being implemented. Thus, the Framers decided that the new constitution would go into effect when it had been ratified by 9 of the 13 states. Furthermore, once ratified, the constitution could be amended by a two-thirds vote of each house of Congress (subject to subsequent ratification by three-fourths of the state legislatures).

2.4 The Ratification Battle

Federalists versus Anti-Federalists

Once Congress submitted the new constitution to the states for approval, battle lines were formed between the **Federalists**, who supported ratification of the new document, and the **Anti-Federalists**, who opposed it. From the outset, the Federalists enjoyed a number of structural and tactical advantages in this conflict:

Federalists: Those who supported ratification of the proposed constitution of the United States between 1787 and 1789.

Anti-Federalists: Those who opposed ratification of the proposed constitution of the United States between 1787 and 1789.

- **Nonunanimous consent.** The rules of ratification for the new constitution, requiring approval of just 9 of the 13 states, were meant to ease the process of adopting the new document. The delegates understood that once the constitution had been approved, it would be difficult for even the most stubborn of state holdouts to exist as an independent nation surrounded by this formidable new national entity, the United States of America.
- **Special "ratifying conventions."** The delegates realized that whatever form the new constitution might take, state legislatures would have the most to lose from an abandonment of the Articles. Thus they decided that the constitution would be sent for ratification not to state legislatures, but instead to special state ratifying conventions that would be more likely to approve it.
- **The rule of secrecy.** The Constitutional Convention's agreed-upon rule of secrecy, which forbade publication or discussion of the day-to-day proceedings of the convention, followed the precedent established in colonial assemblies and the First Continental Congress, where it was thought that members might speak more freely and openly if their remarks were not subject to daily scrutiny by the public at large. In the fall of 1787, the rule of secrecy also gave the Federalists on the inside a distinct advantage over outside opponents, who had little knowledge of the new document's provisions until publicized. Because the number of convention delegates who supported the new constitution far exceeded the number of delegates opposed, the rule of secrecy gave the Federalists a distinct advantage. As it turned out, five state ratifying conventions approved the new constitution within four months of the convention's formal conclusion, just as Anti-Federalist forces were collecting their strength for the battle ahead.
- **Conventions held in the winter limited rural participation.** Winter was approaching just as the fight over the new constitution was being launched. This timing gave

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the Federalists another advantage, especially in the critical ratification battlegrounds of Massachusetts, New Hampshire, and New York. It would be difficult for rural dwellers—mostly poor farmers resistant to a strong central government and thus opposed to the new constitution—to attend the ratification conventions if they were held in the dead of winter. Supporters of the new constitution successfully pressed for the ratifying conventions to be held as soon as possible. And of the six states that held such conventions over the winter, all voted to ratify by substantial margins.

The Federalist Papers

Between the fall of 1787 and the summer of 1788, the Federalists launched an aggressive media campaign that was unusually well organized for its time. James Madison, Alexander Hamilton, and John Jay wrote 77 essays explaining and defending the new constitution and urging its ratification. Signed under the name "Publius," the essays were printed in New York newspapers and magazines. These essays—along with eight others by the same men—were then collected, printed, and published in book form under the title *The Federalist*.[11] The essays allayed fears and extolled the benefits of the new constitution by emphasizing the inadequacy of the Articles of Confederation and the need for a strong government. Today these essays are considered classic works of political philosophy. The following are among the most frequently cited Federalist Papers:

Federalist Papers: A series of articles authored by Alexander Hamilton, James Madison, and John Jay, which argued in favor of ratifying the proposed constitution of the United States; the Federalist Papers outlined the philosophy and motivation of the document.

- **Federalist No. 10.** In Madison's first offering in the **Federalist Papers**, he analyzes the nature, causes, and effects of *factions*, by which he meant groups of people motivated by a common economic and/or political interest. Noting that such factions are both the product and price of liberty, Madison argued that by extending the sphere in which they can act, "you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens." Political theorists often cite Federalist No. 10 as justification for pluralist theory—the idea that competition among groups for power produces the best approximation of overall public good.
- **Federalist No. 15.** Hamilton launched his attack on the Articles of Confederation in this essay. Specifically, he pointed to the practical impossibility of engaging in concerted action when each of the 13 states retained virtual power to govern.
- **Federalist No. 46.** In this essay, Madison defended the system of federalism set up by the new constitution. He contended that the system allowed the states sufficient capacity to resist the "ambitious encroachments of the federal government."
- **Federalist No. 51.** In perhaps the most influential of the essays, Madison described how the new constitution would prevent the government from abusing its citizens. His argument is that the "multiplicity of interests" that influences so many different parts of the government would guarantee the security of individual rights. Because the federal system of government divides the government into so many parts (federal versus state; legislative versus executive versus judicial branches; and so on), "the rights of the individual, or of the minority, will be in little danger from interested combinations of the majority."
- **Federalist No. 69.** Hamilton in this essay defined the "real character of the executive," which, unlike the king of Great Britain, is accountable to the other branches of government and to the people.
- **Federalist No. 70.** In this essay, Hamilton presented his views on executive power, which had tempered considerably since the convention, when he advocated an executive for life. Still, Hamilton argued for a unitary, one-person executive to play a critical role as a check on the legislative process (that is, by exercising vetoes), as well as in the process of negotiating treaties and conducting war. According to Hamilton, "energy in the executive is a leading character in the definition of good government"; by contrast, "the species of security" sought for by those who advocate a plural executive is "unattainable."
- **Federalist No. 78.** In this essay—often cited in U.S. Supreme Court opinions—Hamilton argues that the judiciary would be the weakest of the three branches because it has "neither FORCE nor WILL, but merely judgment." Because the Court depends

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on the other branches to uphold that judgment, Hamilton called it "the least dangerous branch."

In late 1787 and early 1788, Anti-Federalists countered the Federalist Papers with a media campaign of their own.[12] In letters written under the pseudonyms "Brutus" and "The Federal Farmer" and published by newspapers throughout the colonies, the Anti-Federalists claimed that they were invoking a cause more consistent with that of the revolution—the cause of freedom from government tyranny. For them, the new national government's power to impose internal taxes on the states amounted to a revival of the British system of internal taxation. Perhaps the Anti-Federalists' most effective criticism was that the new constitution lacked a bill of rights that explicitly protected citizens' individual rights. They rejected Madison's contention in Federalist No. 51 that limitations on the central government provided those protections.

Ratification ultimately succeeded, but by a somewhat narrow margin (see Table 2.3). Of the first five states to ratify, four (Delaware, New Jersey, Georgia, and Connecticut) did so with little or no opposition, whereas Pennsylvania did so only after a bitter conflict at its ratifying convention. Massachusetts became the sixth state to ratify when proponents of the new constitution swung the convention narrowly in their favor only by promising to push for a bill of rights after ratification. By June, three more states (Maryland, South Carolina, and New Hampshire) had voted to ratify, providing the critical threshold of nine states required under the new constitution. Still, the Federalists worried that without ratification by the major states of New York and Virginia, the new union would not succeed.

Opposition in Virginia was formidable, with Patrick Henry leading the Anti-Federalist forces against James Madison and the Federalists.[13] Eventually Madison gained the upper hand with an assist from George Washington, whose eminent stature helped capture numerous

TABLE 2.3 Ratifying the Constitution

State	Vote	Date of Ratification
Delaware	30–0	December 7, 1787
Pennsylvania	43–23	December 12, 1787
New Jersey	38–0	December 18, 1787
Georgia	25–0	January 2, 1788
Connecticut	128–40	January 9, 1788
Massachusetts	187–168	February 16, 1788
Maryland	63–11	April 26, 1788
South Carolina	149–73	May 23, 1788
New Hampshire	57–46	June 21, 1788
Virginia	89–79	June 25, 1788
New York	30–27	June 26, 1788
North Carolina*	194–77	November 21, 1789
Rhode Island	34–32	May 29, 1790

*Despite strong Federalist sentiment at the convention, North Carolina withheld its vote in 1788 until a draft bill of rights was formally introduced. The submission by Congress of 12 proposed amendments to the states on September 25, 1789, led North Carolina to hold a second ratifying convention the following November.

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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

The Continuing Call to the Federalist Papers

The Federalist Papers had a significant impact on the birth of the new nation. The essays argued persuasively that the Articles of Confederation were inadequate. Many scholars today attribute the narrow margin in favor of ratification of the new constitution at New York's ratification convention to the sophisticated media campaign waged by the Federalists, especially through the Federalist Papers.

1905

In 1905, the Supreme Court's controversial decision in *Lochner v. New York*, which invalidated a New York State health regulation restricting the hours that bakers could be exposed to flour dust, set off a furious political debate about the role government should play in a newly industrialized society. Advocates on both sides of the debate repeatedly cited the Federalist Papers to bolster their arguments. Those who supported government regulation argued that it was not the job of courts to disagree with the decisions of legislatures on such public-interest issues; even if factions and interest groups had produced such legislation, they cited Federalist No. 10 to claim that the corrupting spirit of "factions" distinguished democracy from true republics. Opponents of government regulations countered that Madison's preference for more factions was simply his way of reaching toward an ideal politics in which all of these factions would cancel themselves out—by contrast, they argued that factions remained heavily influential in state legislatures. In support of the Court's ruling, they cited Federalist No. 78, in which Hamilton argued that "the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." Only a sudden switch by the Supreme Court to stop interfering with industrial regulations in 1937 saved the nation from a constitutional crisis fueled in part by dramatically contrasting readings of the Federalist Papers.

2012

By 2012, same-sex marriage had become a reality in an increasing number of states. Up through March of that year, eight states in all had passed laws recognizing same-sex marriage; meanwhile, a handful of states were actively considering joining that list, including New Jersey, whose legislature passed a same-sex marriage recognition law in mid-February. The Republican New Jersey Governor Chris Christie, who would eventually become a much touted contender for the White House in 2016, had previously indicated he would veto that bill if given the chance. Christie followed through on that promise on February 17, 2012, but the debate over Christie's actions raged on as the governor defended his action on talk shows and before the public as a whole. Knowing that a direct vote of the population on same-sex marriage was likely to support his view, Christie called for voters to petition for a constitutional amendment that would change the definition of marriage. Critics charged that by asking for a popular vote and ignoring the vote of the people's representatives, Christie ran up against the purpose of the U.S. Constitution as outlined by Federalist No. 51, in which Madison described the ideals of republican government over a democratic one as the most crucial "political safeguard against tyrannical majorities . . . if a majority be united by a common interest, the rights of the minority will be insecure." Christie's call for a popular vote clearly placed him on the side of democracy; the Federalist Papers offered Christie and others a reminder that many of the Constitution's founders never intended it to promote the interests of a majority over the minority. Finally, in October of 2013, a trial court invalidated the state's restriction of marriage to persons of different sexes, which effectively authorized the issuance of marriage licenses to same-sex couples in New Jersey.

For Critical Thinking and Discussion

1. Are calls to the Federalist Papers still persuasive in the modern age?
2. Given that the Constitution has been amended 27 times since it was ratified, should excerpts from the Federalist Papers (written to defend the new constitution prior to those amendments being ratified) still carry the same degree of authority?

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votes for the Federalists. Madison also promised to support adding a bill of rights to the new constitution. Then, Alexander Hamilton and John Jay capitalized on the positive news from Virginia to secure victory at the New York ratifying convention. With more than the required nine states—including the crucial states of New York and Virginia—the Congress did not wait for the votes from North Carolina or Rhode Island; on July 2, 1788, it appointed a committee to prepare for the new government.

A Bill of Rights

Seven of the state constitutions created during the Revolutionary War featured a statement of individual rights in some form. The Virginia Declaration of Rights of 1776, for example, had borrowed (from John Locke) its grounding of individual rights in a conception of natural law and social contract: "All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity." Later, during the battle over ratification, five state ratifying conventions had stressed the need for amendments to the proposed constitution in the form of a bill of rights, which would expressly protect fundamental rights against encroachment by the national government.[14]

Still, not all Federalists saw the need for a federal bill of rights. Madison, for one, believed a bill of rights was unnecessary because the central government held only those powers enumerated in the Constitution. He explained: "The rights in question are reserved by the manner in which the federal powers are granted . . . the limited powers of the federal government and the jealousy of the subordinate governments afford a security which has not existed in the case of the state governments, and exists in no other." Madison was also concerned about the dangers of trying to enumerate all important rights: "There is great reason to fear that a positive declaration of some of the most essential rights could not be obtained," leaving some essential rights omitted for the future. Hamilton underscored this sentiment in Federalist No. 84, arguing that such a list of rights might invite governmental attempts to exercise power over those rights not included in the list.

Among the most ardent supporters of adding a bill of rights to the Constitution was Thomas Jefferson, who warned about the dangers of abuses of power.[15] From his distant vantage point in France, where he continued to serve as an American minister, Jefferson was in the dark about the new constitution until November 1787. Then, in a December 20, 1787, letter to his friend and political protégé from Virginia, James Madison, Jefferson wrote: "A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." Although recognizing Madison's fears of omissions as legitimate, Jefferson continued to argue the point. In a subsequent letter dated March 15, 1789, Jefferson argued that "half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can."

In the end Jefferson's arguments prevailed, and Madison (by this time a congressman from Virginia) became a principal sponsor of a bill of rights in the first Congress. Introducing the bill in the House of Representatives, he declared: "They will be an impenetrable bulwark against every assumption of power in the legislative or executive." On September 9, 1789, the House of Representatives voted to submit a list of 12 **amendments** to the states; 10 of these were ratified by the required nine states by December 15, 1791, and compose today's **Bill of Rights**.

amendments: Modifications or additions to the U.S. Constitution passed in accordance with the amendment procedures laid out in Article V.

Bill of Rights: The first 10 amendments to the U.S. Constitution, which protect various rights of the people against the new federal government.

Among the rights protected by the Bill of Rights are the rights of free religious exercise, free speech, free press, and assembly (First Amendment); rights against search and seizure without a warrant stating "probable cause" (Fourth Amendment); and rights of due process and no self-incrimination (Fifth Amendment). The two amendments not ratified in 1791 did not relate to individual rights at all. They were (1) a prohibition on salary increases for legislators taking effect prior to the next congressional election (in 1992—more than two hundred years later—this became the Twenty-seventh Amendment); and (2) a provision defining the rules for determining the number of members of the House of Representatives.

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2.5 Changing the Constitution

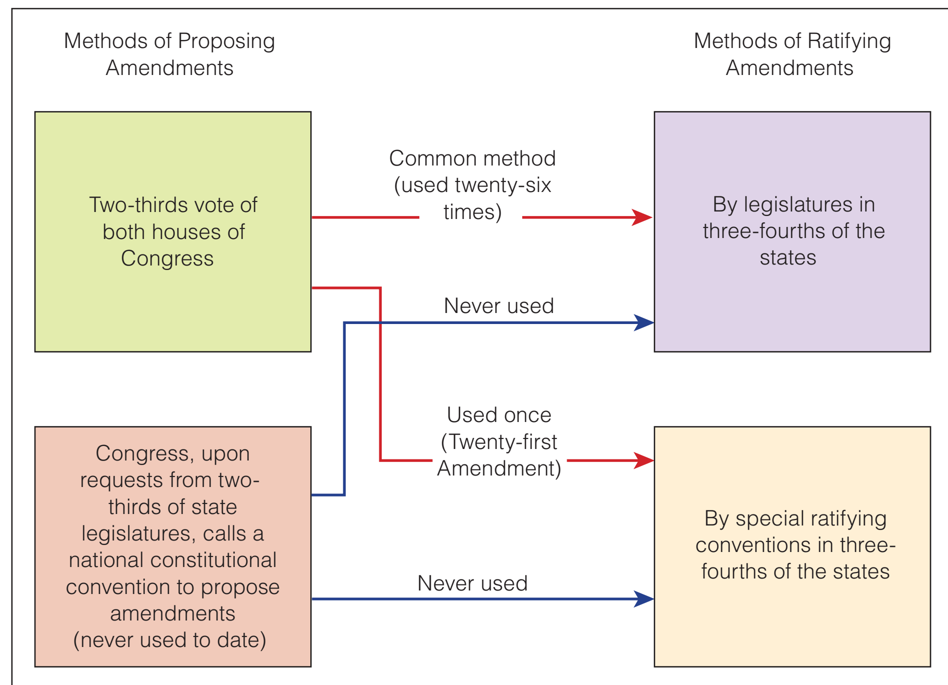
The Formal Amendment Process

Although political circumstances dictated that the Bill of Rights be passed in a relatively speedy fashion, future proposed amendments would not have it so easy. In crafting the rules for amending the new constitution, the Framers sought to balance two competing interests: (1) the need to protect the Constitution from short-lived or temporary passions by making amendments exceedingly difficult to pass; and (2) sufficient flexibility to allow for amendments to be added when the needs of the nation demanded change. Their determination to strike such a balance was shaped by their experience in dealing with the Articles of Confederation, whose "unanimous consent of states" rule had left the document immune from even the most necessary of reforms.

As shown in Figure 2.3, Article V of the Constitution specifies two ways in which amendments can be proposed and two methods of ratification. Congress may propose an amendment by a two-thirds vote of both houses; alternatively, two-thirds of the state legislatures may apply to Congress to call a special national convention for proposing amendments. Amendments take effect when ratified either by a vote of three-fourths of the state legislatures or by special ratifying conventions held in three-fourths of the states. To date, all 27 amendments (including the Bill of Rights) have been proposed by Congress, and all but one (the Twenty-first Amendment) have been ratified by the state legislatures.

No national convention has ever been called for the purpose of proposing amendments. Indeed, the closest the states have ever come to applying to Congress for such an event occurred in 1967, when 33 states (just one short of the required number) petitioned Congress to call a convention that would propose an amendment reversing the 1964 Supreme Court ruling requiring that both houses of each state legislature be apportioned according to population. Given the ambiguity of Article V, numerous questions have been raised about the form such a convention would take.

FIGURE 2.3 **How an Amendment Gets Proposed and Ratified**



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How would delegates be chosen? When Congress proposed the Twenty-first Amendment, it left it to each state to determine the manner in which delegates to the ratifying conventions would be chosen. How would the convention be run? Could a convention go beyond the limitations placed on it by Congress? What would happen if a convention went far afield and proposed an entirely new constitution, just as the convention in 1787 did? Congress has to date refused to pass laws dictating the terms of future conventions, in part because it has not wanted to encourage such an event.[16]

Critics of the amendment process charge that it is undemocratic, as today just 13 of the 50 states can block amendments desired by a large majority. Additionally, amendments, especially those ratified by special conventions, may be adopted even if they lack widespread popular support.

Although 27 amendments have been ratified since 1789, only 17 of those were ratified after 1791 (see Table 2.4 on next page). More than 5,000 amendments have been introduced in Congress since that time, but only 33 have been formally proposed by Congress. Today, as shown in Figure 2.4, different amendments garner varying levels of support. Among the proposed amendments that failed in the ratification process are the following:

- An amendment that would withdraw citizenship from any person who has accepted a title of nobility or who has received (without the consent of Congress) an office or salary from a foreign power (proposed in 1810)

FIGURE 2.4 Popular Support for Possible Constitutional Amendments

Source: Aspen Ideas poll, based on 1,000 online interviews conducted June 18–20, 2010.

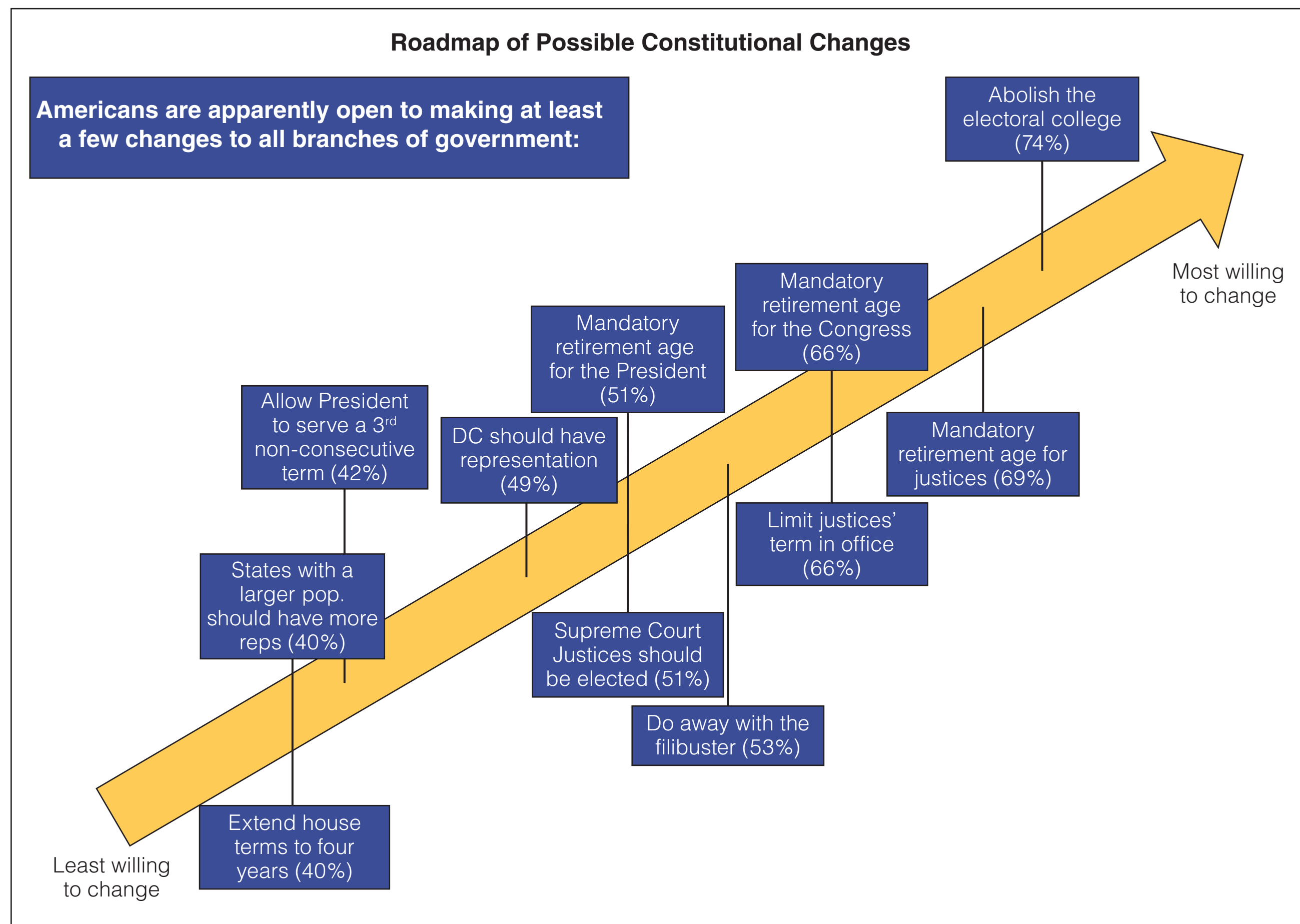

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TABLE 2.4 Amendments, Date of Ratification, and Length of Ratification Process

Amendment	Subject of Amendment	Date Proposed	Date Ratified	Length
Bill of Rights				
First	Free speech, press, religion, assembly	Sept. 25, 1789	Dec. 15, 1791	2+ years
Second	Right to bear arms			
Third	No quartering of troops in homes			
Fourth	No unreasonable searches/seizures			
Fifth	Right to due process, grand jury, no double jeopardy, self-incrimination			
Sixth	Right to speedy and public trial, counsel			
Seventh	Right to trial by jury in civil cases			
Eighth	No excessive bail, fines, cruel/unusual punishment			
Ninth	Rights not enumerated retained by people			
Tenth	Powers not delegated to Congress or prohibited to states belong to states or people			
Subsequent Amendments				
Eleventh	No federal cases between state, citizen of other state	March 5, 1794	Jan. 8, 1798	3+ years
Twelfth	Modification of electoral college rules	Dec. 12, 1803	July 16, 1787	9+ months
Thirteenth	Ban on slavery	Feb. 1, 1865	Dec. 18, 1865	10+ months
Fourteenth	States can't deprive right to due process, equal protection, privileges and immunities	June 16, 1866	July 28, 1868	2+ years
Fifteenth	Right to vote can't be denied by race	Feb. 27, 1869	March 30, 1870	1+ years
Sixteenth	Congress can levy individual income taxes	July 12, 1909	Feb. 25, 1913	3+ years
Seventeenth	Direct election of senators	May 16, 1912	May 31, 1913	1+ years
Eighteenth	Prohibition of liquors	Dec. 18, 1917	Jan. 29, 1919	1+ years
Nineteenth	Women's right to vote	June 4, 1919	Aug. 26, 1920	1+ years
Twentieth	Dates for inauguration, Congress's session	March 2, 1932	Feb. 6, 1933	1+ months
Twenty-first	Repeal of prohibition	Feb. 20, 1933	Dec. 5, 1933	9+ months
Twenty-second	Presidential term limits	March 24, 1947	Feb. 26, 1951	3+ years
Twenty-third	D.C. residents' vote for president	June 16, 1960	March 29, 1961	9+ months
Twenty-fourth	Ban on poll taxes	Aug. 27, 1962	Jan. 23, 1964	1+ years
Twenty-fifth	Appointment of new vice president, presidential incompetence	July 6, 1965	Feb. 10, 1967	1+ years
Twenty-sixth	Eighteen-year-olds' right to vote	March 23, 1971	July 1, 1971	3+ months
Twenty-seventh	Congressional pay raises effective only after election	Sept. 25, 1789	May 7, 1992	202+ years

Based on Paul Murphy, 'Background of the Bill of Rights' (New York: Taylor & Francis, 1990)

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- An amendment proposed on the eve of the Civil War in 1861 that would have prohibited further interference by the federal government with slavery in any state
- An amendment that would have prohibited labor by young children (proposed in 1924)

The Equal Rights Amendment (ERA) proposed by Congress in 1972 also came up short during the ratification process, after years of effort to secure its passage. Although the courts have consistently held that ratification of an amendment must take place within a "reasonable time," it has been left up to Congress to determine what constitutes a reasonable time. When drafting the proposed Eighteenth Amendment in 1917, Congress placed into the text of the amendment a seven-year limit on ratification and continued to do so with subsequent amendments it proposed up until 1960. That year, when Congress proposed the Twenty-third Amendment giving residents of the District of Columbia the right to vote in presidential elections, it began the practice of setting time limits in the resolution accompanying submission of the amendment to Congress, rather than in the formal part of the amendment. As a consequence, when it appeared that the ERA would not be ratified, proponents of the amendment managed to get the ratification period extended to June 30, 1982 (an additional three years and three months beyond the original deadline), by a majority vote of both houses. Despite the extension, however, the proposed amendment died when it failed to win the approval of more than 35 state legislatures, 3 short of the 38 necessary for passage.

Michael Kleinfeld/UPI/Landov

Demonstrators (including Rep. Carolyn Maloney [D-NY], at the podium) urging reintroduction of the ERA as an amendment to the Constitution.

The "reasonable time" requirement for ratification of an amendment reached an extreme with the Twenty-seventh Amendment (forbidding congressional pay raises from taking effect until an intervening election in the House of Representatives has occurred). Originally proposed in 1789 as part of the Bill of Rights, it was finally ratified in 1992, just over 202 years later. (See the "From Your Perspective" box on page 49 for more detailed discussion of what occurred.)

Informal Processes of Change

After the Constitution and Bill of Rights were ratified, there remained the difficult task of interpreting those documents for use by the different branches of government. Among the Framers, Alexander Hamilton was perhaps most attuned to the danger that Anti-Federalists and other opponents of the Constitution might attempt to overturn the convention's carefully crafted compromises so many years later by judicial fiat. Certainly most of the Constitution's provisions were vague enough that they allowed discretion for maneuvering by the generation that interprets them—but how much discretion was justified in the process of constitutional interpretation?

loose construction: Constitutional interpretation that gives constitutional provisions broad and open-ended meanings.

As it turned out, the Supreme Court under Chief Justice John Marshall was the first to put its own lasting imprint on the Constitution. Marshall, who hailed from Virginia, served as the chief justice of the United States[17] from 1801 until his death in 1835. Marshall believed in a **loose construction** (or interpretation) of the Constitution, meaning that under his leadership, many of the Constitution's provisions enjoyed broad and quite open-ended meanings. Thus, for example, Article I, Section 8, Clause 18 empowered Congress "to make all laws which shall be necessary and proper for carrying into execution" any of the powers specifically listed in the Constitution. Marshall's loose construction of that provision gave the federal government considerable implied powers (those not explicitly stated) to regulate the economy. For example,

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THROUGH THE YEARS: SUPREME COURT DECISIONS IMPACTING OUR LIVES

Mistretta v. United States (1989)

One of the relics of nineteenth-century constitutional law that remains formally on the books is the so-called "non-delegation doctrine," which prohibits Congress, being vested with "all legislative powers" by Article I, from delegating that power to another branch. In reality, if the separation of powers was to be enforced so strictly, our entire welfare state (which depends on hundreds of agencies issuing legal rules and regulations that affect people's rights) might well disappear. Yet even if this aspect of the separation of powers is so rarely enforced in the context of agencies, what about in the courts? In 1984 Congress passed the Sentencing Reform Act, which created an agency within the judicial branch, the U.S. Sentencing Commission, charged with issuing binding sentencing guidelines to be followed by federal courts. John Mistretta, who received an 18-month sentence for cocaine distribution under these new guidelines, challenged the sentence as a violation of the separation of powers. Can Congress, which defines sentences for federal crimes, delegate this sentencing power to a judicial agency? In *Mistretta v. United States*, the U.S. Supreme Court by an 8–1 decision said "yes," holding that the delegation was sufficiently detailed and specific enough to meet constitutional standards. Today if you or friends ever find yourselves in federal court, do not be surprised if the judge you are looking for to provide mercy actually has his or her hands tied by rules issued by the U.S. Sentencing Commission.

▸ For Critical Thinking and Discussion

1. Can Congress be expected to determine all the details of federal law, such as the exact emission standards for cars, or (as in this case) the exact sentence that applies to every federal crime?
2. Do we want Congress focusing on the big questions of policy, while leaving these details to unelected officials within the government?
3. How strictly should we enforce the separation of powers?

in the 1819 case of *McCulloch v. Maryland*,[18] the Marshall Court ruled that Congress had the power to create a national bank, even though the Constitution said nothing explicitly about such a power. The Court determined that a national bank was "necessary and proper" to assist in regulating commerce or raising armies. This philosophy of loose constitutional interpretation underlies the concept of a "living Constitution," one that is adaptable to changing times and conditions.

strict construction: Constitutional interpretation that limits the government to only those powers explicitly stated in the Constitution.

Thomas Jefferson, James Madison, and many others viewed the powers of the central government more narrowly. They favored a **strict construction**, arguing that the government possessed only those powers explicitly stated in the Constitution. Thus, although Article I, Section 8, Clause 3 gave Congress the power to regulate interstate commerce, it could not do so by creating a national bank or utilizing any other means not specifically mentioned in the Constitution. They supported a "fixed Constitution," one that could be changed only by the formal amendment process, not by congressional action or judicial ruling.

The tension between advocates of strict and loose constructions of the Constitution continues to this day. The late Robert Bork, a former Yale law professor and failed Supreme Court nominee, argued that overly loose interpretations of the Constitution are outside the Court's proper task. In particular, Bork wrote, the Supreme Court has "simply abandoned" the Constitution by refusing to enforce limits on the subjects that come within congressional reach.[19] Another strict constructionist, Justice Antonin Scalia, rejects the notion of constitutional standards evolving over time; in 2008 Scalia told one reporter that while change in a society can

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FROM YOUR PERSPECTIVE

One Student's Term Paper Proves That the Constitution Is Indeed a "Living Document"?

College students may be forgiven for assuming that classroom assignments that invite them to propose constitutional amendments are strictly theoretical exercises. Yet in the case of one University of Texas student, such an assignment on constitutional change became much more than theoretical. Gregory Watson chose as the topic for his research a long-forgotten amendment to forbid congressional pay raises from taking effect until an intervening election in the House of Representatives had occurred. Originally proposed in 1789 as part of the Bill of Rights, the amendment was finally ratified 203 years later, thanks largely to Watson. The sophomore had discovered the amendment while doing research for a paper on American government. Watson's final paper—in which he argued that the amendment was still viable for ratification—garnered a mere "C" from his professor. But Watson continued his quest to secure ratification of the amendment. Tapping into the resentment of citizens over various instances in which members of Congress had quietly passed pay raises for themselves without calling attention to their actions, Watson joined forces with several state lawmakers to get the required number of states to ratify the provision. Their efforts succeeded, and the Twenty-seventh Amendment was eventually ratified in May 1992. Although Watson's grade from a decade earlier remained unchanged, he at least had the satisfaction of knowing that he had made history—literally.

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For Critical Thinking and Discussion

1. What amendments to the Constitution would you like to see implemented?
2. Would you be willing to sacrifice your own time, energy, and resources to organize interest-group activities on an amendment's behalf?

be reflected in legislation, "society doesn't change through a Constitution."[20] In accordance with this philosophy, the more conservative Supreme Court of the late 1990s (which included Scalia) struck down federal statutes regulating guns in the schools and domestic violence, on the theory that such regulations were not grounded in any specifically enumerated power of Congress, such as the power to regulate interstate commerce.

This strict-construction approach contrasts markedly with the approach advocated by Professors Lawrence Tribe[21] and John Hart Ely,[22] as well as former Supreme Court Justice William Brennan, who argued for a loose or more flexible interpretation of the Constitution. Advocates of a loose construction view the document as evolving with the times. In the 1960s and 1970s,

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the Supreme Court (with Brennan presiding) utilized a loose-construction approach to interpret congressional power more broadly to include the power to create civil rights legislation and federal criminal laws.

With so few amendments proposed and ratified during the nation's history, students of American politics may wonder how a Constitution written in 1787 has developed to meet the needs of a changing nation. In truth, an informal constitutional convention occurs on a frequent basis in the American political system. Congress, the president, and the courts engage in constitutional interpretation every day through their respective activities, both official and unofficial. Thus the Constitution has not been a straitjacket at all—rather, its elegant vagueness has opened it up to a variety of interpretations.

Much of the rise in presidential power during the twentieth century occurred in the absence of any formal amendments conferring new powers on the chief executive; the president of the United States reacted to circumstances facing the executive office by assuming greater authority over foreign and domestic policymaking, and the other branches of government deferred to the president in many such matters. With its ruling in *Marbury v. Madison* (1803),[23] the Supreme Court asserted its right of judicial review, that is, its authority to review acts of Congress for their constitutionality and void those that the Court determines are contrary to the Constitution. As part of its decision in *McCulloch v. Maryland* (1819), the Court ruled that when state and federal powers collide, federal powers take precedence. With some notable exceptions, the other branches of the federal government and state courts have more or less acquiesced to such exercises of power.

* * *

When the states in 1791 ratified the Bill of Rights, citizens must have marveled at the flexibility of the new U.S. Constitution. After all, it had been amended 10 times in just two years! And yet the Constitution has proven remarkably resistant to change since then, incorporating only 17 additional amendments over the following two centuries. How has the federal Constitution survived so long, and in nearly the same form as the original document? The demands of modern government, which manages an advanced welfare state that serves the needs of hundreds of millions of Americans, press the Constitution into service even when traditional rules of constitutional interpretation would seem to offer an insurmountable obstacle. Advocates of the New Deal were undaunted by the strictures of the "non-delegation doctrine," and they stretched the Constitution's language to advance the modern welfare state; supporters of President Obama's individual health care mandate similarly pressed ahead, confident that more traditional constitutional principles would not stand in the way if the measures proved popular. The calculus is straightforward: The so-called "higher law" found in the Constitution must ultimately defer to the same public that vests it with that supreme authority in the first place.

SUMMARY: PUTTING IT ALL TOGETHER

2.1 The Beginnings of a New Nation

- The American Revolution arose a decade after Britain's victory in the French and Indian War; to pay off its significant war debts, Britain imposed numerous regulatory measures on the colonies, which generated outrage, protests, and eventually armed resistance from the colonists.
- First established during the American revolutionary war, the Articles of Confederation created a "league of friendship" among the 13 states by vesting them with equal authority in a weak government with only limited powers to raise revenue and regulate commerce. The weakness of the Articles hampered early American foreign policy; its weak Congress proved unable to stamp out political unrest throughout the states.

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2.2 The Constitutional Convention

- In 1787 a Constitutional Convention of delegates from 12 states considered both the "Virginia Plan," which favored larger, more populous states and a "New Jersey Plan" based on the principle of equal representation of the states. The Convention ultimately accepted the "Connecticut Compromise" and its bicameral legislature featuring a House of Representatives apportioned by population and a Senate allotting equal power to each state. The delegates sidestepped the slavery issue by settling on the "Three-Fifths Compromise" (counting five slaves as three people for purposes of taxes and representation) and by deferring a ban on slave importation for at least 20 years.

2.3 The New Constitution

- The new constitution combined features of popular sovereignty, separation of powers, and checks and balances with a commitment to a system of "federalism," which divides sovereignty between state and federal governments.

2.4 The Ratification Battle

- The battle over ratification was waged between the Federalists who supported the new constitution and the Anti-Federalists who opposed it. In advocating the merits of the document, Federalists benefitted from the convention's rule of secrecy and the rule requiring the approval of just 9 of 13 state ratifying conventions for ratifications.
- Additionally, Federalists employed a well-crafted media campaign in support of ratification; this included the anonymous publication of the Federalist Papers in newspapers justifying various provisions of the new constitution.
- Several state ratifying conventions insisted that the new government add a bill of rights to the Constitution; James Madison, the "father of the Constitution," was initially reluctant to propose such a bill for fear that it might omit important rights, but eventually he sponsored a new Bill of Rights in the first Congress.

2.5 Changing the Constitution

- Article V of the Constitution makes it exceedingly difficult to amend the document. Since the Bill of Rights was ratified in 1791, all but one of the 17 amendments that followed resulted from a two-step process: (1) two-thirds support of both houses of Congress, followed by (2) ratification by three-fourths of the state legislatures. (The Twenty-first Amendment was ratified by three-fourths of special state ratifying conventions). To date, a national constitutional convention (also authorized by Article V) has never been held.
- Informal constitutional change often occurs through U.S. Supreme Court interpretation of the document's text. The Supreme Court under Chief Justice John Marshall favored a loose construction of several provisions, giving the federal government considerable implied powers; Thomas Jefferson and Jeffersonian Republicans favored a stricter construction of the Constitution's provisions.

KEY TERMS

amendments (p. 43)
Anti-Federalists (p. 39)
Articles of Confederation (p. 31)
Bill of Rights (p. 43)
checks and balances (p. 37)
Constitutional Convention (p. 33)
Declaration of Independence (p. 30)
enumerated powers (p. 39)
Federalist Papers (p. 40)
Federalists (p. 39)
Great Compromise (p. 34)
loose construction (p. 47)
New Jersey Plan (p. 34)
separation of powers (p. 37)
Shays's Rebellion (p. 33)
strict construction (p. 48)
Three-Fifths Compromise (p. 36)
Virginia Plan (p. 34)

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TEST YOURSELF

1. The first law passed by Parliament for the purpose of raising money from the colonies for the British Crown was the

a. Sugar Act.

b. Stamp Act.

c. Townsend Acts.

d. Tea Act.

2. Which of the following political philosophers helped inspire ideas found in the Declaration of Independence?

a. Voltaire

b. Hobbes

c. Descartes

d. Locke

3. What were the main weaknesses of the Articles of Confederation?

4. The compromise plan at the Constitutional Convention that featured a Senate with states equally represented, and a House whose members would be apportioned by popular vote, was called which of the following?

a. The New Jersey Plan

b. The Connecticut Plan

c. The Virginia Plan

d. The Georgia Plan

5. Who was selected to be the presiding officer at the Constitutional Convention?

a. George Washington

b. Thomas Jefferson

c. John Adams

d. Alexander Hamilton

6. What was the "Three-Fifths Compromise," and why was it adopted at the Constitutional Convention?

7. The powers that are expressly granted to Congress in the Constitution are referred to as

a. implied powers.

b. enumerated powers.

c. reserved powers.

d. shared powers.

1. a. (LO 2-1); 2. d. (LO 2-1); 4. b. (LO 2-2); 5. a. (LO 2-2); 7. b. (LO 2-3); 8. c. (LO 2-3); 10. a. (LO 2-4); 11. b. (LO 2-4); 12. d. (LO 2-4); 14. c. (LO 2-5)

8. The sharing of powers between the national government and the state governments is based on a principle known as

a. checks and balances.

b. separation of powers.

c. federalism.

d. distributed authority.

9. Identify three "checks" that Congress has on the power of the president.

10. The fact that the proposed constitution would be debated by the states during the winter months gave an advantage to

a. the Federalists.

b. the Anti-Federalists.

c. smaller states.

d. none of the above.

11. In order for the proposed constitution to be adopted, how many of the 13 states had to ratify it?

a. 7

b. 9

c. 11

d. All 13

12. In order to guarantee that the proposed constitution would be adopted, Federalists promised that which of the following would be incorporated into the new constitution by the first Congress?

a. The Declaration of Independence

b. Federalist No. 10

c. *Common Sense*

d. A bill of rights

13. Why did the Anti-Federalists oppose the adoption of the new constitution?

14. Which of the following is *not* required for passage of a constitutional amendment?

a. Two-thirds vote in both houses of Congress

b. Approval by three-quarters of the state legislatures or ratifying conventions

c. Presidential approval

d. All of the above are required.

15. Would those who are concerned about limiting the power of the federal government favor a "loose" or "strict" construction of the Constitution? Why?

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Annotated Constitution of the United States of America

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Annotated Constitution

OF THE UNITED STATES OF AMERICA

The Constitution of the United States of America

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

As a statement containing the essential reasons for drafting the Constitution and the purposes of the new central government, the Preamble theoretically does not confer any actual power on government. Nevertheless, on numerous occasions the Supreme Court has cited the preamble to illustrate the origin, scope, and purposes of the Constitution, as well as to help discern the meaning of certain constitutional provisions that follow it. Most notably in McCulloch v. Maryland *(1819), Chief Justice John Marshall quoted from the Preamble at length to confirm that the Constitution comes directly from the people, and not from the states.*

Article I

Section 1. 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.

The placement of provisions for congressional power in Article I confirms what the Founders undoubtedly assumed to be true: that Congress would be the preeminent branch of the new central government. Section 1 established two important principles. First, by specifying "powers herein granted" it declared that the national government is one of enumerated powers. Despite the broadening of powers implied by the necessary and proper clause of Section 8, this statement of Section 1 still means that Congress theoretically cannot do whatever it wants to do. Rather, it must ground its exercise of power (whether explicitly stated or implied) in a specific provision of Article I. Second, Section 1 established the principle of bicameralism—the presence of two separate but equally powerful legislative bodies—as a further safeguard against government tyranny.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding

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Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

Section 2 of Article I establishes a House of Representatives as the lower House of the Congress. The membership of the U.S. House of Representatives is apportioned according to each state's population; the so-called Three-Fifths Compromise (only three-fifths of the population of slaves would be counted for enumeration purposes) helped resolve an impasse at the Convention between Southern states, which wanted slaves to count as more, and Northern states, which wanted them to count as less. Although the number of House members has grown with the population, since 1911 it has been fixed by statute at 435. As constituted, the House is as powerful as the U.S. Senate, and in one respect is even more powerful: the House has the sole power to originate revenue bills. Section 2 also lays out the two-year-term rule and qualifications for each House member, as well as providing procedures for apportionment and filling vacancies. Finally, it authorizes the House to choose top officials, including the Speaker.

Section 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

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Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Just as Section 2 does for the House of Representatives, Section 3 establishes various powers and procedures for the U.S. Senate. Individual senators may be more powerful than their counterparts in the House because of the longer length of their terms (six years) and because there are far fewer members in the body; however, there is no constitutional basis for the claim that the Senate is a superior chamber. Although the vice president theoretically presides over the Senate as its president, and the president pro tempore serves in the vice president's absence, in actual practice the president pro tempore usually deputizes a more junior senator to preside over most Senate business. The provisions of Clause 1 and Clause 2 that state legislatures choose senators have been overturned by the Seventeenth Amendment, which now provides that senators are chosen by popular election.

Section 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

According to Article I, Section 4, states can regulate the time, place, and manner of all federal elections, but Congress can still establish a single uniform date for federal elections (and it has done so on the first Tuesday following the first Monday in November).

Section 5. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such

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time: and no person holding any office under the United States, shall be a member of either House during his continuance in office.

Article I, Section 6 extends to members of Congress various immunities. The speech and debate clause of Section 6 prevents House members or senators from being sued for slander during congressional debates, committee hearings, or most other official congressional business. In deference to the principle of separation of powers, Clause 2 ensures that members of Congress cannot hold another civil office while retaining their legislative seats.

Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Article I, Section 7 is often referred to as the presentment clause. It establishes the procedures by which Congress presents bills to the president for approval; it also lays out the process by which the president may veto legislation, either by refusing to sign it and sending it back, or by keeping the bill for a period of 10 days without signing it while Congress has adjourned in the interim (referred to as a pocket veto). In 1996, Congress passed the Line Item Veto Act, which allowed the president to veto specific expenditures at the time of signing; the Supreme Court declared the Line Item Veto Act unconstitutional in Clinton v. City of New York *(1998) because it gave the president the power to repeal parts of duly enacted statutes in a manner different from the "finely wrought and exhaustively considered procedure" described in this section.*

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

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

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

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

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

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

To constitute tribunals inferior to the Supreme Court;

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

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

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

To provide and maintain a navy;

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

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

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;—And

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

Article I, Section 8 may be the most heavily cited clause in the original Constitution, as it lays out all the enumerated powers of Congress. The 18th clause listed, the necessary and proper clause, was the source of significant controversy in the early republic. In McCulloch v. Maryland *(1819), Chief Justice John Marshall interpreted the clause as essentially aiding Congress in carrying out its expressed powers. Combining the powers granted by the 18th clause with other powers allows Congress to exercise implied powers not explicitly listed in the Constitution, so long as those powers offer a theoretical means of achieving the enumerated powers. Thus Congress successfully incorporated a bank of the United States because it was deemed necessary and proper to achieve the power to coin money and regulate its value (Clause 5), as well as other powers. No wonder the necessary and proper clause has also been called the elastic clause: it gives Congress the power to enact laws on almost any subject it desires. The power to regulate interstate commerce under Clause 3 has been especially useful in this regard. Citing the commerce clause, Congress since 1937 has regulated minimum wages of state employees, outlawed loan sharking, and passed numerous civil rights laws, among other legislation. The modern limits to that practice*

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were outlined by the Supreme Court in United States v. Lopez *(1995),* United States v. Morrison *(2000), and* NFIB v. Sebelius *(2012)—the law in question must regulate affirmative activities that are at least directly economic in nature. By comparison, the Supreme Court recently held that Congress may regulate even inactivity (e.g., a refusal to purchase health insurance) under its power to collect taxes in Clause 1.*

Section 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 9 places some explicit limits on congressional power, including restrictions on the power to ban the import of slaves (at least through 1808), the power to bestow titles of nobility, and the power to lay direct taxes not apportioned to the states' populations. This last restriction was effectively removed by ratification of the Sixteenth Amendment in 1913. It also prohibits Congress from issuing bills of attainder (legislative acts that inflict punishment without a judicial trial) and from passing ex post facto laws (criminal laws that apply retroactively to acts committed in the past).

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

The final section of Article I limits states from exercising powers reserved exclusively to the federal government. Most controversial of these clauses was the contracts clause, which prohibits states from

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impairing the obligation of contracts. Added to the Constitution largely to prevent state laws that undermined the collection of valid debts, it was later used to protect certain franchises or special privileges that corporations had received from state legislatures. Thus the Supreme Court held in Trustees of Dartmouth College v. Woodward *(1819) that the charter given to Dartmouth by a colonial legislature in 1769 could not be changed without Dartmouth's consent. State legislatures complained that the contracts clause unduly restricted their ability to legislate; thus, the Supreme Court over the course of two centuries has narrowed the meaning of the clause to allow states greater freedom to operate, relying on the theory that such contracts are by implication the laws of the state and thus may be modified by the state. The Court has also upheld state bankruptcy laws when the laws are applied to debts incurred after passage of the law.*

Article II

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal,

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death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.'

Article II, Section 1 lays out the manner by which the president and vice president are selected, the qualifications for those two offices, and the means for removal and succession. (Clause 2 on presidential elections has been replaced by the Twelfth Amendment.) Section 1 begins with the vague declaration that the "executive power shall be vested in a president of the United States of America." Does this clause serve as a source of independent power for the chief executive? Beginning in the twentieth century, the Supreme Court has held that the president possesses broad "inherent powers" to exercise certain powers not specifically enumerated in the Constitution. These vast executive powers included, for example, Franklin Roosevelt's various executive agreements extending the scope of the federal government during the 1930s. On the other hand, the Supreme Court ruled in Youngstown Sheet and Tune Co. v. Sawyer *(1951) that a president's inherent powers did not include President Truman's attempt to seize the steel mills to avert a strike without congressional approval; similarly, in* United States v. Nixon *(1974) the Court held that the chief executive's inherent powers did not encompass President Richard Nixon's refusal to turn over important documents in a criminal matter.*

Section 2. The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Article II, Section 2 is striking for how few expressed powers are granted to the president, as compared to the long list of powers granted to Congress in Article I, Section 8. In the twentieth century the powers granted to the president expanded to create a far more powerful presidency than the Founders envisioned. Thus, invoking

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their power as commander-in-chief, modern presidents have deployed troops around the world in military battles even without a formal declaration of war by Congress. Recent presidents have occasionally terminated treaties without the consent of the Senate. Presidents have also asserted the power to terminate officers of the United States without cause. The combined Supreme Court precedents of Myers v. United States *(1926) and* Humphrey's Executor v. United States *(1935) authorize them to do so in the case of purely executive officers, but not in the case of independent agency heads.*

Section 3. He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Article II, Section 3 lists numerous presidential responsibilities, including the obligation to give a report on the "state of the union" to Congress (today this occurs in the form of a yearly address), and the duty to "take care that laws be faithfully executed." Citing this latter phrase, presidents have asserted the power to impound money appropriated by Congress, and to suspend the writ of habeas corpus. Although reluctant to afford the chief executive such unbridled authority, the Supreme Court has upheld nearly all efforts by the president to call upon the military to assist in faithfully executing the law. President Eisenhower, for example, exercised this power when he used federal troops to enforce desegregation decrees in Arkansas and Mississippi in the late 1950s.

Section 4. The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

Article II, Section 4 lays out the process of impeachment and conviction of civil officers, but the phrase "high crimes and misdemeanors" is vague and subject to conflicting interpretations. Regardless, the House of Representatives has asserted its authority to decide on its own how to define the term. Only two chief executives have ever been formally impeached under this section: Andrew Johnson in 1868, and Bill Clinton in 1998. However, in both cases, the U.S. Senate failed to provide the required two-thirds vote necessary for conviction.

