16e

AMERICAN GOVERNMENT

INSTITUTIONS AND POLICIES

AP® EDITION

JAMES Q. WILSON
University of California, Los Angeles, emeritus
Pepperdine University
Boston College

JOHN J. DIIULIO, JR.
University of Pennsylvania

MEENA BOSE
Hofstra University

MATTHEW LEVENDUSKY
University of Pennsylvania

CENGAGE

Australia • Brazil • Mexico • Singapore • United Kingdom • United States

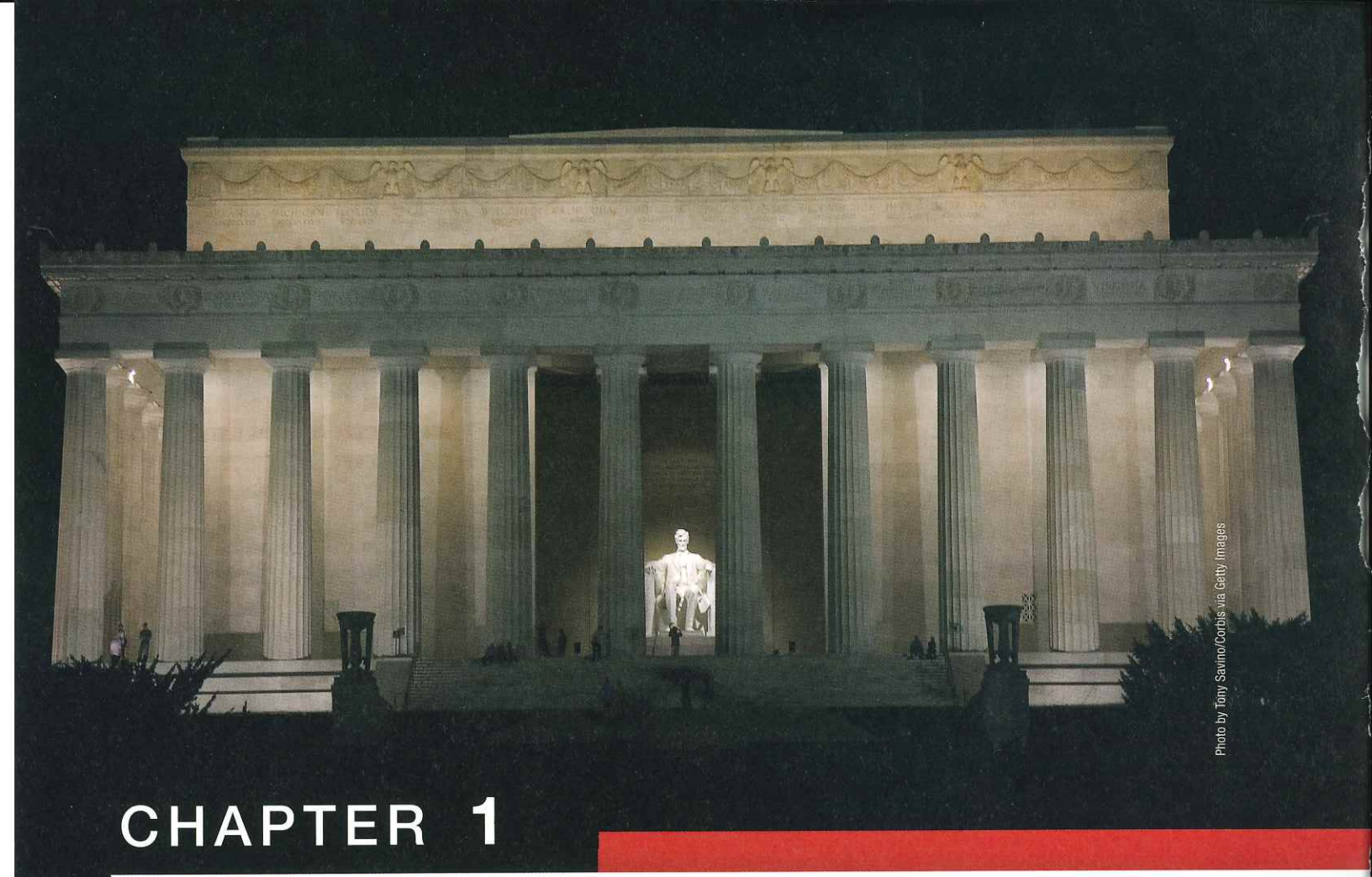


Photo by Tony Savino/Corbis via Getty Images

CHAPTER 1

The Study of American Government

KEY OBJECTIVE OF THIS CHAPTER

- *Representative democracy is shaped by its institutions, policies, events, and debates.*

KEY TAKEAWAYS FROM THIS CHAPTER

- The U.S. government is based on ideas of limited government, including natural rights, popular sovereignty, republicanism, and social contract.
- Representative democracies can take on several forms, including participatory democracy, pluralist democracy, and elite democracy.

Today, Americans and their elected leaders are hotly debating the federal government's fiscal responsibilities, for both spending and taxation.

Some things never change.

THEN In 1786, a committee of Congress reported that since the Articles of Confederation were adopted in 1781, the state governments had paid only about one-seventh of the monies requisitioned by the federal government. The federal government was broke and sinking deeper into debt, including debt owed to foreign governments. Several