Article III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more

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states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

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. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

Article III establishes a U.S. Supreme Court, spells out the terms of office of its members, and lists the various cases to which its judicial power extends. Just as important, it provides the basis for a more elaborate judicial system featuring numerous levels of courts, which Congress may establish at its discretion. Note how vague and general this article is compared to Articles I and II: only one court (the Supreme Court) is specifically mentioned, and there are no provisions that specify the size or composition of the court. Congress subsequently established that federal judges on the courts of appeals and the district courts, like justices of the Supreme Court, are appointed by the president and confirmed by the Senate. They too serve for indefinite terms on good behavior, which provides the equivalent of life tenure to federal judges on those three levels of courts. Article III does not specifically grant the Supreme Court the power of judicial review, that is, the power to review the actions of other branches for their constitutionality. The Supreme Court seized that power for itself in Marbury v. Madison *(1803), and it remains a fundamental precept of the federal judicial system today.*

Article IV

Section 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged

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from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

Article IV describes the responsibilities states have to one another under the Constitution, and the obligations of the federal government to the states. It also provides the procedures for admitting new states to the union (no state has been admitted since the entry of Alaska and Hawaii in 1959). In recent years, the most controversial aspect of Article IV has been the full faith and credit clause of Section 1, which theoretically binds states to respect the public acts and proceedings of other states, including the granting of drivers' licenses and child custody rulings. Does the full faith and credit clause apply as well to the institution of same-sex marriage? The issue remains unresolved. The federal government and various states have sought at different times to evade the recognition of gay marriages sanctioned elsewhere through legislation, including the Defense of Marriage Act of 1996. Though the U.S. Supreme Court in 2013 struck down Section 3 of DOMA (limiting marital benefits under federal law to heterosexual couples) as unconstitutional, section 2 of the statute (reserving to states the power to refuse recognition of same-sex marriages entered elsewhere) remains on the books at the time of this writing. The U.S. Supreme Court may eventually decide whether the full faith and credit clause invalidates Section 2 as well.

The ambiguous privileges and immunities clause of Article IV, Section 2 requires that states not discriminate against citizens of other states in favor of their own citizens, although the Supreme Court has allowed states to establish more favorable terms for in-state residents when distributing certain recreational rights such as amateur fishing licenses or permits to use state parks; taxes on commuters, by contrast, may be unconstitutional if they penalize out-of-state residents who work or do business in the state. The requirement in Section 4 that the United States guarantee to every state a republican form of government was invoked in the 1840s when President John Tyler threatened the use of federal troops after a rebellion occurred in Rhode Island. Today that provision is obscure and seldom used.

Article V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by

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the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Article V spells out the process for amending the Constitution. By far the most common form of constitutional amendment has been by congressional proposal, with state legislatures ratifying the proposal. Twenty-six of the 27 amendments have been adopted in this way. The sole exception was the Twenty-first Amendment, which was ratified by specially chosen state ratifying conventions to assure that farmer-dominated state legislatures would not undermine the effort to repeal Prohibition. The procedure by which the requisite number of state legislatures (two-thirds) applies to Congress to call a convention for proposing amendments has never been used. Article V does not provide a deadline for considering proposed amendments, although Congress has the power to set such deadlines in the language of the proposed amendment. Congress did not do so in the case of the Twenty-seventh Amendment, which received the approval of the required three-fourths of states necessary for ratification in 1992—fully 203 years after the amendment was first proposed.

Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VI establishes that the Constitution, laws, and treaties are to be the supreme law of the land. In interpreting this supremacy clause, the U.S. Supreme Court has countenanced little resistance. Thus the Supreme Court has consistently struck down attempts by states to control federal institutions, and it has reminded state governments that even state constitutions are subordinate to federal statutes. Even more important, in Cooper v. Aaron *(1957) the U.S. Supreme Court stated in no uncertain terms that its own rulings are to be treated as if they are the words of the Constitution itself, heading off attempts by some state governments to resist Supreme Court rulings on desegregation by offering their own interpretations of the federal Constitution as authority.*

Article VII

The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same. Done in convention by the unanimous consent of the states present the seventeenth day of September in

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the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the twelfth. In witness whereof We have hereunto subscribed our Names,
G. Washington—Presidt. and deputy from Virginia

New Hampshire
John Langdon
Nicholas Gilman
Massachusetts
Nathaniel Gorham
Rufus King

Connecticut
Wm. Saml. Johnson
Roger Sherman

New York
Alexander Hamilton

New Jersey
Wil. Livingston
David Brearly
Wm. Paterson
Jona. Dayton

Pennsylvania
B. Franklin
Thomas Mifflin
Robt. Morris
Geo. Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware
Geo. Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco. Broom

Maryland
James McHenry
Dan of St Thos. Jenifer
Danl Carroll

Virginia
John Blair—
James Madison Jr.

North Carolina
Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia
William Few
Abr Baldwin

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Amendments to the Constitution of the United States

The Bill of Rights, ratified in 1791, consists of the first 10 amendments to the Constitution. Since that time, 17 additional amendments have been ratified by the states. Originally the Bill of Rights applied only to the federal government and not to the state governments; however, through a process known as incorporation, the Supreme Court has ruled that the Fourteenth Amendment (adopted in 1868) made most of the provisions found in the Bill of Rights applicable to the states as well. Subsequent amendments have extended the franchise, established (and repealed) Prohibition, and clarified important procedures that the federal government must follow.

Amendment I (1791)

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.

Although many provisions of the original Bill of Rights are based on aspects of English law, the extensive guarantees found in the First Amendment have no true English equivalent. The First Amendment offered one of the first written guarantees of religious freedom, and it formed the basis for extensive free speech and free press protection as well. Yet its unqualified language notwithstanding, the First Amendment has never conveyed absolute freedom to Americans. Whether it was the Alien and Sedition Acts of 1798, the aggressive application of the Espionage Act during World War I, or the "red scare" of the late 1940s, government has often found ways to evade the First Amendment, especially during times of crisis. The Supreme Court has also specifically exempted obscenity, libel, fighting words, and incitement from free speech protections. Nor has the separate and independent provision for the freedom of the press been interpreted to give members of the press any more protection than is afforded to ordinary citizens. Finally, as noted, although the first word of the amendment implies that its protections apply only against actions of the federal government, today the First Amendment offers protection against the state governments as well.

Amendment II (1791)

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The Second Amendment originated as a compromise in the debate between those who feared mob rule by the people and those committed to give the people everything they need to fight governmental tyranny. In 2008, the U.S. Supreme Court ruled for the first time that certain gun-control laws may violate an individual's Second Amendment right to "bear arms." Two years later it went a step further, applying those protections against all 50 state governments and their subdivisions. See District of Columbia v. Heller, *554 U.S. 570 (2008);* McDonald v. Chicago, *561 U.S. ___ (2010).*

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Amendment III (1791)

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

The Third Amendment has been all but lost to history. The Quartering Act, which required the American colonists to provide shelter and supplies for British troops, was one of the grievances that provoked the Declaration of Independence and ultimately the Revolution. Many colonists resented having to house British soldiers in private homes. The Third Amendment aimed to protect private citizens from such intrusions.

Amendment IV (1791)

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

Like the First Amendment, the Fourth Amendment is a uniquely American right. It arose out of colonists' anger over the warrantless searches and so-called General Warrants by which British authorities would conduct raids of colonists' homes virtually at their own discretion. The Fourth Amendment guarantees that with certain carefully specified exceptions (consent of the owner, urgent circumstances, etc.), government authorities can conduct searches only when they possess a reasonably specific warrant demonstrating probable cause. Enforcement of the Fourth Amendment occurs primarily through application of the controversial exclusionary rule, which excludes from trial all evidence seized in violation of a defendant's constitutional rights.

Amendment V (1791)

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

The Fifth Amendment is a collection of various rights, most of which are important primarily to those accused of a crime. Those who "take the Fifth" under oath are normally invoking the privilege against self-incrimination; under current precedents they can invoke that privilege in other contexts as well, such as whenever they are being questioned by police or other authorities. The grand jury requirement has never been incorporated to apply against state governments. The requirement against double jeopardy prevents defendants who have been acquitted from being retried for the same offense by the same government. The due process clause of the Fifth Amendment was later duplicated in the Fourteenth Amendment and applied to states as well. Finally, the takings clause limits the traditional power of eminent domain by requiring that the government must pay compensation whenever it takes private property for public use.

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Amendment VI (1791)

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

> *The Sixth Amendment offers the accused numerous constitutional protections. The need for a speedy and public trial dates back to concerns raised by imprisoned enemies of the British Crown who were detained indefinitely and without notice. The right to a jury trial—considered a sacred aspect of the American political culture—is not all-encompassing either: it applies only to nonpetty offenses (punishable by more than six months of prison).*

Amendment VII (1791)

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

> *The Seventh Amendment is the only amendment in the Bill of Rights that focuses on elements of civil trials exclusively. It preserves the distinction the English system draws between courts of common law (in which juries grant monetary relief) and courts of equity (in which a judge grants nonmonetary relief, such as an injunction).*

Amendment VIII (1791)

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

> *The Eighth Amendment offers protections that come directly from the English Bill of Rights. The prohibition against excessive bail was established to prevent judges from keeping the accused indefinitely imprisoned while waiting for trials on minor offenses; it has subsequently been interpreted to allow judges to deny bail in instances where the charges are sufficiently serious, or where preventative detention is warranted for the safety of the community. The prohibition against cruel and unusual punishment forbids some punishments entirely (drawing and quartering, burning alive, and other forms of torture), while forbidding other punishments only when they are excessive compared to the crime. Aside from the four-year period from 1972 through 1976, the Supreme Court has consistently held that with proper safeguards, capital punishment is not cruel and unusual punishment. However, consistent with this clause it may not be imposed for rape or crimes lesser than murder, and it may not be imposed against the mentally retarded or against juvenile offenders.*

Amendment IX (1791)

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

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The Ninth Amendment has been nicknamed "the Madison Amendment" in deference to James Madison's general concerns about the Bill of Rights. During debates over ratification of the Constitution, Anti-Federalists called for a bill of rights to protect the people against a potentially abusive new central government. In correspondence with Thomas Jefferson, Madison expressed the fear that by listing exceptions to congressional powers, such a bill of rights would effectively deny the existence of rights that did not happen to appear on the list. Eventually, as a member of the House of Representatives in the First Congress, Madison sponsored passage of the Bill of Rights, but he included this amendment as a way to ensure that the listing of certain rights did not mean that other rights were denied. As interpreted, the Ninth Amendment has not had much impact on the constitutional landscape. Likened by some to an "inkblot," it has been most commonly viewed not as a source of rights, but rather as a loose guideline on how to interpret the Constitution.

Amendment X (1791)

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

The Tenth Amendment lays out in explicit terms that the federal government is limited only to the powers granted to it in the Constitution. For most of the twentieth century, the Supreme Court regarded this amendment largely as a redundant truism, adding little to the Constitution as it was originally ratified. Yet since the early 1990s the Supreme Court has began to put teeth into the amendment, interpreting it as a prohibition on attempts by Congress to force states to participate in federal programs.

Amendment XI (1798)

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

The Eleventh Amendment was ratified to modify the Supreme Court's controversial decision in Chisholm v. Georgia *(1793), which upheld the authority of federal courts to hear lawsuits brought by citizens of one state against another state. The Supreme Court has ruled that the Eleventh Amendment provide states with some form of sovereign immunity, which means that it generally protects states from civil or criminal prosecution. The Supreme Court has also determined that under the Eleventh Amendment, a state cannot be sued by one of its own citizens.*

Amendment XII (1804)

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives,

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open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The Twelfth Amendment altered the Constitution's original procedures for holding presidential elections. Under Article II, the winner of a majority of electoral college votes would become president, and the runner-up would become vice president. The election of 1800 exposed the peculiarity that if every member of the electoral college voted for both members of a party ticket, each member of the most popular ticket would receive the same number of votes, resulting in a deadlock. The Twelfth Amendment cured that flaw by requiring electors to cast separate votes for president and vice president, and by ensuring that if a deadlock occurred anyway and the House of Representatives failed to choose a president, then the candidate who received the highest number of votes on the vice presidential ballot would act as president (thus all vice presidents must be constitutionally eligible to serve as president).

Amendment XIII (1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The Thirteenth Amendment was the first of the three Civil War Amendments. It officially prohibited slavery in all states, and with certain exceptions (such as in the case of convicts) involuntary servitude. Immediately prior to its ratification in December 1865, slavery remained legal in only two states, Kentucky and Delaware. (Slavery in the former confederate states had been outlawed by the Emancipation Proclamation of 1863.)

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.
Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.
Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fourteenth Amendment was ratified in an attempt to secure rights for freed slaves by broadening the definition of national citizenship and offering all persons equal protection of the law as well as due process of law from state governments. In the Slaughterhouse Cases (1873), the Supreme Court held that the privileges and immunities of national citizenship are actually quite limited: they include visiting the seat of government, petitioning Congress, using the nation's navigable waters, and other narrow privileges. By contrast, the equal protection clause provided the basis during the twentieth century for dismantling legally enforced segregation in Brown v. Board of Education *(1954) and other cases. It also has been used to extend equal protection to groups other than African Americans, including women and other ethnic minorities. Of equal significance, the Supreme Court has also interpreted the equal protection clause to require states to apportion their congressional districts and state legislative seats on a "one-person, one-vote" basis.*

The due process clause has been interpreted to provide procedural safeguards before the government deprives a person of life, liberty, or property. More controversially, in the early part of the twentieth century the Supreme Court in Lochner v. New York *(1905) interpreted the clause as providing substantive protection to private contracts and other economic agreements. In later rulings the clause sparked considerable controversy when the Court used it as the basis for protecting substantive privacy rights not explicitly spelled out in the Constitution, such as that of a woman's right to an abortion (in the Court's 1973* Roe v. Wade *decision), and of homosexual sodomy (in its 2003 ruling in* Lawrence v. Texas*).*

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Amendment XV (1870)

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Fifteenth Amendment was ratified in order to enfranchise all the former male slaves. (As was the case with all women, former female slaves would have to wait for passage of the Nineteenth Amendment to gain the franchise.) Unfortunately, the promise of the franchise was subsequently undermined in many states by the proliferation of rigorous voter qualification laws, including literacy tests and poll taxes. Not until passage of the Voting Rights Act of 1965 and the elimination of poll taxes did the franchise become a reality for African American voters in many parts of the South.

Amendment XVI (1913)

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration.

The Sixteenth Amendment was ratified in response to the Supreme Court's controversial decision in Pollack v. Farmer's Loan & Trust Co. *(1895), which held that a tax on incomes derived from property was a "direct tax." Prior to the* Pollack *case, income taxes had been considered "indirect" taxes, and thus well within the powers given to Congress by the Constitution. "Direct taxes," by contrast, could be imposed only if they were apportioned among the states according to each state's population (Article I, Section 9). The effect of the* Pollack *decision was to make an income tax all but impractical; the Sixteenth Amendment remedied the situation by placing income taxes back in the category of "indirect taxes."*

Amendment XVII (1913)

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

The Seventeenth Amendment changed the method by which U.S. senators were elected, overturning the provisions in Article I, Section 3. The amendment was the culmination of an extended effort of Progressive Era reformers at the beginning of the twentieth century, who frequently targeted institutions marked by economic privilege and corrupt politics. Eventually they demanded that U.S. senators should be more responsive to the public will—the best way to accomplish that goal was to

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require that senators should be chosen by popular election, rather than by state legislatures. Prior to the amendment's ratification, many states had already amended their primary laws to allow a popular vote for party nominees, and a handful of states had bound their respective legislatures to select the candidate who received the highest number of popular votes in the general election. The Seventeenth Amendment soon followed, receiving the approval of the required number of states (three-fourths) less than a year after it was first introduced.

Amendment XVIII (1919)

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

The Eighteenth Amendment slipped into the Constitution on the strength of efforts by the Anti-Saloon League and members of other groups who believed that intoxicating liquors were harmful and sinful. The amendment was proposed immediately after the end of World War I, and the Prohibition era began a year after its formal ratification on January 16, 1919.

Amendment XIX (1920)

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.

The Nineteenth Amendment was a reform spurred by the Progressive movement. Although women had been fighting for their right to vote since before the Civil War, the drive for woman suffrage started achieving success only with the entry of western states such as Wyoming, which extended the right to vote to women upon its admission to the Union in 1890. (Five other western states followed suit in subsequent decades.) By concentrating their efforts on a federal constitutional amendment guaranteeing women the right to vote, woman suffrage activists brought immediate pressure to bear on Congress and the president to support the movement. With momentum clearly on its side, the Nineteenth Amendment was ratified less than 15 months after it was first proposed.

Amendment XX (1933)

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

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Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.
Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.
Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission.

The Twentieth Amendment brought an end to the excessively long period of time between the November election and the March inauguration of a new president. Given advances in transportation and communications systems over the previous century, such a delay in the president taking office—with the outgoing president reluctant to act even during times of crisis—could no longer be justified. The amendment also limited Congress's lame-duck sessions that followed the November elections: newly elected members of Congress could now begin their service to constituents in early January, rather than waiting 13 months until the following December. Finally, the amendment authorized Congress to provide for a line of succession in the event that neither a president-elect nor a vice president–elect qualified to serve by the January 20th date.

Amendment XXI (1933)

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

The Twenty-first Amendment repealed Prohibition. The enforcement of the Eighteenth Amendment had proven too difficult and expensive, as thousands of illegal sources arose to meet the continuing public demand for alcohol. Crime gangs involved in the illegal liquor trade spread violence and bloodshed throughout the nation, which pressured politicians to end Prohibition. Finally, when both political parties came out in favor of repeal during the 1932 election, Prohibition's days were clearly numbered. After the Twenty-first Amendment was ratified on December 5, 1933, states would thereafter have the exclusive power to prevent the import and use of liquor in their respective jurisdictions.

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Amendment XXII (1951)

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this article shall not apply to any person holding the office of President when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term.
Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several states within seven years from the date of its submission to the states by the Congress.

Franklin Roosevelt's election to a record fourth term as president in 1944 sent politicians clamoring for a means of restoring the unwritten two-term tradition originally established by George Washington. Within two years of FDR's death, Congress proposed the Twenty-second Amendment, and it was adopted soon thereafter. In addition to setting a limit on the number of terms (two) to which a president may be elected, the amendment also sets a maximum of 10 years less one day for a president to serve in the event he or she also succeeds to a part of another president's term. The amendment was worded so as not to apply to the then-sitting president, Harry S Truman, but it has applied to Dwight Eisenhower and all other presidents since.

Amendment XXIII (1961)

Section 1. The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-third Amendment cured the anomaly of U.S. citizens being denied the right to vote for federal officials (including president of the United States) so long as they remained permanent residents of the District of Columbia. Since ratification of the amendment in 1961, DC residents have been entitled to vote for presidential and vice presidential candidates, but the amendment did not authorize residents of DC to elect members to either branch of Congress. Nor did it provide DC residents with home rule or the power to run their own local government. Since 1973 Congress has authorized the DC government to be run primarily by locally elected officials, subject to the oversight and supervision of Congress.

Amendment XXIV (1964)

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President,

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or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Twenty-fourth Amendment eliminated yet another vestige of legally enforced racism in the South and elsewhere. Many states had already eliminated the requirement that voters pay a tax before voting, a restriction that created an undue hardship on lower economic classes, including disproportionate numbers of racial minorities. Still, as late as 1964, five states (Alabama, Arkansas, Mississippi, Texas, and Virginia) continued to tie a poll tax to the voting privilege. In 1966 the Supreme Court ruled in Harper v. Board of Education *that poll taxes also violated the equal protection clause of the Fourteenth Amendment.*

Amendment XXV (1967)

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

The Twenty-fifth Amendment clarified several ambiguous aspects of presidential succession. At the outset, it formalized an unwritten precedent first established by John Tyler, who succeeded to the presidency upon the death of William Henry Harrison in 1841: If the office of president becomes vacant because of the president's

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death or resignation, the vice president becomes president and assumes all powers and duties of the office. If the vice presidency is vacant, the amendment establishes new procedures for filling the position between elections: the president nominates a successor, to be confirmed by a majority vote of both houses of Congress. Since its adoption in 1967, two vice presidents have been selected in this manner: Gerald Ford in 1973 and Nelson Rockefeller in 1974. When Gerald Ford succeeded to the presidency upon the resignation of Richard Nixon in 1974, he became the first—and to date, the only—president in American history to hold that office without being formally elected to either the presidency or the vice presidency.

The amendment also addresses the vexing problem of presidential disabilities. In the early twentieth century, Woodrow Wilson was an invalid for more than a year of his presidency; in the 1950s, Dwight Eisenhower suffered a stroke once during each of his two terms in office. The Twenty-fifth Amendment addresses the problem of presidential disability by providing procedures for the president to temporarily discharge the duties and powers of the office to the officer next in line (normally the vice president), who then becomes "acting president." This has happened only twice: in 1985, when Vice President George H. W. Bush received a transmission of power temporarily while President Ronald Reagan underwent a minor medical procedure; and in 2002, when President George W. Bush temporarily transferred his powers to Vice President Dick Cheney while he underwent a colonoscopy. The amendment further authorizes the vice president and certain members of the executive branch to declare the president disabled or incapacitated, subject (within 27 days) to Congress upholding the finding of incapacity. This final provision has never been invoked.

Amendment XXVI (1971)

Section 1. The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

The Twenty-sixth Amendment extended suffrage to those age 18 and older. At the time of its passage, soldiers under the age of 21 were fighting in Vietnam, creating intense pressure on Congress and state legislatures to extend the vote to all those who were old enough to fight. The amendment does not apply to the denial of rights other than voting to those who are between 18 and 21 years of age. Thus the National Minimum Drinking Age Act of 1984 obliges states to establish a 21-year-old drinking age or risk the loss of federal highway funds. Additionally, Utah and Alaska have established 19 as the minimum age for tobacco use.

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Amendment XXVII (1992)

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

The Twenty-seventh Amendment was intended to serve as a restraint on the power of Congress to raise its own pay—it may only do so if the raise takes effect after a subsequent general election. Although the Supreme Court has never ruled on the issue, lower courts have held that this amendment does not prevent Congress from receiving cost-of-living adjustments immediately.

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Chapter

3 Federalism

The national cemetery at Gettysburg, where states' rights were contested most violently in 1863.

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LEARNING OBJECTIVES

3.1 WHAT IS FEDERALISM?

- Define *federalism* and compare it to other forms of government, including confederations and unitary systems of government
- Explain how the Constitution differentiates between federal government powers, state government powers, and concurrent powers
- Describe the powers accorded to Congress under Article I
- Explain the significance of the supremacy clause, the preemption doctrine, and the full faith and credit clause of Article IV in distributing sovereignty

3.2 THE HISTORY OF AMERICAN FEDERALISM

- Define the five eras of American federalism and assess the role played by the Supreme Court in articulating state–federal relations during each era
- Evaluate different forms of federalism (layer-cake federalism versus marble-cake federalism) in the modern era

3.3 WHY FEDERALISM? ADVANTAGES AND DISADVANTAGES

- Identify the advantages and disadvantages of federalism in terms of fairness and accountability

WATCH & LEARN MindTap™ **for American Government**

Watch a brief "What Do You Know?" video summarizing Federalism.

Dennie Cody/The Image Bank/Getty Images

The term *federal* comes from the Latin *foedus*, which means a covenant, or an agreement linking different entities. A federal (or federated) system of government is one in which power is divided between a central authority and constituent political subunits. Both types of government are linked in order to provide for the pursuit of common ends; at the same time, each government maintains its own integrity. Federalism, the doctrine underlying such a system, generally requires the existence of a central government tier and at least one major subnational tier of governments (usually referred to as "states" or "provinces"). Each tier is then assigned its own significant government powers. What may sound simple in the abstract has proven quite difficult in practice. How exactly does a political system divide sovereignty between two thriving branches of government without creating animosities among the competing branches that may threaten to undermine the system in the first place?

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1788

U.S. Constitution featuring a federalist system, in which clear and explicit lines are drawn between the powers of sovereign state governments and sovereign federal government, is formally ratified.

1816

U.S. Supreme Court asserts its power to hold state governments to the terms of the federal Constitution in *Martin v. Hunter's Lessee*.

1819

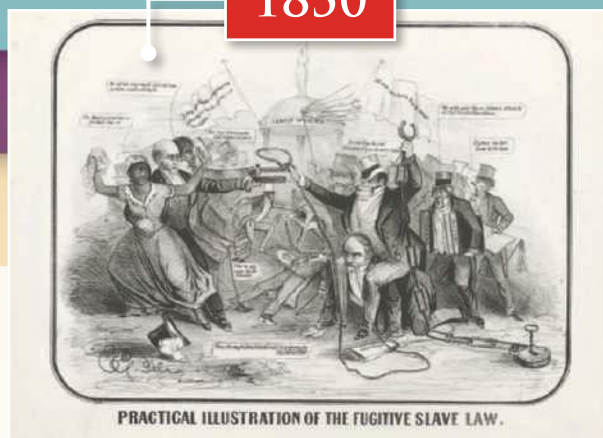
Chief Justice John Marshall articulates the national supremacy doctrine in *McCulloch v. Maryland*.

1837–1937

During reign of "dual federalism," states retain considerable authority to regulate economic affairs not directly in the stream of commerce between two or more states.

Then

1850



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Antebellum Congress debates provisions of the Fugitive Slave Law in the 1850s.

Although Congress often injects itself into the most hotly debated issues of the times, state governments are never far from the battle. Indeed, in a system of federalism, some state interests are responsible for spurring federal legislation forward, while states with competing interests offer resistance at every turn. Consider that by 1850, most slave states had grown tired of Congress's half-hearted efforts at stopping fugitive slaves from escaping their Southern masters; although the Congress had passed a series of fugitive slave laws during the late eighteenth and early- to mid-nineteenth centuries, none were effective at overcoming Northern resistance. Certainly none of them proved as far reaching or as tough as Congress's final effort in this regard: the Fugitive Slave Act of 1850. Southern officials had insisted on federal legislation that protected their states' interests through heightened judicial enforcement; accordingly, the 1850 act—passed as part of the overall Compromise of 1850—offered slave states unprecedented protection from Northern resistors. The provisions of the law included: (1) harsh penalties imposed on marshals who refused to enforce the law; (2) the virtual elimination of jury trials that favored the fugitive; and (3) the establishment of so-called "special commissioners" with jurisdiction to enforce the law, with or without the assistance of courts. Of course with Southern interests now emboldened, frustrated officials from Northern states continued to fight back. Eight Northern state legislatures passed so-called "Personal Liberty Laws" between 1850 and 1854—all were directed at undermining the Fugitive Slave Act by forbidding the use of state jails and requiring that bounty hunters provide more elaborate proof. Clearly state governments from different regions were at loggerheads, but that didn't stop the two sides from increasingly exerting their respective wills on Congress. With room for compromise slowly dwindling, this battle over states' rights and the implications of federalism would rage on for another decade until the Civil War resolved the issue of slavery once and for all.

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1937
U.S. Supreme Court abandons dual federalism principles in a series of landmark cases, adopting a more expansive view of congressional authority.

1980
Ronald Reagan elected 40th U.S. president on a party platform offering to return more policymaking authority to state governments.

1987
U.S. Supreme Court upholds National Minimum Drinking Age Act, which provides financial inducements for states to adopt a 21-year-old drinking age, as a valid exercise of Congress's taxation power under Article I.

2012
U.S. Supreme Court narrowly upholds the Patient Protection and Affordable Care Act as proper exercise of Congress's taxation powers under Article I.

Now

2012

Justin Sullivan/Getty Images News/Getty Images

Protestors at the Supreme Court march in favor of Obamacare.

Although the U.S. Supreme Court in 2012 upheld most of the Patient Protection and Affordable Care Act, better known as "Obamacare," it did strike down at least one key aspect of the law: the so-called Medicaid expansion provisions. Since its enactment in 1965, the Medicaid program has offered government-funded health care insurance to many families living at or below the poverty line. The health care law passed in 2010 would have required states to expand Medicaid to low-income residents living slightly above (up to 133% above) the poverty line as well; although the law required the federal government to fully fund the expansion during its initial three years, the Supreme Court decided these provisions violated states' rights if they remained mandatory. The starkly contrasting positions taken by states in the aftermath of the Supreme Court's ruling reaffirm that federalism and state prerogatives are alive and well in U.S. policymaking today. By late 2013, barely half the states (joined by the District of Columbia) had voluntarily embraced the Medicaid expansion provisions of the new law; by contrast, at least 21 states had still refused to expand Medicaid in their home states, foregoing hundreds of millions of federal dollars in the process. Meanwhile, governors and state legislatures in the handful of remaining states were busy negotiating with the federal government over a third possible option: applying the federal funds to alternative state programs that accomplish similar goals outside the confines of "Obamacare." Indiana, for example, asked the federal government for funds to expand its own statewide program to cover low-income residents who pay into a health savings account. The New Hampshire state government was considering a plan to channel Medicaid money to private insurance alternatives. As long as the states have the legal capacity to go their own way in implementing policy, state officials may be willing to consider ways to adapt the federal largesse to their own interests.

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3.1 What Is Federalism?

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federalism: The doctrine underlying a system of government in which power is divided between a central government and constituent political subunits.

Federalism is the doctrine underlying a political system in which power is divided between a central authority and constituent political subunits. For a system of federalism to maintain itself, it must sustain this division of powers by whatever means possible, including—but not limited to—a resort to the courts to define the proper bounds of authority. Perhaps the greatest challenge facing any federalist system is the task of determining **sovereignty**, defined as the supreme political power of a government to regulate its affairs without outside interference. In a system based on federalism, sovereignty resides not just in the central government, but also within each of the subunits, which in the case of the United States are the individual 50 states. Yet how can there be two separate sovereign governments sharing power over the exact same territory? The distribution of national and local responsibilities to more than one sovereign power depends on how the terms *national* and *local* are defined. These definitions are important, for a government based on federalism must both achieve national unity for certain overarching purposes and also preserve local governments' autonomy to respond to diverse subsets of citizens.

Jack Kurtz/The Image Works

Hispanic immigrants take the oath to become U.S. citizens.

Related to these issues are complex questions concerning the nature of national citizenship. American federalism rests on the principle that two separate sovereigns—the state government and the federal government—both exert authority over the individual. But can an individual citizen really be subject to two separate sovereign governments at the same time? U.S. citizens have official status as citizens both of the state where they reside and of the nation as a whole. Many take pride in *both* associations. What remains unclear are the obligations and duties that dual citizenship requires. Is national citizenship every citizen's primary form of identification? To which sovereign government is the citizen obligated when the nation and individual states are in conflict? Although these conceptual difficulties tend to be unique to a federal system, there are other forms of government that involve multiple governments or tiers of government, and these alternative forms have significant problems of their own.

sovereignty: The supreme political power of a government to regulate its affairs without outside interference.

Comparing Federalism to Other Systems of Government

confederation: A system of government (or "league") in which two or more independent states unite to achieve certain specified common aims.

A federal system of government can be thought of as existing on a continuum of different forms of government. At one end of the continuum is a **confederation** (or "confederacy"), defined as a league of two or more independent states that unite to achieve certain specified common aims. Those aims may be quite limited, as is often the case with offensive or defensive military alliances. For example, the Articles of Confederation, which prescribed the rules of government for the newly independent colonies until 1788, featured 13 states entering into "a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare." Recently the European Community, a collection of European nations united in a commercial alliance, has acquired its own status as a type of confederation.[1] Similarly, the United Nations is a league of countries from around the world that work together to enforce various provisions of international law. Although a confederation may be a useful arrangement to achieve some aims, it can result in political chaos, as when separate member countries bound only by limited rules strike out on their own at critical times, often to the detriment of the larger confederation.

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At the other end of the continuum is a **unitary system of government**, which subordinates the independent aims of constituent states (if any even exist) to the goals of the central whole. Although individual states within such a government may enjoy some form of representation in the central legislature (such as through the election of state senators) and may even assert their own systems of municipal law, sovereignty rests in the central government alone, with states exerting authority over citizens only through the larger government entity. Of the Western industrialized nations, Great Britain and France perhaps come closest to this unitary government ideal, with their provinces and subunits having little or no power independent of the national government. Problems with a unitary system of government often arise from the tendency toward *hypercentralism*, that is, the more or less complete reliance on the central government and the extinguishing of individual state differences. Such a system often hampers local officials from responding to the particular needs of their varying constituencies.

unitary system of government: A system of government in which the constituent states are strictly subordinated to the goals of the central government as a whole.

As Figure 3.1 shows, a federal system of government sits in the middle of this continuum, granting its member states significant power but still subordinating them to the national government in critical instances. James Madison believed this federal system was the preferred "middle ground" of government types. At least 20 countries today, including Canada, Germany, Australia, and Switzerland, may be characterized as federal systems. It is the United States' brand of federalism, however—first established with the ratification of the Constitution in 1788—that represents the most significant breakthrough in the evolution of this government type among modern nation-states.

Government Powers in a Federal System

Under the U.S. Constitution, the national government of the United States was formed to serve a community of 13 states, and each state delegated to the new central government significant powers while retaining full powers within its own constitutionally designated sphere of authority. The Framers of this new government relied on no overarching philosophy or political theory in designing this federalist form of government; federalism was simply a political compromise calculated to build consensus among them. The powers delegated to Congress under Article I of the Constitution are called enumerated powers. The powers retained by the states are **reserved powers**. And the powers shared by the federal and state governments are generally referred to as **concurrent powers** (see Table 3.1).

reserved powers: Those powers expressly retained by the state governments under the Constitution.

concurrent powers: Those powers shared by the federal and state governments under the Constitution.

Article I, Section 8 enumerates the specific powers held by the national government. Among these are economic powers such as the authority to levy and collect taxes, borrow money, coin money, and regulate interstate commerce and bankruptcies; military powers such as the authority to provide for the common defense, declare war, raise and support armies and navies, and regulate the militia; and legislative powers such as the authority to establish regulations governing immigration and naturalization. Congress also enjoys the prerogative to make laws that are "necessary and proper" to carry out these foregoing powers.[2]

On its face, the Constitution appears to draw clear and explicit lines between the powers afforded the state and national governments: the national government assumes responsibility for great matters of national importance, including the protection of national economic interests, relations with other countries, and the military security of the United States. All local and/or internal matters—including the health, safety, and welfare of citizens—were to be to the province of state governments. Indeed, in a delayed victory for states' rights advocates who had opposed the proposed constitution before its ratification, the Tenth Amendment restates this fundamental division of powers: that any specific power not assigned to the federal government by the Constitution may be exercised by the states, unless the Constitution prohibits the states from exercising that power.

The Framers of the Constitution believed that Congress should legislate only within its enumerated powers under Article I; in their view the **necessary and proper clause** (later referred to as the elastic clause) was *not* to be used as an instrument to expand federal legislative

necessary and proper clause: The clause in Article I, Section 8 of the Constitution that affords Congress the power to make laws that serve as a means to achieving its expressly delegated powers.

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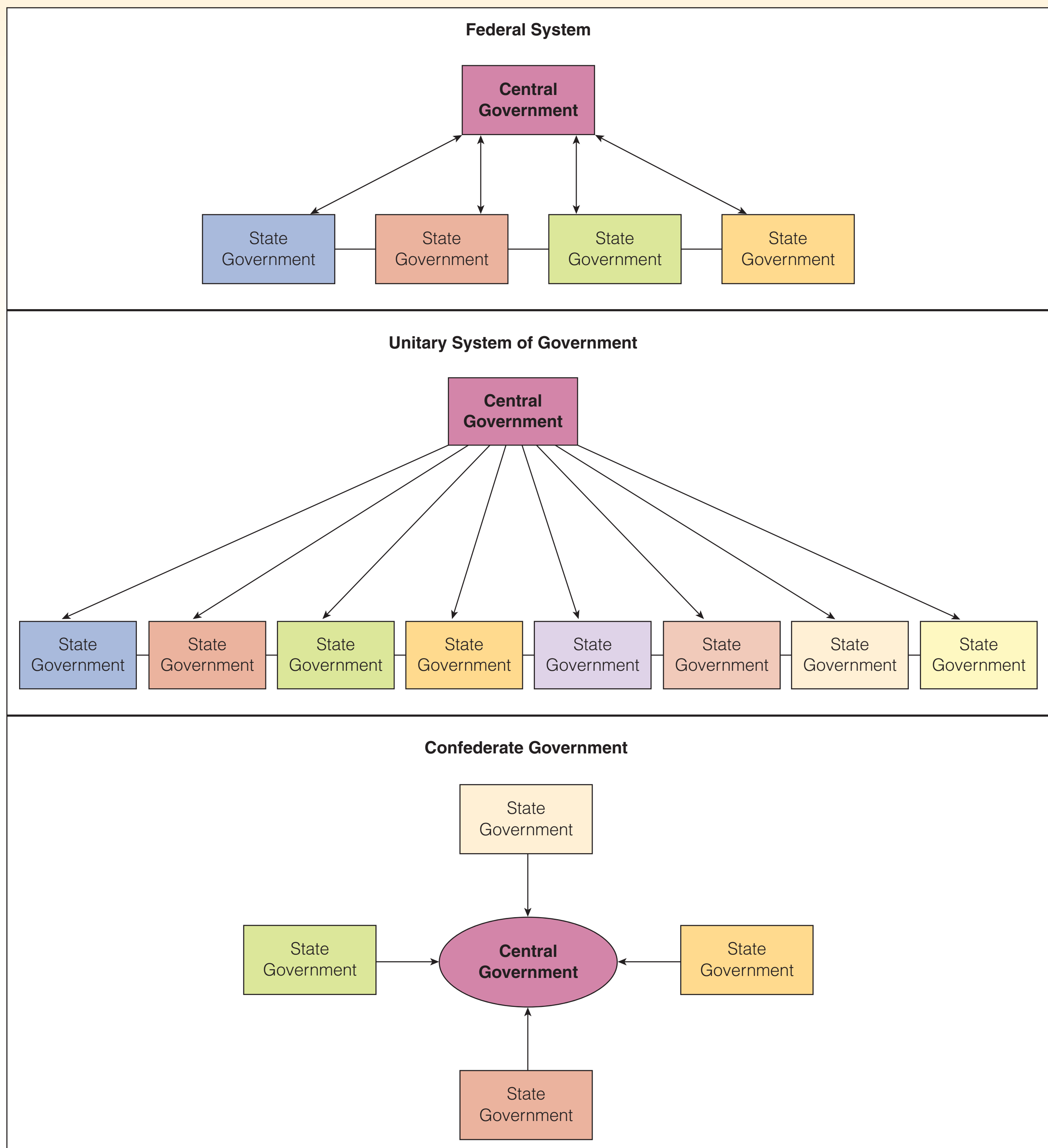

FIGURE 3.1 Comparing Systems of Government

These three figures illustrate the most common configurations for (1) federal systems of government, (2) unitary systems of government, and (3) confederate systems of government. The directions of the arrows indicate the relationship that exists between the different forms of government. Note the two-way arrows found in the federal system.

authority unnecessarily. Yet within a few years, competing views of the necessary and proper clause arose, giving the national government far more discretion in determining how to carry out its enumerated powers.

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TABLE 3.1 The Powers of the Federal and State Governments under the Constitution

Federal Government Powers (Enumerated Powers)	State Government Powers (Reserved Powers)	Concurrent Powers (Shared Powers)
Borrow money on U.S. credit	Regulate intrastate commerce	Spend money for general welfare
Regulate foreign commerce	Regulate state militias	Regulate interstate commerce
Regulate commerce with Indian nations	Conduct elections/qualify voters	Establish bankruptcy laws
Conduct foreign affairs	Regulate safety/health/morals	Lay and collect taxes
Coin money/punish counterfeiting	Ratify amendments	Charter/regulate banks
Establish courts inferior to Supreme Court		Establish courts
Establish post offices		Establish highways
Establish patent/copyright laws		Take private property for public purposes (with compensation)
Define/punish high-seas offenses		
Declare war		
Raise and support armies, navies		
Call forth militias		
Govern District of Columbia matters		
Admit new states to the Union		
Establish rules of naturalization		

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The Supremacy Clause

Overlaying this explicit system of enumerated powers for Congress and reserved powers for the states is the **supremacy clause** of Article VI, which provides that the Constitution and the laws passed by Congress shall be "the supreme law of the land," overriding any conflicting provisions in state constitutions or state laws. The supremacy clause gives special weight to the federal Constitution by ensuring that it cannot be interpreted differently from state to state. In the landmark case of ***Martin v. Hunter's Lessee* (1816)**,[3] the U.S. Supreme Court rejected the Virginia Supreme Court's attempt to interpret the federal Constitution in a way that conflicted with the U.S. Supreme Court's own rulings. Accordingly, each state legislature and state judiciary not only must abide by the terms of the federal Constitution, it must also abide by the interpretation of those terms laid out by the U.S. Supreme Court.

The language of the supremacy clause also gives rise to the doctrine of preemption. When Congress exercises power granted to it under Article I, the federal law it creates may supersede state laws, in effect "preempting" state authority. In practice, when a federal law clearly bars state action, the doctrine of **preemption** is relatively uncontroversial. For example, when the federal government acted to regulate the commercial advertising of tobacco products, it essentially "occupied the field," and all state rules governing tobacco advertising

supremacy clause: The provision in Article VI, Clause 2 of the Constitution that provides that the Constitution and federal laws override any conflicting provisions in state constitutions or state laws.

***Martin v. Hunter's Lessee* (1816):** The Supreme Court case that established that state governments and state courts must abide by the U.S. Supreme Court's interpretation of the federal Constitution.

preemption: The constitutional doctrine that holds that when Congress acts affirmatively in the exercise of its own granted power, federal laws supersede all state laws on the matter.

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immediately gave way to the new federal standard. But when Congress enacts a law that does not clearly articulate its intentions with regard to state laws, a court may have to decide whether the doctrine of preemption applies, subject to later court review. In addition, Congress's lack of action within its enumerated powers opens the door to limited state regulations. For example, a state government can enact transportation regulations affecting truck drivers in the state so long as Congress has not passed any similar laws and the state law does not burden interstate commerce.

Relations between the States

full faith and credit clause: The provision in Article IV, Section 1 of the Constitution that forces states to abide by the official acts and proceedings of all other states.

A federalist system must not only manage relations between the state governments and the federal government, it must also arbitrate disagreements among member states. A feature of American federalism in this regard is the requirement that individual states must respect the civil laws of all other states, as guaranteed by the **full faith and credit clause** of Article IV, Section 1 of the Constitution. This clause provides that each state must abide by the decisions of other state and local governments, including their judicial proceedings. This clause acts to assure stability in commercial and personal relations that extend beyond one state's borders. For example, contracts duly entered into in California under the laws of that state cannot simply be ignored or invalidated by the courts in Arizona or any other state. Similarly, when an unhappy married couple meets the legal requirements of divorce in one state and ends their marriage, they are not required to meet new divorce requirements in other states, as the divorce decree of one state must be recognized as valid by every other state.

AP Photo/Elise Amendola

Gay marriage ceremony in Massachusetts.

Even though the full faith and credit clause has traditionally required states to respect the public proceedings of every other state, many state legislatures have attempted to prevent same-sex couples from asserting their newfound status as married couples. In recent decades at least 31 states have at various times passed laws denying recognition to same-sex marriages. In denying such recognition, these states once enjoyed the theoretical support of Congress, which in 1996 passed the Defense of Marriage Act, authorizing any state to deny a "marriage-like" relationship between persons of the same sex, even when such unions are recognized by another state. When the Supreme Court struck down section 3 of the Defense of Marriage Act in 2013, it rejected as unconstitutional a federal definition of marriage limited to heterosexual couples. Yet that ruling left intact (at least for the time being) the power of individual states to deny recognition of same-sex marriages legally formed in other states.

Another clause that provides for the equal treatment of out-of-state citizens is the privileges and immunities clause of Article IV. Through this clause, which guarantees that the citizens of each state are "entitled to all Privileges and Immunities of Citizens in the several States," the Constitution protects the rights of every citizen to travel through other states, to reside in any state, and to participate in trade, agriculture, and professional pursuits in any state.[4] Some states have tried to limit memberships to in-state residents, or to impose hefty commuter taxes on out-of-staters who cross state lines each day for work. Such legislative efforts potentially conflict with the privileges and immunities clause. Article IV also provides that the criminal laws of individual states must be respected across state lines. When a criminal in one state escapes to another state, he or she is normally "extradited" or handed over to the original state either to stand trial or to complete a previously imposed sentence.

Article III, Section 2 of the Constitution gives the U.S. Supreme Court the authority to decide disputes between states. Although such jurisdiction is rarely exercised, the Court has taken its responsibility to arbitrate state conflicts seriously on those occasions when it has been asked to do so. For example, when officials in New York and New Jersey were battling in the

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late 1990s over which of those two states could claim sovereign authority over Ellis Island, the site where millions of immigrants to the United States were initially processed, the Supreme Court authorized a fact-finding investigation on the issue. Presented with the evidence of that investigation, the Court ruled that Ellis Island was within the state boundaries of New Jersey—news no doubt to the millions of immigrants who thought they had disembarked in New York.[5] The Framers of the Constitution believed it was critically important that the highest federal court enjoy the power to arbitrate disputes between state governments, a key component of American federalism.

3.2 The History of American Federalism

In the more than two centuries that have passed since the ratification of the Constitution, different conceptions of federalism have prevailed during different eras. Some of these shifting patterns in state–federal relations were inevitable given the changing state of the nation and the increasingly important role it would play in world politics. The dominance of a global economy in the late-twentieth and early-twenty-first centuries, changing patterns in population growth, and technological developments in communication and transportation all spurred wholesale reexamination of the nature of federal and state governmental functions. Various government figures—presidents, Supreme Court justices, and members of Congress—have also played a role in shaping the nature of federalism. The flexibility of the federalist system has allowed it to adapt to changing circumstances.

Although a clear delineation of periods may oversimplify history, scholars have identified at least five eras of American federalism:

1. state-centered federalism, 1789–1819;
2. national supremacy period, 1819–1837;
3. dual federalism, 1837–1937;
4. cooperative federalism, 1937–1990; and
5. the "new federalism," 1990–present.

Each of these periods is defined by some shift in the power relationship between the national and state governments.

State-Centered Federalism, 1789–1819

The Framers' vision of federalism was relatively clear at the time the Constitution was ratified: other than in those policy areas expressly identified in Article I as subject to the national government's control (the military, foreign affairs, creation of currency, and so on), state governments would have full sovereignty over all matters involving the health, safety and welfare of individuals. Indeed, it is tough to imagine the Constitution being ratified by the requisite number of states had it called for any further subordination of traditional state authority. And with some notable exceptions, the national government's reach was exceedingly limited during the first 30 years of the Constitution's history.[6] At the urging of Treasury Secretary Alexander Hamilton, the Washington administration cautiously undertook some first steps in nationwide economic planning when it chartered the first National Bank of the United States and the federal government assumed all the debts of the state governments. Nevertheless, during this earliest period of federalism states remained the principal authority for American citizens. For the most part, each state managed its own affairs, often with little interference from the federal government.

National Supremacy Period, 1819–1837

Just before leaving office in 1801, President John Adams installed as chief justice of the Supreme Court a fellow nationalist, John Marshall of Virginia. That appointment may have been

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the most significant act of Adams's presidency; although the Federalists would never again occupy the White House or control Congress, the national-government-oriented party would influence American politics through Chief Justice Marshall for the next three decades.

national supremacy doctrine: Chief Justice John Marshall's interpretation of federalism as holding that states have extremely limited sovereign authority, whereas Congress is supreme within its own sphere of constitutional authority.

***McCulloch v. Maryland* (1819):** The Supreme Court case that established that Congress enjoys broad and extensive authority to make all laws that are "necessary and proper" to carry out its constitutionally delegated powers.

***Gibbons v. Ogden* (1824):** The Supreme Court case that held that under the Constitution, a federal license to operate steamboats overrides a state-granted monopoly of New York water rights.

Marshall's **national supremacy doctrine** of federalism is most evident in the Supreme Court decision in ***McCulloch v. Maryland* (1819)**,[7] which concerned the National Bank of the United States. As Secretary of the Treasury during the Washington administration, Alexander Hamilton successfully pushed for Congress to charter the first bank of the United States in 1792, arguing that such an institution would help provide for a sound national currency and a national system of credit. Thomas Jefferson, then Secretary of State, and James Madison opposed the bank, believing that the Constitution gave Congress no authority to charter such a bank. Consequently, when the bank's 20-year charter expired, the Jeffersonian Republican–controlled Congress declined to recharter it. Recognizing that the lack of a national bank had hindered American efforts to obtain needed financial resources throughout the War of 1812, many in the Democratic-Republican Party, including Madison, who was now president, swallowed their pride and supported the chartering of a second national bank in 1816.

Marshall's Court also refuted the power of state courts to interpret and apply the Constitution in ways that conflicted with the Supreme Court's own interpretations. Thus the Constitution assumed its status as the uniform governing law of all the states. To Marshall, the Court's duty was not to preserve state sovereignty, but rather "to protect national power against state encroachments." Consistent with this view, the Marshall Court routinely interpreted Congress's legislative authority quite broadly. In ***Gibbons v. Ogden* (1824)**,[8] for example, the Court invalidated a monopoly granted by the New York legislature covering the operation of steamboats in New York waters, because the New York monopoly was in conflict with a federal license.

The national supremacy doctrine articulated by Marshall was not without its critics. State politicians accused the Court of ignoring the sovereign power of the states. Some national politicians were no less sympathetic. As president, Andrew Jackson opposed the National Bank and all internal improvements (such as the building of roads or canals) ordered by Congress as unconstitutional. He even vetoed a rechartering of the bank in 1832. Yet, at the same time, he also applied Marshall's national supremacy doctrine in defending the Tariff of 1828. After Congress passed a highly protectionist tariff over the objections of Southern free-trade adherents, the South Carolina legislature adopted a series of resolutions negating the tariff on the theory that state sovereignty allowed each state to nullify any law passed by Congress that the state deemed unconstitutional. (New Englanders had used that same argument during the War of 1812 when a convention of the region's states met in Hartford, Connecticut, in early 1815 and endorsed the right of states to interpose themselves against "dangerous infractions" of the Constitution by the federal government.) In response to the action by South Carolina, President Jackson declared that such a nullification was an "impractical absurdity" and rejected the right of individual states to refuse to obey federal laws. A call by South Carolina Senator John Calhoun and others for a "general convention of the states" to reconsider state–federal relations, including possible secession from the Union, elicited enthusiasm from numerous Southern states, but eventually the nullification crisis passed when Congress approved a compromise tariff that progressively lowered rates until they reached the same level they had been at in 1816.[9]

Although slavery was a crucial component of the fight between the Union and the Confederacy, the Civil War was at its core a struggle about the relationship between the states and the federal government. The Union's victory undermined dual federalism's "compact of states" premise by rejecting the authority of states to leave the compact. Then, in a series of cases handed down after the Civil War, a newly constituted Supreme Court acknowledged national power and congressional authority to set the terms for readmitting former Confederate states into the Union. This power was considered an outgrowth of Congress's exclusive and unquestioned authority not only to regulate the territories of the United States, but also to oversee the admission of new states to the Union. With 24 of the 50 states joining the Union between 1836 and 1912 (see Figure 3.2), admission to statehood was an important function of the federal government during this period.

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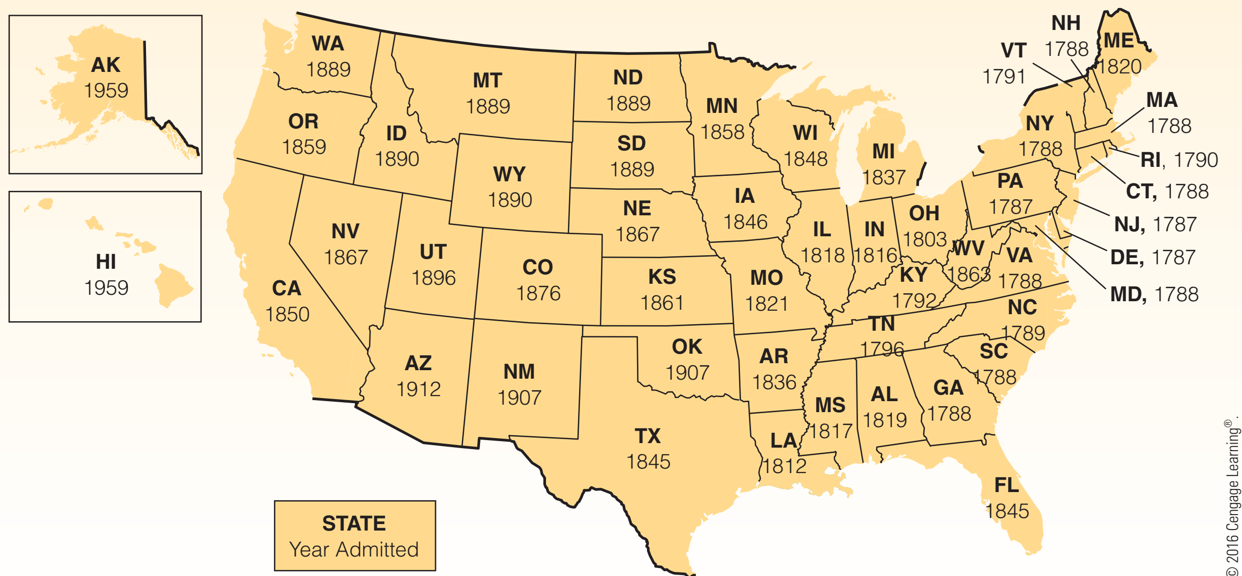

FIGURE 3.2 **Admission of States to the Union**

Under **dual federalism**, however, the states did retain considerable authority to regulate economic affairs that were not directly within the "stream of commerce" between two or more states, including matters concerning the manufacturing of products and the health and safety of factory workers. Ignoring *McCulloch v. Maryland*, the Supreme Court refused to give Congress the discretionary authority it enjoyed during the era of the national supremacy doctrine. Regulatory legislation passed by Congress, such as child labor laws and many minimum wage laws, were set aside as unconstitutional. Once again the Court had greatly diminished the scope of the necessary and proper clause. Despite the onset of the Industrial Revolution, Congress was eventually rendered helpless to regulate the abuses of some businesses. Later, in the 1930s, the Court struck down a series of New Deal laws implementing pension and retirement systems for workers and regulating industrial relations.[10] In this way, dual federalism prevented Congress from addressing the hardships brought on by the Great Depression.

dual federalism: The doctrine of federalism that holds that state authority acts as a significant limit on congressional power under the Constitution.

Cooperative Federalism, 1937–1990

Faced with judicial opposition to New Deal policies regulating the workplace, retirement policies, and other subjects traditionally ceded to the states, President Franklin D. Roosevelt (FDR) and his supporters grew increasingly frustrated. To them, the economic hardships of the Great Depression demanded an activist federal government, and a conservative Supreme Court now stood in the way. FDR and his allies in Congress proposed slowly expanding the size of the Supreme Court from 9 to what would eventually become 15, which would allow Roosevelt to "pack" the Supreme Court with advocates of a broader vision of federal legislative power.[11] The proposed "court-packing plan" became unnecessary, however. As public frustration with the Court was mounting, one member of the Court in 1937 (Justice Owen Roberts) suddenly did an about-face, abandoning dual federalist principles in favor of a more expansive view of congressional authority. A shift in just one vote had a significant impact; a shift in two votes on the Supreme Court meant that nearly all federal legislation would now survive High Court scrutiny. Once Roosevelt was able to add his own judicial appointees to the mix, the Court as a whole was ready to support unprecedented exercises of congressional power.

Social scientists speak of the post–New Deal period as marking a shift from **layer-cake federalism**, in which the authority of state and federal governments is distinct and more easily delineated, to a system of **marble-cake federalism**, in which state and federal

layer-cake federalism: Description of federalism as maintaining that the authority of state and federal governments exists in distinct and separate spheres.

marble-cake federalism: Description of federalism as intertwining state and federal authority in an inseparable mixture.

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authority are intertwined in an inseparable mixture. This new era, later labeled as the period of **cooperative federalism**, in some ways harkened back to the national supremacy doctrine articulated by John Marshall. Congress once again became the judge of its own powers, including those powers implied under the necessary and proper clause. Congress could, for example, restrict the activities of labor unions, criminalize loan sharking, or enact any policy under the theory that it may be "necessary and proper" to exercise enumerated powers such as the power to regulate interstate commerce. The limits on congressional power under so-called cooperative federalism were thus quite small: so long as some link to commerce could be offered, for example, no matter how tenuous such a link might be, Congress remained free to exert its authority over the states. When Congress passed civil rights laws in 1964 under the premise that racial discrimination in restaurants and hotels "burdened" interstate commerce, the Supreme Court barely batted an eye at what was in fact an extremely broad reading of congressional authority.[12]

cooperative federalism: The doctrine of federalism that affords Congress nearly unlimited authority to exercise its powers through means that often coerce states into administering and/or enforcing federal policies.

Cooperative federalism, however, can be distinguished from Marshall's doctrine of national superiority. Whenever concurrent legislative power is exercised, Congress can act in one of three ways:

1. Preempt the states altogether and assert exclusive control over the subject matter.
2. Leave the states to act on their own.
3. Provide that the operation of its own law depends on or is qualified by existing state laws.

This last category provides an opening in state–federal relationships that even Marshall could not have anticipated: the possibility that the federal government might actually enlist state officials and other state actors to implement federal policies.

The positive aspects of cooperative federalism are obvious. The expansion of the central government beginning in the 1930s into the $6.3-trillion-per-year behemoth that it is today means that federal officials now have huge sums of money at their disposal, as shown in Figure 3.3. Individual states can benefit from this pool of funds whenever the federal government passes on some of its revenues directly to the states to initiate and administer programs. **Grants-in-aid** from the federal government to the states have been used to fund state educational initiatives, build roads, and provide unemployment relief, among other programs that fulfill purposes expressly approved by Congress and/or its federal regulatory agencies. Federal grants also help balance the economic inequities that arise because states have vastly different tax bases. Occasionally the federal government has transformed grants-in-aid, which are allocated only for specific programs or policies, into **block grants**, which state or local governments may use at their discretion for more generalized programs.

grants-in-aid: Grants from the federal government to states that allow state governments to pursue specific federal policies, such as highway construction.

block grants: Grants from the federal government to the states that may be used at the discretion of states to pursue more generalized aims.

The collaboration between state governments and the federal government in the era of cooperative federalism also carried some negative implications for state sovereignty. Federal government officials increasingly insisted that federal appropriations to the states be accompanied by various conditions. Often these consisted of "protective conditions," designed to ensure that the state would administer its program consistent with the objectives of Congress. For example, Congress required that states receiving educational assistance meet federal requirements for educating handicapped children, including the creation of individualized education programs for students with special needs. On occasion, however, Congress has imposed coercive burdens on states that increasingly rely on such federal assistance. In 1984, for example, Congress passed the National Minimum Drinking Age Amendment, which withheld 5 percent of federal highway funds from any state "in which the purchase or public possession of any alcoholic beverage by a person who is less than 21 years of age" is lawful. The purpose of the law was to decrease the number of serious automobile accidents among those aged 18 to 20—statistics showed that this group was responsible for a high percentage of accidents on the nation's highways.

***South Dakota v. Dole* (1987):** The Supreme Court Case that allowed Congress to coerce state governments to pass state laws by conditioning grants to those states, so long as the requirements are related to the overall spending in question.

Although the conditions imposed by the National Minimum Drinking Age Act essentially coerced state governments to pass laws at the behest of the federal government, the Supreme Court generally approved of such tactics in ***South Dakota v. Dole* (1987)**.[13] Yet when Ronald Reagan was

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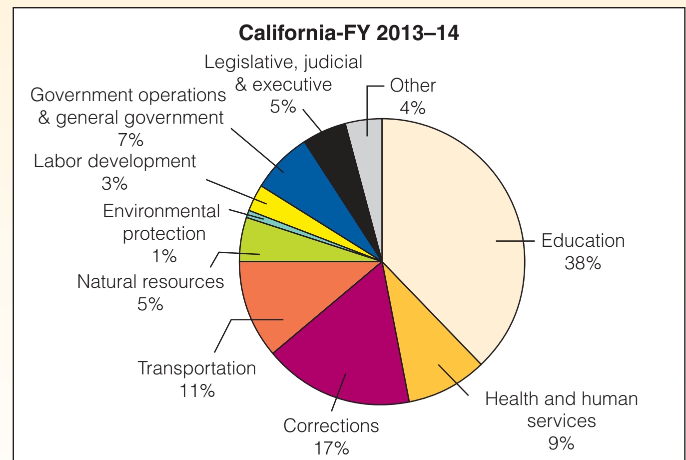
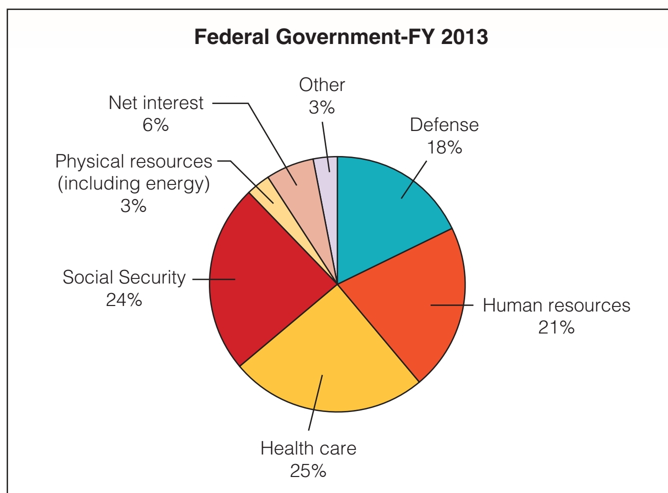
FIGURE 3.3 Comparing Federal Expenditures to State Expenditures

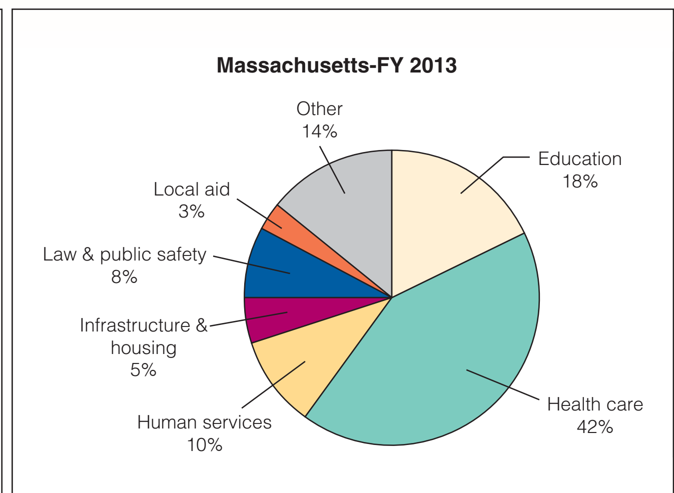
The system of federalism dictates that the federal government, not the states, must provide national defense. By contrast, state expenditures focus on educational expenses, criminal justice, and social services in particular. Although different systems of categorization make budget comparisons among governments difficult, a glimpse of the budgets of the federal government and two state governments provides some interesting insights as to where your tax dollars are going . . . or not going.



Source: ebudget.ca.gov (FY 2013–14)



Source: Office of Management and Budget (FY 2013)



Source: Massachusetts Budget and Policy Center (www.massbudget.org) (FY 2013)

elected president in 1980, he openly trumpeted federal initiatives to return policymaking authority to the states. In his first State of the Union Address in early 1981, Reagan proposed to terminate the federal role in welfare and return to the states 43 other major federal grant programs.

The voluntary transfer of power by the central government to state or local governments is known as "devolution."[14] If Reagan's proposals had been fully implemented, such a large-scale devolution of federal programs would have returned federal–state relations to the version of federalism that existed before the New Deal. As it turned out, however, strong resistance from the Democratic-controlled House led to the defeat of many of Reagan's devolution initiatives. Nonetheless, Reagan administration rhetoric emphasizing federal deregulation and increased state responsibilities set the stage for more sweeping reforms to be implemented in the years ahead.

The "New Federalism," 1990–Present

Scholars assessing the state of federalism since 1990 have failed to reach a consensus on the proper label for characterizing what appears to be a counterthrust favoring states' rights in certain areas. This new era of federal–state relations has been marked by a resuscitation of state authority, helped by a Supreme Court that, since the early 1990s, has been far more attentive

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to protecting states' rights. The changed composition of the Court accounts for this shift. Between 1991 and 2005, four Reagan appointees to the Court (Chief Justice Rehnquist and Associate Justices Antonin Scalia, Sandra Day O'Connor, and Anthony Kennedy) and one of George H. W. Bush's appointees (Associate Justice Clarence Thomas) generally favored states' rights in federalism disputes.[15] (In 2009 and 2010, President Obama replaced liberal justices with like-minded nominees, and thus was unable to reverse this recent trend.) The modern Court's decisions on federalism fit into a number of different categories.

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Second, since the mid-1990s, Congress's virtually unlimited authority to regulate interstate commerce has been scaled back somewhat. In *United States v. Lopez* (1995), the Supreme Court declared that Congress could not ban guns in school zones.[16] Whereas during the cooperative federalism era Congress regulated all manner of criminal and social activities, the present-day Supreme Court has more strenuously insisted that Congress must show a clear connection with commerce when exercising its power to regulate interstate commerce, for example. Then, in 1997, Congress ran into more obstacles when it enacted a law entitling sexual assault victims to sue their perpetrators in federal court. Once again, the Supreme Court stood firm for state sovereignty, ruling in *United States v. Morrison* (2000) that the law was unconstitutional, on the grounds that domestic abuse had only a slight connection to commerce.[17] Even when the high Court upheld the controversial individual mandate provisions of Obamacare in *NFIB v. Sebelius* 2012, it did so while offering a key concession to states' rights enthusiasts: that while the mandate to purchase insurance may have survived scrutiny as a valid exercise of Congress' power to tax, such a penalty on inactivity was *not* a proper use of Congress' commerce clause powers. In that sense, the Court's decision in the case continued down the path set out by *Lopez* and *Morrison*.

Meanwhile a Supreme Court increasingly intent on protecting states' rights has given new teeth to the Eleventh Amendment, which bars citizens of one state from bringing suit against another state in federal court. As a result of Court decisions, many plaintiffs are now restricted from bringing lawsuits in federal court against public employers; instead, plaintiffs must bring suit in state courts.[18]

Of course Supreme Court decisions are not solely responsible for the resurrection of state sovereignty that has occurred over the past decade and a half. Political developments have also altered the character of American federalism in important ways. Many of President Reagan's federalism initiatives met with limited success in a Democratic-controlled House of Representatives. For example, his own Republican Party's platform in the 1980s called for the abolition of the Department of Education; yet that controversial proposal proved a nonstarter in the Congress. Still, his administration managed to push through deregulation initiatives in a num-ber of partially preempted programs, and it relaxed federal oversight of state performance to a considerable degree. In addition, six years after Reagan left office, Republicans took control of both the House and the Senate for the first time since the early 1950s. In 1994, Newt Gingrich (R-GA), then House Minority Whip, and 366 other Republican candidates for Congress rallied around the "Contract with America," a series of initiatives they promised to introduce in the first one hundred days of the 104th Congress. (Republicans would maintain control of at least one and usually both houses of Congress for more than a decade, up until the Democratic sweep of both houses in 2006.)

In the end, that Congress passed few revolutionary new laws. A standoff between President Bill Clinton, who refused to sign the budget resolutions, and Congress, which threatened to close down the government unless the president gave way, led to government shutdowns in November 1995 and January 1996; eventually, on April 26, 1996, Clinton signed a budget bill

KIT KITTLE/CORBIS

Like this Texan, many citizens take pride in their home states.

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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

When Must the Federal Government Put State Governments in Their Place?

Citizens of the United States are also citizens of one of the 50 states. Policies in the states are by no means uniform. Notwithstanding some of the uniform testing requirements imposed by federal No Child Left Behind legislation, educational policy differs widely from state to state. So too will an individual accused of a crime find one state's criminal justice system far more onerous and difficult than another. The federal government (which includes federal courts) has occasionally stepped in to smooth out those differences, much to the chagrin of states that prefer to maintain their own unique identity on specific issues. Sometimes uniformity is favored as a matter of good policy; at other times it may be mandated by the Constitution itself. This delicate balancing act between state interests and the need to maintain states' unique political and cultural identities has never been easy to maintain.

1850

In 1850, Congress debated a legislative compromise at a time when Northern and Southern senators were growing increasingly anxious about the future course of slavery in the United States. Although Southern legislators recognized the right of Northern states to forbid slavery, they rejected all efforts to undermine Southern laws that allowed the practice. In passing the Compromise of 1850, Congress defused the confrontation and put off the threat of secession for the time being by ensuring that new territories like New Mexico and Utah could decide on their own whether to be slave states; it also strengthened the enforcement of fugitive slave acts. Thus while Congress did not mandate uniform laws on slavery, it did manage to bring Northern states into line with the clear expectations of Southern states. In this instance uniformity was not possible, and the only feasible compromise would have to accept that reality for the time being.

1963

In 1963, uniformity in the treatment of criminal defendants was squarely at issue before the U.S. Supreme Court. By late 1962, close to half of the states were automatically providing indigent defendants a right to free counsel whenever jail time was a possibility. In fact, just prior to the landmark Supreme Court case of *Gideon v. Wainwright* (1963),[19] 22 of those states urged the Court to adopt this right as a federal standard. By contrast, many states (including Florida) provided such counsel only on a case-by-case basis—if an indigent defendant seemed competent enough to try his or her own case, judges usually insisted that he or she do so. Could such a patchwork of protections stand under the Sixth Amendment? "No," said the Supreme Court, which in *Gideon* effectively nationalized the requirement that counsel be provided to indigent defendants. Following the landmark decision, the second half of the 1960s witnessed the creation of public defender programs across the country.

2010

In 2010, the U.S. Supreme Court once again inserted itself into a social and cultural debate where individual feelings tended to run high. This time the issue was gun control. In 2007 the Court ruled that the Second Amendment protects an individual's right to possess a firearm for public use. Its ruling was limited, however, to federal restrictions on firearms (in that case it was a D.C. law); the Supreme Court did not address whether the Second Amendment applied to state laws as well under the process known as *incorporation*. (Incorporation is discussed in detail in Chapter 4). Certainly the possession of firearms has different implications for residents of the South Bronx than it does for residents of rural farmland in Wyoming. Does the Fourteenth Amendment hold all governments accountable to the protections afforded by the Second Amendment? The Supreme Court's answer was "yes." On June 28, 2010, the Court held in *McDonald v. Chicago* that the Second Amendment right to bear arms applies to all 50 states as well as the District of Columbia.

For Critical Thinking and Discussion

1. If the Bill of Rights was intended to provide certain fundamental rights for all citizens, shouldn't those rights be uniform from state to state?
2. Can you justify, for example, giving criminal defendants in one state less constitutional protection than defendants in another state? If so, on what basis?

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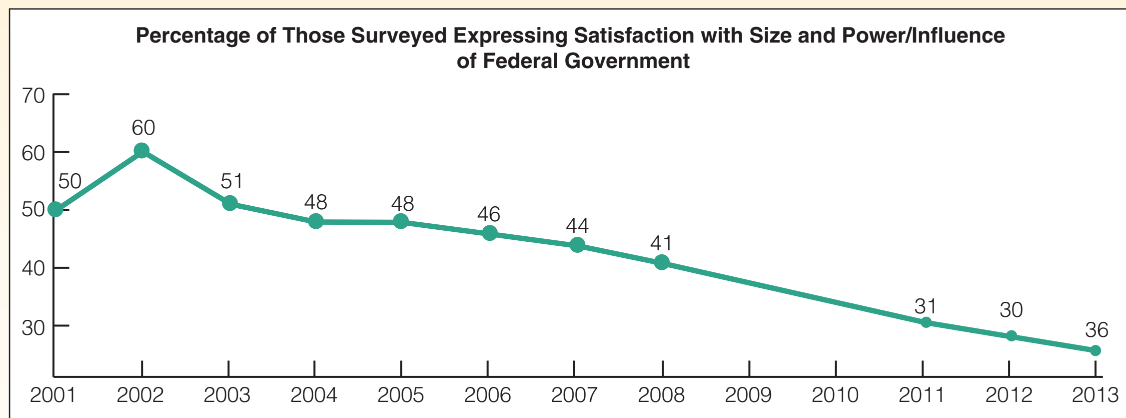

FIGURE 3.4 Has the Federal Government Gotten Too Big?

Source: Gallup poll, January 17, 2013. (http://www.gallup.com/poll/159875/americans-similarly-dissatisfied-corporations-gov.aspx)

that cut federal domestic discretionary spending for the first time in three decades. Yet the bill did not achieve anything close to the revolution that the leaders of the 104th Congress had hoped for. Devolution of programs to the states has instead evolved far more gradually, through legislation like the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which capped federal block grants to states for welfare aid. States have been encouraged by the law to create their own cost-efficient welfare benefits programs. But the states' rights movement stopped significantly short of the vaunted "devolution revolution" promised by Republican House leaders when they first took control in 1995.

In the wake of the terrorist attacks that occurred on September 11, 2001, Americans rallied around the flag, offering their support for a strong and emboldened federal government, as seen in Figure 3.4 But in the decade since then, support for the federal government has dropped sharply, falling even below pre 9/11 levels. For better or worse, public frustration with the immense size and power of the federal government is a modern reality, and politicians in Washington, D.C., must account for this sentiment when they introduce new programs.

3.3 Why Federalism? Advantages and Disadvantages

Supporters of federalism point to several advantages offered by this form of government, and opponents of federalism counter with arguments of their own concerning the disadvantages of this form of government.

Advantages of Federalism

Supporters of federalism cite among the specific advantages of this form of government that it is more likely to accommodate the needs of a diverse citizenry, to strengthen liberty by dividing powers between levels of government, to encourage experimentation, and to respond to change.

Accommodation of diversity. If a unitary system of government threatens to treat citizens of different states as interchangeable parts for purposes of quick and easy administration, federalism acts as an important counterbalance to this trend. A citizen of the United States can also take pride in being a citizen of Texas or some other state with a clearly defined culture or character. State and local politicians can perhaps respond to the specific demands or needs of their citizens better than a central government can. The culture of a state may be reflected in

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THROUGH THE YEARS: SUPREME COURT DECISIONS IMPACTING OUR LIVES

Gonzales v. Raich (2005)

In 1996 California voters passed Proposition 215, making it the 14th state to legalize the use of marijuana for medicinal purposes. Of course those laws stand in conflict with federal statutes criminalizing all forms of marijuana use, as Angel Raich learned in 2002 when she was arrested under the Federal Controlled Substances Act for using homegrown marijuana. Raich's doctors claimed that without the marijuana her life would be threatened by excruciating pain. So which law applies under those circumstances? In *Gonzales v. Raich*, the Supreme Court held that Congress does indeed have the power to control or ban marijuana for medical and nonmedical uses. Subsequently, the federal government essentially determines the state of the law by its own patterns of enforcement. Between 2006 and 2009 the federal government used criminal raids and other means to thwart California's marijuana users, including those using it for medicinal purposes. Since early 2009, however, the Obama administration has adhered to an enforcement policy that countenances medical marijuana distribution/use in California and elsewhere. Thus while the federal government enjoys superiority in the world of drug enforcement, federal policy is not tone-deaf to the reality that the use of marijuana for medical purposes enjoys increasing levels of support from the public.

▸ For Critical Thinking and Discussion

1. Should the federal government enforce unpopular drug laws in the face of reluctant state governments?
2. Do competing governments in this context offer more effective checks and balances, or do they simply create a source of confusion for citizens?

that state's handgun control laws, its rules on the distribution of alcohol, or its laws concerning abortion, prostitution, the use of land, and many other issues that tend to receive differing levels of support across America.

Strengthening of liberty through the division of powers. In Federalist No. 51, James Madison argued that "in the compound republic of America" the power surrendered by the people is divided between two distinct governments. This division provides security against a concentration of power in a single, unitary government. Madison also considered the division of such power "essential to the preservation of liberty," because it becomes harder for a corrupt agreement between these two separate governments to last for long—in the unlikely event that one entire government turns corrupt, the other government would still be available to check that government's abuses. Thus the existence of two distinct levels of government, combined with the separation of executive, legislative, and judicial powers within each of those governments, offers individuals considerable protection. Accordingly, Madison argued that "a double security arises to the rights of the people."

Encouragement of laboratories of democracy. In 1932, Supreme Court Justice Louis Brandeis made famous a metaphor for creative federalism when he wrote that "a single courageous state may, if its citizens choose, serve as a laboratory, and try social and economic experiments without risk to the rest of the country."[20] This notion of states serving as "laboratories of democracy" is encouraged by a federalist system that gives the states authority to craft policies at the outset, while at the same time affording the central government authority to implement

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policies that prove successful throughout the nation. During the 1930s, FDR borrowed from the experience of various states in crafting many New Deal policies. In 1993, the Brady Bill passed by Congress drew heavily on successful state gun-control provisions that established waiting periods for handgun purchases. The flip side of such successes is also significant: state policies that proved to be failures discourage broad-based applications by the federal government. For example, given that California's deregulation of utilities helped bring about an energy crisis in that state in early 2001, it seems unlikely that other states or the federal government will seek similar forms of deregulation anytime soon.

Disadvantages of Federalism

Opponents of federalism present arguments of their own concerning the disadvantages of this form of government. Chief among their objections to a federalist system are the unfairness caused by economic disparities among the states, questions about government accountability for many public programs that are inherent with competing sovereigns, and the system's heavy reliance on the courts to define the nature of federalism.

COMPARE WITH YOUR PEERS
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Access the Federalism Forum: Polling Activity—State Income Tax

Fiscal disparities among the states. States differ markedly in the wealth of their citizens, and thus in the taxable resources available to them for programs. According to the U.S. Department of Commerce's Bureau of Economic Analysis, Connecticut's citizens in 2012 boasted a per capita personal income of $59,687, more than 70 percent higher than that enjoyed by citizens of Mississippi ($33,657).[21] Because of these fiscal differences, the amount that states have available to spend on governmental programs varies widely. Furthermore, when the central government defers to state entities in the governing process, such as when it requires states to fund their own welfare programs, wide fiscal inequalities among states (and localities) may mean disparate—and inequitable—programs for citizens in different states. Advocates of social equity and justice routinely complain about this consequence of federalism. Although federal financing of state developmental projects or other state programs relieves some of these inequities, the current trend toward reducing state dependency on the federal government promises more, not less, equity in the distribution of government benefits across states.

Lack of accountability. Numerous government programs fall under the exclusive authority of neither the state governments nor the federal government; both may act, either may act, or, in some cases, neither may act. At least in the abstract, federalism creates the prospect of multiple levels of government vying for the opportunity to address economic or social problems. In practice, however, the federal and state governments often play a game of "chicken," each hoping the other will act first and assume greater economic responsibility, and perhaps accountability for failures. In an era when public frustration with rising taxes discourages government spending, this "blame game" may go on for years, with both sides accusing the other of shirking its responsibilities to the public. During the 1990s, for example, many state governments eliminated benefits for the needy and imposed stricter requirements on those seeking welfare. State legislatures facing growing budget deficits hoped to "push" the poverty problem onto other states by passing laws that encouraged poor people to move to states with more liberal benefits programs. During this same period Congress passed welfare legislation in 1996 that transferred welfare responsibilities back to states. Critics charge that this arrangement of shared accountability quickly transforms into a lack of accountability, with neither government accepting responsibility for dealing with problems.

* * * * * *

Contentious issues often begin as debates over the substance of legislation: Should fugitive slaves who escape to freedom be returned to their masters? Should immigration enforcement extend to local police officers stopping individuals and demanding that they produce evidence of citizenship? Yet when significant questions about resources and enforcement inevitably arise, those issues quickly transform into even larger questions of jurisdiction and

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FROM YOUR PERSPECTIVE

The Real-Life Benefits of Attending College Close to Home

Many high school seniors dream of attending colleges or universities in distant and exotic locations, far from the watchful eyes of parents or guardians who may be footing the bill. Did you ever dream of attending the University of Hawaii, or perhaps the Florida Keys Community College?

Kevork Djansezian/Getty Images News/Getty Images

UCLA students walking to class on the school's Westwood campus. In recent years, state universities such as UCLA have increased the number of admissions offers extended to nonresidents as a means of generating more revenue.

While admission standards to such schools may or may not pose an obstacle, the bigger issue may be financial. State legislatures try to attract in-state students by offering lower-cost in-state tuition: They know that those students will often stay in the state after graduation and secure good jobs, contributing to the state's economy. For example, if you live in Wisconsin and you want to go to the University of Rhode Island, your college tuition in 2013 would have cost you $26,444. But if you were from Rhode Island, it would only cost you $10,878. UCLA offers perhaps the biggest home-state discount in the country: $34,098 in tuition per year for out-of-staters, as compared to just $11,220 for California residents.

For Critical Thinking and Discussion

1. Did you consider attending (or are you currently attending) a school far from your own home state?
2. As a high school senior, were you aware of the significant disparities in tuition charged by some public universities to students from other states?
3. Should states be allowed to financially discriminate against out-of-state applicants? Why or why not?

sovereignty: Can the federal government order states to accept Medicaid expansion funds? If it cannot, are states entitled to the money when they offer alternatives better suited to their own needs, but that accomplish federal goals? States tend to respond to federal programs and the mandates that flow from those programs based on political factors as well: Do the citizens of the state want to be part of the federal program? Are they willing to pay more taxes to fund their own programs? Sweeping federal programs ensure a measure of uniformity from state to state; sometimes uniformity also helps to avoid confusion and prevent abuse; at other times, however, variations among the states allow for valuable policy experimentation as well as the protection of local concerns and interests. Dividing sovereignty is never easy: In the case of fugitive slave acts and the recent battle over Obamacare funds, it has been especially controversial. No one ever said federalism was a simple doctrine. As long as federal and state governments keep the public interest in mind, the debate over applications of federalism should continue to serve as a mostly healthy (if a bit uncomfortable) form of political dialogue.

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SUMMARY: PUTTING IT ALL TOGETHER

3.1 What Is Federalism?

- Federalism links the central government of the United States to all 50 state governments. Sovereignty resides concurrently in both the central government and state governments, as distinguished from confederations (simple alliances of powerful independent states) or unitary systems of government (in which the subunits are subordinate to the central government).
- The Framers of the Constitution assigned to the federal government matters of great national importance (including foreign and military affairs) and assigned to the states all local and internal matters, including those relating to the health, safety, and welfare of citizens. Concurrent (or "shared") powers include taxation, banking and bankruptcy regulations, spending for highways, and other forms of general welfare.
- In addition to managing foreign and military affairs, Article I also vests Congress with the power to borrow money on U.S. credit, coin money, establish post offices, admit new states, and establish rules of naturalization, among other authorities.
- The supremacy clause of Article VI provides that the Constitution and all federal laws override (or "preempt") conflicting provisions in state constitutions or state laws. The full faith and credit clause of Article IV requires that states respect each other's acts and official proceedings.

3.2 The History of American Federalism

- Beginning in 1819, the Supreme Court under Chief Justice John Marshall substituted the Framers' vision of state-centered federalism with a national supremacy doctrine that deferred to Congress as the supreme authority within the sphere of its own constitutional powers. Beginning in 1837 a system of "dual federalism," in which state authority served as a severe limit on congressional power, reigned for nearly a century. The Great Depression ushered in an era of "cooperative federalism" (1937–1990), which allowed Congress nearly free reign. During the current period of "new federalism" (1990–present), state sovereignty has once again been resuscitated to resist certain forms of congressional coercion.
- In the modern era, relatively clear divisions between state and federal authority (i.e., "layer-cake federalism") have given way to an intertwining of federal and state authority (i.e., "marble-cake federalism"). Through grants-in-aid and block grants, the national government has placed huge sums of federal money at the disposal of states, while still imposing conditions on states and state officials to help administer federal laws.

3.3 Why Federalism? Advantages and Disadvantages

- Supporters of federalism argue that it accommodates diversity, strengthens liberty, and encourages states to serve as "laboratories of democracy." Opponents of federalism object to the unfairness caused by economic disparities among the states. They also complain about the lack of government accountability for programs managed by competing sovereign powers, as well as the system's heavy reliance on the judiciary to define the nature of federalism and enforce its perimeters.

KEY TERMS

block grants (p. 66)
concurrent powers (p. 59)
confederation (p. 58)
cooperative federalism (p. 66)
dual federalism (p. 65)
federalism (p. 58)
full faith and credit clause (p. 62)
***Gibbons v. Ogden* (1824)** (p. 64)
grants-in-aid (p. 66)
layer-cake federalism (p. 65)
marble-cake federalism (p. 65)
***Martin v. Hunter's Lessee* (1816)** (p. 61)
***McCulloch v. Maryland* (1819)** (p. 64)
national supremacy doctrine (p. 64)
necessary and proper clause (p. 59)
preemption (p. 61)
reserved powers (p. 59)
***South Dakota v. Dole* (1987)** (p. 66)
sovereignty (p. 58)
supremacy clause (p. 61)
unitary system of government (p. 59)

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TEST YOURSELF

1. The provision of the Constitution declaring that state constitutions and state laws my not conflict with the Constitution is known as the
   - **a.** elastic clause.
   - **b.** supremacy clause.
   - **c.** necessary and proper clause.
   - **d.** dominance clause.
2. The requirement that all states recognize and abide by the official acts of other states is known as
   - **a.** full faith and credit.
   - **b.** preemption.
   - **c.** privileges and immunities.
   - **d.** extradition.
3. The specific powers delegated to Congress, such as the power to coin money, are referred to as
   - **a.** reserved powers.
   - **b.** concurrent powers.
   - **c.** shared powers.
   - **d.** enumerated powers.
4. What clause in the U.S. Constitution makes it easy for a citizen to change his or her official state of residence? In what other ways do Americans benefit from this clause?
5. Which of the following Supreme Court cases did *not* favor broad federal government power to regulate?
   - **a.** *McCulloch v. Maryland*
   - **b.** *Gibbons v. Ogden*
   - **c.** *South Dakota v. Dole*
   - **d.** *Lopez v. United States*
6. The doctrine of federalism that gives Congress nearly unlimited authority to exercise its powers to coerce states into enforcing federal policies is
   - **a.** dual federalism.
   - **b.** layer-cake federalism.
   - **c.** marble-cake federalism.
   - **d.** cooperative federalism.
7. Funds provided by the federal government to the states that may be used at the discretion of the states for more generalized policy goals are called
   - **a.** grants-in-aid.
   - **b.** block grants.
   - **c.** federal matching funds.
   - **d.** continuing appropriations.
8. In this period of "new federalism," the Supreme Court has issued a number of decisions that have resuscitated state authority. What are some of these decisions, and how did they empower state authority?
9. Which of the following individuals made famous the metaphor that states might serve as "laboratories of democracy"?
   - **a.** Thomas Jefferson
   - **b.** James Madison
   - **c.** Louis Brandeis
   - **d.** Ronald Reagan
10. Differences in per capita income among states
    - **a.** lead states to spend different amounts of money on government programs.
    - **b.** do not matter, thanks to federal financing initiatives.
    - **c.** decrease state dependency on the federal government.
    - **d.** are relatively insignificant.
11. What are the main arguments that have been advanced in favor of the system of federalism in the United States?
12. What are the main arguments against the system of federalism in the United States?

1. b. (LO 3-1); 2. a. (LO 3-1); 3. d. (LO 3-1); 5. d. (LO 3-2); 6. d. (LO 3-2); 7. b. (LO 3-2); 9. c. (LO 3-3); 10. a. (LO 3-3)]

MASTER THE CONCEPT OF FEDERALISM WITH MindTap™ FOR AMERICAN GOVERNMENT

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Access Key Term Flashcards for Chapter 3.

TEST YOURSELF MindTap™ for American Government
Take the Wrap It Up Quiz for Chapter 3.

STAY CURRENT MindTap™ for American Government
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Complete the Focus Activities for Federalism.

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Chapter 4
Civil Liberties

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Learning Objectives

4.1 THE BILL OF RIGHTS: ORIGINS AND EVOLUTION

- Compare civil rights to civil liberties; discuss the origins of the Bill of Rights and the process of incorporation

4.2 FREEDOM OF RELIGION AND THE ESTABLISHMENT CLAUSE

- Describe the free exercise clause; identify the rules governing the separation of church and state and explain the tests for upholding government accommodations of religion

4.3 FREE EXPRESSION RIGHTS

- Outline the theories that justify giving heightened protection to expression rights
- Assess the scope of free speech rights, free press rights, and symbolic speech; summarize the rules for exempting from protection lesser-value speech, including libel and obscenity

4.4 THE SECOND AMENDMENT RIGHT TO BEAR ARMS

- Identify the scope of the right to bear arms and the constitutional limits on gun control laws

4.5 THE RIGHTS OF THE CRIMINALLY ACCUSED

- Assess the scope of Fourth and Fifth Amendment rights aimed at the accused, including the rights against search and seizure, double jeopardy, and the privilege against self-incrimination
- Summarize the rights granted under the Sixth and Eighth Amendments

4.6 THE MODERN RIGHT TO PRIVACY

- Define the modern privacy rights that apply to government restrictions on abortion, sodomy, and euthanasia

WATCH & LEARN MindTap® for American Government

Watch a brief "What Do You Know?" video summarizing Civil Liberties.

Scales of Justice: ©iStockphoto.com/Creativeye99; background image: Douglas Graham/CQ-Roll Call Group/Getty Images

The concept of **civil liberties**—those specific individual rights that cannot be denied by government—dates all the way back to the original English legal charter, the Magna Carta of 1215. Yet civil liberties remain just as significant and hotly contested today. In the United States, most discussions of civil liberties begin with the Bill of Rights, which amended the Constitution in 1791. The Bill of Rights affords to individuals numerous protections, including the freedom of speech and the right of protection against self-incrimination. All these individual rights are subject to formal interpretation from the courts, and to informal interpretation by those charged with their enforcement. Civil liberties may be distinguished from civil rights (sometimes called *equal rights*), which refer to rights that members of various groups (racial, ethnic, gender, and so on) have to equal treatment by government under the law as well as equal access to society's opportunities. This chapter deals with civil liberties, whereas Chapter 5 deals with civil rights.

civil liberties: Those specific individual rights that are guaranteed by the Constitution and cannot be denied to citizens by government. Most of these rights are in the first 10 amendments to the Constitution, known as the Bill of Rights.

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1833
U.S. Supreme Court in *Barron v. Baltimore* confirms that the Bill of Rights offers restrictions against the federal government only.

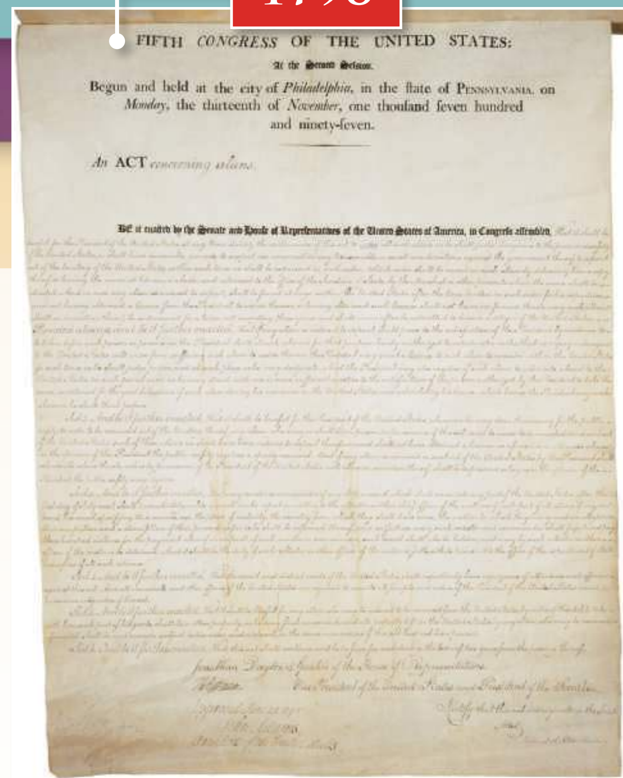
1897
U.S. Supreme Court in *Chicago Burl & Quincy Rwy v. Chicago* begins century-long process of “incorporating” the Bill of Rights within the Fourteenth Amendment’s due process clause to restrict state governments as well. (By 2010, all but a handful of provisions applied both to the federal and state governments.)

1962
Religious prayers in public schools led by teachers or school officials declared unconstitutional in *Engel v. Vitale*.

1964
Landmark decision in *New York Times v. Sullivan* articulated a more stringent test for public officials suing for libel, requiring “reckless disregard” or “malice” on the part of media defendants.

Then

1798


FIFTH CONGRESS OF THE UNITED STATES:
At the Second Session.
Begun and held at the city of *Philadelphia*, in the ftate of Pennsylvania, on *Monday*, the thirteenth of *November*, one thoufand feven hundred and ninety-feven.

An ACT *concerning aliens.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

PF-(usna)/Alamy

Picture of parchment copy of Alien and Sedition act of 1798.

When a democratic nation like the United States faces a crisis of epic proportions—whether foreign or domestic—a frightened population may be willing to compromise its civil liberties to achieve greater safety and security. But to what end and for how long? Consider the dilemma facing President John Adams in 1798, when his administration was gearing up for hostilities against the French dictator Napoleon Bonaparte. Napoleon’s forces had already captured Rome and invaded Switzerland and Egypt earlier that year, and now Napoleon’s aides intimated to American diplomats that a war against the young American republic might just be next. Congress passed 20 acts to help consolidate the national defense against France and prepare for the possibility of invasion. The most controversial of these acts were the Alien Act, which authorized the president to deport from the United States all aliens suspected of “treasonable or secret” inclinations; the Alien Enemies Act, which allowed the president during wartime to arrest aliens subject to an enemy power; and the Sedition Act, which criminalized the publication of materials that brought the U.S. government into “disrepute.” Fearful of being viewed as weak on foreign policy, Adams approved of all three laws. Although Adams did not issue any deportation orders during his presidency, several Republican editors were jailed for violating the Sedition Act. War fever captured the nation’s imagination for a while, but when the actual war against France did not materialize, the public struck back, helping throw Adams and the Federalist Party out of office two years later. Still, none of those controversial laws was ever declared unconstitutional, allowing for their possible return when future presidents deemed them as once again necessary.

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1966

Landmark *Miranda v. Arizona* decision requires that warnings be read to all defendants in custody before they are questioned by police.

1969

U.S. Supreme Court reinterprets "clear and present danger" doctrine from *Schenck v. U.S.* (1919) as part of far more speech-protective doctrine articulated in *Brandenburg v. Ohio.*

1971

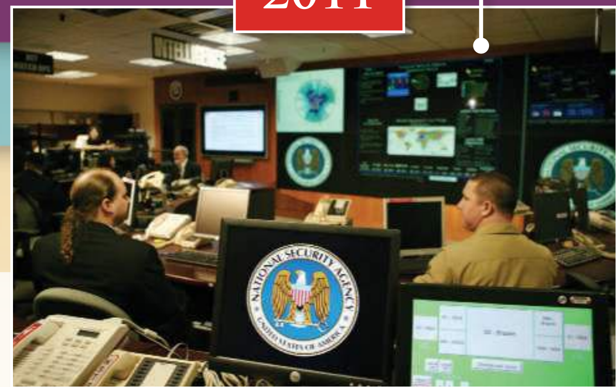
U.S. Supreme Court in *Lemon v. Kurtzman* articulates stringent test for establishment clause cases that renders many government accommodations of religion presumptively invalid.

1990

U.S. Supreme Court adopts new free exercise test that rejects religious exemption claims against neutral, generally applicable laws in *Employment Div. v. Smith.*

Now

2011



JASON REED/Reuters/Landov

Inside the National Security Agency, a subject of considerable controversy in recent years.

Presidents George W. Bush and Barack Obama were the first two chief executives to direct the U.S. government's post-9/11 antiterrorism policies. The Bush administration launched wars in Afghanistan and Iraq in the years immediately following the September 11, 2001, terrorist attacks. Spurred on by a scared populace, Congress enacted the USA Patriot Act, authorizing President Bush to take steps to prosecute the war, including giving the federal government broad new powers to detain suspects without hearings at the Guantanamo Military Base ("Gitmo") in Cuba and elsewhere. The law targeted aliens in particular, allowing authorities to hold noncitizens suspected of terrorism for seven days without charging them, and utilized a system of military tribunals with limited due process protections. The Bush administration also empowered the National Security Agency to monitor and digitally clone (without search warrants) phone calls, texts, and other communications involving at least one party outside the United States. In 2008 Barack Obama successfully won the White House by appealing to a citizenry that had soured on many aspects of the war on terrorism, including the use of torture to interrogate prisoners. As president, Obama did halt the use of torture; however, he refused to roll back the Bush administration's other antiterrorism measures, including the practice of indefinitely detaining prisoners deemed "unlawful combatants," denying them habeas corpus rights. And although the Obama administration discontinued some forms of warrantless surveillance, it continues to collect millions of U.S. phone records from private phone companies. More than a decade after 9/11, the foundation of civil liberties in the United States remains shaken to its core, with critics decrying what they call the "massive continued violation of individual rights" in the name of vaguely articulated national security concerns.

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4.1 The Bill of Rights: Origins and Evolution

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Access Read Speaker to listen to Chapter 4.

What are rights? Strictly speaking, they are powers or privileges to which individuals are entitled. The central question is: where do rights come from, and are they absolute? *Natural rights*, which are based on the natural laws of human society, exist even in the absence of a formal government. Because natural rights theoretically transcend government entities, no authority can legitimately take them away. As Thomas Jefferson so eloquently stated in the Declaration of Independence, human beings are endowed with certain rights that are "unalienable," which means they cannot be denied by government.

Positive rights, by comparison, are granted by government authority and can usually be shaped and modified by that authority according to certain rules. An indigent person's right to a lawyer paid by the state in felony cases, for example, is a positive right. The term *liberty* refers to a right received from a higher authority, such as a government. As they articulated the basis for a new government, many of the Framers grappled with these and other terms in the nation's founding documents.

It is sometimes easy to forget that, as U.S. Supreme Court Justice Antonin Scalia once stated, individual rights are only "the fruits, rather than the roots, of the Constitutional tree."[1] The Constitution of the United States was intended to provide individuals with protection by guaranteeing a framework of limited government based on a theory of enumerated powers—the central government was allowed to exercise only those powers delegated to it by the Constitution. As James Madison wrote in Federalist No. 14, "the general government is not to be charged with the whole power of making and administering laws . . . its jurisdiction is limited to *certain enumerated objects*."[2] Thus by Madison's logic, separate provisions for the protection of individual rights were unnecessary; protection for those rights was inherent in the nature of limited government with enumerated powers. Because the government possessed no explicit power to infringe on those rights in the first place, they should never be in danger.

Yet Madison's logic ran up against an early American tradition that called for the explicit delineation of individual rights. The Declaration of Independence not only formally recognized that certain "unalienable rights" exist, it also stated that when a government created by "the consent of the governed" fails to protect those rights, the people have the right to "alter or abolish such government." At the time of the founding, individual rights were considered an important element of America's political culture, because they embodied the principles that justified the American Revolution. Many of the former colonists wanted those rights clearly spelled out, lest there be any doubt of their significance to the new nation.

When the U.S. Constitution was created in 1787, most state governments already maintained a bill of rights to protect citizens against government encroachment. As the final draft of the proposed constitution was being debated at ratification conventions in the states, it became evident to the new constitution's supporters that its approval was going to require the inclusion of a more formal bill of rights to protect citizens against the federal government. George Mason and Patrick Henry of Virginia cast votes against ratification, in part because the proposed constitution lacked a formal statement of rights. Thomas Jefferson was also an early proponent of a bill of rights. To Madison's fears that such a declaration of rights could never be comprehensive, and thus might leave out something important, Jefferson replied: "Half a loaf is better than no bread."[3]

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Eventually it was Madison who framed the list of rights that the first Congress proposed in 1789—10 amendments to the Constitution were ratified by the required three-fourths of state legislatures. These are normally regarded as the "Bill of Rights." Whereas the first eight amendments guarantee specific rights, the Ninth and Tenth Amendments offer more general statements describing divisions of power between the federal and state governments under the Constitution.

The provisions listed in the Bill of Rights enjoyed little influence in late-eighteenth- and early-nineteenth-century America, because they were understood to be restrictions on the federal government only. The Supreme Court confirmed as much in the case of *Barron v. Baltimore* (1833),[4] which pitted a wharf owner against the city of Baltimore. City officials had lowered the water level around the wharves, causing him a significant economic loss. The wharf owner thus sued the city under the Fifth Amendment's "taking clause," which stated that no private property could be taken from an individual for public use without just compensation. But the Supreme Court dismissed the suit because at that time only the federal government could be held up to the standards of the Bill of Rights. In light of the dominant role state governments played in regulating individuals' daily lives during most of this period, the *Barron v. Baltimore* decision essentially reduced the Bill of Rights to paper guarantees that only occasionally provided protection for ordinary citizens.

That all changed in the twentieth century, as the Supreme Court grew increasingly willing to protect individuals against intrusive state actions. Its instrument for doing so was the Fourteenth Amendment (ratified in 1868), which provided that no *state* could "deprive any person of life, liberty or property without due process of law." The Fourteenth Amendment had been passed immediately after the Civil War to protect freed slaves from discriminatory state laws. Yet at the beginning of the twentieth century and increasingly throughout the century, the Supreme Court, by a process known as **incorporation** (or "nationalization"), demonstrated a new willingness to hold state governments accountable to the Bill of Rights by utilizing the Fourteenth Amendment's vague requirement that states respect "due process." Specifically, the Court carefully considered individual clauses from the Bill of Rights, and if the right was deemed fundamental enough, the Court held that no state could legitimately ignore the right without depriving an individual of the right to "life, liberty and property, without due process of law." By this incorporation process, states were required to live up to the dictates of the First Amendment free speech clause beginning in 1925, the Fourth Amendment right against unreasonable searches and seizures beginning in 1949, and the Sixth Amendment right to a speedy trial beginning in 1967. (See Table 4.1.) Slowly but surely the provisions of the Bill of Rights were incorporated by the Fourteenth Amendment to apply to state governments as well as to the federal government.

incorporation: The process by which the U.S. Supreme Court used the due process clause of the Fourteenth Amendment to make most of the individual rights guaranteed by the Bill of Rights also applicable to the states. Incorporation provided that state and local governments, as well as the federal government, could not deny these rights to citizens.

At present there remain just a handful of provisions of the Bill of Rights that theoretically provide protection against the federal government only:

- The Third Amendment safeguard against the involuntary quartering of troops
- The Fifth Amendment requirement that defendants be indicted by a grand jury
- The Seventh Amendment guarantee of a trial by jury in civil cases
- The Eighth Amendment prohibition against excessive bail and fines

Virtually all other provisions contained within the first eight amendments of the Constitution are considered applicable to all state governments and to all local governments within the states in exactly the same manner as they are applicable to the federal government.

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Table 4.1 Incorporating the Bill of Rights to Apply to the States

Provision (Amendment)	Year	Case
Protection from government taking property without just compensation (Fifth)	1897	*Chicago, Burl. & Quincy Rwy. v. Chicago*
Freedom of speech (First)	1925	*Gitlow v. New York*
Freedom of the press (First)	1931	*Near v. Minnesota*
Right to assistance of counsel in capital cases (Sixth)	1932	*Powell v. Alabama*
Freedom of assembly (First)	1937	*Delaware v. Van Arsdall*
Free exercise of religion (First)	1940	*Cantwell v. Connecticut*
Protection from establishment of religion (First)	1947	*Everson v. Board of Education*
Right to public trial (Sixth)	1948	*In re Oliver*
Right against unreasonable search and seizure (Fourth)	1949	*Wolf v. Colorado*
Exclusionary rule (Fourth and Fifth)	1961	*Mapp v. Ohio*
Protection against cruel and unusual punishment (Eighth)	1962	*Robinson v. California*
Right to paid counsel for indigents in felony cases (Sixth)	1963	*Gideon v. Wainwright*
Right against self-incrimination (Fifth)	1964	*Malloy v. Hogan*
Right to confront witnesses (Sixth)	1965	*Pointer v. Texas*
Right to an impartial jury (Sixth)	1966	*Parker v. Gladden*
Right to compulsory process to obtain witnesses (Sixth)	1967	*Washington v. Texas*
Right to speedy trial (Sixth)	1967	*Klopfer v. North Carolina*
Right to jury in nonpetty criminal cases (Sixth)	1968	*Duncan v. Louisiana*
Right against double jeopardy (Fifth)	1969	*Benton v. Maryland*
Right to keep and bear arms (Second)	2010	*McDonald v. Chicago*

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4.2 Freedom of Religion and the Establishment Clause

THE FIRST AMENDMENT: *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .*

Although the first words of the Bill of Rights speak to the freedom of religion, the actual rights guaranteeing religious freedom did not become widespread until the latter half of the twentieth century. In early America, Protestantism played a highly influential role in public life, and the First Amendment was intended to provide a limited barrier against its influence. In 1802, Thomas Jefferson described the First Amendment as erecting a "wall of separation" between church and state,[5] but that metaphor captured his hopes more than the reality of the time. Although there existed no official church of the United States, government aid to

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religion—in particular to certain Protestant sects—stood little chance of being overturned by a court on constitutional grounds. And for much of American history, minority religious groups such as Mormons, Jehovah's Witnesses, and the Amish were forced to change or abandon some of their religious practices whenever public policy conflicted with them. By the 1940s, however, American public life had grown increasingly secular, and application of the First Amendment's guarantees of freedom of religion was transformed. Even today the interest in accommodating religion continues to run up against the desire to create a "wall of separation" emphasizing government neutrality.

The Free Exercise of Religion

The **free exercise clause** of the First Amendment bans government laws that prohibit the free exercise of religion. Debate over the clause has largely focused on whether government laws can force adherents of a certain religion to engage in activities that are prohibited by their religious beliefs or prevent them from performing acts that are compelled by their religious beliefs. During the heart of World War II, the Supreme Court in *West Virginia v. Barnette* (1943)[6] ordered school officials to reinstate the children of Jehovah's Witnesses who had been suspended for refusing to salute the American flag in their public school classrooms. Yet although those children could claim legitimate religious objections to the law (the Jehovah's Witnesses' creed forbids them from saluting any "graven image"), they also could claim more generally the right of free expression—those who disagreed with the U.S. government were free to withhold displays of public support for the nation's symbol. It remained for the Court in subsequent years to sort out what rights of religious freedom might exist under the free exercise clause.

free exercise clause: The religious freedom clause in the First Amendment that denies government the ability to prohibit the free exercise of religion. Debate over the clause has largely focused on whether government laws can force adherents of a certain religion to engage in activities that are prohibited by their religious beliefs or prevent them from performing acts that are compelled by their religious beliefs.

Seventh-Day Adventists and the Refusal to Work. In the landmark case of *Sherbert v. Verner* (1963),[7] the Supreme Court ordered the state of South Carolina to pay unemployment benefits to a Seventh-Day Adventist who refused to work on Saturdays. Even though the state's unemployment laws required that she make herself available for work on Saturday, the Court refused to apply that law to this worker because Saturday is the Seventh-Day Adventists' sabbath. Although the state could provide legitimate reasons for refusing to pay her benefits (guarding the unemployment insurance fund against running low, for example), the Supreme Court declared that only a *compelling state interest* could justify denying her such an exception on the basis of religion. What interest counts as "compelling"? Although no precise definition is available, the Court has held that administrative convenience is not compelling; rather, the Court must be convinced that the government program (whether the draft, Social Security, unemployment benefits, and so on) would be significantly undermined by religious exemptions in order to say that the government's interest is compelling.

The Amish and Mandatory School Attendance. Continuing to accept exemptions for religious reasons, the Supreme Court in *Wisconsin v. Yoder* (1972)[8] held that members of the Amish religion were not required to send their children to school after the eighth grade. Even though Wisconsin law compelled high school attendance, the Court ruled that the enforcement of that law would undermine Amish

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Amish children walking to school in Ohio. In 1972 the U.S. Supreme Court declared that members of the Amish religion could not be compelled to send their children to school after the eighth grade.

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religious principles, which include the value of "learning through doing" and support for "community welfare" over all other interests.

The Mormons and Polygamy Laws. Up until the late nineteenth century, a central tenet of the Mormon Church, also called the Church of Jesus Christ of Latter-Day Saints, required some of its adherents to practice polygamy—the act of having multiple spouses "when circumstances would permit." During the 1870s, many Mormons were prosecuted under a federal anti-bigamy statute that applied to federal territories, including the new Utah territory where many Mormons had settled. George Reynolds, secretary of one of the founders of the Mormon Church in America as well as the founder of Brigham Young University, brought suit in 1878, challenging the law as destructive to the Mormon Church, and thus a violation of the free exercise clause of the First Amendment.

The Supreme Court, in a unanimous decision, rejected Reynolds's argument that the First Amendment protects plural marriage. According to the Court, religious practices that impair the "public interest" do not receive constitutional protection; such practices were to be distinguished from religious "beliefs," which the government had no power to regulate. *Reynolds v. United States*[9] remains the law today, and polygamy is now banned in all 50 states. Additionally, since 1890 the Mormon Church has formally renounced the practice of polygamy by its members.

Illegal Drug Use and the *Smith* Case. In 1990, the Supreme Court adopted a new approach to the free exercise of religion, one that dramatically diminished the likelihood that future religious exemptions might be granted. Two Native Americans were dismissed from their jobs as drug rehabilitation counselors when it was discovered that they had ingested the illegal drug peyote as part of their tribe's religious rituals. Because their drug use violated the Oregon criminal code, the two men were subsequently denied unemployment compensation. The Supreme Court ruled in *Employment Division v. Smith* (1990)[10] that the state's legitimate interest in maintaining its unemployment insurance fund at a high level outweighed the Native Americans' religious rights and thus that it could deny the two men unemployment benefits. State governments may choose to accommodate otherwise illegal acts done in pursuit of religious beliefs, but they are not *required* to do so.[11]

Today *Smith* remains the rule for judicial interpretation of free exercise cases: instead of being forced to show a *compelling* government interest (which is extremely hard to do), a government interested in applying its neutral laws over religious objections may do so based on any *legitimate state interest* it might claim. What is a legitimate state interest? The bar here is quite low; only an arbitrary or irrational objective by government will fail the test of legitimacy. The Religious Freedom Restoration Act passed by Congress in 1993 attempted to reverse the Court's holding in *Smith* and revert to the more liberal rules established in the *Sherbert* and *Yoder* decisions. However, the Supreme Court invalidated the religious freedom law in 1997 (*Yoder* and *Sherbert* remain as valid exceptions to the Smith doctrine). The Supreme Court—and not the Congress—holds the lever of power in the debate over religious exemptions. And, at least for the time being, that means the courts generally will not grant such exemptions.

establishment clause: The clause in the First Amendment that prohibits government from enacting any law "respecting an establishment of religion." Separationist interpretations of this clause affirm that government should not support any religious activity. Accommodationists say that support for a religion is legal provided that all religions are equally supported.

The Establishment Clause

Even more controversial than the debate over religious exemptions from public policies has been the battle over what role religion may play in American public life under the **establishment clause**, which prohibits the government from enacting laws "respecting an establishment of religion." Most Americans take it for granted that during the holiday season they will see Christmas decorations prominently displayed in government buildings, in front of the town hall, and in public squares. But what about nativity scenes? Menorahs? The Ten Commandments? What types of religious activities and symbols are considered acceptable in public places, and which ones run afoul of the First Amendment, whose pro-

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hibition of government "respecting an establishment of religion" has been interpreted to mean creating a "wall of separation" between church and state?

Modern debates over the proper role religion may play under the establishment clause generally divide advocates into two camps. Those who advocate a strict dividing line between church and state support a principle of "separation," which holds that government should have no involvement whatsoever with religious practices, although religion remains free to flourish privately on its own, with its own resources.[12] Opponents of strict separation argue instead for the principle of "accommodation," which holds that government neutrality toward religion requires only that it treat all religions equally. Government should be free to aid and subsidize religious activities as long as it does so fairly across different religions, and aids comparable nonreligious activities as well. In recent decades, the Supreme Court has moved from a position of especially strict separation to one that shifts back and forth between principles of separation and accommodation.

Historically Accepted Practices. Certain religious practices have been a part of political and public life for generations, and the Supreme Court has generally allowed such activities to continue. Congress opens each legislative session with a prayer from a clergy member, chaplains serve in religious capacities with the U.S. armed forces, and U.S. currency proclaims "In God We Trust." Even the Supreme Court opens every court session to a marshal's bellowing pronouncement: "God save this honorable court!" All of these are considered acceptable practices, products of the American historical tradition. Moreover, just recently (in 2014) the high Court ruled that one town's practice of opening its town board meetings with a sectarian prayer did not violate the Establishment Clause because it comported with the town's traditions and it did not coerce non-adherents. Still, not all religious displays on public property will be automatically deemed "historically accepted practices." On occasion, the Court has ordered the removal of nativity scenes and other religious displays during Christmastime.

In Kentucky, versions of the Ten Commandments were posted on the walls of several county courthouses. In Texas, a six-foot-high monolith inscribed with the Ten Commandments sits among numerous other monuments and historical markers outside the state capitol building commemorating the "people, ideals, and events that compose Texan identity." Do these public displays of the Ten Commandments, which feature such statements as "Thou shalt have no other gods before me" and "Thou shalt not take the name of the Lord thy God in vain," violate the establishment clause of the First Amendment?

In a set of cases handed down in 2005, the Supreme Court ordered the Kentucky courthouses to remove their displays, but allowed the Texas display to remain standing. In explaining its different approach to these cases, the Court ruled that even though the Ten Commandments are inherently religious, their placement in a monument outside the state capitol is an essentially "passive" act, whereas their placement within the courthouse had been motivated by a desire on the part of legislators to advance religion. Of course the members of the U.S. Supreme Court need not be reminded that a frieze in their own courtroom depicts Moses holding tablets exhibiting a portion of the secularly phrased Commandments in the company of 17 other lawgivers. Perhaps the Court believes that there is little risk that such a depiction of Moses would strike an observer as evidence of the federal government violating religious neutrality.

Religious Prayers in Public School Classrooms. The public school classroom has always been viewed as a unique context in which to assess claims that the government has violated the establishment clause. Judges and politicians alike assume that students—particularly elementary school students—have not yet formed firm beliefs about religion and thus may be susceptible to even subtle forms of religious coercion. Public officials interested in promoting religion in society as a whole have focused on the school as a place to encourage religious practices; as a consequence, school policies touching on the subject of religion have undergone serious scrutiny in the courts.

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In 1962, the Supreme Court in *Engel v. Vitale*[13] invalidated the New York public schools' policy of having each class recite a specified nondenominational religious prayer each day. That prayer, which proclaimed in nondenominational terms, "Almighty God, we acknowledge our dependence upon thee," was held to be a violation of the First Amendment's prohibition against the establishment of religion. In *Abington School District v. Schempp* (1963),[14] the Court refused to allow spiritual Bible readings in public school classrooms, and in *Wallace v. Jaffree* (1985)[15] it outlawed "moments of silence" authorized by government officials to encourage religious prayer during those moments. The Court held that in neither of those instances was the government acting with a "secular purpose"—one not grounded in a desire to "advance religion." These decisions are especially difficult to enforce, as the closed nature of most public school classrooms allows prayer to escape the notice of those seeking to enforce these landmark decisions. And it remains unclear whether the general ban on religious prayer in public schools extends to the teaching of the Ten Commandments, among other issues.

Despite these seemingly clear rulings against school prayer, some teachers continue to lead students in prayer in public school classrooms across the country. Defiance has become widespread in some instances, forcing one court in Alabama to forbid prayer in schools throughout the state fully 35 years after *Engel v. Vitale* invalidated the practice. Anecdotal evidence of violations continue to mount as well: in one highly publicized case, officials in DeKalb County, Georgia, helped lead a religious revival at a public high school in admitted disobedience of the Supreme Court. Defiance persists in part because public schools are so rarely challenged in court for their violations. Community sentiment has also played an influential role in squelching potential litigation, as dissenting parents quickly realize that only continued and expensive litigation over many years will bring a defiant school into line.

Financial Aid and the *Lemon* Test. During the last several decades, government officials seeking to promote religion as part of the educational process have expanded the variety and scope of their efforts. Many initiatives have occurred in public schools—provisions for school prayer recitations, released-time programs (allowing students to visit religious schools for instruction during normal school hours), and the teaching of subjects with religious content, such as creationism. Efforts to provide religious private schools that teach students full-time with public funds have met with some recent success. In 2000, the Supreme Court approved of a program to provide government-funded computers and other teaching aids to certain parochial schools. Two years later, the Court in *Zelman v. Simmons-Harris* (2002)[16] upheld a system of private school vouchers, whereby parents are given coupons that can be used to pay tuition at private schools, including parochial schools. Such programs continue to be a source of heated policy debate between proponents of separation and accommodation.

***Lemon* test:** The legal test that determines if a government statute aiding public or private schools is an unconstitutional violation of the establishment clause. The statute is unconstitutional if the statute has no secular purpose, if its principal or primary effect advances or inhibits religion, or if it fosters "an excessive government entanglement with religion."

Since 1971, issues involving the separation of church and state have often been governed by the ***Lemon* test** articulated by the Supreme Court in the landmark decision of *Lemon v. Kurtzman* (1971).[17] Under the test, government aid to public or private schools is considered unconstitutional if it fails to meet three separate criteria: "First, the statute must have a secular [that is, not religious] purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" The test has been criticized by many, including a number of the Supreme Court justices, who assert that its requirements are so stringent that literally all deliberate government accommodation of religion is presumptively invalid. The Court has never renounced the test, and it continues to play a role in the consideration of various types of financial aid.

Prayers at Graduation Ceremonies and Football Games. In recent years, some school officials have attempted to facilitate student prayers in school contexts outside of the classroom. Those efforts have met with little success. In *Lee v. Weisman* (1992),[18] the Supreme Court ordered a Providence, Rhode Island, middle school to stop its practice of permitting prayers to be read at the school's graduation ceremony, even though attendance was voluntary. Eight years later, in *Santa Fe v. Doe* (2000),[19] the Court ruled that a student-led prayer before a football game at a Texas public high school violated the separation of church and state. The Court believed

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Group prayer before a high school football game in Austin, Texas.

that both practices forced all of those present to participate in an act of religious worship. In addition, these practices could have been interpreted as state endorsements of prayer, which is unconstitutional.

The debate over the role religion should play in American public life remains a highly charged topic. Public schools especially will continue to be a focus of intense interest, as the proponents of a greater role for religion seek ever more creative ways to combine the educational process with efforts to encourage spirituality and religious participation.

4.3 Free Expression Rights

> **THE FIRST AMENDMENT:** *Congress shall make no law . . . abridging the freedom of speech, or of the press.*

Among the many civil liberties guaranteed by the Bill of Rights, the First Amendment rights of free speech and press enjoy especially revered status. That wasn't always the case. The Sedition Act of the late 1790s egregiously restricted speech that negatively reflected on the Federalists who were in power; during the Civil War, the Lincoln administration took harsh action against those who sought to undermine the Union's cause. Today, nearly all politicians openly celebrate rights of free expression, at least in the abstract. For many, these rights of free expression serve as a cornerstone for all other individual rights, facilitating the more effective realization of such freedoms as the right to vote and participate in the democratic process.

What accounts for the lofty status of free expression rights in the American political system? Several theories have been offered to justify this high level of respect:

- **"The marketplace of ideas,"** a phrase coined by Supreme Court Justice Oliver Wendell Holmes in 1919, is a metaphor for the premise that the best test of truth is the free trade of ideas; only through such free exchange and presentation of all arguments, valid and invalid, can the truth prevail. To ensure a robust "marketplace of ideas," government restrictions on speech must be kept to a minimum.

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- **Self-governance** is another frequently cited justification for protecting free expression. Speech is considered essential to representative government, because it provides the mechanism by which citizens deliberate on important issues of public policy. Free speech also serves as a means for ordinary citizens to check the abuse of power by public officials.
- **Self-fulfillment.** Some philosophers have emphasized the importance of free speech and expression as a means of achieving individual self-fulfillment. The human capacity to create ideas and express oneself is thus considered central to human existence; government restrictions on free speech invariably threaten that human capacity. Such a justification of free speech rights extends as well to the protection of music, pictures, and other forms of artistic expression.
- **A "safety valve."** Free speech also serves a critical role in encouraging adaptability and flexibility according to the changing circumstances in society. If the suppression of free speech forces citizens to adopt more extreme means of enacting change, such as violence, the promotion of free speech provides an essential mechanism for balancing the need for order with cries for reform.

Each of these justifications for free speech protection may be subject to legitimate criticisms as well. But for better or worse, the First Amendment's protection of free expression today enjoys a special status in our constitutional system, even though that was not always the case.

Free Speech During the Early Twentieth Century: The Clear and Present Danger Test

The modern status of free expression rights is a far cry from the low level of protection the First Amendment afforded to free speech nearly a century ago. Many of the early cases pitting dissenting speakers against the government came before the Court when tensions were great—first during wartime, then at the height of the Cold War when fears of communist infiltration in American society gripped many ordinary Americans. In neither instance did free speech fare well.

The Supreme Court gave birth to the "clear and present danger" test in *Schenck v. United States* (1919).[20] In 1917, with the United States readying for active participation in World War I, Charles Schenck, a general secretary for the American Socialist Party, was tried and convicted for distributing leaflets arguing that the military draft was immoral. Although the pamphlet posed little danger of interfering with the draft, the Supreme Court refused to release Schenck from jail. Writing the majority opinion for a unanimous court, Justice Oliver Wendell Holmes stated that there was in fact "a clear and present danger" that the pamphlet could bring about the damage being claimed by the government.

In practice, the clear and present danger test soon became a hammer on speakers' rights rather than a shield against government suppression. Under the doctrine, members of the Socialist and Communist parties were tried and punished for participating in organizational meetings or declaring allegiance to their party's principles. Justice Holmes was clearly alarmed by the legacy his *Schenck* decision had wrought; in subsequent decisions he modified his earlier view by insisting that the present danger must relate to an "immediate evil" and a specific action. But Holmes was now in the minority, and there was little he could do to stop the momentum. During the late 1940s and early 1950s, when the fear of communism in the United States was reaching a fever pitch, members of the Communist Party were convicted for their advocacy of sedition. In *Dennis v. United States* (1951),[21] the Supreme Court gave a measure of credibility to this red scare when it upheld the convictions of numerous communist defendants for "teaching and advocating the overthrow and destruction of the Government of the United States."

The Warren Court and the Rise of the "Preferred Freedoms" Doctrine

By the late 1950s, fears of subversion and communist infiltration in the United States were beginning to subside. However, it was the ascension of former California Governor Earl

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Warren to the position of chief justice of the United States in 1953 that eventually changed the Court's free speech doctrine from one that offered little protection to dissenting speakers into one that protected even the most unpopular speakers against suppression by the majority. The Warren Court brought about this change by embracing a doctrine first articulated by Justice Harlan Fiske Stone in 1938. In a footnote to the otherwise forgettable case of *United States v. Carolene Products* (1938),[22] Justice Stone declared that various civil liberties guaranteed in the Bill of Rights, including the right of free expression, enjoyed a "preferred position" in constitutional law. Stone's explicit support for this preferred freedoms doctrine did not take immediate hold. Yet in the 1960s, when new social tensions such as the battle over civil rights and resistance to the Vietnam War threatened to wreak havoc on civil liberties, the Warren Court issued several key decisions that shattered any possibility that the government might be able to suppress the exercise of free speech rights under the Constitution, as it had in the earlier part of the century.

In 1969, the Supreme Court in *Brandenburg v. Ohio* (1969)[23] abandoned the clear and present danger test and replaced it with a test that was much more protective of free speech. A Ku Klux Klan rally in Cincinnati, Ohio, featured numerous figures in white hoods uttering phrases that demeaned African Americans and Jews. The principal speaker had argued that some form of vengeance be taken against both groups. The group's leader was convicted under a law criminalizing the advocacy of violence. The Supreme Court overturned his conviction. In the process, it declared a new "imminent danger" test for such speech: first, is the speech "directed to inciting or producing imminent lawless action," and second, is the advocacy *likely* to produce such action? Few of the speakers jailed in the previous half century for seditious speech could have been convicted under this new standard.[24]

The preferred freedoms doctrine also offered protection to those exercising their rights of free expression in other contexts—to writers and publishers, filmmakers, and protesters, for example. Indeed, it provided a foundation for the protection of such modern activities as the dissemination of information on the Internet. Even speakers and publishers of certain categories of speech that have not traditionally enjoyed First Amendment protection—obscenity and libel, for example—soon discovered that the preferred freedoms doctrine provided protection for their activities.

The Freedom of the Press, Libel Laws, and Prior Restraints

Freedom of the press enjoys a long and storied tradition in the United States. Well before the American Revolution or the drafting of the Constitution, the trial of newspaper publisher John Peter Zenger in 1734 on charges of libel laid the foundation for robust press freedoms. **Libel** is the crime of printing or disseminating false statements that harm someone. Zenger was accused of attacking the corrupt administration of New York's colonial governor in his weekly newspaper. When he was acquitted on the basis of his lawyer's argument that he had printed true facts, Zenger's case helped to establish the legal principle that truth would serve as a defense to any libel action. In the late 1790s, after many Republican editors and publishers had been jailed under the highly controversial Sedition Act, public distaste for the act helped to catapult Thomas Jefferson and his Republican Party into power in the election of 1800.

libel: Printing or disseminating false statements that harm someone.

Despite the general recognition of the importance of the press, newspapers traditionally enjoyed few special privileges under the law. Specifically, individuals whose reputations were harmed were free to bring libel suits against newspapers and other publications without any implications for the First Amendment. That all changed in 1964 with the landmark decision of *New York Times v. Sullivan*.[25] A Montgomery, Alabama, police commissioner sued the *New York Times* in March 1960 for an advertisement the newspaper had published. The ad—charging the existence of "an unprecedented wave of terror" against blacks in Montgomery—had been signed by several black clergymen. In its description of events that had transpired, the ad also contained some minor inaccuracies. Although the police commissioner was unable to prove that he had suffered any actual economic harm, he still

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sought a $500,000 judgment against the *Times*. But the Supreme Court refused to allow the official to claim damages, and in the process articulated a much more stringent test to be met by public officials suing for libel: they must prove that the newspapers had published false facts with malice (bad intentions) or reckless disregard for the truth (they ignored clear evidence of contrary facts).[26]

In subsequent years, the *New York Times v. Sullivan* decision has applied to public figures as well as public officials; today a libel lawsuit brought by any famous person—whether it's the president of the United States, LeBron James, or Julia Roberts—must prove that the newspaper or magazine in question not only printed false facts, but did so either with "malicious intent" or in "reckless disregard" for the truth. Of course, an important question remains: Who is a public figure? This was the question raised in the case of Richard Jewell, a security guard suspected of setting off a bomb in Centennial Park in Atlanta, Georgia, during the 1996 Summer Olympics. Two people died in the explosion. Jewell was initially portrayed as a hero for his role in discovering the bomb, alerting authorities, and evacuating bystanders from the immediate vicinity. But when Jewell's status changed from hero to suspect, the resulting media coverage of the criminal investigation caused Jewell and his family considerable anguish. Although the investigation ultimately cleared Jewell of any involvement in the bombing, his reputation had been harmed enough that he decided to sue the *Atlanta Journal-Constitution*, which had rushed to judgment against him.

Jewell's entire lawsuit rested on the premise that he was (and continued to be) a private figure. Unlike public figures who had to prove the libeling newspaper had demonstrated a "reckless disregard for the truth," private figures seeking monetary damages need only show that the newspaper was "negligent." Immediately following the bomb explosion, but before he became a suspect, Jewell granted one photo shoot and 10 interviews to the media, including *Larry King Live* and the *Today* show. During the course of these interviews, Jewell repeatedly stated that he had spotted a suspicious bag after a group of rowdy, college-age men had left the park, and announced that he had matched one of the men to a composite sketch. These interviews proved Jewell's undoing, as both a trial judge and the Georgia Court of Appeals ruled that his media activities meant he had "voluntarily assumed a position of influence in the controversy," and thus was a public figure for purposes of his lawsuit. Jewell never received any monetary relief from the *Atlanta Journal-Constitution*.

prior restraint: The government's requirement that material be approved by government before it can be published.

Whereas libel laws punish publications after the fact, a **prior restraint** imposes a limit on publication *before* the material has actually been published. Securing a prior restraint is very difficult for government to accomplish. In the *Pentagon Papers Case* (1971),[27] the Supreme Court refused the U.S. government's request to stop *The Washington Post* and *The New York Times* from publishing a classified study of U.S. decision making about the Vietnam War. The courts have made it very difficult for government to implement a prior restraint of expression. In only the rarest of cases, such as the publication of information about troop movements during wartime, has government been able to block the publication of a story.

Obscenity and Pornography

Despite the exalted status free expression rights enjoy under the Constitution, obscenity has long been recognized as an exception to the rule. Even through the so-called sexual revolution of the 1960s and 1970s, the Supreme Court continued to adhere to the premise that truly obscene speech—words or publications that tend to violate accepted standards of decency by their very lewdness—may under certain circumstances be regulated. When asked how he would define obscene pornography, Justice Potter Stewart in 1964 uttered his now celebrated phrase: "I can't define it, but I know it when I see it." Stewart's statement captures the often confusing state of obscenity law in the United States. The First Amendment does not allow governments simply to ban all sexually explicit materials. But what types of materials can be banned? Is all pornography to be considered "obscene"?

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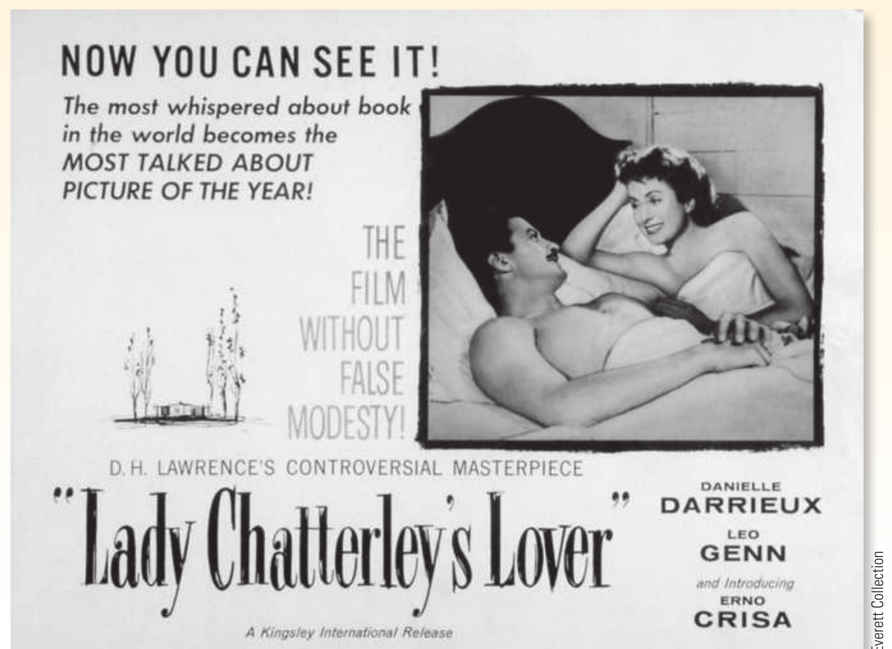
In *Miller v. California* (1973),[28] the Supreme Court created the modern legal test for determining what sexually explicit materials may be legitimately subject to regulation under the Constitution. According to the Court, a work is obscene if *all* of these three conditions are met:

1. The average person applying contemporary community standards would think that the work (taken as a whole) appeals to the "prurient" (that is, lustful) interest.
2. The work depicts sexual conduct in a patently offensive way.
3. The work taken as a whole lacks "serious literary, artistic, political or scientific value."



Poster advertising Lady Chatterley's Lover. *The film was based on a book that was the target of a New York State ban during the 1950s.*

This third condition has come to be known as the **SLAPS test** (derived from taking the first letter of each word in the quoted phrase). In theory, adherence to the SLAPS test allows a jury to apply its own conception of "contemporary community standards" and thus ban relatively innocent sexual materials. In practice, however, courts have found very few materials able to survive the SLAPS test (after all, who is to say what possesses "artistic value"?). None of the above rules apply to child pornography, which enjoys no First Amendment protection whatsoever under the Constitution.

SLAPS test: A standard that courts established to determine if material is obscene based in part on whether the material has serious literary, artistic, political, or scientific value. If it does, then the material is not obscene.

The rise of the Internet as a medium of communication in recent years has caused even more confusion as to what types of obscenity and/or pornography can be regulated. In *Reno v. ACLU* (1997),[29] the Supreme Court invalidated a federal law passed to protect minors from "indecent" and "patently offensive" communications on the Internet. The Court feared that in denying minors access to potentially harmful speech, the law had suppressed a large amount of speech that adults have a constitutional right to receive. Still, the question of how to restrict sexually explicit speech on the Internet will remain an issue for years to come.

Symbolic Speech and the Flag-Burning Controversy

When school officials in Des Moines, Iowa, suspended two students for wearing black armbands in protest of the Vietnam War in the 1960s, they claimed they were not restricting free speech rights at all—rather, the students were engaging in conduct that could be regulated by authorities.[30] The Supreme Court in 1969 disagreed and the students were vindicated;[31] but the line between speech and conduct remains difficult to draw. Protesters often engage in disruptive activities that make powerful statements about important issues of public policy. They may camp out in public parks overnight to bring attention to the plight of the homeless, or burn their draft cards as a statement of opposition to a war. Are such forms of **symbolic speech** protected by the First Amendment?

symbolic speech: Nonspoken forms of speech that might be protected by the First Amendment, such as flag burning, wearing armbands at school to protest a war, or camping out in public parks to protest the plight of the homeless.

In 1968, the Supreme Court in *United States v. O'Brien*[32] refused to allow a Vietnam War protester to burn his draft card in violation of federal law. That case introduced three criteria for determining whether the regulation of symbolic speech may be justified:

1. The government interest must be valid and important.
2. The interest must be unrelated to the suppression of free speech.
3. The restriction should be no greater than is essential to the furtherance of that interest.

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In *United States v. O'Brien*, the key was motive: the Court believed the government actions were motivated by the need to operate a military registration system during wartime, rather than simply to suppress the ideas and message of this particular protester. Similarly, protesters do not have the right to violate federal park service rules and sleep in parks after closing—those rules were established for one reason: to prevent damage to public property. By contrast, students were granted the constitutional right to wear black armbands in school to protest the Vietnam War—their "conduct" was considered the equivalent of "pure speech," and school officials' arguments about the maintenance of order and discipline were given little credibility.

The constitutionality of flag burning has been a source of considerable debate in recent years. To many the American flag is a symbol of nationhood and national unity, and thus must be preserved at all costs. For that very reason, protesters seeking to attract publicity for their ideas have burned or desecrated the flag in public places. The Supreme Court ended the legal debate over flag burning with its decision in *Texas v. Johnson* (1989).[33] In 1984, Gregory Lee Johnson was arrested and convicted for "desecrating a venerated object" at a political demonstration in Dallas, the site of the Republican National Convention. Johnson had been leading a protest against the Reagan administration; he eventually set an American flag on fire, after which he and the other protesters chanted: "America, the red, white and blue, we spit on you." But the Supreme Court threw out Johnson's conviction because the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[34]

Despite the Supreme Court's apparent resolution of the matter, heated feelings on both sides of the flag-burning issue have kept it alive. After an initial attempt by Congress to pass flag-burning legislation failed to withstand judicial scrutiny in 1990, some members of Congress proposed passage of an amendment to the Constitution that would make flag burning unconstitutional. Although that proposed amendment has on several occasions achieved the necessary level of support in the House of Representatives, the U.S. Senate has so far failed to approve it, thus preventing it from being promulgated to state legislatures for ratification.

Hate Speech Codes

Since the 1970s, communities have sought to prevent speakers who preach hatred for certain groups—whether racial, religious, or some other classification—from exercising their rights of free speech in certain specified neighborhoods or other places where the perceived harms may be great. Such efforts have not always passed constitutional muster. In one instance during the late 1970s, the courts refused to deny neo-Nazis the right to march in a parade in Skokie, Illinois, home to a large number of Holocaust victims.[35] By contrast, efforts to ban cross burning and other controversial forms of expression have sometimes been upheld. In *Virginia v. Black* (2003),[36] the U.S. Supreme Court ruled that the state of Virginia could prohibit cross burning with the "intent to intimidate any person or group," because the law applied only to intimidation and not to cross burning in general. The law also applied to all groups, not just racial or ethnic groups.

It is a considerable challenge for school officials to restrict hate speech by students at public colleges and universities, even when that speech proves disruptive to the school's mission of providing a constructive environment for learning.[37] In 1988, the University of Michigan passed a regulation subjecting individuals to discipline for "behavior, verbal or physical" that stigmatized or victimized an individual on the basis of race, ethnicity, religion, sex, or a host of other criteria. Stanford University similarly attempted to prohibit "discriminatory harassment," which was defined to include speech intended to stigmatize or insult on the basis of sex, race, and so on. Lower courts invalidated both of these "hate speech codes" on grounds that they violated the First Amendment.

Regulating the Internet

Meanwhile, high school principals and superintendents face their own set of twenty-first-century challenges, thanks to the Internet and popular social networking sites like Facebook and Twitter. Recently, some public school students found themselves the target of "cyberbullying"

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from classmates who posted nasty comments about them on social media sites. If the harassing posts originated from a school or library computer, the school would obviously have the authority to punish the cyberbullies. But what if a student posted the harassing comment from his or her own computer or a mobile device while at home? What if the student posted the offending comments on a discussion thread open only to his or her closest friends? Does school authority extend to students' behaviors in their own private spheres? Lower courts are still sorting out such issues as they await eventual judgment from the U.S. Supreme Court.

MENDIL/BSIP/AGE Fotostock

Courts are still sorting out whether students—many of whom spend time at home on social network sites such as Facebook—may still be subject to discipline by school officials for harassing fellow students in cyberspace.

What about congressional attempts to curb the online theft of music, movies, and other popular content? The 112th Congress considered two new bills—the Stop On-Line Piracy Act (SOPA) and the Protect Intellectual Property Act—that would have made the unauthorized streaming of protected content a criminal offense. Fearful that law enforcement might use the laws to block access to entire Internet domains, some Internet companies argued that the bills would harm the "free, secure and open Internet" and encourage censorship. As a means of protest, Wikipedia and over 7,000 other websites led a self-imposed blackout of their own content for a 12-hour period on January 18, 2012. The show of force proved effective, as members of Congress postponed plans to move forward with SOPA until it could create a wider consensus on a solution. In the years to come, Congress is expected to keep searching for a solution that strikes a balance between deterring piracy on one hand and encouraging the open exchange of information on the other hand.

4.4 The Second Amendment Right to Bear Arms

THE SECOND AMENDMENT: *A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The Second Amendment "right to keep and bear arms" remains something of a puzzle for Americans. On one hand, the second part of the amendment appears to trumpet the "people's" right to own firearms at their discretion, and has taken its place as a central tenet in the platforms of interest groups such as the National Rifle Association (NRA), which opposes nearly all government attempts to restrict gun ownership. On the other hand, the first part of the amendment speaks directly of a "well-regulated militia," and implies that some relationship must exist between the private gun owner's rights and more formal state activities. The U.S. Supreme Court finally weighed in on the subject in 2008. In *District of Columbia v. Heller* (2008),[38] the Supreme Court by a 5–4 vote held that the Second Amendment forbids the government from banning all forms of handgun possession in the home for purposes of immediate self-defense.

In *McDonald v. Chicago* (2010),[39] the Supreme Court went a step further, ruling that the right to bear arms is incorporated by the due process clause of the Fourteenth Amendment, and thus applies to all 50 states as well. However, this Second Amendment right is not absolute: the Court in *Heller* noted that government can still regulate the commercial sale of handguns;

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SHANNON HICKS/Newtown Bee/LANDOV

Teachers and students exit Sandy Hook Elementary School in Newtown, Connecticut, on December 14, 2012.

it can also prohibit their possession by felons and the mentally ill, or in sensitive places such as school buildings.

Second Amendment considerations aside, Congress has been reluctant to regulate gun ownership—only rarely are the sponsors of gun control able to overcome fierce lobbying efforts by the NRA and others in opposition. Advocates of gun control scored some success following the attempted assassination of President Ronald Reagan in 1981. Reagan was wounded in the attempt, as was James Brady, his press secretary. Although the president fully recovered from his injuries in a matter of weeks, Brady sustained serious head injuries because a bullet tore into his temple and lodged in the base of his brain. He ultimately experienced a partial recovery, although he permanently lost the use of his left arm and left leg and suffers from slurred speech.

In 1985 Brady and his wife, Sarah, became spokespersons for gun control measures. Their efforts resulted in the Brady Handgun Violence Prevention Act, signed by President Clinton in 1993. The "Brady Law" required a five-day waiting period and a background check on handgun purchases from licensed firearms dealers to ensure that felons, drug users, fugitives, and other specified categories of individuals are not permitted to purchase guns. The NRA avoided any direct court challenges to the law on Second Amendment grounds, hammering instead at more peripheral aspects of the law, such as the requirement that local sheriffs conduct these checks as part of a federal regulatory scheme. In 1997, the Supreme Court struck down this aspect of the Brady Law as a violation of federalism, although leaving the substance of the law in place. Congress has also attempted to restrict the carrying of firearms near schools, even though some of these efforts have been invalidated by the Supreme Court on the grounds that the federal government cannot commandeer the states to enforce federal legislation.

4.5 The Rights of the Criminally Accused

bill of attainder: An act of a legislature declaring a person (or group) guilty of some crime, and then carrying out punishment without a trial. The Constitution denies Congress the ability to issue a bill of attainder.

ex post facto law: A law that punishes someone for an act that took place in the past, at a time when the act was not illegal. The Constitution denies government the ability to write laws ex post facto.

A few rights for the accused may be found in the language of the original Constitution. Article I prohibits Congress from passing a **bill of attainder**, which is an act of a legislature declaring a person (or group) guilty of some crime and then carrying out punishment without a trial. It also prohibits **ex post facto laws**, which are new criminal laws retroactively applied to those who engaged in activities when they were not yet illegal. But the vast majority of constitutional rights for those accused of crimes are contained in the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution. Despite the seemingly explicit protections found in those four amendments, accused individuals enjoyed only limited substantive protection from arbitrary violations of criminal due process for better than a century and a half of this nation's history, as they protected defendants primarily only against intrusions by the federal government.

Much of that changed in the 1960s with a number of decisions handed down by the Warren Court. During that period the Supreme Court applied many of the provisions of the Bill of Rights against state governments by incorporating most of the protections given accused persons in the federal judicial system. In addition, the Warren Court gave increased substance to these rights, holding government officials accountable under the Bill of Rights for their actions at highway road stops, during the interrogation of witnesses at the police station, and

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elsewhere.[40] Even the right to counsel was broadened to extend to far more of those accused of committing crimes. During the late 1980s and 1990s under Chief Justice William Rehnquist, the Court scaled back some of these protections. Nevertheless, defendants forced to weave their way through the criminal justice system today still enjoy numerous rights protections that were not guaranteed before the Warren Court era.

Fourth Amendment Rights

> **THE FOURTH AMENDMENT:** *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .*

The right of citizens to be free from unreasonable searches and seizures has a long history in America. Before the American Revolution, colonists loudly protested English abuses of the power to inspect merchants' goods through the use of an unlimited "general warrant." Although the Fourth Amendment had been in place for nearly two centuries, the Warren Court modernized the rules governing police searches with its decision in *Katz v. United States* (1967).[41] The Court's ruling created the ***Katz* test**, which requires that the government attain a warrant demonstrating "probable cause" for any investigative activity that violates a person's reasonable expectation of privacy, whether or not the person is at home. A **warrant** is a document issued by a judge or magistrate that allows law enforcement to search or seize items at a home, business, or anywhere else that might be specified.

***Katz* test:** The legal standard that requires the government to attain a warrant demonstrating "probable cause" for any "search" that violates a person's actual and reasonable expectation of privacy.

warrant: A document issued by a judge or magistrate that allows law enforcement to search or seize items at a home, business, or anywhere else that might be specified.

Perhaps the most controversial aspect of the Fourth Amendment is the mechanism by which it is enforced. Although no specific provision for enforcing civil liberties is provided in the amendment, since its 1961 decision in *Mapp v. Ohio*,[42] the Supreme Court has demanded that the states adhere to the **exclusionary rule**, by which all evidence obtained by police in violation of the Bill of Rights must be "excluded" from admission in a court of law, where it might have assisted in convicting those who have been accused of committing crimes. Complaints about the exclusionary rule focus on its most likely beneficiaries: those who are guilty of committing some wrongdoing. They are the ones with the most potential evidence against them and thus have the most to gain from such exclusion. Detractors also complain about the "injustice" of the rule—whenever evidence is thrown out because of a warrantless search by police, "the criminal is to go free because the constable has blundered." Defenders of the rule counter that without a means of excluding such evidence, the government could violate the rights of guilty and innocent individuals alike by conducting the equivalent of fishing expeditions.

exclusionary rule: The legal rule requiring that all evidence illegally obtained by police in violation of the Bill of Rights must be "excluded" from admission in a court of law, where it might have assisted in convicting those accused of committing crimes.

Since the 1960s, the Court has modified application of the exclusionary rule somewhat, although it has refused to back down from its central requirements. The most significant of these modifications is the **good faith exception** to the rule, which was first instituted in 1984: if a search warrant is invalid through no fault of the police (for example, the judge puts the wrong date on the warrant), evidence obtained under that warrant may still be admitted into court. Police may also under certain circumstances conduct warrantless searches of a defendant's premises. The allowable circumstances for a warrantless search include (1) the search is incidental to a lawful arrest; (2) the defendant has given consent to be searched; (3) the police are in "hot pursuit" of the defendant; and (4) the evidence is in "plain view" of police standing in a place where they have the legal right to be. Police may also briefly stop individuals driving in their cars, or conduct a "pat down" of suspicious individuals for weapons—in neither case is a warrant required. Nevertheless, police should conduct such warrantless searches with caution, as the good faith exception may be relied on only when conducting searches under the authority of a warrant.

good faith exception: An exception to the exclusionary rule stating that if a search warrant is invalid through no fault of the police, evidence obtained under that warrant may still be admitted into court.

Advances in technology and new innovations in police work have invited new types of Fourth Amendment civil liberties claims, and a potential reinterpretation of those rights by the U.S. Supreme Court. The testing of defendants for drug or alcohol use through breathalyzer tests and the taking of blood samples may require the police to jump through a series of

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Peter Steiner/Alamy

The Syracuse Common Council spent $150,000 on police surveillance cameras such as these. Critics complain that this type of comprehensive surveillance by police violates citizens' privacy rights.

procedural hoops imposed on them by the state, but no warrant is generally required in either instance when the defendant is in the legitimate custody of the police. Similarly, the DNA testing of defendants has provided a significant breakthrough in the prosecution of difficult cases that lack eyewitnesses or other "hard" evidence of the crime. The use of thermal imaging scans, which expand police investigative tactics from afar, has also been tested in the courts. A thermal imaging scan detects infrared radiation, which then converts radiation into images based on relative warmth, operating somewhat like a video camera showing heat images. In the mid-1990s, police forces began to employ the device to detect the presence of indoor halide lights used to grow marijuana plants inside large buildings; police are able to conduct these scans from vehicles parked across the street from the buildings in question. Do such scans violate a person's reasonable expectation of privacy? "Yes," said the Supreme Court, in a narrow 5–4 decision handed down in 2001:[43] "Where the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

Recently, some communities have posted cameras at stoplights that produce photographic evidence of traffic violations. Other communities have installed cameras on street corners in busy areas. When used in conjunction with computer databanks of convicted criminals, these cameras can provide surveillance capable of instantly detecting the presence of such figures on the street. Officials in Tampa, Florida, have recently turned to closed-circuit television systems to assist police departments in performing surveillance. Specifically, face-recognition software programmed to identify certain wanted individuals has been employed on the streets of Tampa as well as in certain airports; an extensive network of cameras deployed throughout those areas can theoretically identify the faces of wanted individuals, and alert authorities quickly and efficiently of their presence.

Reviews of this technology have so far been mixed: Critics complain that the system often makes false matches in the same way that humans so often are mistaken. Civil libertarians further complain that the use of surveillance cameras in general violates many citizens' privacy rights, which they believe extend beyond the privacy of their own homes. Tampa abandoned the face-recognition system in April 2001, but other cities continue to rely on closed-circuit cameras in general as a means of detecting crime—or, if possible, preventing it from taking place.

To date, none of these modern police tactics has been successfully challenged on Fourth Amendment grounds. But as the use of these techniques is broadened—perhaps to facilitate racial profiling or other controversial forms of police investigation—it is certain that legal challenges will be waged.

Fifth Amendment Rights

> **THE FIFTH AMENDMENT:** *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself.*

Under the Fifth Amendment, the accused enjoy an assortment of rights that may prove crucial to their defense. The requirement that a grand jury, a jury that meets to decide whether the evidence is sufficient to justify a prosecutor's request that a case go to trial, be convened for serious crimes is theoretically significant; it forces prosecutors to convince an initial jury that a defendant should rightfully be forced to go to trial. (Grand juries do not decide on a

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THE MORE THINGS CHANGE,

THE MORE THEY STAY THE SAME

Balancing Police Surveillance Techniques with the Need for Individual Privacy

Americans have long accepted that even in a free society they must consent to some degree of police surveillance of their activities. When an individual takes a walk in a public park or drives a car along a public thoroughfare, he or she can expect those activities will be observed by complete strangers, including members of law enforcement. Under Fourth Amendment precedents, the government must have a warrant to search someone—even in a public place—if the person maintains a "reasonable expectation of privacy" in his or her actions. Of course law enforcement officers' increasing use of technology for surveillance purposes complicates this area of the law, forcing the Court to weigh the interests of society against those of the individual in this context.

1967

In 1967, the Supreme Court for the first time ruled that nonphysical government intrusion may require a warrant. In *Katz v. United States*, the court considered the case of Charles Katz, who made illegal gambling wagers by using a public pay phone booth—the Federal Bureau of Investigation (FBI) had secretly attached an electronic bugging device (without a warrant or probable cause) to the outside of the booth to record all conversations. The government defended its actions by asserting that the phone booth was in the public, and the bugging device was on the outside of the booth, where others could legally go. The Supreme Court rejected this argument: By a 7–1 vote, it held that the recording of Katz's conversation violated the privacy "upon which he justifiably relied." *Katz* established that the Fourth Amendment protects not just "things," but the reasonable expectations of people as well.

1986

In 1986, the Court ruled that this new Fourth Amendment doctrine was not unlimited. In *California v. Ciraolo*, Dante Ciraolo was charged with growing marijuana in his backyard. Ciraolo put up two large fences to keep the activity private; meanwhile, the Santa Clara police photographed the marijuana plants from a private airplane 400 feet above the ground. This time, by a 5–4 vote, the Supreme Court held that so long as the plants were visible to the "naked eye" from above, the government did not require a search warrant, and Ciraolo's reasonable expectation of privacy was not violated.

2012

In 2012, the police learned that they could not over-rely on technology to conduct surveillance. In *U.S. v. Jones*, the Supreme Court ruled that the police decision to attach a global positioning system (GPS) device to a vehicle without a warrant, thus allowing them to monitor its movements on a nearly continuous basis, was unconstitutional. The Court held that because the police had physically intruded onto the defendant's private property to attach the device, the information discovered from the device could not be admitted in court. Unfortunately, the court's opinion left many significant questions unanswered: Could the government monitor movements from a distance if no physical intrusion was necessary? What about the acquisition of text messages and e-mails retained by the individuals' cell phone providers? As technology grows more sophisticated, the police will enjoy a significant advantage over targets, so long as privacy expectations do not raise even more red flags with the Court.

AP Images/Jae C. Hong

In 2012 the Supreme Court ruled that the police cannot attach GPS tracking devices such as this one to cars without a warrant.

For Critical Thinking and Discussion

1. Have advances in modern technology expanded or contracted citizens' conceptions of what privacy they actually enjoy? Is it still reasonable to assume that conversations on cell phones remain private? What about e-mail messages and texts? Is anything that you do or write on a social networking site such as Facebook actually private?
2. What steps must an individual take to keep his or her activities private from government?

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defendant's guilt or innocence.) In practice, however, the grand jury requirement is rarely much of an obstacle to a skilled prosecutor, who can selectively present evidence to the jury members outside the view of the defendant or the defendant's lawyer. Moreover, because the grand jury requirement was never incorporated, it applies only to federal prosecutors in federal court.[44] The **double jeopardy clause** is a source of much greater protection for defendants: it provides that no defendant may be tried twice for the same crime. Prosecutors must weigh carefully their probability of success at trial and bring forth all the relevant resources at their disposal. If the jury acquits the defendant, the prosecutor cannot try the defendant again. Still, the double jeopardy clause does not stop an altogether different government from retrying the defendant for violating that government's own laws. This occurred in the high-profile case of several white Los Angeles police officers who were accused in 1991 of beating Rodney King, an African American motorist whom they had stopped for a traffic violation. The acquittal of the police set off a series of race riots in Los Angeles. Later, federal charges were brought against the police for violating King's civil rights. At the federal trial, the officers were convicted.

double jeopardy clause: The constitutional protection that those accused of a crime cannot be tried twice for the same crime.

Another provision of the Fifth Amendment is the so-called self-incrimination clause, which prevents individuals from being compelled to testify against themselves. Although originally interpreted to provide protection for defendants only in the courtroom, the self-incrimination clause today offers substantial protection to defendants being questioned by police at the station house or elsewhere. Certainly the clause protects defendants from being coerced or tortured into confessing to crimes. (That form of protection is valuable enough: as shown in Figure 4.1, the right against self-incrimination ranks high in public support, above the right to health care and the right not to be tortured.) But the Warren Court truly changed this area of the law in the now famous case of *Miranda v. Arizona* (1966).[45] In that ruling, the Supreme Court announced the requirement that ***Miranda* warnings** be read to all defendants in custody before they are questioned by police.

***Miranda* warning:** The U.S. Supreme Court's requirement that an individual who is arrested must be read a statement that explains the person's right to remain silent and the right to an attorney.

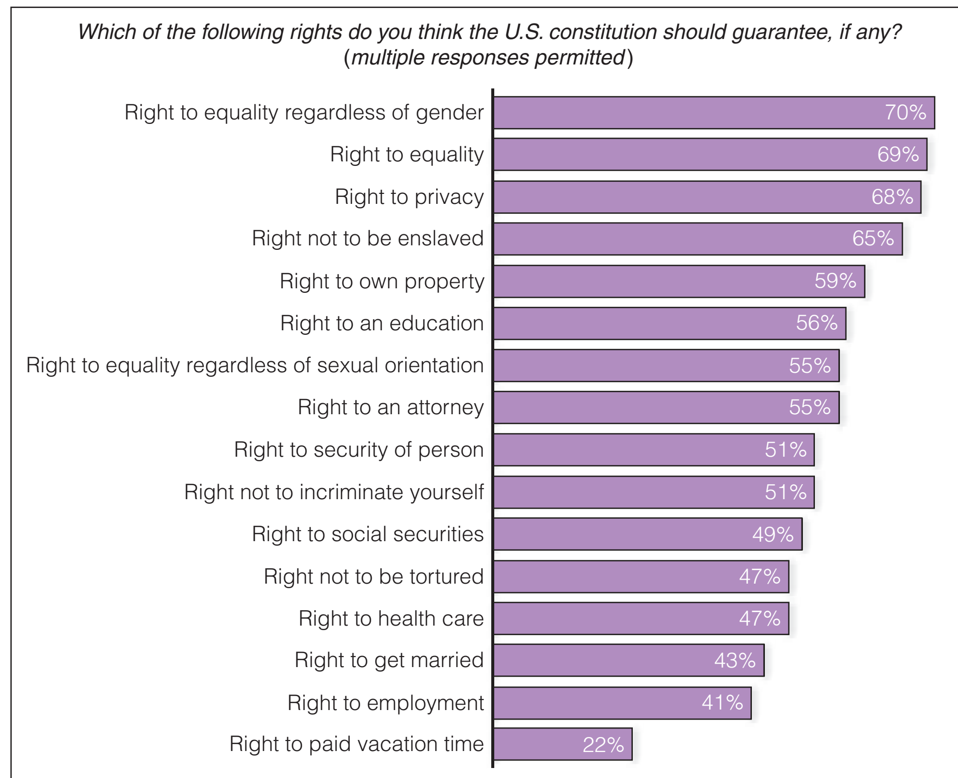

FIGURE 4.1 American's Attitudes on Rights That Should Be Guaranteed
Aspen Ideas poll, based on 1,000 online interviews conducted June 18–June 20, 2010.

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Ernesto Miranda was convicted of the March 1963 kidnapping and rape of an 18-year-old girl in Phoenix, Arizona. Soon after the crime, the police picked up Miranda, who fit the description of the girl's attacker. Officers immediately took him into an interrogation room and told him (falsely) that he had been positively identified by his victim. After two hours of questioning, Miranda confessed. At trial, the defense counsel prodded one of the detectives into admitting that Miranda had never been given the opportunity to seek advice from an attorney prior to his interrogation. Miranda was nevertheless convicted and sentenced to 40 to 60 years in prison. On appeal, the U.S. Supreme Court in 1966 set aside Miranda's conviction. Chief Justice Warren wrote: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. . . ."

Miranda was retried, this time without his confession being introduced into evidence at the trial, and again convicted. Although his original confession could not be used, a former girlfriend testified that Miranda had told her about the kidnapping and rape. After Miranda was paroled in 1972, he spent time in and out of prison before being stabbed fatally in a bar at the age of 34. Thanks to police drama shows and movies, the *Miranda* warnings are better known to citizens today than are any other constitutional protections: police must routinely tell suspects being questioned that they have the right to remain silent and the right to a court-appointed attorney, and confirm that the suspects understand these rights. Perhaps that's why a more conservative Supreme Court conceded in the case of *United States v. Dickerson* (2000) that *Miranda* has become so "embedded in routine police practice" that the warnings have become "part of our national culture." Thus a failure to read the list of *Miranda* rights to witnesses may still result in any subsequent confession to the police being thrown out of court by virtue of the exclusionary rule.[46]

Sixth Amendment Rights

> **THE SIXTH AMENDMENT:** *In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.*

Images of beleaguered and confused defendants trying desperately to defend themselves against experienced and well-seasoned prosecutors are now mostly a thing of the past. In 1963, the Supreme Court in *Gideon v. Wainwright*[47] ordered a new trial for an indigent defendant who had been ordered by the state of Florida to defend himself in a criminal trial, even though he possessed no legal training. Under prevailing Sixth Amendment standards today, no indigent criminal defendant can be sentenced to jail unless the defendant has been provided with a lawyer at no cost. This constitutional right to the assistance of counsel even extends beyond the trial: a court-appointed lawyer must assist the defendant in preparing the case and in all other hearings and meetings before trial. Some critics of the criminal justice system cite the disparity that often exists between the quality of court-appointed counsel and of paid counsel for well-off defendants. Nevertheless, public defenders' offices have been established all over the country in response to the requirement that indigent defendants be provided with lawyers.

Eighth Amendment Rights

> **THE EIGHTH AMENDMENT:** *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Eighth Amendment deals in a limited way with defendants being held for trial: according to its language, **bail**, which is an amount of money paid to the court as security against a defendant's illegal flight before trial, may not be excessive. In practice, that provision applies only when bail is proper in the first place; many high-risk defendants are held either to prevent flight or to ensure that they do not cause more harm while on release. In those instances, bail may be denied altogether without any violation of the Constitution.

bail: An amount of money determined by a judge that the accused must pay to a court as security against his or her freedom before trial.

Far more significant are the concluding words of the Eighth Amendment with respect to "cruel and unusual punishment." No government may impose a cruel and unusual

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THROUGH THE YEARS: SUPREME COURT DECISIONS IMPACTING OUR LIVES

Rosenberger v. Rector and Visitors of the University of Virginia (1995)

Like many colleges and universities, the University of Virginia collects a student activity fee from all enrolled students; it then makes those funds available to formally registered student organizations upon application each year. Not wanting to jeopardize its tax-exempt status under federal law, the university has traditionally rendered religious activities (defined as those that primarily promote a particular belief) as well as "political activities" ineligible for such funding. Pursuant to this policy, the administrator of the student activities fund denied funding to a student religious magazine entitled *Wide Awake*, whose mission was to "provide a unifying focus for Christians of multicultural backgrounds." In its efforts to avoid showing favoritism to certain religious or political beliefs, had the University of Virginia violated the free speech rights of these same students? "Yes," said the U.S. Supreme Court in a hotly contested 5–4 ruling. According to the Court's majority, the university may not impose a financial burden on any particular type of speech; if it chooses to promote speech at all, it must promote all forms of it equally, including religious speech. So much for the fear that subsidizing religious publications might actually violate the establishment clause and its requirement that the state be neutral on religious issues.

Andrew Shurtleff/Alamy

The Rotunda at the University of Virginia. In 1995 the university, founded by Thomas Jefferson, was embroiled in a First Amendment controversy over the funding of student religious publications.

▶ For Critical Thinking and Discussion

1. Are the activities of student religious groups and student religious publications consistent with the purpose of a public university or college? Why or why not?
2. If the university is required to subsidize such publications, can it also supervise (and if necessary, discipline) those same organizations without violating their constitutional rights?

punishment on an individual, but there remains heated debate over what is "cruel and unusual." Traditionally, the clause prohibited only those punishments that even the drafters of the Bill of Rights would have disapproved of—drawing and quartering, beheading, and other forms of extreme torture. In recent times, the Court has added to the mix the requirement of "proportionality," in which serious punishments may not be imposed for relatively minor offenses. Thus, for instance, the Court struck down imprisonment for the controversial offense of "being addicted to the use of narcotics" on the ground that the state was punishing someone for an illness.

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Access the Civil Liberties Forum: Discussion—Eighth Amendment Rights

The Supreme Court currently rejects the premise that the death penalty is inherently cruel and unusual. Most modern lawsuits by prisoners on "death row" focus on the manner by which the death sentence has been imposed. Any judge or jury that imposes capital punishment must have the opportunity to consider mitigating circumstances that might generate

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some sympathy for the accused. Nor can a jury impose a death sentence at the same time that it finds the defendant guilty; the defendant's lawyers must be given a chance to argue against imposition of the death penalty without also having to prove the defendant is innocent. Finally, certain defendants may not receive the death penalty. In 2002, the Court in *Atkins v. Virginia* ruled executions impermissible in the case of mentally retarded defendants.[48] Then in 2005, the Court also ruled executions impermissible for defendants who committed their crimes while under the age of 18.

Critics of the system claim that so many death penalty cases are held up on appeal that bad luck and misfortune are inevitable in the process.[49] Furthermore, advances in DNA testing technology have revealed that some prisoners on death row were innocent of the crime for which they had been sentenced to death. Even in the face of unrelenting popular support for the death penalty, governors in Illinois and Maryland recently announced a "moratorium" on executions in their respective states, to be continued as long as the process by which death sentences are determined remains so riddled with errors.

4.6 The Modern Right to Privacy

Perhaps no single constitutional right garnered more controversial attention during the second half of the twentieth century than the right to have an abortion. Unlike all the other rights mentioned so far in this chapter, however, neither the specific right to abortion nor the more general right to privacy is explicitly referred to in the Constitution or in the amendments to the Constitution. The right to privacy is thus often referred to as an unwritten or "unenumerated" right. The Ninth Amendment counsels against dismissing such rights offhand. It reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." In other words, the fact that other rights such as freedom of speech are written down in the Bill of Rights does not mean that the Constitution doesn't also recognize certain unwritten rights.

The recognition of unstated rights in the Constitution raises difficult questions, such as how to justify recognizing certain unenumerated rights but not others. In 1965, the Supreme Court stepped into this controversy with its decision in *Griswold v. Connecticut*,[50] when it invalidated an 1879 Connecticut law prohibiting the dissemination of information about and the sale of contraceptives. Seven of the nine justices ruled that although the right to birth control is not explicitly mentioned in the Constitution, several provisions of the Bill of Rights (the First, Third, Fourth, and Fifth) and the Fourteenth Amendment, taken together, suggest that these provisions create a "zone of privacy" that includes within it the right to decide whether or not to bear a child. Although the Supreme Court's methods were considered highly speculative, widespread acceptance of birth control devices allowed the Supreme Court to avoid controversy in the years following the decision.[51]

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Access the Civil Liberties Forum: Polling Activity—Privacy Rights

No such sidestepping of heated controversy was possible in 1973, when the Supreme Court formally recognized the constitutional right to abortion in *Roe v. Wade*.[52] By the early 1970s, nearly 15 states had passed liberal abortion laws, but lawyers for Norma McCorvey (she used the pseudonym of "Jane Roe" for purposes of her lawsuit) argued that the decision to end a pregnancy was a constitutional right that *all 50 states* must adhere to. McCorvey herself had been unable to secure a legal abortion in Texas and so eventually gave birth and put her baby up for adoption. The Supreme Court agreed to take her case and rule on the general constitutionality of abortion restrictions.

In ruling in McCorvey's favor, the Supreme Court affirmed that the Constitution recognizes a right to privacy in general—and thus a right to abortion more specifically—even though neither of those rights is ever spelled out explicitly. Such a right is not absolute throughout the term of the pregnancy, however. The author of the opinion, Justice Harry Blackmun, divided the pregnancy into three stages as part of a highly controversial *trimester framework*. During the first trimester, a woman's right to end her pregnancy is absolute. During the second

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trimester, the right is nearly absolute, although the government has the right to restrict abortions that might pose threats to a woman's health. Finally, in the third trimester (when the fetus is potentially viable), the state government is allowed to impose any abortion restrictions on the mother, so long as they do not limit efforts to protect the life or health of the mother.[53]

The number of legal abortions that occurred in the United States rose dramatically in the years immediately following *Roe v. Wade*. The decision also unleashed a fury of controversy from antiabortion interest groups and conservative lawmakers. The election of Ronald Reagan to the presidency in 1980 and his reelection in 1984 set the stage for *Roe v. Wade*'s weakening; as a candidate for high office, Reagan had specifically targeted *Roe v. Wade* as a case of illegitimate judicial activism and had promised to nominate Supreme Court justices who would overturn the controversial decision. Reagan's more conservative Supreme Court appointments began to make their presence known during the late 1980s, when increasingly severe restrictions on abortion were upheld by the Court.

In 1992, the Supreme Court overhauled *Roe v. Wade*'s controversial trimester framework in *Planned Parenthood v. Casey*.[54] Although the Court did not specifically overturn *Roe*, the justices replaced the trimester framework with a less stringent *undue burden test*: does the restriction at issue—regardless of what trimester it affects—*unduly burden* a woman's right to privacy under the Constitution? One example of this new constitutional test at work can be found in the Court's approach to state-mandated 24-hour waiting periods for abortions. Under *Roe v. Wade*, the requirement that a woman wait for an abortion in either of the first two trimesters would have been unconstitutional. Yet in *Casey*, the Court held that such a waiting period does not unduly burden the woman's right to privacy. Other regulations that have been upheld under the *Casey* framework include the requirement that minors seek permission from a parent or a court before having an abortion, and the requirement that women seeking abortions be provided information about the specific medical effects an abortion will have on the fetus.

Not all abortion restrictions are allowed under this new framework. In *Casey*, the Supreme Court invalidated a requirement that women notify their spouses of their intention to have abortions. Yet many more provisions restricting abortion have been upheld since 1992 under the less restrictive *Casey* doctrine. In *Gonzales v. Carhart* (2007),[55] the Supreme Court upheld the Partial Birth Abortion Act of 2003, which effectively banned the use of the "intact dilation and extraction" abortion procedure, most often performed during the second trimester of pregnancy.

Once the unwritten right to privacy became a reality in constitutional law, it seemed inevitable that citizens might try to claim other unwritten rights implicating privacy in the same fashion. Although most efforts to expand the right to privacy beyond abortion and birth control have met with limited success, the Court has not always shut the door on these claims. In 1986, the Court held that a Georgia law that criminalized acts of sodomy by homosexuals was constitutional. Seventeen years later in the case of *Lawrence v. Texas*,[56] the Court reversed itself, holding that a Texas law making it a crime for two people of the same sex to engage in certain types of intimate sexual conduct did in fact violate the individual's right to due process.

The highly visible prosecutions of Dr. Jack Kevorkian for helping terminally ill patients end their lives has brought added attention to the issue of physician-assisted suicide in recent years. On April 13, 1999, Kevorkian, a retired pathologist, was sentenced to jail in Michigan for helping a terminally ill man die by direct injection, a form of voluntary euthanasia. Kevorkian, labeled by many of his opponents as "Dr. Death," had already acknowledged publicly that he had helped at least 90 other people to die by assisted suicide in Michigan between 1990 and 1997. Indeed, when enforcement authorities in Michigan initially refused to charge Kevorkian with killing his most recent patient, he took a tape of the incident to CBS television and aired it on the widely watched news program *60 Minutes*. On the program, Kevorkian challenged the state to act; three days later, he got his wish.

Questions remain about Kevorkian's tactics—do terminally ill patients have the right to end their lives, and if so, can a licensed physician assist them in doing so? Although the Court has

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FROM YOUR PERSPECTIVE

Shedding Fourth Amendment Rights at the Schoolhouse Door

Justice Abe Fortas once wrote that "students do not . . . shed their constitutional rights when they enter the schoolhouse door." His comment held true in *Tinker v. Des Moines* (1967), when the Court upheld the rights of students to wear black armbands in protest of the Vietnam War. Yet the Court has not been so kind to students in subsequent civil liberties cases. This has been especially true within the schoolhouse itself, where Fourth Amendment rights may be implicated. When the state's power to search and seize conflicts with student claims of privacy, all the advantages lie with the state.

The leading Supreme Court case addressing students' Fourth Amendment rights is *New Jersey v. TLO* (1985), involving the search of a high school student for contraband after she was caught smoking. The assistant vice principal's subsequent search of her purse without a warrant revealed drug paraphernalia and marijuana. The U.S. Supreme Court held that the search was constitutional so long as it was "deemed reasonable given the circumstances." Because the student was caught and taken directly to the office, it was considered "reasonable" to assume the purse contained some evidence of wrongdoing.

Mikael Karlsson/Alamy

A trained police dog checking bags and lockers at a Nebraska high school.

For Critical Thinking and Discussion

1. Do you think the rights of college students on your campus should be equivalent to the rights adults enjoy in the workplace, or should they be equivalent to the more limited rights of high school students?
2. Is the location of the search relevant?
3. Should college students enjoy the same rights against unreasonable searches and seizures in their dorm rooms as they enjoy elsewhere on campus?
4. Should private colleges and universities have greater power to search students than public colleges or universities? Why or why not?

been willing to recognize a right of terminally ill patients to end their medical treatment, it has steadfastly refused to extend that privilege to the active termination of one's life. In 1997, the Supreme Court held that no such constitutional right exists, although the justices were significantly divided as to the specific reasons why that is so. But the Court also indicated that states are free to legalize physician-assisted suicide. Since then, only one state (Oregon) has enacted an assisted-suicide law. As for Kevorkian, after serving eight years of his prison sentence for second-degree murder, he was granted parole on June 1, 2007, and died four years later at the age of 83.

* * * * * *

Passionate debates over constitutional rights are hardly a new phenomenon. With a tradition of robust press protections in America dating back to John Peter Zenger's acquittal in the early eighteenth century, the Sedition Act of 1798 stood little chance of long-term success;

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America's policy of openness to immigrants from abroad similarly doomed the Alien Act passed that same year. (Both acts were repealed just three years after their passage.) As a candidate, Barack Obama attacked the George W. Bush administration for violating the rights of the accused in prosecuting the war on terror; yet once he became president, he left many of his predecessor's more controversial measures in place, and he failed to effectively modify a handful of others. Where necessary, Obama vigorously defended those initiatives as necessary for national security. Ultimately, President Obama must strike a balance between the interests of national security and the integrity of these constitutional rights. Certainly not all presidents are able to strike that balance with the same degree of political success: John Adams suffered at the polls in 1800; George W. Bush served two terms, but left office with record-low approval ratings. President Obama treaded on similar ground when he assumed the presidency in 2009—how will history judge his presidency on this issue?

SUMMARY: PUTTING IT ALL TOGETHER

4.1 The Bill of Rights: Origins and Evolution

- Civil liberties are rights that government cannot deny to citizens, whereas civil rights are owed to members of certain groups that afford them equal treatment under the law. The Framers guaranteed ratification of the proposed constitution by promising that Congress would propose a "bill of rights" protected from intrusion by the federal government; not until the mid-twentieth century did the U.S. Supreme Court, through a process known as incorporation, use the Fourteenth Amendment's due process clause to require that state governments uphold most of these protections as well.

4.2 Freedom of Religion and the Establishment Clause

- The free exercise clause arguably bans the government from forcing adherents of a certain religion to engage in activities that would otherwise violate their religious beliefs, except through neutral, generally applicable laws. The establishment clause prohibits the government from enacting any law "respecting an establishment of religion"; in recent decades this has led to a strict separation between church and state on some issues, while allowing significant accommodations to religion in other cases.

4.3 Free Expression Rights

- The First Amendment rights of free speech and press are "preferred freedoms" that enjoy heightened protection under the Constitution because free expression promotes the marketplace of ideas, acts as a watchdog on government, and advances the capacity for individuals to create ideas and improve society.
- Speech includes such activities as flag burning (referred to as symbolic speech), and other forms of expressive conduct, all of which enjoy a high level of protection from the courts. By contrast, the Supreme Court has exempted obscenity, libel, fighting words, and other lesser-value speech from this heightened level of protection. Meanwhile, the press is afforded significant protection from libel suits (which are exceedingly difficult to prosecute) and from prior restraints, granted only under extremely rare conditions.

4.4 The Second Amendment Right to Bear Arms

- The Constitution protects the right of individuals to possess a firearm, although government retains the power to enact a broad range of firearms laws, including reasonable restrictions on possession by felons, or in sensitive places such as schools or government buildings.

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4.5 The Rights of the Criminally Accused

- The Fourth Amendment protects the right of citizens to be free from unreasonable searches and seizures; with some exceptions, a warrant (issued only based on probable cause) is necessary for a valid search. Additional rights of the accused are articulated in the Fifth Amendment, including the double jeopardy clause, the grand jury requirement, and the self-incrimination clause. The Supreme Court has ruled that police must read the *Miranda* warnings to anyone who is arrested, which indicates not only the right to remain silent, but also the right to an attorney. (A failure to read *Miranda* rights to a suspect in custody may lead to a confession being excluded as evidence at trial.)
- A more comprehensive right to counsel is protected by the Sixth Amendment, and the Eighth Amendment protects against the government imposing excessive bail requirements, or cruel and unusual punishment.

4.6 The Modern Right to Privacy

- The Supreme Court has recognized a general right to privacy under the due process clause, which includes a qualified right to abortion and a limited right to die. *Roe v. Wade* was the 1973 case that first established abortion rights under the Constitution; however, a more conservative Supreme Court in recent years has allowed the states to place more restrictions on abortion rights. And although the Court has recognized the right of terminally ill patients to end their medical treatment, it has refused to extend that privilege to the active termination of one's life. By contrast, the Court has recognized greater rights of sexual privacy in recent years, including a right to sodomy.

KEY TERMS

bail (p. 99)
bill of attainder (p. 94)
civil liberties (p. 77)
double jeopardy clause (p. 98)
establishment clause (p. 84)
ex post facto law (p. 94)
exclusionary rule (p. 95)
free exercise clause (p. 83)
good faith exception (p. 95)
incorporation (p. 81)
***Katz* test** (p. 95)
***Lemon* test** (p. 86)
libel (p. 89)
***Miranda* warning** (p. 98)
prior restraint (p. 90)
SLAPS test (p. 91)
symbolic speech (p. 91)
warrant (p. 95)

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TEST YOURSELF

1. Who framed the original Bill of Rights in the First Congress, prior to its formal ratification in 1791?
   - **a.** Alexander Hamilton
   - **b.** John Jay
   - **c.** Thomas Jefferson
   - **d.** James Madison

2. What provision of the Constitution was used by the Supreme Court to "incorporate" most of the Bill of Rights against the states as well as the federal government?
   - **a.** the Fourteenth Amendment's due process clause
   - **b.** Article I's elastic clause
   - **c.** Article I's enumerated powers
   - **d.** the Fourteenth Amendment's equal protection clause

3. The "unalienable rights" that Jefferson talked about in the Declaration of Independence constitute what kind of rights?
   - **a.** positive rights
   - **b.** natural rights
   - **c.** equal rights
   - **d.** fundamental rights

4. Distinguish between "civil liberties" and "civil rights." Give an example of each.

5. Which of the following practices by government have been upheld as constitutional by the Supreme Court?
   - **a.** providing private school vouchers to parents
   - **b.** offering a religious prayer for students during the school day
   - **c.** reading of a religious prayer at a high school graduation ceremony
   - **d.** having a religious prayer read at the start of a high school football game

6. Which Supreme Court decision articulated a controversial three-part test to determine if a law or practice violates the establishment clause?
   - **a.** *Barron v. Baltimore*
   - **b.** *Lemon v. Kurtzman*
   - **c.** *Engel v. Vitale*
   - **d.** *Lee v. Weisman*

7. What are the different schools of thought when it comes to interpreting the establishment clause?

8. Which Supreme Court ruling effectively ended the legal debate over flag burning by declaring it a form of constitutionally protected speech?
   - **a.** *Miller v. California*
   - **b.** *Texas v. Johnson*
   - **c.** *Tinker v. Des Moines*
   - **d.** *United States v. O'Brien*

9. The "SLAPS" test was articulated by the Supreme Court in *Miller v. California* to provide a framework for determining speech that
   - **a.** is libelous.
   - **b.** is slanderous.
   - **c.** promotes riotous behavior.
   - **d.** is obscene.

10. The current test that is used to determine whether political speech that advocates unlawful action is protected is the
    - **a.** clear and present danger test.
    - **b.** imminent danger test.
    - **c.** compelling state interest test.
    - **d.** legitimate state interest test.

11. What is "symbolic speech"? What forms of symbolic speech has the Supreme Court ruled are protected by the Constitution?

12. What was the Supreme Court case that ruled that the Second Amendment forbids the government from banning all forms of handgun possession in the home for the immediate purpose of self-defense?
    - **a.** *McDonald v. Chicago*
    - **b.** *Virginia v. Black*
    - **c.** *Reno v. ACLU*
    - **d.** *District of Columbia v. Heller*

13. What is it about the language of the Second Amendment that has caused differences in interpretations about the right to own a gun?

14. An act of a legislature that declares a person to be guilty of a crime without a trial is called a(n)
    - **a.** ex post facto law.
    - **b.** habeas corpus law.
    - **c.** bill of attainder.
    - **d.** letter of marquee.

15. Which of the following is *not* a valid exception to the Fourth Amendment requirement that the police obtain a proper warrant?

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a. At a traffic stop, a police officer seizes a gun that he sees in the back seat of a car.

b. A police officer searches an apartment for a weapon based on a reliable tip from an informant.

c. A police officer searches a suspect running from the scene of a crime.

d. A warrant unintentionally lists the wrong address to be searched and the search (conducted in good faith) produces valuable evidence.

16. The legal standard that a judge uses to determine whether or not a warrant should be issued is

a. reasonable cause.

b. imminent danger.

c. clear and present danger.

d. probable cause.

17. How did the Supreme Court's decision in *Gideon v. Wainwright* alter the Sixth Amendment's mandate for a "right to an attorney"?

18. Which was the first Supreme Court case that recognized a right that was not explicitly mentioned in the Constitution?

a. *Roe v. Wade*

b. *Planned Parenthood v. Casey*

c. *Griswold v. Connecticut*

d. *Lawrence v. Texas*

19. *Roe v. Wade* guaranteed a women's right to an abortion

a. unconditionally during the first three months of a pregnancy.

b. only when the mother's life is in danger.

c. only in cases of rape or incest.

d. with consent of the fetus' father.

1. d (LO 4-1); 2. a (LO 4-1); 3. b (LO 4-1); 5. a (LO 4-2); 6. b (LO 4-2); 8. b (LO 4-3); 9. d (LO 4-3); 10. b (LO 4-3); 12. d (LO 4-4); 14. c (LO 4-5); 15. b (LO 4-5); 16. d (LO 4-5); 18. c (LO 4-6); 19. a (LO 4-6)

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CHAPTER

5 Civil Rights, Equality, and Social Movements

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Learning Objectives

5.1 TYPES OF EQUALITY

- Define civil rights and the three types of equality: political, social, and economic

5.2 THE STRUGGLE FOR EQUALITY: APPROACHES AND TACTICS

- List the means groups employ to pursue equality within and outside the system

5.3 THE AFRICAN AMERICAN STRUGGLE FOR EQUALITY AND CIVIL RIGHTS

- Assess the history of racial discrimination against African Americans, including the role courts played in initially denying African Americans full equality
- Describe the Court-created framework of equality, the voting rights legislation, and the challenges they have presented in recent times
- Evaluate the more recent battles waged over affirmative action and racial profiling

5.4 THE WOMEN'S MOVEMENT AND GENDER EQUALITY

- Summarize the history of women's rights, including the role of the courts in recognizing such rights, from women's suffrage up through the present
- Explain Title IX's effect on women's rights

5.5 OTHER STRUGGLES FOR EQUALITY

- Trace the struggles for equality waged by other racial, religious, and ethnic groups, including Native Americans, Asian Americans, Muslims, and Hispanic Americans
- Discuss the struggles of older Americans, Americans with disabilities, and gays and lesbians

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Erkan Avci/Anadolu Agency/Getty Images

In the abstract, the word *equality* sits alongside lofty terms such as *liberty*, *freedom*, and *justice* as values that underlie American political culture. Unfortunately, when it comes to settling on a formal definition of equality, no consensus exists. "All men are created equal," was the phrase Thomas Jefferson penned in the Declaration of Independence of 1776. But Jefferson never intended that document to extend to African American slaves, at least not in the short run. When Abraham Lincoln warned in 1859 that "those who deny freedom to others, deserve it not for themselves," the future president of the United States did not consider the lot of women in American society, who at that time were not yet guaranteed the freedom to vote or own property, among other rights. As with any other abstract ideal, we must fully define *equality* and appreciate its implications in order to understand all that it encompasses.

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1868
Fourteenth Amendment, guaranteeing to each person that no state deny the "equal protection of the laws," is ratified.

1896
U.S. Supreme Court declares "separate but equal" accommodations constitutionally valid in *Plessy v. Ferguson.*

1954
U.S. Supreme Court unanimously rules that racially segregated public education violates the equal protection clause in *Brown v. Board of Education.*

1955
Rosa Parks arrested for refusing to give up her seat on a public bus in Montgomery, Alabama; the incident sparks a racial boycott of the city's bus system.

1963
Martin Luther King writes his famous "Letter from a Birmingham jail" in response to those calling for more radical and militant action.

Then

1919

Bettmann/CORBIS

Suffragettes marching for the right to vote in May 1912.

In the quest for equal treatment, rarely is progress linear: small breakthroughs are often followed by intermittent setbacks, until the larger public offers more general acceptance, reluctant as it may be, of the general principle. Beginning in the 1860s and continuing through World War I, demands for women's suffrage stood front and center in the battle lines of equality. Activists at the outset were mostly older women of English or German descent; frustrated that Congress had placed the African American male's right to vote as a higher priority, several women's groups began working to achieve the right to vote, including the New England Woman Suffrage Association and the American Woman Suffrage Association. By the 1890s, these voices had merged into a movement, led at first by Susan B. Anthony. Opposition was widespread: upper-class women worried that their behind-the-scenes influence would be diluted once all women could vote; southern white males feared that African American women would vote, and liquor interests worried that women voters would favor prohibition. Pro-suffrage groups managed some limited victories, particularly in the newly settled western states of Utah, Colorado, Idaho, and Wyoming, which all granted women suffrage before the turn of the century. Still, they experienced continued setbacks at the federal level during the first decade of the new century. The tide may have finally turned with President Woodrow Wilson's call for American entry into World War I. When Wilson termed the battle ahead as a "war for democracy," his point rang hollow among disenfranchised women. Reluctantly, Wilson shifted his position in favor of women suffrage. Finally, in 1919, the Nineteenth Amendment passed, guaranteeing women the right vote nationwide.

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1964
Congress passes the Civil Rights Act of 1964, banning racial discrimination in all public accommodations.

1972
Congress passes Title IX, prohibiting the exclusion of women from educational programs receiving federal assistance, including all intercollegiate sports.

1990
Congress passes the Americans with Disabilities Act, providing a wide range of civil rights protections to those who suffer from "a physical or mental impairment that substantially limits a major life activity."

2013
U.S. Supreme Court holds that federal law restricting federal interpretations of marriage to heterosexual couples in states that recognize same-sex marriage violates the due process clause.

Now

2013

AP Images/Appeal-Democrat, Nate Chute

A protestor holding up a rainbow flag in support of same-sex marriage in Marysville, California.

By the 1970s, gay and lesbian advocacy groups had begun organizing to achieve equality on a number of fronts. The going was tough at first. In 1973, just three years after Jack Baker and Michael McConnell applied unsuccessfully for a marriage license in Minnesota, Maryland became the first state to statutorily ban same-sex marriage. During the remainder of the twentieth century, 44 more states followed Maryland's lead, undermining gay advocacy groups' efforts to secure equal access to marriage at every turn. Even the Democratic Party, which strategically embraced gay rights as a general matter, refused support for same-sex marriage in its party platform. Then in 1996 President Bill Clinton signed into law the Defense of Marriage Act (DOMA), which banned federal recognition of same-sex unions. During the first decade of the twenty-first century, however, the tide began to turn in the opposite direction. First gay and lesbian groups achieved some limited success in Vermont, which established a law providing for same-sex civil unions. The movement for same-sex marriage then earned its first major breakthrough in 2004, when Massachusetts became the first state to formally authorize marriages for gay and lesbian couples. In the decade that followed, at least 17 states and the District of Columbia followed suit. By 2014, a Gallup poll registered 54 percent of Americans supporting gay marriage. Recently, advocates for same-sex marriage achieved key victories in the Supreme Court, which struck down DOMA and denied access to those opposed to a federal court ruling in favor of same-sex marriage rights in California.

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5.1 Types of Equality

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References to different types of equality tend to appear again and again in discussions of American politics; political equality, social equality, and economic equality are among those most often referred to.

political equality: A condition in which members of different groups possess substantially the same rights to participate actively in the political system. In the United States, these rights include voting, running for office, petitioning the government for redress of grievances, free speech, free press, and the access to an education.

Political equality generally refers to a condition in which members of different groups possess substantially the same rights to participate actively in the political system. These rights include voting, running for office, and formally petitioning the government for redress of grievances. In a democracy, the rights to free speech, to free press, and to a quality education may also be considered necessary elements of political quality, as those who are denied such rights often are less able to exercise influence over the political process in any meaningful way. In the years immediately following the Civil War, some moderates in Congress argued that if freed slaves were simply given formal political equality, other benefits and privileges would inevitably follow. Reality quickly proved otherwise, as even African Americans in the North who were able to exercise their right to vote were generally unable to influence the political process.

social equality: Equality and fair treatment of all groups within the various institutions in society, both public and private, that serve the public at large, including in stores, theaters, restaurants, hotels, and public transportation facilities, among many other operations open to the public.

Social equality extends beyond the granting of political rights; it refers additionally to equality and fair treatment within the various institutions in society, both public and private, that serve the public at large. Social equality calls for a sameness of treatment in stores, theaters, restaurants, hotels, and public transportation facilities, among many other operations open to the public. Jim Crow laws passed in the South during the late nineteenth century segregated many of these institutions, thus denying social equality to African Americans.

economic equality: May be defined as providing all groups the equality of opportunity for economic success, or as the equality of results. In the United States, the latter has been the more common understanding of economic equality.

Economic equality remains the most controversial form of equality—indeed, its very mention often touches off heated debate among political officials. To some, society's responsibility to promote economic equality requires only that it provide equality of economic "opportunity," by which different groups enjoy substantially the same rights to enter contracts, marry, purchase and sell property, and otherwise compete for resources in society. To others, economic equality extends beyond equality of economic opportunity to something approaching an "equality of results." Whichever meaning one gives to the term, economic equality has been exceedingly difficult to achieve. Although the government has introduced a graduated income tax and other resource-leveling measures during the past century to improve economic opportunities for the poor, large variances in the quality of education afforded to different groups continue to render economic equality an elusive ideal.

civil rights: Those positive rights, whether political, social, or economic, conferred by the government on individuals or groups.

The term **civil rights** refers to those positive rights, whether political, social, or economic, conferred by the government on individuals or groups that had previously been denied them. What type of equality does the guarantee of civil rights promote? Immediately after the Civil War, civil rights legislation that provided for greater social equality (equal accommodations in hotels, restaurants, trains, and other public facilities) was struck down as unconstitutional by the U.S. Supreme Court. As a result, the package of civil rights granted to freed slaves included only limited political rights, including the right to vote. In the late 1950s and 1960s, renewed efforts to guarantee equality in all areas of American life led to the civil rights movement.

Many civil rights battles in American history have been waged by African Americans, but other ethnic groups, women, the physically disabled, the aged, and homosexuals have also sought the political, social, and economic equality denied them. The Constitution of the United States and the amendments to it have provided a framework for these groups to use to win equality. As a result, the meaning of civil rights has been significantly expanded both in the scope of its protection and in the variety of groups who seek its guarantees.

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5.2 The Struggle for Equality: Approaches and Tactics

The methods and tactics various groups use to achieve equality have evolved since the end of the Civil War. Initially, the battle over what constituted the most effective means of fostering change—at least in the context of challenging racial discrimination against African Americans—pitted two competing philosophies against each other. Booker T. Washington, who founded Tuskegee Normal and Industrial Institute (today Tuskegee University) in Alabama in 1881, advocated a philosophy of *accommodation*, which promoted vocational education for African Americans and opposed confrontation with the mostly white power structure in place in post–Civil War America. Washington urged his fellow African Americans to accept existing conditions, even to the point of tolerating racial segregation and all but surrendering the newly won right to vote. According to his philosophy, engaging in law-abiding practices and standing by former white oppressors would best prepare African Americans for the exercise of the franchise. Washington's philosophy of accommodation fit comfortably within the dominant conservative political and economic structure of his time. Although some critics charged him with accepting second-class citizenship for his race, Washington was perhaps the most powerful and influential figure in African American affairs until his death in 1915.[1]

Bill Clark/CQ Roll Call/Getty Images

Pictured above is Marcia Fudge, who has been the leader of the Congressional Black Caucus since 2013.

Washington's passive approach contrasted with the philosophy of *agitation*, which challenged racial discrimination and injustice through various forms of political activity. Among Washington's contemporaries, the most widely recognized proponent of this alternative approach was W. E. B. Du Bois. At the beginning of the twentieth century, Du Bois and his associates proposed a specific platform of legal, political, and social reforms to achieve social, economic, and political equality for African Americans.[2] Their demands included the unfettered right to vote and an immediate end to all segregation. Agitation eventually replaced accommodation as the dominant mode by which African Americans and other groups sought equality in twentieth-century America. New debates emerged, however, over what would be the most effective means and methods for achieving these reforms. Tactics that various groups have used to seek their civil rights are discussed next.

Working Within the Political System. Some groups have used the political process to implement reforms to end discrimination. In recent decades, for example, African Americans have used their substantial power as a voting bloc to influence the outcome of some elections. Various groups have expanded their influence more directly over public policies and programs by lobbying and petitioning government officials; in some cases members of these groups have been elected to high public office, giving them a place at the table of political power.

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Access the Civil Rights Forum: Polling Activity—Civil Rights Protection

Litigation. When the political arena fails to provide adequate remedies to discrimination, a lawsuit brought before a court may afford a better opportunity for success. Founded in 1909 for the purpose of ensuring the political, educational, social, and economic equality

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of rights of all Americans, the National Association for the Advancement of Colored People (NAACP) focused its efforts on legal challenges to discrimination and segregation because the political arena had offered inadequate remedies. Civil rights legislation in particular had proven ineffective, with Southern state legislatures either ignoring or circumventing the laws. The NAACP won a string of legal battles that gradually broke down racial barriers in education and elsewhere. These efforts culminated with the U.S. Supreme Court's decision in ***Brown v. Board of Education* (1954)**,[3] which ordered desegregation of public schools. In subsequent years women's groups, disabled people, and other victims of discrimination have similarly turned to the courts for remedies to discriminatory practices.

***Brown v. Board of Education* (1954):** The 1954 U.S. Supreme Court decision that declared school segregation to be unconstitutional.

Legal Boycott. The organized refusal to buy, sell, or use certain goods or to perform certain services has long been a tool in economic battles waged between employers and unions. Adopting this tactic for use in the war on racial discrimination, African American citizens of Montgomery, Alabama, refused to ride the city's buses for more than a year in the mid-1950s; their efforts drained the city's public transportation budget and ultimately forced city officials to desegregate the bus system. In 2003, women's rights organizations discouraged some companies from sponsoring the Masters Golf Tournament held at the all-male Augusta National Golf Club in Augusta, Georgia.

Civil Disobedience. Sometimes citizens resort to passive resistance to what they see as an unjust government policy or law by openly refusing to obey it. Such a tactic may result in arrests, fines, or even jail time for those who practice it. Still, civil disobedience may also call attention to a group's plight in an especially effective way. The Reverend Martin Luther King Jr., who had studied the methods used by Mohandas Gandhi of India and other nonviolent protestors, applied these methods to the civil rights movement in the American South.

5.3 The African American Struggle for Equality and Civil Rights

Colonists who supported the American Revolution trumpeted the notion of equality as a means of justifying their war with England. Yet when the U.S. Constitution was drafted in 1787, the document said nothing about such a call to equality, nor did the Bill of Rights (ratified in 1791) guarantee to all citizens "equal protection of the law." The period following the Revolution offered equality primarily to property-owning white men. Nowhere did Jefferson's call for equality, as stated in the Declaration of Independence, seem more hollow than in the area of racial discrimination. Throughout the North, African Americans were denied the right to vote and numerous other economic and social privileges enjoyed by white citizens. And in the South, the institution of slavery thrived for more than a half century after the Constitution was ratified.

Racial Discrimination: From Slavery to Reconstruction

The organized antislavery movement in the United States began in the late eighteenth century as an effort to eradicate slavery through progressive elimination. Advocates of gradual emancipation believed that by preventing the extension of slavery to new areas and relocating emancipated slaves to areas outside the United States, slavery would eventually die out. Opposed to gradual emancipation were the abolitionists, who sought the immediate emancipation of all slaves. A leader of the abolitionist movement was William Lloyd Garrison, who founded the antislavery periodical *The Liberator* in 1831. It is noteworthy, however, that even extreme abolitionists such as Garrison believed that the "fatal characteristic" of slavery was that it denied African Americans the basic legal rights to own property, enter into contracts, and testify in court. Many abolitionists at the time did *not* believe that emancipation automatically entitled freed slaves to the right to vote or serve on juries. Even among some of the most ardent advocates of equality before the Civil War, a sharp distinction was often drawn between economic rights—which they felt African Americans were entitled to—and basic political rights including suffrage, which were somehow not viewed as natural entitlements.

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Neither conception of civil rights for slaves gained much favor in the South, where the economy of the plantation system depended on slave labor. The southerners' approach to racial equality was perhaps best summed up by Chief Justice Roger Taney of Maryland, who in the landmark Supreme Court case of *Dred Scott v. Sandford* (1857)[4] wrote that blacks were "so far inferior that they had no rights which the white man was bound to respect." The initial rhetoric surrounding the outbreak of the Civil War in 1861 focused on issues such as states' rights and territorial expansion in addition to slavery. The Emancipation Proclamation issued by President Lincoln in 1863 declared the freedom of all slaves in states fighting the Union and allowed blacks to enlist in the Union Army. By the end of the struggle in 1865, the war was essentially transformed into a battle over the end of the institution of slavery.

With the Union victory in the Civil War, the complete emancipation of African Americans after the war was a foregone conclusion. Former slaves were able to legally marry, worship as they wished, and migrate to different parts of the country. But the years following the Civil War—normally referred to as the Reconstruction era (1865–1877) in American history—proved a mixed blessing for the newly freed slaves.[5] The **Civil War Amendments** to the Constitution did grant African Americans the rights of citizenship. The Thirteenth Amendment (ratified in 1865) banished slavery from all states and U.S. territories. The Fourteenth Amendment (ratified in 1868) granted full U.S. and state citizenship to all people born or naturalized in the United States and guaranteed to each person "the equal protection of the laws." Finally, the Fifteenth Amendment (1870) forbade the denial or abridgement of the right to vote by any government on account of race. The Republican-controlled Congress hoped that these three amendments would institutionalize freedom for the former slaves and protect their rights from being undermined by future generations.

Civil War Amendments: The Thirteenth Amendment (ratified in 1865) banished slavery from all states and U.S. territories. The Fourteenth Amendment (ratified in 1868) granted full U.S. and state citizenship to all people born or naturalized in the United States and guaranteed to each person "the equal protection of the laws." The Fifteenth Amendment (1870) forbade the denial or abridgement of the right to vote by any government on account of race.

During the Reconstruction era, many freed slaves were successful in getting on ballots in the former Confederate states—in all, 22 African Americans were elected to the House and 1 (Hiram Revels of Mississippi) was elected to the Senate during the latter part of the nineteenth century. African American participation in Congress trailed off at the beginning of the twentieth century, however, because restrictions on the franchise curtailed the political viability of most black candidates. No African American served in either house of Congress for most of the first three decades of the twentieth century, and just four served in the House up to 1954. After George Henry White (R-NC) left Congress in 1901, no African American was elected from a Southern state again until 1973, when Barbara Jordan (D-TX) and Andrew Young (D-GA) were elected to serve in the 93rd Congress.

Although African Americans achieved some gains during Reconstruction, the Reconstruction-era generation posed the greatest threat to those civil rights victories. The Fourteenth Amendment had been proposed in part to negate the infamous *Black Codes* passed by the southern states, which denied African Americans numerous economic and social rights. However, in *The Slaughterhouse Cases* (1873),[6] a conservative U.S. Supreme Court narrowly defined the scope of rights protected by the Fourteenth Amendment, holding that the great body of civil rights still lay under the protection of state governments, not the U.S. Constitution. The Civil Rights Act of 1875 attempted to ensure the social and political rights of freed slaves by, among other provisions, prohibiting discrimination in public accommodations. The Supreme Court invalidated the act in *The Civil Rights Cases* (1883),[7] ruling that whereas the Constitution prohibits the states from discriminating by race against certain civil rights, it does not protect the invasion of such civil rights by private individuals unaided by state authority. Therefore, privately owned restaurants and hotels could freely discriminate on the basis of race without violating the Constitution.

This judicial gutting of federal civil rights guarantees opened the way for numerous abuses of freed slaves once the federal government's military occupation of the South ended in 1877. Although the Fifteenth Amendment had given African American men the right to vote, the southern states imposed new barriers to disenfranchise the former slaves. They levied *poll taxes*, which a voter had to pay before being allowed to vote; they required potential voters to pass *literacy tests*; they demanded some form of property-owning and residency

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documentation; they issued a grandfather clause requirement, which stated that to be eligible to vote one's grandfather had to have voted; and they restricted blacks from participating in crucial party primaries. Discrimination against African Americans in all areas of public life soon became the norm. Terrorist groups like the Ku Klux Klan intimidated or threatened African Americans to keep them under control, sometimes backing up their threats with beatings, arson, or murder. White vigilante groups resorted to lynching in an effort to restore white supremacy and deny blacks their rights. Post–Civil War blacks might no longer be slaves, but they could hardly be considered fully equal citizens under the law.

Racial Segregation and Barriers to Equality

In the period immediately following the Civil War, some African Americans were able to use public accommodations as long as they could afford to pay for them. By the turn of the twentieth century, however, growing racial tensions, exacerbated by urbanization and industrialization, led to racial segregation throughout America. The Southern states enacted **Jim Crow laws**, which required segregation of blacks and whites in public schools, railroads, buses, restaurants, hotels, theaters, and other public facilities. The laws excluded blacks from militias and denied them certain education and welfare services. When Homer Plessy (described in court filings as being "seven-eights Caucasian and one-eight African blood") was arrested on a Louisiana train for refusing to leave a seat in a coach section designated for whites, he challenged the Louisiana law requiring segregated railroad cars, arguing that the law violated the equal protection clause of the Fourteenth Amendment. In ***Plessy v. Ferguson* (1896)**,[8] the Supreme Court upheld the Louisiana law on the theory that as long as the accommodations between the racially segregated cars were equal, the equal protection clause was not violated. The Court's ruling established the constitutionality of racial segregation according to the *separate but equal* doctrine. To the argument that such an enforced separation of the two races stamps the colored race with a "badge of inferiority," the Supreme Court replied matter-of-factly: "If this be so, it is not by reason of anything found in the act, but solely because the colored race *chooses* to put that construction upon it."

Jim Crow laws: Laws used by some southern states that required segregation of blacks and whites in public schools, railroads, buses, restaurants, hotels, theaters, and other public facilities. The laws excluded blacks from militias and denied them certain education and welfare services.

***Plessy v. Ferguson* (1896):** The Supreme Court case that upheld a Louisiana segregation law on the theory that as long as the accommodations between the racially segregated facilities were equal, the equal protection clause was not violated. The Court's ruling effectively established the constitutionality of racial segregation and the notion of "separate but equal."

African American leaders responded to the spread of segregation in different ways. Initially, Booker T. Washington's accommodationist philosophy prevailed. W. E. B. Du Bois, by contrast, advocated direct and militant challenges to segregation. Perhaps the greatest breakthrough against segregation occurred through the legal arm of the organization that Du Bois helped found: the NAACP. Beginning in the late 1930s, NAACP lawyers Charles Houston and Thurgood Marshall began attacking the legal basis for segregation in the courts.[9] As detailed in Table 5.1, they won their first battles against state-mandated segregation in institutions of higher education, as the Supreme Court in 1950 recognized that separate accommodations in law schools and colleges had failed to meet the essential requirements of equality mandated by the Fourteenth Amendment.

The NAACP's incremental approach to eliminating segregation in education reached its climax in 1954, with the Supreme Court's landmark decision in *Brown v. Board of Education*. Chief Justice Earl Warren, writing for a unanimous Court, held that racial segregation in any facet of public education constituted a denial of equal protection by the laws. Recognizing the psychological harms of segregation on African American children, the Court declared that segregated schools were "inherently unequal."

The *Brown* decision also confirmed that in all future cases related to racial (and ethnic) discrimination, the Court would apply a standard of **strict scrutiny**, a level of judicial review that requires the government to prove that the racial classification of the law or practice in question is "narrowly tailored" to meet a "compelling state interest." What precisely does this mean? At a minimum, there should be no less-restrictive alternative means available for achieving the government's objectives, and those objectives should stand among the most necessary that may be pursued by any government. Many legal scholars and judges say the strict scrutiny standard tends to invalidate nearly all government laws and programs. In the years following

strict scrutiny: A legal standard set in *Brown v. Board of Education* for cases related to racial discrimination that tends to invalidate almost all state laws that segregate racial groups.

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TABLE 5.1 Tracking the NAACP's Legal Assault on Racially Segregated Education

U.S. Supreme Court Case	Description
Missouri ex. rel. Gaines v. Canada (1938)	Invalidated the exclusion of black students from the University of Missouri's School of Law absent some other provision for their legal training.
Sipuel v. Bd. of Regents of Univ. of Okla. (1948)	Rejected Oklahoma's attempt to create a separate law school for blacks by roping off a section of the state capitol for black law students and assigning three law teachers to them; such a form of separation failed to comply with the constitutional requirement of "equality."
Sweatt v. Painter (1950)	Invalidated Texas's attempt to create an alternative to the University of Texas law school for blacks, because any such alternative would be inherently different in the reputation of its faculty, the experience of its administration, the position and influence of its alumni, its standing in the community, and so on.
McLaurin v. Okla. State Regents (1950)	Rejected as "unequal" Oklahoma's attempt to provide graduate education to a black student by making him sit in a classroom surrounded by a railing marked "reserved for colored," assigning him a segregated desk in the library, and requiring him to sit separately from whites in the cafeteria.
Brown v. Board of Education (1954)	Rejected the "separate but equal" doctrine altogether, declaring that in the field of public education, "separate educational facilities are inherently unequal."
Cooper v. Aaron (1958)	Condemned the attempts of the Little Rock, Arkansas, school board to postpone desegregation efforts, ruling that no scheme of racial discrimination against black schoolchildren can stand if "there is state participation through any arrangement, management, funds, or property."

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Brown, the courts would apply the standard of strict scrutiny in decisions on segregated public swimming pools, police forces, and laws banning interracial marriages.

A year after handing down the *Brown* decision, the Supreme Court declared that its implementation should proceed "with all deliberate speed." Despite that decree, many local school boards resisted desegregation. The school board of Little Rock, Arkansas, adopted a plan for "phased integration" over a 10-year period, spurring more lawsuits to speed up the process. Undeterred, Arkansas Governor Orval Faubus declared that no "*Brown* decisions" enjoyed "the force of law" in his state. In one famous instance, he placed soldiers of the Arkansas National Guard at Little Rock's Central High School to stop African American students from entering the school. Governor Ross Barnett of Mississippi refused to comply with court desegregation orders on so many occasions that a federal court held him in contempt and committed him "to the custody of the Attorney General of the United States." Alabama Governor George Wallace blocked a University of Alabama doorway, refusing to allow black students to pass through, in 1963. One hundred members of Congress signed a "Southern Manifesto" declaring their intention to use "all lawful means" to reverse the *Brown* decision. On several occasions, the Supreme Court was forced to reassert its authority over state governments. In *Cooper v. Aaron* (1958),[10] for example, the Court held that the rights of African American students could "neither be nullified openly and directly by state legislatures or state executive officials . . . by evasive schemes for segregation."

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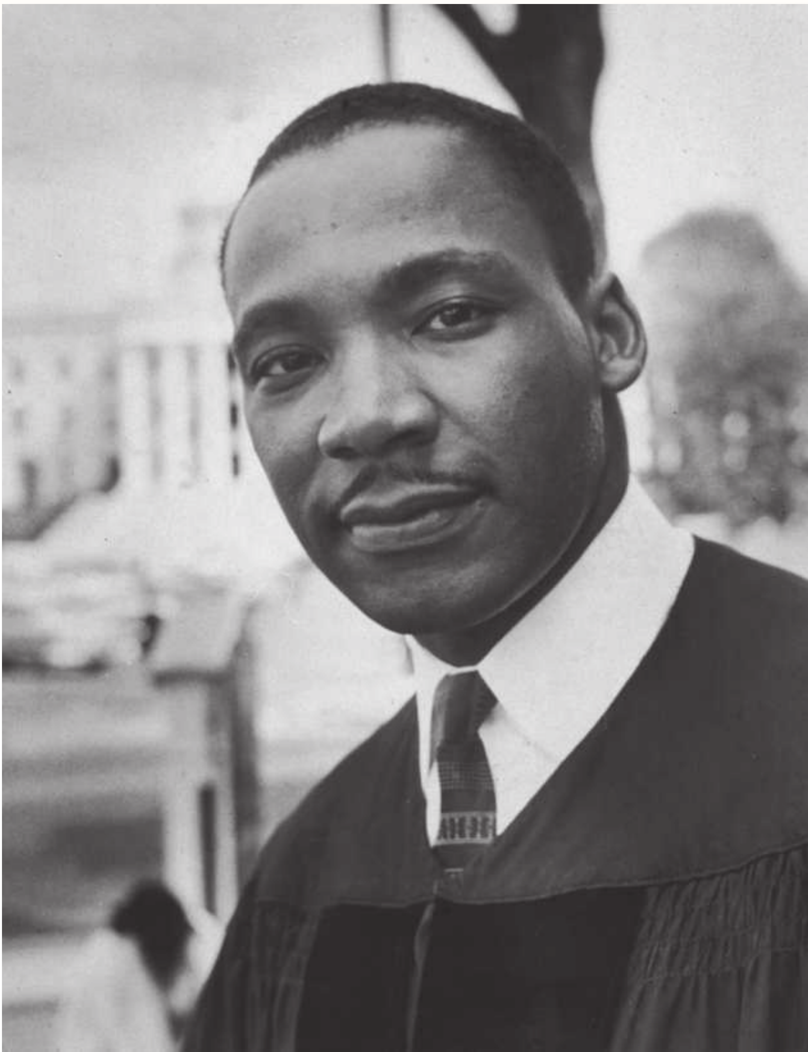
Despite the Supreme Court's increasingly clear edicts against segregation, many school districts in the South and North continued to drag their feet.[11] Significant and widespread change would not occur until after passage of civil rights legislation in the mid-1960s, which gave the executive branch of the government increased power to enforce school desegregation in local districts. Additionally, a sudden influx of federal money into local schools gave extra bite to court desegregation decrees. As scholar Gerald Rosenberg remarked: "Put simply, courts could hold up federal funds." Many school districts in the Deep South where less than half of all blacks were being educated alongside whites as late as 1967 were almost fully integrated by 1971.

In urban areas where whites and blacks lived largely apart, strict adherence to a neighborhood school system meant indefinitely perpetuating a racially unmixed setting; thus massive court-ordered "busing" in the late 1960s and 1970s became a controversial feature of efforts to integrate these schools. Many such court orders were issued in both Northern and Southern cities, as the Supreme Court required communities to cease both *de jure discrimination* (segregation sanctioned by the law), which was found mostly in the South, and *de facto discrimination* (segregation in reality, such as that which occurs when different racial groups voluntarily choose to live in different neighborhoods or attend different schools), which was found in both the North and the South. Yet busing was a remedy limited to a single metropolitan area, and comprehensive efforts to integrate schools were further hindered by white flight to suburbia, which left inner-city school districts in many large northern cities predominantly black and Hispanic. Today, fully 70 percent of the nation's African American students attend schools that are predominantly black. Thus more than 50 years after the *Brown* decision, de facto discrimination in public education remains a reality in many parts of America.


Michael Evans/Hulton Archive/Contributor/Getty Images

A 19-year-old student named Martin Luther King Jr. was first introduced to the pacifist philosophy of Mohandas Gandhi. By seeking a nonviolent confrontation with the segregation laws, King's followers practiced Gandhi's philosophy in a way that sent shock waves throughout the South and eventually the entire nation. King would continue to preach Gandhi's call for nonviolent protest up until his assassination in 1968.

The Beginnings of the Civil Rights Movement

Although *Brown* signaled the end of state-sponsored segregation, the Supreme Court took pains to note that its holding applied only to discriminatory acts by the government. The extension of civil rights protections to all public accommodations did not occur until the civil rights movement began to gather momentum in the late 1950s and early 1960s. In December 1955, Rosa Parks, an African American seamstress in Montgomery, Alabama, was arrested for refusing to give up her seat at the front of a city bus. Her arrest sparked a racial boycott of the city's bus system. Leading the boycott was Martin Luther King Jr., pastor of the Dexter Avenue Baptist Church. King's eloquent speeches and his methods of nonviolent civil

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disobedience brought national attention to the boycott. King had been introduced to these tactics of nonviolent protest when he was a student at Crozer Theological Seminary in Chester, Pennsylvania, and studied the pacifist philosophy of Mohandas Gandhi of India, whose unshakable belief in nonviolent protest and religious tolerance helped secure independence for his country from Great Britain.

In 1957, King and other African American ministers in the South formed the Southern Christian Leadership Conference (SCLC), which encouraged Ghandian practices of nonviolent civil disobedience as a way to gain equal rights for blacks and spur white politicians into action. African American and white college students in numerous cities across the South eventually became the engine for pressing such change. One early tactic the students used was the sit-in. On February 1, 1960, four freshmen from the black North Carolina A&T College in Greensboro sat down at a whites-only lunch counter and refused to move after being denied service. The next day more students—black and white—joined them. Angry mobs harassed the students verbally and physically. Committed to nonviolence, the students endured the abuse. The episode brought considerable publicity to the civil rights movement. In 1961, interracial groups of students sponsored “Freedom Rides,” traveling together from Washington, D.C., to the South to test court decisions prohibiting segregation on interstate buses and in bus terminals; many within the groups of interstate travelers of mixed races were beaten when their buses arrived in Alabama. Eventually President John F. Kennedy was forced to nationalize the Alabama police to help assure the freedom riders safe passage.

Birmingham 1963: The Turning Point of the Civil Rights Movement

The civil rights movement’s strategy of nonviolent civil disobedience reached a climax between 1963 and 1965.[12] The year 1963 will long be remembered as the “Year of Birmingham.” Tension was growing between King’s SCLC and new civil rights groups that favored more radical and militant action, including the use of violence. Looking for a site where nonviolent

Bettmann/CORBIS

In 1963, firefighters in Birmingham, Alabama, sprayed civil rights demonstrators with fire hoses.

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demonstrations might succeed and draw national attention to the civil rights movement, King and his followers settled on Birmingham, Alabama. Birmingham was an obvious target, for several reasons. First, as an industrial city (unlike most southern cities), it had a sizable concentration of workers. Also, during the 1930s and 1940s, the labor movement had introduced to the city a tradition of organized protest unusual throughout most of the South. And finally, the city was a stronghold of segregation; city leaders included the notoriously racist Public Safety Commissioner Eugene "Bull" Connor, who ruthlessly enforced segregation laws throughout the city.

In Birmingham, King led other demonstrators in a nonviolent march downtown, where he was arrested and placed in solitary confinement. While confined, he wrote his famous "Letter from Birmingham City Jail," addressed to the white Alabama clergymen who had criticized King's campaign. In the letter, King explained his philosophy and defended his strategy of nonviolent protest. Despite King's arrest, the demonstration in Birmingham continued. The marchers, including more than a thousand black schoolchildren, were met by attack dogs, cattle prods, and fire hoses. Pictures of children being attacked flashed across the nation's television sets and the violence was covered by newspapers and magazines across the world. The nation would be forever aroused by these events; the civil rights movement had finally been transformed into a truly national cause.

Birmingham businessmen, fearing damage to their downtown stores, hastened negotiations with King and his fellow civil rights leaders. An accord was eventually reached on May 10, 1963, with merchants agreeing to desegregate lunch counters and hire more black workers for clerical and sales positions. Yet the agreement did not bring peace to Birmingham: On the night of May 11, a Ku Klux Klan rally outside the city was followed by the explosion of bombs at the motel where King was staying. Riots erupted and some stores were set ablaze. This time, however, the federal government got involved; President Kennedy dispatched soldiers to Fort McClellan, 30 miles outside of Birmingham. Nevertheless, in September a bombing at the city's Sixteenth Street Baptist Church killed four African American schoolgirls.

The events in Birmingham were neither the last of the civil rights demonstrations nor did they mark the end of violence in response to those activities. In August 1963, more than 250,000 people participated in the March on Washington, where King delivered his memorable "I Have a Dream" speech from the steps of the Lincoln Memorial. In 1964, the murder of three civil rights workers and a local NAACP leader in Mississippi revealed the depth of continuing opposition to racial equality. In 1965, King and other civil rights leaders organized a march from Selma, Alabama, to the state capital in Montgomery to bring attention to harsh political realities in the South, where African Americans had been denied the right to vote by illegitimate tests and in some instances outright intimidation.

President Lyndon Johnson and the U.S. Congress were eventually prodded into action. Johnson signed into law the **Civil Rights Act of 1964**, which banned racial discrimination in all public accommodations, including those that were privately owned; it also prohibited discrimination by employers and created the Equal Employment Opportunity Commission to investigate complaints of discrimination; and it denied public funds to schools that continued to discriminate on the basis of race.[13] The **Voting Rights Act of 1965**, enacted the following year, invalidated literacy tests and property requirements and required that certain states and cities with a history of voting discrimination obtain pre-approval from the Justice Department for all future changes to their voting laws. As shown in Table 5.2, the act proved largely successful, as millions of African Americans were effectively reenfranchised in the South in subsequent decades.

The **Civil Rights Act of 1968** banned race discrimination in housing and made interference with a citizen's civil rights a federal crime. Even the state legislatures played a role in this civil rights transformation by ratifying the **Twenty-fourth Amendment** in 1964, which banned poll taxes in federal elections.

The focus of the civil rights movement began to shift in the mid- to late 1960s with the rise of "black nationalism," which was grounded in the belief that African Americans could not

Civil Rights Act of 1964: The federal law that banned racial discrimination in all public accommodations, including those that were privately owned; prohibited discrimination by employers and created the Equal Employment Opportunity Commission to investigate complaints of discrimination; and denied public funds to schools that continued to discriminate on the basis of race.

Voting Rights Act of 1965: The federal law that invalidated literacy tests and property requirements and required select states and cities to apply for permission to the Justice Department to change their voting laws. As a consequence, millions of African Americans were effectively reenfranchised in the South.

Civil Rights Act of 1968: The federal law that banned race discrimination in housing and made interference with a citizen's civil rights a federal crime.

Twenty-fourth Amendment: A 1964 constitutional amendment that banned poll taxes in federal elections.

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Table 5.2 The Effect of the Voting Rights Act on Registration Rates in the South

The following table compares black voter registration rates with white voter registration rates in seven southern states in 1965 and 1988. All numbers are percentage rates.

	March 1965			November 1988		
State	**Black**	**White**	**Gap**	**Black**	**White**	**Gap**
Alabama	19.3	69.2	49.9	68.4	75.0	6.6
Georgia	27.4	62.6	35.2	56.8	63.9	7.1
Louisiana	31.6	80.5	48.9	77.1	75.1	-2.0
Mississippi	6.7	69.9	63.2	74.2	80.5	6.3
North Carolina	46.8	96.8	50.0	58.2	65.6	7.4
South Carolina	37.3	75.7	38.4	56.7	61.8	5.1
Virginia	38.3	61.1	22.8	63.8	68.5	4.7

The U.S. Commission on Civil Rights; Chandler Davidson and Bernard Grofman, *Quiet Revolution in the South* (Princeton, NJ: Princeton University Press, 1994).

effectively work within the confines of a racist political system to produce effective change. Malcolm X, a leading advocate of black nationalism, sought to turn the characteristic of being black-skinned into a source of strength, and he urged African Americans to shun white culture and the values promoted by white society. He and other black nationalists criticized the civil rights leaders who advocated integration into white society rather than building separate black institutions. The influence of black nationalism in the civil rights movement reached its peak during the late 1960s and early 1970s following the assassination of Martin Luther King Jr. in 1968. Epitomizing a revolutionary vision of society that replaced the strategy of nonviolence with confrontational tactics, the Black Panther Party became a controversial militant presence in some cities.

Although the Black Panther Party had all but faded as a significant entity by 1972, black separatist organizations continue to maintain a strong presence. For example, the Nation of Islam (Black Muslims), led by Louis Farrakhan, preaches class consciousness and the concept of black self-rule. In 1995, Farrakhan's Nation of Islam led the Million Man March in Washington, D.C., which far outdrew the 1963 March on Washington. This Million Man March garnered international attention for Farrakhan's movement. Four years later, African American women held their own million women march.

Barack Obama's historic election as the first African American president may have fundamentally changed how many African Americans perceive their national government. Still, African Americans face immense challenges in making their voices heard in other institutions on the national political scene. Obama left a Senate chamber in November 2008 in which he had been the only African American then serving, and where he was just the third popularly elected African American senator to serve since Reconstruction. (Though several African-Americans were appointed to vacant Senate seats in the years that followed, in 2013 Cory Booker of New Jersey became the first African-American to be elected to the Senate since Obama in 2004.) African Americans have enjoyed a bit more success in the other house of Congress, as 40 African Americans (9.2 percent) served in the House of Representatives during the 113th Congress. Finally, African Americans have been mostly absent from the highest levels of state government: In 2006, Deval Patrick of Massachusetts became only the second popularly elected African American governor in history.

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Continuing Struggles over Racial Equality

Two contemporary and hotly debated topics related to racial equality are affirmative action and racial profiling.

Affirmative Action. Some observers have called the civil rights movement a "Second Reconstruction," because it eliminated most of the vestiges of racial discrimination and segregation from the books. But would this successful legal revolution translate into real change? Various civil rights leaders in the 1970s and 1980s shifted their focus to affirmative action as a means of promoting African American gains in education and the workplace. **Affirmative action** programs are generally laws or practices designed to remedy past discriminatory hiring practices, government contracting, and school admissions. The women's movement too has benefited from affirmative action programs in the workplace and elsewhere. Although "quotas" (specifically defined numerical goals for hiring or admitting members of certain groups) have been used in the past, more often such programs involve giving some form of preferential treatment, whether by adding points to a mathematical score due to a person's status as a member of a particular racial group, or by creating economic or other incentives for administrative bodies to increase the diversity of their incoming workforce and/or educational institutions.

affirmative action: Programs, laws, or practices designed to remedy past discriminatory hiring practices, government contracting, and school admissions.

Proponents of affirmative action argue that past discriminatory practices have deprived certain racial groups and women of opportunities to get the skills or experiences they need to compete for jobs or college admissions on an equal footing with those who have not experienced such discrimination. The issue of affirmative action reached the U.S. Supreme Court in the case of *Regents of the University of California v. Bakke* (1978).[14] In 1973, Alan Bakke, one of 2,664 applicants for 100 seats at the University of California–Davis Medical School, interviewed with one of the school's officials, Dr. Theodore West. At that time, West told Bakke that he was a "very desirable applicant to the medical school." Thus Bakke was quite surprised when he was denied admission. Bakke in fact was rejected not once but twice for admission: in 1973 and again in 1974. In both instances, 16 applicants with lower grade point averages and MCAT (Medical College Admission Test) scores than Bakke's were admitted to the school under a special minority admissions program. Bakke challenged the program as a violation of the Fourteenth Amendment's equal protection clause. In previous years, the courts had dismissed most lawsuits because they were quickly rendered "moot," a legal term that indicates that circumstances have removed the practical significance of deciding the case. (By attending some other school, those unsuccessful applicants had essentially prevented their cases from ever being decided.) But Bakke was determined to go to University of California–Davis Medical School and thus his case eventually reached the U.S. Supreme Court.

In deciding the case, the Supreme Court ruled that a university could take into account race and ethnicity when making decisions about the admission of students, as long as it did not utilize specifically assigned numerical goals. To the Court, no constitutional infirmity exists where "race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process." In his majority opinion, Justice Lewis Powell also heralded the benefits of a diverse student body, noting that students with particular racial backgrounds may bring to a school "experiences, outlooks and ideas that enrich the training of its student body."[15]

Five years after he was first denied admission, Bakke got what he wanted: on June 28, 1978, the U.S. Supreme Court directed that he be admitted to the university's medical school. Opponents of affirmative action thought they had received the victory they were looking for; after all, the Court held that the university could not use fixed racial quotas in this instance. But schools and universities took refuge in the Court's statements favoring the consideration of racial criteria more generally, and in the quarter century that followed, countless schools of higher education utilized race-conscious admissions programs. Thus although Alan Bakke won his personal battle for admission, the war over affirmative action would continue to be waged in the years that followed.

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THE MORE THINGS CHANGE,

THE MORE THEY STAY THE SAME

Tolerance Can Be Hard to Come by . . . Even in Congress

1917

In 1917, Montana's Jeanette Rankin, a Republican, arrived in Washington, D.C., as the first female to serve in the House of Representatives. Embracing her historic victory, she wrote a weekly newspaper column aimed at women suffragists and actively pressed for passage of child protection laws and other measures important to women. Still, many of her initial admirers were dismayed when in 1917 she cast the only vote in the House against U.S. entry into World War I, as they feared that her vote would handicap the cause of women's rights at a crucial time. The following year the Republican Party machine denied her the party's nomination and she lost her House seat. Rankin won her seat back again two decades later. Yet once again Rankin found her stay in Congress short-lived: On December 8, 1942, she became the only member of Congress to hold the distinction of voting against American involvement in *both* world wars. Of course by then Rankin was no longer a lone wolf, as eight other female House members served in the 77th Congress (along with the first female senator, Hattie Caraway of Arkansas).

1945

In 1945 Adam Clayton Powell Jr. became the first African American from New York to hold a seat in Congress. When the Democratic congressman first took his seat, African Americans from northern states were frustrated that liberal white House members and Senators had thus far refused to challenge segregationists on the floor of Congress. Powell relished the opportunity to take on that challenge, even if it eventually rendered him an outcast in the House. On bill after bill Powell offered amendments and riders (all unsuccessful) denying funds to jurisdictions that maintained segregation. House members from his own party became increasingly frustrated with him; to make matters worse, Powell often broke from the Democratic Party ranks in high-profile ways, such as in 1956 when the party's weak civil rights plank led him

Everett Collection Inc/Alamy

Roger L. Wollenberg/UPI/Landov

At left, Rep. Jeannette Rankin of Montana, speaking from the balcony of the National American Woman Suffrage Association; at right, Congressman-elect Keith Ellison, being sworn in to the House of Representatives in January 2007.

(*Continued*)

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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

Tolerance Can Be Hard to Come by . . . Even in Congress (continued)

to support Republican Dwight D. Eisenhower's presidential bid. By the mid-1960s, Powell came under attack for mismanaging the budget of the Education and Labor Committee he chaired; he was even accused of taking vacations at public expense. Democratic Party leaders eventually stripped him of his committee chairmanship and refused to seat him pending further investigation of the allegations. Luckily for Powell, he was rescued by another branch: In *Powell v. McCormack* (1969), the Supreme Court ruled that the House had acted unconstitutionally when it excluded Powell from his duly elected seat in Congress.

2006

In 2006, Keith Maurice Ellison, a Democrat and member of the Farmer-Labor Party in Minnesota, became the first Muslim elected to the House of Representatives, and only the fourth elected Muslim official in American history. Ellison's landmark election occurred while the federal government's war on terrorism was continuing to spark unsupported allegations within the general public about the loyalty of Muslim Americans in general. Resistance even emerged from some of Ellison's own colleagues: when he announced plans to use the Koran for his unofficial swearing-in ceremony, Congressman Virgil Goode (R-Va) sent a letter to his own constituents warning that "if American citizens don't wake up and adopt the Virgil Goode position on immigration, there will likely be many more Muslims elected to office and demanding the use of the Koran." Undaunted, Ellison became a thorn in the side of the George W. Bush administration, opposing the troop surge in Iraq and advocating for Islamic causes.

For Critical Thinking and Discussion

1. What disadvantages do modern-day pioneers in battles over equality face? Is the fame they gain for being first worth the price they must pay from their opponents?
2. Why do you think Congress—and the House of Representatives in particular—is so slow to respond to the forces of demographic change?

Opponents of affirmative action complain that such programs punish white applicants who played no role at all in the original discriminatory practices. They also claim that a racial divide that currently exists in this country may be exacerbated by affirmative action, because members of racial groups who benefit from such programs may be stigmatized by the perception that they are not fully deserving. Finally, affirmative action programs are explicit racial classifications, and thus may be thought to violate the principle of a "color-blind Constitution" that was celebrated by the Supreme Court's decision in *Brown v. Board of Education*.

A string of Supreme Court decisions in the late 1980s and 1990s has effectively brought an end to explicit affirmative action programs in public employment and contracting. The final nail in the coffin for affirmative action in contracting may have been the Court's decision in *Adarand v. Peña* (1995),[16] which held that any racial classification may be considered unconstitutional unless it meets the test of strict scrutiny: that it must be "narrowly tailored" to further a "compelling governmental interest," a standard that has proved nearly impossible for the government to meet. In fact, no affirmative action employment plan has been upheld as constitutional since the early 1990s.

By contrast, affirmative action in education remains steeped in controversy; the confusion over what is legal in this context was only partially resolved by two University of Michigan cases in 2003 that essentially reaffirmed *Bakke*'s finding that diversity constitutes a "compelling state interest" under certain circumstances. In *Grutter v. Bollinger* (2003),[17] the Court upheld

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Students at the University of Michigan rally in support of affirmative action. In 2003 the U.S. Supreme Court upheld the use of affirmative action by the University of Michigan's Law School but struck down the affirmative action program utilized in that university's undergraduate admissions.

the university's law school admission program because it only considered race as a positive factor in a review process where all individual applications were carefully reviewed and analyzed on their own merits. Yet that same day in *Gratz v. Bollinger* (2003),[18] the Supreme Court struck down the same university's undergraduate admissions program because instead of providing such careful, individualized review, it automatically awarded 20 points to all students from underrepresented groups, greatly enhancing their chances of being admitted. The Court declared that such a blanket award of benefits was not "narrowly tailored" enough to promote diversity.

In an attempt to balance the interests of having a diverse student body with frequently heard criticisms of affirmative action, state governments in Texas, Florida, and California have enacted alternative programs that would guarantee a place at the state's top universities for every student who finishes in the upper tier (normally the top 5 or 10 percent) of his or her high school class. Given that racial minorities tend to predominate at high schools both in the inner city and in especially poor rural neighborhoods in the South, these percentage plans tend to guarantee seats at major state universities to minority students who would otherwise have been denied admission. Critics of the plans charge that they capitalize on patterns of segregation in housing and geography. In 2013, the U.S. Supreme Court held that courts must apply strict scrutiny to programs like the one at the University of Texas, which accepted 81 percent of incoming students through the "top 10 percent plan" and the rest through a review of various factors, including race. Whether such programs can survive strict scrutiny, which requires that the program be "narrowly tailored to obtain the educational benefits of diversity," remains an open question.

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Racial inequality remains a fact of life in twenty-first-century America. According to a 2010 U.S. Census Bureau report, the mean and median income of African American households was just 65 percent that of all racial households combined.[19] Moreover, the *Journal of Blacks in Higher Education* recently reported that almost 37 percent of non-Hispanic white Americans age 30 to 34 hold at least a bachelor's degree, as compared to just 21 percent of all African Americans in that same age group.[20]

Racial Profiling. Statistics pertaining to the criminal justice system also testify to continuing racial inequality and racial tensions. For instance, although African American youth at the end of the twentieth century represented just 15 percent of the nation's total youth population, they made up 26 percent of the youth arrested, 31 percent of the youth referred to juvenile court, and 44 percent of the youth detained by the police.[21] African American males in particular compose a disproportionate number of those imprisoned. Critics of the system charge that it is racially biased, especially in how it metes out capital punishment. A study conducted by social scientist David Baldus in the early 1990s concluded that the victim's race was a significant factor in predicting which convicted murderers receive the death penalty. Specifically, killers of whites were 4.3 times more likely to be sentenced to death than killers of African Americans.

racial profiling: The law enforcement practice of taking race into account when identifying possible suspects of crimes.

Racial discrimination may also characterize the initial phases of gathering information about a crime. For example, some law enforcement officials admit to using **racial profiling**—the practice of taking race into account when investigating crimes. African Americans may be stopped, questioned, and even held in custody not because there is specific evidence that links them to a particular crime, but because they fit a "profile" of the perpetrator that includes the characteristic of race.

Even in the wake of the civil rights revolution of the 1960s, little objection was raised against the practice, provided that it was done for purposes of "bona fide law enforcement" and not racial harassment, and so long as race was one of several factors that police officers considered when investigating crimes. But racial profiling became a source of considerable controversy in the 1990s. During the spring of 1999, victims of the New Jersey State Police force's allegedly overaggressive racial profiling testified at hearings held by the Black and Latino Caucus of the state's legislature. President Bill Clinton publicly condemned racial profiling as a "morally indefensible, deeply corrosive practice." Finally, in March 2003, New Jersey became the first state in the nation to enact an antiprofiling law, which made any profiling by police punishable by five years in prison and a $15,000 fine. Yet by the end of that decade a majority of states still had not banned racial profiling as a law enforcement practice. In June 2003, President George W. Bush issued a directive that banned racial profiling by federal law enforcement agencies, although critics complained about both the law's exception for the use of racial profiling in "national security" investigations and the lack of enforcement mechanisms provided. Accordingly, claims of profiling in the past decade have focused on Naturalization, Customs, and Border Patrol agents accused of improperly restricting Muslims' entry or reentry into the United States.

More recently, Arizona law enforcement officials were accused of racial profiling under the auspices of the Arizona Law Enforcement and Safe Neighborhoods Act, better known as SB 1070. Passed in 2010, the act authorized the police to arrest individuals if there was a mere "suspicion" that the persons were illegal immigrants. Critics were quick to complain that the law was directed at those who merely "looked" like they were from foreign countries, a clear form of racial profiling. In 2012, the Supreme Court struck down most provisions of the Arizona law, including the power of police to arrest a person on the mere suspicion that he or she is an illegal immigrant.

Are criticisms of racial profiling exaggerated? Statistics overwhelmingly confirm that African American young men commit a disproportionate share of street crime in the United States. Thus not all racial profiling may be driven by prejudice against African Americans—civil rights leader Jesse Jackson admitted in 1993 that he was less fearful of

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Scott Olson/Getty Images

A policeman interviews several teenagers that he suspects of being undocumented on a street corner in Tucson, Arizona.

white strangers than black strangers on dark streets, if only because, statistically speaking, he stands a greater risk of being robbed by a black person than a white person. At the same time, defenders of racial profiling (as one of many factors in the investigative process) tend to minimize the extent to which the practice adds to the sense of resentment of law enforcement felt by rich and poor blacks alike. No court has ever banned the practice outright. Moreover, even if a court did take such a bold action, it would be difficult to disprove an officer's claim that nonracial factors were in fact the primary consideration in his or her decision-making process.

The controversy over racial profiling entered the national conversation once again in 2012 with the fatal shooting of an unarmed 17-year-old African American, Trayvon Martin, by a multiracial neighborhood watch coordinator in a Sanford, Florida, gated community. Although there was no indication that Martin was involved in any criminal activity, the coordinator, George Zimmerman, initially reported Martin to the police, and then shot him in an altercation that took place before the police arrived. The local police chose not to charge Zimmerman; nearly six weeks passed before Zimmerman was charged by a specially appointed prosecutor with second-degree murder. In the meantime, allegations of racist motivations both by the shooter and the police dominated media coverage of the incident. Critics also charged that laws like Florida's "Stand Your Ground Law"—which allows the use of force in self-defense without a duty to retreat—encourages racial profiling by citizens. Thus few were surprised when Zimmerman was acquitted on charges of second-degree murder and manslaughter in June of 2013.

Controversies surrounding affirmative action and racial profiling highlight a vexing challenge in modern society. Even if all vestiges of formal racial classifications under the law are eliminated, calculations of racial differences inevitably enter into the subjective judgments of those in positions of authority. Thus for all the successful challenges launched against the racist legal and political structures that prevailed in American society during much of the twentieth century, the greater challenge of winning over the "hearts and minds" of individuals still remains.

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5.4 The Women's Movement and Gender Equality

The process by which women achieved their own degree of equality during the course of the twentieth century took a circuitous route. In the early part of the twentieth century, women's rights leaders linked their calls for equality to other social movements of the same period, including those calling for child labor laws and increased literacy for immigrants. Initially, the women's rights movement pressed for protective laws, arguing that such legislation was necessary because of women's otherwise inferior legal status. For example, in *Muller v. Oregon* (1908),[22] the Supreme Court upheld an Oregon law that prohibited women laundry workers from being required to work more than 10 hours a day; similar laws applied to male workers had been invalidated as beyond the government's authority. Yet the reason for the holding could hardly have cheered advocates of women's equality: according to the Court, "a woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence."

Judicial Scrutiny of Gender Discrimination and the Equal Rights Amendment

After ratification of the Nineteenth Amendment in 1920 guaranteed women the right to vote, women's rights groups began to alter their strategy for pursuing gender equality through the courts. In attempting to expand women's legal rights, these groups now argued that men and women should be treated equally. Their efforts met with only limited success at first. Although the NAACP achieved a string of successful challenges to racial discrimination in the 1940s and 1950s, the Supreme Court refused to view gender discrimination as similarly deserving of suspect scrutiny. In *Goesaert v. Cleary* (1948),[23] the Court upheld a Michigan law that banned women from tending bar unless they were the daughter or wife of the bar owner. Thirteen years later, the Court accepted as legitimate a Florida law that gave only women the right to excuse themselves from jury duty. In both cases, the Court continued to accept sex-role stereotypes of women as weak, and as dedicated above all else to taking care of the children at home. As the Court pointed out in *Hoyt v. Florida* (1961), "despite the enlightened emancipation of women from the restrictions and protections of bygone years . . . woman is still regarded as the center of home and family life."[24]

The women's rights movement did not achieve any significant breakthroughs in this regard until the early 1970s. Although the National Women's Party had first proposed an equal rights amendment to the Constitution in 1923 and in nearly every session of Congress since then, the amendment never got very far. In 1966, the newly formed National Organization for Women (NOW) became a new and forceful advocate for the Equal Rights Amendment (ERA) and other equal rights in education, employment, and political opportunities for women. NOW and other women's groups vigorously pressed for passage of the ERA, which stated simply that "equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." In 1972, Congress passed the amendment and sent it to the state legislatures for ratification. Even after the deadline for ratification was extended to June 1982, the amendment failed to achieve the approval of the three-fourths of state legislatures necessary for passage, falling just three states shy.

Although the ERA failed, women have recently achieved some noteworthy victories in politics. For example, women made political history in 2003, when Democrat Nancy Pelosi of California was elected minority leader in the House, the first woman ever to hold that high of a position in either branch of Congress. When Democrats won control of Congress after the 2006 midterm elections, Pelosi was elected Speaker of the House, again the first woman to hold that exalted position. (In 2011–2014, she served as House minority leader in the Republican-controlled Congress.) Pelosi's ascension to such high congressional leadership positions contrasts with the way women in Congress were often relegated to lesser committees and noninfluential positions

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in the past. When the 113th Congress began in 2013, there were 80 women serving in the U.S. House of Representatives (including 3 delegates) and 20 in the U.S. Senate.

Legal Challenges to Gender Discrimination

Ironically, some attributed the failure of the Equal Rights Amendment to other legal developments that may have rendered it unnecessary. The American Civil Liberties Union (ACLU), an organization traditionally dedicated to protecting the First Amendment rights of political dissidents and labor unions, turned its attention to women's rights in the late 1960s. Led in court by board member Ruth Bader Ginsburg (who was later appointed by President Clinton to the U.S. Supreme Court), the ACLU brought suit on behalf of women who charged that they had been victims of gender discrimination. Although the Court refused to accord gender discrimination the strict scrutiny normally reserved for racial discrimination, the ACLU achieved several victories in cases brought before the Supreme Court. In *Reed v. Reed* (1971),[25] the Court invalidated an Idaho law that gave males preference over females as administrators of estates. In *Frontiero v. Richardson* (1973),[26] the Court struck down a federal law requiring only female members of the armed forces to show proof that they contributed more than 50 percent to the income of their household in order to receive certain fringe benefits. And in the landmark case of *Craig v. Boren* (1976),[27] the Court invalidated an Oklahoma law that prohibited the sale of 3.2 percent beer to males under the age of 21 and to women under the age of 18.

Since *Craig*, the Supreme Court has applied *intermediate scrutiny* in all gender discrimination cases, a standard requiring the government to show that the gender classification is "substantially related to an important state interest." This level of scrutiny is less than that of strict scrutiny, which tends to invalidate all racial classifications. But under intermediate scrutiny, *nearly* all laws that discriminate against women will be invalidated. That fact alone distinguishes intermediate scrutiny from *rational basis* (or *minimum*) *scrutiny*, which asks only whether the law is "rationally related to a legitimate state interest"—a question to which courts can readily answer "yes" in nearly every instance.

In fact, in the modern era the Court has upheld only a handful of gender classifications as constitutional. For example, in 1981 the Court upheld a challenge to federal laws that required selective military service registration for males, but not for females. That same year the Court upheld a statutory rape law in California that punished men for having sex with underage females, although not vice versa. In each of those two instances, perceptions of real and relevant differences between men and women persuaded the Court to allow the discrimination to stand.

The highest-profile lawsuits charging gender discrimination targeted two all-male southern military academies, The Citadel in Charleston, South Carolina, and the Virginia Military Institute (VMI) in Lexington, Virginia. Both were classified as state institutions because they accepted significant funds from their respective states' budgets; thus each was hard-pressed to continue excluding women in violation of the Fourteenth Amendment's equal protection clause. Shannon Faulkner's frustrating experience as the first female cadet at The Citadel paved the way for future women to apply and be accepted to the institution in subsequent years. In an attempt to fend off gender integration of its own student body, VMI contracted with nearby Mary Baldwin College to create a parallel military program for women called the Virginia Women's Institute for Leadership (VWIL). But in 1996, the Supreme Court ruled that VWIL did not approximate VMI in terms of student body, faculty, course offerings, facilities, or opportunities for its alumni and ordered VMI to accept women. The issue of "separate but equal" that was resolved by the Supreme Court for racial classifications in 1954 was still being litigated for gender classifications well into the 1990s.

As with race discrimination, discrimination against women has been mostly eliminated in the formal sense. **Title IX** of the Federal Educational Amendments of 1972 prohibited the exclusion of women from an educational program or activity receiving financial assistance from the federal government. Courts have interpreted those provisions to force colleges and universities to provide as many athletic teams for women as they do for men. Title VII of the

Title IX: The section of the Federal Educational Amendments Law of 1972 that prohibits the exclusion of women from an educational program or activity receiving financial assistance from the federal government. Courts have interpreted those provisions to force colleges and universities to provide as many athletic teams for women as they do for men.

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THROUGH THE YEARS: SUPREME COURT DECISIONS IMPACTING OUR LIVES

Gratz v. Bollinger (2003)

Gratz v. Bollinger (2003) offers important lessons that must be heeded by larger colleges and universities across the country: that promoting racial diversity by the use of an automatic points system in college admissions violates the equal protection clause.

The case took up the issue of whether the University of Michigan could automatically award 20 points (out of a possible 100 points) to minority applicants for undergraduate admissions. The Supreme Court found that these admissions guidelines operated as the functional equivalent of a quota, running afoul of the Fourteenth Amendment's equal protection clause. No such rule could be "narrowly tailored" to meet the state's needs because it failed by definition to assess all of the qualities that the individual applicant possesses, and because, in turn, it failed to evaluate that individual's ability to contribute to the unique setting of higher education. Given that the University of Michigan's admissions office routinely reviews upwards of 40,000 applicants per year, such a form of individualized review would be inordinately expensive, excessively time consuming, or both. Perhaps it is not surprising that in the decade after Gratz, large undergraduate universities (like the University of Texas) increasingly turned to devices like the so-called "10 percent rule" that focused on regional and geographical factors, rather than racial factors. If you yourself applied to a large school such as the University of Michigan, you should not have expected to receive individualized review as a matter of course—and few applicants did receive such review.

▸ For Critical Thinking and Discussion

1. Should the size of a college or university dictate the degree to which it can actively promote racial diversity through the admissions process?
2. Do you suspect that rules allowing seniors who finish in the "top 10 percent" of high schools across a state to be admitted to the state's main university are in fact attempts to promote racial diversity? Why or why not?
3. Is the need for diversity across different parts of the state a legitimate state interest too?

Civil Rights Act of 1964 extended to women's protection against discrimination in private and public businesses alike. Armed with equal rights to education and to entry in the workforce, women made considerable occupational gains during the twentieth century.

Women have also benefited from affirmative action programs, especially in the workplace and in admission to professional and trade schools. To rectify long traditions of excluding women from certain occupations, scores of businesses and firms have aggressively recruited women. The period of most striking change occurred over the two decades between 1970 and 1990, when the proportion of women physicians doubled from 7.6 percent to 16.9 percent, and the percentage of women lawyers and judges nearly quadrupled from 5.8 percent to 22.7 percent. The percentage of women who are engineers rose over that same period from 1.3 percent to 8.6 percent. Still, complaints remain that in some occupations women continue to be clustered in low-paying positions. Thus women still compose only 3 percent of the nation's firefighters, 8 percent of state and local police officers, 1.9 percent of construction workers, 11.8 percent of college presidents, and 3 to 5 percent of senior-level positions in major companies. Some observers contend that a "glass ceiling" exists in many businesses, whereby women are prevented from receiving raises and promotions due them because of the subjective biases of their male bosses.

The securing of formal equality under the law and the proliferation of affirmative action programs have not always translated into actual equal opportunities to succeed. Women today

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continue to earn less than men in comparable positions—calls for "equal pay for equal work" have not always generated substantive changes in the pay structures of private companies or even the government. When women's salaries are compared with those of equally qualified men, the differences remain dramatic. Although Congress passed the Equal Pay Act in 1963 to ensure that women would be paid the same as men for work that is "substantially equal" (that is, almost identical unless the pay difference is based on seniority, experience, or other legitimate factors), in the year 2012 a woman on average still earned only 82.2 cents for every dollar a man received.[28]

In April of 2014 President Barack Obama issued two executive orders meant to pressure federal contractors on pay equity, a move that drew praise from advocates and criticism from conservatives who accused the administration of pandering to female voters. Even the president's own Office of Personnel Management conceded that factors other than discrimination could contribute to the differences in pay between men and women, including differences in prior work experience, care-giving responsibilities, motivation, and work performance. Given the growing political power of women in the electorate, officials from both political parties can expect to answer even more questions about pay equity in the years to come.

Sexual harassment, normally in the form of unwelcome sexual advances by superiors, continues to pose a threat to working women in America. Since the mid-1980s the Supreme Court has considered such harassment—which includes any and all actions that create a hostile working environment, such as putting up provocative posters, making lewd comments, and so forth—to be a form of sexual discrimination actionable under Title VII of the 1964 Civil Rights Act. Still, many such sexual advances in the workplace continue despite the law, either because women remain unclear about the bounds of permissible conduct or because they fear reprisals for reporting the legal violations of superiors. Indeed, more than 4 in 10 women employed in federal agencies say they have experienced some form of harassment.[29] For all the legal equality that is now afforded to women, discrimination continues on a level that falls under the radar screen of the legal and judicial process.

5.5 Other Struggles for Equality

The political and legal systems in the United States directed increased attention during the late nineteenth and twentieth centuries to the plights of African Americans and women. The hardships suffered by these two groups inspired the passage of five constitutional amendments in all (the three Civil War Amendments, the Nineteenth Amendment granting women the right to vote, and the Twenty-fourth Amendment banning poll taxes) as well as many federal and state antidiscrimination laws. But both these groups' continuous quests for equal privileges under the law compose only part of the equal rights landscape. American history is replete with accounts of discrimination against other underrepresented groups as well. In recent years, these additional groups have begun to see their own claims to fairness and equal treatment recognized and vindicated within the American political system.

Native Americans

One of the nation's most unfortunate tales of mistreatment concerns Native Americans. For much of the eighteenth and nineteenth centuries, vast numbers of white Americans migrated west, pursuing what they viewed as their manifest destiny to settle across the continent. Consequently, millions of Native Americans were herded onto reservations according to a removal policy backed by the federal government. By a federal law passed in 1871, the government no longer agreed to recognize Native American tribes or nations as independent powers capable of entering treaties with the United States—all future tribal affairs were to be managed by the federal government without tribal consent. With passage of the Dawes Severalty Act in 1887, the U.S. government divided tribal lands still in existence among individual Indians who renounced their tribal holdings, further undermining tribal cultures and structures.

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Although certain Native American tribes received piecemeal U.S. citizenship beginning in the 1850s and the Dawes Act granted citizenship to those who ceded their tribal holdings, the class of Native Americans as a whole was not admitted to full citizenship until 1924, nearly 60 years after freed slaves had been afforded that same privilege. The federal government's attempt to undo the tribal structure did not produce widespread assimilation of Indians into American society as proponents of the Dawes Act intended; many chose to remain on reservations in an attempt to protect their culture from outside influences. Beginning in the middle of the twentieth century, some Native Americans turned to activism to protest their mistreatment by government authorities.

From November 1969 until June 1971, 78 members of one tribe occupied Alcatraz Island in San Francisco Bay, demanding that it be made available as a cultural center to the tribes. Members of the American Indian Movement (AIM), an organization founded in 1968 to promote civil rights for Native Americans, occupied the Washington, D.C., offices of the Bureau of Indian Affairs in 1972, demanding that they receive the rights and privileges that had been promised them under the original treaties entered into by the federal government. This activism drew public attention to Native American causes and spurred action by Congress, which formally terminated its policy of assimilation and began to recognize the autonomy of Native American tribes to administer federal programs on their own lands. In the past quarter century, the U.S. government has settled millions of dollars in legal claims pressed by Native American tribes and has returned nearly half a million acres of land to the Navajo and Hopi tribes alone.

Asian Americans

Immigrants from East Asia—especially Japan and China—supplied much of the labor for building U.S. railroads in the nineteenth century. Even so, many were excluded from labor unions and denied other civil rights. Historically, the government has enacted several immigration acts specifically designed to limit or prevent Asian immigration. For example, the Chinese Exclusion Act passed in 1882 prohibited Chinese laborers from immigrating and denied U.S. citizenship to Chinese living in the United States. The 1907 Gentleman's Agreement with Japan prohibited the immigration of Japanese laborers. The National Origins Act of 1924 banned all Asians from further immigration to the United States.

Discrimination was especially rampant on the West Coast, where many Asian American populations were concentrated. Asian children were segregated into separate public schools in San Francisco, and the state of California restricted Japanese immigrants' rights to own farmland. Perhaps the most notorious incident of discrimination against Asian Americans occurred in 1942, when the U.S. government in response to the Japanese bombing of Pearl Harbor forcibly relocated 110,000 Japanese Americans to inland internment camps and seized their property. The Supreme Court upheld the internment policy in 1944, perpetuating an especially egregious brand of racial discrimination committed against legal residents of the country, including more than 60,000 legal U.S. citizens. National security concerns used to justify the policy at that time have been exposed in later decades as baseless claims.

In the post–World War II period, Asian Americans enjoyed increased economic prosperity and made significant civil rights gains as well. The ban on Asian immigration was officially lifted in 1952, and provisions of federal law encouraging the immigration of professionals helped attract to the United States large numbers of educated and highly skilled Asian professionals. The end of the Vietnam War in 1975 brought a great influx of immigrants from Vietnam, Laos, and Cambodia to the United States. With increasing numbers of immigrants from South Korea and the Philippines, the Asian American population today stands at approximately 4 percent of the American population as a whole.

Muslim Americans

The events of September 11, 2001, had a profound impact on America's foreign policy priorities and its approach to international terrorism. Those events have also taken a toll on citizens'

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perceptions of Muslim Americans, a group already set apart by its members' distinct religious practices and forms of dress. When plans for an Islamic community center and mosque to be built near the site of "Ground Zero" were revealed in early 2010, anger directed at Muslim Americans suddenly found a new cause. Polls showed a clear majority of Americans opposed to the project, even though most of those surveyed also recognized that the Muslim group had a legal right to build there. Politicians of all stripes, including Sarah Palin and Senate Majority Leader Harry Reid (D-NV), were quick to oppose the proposal, knowing that such opposition would offer them immediate political benefits.

The stereotype that associates the Islamic religion with terrorism is hardly applicable to the vast majority who practice the faith, but post–September 11 initiatives sanctioned by Congress under the USA Patriot Act targeted many Muslim Americans for questioning, and in some cases temporary detention. Of course African Americans have long suffered from racial profiling in criminal law enforcement, but the level and degree to which Muslim Americans have been singled out has been a special source of worry for civil rights groups.

Hispanic Americans

Hispanic Americans are defined as those of Spanish-speaking descent. A majority of the group descended from Mexicans who were living in the Southwest when it became part of the United States in the 1840s. Even after immigration laws were tightened in the 1890s, hundreds of thousands of Mexicans continued to enter the United States illegally, drawn by opportunities in farming, mining, and other industries. Segregation of Mexican students from white students began in California in 1885 and continued through the 1950s; beginning in the 1960s, many Mexican Americans moved from rural areas to cities. Public schools in California, Texas, and elsewhere were forced to assimilate this growing population, including the children of illegal aliens, into overcrowded school districts.

Today, with more than 1,400 miles of border in common between the two nations, the United States and Mexico continue to be at odds over some important issues, including immigration. Meanwhile, more than 35 million people of Hispanic descent currently live in the United States, forming the nation's largest language minority. Cubans, Puerto Ricans, and numerous immigrants and refugees from other Central American countries contribute to the ranks of Hispanic Americans today. Some of the Cubans who left their native land hailed from privileged socioeconomic conditions; fleeing Castro's communistic agenda, their move to the United States was at least in part an effort to save their standard of living. Still, most immigrants from Hispanic countries such as Mexico and Cuba come from adverse economic circumstances in those nations. The crime linked to Mexican immigration in particular may be directly related to the impoverished conditions many of them live under in the United States.

Of course discrimination against Hispanics also contributes to the overall disproportionate levels of poverty and unemployment in this group. Unlike African Americans, Hispanics were never legally barred from the polls, and in New Mexico and California they have been a large and influential minority for several decades. And yet despite the large number of Hispanic Americans, the group's political power has yet to have its due influence on public policy, perhaps because many Hispanics are not yet citizens, and thus do not have the right to vote. Still, the appointment of Judge Sonia Sotomayor as the first Hispanic to the U.S. Supreme Court in 2009 was a source of pride among American Hispanic community.

As governor of Texas in the late 1990s before becoming president, George W. Bush regarded the Hispanic community as a potential source of growth within the more conservative Republican Party. Yet in the 2006 midterm elections, exit polls showed Hispanics voting in favor of the Democrats by a wide margin, helping them defeat many Republican incumbents. And in the 2008 and 2012 presidential elections, Hispanics voted for the Democratic ticket by a margin of more than two to one.

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Senator Marco Rubio, seen here campaigning for Mitt Romney in 2012, looks to build up Republican support among Hispanic voters in Florida and elsewhere.

As Latin America (including Mexico) continues to dominate American immigration, Hispanic Americans have become by far the fastest growing ethnic minority in the country. As shown in Table 5.3, Mexico was the source for 29 percent of the overall growth in foreign-born persons living in the United States. Meanwhile, Latin America as whole accounted for 58 percent of the growth in the immigrant population from 2000 to 2010. It is no wonder, then, that both parties vied for the support of this crucial demographic in the lead-up to the 2012 president election. Hispanic Americans should see their political clout increase even more in the years to come.

Older Americans

Today approximately 13 percent of Americans are over the age of 65, compared with just 4 percent of Americans who were at that age at the beginning of the twentieth century. With their increased numbers has come increased political power; older Americans are among the most politically active of all citizens, and groups such as AARP (formerly the American Association of Retired Persons), with more than 40 million members on its rolls, have become especially influential players on the political scene. This increased influence has been used to counteract incidents of age discrimination in the workplace and elsewhere. The Age Discrimination in Employment Act, passed in 1967 and broadened in 1986, makes it unlawful to hire or fire a person on the basis of age. Older Americans have also been at the forefront of lobbying efforts to protect Social Security trust funds and to ensure the continuation of cost-of-living adjustments to their payments. Ironically, older Americans' success at wielding influence within the political system has given credence to the suggestion that age classifications do not require suspect scrutiny by courts; at least in this instance, the political system appears to protect the civil rights of this particular subset of Americans.

Individuals with Disabilities

As with age classifications, discrimination against Americans with physical and mental disabilities has never received heightened scrutiny from the courts. Misperceptions about the nature of certain disabilities have on occasion led to discriminatory treatment of individuals with disabilities. In the 1920s, some states passed laws authorizing the sterilization of institutionalized "mental defectives"—Justice Oliver Wendell Holmes callously dismissed all legal challenges to such laws with the statement that "three generations of imbeciles are enough."

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Table 5.3 Countries Sending the Most Immigrants to the United States, 1990, 2000, and 2010

Country	2010	2000	1990
1 Mexico	11,711,103	9,177,487	4,298,014
2 China, Hong Kong, and Taiwan	2,166,526	1,518,652	921,070
3 India	1,780,322	1,022,552	450,406
4 Philippines	1,777,588	1,369,070	912,674
5 Vietnam	1,240,542	988,174	543,262
6 El Salvador	1,214,049	817,336	465,433
7 Cuba	1,104,679	872,716	736,971
8 Korea	1,100,422	864,125	568,397
9 Dominican Republic	879,187	687,677	347,858
10 Guatemala	830,824	480,665	225,739
11 Canada	798,649	820,771	744,830
12 United Kingdom	669,794	677,751	640,145
13 Jamaica	659,771	553,827	334,140
14 Colombia	636,555	509,872	286,124
15 Germany	604,616	706,704	711,929
16 Haiti	587,149	419,317	225,393
17 Honduras	522,581	282,852	108,923
18 Poland	475,503	466,742	388,328
19 Ecuador	443,173	298,626	143,314
20 Peru	428,547	278,186	144,199
All of Latin America	**21,224,087**	**16,086,974**	**8,407,837**
All Immigrants	39,955,854	31,107,889	19,767,316

Center for Immigration Studies (http://www.cis.org/articles/2011/record-setting-decade.pdf)

Today, thanks to significant technological and medical advances, a more enlightened social understanding, and a more sophisticated approach to educating citizens about the nature of these limitations, millions of Americans with disabilities have been mainstreamed into society, attending school, going to work, and living otherwise normal lives. The Americans with Disabilities Act of 1990 established a national commitment to such mainstreaming efforts and extended to those with disabilities protection from discrimination in employment and public accommodations comparable to that afforded women and racial minorities under the 1964 Civil Rights Act.

Gays and Lesbians

Of all the groups that have claimed to be victims of discrimination in the United States, homosexuals until quite recently stood among the least successful in having their claims to equal

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Steven Rubin/The Image Works

Activists for the rights of individuals with disabilities at a rally advocating broader enforcement of the Americans with Disabilities Act of 1990.

treatment vindicated under the law. Gays and lesbians have traditionally suffered discrimination in society, whether from those whose religions frown on homosexuality in general or from those who are simply uncomfortable with this lifestyle. In the period immediately following World War II, a movement for gay rights emerged with generally integrationist goals, encouraging homosexuals to conform to most existing social standards. Gays and lesbians assumed a more activist quest for equality beginning in the late 1960s, marching for "gay power," urging reluctant gays to "out" themselves by openly admitting their sexual orientation, and interrupting government meetings to draw attention to their cause of equal treatment and nondiscrimination.

Although homosexual activists made advances, no significant antidiscrimination legislation followed. Some communities reacted by passing laws that prohibited the granting of "any special rights or privileges" to homosexuals. The Supreme Court in *Romer v. Evans* (1996)[30] struck down such a provision of the Colorado Constitution in 1996. Perhaps the biggest court victory of all for gays and lesbians occurred in 2003, when the Supreme Court in *Lawrence v. Texas*[31] struck down a Texas law that forbade same-sex partners from engaging in certain types of intimate relations. Despite these victories, the Supreme Court has still never recognized homosexuals as a protected class on a par with women or African Americans. Battles over the right to same-sex marriage—approved by 17 states and the District of Columbia as of April 1, 2014—remain a high priority on the gay rights agenda, promising to engage other state legislatures in debate for years to come. These efforts gained further momentum when, on June 26, 2013, the U.S. Supreme Court struck down the Defense of Marriage Act (barring same-sex married couples from enjoying marital benefits under federal law) as unconstitutional. That same day the Court additionally refused to hear a lawsuit brought by opponents of a federal court decision in California recognizing same-sex marriages in that state.

The issue of homosexuals in the military first drew intense national attention when U.S. Army Colonel Margarethe Cammermeyer was discharged from the armed forces in June 1992; during a routine security clearance interview, she acknowledged that she was a lesbian. Cammermeyer hinged her hopes for reinstatement on a promise made to her by candidate Bill Clinton during his successful presidential campaign that fall. Yet soon after taking office, President Clinton began to backtrack on his promise: at his first televised

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FROM YOUR PERSPECTIVE

Title IX Brings Gender Equality—and Controversy—to a Campus Near You

Every March on college campuses all across the country, many students get caught up in March Madness—the National Collegiate Athletic Association (NCAA) men's basketball tournament that crowns the sport's annual champion. In April, another event occurs that has become a serious business at many schools as well: the NCAA women's basketball tournament. Women have been crowned as NCAA champions since 1982; before that, between 1972 and 1982, women's college basketball championships were held by the Association for Intercollegiate Athletics for Women. Women who have won the NCAA championship may not realize that they owe some form of debt not just to the parents who supported them and the coaches who coached them, but also to the late Rep. Patsy Mink (D-HI), the first Asian American woman elected to Congress. In 1972 Representative Mink authored the Title IX Amendment to the Higher Education Act, which banned gender discrimination in any "education program or activity" receiving federal assistance. Although Mink's law made no explicit mention of intercollegiate athletics, that is where the law has had its most prominent impact to date.

The implications of Title IX are profound: courts have interpreted the statute to require gender equality in roster sizes for men's and women's athletic teams in general, as well as to require comparable budgets for recruiting, scholarships, coaches' salaries, and other expenses. The law has not been without controversy: some schools have eliminated successful men's athletic teams to bring the percentage of women's athletic scholarships up to par. Critics complain that men's football and basketball teams are normally the only sports teams that bring in revenue, and so they should be judged independently of all the other sports. Regardless, colleges and universities have fallen into line in the past 30 years; so much so, in fact, that in 2006 the Western Kentucky University Board of Regents ordered the upgrading of its football team (from Division 1-AA to 1-A), ostensibly because its share of female scholarship athletes had become disproportionately large.

AP Images/Julie A. Jacobson

Notre Dame Head Women's Basketball Coach Muffet McGraw at a practice in 2012.

For Critical Thinking and Discussion

1. Football and men's basketball generate more revenue for colleges and universities than all the other sports combined. Should the revenue generated by individual sports help determine whether those programs should be maintained?
2. Do you participate in other aspects of college life, such as school-sponsored clubs or the school band, where gender inequality exists in some form? Does the intense focus of Title IX enforcement on sports teams in particular tend to obscure gender discrimination where it exists elsewhere on campus?

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news conference two weeks into his presidency, he indicated he might go along with a supposed compromise that would segregate gays within the military. The ultimate compromise reached was a "don't ask, don't tell" policy that would allow gays still in the closet to stay in the military, so long as they never publicized their status.

In his 2010 State of the Union Address, President Barack Obama indicated that he planned to work with Congress and the military to repeal the "don't ask, don't tell" rule. Eighteen months later he made good on this promise. After a federal court ruled in July 2011 that a ban on openly gay troops was unconstitutional, President Obama and the Chairman of the Joint Chiefs of Staff certified to Congress that ending the policy would not harm the nation's "military readiness." With the support of Congress, the federal government then formally ended the policy on September 20, 2011. Meanwhile, antigay violence continues. The 1998 murder of college student Matthew Shepard brought new calls for hate crime legislation directed at such criminal activity. Despite suffering countless setbacks, gays and lesbians continue to enjoy a significant presence in the political system, forging alliances with more liberal administrations and even electing some openly gay politicians. The attention paid to the Log Cabin Republicans—members of that party who actively promote gay and lesbian rights—provides some indication that homosexuals represent a political force in America today that can no longer be ignored.

* * * * * *

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Access the Civil Rights Forum: Discussion—Minority Rights Protection

The civil rights movement continues to be waged in modern-day courts and legislatures. Despite all the gains of the past, battles are still being taken up by racial, ethnic, and religious groups, as well as by other traditionally disadvantaged groups, to attain equal rights under the law. Just as pioneers of the suffragette movement fought a slow and painful battle to achieve the right to vote for women, so too do gay rights activists continue to walk a difficult path to achieve support for same-sex marriage. Today other groups, such as Native Americans and Muslim Americans, walk this path as well, seeking recognition of rights traditionally denied to them by authorities acting on behalf of "the political majority." For every one or two steps they take forward, they are just as likely to take one other step backward. The hearts and minds of the majority are not so easily transformed. Fortunately, the openness of the American political system provides many mechanisms for groups to pursue and achieve equality over the long run.

SUMMARY: PUTTING IT ALL TOGETHER

5.1 Types of Equality

- Civil rights are those political rights (focusing on the right to participate in the political system), social rights (focusing on equality within institutions that serve the public), or economic rights (focusing on competition over resources) conferred by the government on members of groups that had previously been denied those rights. The battle for civil rights in America has focused primarily on African Americans and other ethnic groups (Hispanics, Asian Americans, Native Americans, Muslim Americans), women, older Americans, individuals with physical disabilities, and gays and lesbians.

5.2 The Struggle for Equality: Approaches and Tactics

- The tactics used by groups seeking to achieve civil rights include working within the existing rules and political process, litigation, boycotts, and civil disobedience.

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5.3 The African American Struggle for Equality and Civil Rights

- The hard-fought struggle by African Americans for equality dates back to the Constitutional Convention, which controversially left the institution of slavery intact in the South. The Civil War Amendments ended slavery, granted citizenship to former slaves, guaranteed all Americans "equal protection under the laws," and denied states the ability to prevent voting rights on the basis of race. Yet despite these amendments, the states used many means to prevent African Americans from obtaining equality, including *Black Codes*, literacy tests, poll taxes, and Jim Crow laws; by distinguishing state action from private discrimination and upholding the controversial "separate but equal doctrine" in public accommodations, the courts up through the middle of the twentieth century allowed such discrimination to continue.
- The movement toward civil rights for racial minorities in all public accommodations began in the late 1950s and emerged as a major force under the leadership of Martin Luther King Jr. A number of U.S. Supreme Court decisions, including *Brown v. Board of Education* (1954), eliminated the "separate but equal" doctrine. By offering heightened scrutiny to laws that discriminated on the basis of race, the courts eventually ended "de jure" racial discrimination. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 brought America closer to the goal of equality for African Americans. Additionally, the Civil Rights Act of 1968 prohibited discrimination in housing and made it a federal crime to deny individuals their civil rights. Still, so-called "de facto" discrimination remains a challenge, as racial housing patterns often undermine efforts to erect equitable school districts and legislative districts on a non-racial basis.
- Two contemporary issues relating to civil rights are affirmative action and racial profiling. The courts have struck down many affirmative action programs, but many states continue to try to find ways for government to level the playing field in hiring and college admissions. Racial profiling remains a controversial practice, especially as practiced by state officials against immigrant populations and others.

5.4 The Women's Movement and Gender Equality

- The seeds were sown for the movement toward gender equality in the early twentieth century with the ratification of the Nineteenth Amendment, guaranteeing women the right to vote. However, not until the formation of the National Organization for Women (NOW) and its emergence as a significant political force did women's equality start to capture national attention. Beginning in the 1970s the Supreme Court gave intermediate scrutiny to gender classifications as well, invalidating all but a handful of laws that discriminated on the basis of gender.
- Congress passed Title IX in 1972, prohibiting the exclusion of women from any educational programs receiving financial assistance from the federal government. Courts have interpreted Title IX as requiring colleges to provide as many opportunities for female athletes as male athletes.

5.5 Other Struggles for Equality

- Native Americans have struggled to receive all the rights and privileges of U.S. citizenship since the federal government herded them onto reservations in the eighteenth and nineteenth centuries. More recent debates over racial and ethnic equality have focused on discrimination against Muslim Americans (and how to protect their civil rights in the post-9/11 era), Asian Americans, and Hispanic Americans. The latter group's growing political power has not stopped states from enacting immigration policies that allegedly target Hispanic Americans for discrimination.
- Racial and ethnic differences are not the only type of discrimination practiced by governments. In recent decades courts have addressed the rights of gays and lesbians, particularly as they relate to marriage. Additionally, Congress has passed laws protecting the rights of older Americans and disabled Americans from discrimination, especially in the workplace.

KEY TERMS

affirmative action (p. 122)
***Brown v. Board of Education* (1954)** (p. 114)
civil rights (p. 112)
Civil Rights Act of 1964 (p. 120)
Civil Rights Act of 1968 (p. 120)
Civil War Amendments (p. 115)
economic equality (p. 112)
Jim Crow laws (p. 116)
***Plessy v. Ferguson* (1896)** (p. 116)
political equality (p. 112)
racial profiling (p. 126)
social equality (p. 112)
strict scrutiny (p. 116)
Title IX (p. 129)
Twenty-fourth Amendment (p. 120)
Voting Rights Act of 1965 (p. 120)

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TEST YOURSELF

1. The Civil Rights Act of 1968 was aimed primarily at advancing
   - **a.** political equality.
   - **b.** social equality.
   - **c.** economic equality.
   - **d.** cultural equality.
2. The notion of "equality" as a value defining American political culture was articulated specifically in which of the following documents?
   - **a.** Declaration of Independence
   - **b.** Bill of Rights
   - **c.** Articles of Confederation
   - **d.** Article I of the Constitution
3. Distinguish between political and social equality. Give an example of each.
4. Which of the following Supreme Court decisions declared that racial segregation in public schools was unconstitutional?
   - **a.** *Scott v. Sanford*
   - **b.** *Plessy v. Ferguson*
   - **c.** *Marbury v. Madison*
   - **d.** *Brown v. Board of Education*
5. The civil rights leader who first advocated pursuing equality for African Americans using "agitation" techniques rather than accommodation was
   - **a.** Booker T. Washington.
   - **b.** W. E. B. DuBois.
   - **c.** Al Sharpton.
   - **d.** Martin Luther King Jr.
6. What is "civil disobedience," and how does its use advance the goals of the civil rights movement?
7. Which of the following most directly played a role in bringing about the Civil War?
   - **a.** *Plessy v. Ferguson*
   - **b.** the *Dred Scott* decision
   - **c.** the ratification of the Bill of Rights
   - **d.** *Brown v. Board of Education*
8. Which of the following banished slavery from all states and U.S. territories?
   - **a.** Thirteenth Amendment
   - **b.** Fourteenth Amendment
   - **c.** Fifteenth Amendment
   - **d.** Sixteenth Amendment
9. The legal standard advanced in *Brown v. Board of Education* and other cases that tends to invalidate most state laws that discriminate on the basis of race is
   - **a.** reasonable intent.
   - **b.** probable cause.
   - **c.** eminent domain.
   - **d.** strict scrutiny.
10. In the *Bakke* decision, the Supreme Court ruled that
    - **a.** the use of racial quotas violates the equal protection clause.
    - **b.** quotas may be used to achieve equality.
    - **c.** affirmative action of any kind is unconstitutional.
    - **d.** quotas may be used in medical school admissions but not in law school admissions.
11. What is "affirmative action," and how has the court squared its application with the constitutional promise of "equal protection under law"?
12. Which U.S. Supreme Court justice led the ACLU in its legal fight during the 1960s and 1970s to achieve protection against gender discrimination?
    - **a.** Sandra Day O'Connor
    - **b.** Ruth Bader Ginsburg
    - **c.** Elana Kagan
    - **d.** Sonia Sotomayor
13. Which of the following statements is true?
    - **a.** Women have achieved parity with men in salaries.
    - **b.** The Equal Rights Amendment was passed in 1972.
    - **c.** Title IX substantially increased women's opportunities to participate in college sports.
    - **d.** About half of all college presidents are now women.
14. What is meant by the legal standard of "intermediate scrutiny," and how does this concept apply to gender discrimination?
15. The law passed by Congress in 1887 that attempted to divide tribal lands and undermine Native American cultures was the
    - **a.** Indian Limitation Act.
    - **b.** Jim Crow Act.
    - **c.** Dawes Act.
    - **d.** Native American Assimilation Act.

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16. The fastest growing minority group in the United States is
- **a.** African Americans.
- **b.** Asian Americans.
- **c.** Native Americans.
- **d.** Hispanic Americans.

1. b (LO 5-1); 2. a (LO 5-1); 4. d (LO 5-2); 5. b (LO 5-2); 7. b (LO 5-3); 8. a (LO 5-3); 9. d (LO 5-3); 10. a (LO 5-3); 12. b (LO 5-4); 13. c (LO 5-4); 15. c (LO 5-5); 16. d (LO 5-5); 17. c (LO 5-5)]

17. The first state to pass a law formally authorizing the granting of licenses for same-sex marriages was
- **a.** Vermont.
- **b.** California.
- **c.** Massachusetts.
- **d.** Florida.

18. Why is the USA Patriot Act the subject of controversy among those who are concerned about equal rights for Muslim Americans?

MASTER THE CONCEPT OF CIVIL RIGHTS WITH MindTap™ FOR AMERICAN GOVERNMENT

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CHAPTER

6 CONGRESS

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Learning Objectives

6.1 ARTICLE I AND THE CREATION OF CONGRESS

- Define the role the U.S. Congress plays as the legislative branch of government

6.2 THE STRUCTURE AND ORGANIZATION OF CONGRESS

- Identify the structure and powers of Congress, explain bicameralism, and distinguish between the roles of the House and Senate
- Assess the role that political parties play in the leadership of Congress
- Identify key leadership positions and their functions in Congress
- Explain reapportionment and redistricting

6.3 THE COMMITTEE SYSTEM

- Compare and contrast the different types of committees found in Congress

6.4 HOW A BILL BECOMES A LAW

- Describe the various steps necessary for a bill to become a law

6.5 OVERSIGHT AND PERSONNEL FUNCTIONS OF CONGRESS

- Explain why Congress often delegates its lawmaking authority to regulatory agencies
- Describe the role of the Senate in confirming presidential appointments, and the congressional procedures for impeachment and removal of executive and judicial officers

6.6 CONSTITUENT SERVICE: HELPING PEOPLE BACK HOME

- Assess the "casework" functions of members of Congress in assisting constituents, educating them on policy issues, and performing other services on their behalf

WATCH & LEARN MindTap™ for American Government
Watch a brief "What Do You Know?" video summarizing The Congress.

Congress is a large and complex institution. It is the branch of government that is primarily responsible for creating new laws, but it largely takes its cues from the White House. Although the Constitution makes no mention of the role that political parties might play in making laws, partisanship has become the primary factor that organizes Congress and its daily operations. Nonetheless, the nuances of the legislative process provide ample opportunities for the minority party, or even a small set of members, to thwart new laws from passage. Among the three branches of government, intense partisan divisiveness is most likely found in the halls of Congress. In this chapter, we explore the organization of the Congress and its leadership structure. We trace the steps of the tedious lawmaking process, the checks that Congress has on the other branches of government, and the important role the members of Congress play back in their home districts.

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1787
The Framers of the Constitution design a bicameral legislative branch as a compromise between the interests of large and small states.

1793
President George Washington lays the cornerstone for the U.S. Capitol Building in the District of Columbia.

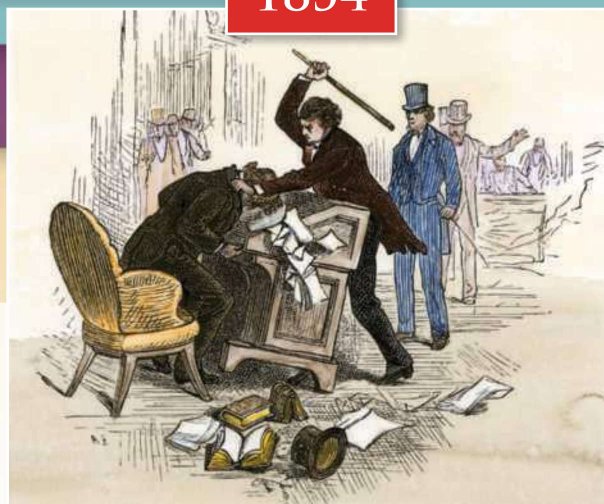
1854
Congress passes Kansas-Nebraska Act.

1870
The first African American, member of the House Joseph Rainey from South Carolina, is elected.

1903
Joe Cannon becomes Speaker of the House and substantially increases the power of that office.

Then

1854



North Wind Picture Archives/Alamy

Senator Preston Brooks shown clubbing Senator Charles Sumner on the floor of the U.S. Senate during an antislavery debate in 1856.

Partisan divisiveness often overtakes the halls of Congress, but during certain periods of our nation's history, the level of partisan nastiness and incivility reached heights that all but paralyzed the legislative branch. Consider the era of the 1850s, just before the Civil War. Historians often cite this period as representing the low point in relations between the parties in Congress, sometimes even characterized by physical violence. Most notably, House member Preston Brooks of South Carolina actually walked over to the Senate floor and clubbed Senator Charles Sumner of Massachusetts nearly to death because of their disagreements over slavery. Indeed, Congress was bitterly divided in all its feeble attempts at passing legislation. The issues that divided the parties were not limited to slavery, though the Kansas-Nebraska Act of 1854 proved so controversial that it actually gave birth to the Republican Party in opposition to it. The party divisions also reflected a commercial-versus-agricultural conflict. The term *filibuster*—from a Dutch word meaning "pirate"—first became popular during the 1850s, when it was applied to efforts by the Senate minority to hold the Senate floor in order to prevent a vote on a bill. The heightened divisiveness of the 1850s led to extreme dysfunction, driven by congressional party-based factions that could not work together to solve America's problems.

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1913
The Seventeenth Amendment directs that U.S. senators will be popularly elected.

1916
The first woman congressperson, Jeanette Rankin from Montana, is elected.

1998
The House votes to impeach President Bill Clinton, but the Senate does not remove him from office.

2007
Nancy Pelosi is selected as the first woman to be Speaker of the House.

2010
The GOP wins a majority in the House, dividing Congress with an existing Democratic Senate majority.

Now

2014

Chip Somodevilla/Getty Images

Rep. Joe Wilson shouts to President Obama "You lie!," during a 2009 Obama address to Congress discussing the health care reform debate.

By 2014, congressional approval ratings had fallen to all-time lows, according to polls. Certainly, these ratings were a product of the vitriol and partisanship that began in 2009 with the 111th Congress. The Senate witnessed a record number of filibusters, as not one simple majority vote on a substantive bill prevailed throughout this period. The legislative battle over health care reform epitomized this bitter partisan reality, as Senate Republicans voted over and over along party lines to reject any and all bills proposed by the Democrats. Consider this telling statistic: for the first time ever, the *National Journal*'s vote ratings showed that the most conservative Democratic senator was now more liberal than the most liberal Republican, ensuring that there was no longer any overlap ideologically between the parties. In the House there were contentious, drawn-out partisan battles as well. During a speech that President Obama delivered at the Capitol to promote health care reform, Representative Joe Wilson (R-SC) shouted "You lie!" in response to an Obama claim about coverage of illegal immigrants under the proposal. In 2013 a squabble over the normally perfunctory matter of raising the statutory debt ceiling ensued, and led to the shutting down of many government functions for weeks. Moreover, Congress could not even manage a full-fledged substantive debate on pressing issues such as climate change, unemployment benefits, and immigration reform. The extreme partisan divisiveness in Congress beginning in 2009 had led to congressional dysfunction once again.

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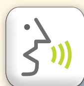
6.1 Article I and the Creation of Congress



LISTEN & LEARN
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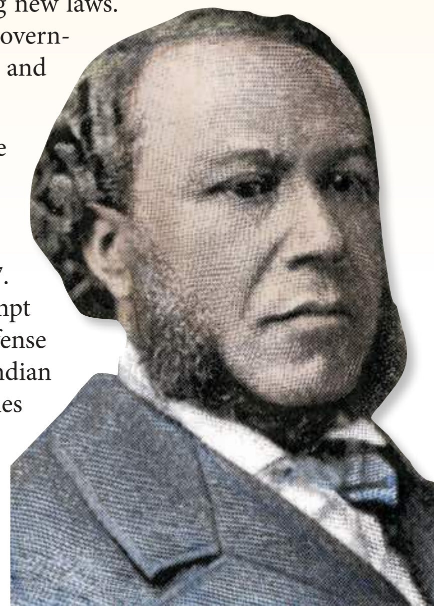
Access Read Speaker to listen to Chapter 6.

Article I of the U.S. Constitution created Congress; and the fact that it came first was no accident. James Madison, the Father of the Constitution, referred to Congress as the "first branch of government," and as a graduate student, Woodrow Wilson (later the 28th president of the United States) wrote in his book *Congressional Government* (1885) that "anyone who is unfamiliar with what Congress actually does and how it does it . . . is very far from a knowledge of the constitutional system under which we live."[1] As the legislative branch of the federal government, Congress has ultimate authority for enacting new laws. Because this authority is central to any system of government, the Founders engaged in considerable debate and took great care in building this first branch.



Joseph Rainey of South Carolina was the first African American elected to the House of Representatives. He took office in 1870 and was reelected four times.

There was little question that a congress of some type would be the central institution in the new political system—a congress had been a central feature in all attempts to organize the states up through and including the Constitutional Convention of 1787. The Albany Congress of 1754 was the first attempt to unite the colonies—at the time for common defense against the French in the pending French and Indian War. The Albany Plan of Union called for the colonies to organize through the vehicle of a "congress." In addition, colonial efforts to deal with emerging conflicts with the British led to the formation of two congresses: the First Continental Congress in 1774, and then the Second Continental Congress in 1775. After the revolutionary war was won, the first official government of the United States, created under the Articles of Confederation, again used a congress as its organizing principle. It is not surprising, then, that Article I, Section 1 of the U.S. Constitution states: "All legislative powers herein granted shall be vested in a Congress of the United States."

The Founders engaged in plenty of debate, negotiation, and compromise in defining the powers, functions, and structure of the U.S. Congress. The complexity of this institution continues today. Congress is filled with paradoxes. On one hand, it is a highly democratic institution in which senators and representatives are selected in free and open elections; on the other hand, Congress often is responsive to an exceedingly narrow set of specialized interests. Citizens and journalists frequently criticize the institution as being too slow to act responsively; yet voters return more than 9 in 10 of their elected members to office. At times, such as in the weeks following the terrorist attacks of September 11, 2001, Congress can show enthusiasm for tackling large issues expeditiously: within days of the attacks it passed the USA Patriot Act, which featured numerous antiterrorism measures. At other times, it seems to avoid taking positions on important issues, such as campaign finance reform and abortion rights. Many of these factors have led to very low confidence ratings in Congress from the American public. Figure 6.1 shows the results of the Gallup Poll's 2014 survey on confidence levels in a variety of institutions. As the chart shows, confidence in Congress ranks the lowest.

Most significantly, Congress is the branch of the U.S. government that ensures representation of the people through the direct election of members of the House and, in more recent times, of members of the Senate as well. Through its 535 members, Congress provides representation of many groups throughout the country, such as women, African Americans, Native Americans, gays and lesbians, the physically disabled, and Hispanics.

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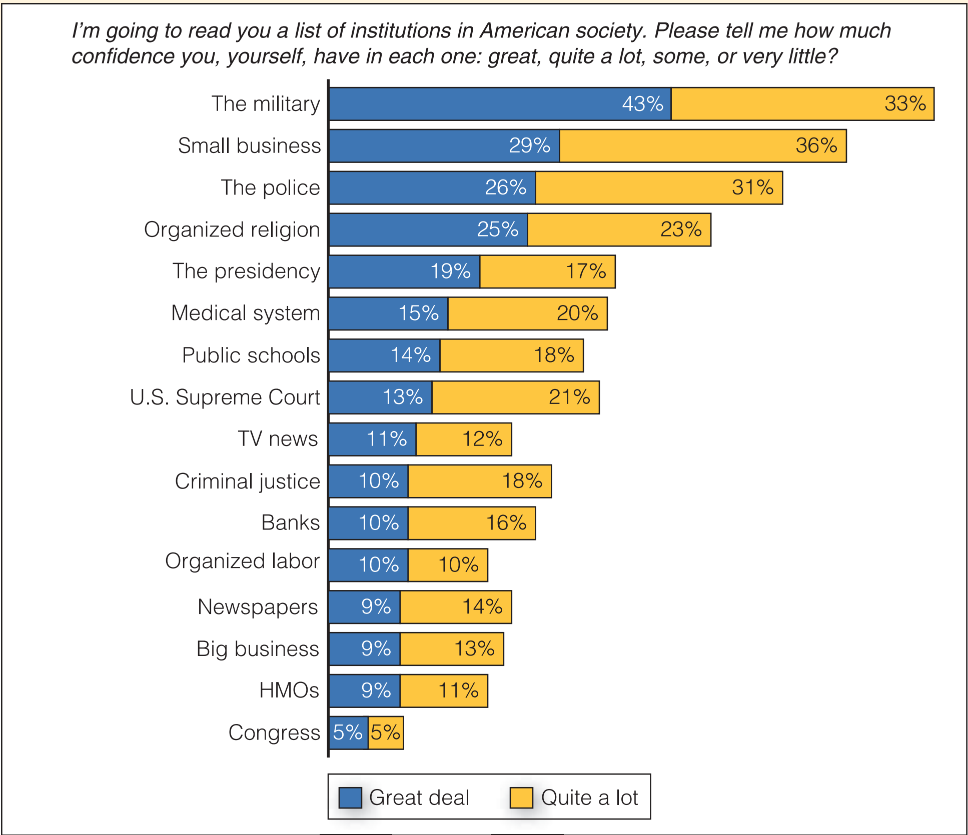

FIGURE 6.1 Confidence in Congress (2014)

6.2 The Structure and Organization of Congress

Congress is organized into two separate chambers, the Senate and the House of Representatives, and is thus termed a **bicameral legislature.** Creating a bicameral legislature enabled the Founders to reach a compromise between two factions at the Constitutional Convention—those who represented large states and wanted congressional representation according to population, and those from small states who favored the model of the Articles of Confederation: that each state, regardless of population, would be equally represented in Congress. The "Great Compromise" reached by the convention delegates allowed for equal state representation in the Senate, and representation based on population in the House. These two chambers have shared lawmaking responsibilities since 1789.[2]

bicameral legislature: A legislature composed of two separate chambers.

This nearly equal sharing of legislative power between the two chambers is significant. Many other nations in the world have bicameral legislatures, but the two legislative houses are rarely equal in power and usually do not share power. In the British Parliament, for example, the House of Lords has little power and serves a mostly symbolic function in that nation's politics, whereas the House of Commons wields the most authoritative power. Legislatures in other nations, such as Canada, France, Germany, Israel, and Japan, are also heavily dominated by one house. By contrast, in the U.S. Congress, the Senate and House are coequal chambers, with each enjoying about as much power as the other. Similar to the United States, the national legislatures in Italy and Mexico include two houses with nearly equal power. Many nations have *unicameral* legislatures that consist of only one body, such as the 275-member legislature elected to govern in Iraq in 2005.

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The Hispanic delegation in Congress is organized into two different groups. The Congressional Hispanic Caucus was formed in 1976 and now includes 27 members. It is chaired by Texas Congressman Ruben Hinojosa (pictured above). In 2003 the Republican members split ranks over policy differences and formed the Congressional Hispanic Conference, which currently has 12 members and is chaired by Florida Congressman Mario Diaz-Balart.

Bicameralism has important implications for the legislative process in American politics—passing new laws is difficult because the two chambers, constructed so differently, must come to absolute agreement before a new law is enacted. The slowness that often characterizes lawmaking in Congress is, in part, a product of this reality. The sharing of power and the "checks" that each chamber has on the other are no mistake. Indeed, the Founders intentionally built a Congress that would move slowly and carefully in the adoption of new laws, a process that, although often characterized as gridlock, ensures that change is well contemplated before it is adopted.

The House of Representatives: The "People's House"

The Founders intended the House of Representatives to be the "people's house," or the institution through which ordinary people would be represented in government. At the time the Constitution was adopted, the only federal officials directly elected by the people were members of the House of Representatives. Senators were chosen by state legislatures; the president and vice president were selected by electors in the electoral college; and judges, ambassadors, and high-ranking officials in the executive branch were nominated by the president and approved by the Senate. In Federalist No. 51, James Madison admonished, "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House] should have an immediate dependence on, and an intimate sympathy with, the people."[3] The House of Representatives thus directly connects voter sentiment with popular representation.

So that members of the House would be held accountable, Article I, Section 2 sets the term of a House member at two years, keeping members constantly attentive to public opinion. Indeed, because of their relatively brief term of office, members of the House are typically consumed with concerns about winning reelection. This preoccupation has been well documented by scholars such as Thomas Mann, who argues that incumbent House members are in campaign mode most of the time, feeling "unsafe at any margin" of victory.[4]

Article I also ensures that the House of Representatives reflects the popular will by requiring that the number of representatives from each state be proportional to each state's population.

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States are not equally represented in the House of Representatives; rather, the population of each state is proportionately represented, at least to a large degree. This means that a more populous state has greater representation than a less populous one. The state of California, for example, now has 53 seats in the House of Representatives, compared to Wyoming, which has only 1.

The first Congress in 1789 included 65 members, consistent with the Article I requirement that the number of House members should not exceed one for every 30,000 people in a state. As the nation grew in both the number of states and number of people, the number of members of the House of Representatives also grew. If the ratio of 30,000 people to one representative applied today, there would be about 10,000 members of the House of Representatives! By the mid-1800s, Congress began enlarging the population size of a congressional district to keep the membership of the House from getting too large. Public Law 62–5, passed in 1911 to take effect in 1913, capped the total number of House seats at 435.[5]

Today there are still 435 **congressional districts**, each represented by one House member. The number of people who are represented in a congressional district is tied to a number that changes after every census. Since fixing the number of seats at 435, Congress has struggled to find an equitable way to allocate House seats to the states—a process known as **reapportionment**.

congressional district: A geographic region (either a state itself or a region located entirely within one state) whose residents select one member to represent it in the House of Representatives.

reapportionment: The allocation of a fixed number of House seats to the states.

Several U.S. Supreme Court decisions in the early 1960s[6] established the basic principle that guides the process of reapportionment after every census—the "one person, one vote" principle. According to this principle, the population size of congressional districts must be as equal as possible. Currently, that amounts to roughly 650,000 people per district. The requirement that each state maintain at least one House district causes some variance among the population sizes of each district. The single congressional district for Wyoming, for example, has a population of about 570,000 because that is the number of people who live in that state. Consequently, Wyoming's population is proportionately "overrepresented," compared to most other congressional districts. Because congressional districts cannot cross state boundaries, the population size of congressional districts across states also varies. Yet once congressional districts are officially allocated to states based on the U.S. Census, the size of each district within a state must be as close to equal as possible.

The Constitution requires that a new census of the population be taken every 10 years, which is used to reapportion seats in the House of Representatives to each state. The states are then responsible for **redistricting** congressional boundary lines to achieve equal representation in each of the congressional districts; that is, redrawing congressional district lines to achieve the "one person, one vote" principle within the borders of the state.

redistricting: The act of redrawing congressional boundaries to achieve equal representation in each of the congressional districts.

In addition to equalizing the size of congressional districts, parties in each state try to optimize the partisan characteristics of each district to their advantage. This drawing of district boundaries to favor one party over the other is referred to as **gerrymandering**, a term named for Elbridge Gerry, who was a signer of the Declaration of Independence, a Massachusetts delegate to the Constitutional Convention, a U.S. congressman, governor of Massachusetts, and vice president under James Madison. While governor, he endorsed legislation that redrew districts in Massachusetts, resulting in huge advantages for his political party, the Democratic-Republicans. The map of one of the new districts took on an odd shape, that of a salamander. Gerry's political opponents, the Federalists, dubbed the plan the "gerrymander plan." The political fallout for Gerry was significant—he lost his next bid for governor. But the legacy of gerrymandering continues. Every decade or so, parties in states with more than one House member must ultimately negotiate a redistricting plan based on gerrymandered district boundaries that each party hopes will optimize its electoral successes.

gerrymandering: The drawing of House district boundaries to the benefit of one political party over another. The term is named for Elbridge Gerry, a Massachusetts delegate to the Constitutional Convention, who (as governor) redrew districts in this fashion to favor the Democratic-Republicans.

Amendments to the Voting Rights Act in 1982 have required that some states apply the gerrymandering concept to create "**majority-minority districts**." That is, the boundaries of some congressional districts are drawn to ensure that the majority of voters are member of minority groups, thus enhancing the chances that a minority group member will win the congressional seat. Such "racial gerrymandering" is intended to prevent the dilution of minority representation in Congress. The creating of majority-minority districts has substantially increased African American representation in the House.

majority-minority district: A congressional district drawn with geographic boundaries that promote the chances of electing a minority member to represent that district.

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Article I requires that all members of the House of Representatives be at least 25 years of age, have been a U.S. citizen for a minimum of seven years, and live in the state (though not necessarily the congressional district) from which they are elected. These requirements are somewhat less restrictive than those for the Senate—another indication of the Founders' intention to give the people a greater role in deciding on who members of the House should be.

The Senate: A Stabilizing Factor

Whereas the Founders wanted to make the House of Representatives highly responsive to the people, their idea for the Senate was quite different. The Senate was to represent the states—with each state having two senators, or equal representation. As adopted, the Constitution specified that senators were to be elected not by the people of the state, but by the state legislatures, another way to recognize states' importance. Not until passage of the Seventeenth Amendment to the Constitution in 1913 were senators elected directly by the people of the state they represented.

The Founders were also concerned that the "people's house" might be too prone to radical changes in membership resulting from swift changes in popular opinion. James Madison in particular regarded the U.S. Senate as "a necessary fence against this danger,"[7] able to resist fast changes in federal legislation because it was less accessible to the people. In fact, during the first five years of our constitutional government, the U.S. Senate met in closed session. By sharing legislative power with the House of Representatives, the Senate, a slower, more deliberative body, would be the mechanism for protecting against the potential tyranny of the masses. Thus the creation of new laws would be forced to proceed at a more thoughtful pace.

The Constitution sets the term of a U.S. senator at six years, three times the length of that for a House member. The Founders staggered the terms of senators. Every two years, only one-third of the seats in the Senate are up for reelection, as compared to all of the seats in the House. So although in theory all of the seats in the House can change every other year, the Senate may change only by a maximum of 34 seats every two years and is thus less prone to drastic changes in membership.

The qualifications for becoming a U.S. senator are also tighter. The minimum age is 30, five years older than in the House, with the idea being that older people are less likely to endorse radical change. Also, a U.S. senator must have been a citizen for at least nine years (rather than seven for the House) and be a resident of the state that he or she represents.

Article I requires that there be two senators from each state. The total number of senators grew from 26 in 1789 to 100 in 1959, the year Alaska and Hawaii became the 49th and 50th states, respectively. Although the size of the Senate has grown, it still remains small, at least relative to the size of the House of Representatives. The smaller size of the Senate is often cited as the primary reason why debate in the Senate tends to be more civil and camaraderie between individuals more important.

Alex Wong/Getty Images

Vice President Joe Biden (left) confers with House Speaker John Boehner and Senate Majority Leader Harry Reid at the Capitol in 2014.

Leadership in Congress

Unlike the executive branch which is headed by the president, no one person or office leads Congress as a whole. Leadership is distinct in the Senate and the House of Representatives. Though both chambers must work together to pass new laws, each chamber maintains its own leadership structure to work on bills, pass laws, and conduct its other business. Cooperation between the House and Senate is necessary to accomplish legislation.

The principal factor driving leadership in each chamber is the political party system, which, interestingly, is not mentioned in the U.S. Constitution.[8] The two-party system in America generates a majority of members from

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one of the two major parties, in both the Senate and House of Representatives. Since 1851, the majority party in each house has been either the Democratic Party or the Republican Party. Members of the party that has the majority of seats constitute the **majority caucus**, whereas those who are members of the party with a minority of seats constitute the **minority caucus**. The majority caucus in the House and the majority caucus in the Senate use their respective majorities to elect leaders and maintain control of their chamber. The larger the party's majority, and the more discipline and unity among party members, the stronger the power of the majority party's leadership ability.

majority caucus: The members of the party that has the majority of seats in a particular chamber.

minority caucus: The members of the party that has a minority of seats in a particular chamber.

From 1954 through 1980, the Democrats held the majority caucus in the Senate. Since then partisan control of the Senate has shifted five times. More recently, the Democrats won back a narrow majority in 2007, and then widened its margin to 60–40 as a result of the 2008 elections. In 2010 and 2012, the Democratic majority was narrowed, and the midterm elections in 2014 returned the GOP to majority control of the U.S. Senate.

By contrast, the House of Representatives has enjoyed a bit more stability, undergoing fewer changes in party control of the majority caucus since 1954. Up through 1994, the Democratic Party had maintained a seemingly iron grip of control over the House. Finally after 40 years, the 1994 elections transformed a Democratic majority to a Republican majority. The Republicans continued to dominate the House until the 2006 midterm elections, at which point the Democrats regained leadership of the people's chamber. Democratic control of the House, however, proved short lived. In 2010, the GOP won back more than 60 House seats from the Democrats and reestablished a Republican majority, which it retained in the 2012 and 2014 elections.

Leadership in the House of Representatives

The only guidance the Constitution offers regarding House leadership is contained in Article I, Section 2: "The House of Representatives shall choose their Speaker and other officers." The **Speaker of the House** is the title given to the leader of this chamber. Every two years, when a new Congress takes office, the full House of Representatives votes to determine who the Speaker will be from among its 435 members. In practice, the selection of Speaker is made by the majority caucus, which meets prior to the vote for Speaker and agrees on their leader, who receives virtually all the votes from the majority party members, thus guaranteeing that the majority party will occupy the Speaker of the House post.

Speaker of the House: The leader of the House of Representatives, responsible for assigning new bills to committees, recognizing members to speak in the House chamber, and assigning chairs of committees.

As presiding officer, the Speaker of the House is the most powerful member of the House of Representatives, although the position was not always so powerful. Through the 1800s, the Speaker acted mostly as procedural leader, or presiding officer, of the House. However, with the accession of Joe Cannon to Speaker in 1903, this post became much more powerful. Cannon, a Republican from Illinois, served in the House for more than 50 years and was Speaker from 1903 to 1911. As Speaker, Cannon used the House Rules Committee to amass a tremendous amount of power.[9] Known as "Uncle Joe," he arbitrarily recognized who could speak in the House chamber and required that any measure passing the Rules Committee would have to be personally approved by him. Cannon also made a practice of filling important committee posts with those who were loyal to him. A coalition of Democrats and insurgent Republicans eventually unseated Cannon, but Uncle Joe permanently changed the visibility and power of the Speaker position.

The Speaker remains powerful today for a variety of reasons. First, as the person responsible for assigning new bills to committees, the Speaker can delay the assignment of a bill or assign it to a committee that is either friendly or hostile to its contents, a power that gives the Speaker control over much of the House agenda. Second, the Speaker has the ability to recognize members to speak in the House chamber. Because an important part of the legislative process involves members debating bills on the House floor, the Speaker's authority over this process is significant.

Third, the Speaker is the ultimate arbiter and interpreter of House rules. The ability to cast final judgment on a rule of order can make or break a piece of legislation. Fourth, the Speaker

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appoints members to serve on special committees, including conference committees, which iron out differences between similar bills passed in the House and Senate. The Speaker's influence is thus felt in the final changes made to a bill before Congress completes work on it. Fifth, the Speaker plays an influential role in assigning members to particular permanent committees. Some committees, as we will see later in this chapter, are more important than others. Being on the Speaker's "good side" can help in getting a good committee assignment. In addition, the Speaker hand-picks the nine members of the all-important Rules Committee. Finally, the Speaker has ultimate authority to schedule votes in the full House on a bill, an authority that allows the Speaker to speed the process or delay it, using timing to either improve or subvert a bill's chances of being passed.

majority leader: In the Senate, the controlling party's main spokesperson who leads his or her party in proposing new laws and crafting the party's platform. The Senate majority leader also enjoys the power to make committee assignments. In the House, the majority leader is the controlling party's second in command, who helps the Speaker to oversee the development of the party platform.

minority leader: The leader of the minority party in each chamber.

whip (majority and minority): Member of Congress elected by his or her party to count potential votes and promote party unity in voting.

president pro tempore: In the absence of the vice president, the senator who presides over the Senate session. By tradition, this is usually the senator from the majority caucus who has served the longest number of consecutive years in the Senate.

Partisan control of the House is the key factor regarding how that body is organized to do its work. Because the party that holds a majority of seats selects the Speaker, the majority party controls the legislative agenda through members serving in other leadership posts, including chairs of committees.

To promote partisan leadership, the majority caucus in the House votes for a House **majority leader**, and the minority caucus for a House **minority leader**. These leaders oversee the development of their party platforms and are responsible for achieving party coherence in voting. Other important party leadership positions in the House are the House minority and majority **whips**. Whips report to their respective party leaders in the House and are primarily responsible for counting up the partisan votes on bills—that is, they contact members of their party caucus and try to convince them to vote the way their party leadership wants them to vote. The whips spend much of their time on the floor of the House, on the phone, or in the offices of their party colleagues, counting votes and urging their members to vote the party line on bills.

Leadership in the Senate

The Constitution prescribes that the presiding officer of the Senate is the vice president of the United States. In this capacity, the vice president also holds the title of president of the Senate. Unlike the Speaker of the House, who is necessarily a member of the House of Representatives, the president of the Senate is not a member of the Senate. The president of the Senate cannot engage in debate on the floor of the Senate and has no legislative duties in the Senate, with one notable exception: to cast a vote in the Senate in the event of a tie. John Adams, the first vice president of the United States, was the most frequent tiebreaker in U.S. history, casting a vote 21 times in the Senate.

In practice, the vice president rarely shows up on the Senate floor to preside over its session. The presiding officer, in the absence of the vice president, is the **president pro tempore** (*pro tempore* is Latin, meaning "for the time being"). By custom, the official president pro tempore is the senator in the majority caucus who has served the longest number of consecutive years in the Senate. Again, however, in practice the president pro tempore rarely exercises the authority to preside over the Senate. With fewer rules and a greater culture of respect to fellow members than in the House, the presiding officer of the Senate serves what is largely a ceremonial role.

Tom Williams/CQ Roll Call/Getty Images

Senator Ted Cruz (R-TX), a leader in the Tea Party wing of the GOP, confers with Senate Minority Leader Mitch McConnell (R-KY) in 2014.

Leadership in the Senate is principally a function of partisanship, with the majority and minority caucuses organizing through leadership posts similar to those of the House of Representatives. As in the House, the majority party exercises tremendous power by controlling the agenda and mobilizing majority votes on important issues for the party. The majority caucus elects a Senate majority leader, and the minority caucus a Senate minority leader. These leaders are the main party spokespersons in the Senate, lead their party caucuses in proposing new laws, and are the chief architects of their party's platform. As leader of the majority, the Senate majority leader enjoys special power in making assignments to leadership of committees.

As in the House, the Senate majority and minority leaders are supported by whips, majority and minority. The whips in the Senate serve the same function as those in the House—they keep track of how caucus members are planning to vote on upcoming bills, and they communicate the positions of party leaders on upcoming legislative votes.

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Leaders in the Senate generally have far less power than their counterparts in the House. The smaller number of senators requires less discipline in membership, and the culture of the Senate includes a greater amount of deference from one senator to another. Because there are fewer rules and formal procedures in the Senate, leaders and rule-making members have less power to control debate in that body.

6.3 The Committee System

The work of a member of Congress can be classified into four categories: (1) running for re-election, (2) serving constituents, (3) working on legislation, and (4) providing oversight of federal agencies. Working on legislation involves two activities—working on bills in committees and voting on proposed bills.[10] The bulk of work on legislation consists of what members do in committees, which includes generating ideas for new laws, debating the merits of those ideas, holding hearings, conducting investigations, listening to the testimony of experts, offering modifications and additions to proposed bills, and giving important advice to all House and Senate members regarding how they should vote on a new bill. Committee work also is the means through which members fulfill their role of oversight of federal agencies. Voting, on the other hand, is a rather simple and straightforward process. Members show up on the House or Senate floor and cast a vote of either "aye," "nay," or "present," indicating their support for, opposition to, or abstention from voting on a proposed piece of legislation.

Every year about ten thousand bills are introduced into Congress. A **bill** is a formally proposed piece of legislation, and many bills are long, complex documents with much legal and technical information. It is not practical to assume that each senator and House member reads and digests every bill that is introduced. As a way to manage the workload, both chambers of Congress rely heavily on a committee system. In both the House and Senate, each member is assigned to a few committees and becomes an expert in the subject area of the committee. Most of members' legislative work revolves around the committees to which they are assigned.

bill: A proposed law presented for consideration to a legislative body.

Congressional committees also include subcommittees, providing for even more specialization and division of labor. Currently there are more than one hundred subcommittees in the House alone. Each of the subcommittees is also assigned a chair, so many members in the majority party of the House are chairs of either a committee or subcommittee. In the Senate, with fewer members, all members of the majority are usually the chair of at least one committee or subcommittee. A House member sits on an average of five different committees, whereas a senator sits on an average of seven committees.

What makes the committee system so powerful a force in legislation? It is the deference that most members give to the work of their colleagues in committees. Recognizing specialized knowledge, respecting the need for division of labor, and protecting one's own authority in the committees in which one serves all lead senators and House members to vote on the basis of a committee's recommendation on a bill.

Types of Committees in Congress

There are four general types of congressional committees: standing committees, select committees, conference committees, and joint committees.

Standing committees are permanent committees that exist in both the House and Senate. Most standing committees focus on a particular substantive area of public policy, such as transportation, labor, foreign affairs, and the federal budget. A few focus on procedural matters of the House and Senate, such as the House Rules Committee and the Senate Rules and Administration Committee. The most significant power of the standing committee is that of **reporting legislation**—which means that the full House or Senate cannot vote on a bill unless the committee votes to approve it first. No other type of congressional committee has the power to report legislation. Table 6.1 lists the standing committees of the House and Senate.

standing committee: A permanent committee that exists in both the House and Senate; most standing committees focus on a particular substantive area of public policy, such as transportation, labor, foreign affairs, and the federal budget.

reporting legislation: The exclusive power of standing committees to forward legislation to the full House or Senate. Neither chamber can vote on a bill unless the committee votes to approve it first.

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TABLE 6.1 The Standing Committees in Congress

Committees in the House	Committees in the Senate
Agriculture	Agriculture, Nutrition, and Forestry
Appropriations	Appropriations
Armed Services	Armed Services
Budgets	Banking, Housing, and Urban Affairs
Education and Labor	Budget
Energy and Commerce	Commerce, Science, and Transportation
Financial Services	Energy and Natural Resources
Homeland Security	Environment and Public Works
House Administration	Homeland Security and Governmental Affairs
Intelligence*	Finance
Judiciary	Foreign Relations
Natural Resources	Health, Education, Labor, and Pensions
Oversight and Government Reform	Judiciary
Rules	Rules and Administration
Science and Technology	Small Business and Entrepreneurship
Small Business	Veterans Affairs
Standards of Official Conduct	
Transportation and Infrastructure	
Veterans Affairs	
Ways and Means	

*Technically a "permanent select committee."

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Standing committees have been the heart and soul of congressional legislative work since the very early 1800s. Just like today, standing committees then were divided into substantive policy areas and had plenty of authority to determine the future of a bill within their jurisdiction. For example, in 1802 the House of Representatives established the Ways and Means Committee to set policies for America's federal tax system. Any bill dealing with changes in the tax system had to pass through this committee, as it still does today. The House Ways and Means Committee remains the primary author of tax bills.

Though most standing committees focus on a substantive area of public policy, such areas of focus are often broad and complex. In order to further divide labor and provide for even greater levels of specialization, most standing committees include subcommittees. For example, the House Transportation and Infrastructure Committee includes the following subcommittees: Aviation; Coast Guard and Marine Transportation; Economic Development, Public Buildings, Hazardous Materials, and Pipeline Transportation; Ground Transportation; Oversight, Investigations, and Emergency Management; and Water Resources and Environment.

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Before the House of Representatives or the Senate can vote on any bill, it must first be approved by a majority of members on the committee. A number of factors can affect a committee's consideration of a bill, which can seriously slow down the process of a bill becoming law and create a sense of "legislative gridlock." When a committee gets a new bill, the chair usually directs the bill to a subcommittee. The subcommittee discusses the bill, holds hearings, and makes changes, additions, or deletions to the bill. Usually, after a successful subcommittee vote, the bill moves back to the full committee, where additional debate and hearings might occur. Only after a successful committee vote is the bill ready to be considered by the full House and/or Senate. This process occurs in both the House and the Senate. There are, therefore, many opportunities for standing committees to slow the policymaking process, or bring it to a grinding halt.

A second general type of committee in Congress is the **select committee**, a special committee established to examine a particular issue of concern. Select committees do not have the power to report legislation, and they are not permanent. Once their work on a particular issue of the day is complete, the select committee is dissolved. Select committees are often formed to deal with a particularly serious national problem—a problem for which legislation may not be considered but rather a recommendation might be made. In 2009, for example, the Democratic leadership in both houses established the Select Committee on Energy Independence and Global Warming. When the GOP won back the House, its new leaders indicated they no longer wanted this committee to continue its work, and so it was disbanded.

select committee: A committee established by a resolution in either the House or the Senate for a specific purpose and, usually, for a limited time.

A third type of committee found in Congress is the **conference committee**. As described earlier in this chapter, the House and Senate are equal players in the legislative process. This means that both chambers debate, hold hearings on, comment on, and vote on individual pieces of legislation. A bill, then, is considered, modified, and voted on by both the House and the Senate. Assuming that a bill survives both chambers and passes, it is likely that the changes made to the bill during the standing committee process will differ between the House and Senate. Conference committees consist of both House members and senators, who work together to iron out differences in the House and Senate versions of a bill.

conference committee: A joint committee of Congress appointed by the House of Representatives and the Senate to resolve differences on a particular bill.

A fourth type of committee is the **joint committee**, which consists of members from both chambers. Joint committees do not propose legislation and have no reporting power, but rather are investigative in nature, focusing on issues of general concern, such as oversight of programs that are administered by the executive branch of the federal government. Unlike select committees, which are temporary and focus on a narrower topic, joint committees are typically permanent and focus on broader policy areas. An example is Congress's Joint Economic Committee. This committee keeps tabs on the performance of the nation's economy and provides oversight to the Federal Reserve Board, the unit that, among other things, has authority to adjust the federal prime interest rate.

joint committee: A committee composed of members of both the House and the Senate that is investigative in nature.

Leadership of Congressional Committees

Although there are a handful of broad leadership positions such a presiding officers and "party leaders" in the House and Senate, the vast majority of leaders are the chairs of the many committees and subcommittees in the two chambers. The power of the majority caucus is fully felt in the committee and subcommittee chairs, as all chairs are members of the majority caucus. Committees are where Congress gets most of its work done, and the chairs of committees have a great deal of power in determining what gets done and when it gets done.[11]

For example, the chairs decide how much time, if any, to spend on a new bill; they choose the people who will testify before the committee; and they allot the time to be spent on testimony and committee discussion. House and Senate leaders choose committee chairs from members of the majority caucus, a selection generally based on seniority and party allegiance. For each committee, the majority party's ranking, or senior, member is typically the person who becomes the committee chair, although the Speaker of the House ultimately determines the chairs for House committees and the Senate majority leader does the same for Senate committees.[12] Though still important, congressional reforms in 1974 and 1994 have somewhat reduced the power of seniority in the determination of committee chairs. More recently, the

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selection of chairs and the chairs' adherence to party leadership has provided a strong basis for party influence in congressional leadership.

Partisan Nature of the Committee System

The large number of standing committees and subcommittees, along with the significant power of the committee given its expertise in the policy area, disperses legislative power. It is in the interest of the majority party, however, to control what bills are given priority, how bills are written, and what bills get passed. Thus, the primary organizational characteristic of most committees in Congress is partisanship. To control the committee agenda and the committee votes, the majority caucus ensures that all committees have a majority of members of their party.[13] Furthermore, the chair of each committee is from the majority caucus. In addition, the majority caucus typically reserves a "supermajority" of seats on the most powerful committees, such as the Rules and Appropriations Committees.

Congressional Staffing

The 435 House members and 100 senators are supported by a large professional staff, many of whom are young, recent college graduates. Staffers perform a variety of support functions related to the roles of members of Congress. They conduct background research on bills, help generate new ideas for bills, provide services to constituents, and aid in the oversight of executive agencies. There are three categories of congressional staff.

congressional personal staff: A group of workers who assist an individual member of Congress in performing his or her responsibilities.

First is the member's **congressional personal staff**. Members of Congress are given a budget to support a group of staffers to assist them. They typically have a staff in their Washington, D.C., office and one in their home district office. The personal staffers serve a number of legislative support functions, including tracking bills that the member has introduced and conducting research on ideas for new bills. They also work with the local media in the member's home district, answering journalists' questions and providing information on the member's legislative activities. Perhaps the personal staffers' most important responsibility is responding to constituents in the district. House and Senate members receive many kinds of communications from constituents, ranging from requests for information about bills and explanations of why they voted a particular way, to letters expressing opinions on various issues and requests for speaking engagements. The personal staffers are responsible for dealing with these myriad constituent inquiries.

congressional committee staff: A group of workers assigned to congressional committees to support each committee's legislative work.

A second type of staffing resource at Congress's disposal is the **congressional committee staff**. Each standing committee of Congress employs a professional staff, many of whom are policy or legal experts in the policy area of the committee.

congressional agencies: Government bodies formed by and relied on by Congress to support members of Congress in performing their functions.

The third form of support for members of Congress is **congressional agencies**. The volume of legislative work has grown substantially over the years, as has the complexity of the federal budget and the policy issues with which Congress deals. One way that Congress has dealt with problems of growth and complexity has been to delegate authority to executive agencies. Consequently, Congress began to lose control of the ability to keep tabs on what those agencies were doing. The explosion of budget deficits in the 1970s and suspicions about the administration that were inspired by the Watergate scandal also left Congress feeling that it lacked necessary information for effective executive oversight. Through the 1970s, Congress relied on budget data from the Office of Management and Budget (OMB), which reports to the president. Congress suspected that the budget figures produced by the OMB were compiled with an eye toward supporting the president's point of view. In response, in 1974 Congress created a new congressional agency, the Congressional Budget Office (CBO), to monitor the nation's economic situation and provide objective projections of the national budget. It reports directly to Congress. With the CBO, Congress no longer relies exclusively on the executive branch to gather economic data and produce information to help Congress oversee the budget process.

At the same time, Congress also substantially expanded the size and funding of the Government Accountability Office (GAO; formerly called the General Accounting Office) and the Congressional Research Service (CRS). Congress uses the GAO to monitor executive agency

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THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME

The Power of Congressional Caucuses within the Major Parties

The two-party system in the United States features the Democratic and Republican Parties, each of which has very broad bases of support. The diversity of views even within parties is quite evident in the party caucuses. When a smaller group of members holds strong and passionate views on a particular topic, and those views are not as passionately held by (or even opposed by) other members in their party's caucus, that group will often form a special interest caucus to demonstrate their allegiance to the topic and to provide a framework for collective action.

1969

By 1969, the number of African Americans elected to the House of Representatives had grown substantially. These members, such as Shirley Chisholm (D-NY), felt that the Nixon administration had been particularly unresponsive to their concerns, and so formed the Democratic Select Committee as a way to organizationally advance their agenda. At the suggestion of Rep. Charles Rangel (D-NY), who still serves in the House, the group was renamed the Congressional Black Caucus (CBC) in 1971, and operated as a senate select committee to effectively promote the African American agenda. In 1995 the newly elected GOP majority abolished the 28 existing special select committees in the House, and so the CBC lost its public funding. The CBC reconstituted as a Congressional Member Organization, and continues to operate from private donations. Each year the CBC requests, and has been granted, a meeting with the president at the White House to ensure that its views are known.

2010

In 2010, Rep. Michelle Bachmann (R-MN) launched the Tea Party Caucus. In his successful run for a senate seat in 2010, Tea Party–endorsed candidate Rand Paul (R-KY) suggested that Bachmann form the caucus, and upon his victory Paul quickly signed up. A number of other Tea Party–backed candidates won their election bids in 2010, 2012, and 2014. The Tea Party Caucus is particularly committed to advancing the goals of the Tea Party movement, which includes fiscal discipline in the form of cutting government spending, limited government, and a strict interpretation of the Constitution. In the 2011–2012 term of the 112th Congress, the Tea Party Caucus was the primary force within the larger House GOP caucus responsible for rejecting Senate Democrat and President Obama's attempts to increase federal regulations. The Tea Party Caucus has also been the biggest advocate of decreasing federal spending and objections to increases in the national debt even at the expense of shutting down the government, which it did for about one month in 2013, much to the dismay of GOP Speaker John Boehner, who has sometimes been at odds with the Tea Party coalition in his own party.

Ron Sachs/CNP/Newscom

Pictured here are several members of the Tea Party Caucus surrounding the caucus chair, Rep. Michelle Bachmann (R.-Minn).

AP Images/Carolyn Kaster

Members of the Congressional Black Caucus surround their chairman, Representative Emanuel Cleaver.

For Critical Thinking and Discussion

1. Do specialized caucuses within Congress, such as the Tea Party and CBC, provide advantages or disadvantages to the political party to which the caucus belongs?
2. Has the Tea Party Caucus helped or hurt the GOP?
3. Has the CBC helped or hurt the Democratic Party in the House?

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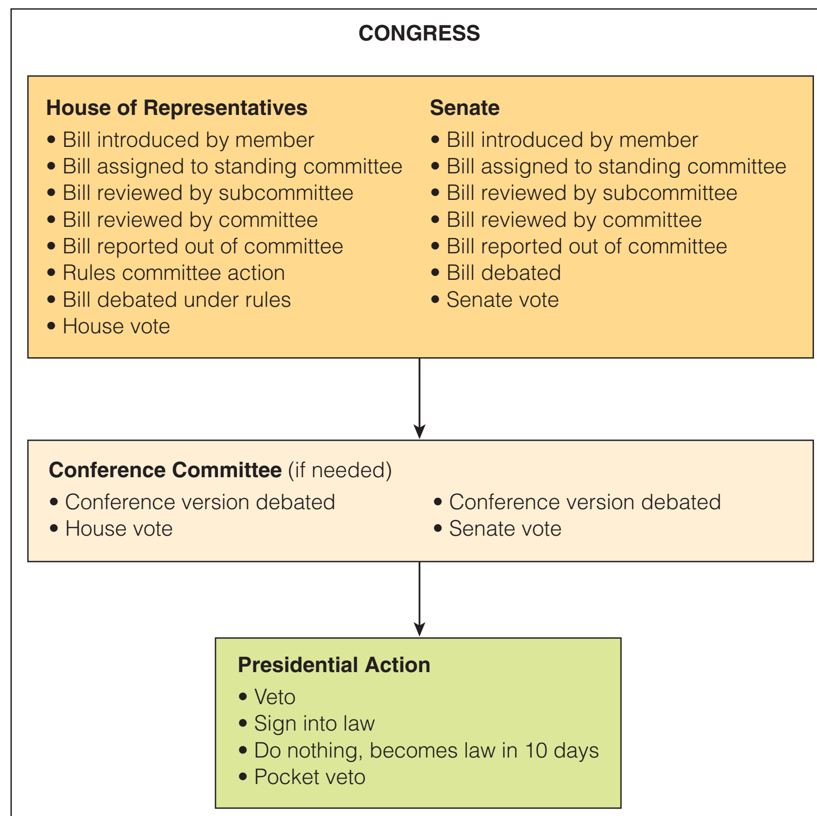
expenditures. Essentially, the GAO audits the spending of federal organizations to find and remove any abuses. The CRS is Congress's information and statistical data archive. It provides members with information they might need in preparation for writing a bill, conducting a hearing or investigation, or making a speech. Other important agencies of Congress include the Library of Congress, which acts both as the de facto national library of the United States as well as a research arm for congressional members; and the Government Printing Office, which prints and provides access to documents produced by and for all three branches of the federal government.

6.4 How a Bill Becomes a Law

It is not easy for a bill to become a law. Though most work on bills occurs in committees, there are numerous other points at which a bill might be "killed." The Speaker of the House, the Senate majority leader, and the president all have means at their disposal to kill a bill. There are other points, as well, when bills might be stopped dead in their tracks. Not surprisingly, of the 10,000 or so bills introduced annually in Congress, only about 500 to 1,000 end up becoming law. The more recent political divisiveness and partisan differences have produced even less legislation. For example the 112th Congress (which sat from 2011 through 2012) passed only about 280 laws annually.[14] Rarely does a bill, as originally introduced, become law without significant revision on its way to becoming law. An important book on the process of a bill becoming law by is *The Dance of Legislation*, by Eric Redman.[15] As the title suggests, the lawmaking process involves many people and much politicking; the process is difficult and often follows no regular or consistent path. The steps to a bill becoming law (highlighted in Figure 6.2) are also highly influenced by partisan politics, lobbyists and special interest groups, public opinion, and powerful voices in and out of government. Even though the actual dance of legislation typically follows no neat pattern or order, we describe here the general steps in which a bill becomes a law.

FIGURE 6.2 The Steps in a Bill Becoming a Law



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Step 1: A Bill Is Introduced

With the exception of tax or revenue proposals, which must originate in the House of Representatives, a bill can be first introduced into either the Senate or the House. The revenue exception, as stipulated in the Constitution, is a product of the American colonial experience with England, and the famous cry "no taxation without representation." Because the House provides popular representation, and representation is the philosophical basis undergirding taxation, the Founders gave the House sole authority to originate tax and revenue bills.

Whereas the Constitution requires that only a House member or a senator can introduce a bill, the ideas for new bills come from a variety of sources. Many come from the president of the United States or someone in the president's office or executive branch of government. Others come from lobbyists. Because House members and senators depend on lobbyists for information, and lobbyists represent groups who support candidates for congressional office, those with access to members are an important source of ideas for new legislation. Business leaders, educators, journalists, and regular constituents may also generate ideas for new bills. The next step for those with a suggestion for a new law is to find a sponsor in the House or Senate to introduce the idea in the form of a bill.

Whether the idea for a law comes directly from a member of Congress or from some other source, the first official step in the process is for the sponsoring member to submit the bill to the House or Senate clerk, who issues a unique number to the bill. The clerk in the House sends the bill to the Speaker of the House; the Senate clerk forwards the bill to the Senate majority leader.

Step 2: The Bill Is Sent to a Standing Committee for Action

Next the bill is assigned to the standing committee that has policy jurisdiction over the topic the bill addresses. Sometimes a bill never makes it to this step. For example, the GOP majority in the House introduced dozens of bill from 2011 through 2013 aimed at contracting or eliminating Obamcare. None of these bills was even sent to a Senate committee by Democratic Majority Leader Harry Reid.

More times than not, however, the Speaker and majority leader do assign a bill for committee work. A bill introduced in the Senate to raise the minimum wage, for example, would likely be sent to the Senate Labor and Human Resources Committee; a bill proposing increased criminal penalties for mail fraud introduced into the House might be assigned to the House Judiciary Committee.

Most bills die during their initial consideration by the committee. In some cases, the committee chair simply ignores it. In other cases the full committee, without deliberation, votes to kill the bill. If the committee decides to give the bill serious consideration, the committee chair usually assigns it to a subcommittee. The subcommittee may hold hearings, conduct investigations, and deliberate on the merits of the bill. Often the subcommittee will make amendments to the bill before sending it back to the full committee.

When a bill is back in full committee, the recommendations of the subcommittee may be accepted, rejected, or further revised. The full committee may conduct additional hearings, call more witnesses and experts to testify, and debate the bill. At the end of this process, a "markup," or final version of the bill, is prepared. The markup is the proposed legislation on which the full committee will vote. If a majority of committee members vote against the bill, the bill goes no further, so here is another point in the process where a bill might be stopped. If a majority of committee members vote in favor of the bill, it moves forward in the process.

Rod Lamkey/Getty Images

Secretary of Health and Human Services Kathleen Sebelius testifies before a congressional committee on provisions of the Obamacare legislation.

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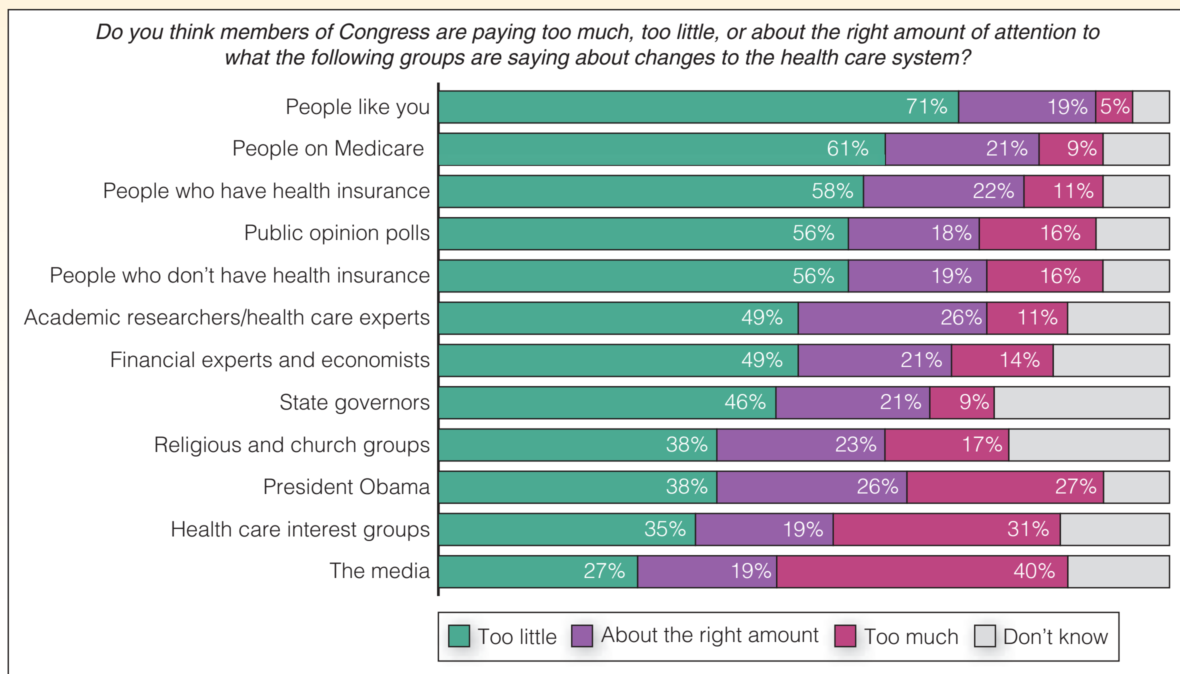

FIGURE 6.3 **Who Does Congress Listen To?**

Step 3: The Bill Goes to the Full House and Senate for Consideration

Rules Committee: A committee in the House of Representatives that determines the rules by which bills will come to the floor, be debated, and so on.

closed rule: A rule of procedure adopted by the House Rules Committee that severely limits the ability of members of Congress to amend a bill.

open rule: A rule of procedure adopted by the House Rules Committee that permits amendments to a bill.

At this next stage, the full House or Senate debates the bill and proposes amendments. The start of this process differs in the House and Senate. In the House, a bill that makes it through the committee is immediately assigned to the House **Rules Committee**. The Rules Committee decides when the bill will be debated, the amount of time that will be allotted for debate, and the extent to which amendments may be added from the floor of the House. The ability to control the timing and amount of time for debate is significant, thus making this committee one of the most important ones in the House. The ability to control the amendment process is even more powerful. If the Rules Committee issues a **closed rule**, House members are severely limited in their ability to amend the bill. An **open rule** order, on the other hand, permits amendments to the bill.

filibuster: The action by a single senator or a minority of senators to block a bill from passage by refusing to end discussion.

In the Senate, there are no rules set up ahead of time for debate. The Senate majority leader decides when to bring a bill to the floor. But, in theory, there are no limits on the amount of time the bill will be debated, and all senators are given the courtesy of speaking on any bill, if they so wish. The fact that the Senate includes far fewer members than the House allows for less structured debate. With no rules about how long a senator might speak, there is a possibility that a minority of senators—or even one senator—might try to block a bill from passage by refusing to end discussion, a process known as a **filibuster**.[16]

cloture: A Senate debate procedure that permits that body to end debate and force a vote on a bill by a vote of 60 senators.

In 1917, a group of senators successfully filibustered to thwart a bill that would have armed American ships in anticipation of the nation's entry into World War I. In response to this event, the Senate adopted a **cloture** rule, which permitted the Senate to end debate and force a vote on a bill by approval of a two-thirds vote. The Senate left a loophole in place, however: if any senator, once properly recognized, refuses to concede the floor, he or she can exercise the equivalent of a one-person filibuster for as long as his or her voice will hold out. Accordingly, in 1957 South Carolina Senator Strom Thurmond spoke for more than 24 hours in an attempt to block the Senate from passing civil rights legislation. For many years, Senate filibusters successfully blocked legislation supported by a majority of senators. Then in 1975, the Senate modified the cloture requirement, so that currently

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a less stringent three-fifths vote of the Senate (60 out of 100 senators) is required to end debate.

Since 2009, Senate Republicans have increasingly resorted to the use of a filibuster in their attempts to block the Democratic majority from passing legislation endorsed by the Obama administration. At the end of 2009, the House and Senate each passed a version of the Obama administration's health care reform legislation. Yet final passage was initially thwarted by a threatened filibuster in the Senate after the election of Senator Scott Brown (R-MA) in February 2010 gave the Republicans the necessary 41 votes to defeat cloture on a party-line vote. (Ultimately the Obama administration pressed successfully for House passage of the original Senate version, which did not require a revote by the Senate, in 2010.) In all, Senate Republicans made use of the filibuster more than a hundred times during the 111th Congress.

Frustrated by GOP filibuster threats for presidential nominees to the judiciary and senior executive positions, the Democratic majority in the Senate modified its rules in 2013 by eliminating the possibility of a filibuster for such nominees. Some Democrats feared that this move might come back to threaten their own party's senators, should the GOP regain a majority in the future. The filibuster does, however, remain a thorn in the side of the Senate majority for legislative processes outside of presidential appointments.

At the end of the debate and amendment process, the House and Senate take a vote on the proposed bill. Passage of a bill must achieve a majority of votes (half of all present for voting, plus one) from members on the floor. A majority of votes must be achieved in both the Senate and House for the bill to survive to the next step in the legislative process.

How any one member of the House or Senate makes the decision to vote "aye" or "nay" on a given proposed bill differs from one bill to another, and from one member to another. But there are six common explanations, which vary in importance, depending on the situation:

1. **Personal opinion and judgment.** Many members of Congress have strong personal opinions and convictions on issues, and cast their votes on bills on the basis of those opinions. Rep. Henry Waxman (D-CA), for example, is an ardent environmentalist and consistently votes this position on environmental bills. Similarly, Rep. Chris Smith's (R-NJ) pro-life stance on abortion leads him to vote that position on bills. When members use their own personal judgment, they are said to be exercising their role as a "trustee."
2. **Constituent opinion.** Members of Congress want to be liked by their constituents, and most want to be reelected. In voting on particular bills, members often use results of polls, editorial commentary in local media, and letters written to them by their constituents to help them make up their minds in voting on a particular bill. When members use constituent opinion as a cue to casting a vote, they are said to be exercising their role as a "delegate" of the people they represent.
3. **Interest groups and lobbying.** As a way of achieving their goals, interest groups exert influence on congressional voting in a number of ways, including making contributions to congressional campaigns and hiring lobbyists to provide arguments to members regarding why they should vote a particular way on a bill. So members use both information provided by lobbyists to aid in their voting and the campaign support from interest groups to prompt how they will vote.
4. **Political parties.** The party of a member often conveys quite a bit about his or her political positions and ideology, with Democrats tending to be more liberal on social and economic issues, and Republicans tending to be more conservative on these issues. So party membership is an important cue. In addition, the leadership of each party is organized to influence party members to vote the "party line" on bills. Members voting with their party tend to be rewarded with better committee assignments and greater campaign funding, thus making party a very important factor in voting on legislation.

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5. **The president.** Presidents are the focus of national attention and have, as President Teddy Roosevelt once said, a "bully pulpit" to make their case and influence others, including members of Congress. Presidents are quite influential in directing congressional members of their own party how to vote, but often exert influence on members of the opposition party as well. Particularly in times of international crisis, presidents can effectively make appeals to put partisanship aside and convince members to vote in the interests of the country.
6. **Logrolling.** Members often enter into an agreement with other members to vote a certain way on one bill in exchange for a favorable vote on another bill. This process is known as **logrolling**. Members vote on thousands of bills every term. Giving up a vote on less important bills in exchange for favorable votes on more important bills is a common practice, and one that often guides congressional voting behavior.

logrolling: The trading of influence or votes among legislators to achieve passage of projects that are of interest to one another.

Many Americans have expressed frustration over how Congress makes decisions on important bills before it. During the highly charged debate over the health care reform legislation in 2009 and 2010, for example, most Americans felt that Congress paid too little attention to the public and people who would be affected by the changes to heath care, and too much attention to the media and interest groups, as shown in Figure 6.3.

Step 4: Conference Committee Action

Often the version of a bill that passes the Senate differs from that passed by the House. To iron out any differences between Senate and House bills, Congress has two options. The first and most common route is to work out the differences informally. Of course the ability to do this depends on the extent of differences in the two versions of the bill and the closeness of the votes in committee and in the full chambers. When the versions are not far apart in content and when the margins of approval are large, informal discussions between House and Senate leaders and committee chairs are usually sufficient to strike a deal. When the prospects for informal agreement are less likely, then House and Senate leaders select a conference committee to work out the kinks. The conference committee consists of House and Senate members—usually drawn from the standing committees that worked on the bills.

Step 5: Presidential Action

The president plays both an informal and a formal role in the passage of new laws. The president's informal role is to develop new ideas for laws and urge members of Congress to introduce them. The president also lobbies Congress, attempting to persuade members to support or oppose certain bills. The president's strong presence in the American political system, along with attention from the national media, offers the president a unique platform from which to lobby on behalf of or against certain legislation.

The formal constitutional role that the president plays in legislation is the fifth step in the process by which a bill becomes law. Once both chambers of Congress have agreed to a bill, the bill is sent to the president for action. The president has three options for dealing with the congressionally approved bill. First, the president can sign the bill, which officially makes it new law. Second, the president can **veto** (or refuse assent to) the bill, which stops the bill from becoming law. If the bill is vetoed, Congress has one more opportunity to pass the bill, by **overriding** the presidential veto. This requires a two-thirds vote in favor of passage in both the Senate and the House, a margin substantially more difficult to achieve than the simple majority vote required prior to a presidential veto. Third, the president can decide not to act on a bill (that is, neither sign it nor veto it), in which case the bill automatically becomes law after it has sat on the president's desk for 10 days. If Congress passes a bill and sends it to the president within 10 days of the end of a congressional session and the president does not act on the bill, then the bill does not become law, a process known as a **pocket veto**.

veto: The constitutional procedure by which the president refuses to approve a bill or joint resolution and thus prevents its enactment into law.

overriding (a veto): The power of the Congress to enact legislation despite a president's veto of that legislation; requires a two-thirds vote of both houses of Congress.

pocket veto: The indirect veto of a bill received by the president within 10 days of the adjournment of Congress, effected by the president's retaining the bill unsigned until Congress adjourns.

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6.5 Oversight and Personnel Functions of Congress

In addition to creating new laws, Congress performs a number of oversight functions: oversight of federal agencies, confirmation of top federal executives and judges, approval of treaties, and impeachment of top federal executives and judges.

Congressional Oversight

Congress's principal responsibility is to enact new laws to deal with national problems and concerns. But given the complexity of many issues (nuclear and toxic waste disposal, creating new sources of energy, promoting the role of high technology, and enhancing the performance of a multitrillion-dollar economy that has become highly integrated in the global economy, to name just a few), Congress often lacks the scientific and technological expertise needed to enact laws. In addition, for political reasons, sometimes Congress prefers not to deal with issues on its own, but rather to "pass the buck" to a bureaucratic agency. Defining the limits of genetic cloning is one such political hot potato. Whether the reason is technical capability or politics, Congress often delegates more specific legislative authority to the executive branch, which has the resources and expertise to make more highly technical policy decisions. The delegation of congressional power to the executive branch has become more frequent as our society has become more complex.

This delegation of authority, however, is not carried out blindly or without accountability. When Congress delegates its authority, it generally monitors the activities of agencies and administrators who are given this power through congressional oversight. One agency to which

AP Images/J. Scott Applewhite, File

President Obama signs the health care reform bill into law at the White House in March 2010.

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Congress has delegated considerable authority is the Federal Reserve Board (known as "the Fed"). Established by the Federal Reserve Act of 1913, the Fed has authority over credit rates and lending activities of the nation's banks. Congress created the agency because it recognized that specialized monitoring of the economy and the technical expertise of economists were necessary to make decisions about credit rates and lending activities in order to maintain a viable economy. The act gave the Fed the authority to adjust the supply of money to banks and to shift money from where there is too much to where there is too little. The Fed also has the power to take means to ensure that banks do not overextend themselves in lending so that a sudden economic scare will not cause a sudden run on banks for money. For nearly one hundred years, Congress has given this agency the power to set important monetary policy for the nation. But Congress retains its authority to exercise oversight of the Fed. The Joint Economic Committee in Congress carefully monitors the Fed's performance and regularly holds hearings to inquire about its policies and decisions. In addition, newly appointed members of the Federal Reserve Board must be approved by Congress.

In his book on Congress titled *Congress: The Keystone of the Washington Establishment*,[17] political scientist Morris Fiorina notes other important reasons for congressional delegation of power to executive agencies, including garnering political rewards while shifting blame to the executive branch, enabling Congress to blame federal agencies for failing to fulfill legislative intent, and taking credit for problem solving by holding oversight and investigative hearings.

Confirmation of Presidential Nominations and Approval of Treaties

The U.S. Senate plays a pivotal role in the selection of cabinet officers, other agency and executive branch heads, federal judges, and foreign ambassadors. The president nominates individuals for these posts, but the Senate must consent to the nomination with a majority vote in favor of the candidate. This function is one performed solely by the U.S. Senate, and not the House of Representatives.

At the beginning of a new presidential administration, the U.S. Senate is typically quite busy reviewing the president's nominations for high executive office positions.[18] Although the Senate usually endorses most nominees, there have been a number of high-profile instances when the Senate has been unwilling to confirm the nominee, typically occurring during eras of divided government when the political party of the president is different from the majority party in the Senate. The threat of a denial has become somewhat less likely since the senate modified its rules in 2013 to eliminate the possibility of a filibuster for presidential appointments to the judicial and executive branches.

When there is a vacancy on the U.S. Supreme Court, a situation that often draws considerable interest from both the press and the public, the president nominates a new justice, whom the Senate also must confirm with a majority vote. Conflict between the Senate and the president over Supreme Court nominees goes all the way back to the first U.S. president, George Washington, and his choice of John Rutledge for chief justice of the United States. Although Rutledge appeared eminently qualified for the post (he was associate justice on the Supreme Court from 1789 to 1791 and chief justice of the South Carolina Court of Common Pleas from 1791 to 1795), he had openly criticized the highly controversial Jay Treaty with Britain (backed by Washington and the Federalists), which reneged on the terms of America's 1778 treaty with France. Rutledge's criticism was directed as much at its chief negotiator, John Jay, as at the treaty itself, which reassured Britain of American neutrality. Apparently, Rutledge still harbored a grudge against Jay, who had edged him out to become the nation's first chief justice in 1789. Although Washington stood behind his nominee and gave him a temporary recess appointment as chief justice, Federalist senators argued that confirmation of Rutledge would be an extreme embarrassment to their party and denounced him publicly. One called him a character "not very far above mediocrity." On December 15, 1795, the Senate rejected Rutledge's nomination by a 14–10 vote.

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A more recent example of Senate opposition to a Supreme Court nominee occurred in the case of Clarence Thomas, nominated for the Court by President George H. W. Bush in 1991. The Democrat-controlled Senate opposed Thomas, an African American who held conservative views on numerous issues. Thomas's problems mounted further when one of his former employees at the Equal Employment Opportunity Commission, Anita Hill, testified that he had sexually harassed her while he was her boss. Thomas ultimately won confirmation by a close 52–48 vote and currently sits on the Supreme Court.

Under certain circumstances, Congress may also become involved in the selection of president and vice president of the United States. When no candidate receives a majority of electoral votes, the House of Representatives chooses the president and the Senate chooses the vice president. This has happened three times in the history of the nation—in 1801 when the House chose Thomas Jefferson as president, in 1825 when the House chose John Quincy Adams, and in 1877 when the House appointed a commission to resolve the controversial 1876 election (it chose Rutherford B. Hayes).

In the event of a vacancy in the vice presidency, the Twenty-fifth Amendment to the Constitution stipulates that the president's nomination of an individual to fill that position is subject to the approval of both the House and Senate by majority vote. This has happened twice since adoption of that amendment: in 1973 when Vice President Spiro Agnew resigned and Nixon's nomination of Gerald Ford was quickly approved, and in 1974 when Ford became president due to Nixon's resignation and Congress approved Ford's nomination of Nelson Rockefeller as vice president.

Finally, the Senate has the power to approve treaties that the president negotiates with foreign countries. The Constitution stipulates that approval of a treaty requires the consent of two-thirds of the Senate. Even though the standard for treaty approval is much higher than a simple majority, most treaties do obtain the necessary two-thirds approval. Perhaps the most important rejection concerned the Treaty of Versailles following World War I. The relatively low number of rejected treaties may be due to presidents' reluctance to negotiate treaties that they are not reasonably certain will pass. President Woodrow Wilson's failure to consult with the Senate and consider its objections to the Treaty of Versailles led to the treaty's twice being rejected by the Senate, once in 1919 and again in 1920. More recently, the House has also played an important role in approving treaties because most of them involve financial issues that require the approval of that chamber.

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Impeachment and Removal of Federal Judges and High Executives

Congress also has the authority to impeach and remove federal judges, cabinet officers, the president, the vice president, and other civil officers. The removal process requires an impeachment action from the House and a trial in the Senate. Only two presidents (Andrew Johnson in 1867 and Bill Clinton in 1998) have been impeached, and neither was actually removed from office.

Impeachment is the formal process by which the House brings charges against federal officials. A judge, president, or executive official who is "impeached" by the House is not removed; he or she is charged with an offense. In this sense, the House acts as an initial forum that makes the decision about whether a trial is warranted. An impeachment occurs by a majority vote in the House of Representatives. An official may be impeached by the House on more than one charge, each of which is referred to as an article of impeachment.

Assuming the House passes at least one article of impeachment, the official must then stand trial in the Senate. The prosecutors in the trial are members of the House of Representatives and are referred to as House "managers." Selected by the House leadership, the House managers present the case for removal to the full Senate. If the defendant is the president, the chief justice of the U.S. Supreme Court presides over the trial; otherwise the vice president of the United States (who is president of the Senate) or the president pro tempore of the Senate presides. Other than in the impeachment of a president or vice president, the Senate in recent

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Through the Years: Supreme Court Decisions Impacting Our Lives

Immigration and Naturalization Service v. Chadha (1989)

The rapid growth of the welfare state and the proliferation of federal workers charged with its implementation posed serious challenges for those concerned with the specter of a federal bureaucracy out of control. Searching for a more efficient means to reign in these bureaucratic agencies, Congress in the mid-twentieth century began to increasingly rely on the so-called "legislative veto," a device by which just one house of Congress (or in some cases, a mere committee of Congress) can exercise the power to veto individual agency decisions.

After the Immigration and Naturalization Service (INS) initiated deportation proceedings against Jagdish Rai Chadha, a Kenyan-born holder of a British passport residing in America, the agency reversed itself and sought to accommodate Chadha's request to stay in the United States permanently. Disagreeing with the agency's decision, the House of Representatives exercised its right to veto the INS suspension, and thus reinstitute the deportation of Chadha. Was an act of Congress necessary in this instance? Yes, said the Supreme Court, by a 7–2 decision. Any law that modifies the rights and duties of individuals must conform to the constitutional process for passing laws: (1) bicameralism (both the House and the Senate must approve the law) and (2) presentment (the president must have the power to veto that law as a means of resisting legislative encroachment). The legislative veto of the INS abided by neither of those two principles, so Chadha's deportation remained suspended. Three years later, Chadha became a citizen of the United States. Meanwhile, legislative vetoes quickly fell out of favor, giving way to other devices intended to speed up the legislative process such as so-called "fast-track legislation" (providing the president with authority to negotiate international agreements, for example, that Congress can approve or disapprove but cannot amend or filibuster). In *INS v. Chadha* we learned that the lessons of "how to make a law" first learned in civics class are not just theoretical, even in a welfare state that often begs for ways to quickly and efficiently check executive agencies.

▶ For Critical Thinking and Discussion

1. If Congress has the exclusive power to enable executive agencies in the first place, shouldn't it also have the power to attach "strings" to the authority it grants, such as the requirement that agencies be subject to a one-house veto?
2. If legislative vetoes are no longer available, won't that make Congress more reluctant to grant executive agencies power in the first place?
3. Do you think Congress or government agencies should have the ultimate power to modify your legal rights?

times has usually designated a committee to receive evidence and question the witnesses. The impeached official provides lawyers in his or her own defense. A two-thirds vote of the full Senate is required for removal of an official.

6.6 Constituent Service: Helping People Back Home

Much of what has been discussed thus far in this chapter pertains to what members of Congress do in Washington. As the people's representatives, members are sent to Washington to develop new laws and deliberate on important issues. They are expected to safeguard the nation's security, act as watchdogs against fraud, and ensure that judges and high-ranking executive officers are qualified for office. An integral part of the way members serve their

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constituents is by reflecting the opinions and input of those whom they represent while carrying out these legislative functions.

However, the service of members of Congress does not stop with the work they do in Washington. Often constituents will call upon a House member or senator to provide information about federal programs, to render assistance in getting benefits from federal programs, or to prepare a talk or visit with a community group to educate its members about the political system or on a specific legislative or policy topic. Members are often asked by officials in state or local government to facilitate federal help for a local or state issue. The direct assistance that a member provides to a constituent, community group, or a local or state official is referred to as **casework**. A now classic book by Richard F. Fenno Jr., titled *Home Style: House Members in Their Districts*, provides a rich description of this role played by members of Congress.[19]

Chris Maddaloni/Getty Images

House members holding a town hall meeting with college students at the Capitol. From left to right: Rep. Debbie Wasserman Schultz (D-FL), Rep. Linda Sanchez (D-CA), Rep. Stepanie Herseth (D-SD), and Rep. Kendrick Meek (D-FL).

casework: The direct assistance that a member of Congress provides to a constituent, community group, or a local or state official.

Casework is important for a number of reasons. First is its electoral importance to members of Congress. Casework raises the visibility of members in their home state or district, which reflects positively on how well the member is regarded and gives members an advantage over their opponents in elections. More than 9 in 10 House and Senate members who run for reelection are returned to office, and effectively managing casework is an important reason for this high return rate.

It has also become an implicit responsibility of members to help their constituents navigate the complex federal bureaucracy. Federal programs are varied and complex, and constituents are often overwhelmed in their efforts to obtain the benefits for which they are eligible. For example, under the Workforce Development Act, the federal government has programs that provide assistance to "displaced workers," defined as those who have lost their jobs due to technological or broad trends in the workplace. Many workers in the manufacturing industry in the United States have lost their jobs over the past decade as the national economy has shifted away from manufacturing and toward technology and information services. Various programs are available for these displaced workers to help them obtain training in new skills necessary to adapt to the new workforce. Finding these programs is often difficult, and members provide information to connect constituents with available programs.

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Third, casework provides a direct connection between members and their constituents. Casework requires members to keep in touch with those whom they represent. Giving a speech to a local Rotary club or League of Women Voters meeting, showing up to cut the ribbon at an opening of a new local school building or park, and coming to speak to a group of students or employees all provide face time between the members and their constituents. The experiences that members have and the type of work they do in Washington can shelter them from the real-life concerns of their constituents back home. Casework provides a constant reminder of the needs and interests of those whom members represent.

* * * * * *

Another aspect of constituent service involves what is known as "pork-barrel" politics. The federal budget includes a great deal of money for local projects, such as parks, dams, and road improvements. Members secure federal funds to support these projects in their states and districts through what is often referred to as **pork-barrel legislation**. The pork-barrel reference is based on the idea that members are "bringing home the bacon." Members use their influence on congressional committees and leadership positions to add amendments to bills that authorize pork-barrel spending on projects back home. Though many observers of the political system

pork-barrel legislation: A government project or appropriation that yields jobs or other benefits to a specific locale and patronage opportunities to its political representative.

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FROM YOUR PERSPECTIVE

An Internship as a Steppingstone

Many college students interested in politics and public policy seek internships with Congress during the summer. Such an experience allows them to see firsthand how Congress works, gain valuable experience, and prepare for a possible job with the federal government. In early 2010, the job-search Web site Monster.com estimated that job opportunities in the federal government would grow from 2.1 million to 2.5 million by end of 2012. Building one's résumé with an internship in Congress can help to jump-start a successful career in public service.

The Pew Research Center for the People and the Press, Pew Global Attitudes Project, http://pewglobal.org/2009/07/23/confidence-in-obama-lifts-us-image-around-the-world.

A recent group of interns who work with the Congressional Hispanic Caucus.

The dozens of committees in Congress all have spots for college interns, as do large congressional agencies such as the General Accounting Office, the Congressional Budget Office, and the Library of Congress. In addition, all 535 members of Congress maintain offices in Washington, D.C., as well as in their home state or district. Interns are commonly found helping with casework in many of these offices. Moreover, the partisan leadership offices, such as the majority and minority leaders and whips, frequently staff college interns to help them do their work, as do the Democratic and GOP House and Senate campaign committees. Many senators and representatives first got introduced to Congress through an internship that they themselves had. At a minimum, an internship with Congress provides a great résumé item when applying for a full-time position in some part of the federal government.

If you are interested in a congressional internship, there are a number of ways to get one. You can contact the office of a member of the House or Senate directly and inquire about future openings. You can visit the internship coordinator at your college or in your university's political science department and ask what might be available and how to apply. Or you can visit the following Web sites for information about ongoing internship opportunities:

- http://dc.about.com/od/jobs/a/Internships.htm
- www.twc.edu
- www.cbo.gov/employment/intern.cfm

For Critical Thinking and Discussion

An internship in Congress provides a wonderful experience for interested students to learn firsthand how our government works. However, there are only a handful of these internships, and so getting them is not easy. Should students who are interested in spending a semester in Washington have more opportunities to do so?

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decry the unfairness of pork-barrel legislation, it has been an important aspect of constituent service since the beginning of our political system and promises to remain so in the future.

When Congress is dealing with major problems or issues of the day, the process of creating new laws, approving new treaties, and approving presidential appointments can be very slow indeed—many observers use the word "gridlock" to describe congressional inaction. Congress's actions are slow and deliberate; there are many points at which the process may be halted, and many actors with the capacity to hinder progress. Further, the compromises necessary to achieve success in Congress rarely prove entirely satisfactory to everyone involved. The slow and grinding legislative process can even lead to bad behavior on the part of members of Congress, such as with Senator Preston Brooks's clubbing of Senator Charles Sumner in a debate on slavery in 1856, and Representative Joe Wilson's "You lie!" shout at President Obama in 2009 during the Obama's health care address. The power and significance of individual actors in the legislative process is also significant to understanding how Congress works. Strong individuals such as Senate Majority Leader Harry Reid and House Speaker John Boehner dominated the debate in recent years. Congress is not simply two houses of 535 individuals who vote, with a majority obtaining victory. Those in leadership positions can exert a disproportionate influence on the process. Those with special communication skills enjoy more power, as do those who are highly informed on a particular issue.

SUMMARY: PUTTING IT ALL TOGETHER

6.1 Article I and the Creation of Congress

- Congress, the legislative branch of the government, was the central institution in America's new political system at the beginning of the republic. It is the branch of government that represents the people, and its primary function is to create laws.

6.2 The Structure and Organization of Congress

- Congress consists of two houses, a "people's house" apportioned by population (the House of Representatives), and a Senate in which the states, regardless of population, have equal representation. States are equally represented in the Senate while the House represents the population.
- Although not mentioned in the Constitution, leadership in Congress is primarily determined based on political parties. The majority party controls the legislative process.
- The Constitution designates that the leader of the House carry the title Speaker of the House. The Speaker is responsible for assigning new bills to committees and recognizing members to speak in the House chamber. The Constitution also prescribes that the vice president is to be the presiding officer of the Senate. Unlike the Speaker, the president of the Senate can vote only to break ties. When the vice president is absent from the Senate chamber, as is quite often the case, the presiding officer is the president pro tempore ("for the time being").
- To ensure the principle of "one person, one vote" in the House, the size of congressional districts must be "reapportioned" so that they are as even as possible, based on the results of the decennial census. Political parties try to maximize their advantage in the redistricting process that occurs after each census by "gerrymandering," which means that the party in control in each state draws district boundaries to favor the dominant party in elections.

6.3 The Committee System

- There are four types of congressional committees: standing committees (permanent), select committees (established to look at a particular issue for a limited time), conference committees (reconcile differences between House and Senate versions of a bill), and joint committees (includes members from both houses, investigative in nature). Most members defer to committee recommendations on a bill.

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6.4 How a Bill Becomes a Law

- The lawmaking process is often slow, and bills that survive frequently receive significant revisions along the way. After a bill is introduced by a member of Congress, it is usually sent to a committee for consideration (often in the form of hearings) and possible action. If the bill is endorsed by a majority of the committee, it then goes to the full House and Senate for consideration. Finally, if it is endorsed by a majority of each chamber, a conference committee reconciles differences in versions between the chambers, and then after a vote on the bill's final version, it goes to the president for signature. If the president vetoes the final bill, Congress can override the presidential veto by a two-thirds vote of both houses of Congress.

6.5 Oversight and Personnel Functions of Congress

- Congress delegates considerable legislative authority to the executive branch, whether because it lacks the expertise of bureaucrats or because it wishes to shift blame for policies to the executive branch. Still, Congress may exercise oversight to ensure that the implementation of laws and regulations is consistent with national problems and concerns.
- The U.S. Senate plays an important role in consenting to the president's selection of cabinet officers, other executive branch officials, and judges. Senate confirmation of Supreme Court nominees in particular has been the subject of considerable controversy. If a majority in the House of Representative impeaches a president, federal judge, or other executive official, the official must stand trial in the Senate. A two-thirds vote of the full Senate is required for the removal of an official from office.

6.6 Constituent Service: Helping People Back Home

- Members of Congress play an important role doing casework for local constituents, whether by assisting them in getting federal benefits, educating them on policy issues, or performing some other service on their behalf. Casework provides a direct connection between members and their constituents.

KEY TERMS

bicameral legislature (p. 147)
bill (p. 153)
casework (p. 167)
closed rule (p. 160)
cloture (p. 160)
conference committee (p. 155)
congressional agencies (p. 156)
congressional committee staff (p. 156)
congressional district (p. 149)
congressional personal staff (p. 156)
filibuster (p. 160)
gerrymandering (p. 149)
joint committee (p. 155)
logrolling (p. 162)
majority caucus (p. 151)
majority leader (p. 152)
majority-minority district (p. 149)
minority caucus (p. 151)
minority leader (p. 152)
open rule (p. 160)
overriding a veto (p. 162)
pocket veto (p. 162)
pork-barrel legislation (p. 167)
president pro tempore (p. 152)
reapportionment (p. 149)
redistricting (p. 149)
reporting legislation (p. 153)
Rules Committee (p. 160)
select committee (p. 155)
Speaker of the House (p. 151)
standing committee (p. 153)
veto (p. 162)
whip (majority and minority) (p. 152)

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TEST YOURSELF

1. The first attempt to unite the colonies under a single "congress" was the
   a. Seneca Falls congress.
   b. First Continental Congress.
   c. Albany Congress.
   d. Congress of the States.
2. The primary power given to Congress by Article I of the constitution is to
   a. create laws.
   b. implement laws.
   c. adjudicate disputes.
   d. execute laws.
3. Which of the following presidents was a congressional scholar and author of "Congressional Government"?
   a. Thomas Jefferson
   b. Theodore Roosevelt
   c. Woodrow Wilson
   d. Harry Truman
4. To qualify for membership in the House of Representatives, an individual must
   a. be 30 years old.
   b. reside in the congressional district he or she represents.
   c. be a natural-born citizen.
   d. Be a citizen of the United States for at least 7 years.
5. Under the Constitution as it was adopted, which of the following was directly elected by voters?
   a. House members
   b. Senate members
   c. Speaker of the House
   d. Senate majority leader
6. The power structure in Congress is primarily organized around
   a. seniority.
   b. partisan control.
   c. the most powerful committees.
   d. strong personalities.
7. What makes the position of Speaker of the House such a powerful one?
8. The type of committee that irons out differences between House and Senate versions of a bill is a
   a. standing committee.
   b. joint committee.
   c. conference committee.
   d. select committee.
9. The congressional office that provides objective analyses of the budget, separate from the White House analyses, is the
   a. CBO.
   b. OMB.
   c. GAO.
   d. CRS.
10. What is the significance of a standing committee's power of "reporting legislation"?
11. What type of bill may *not* be introduced first into the Senate?
    a. appropriations of money
    b. defense bills
    c. revenue bills
    d. proposed constitutional amendments
12. Which of the following would *not* be found in the House of Representatives?
    a. Rules Committee
    b. a filibuster
    c. a majority leader
    d. a minority caucus
13. The trading of influence or votes among legislators is known as
    a. lobbying.
    b. pocket vetoing.
    c. reporting legislation.
    d. logrolling.
14. What options does the president have when a bill passed by Congress arrives on his desk?
15. Which of the following is responsible for confirming presidential appointments?
    a. the Senate
    b. the House
    c. both the Senate and the House
    d. the Senate Judiciary Committee
16. When no presidential candidate receives a majority of electoral votes, which of the following selects the president?
    a. the Senate
    b. the House
    c. both the Senate and the House
    d. the Supreme Court
17. Under what circumstances is Congress likely to delegate its authority to a bureaucratic agency?

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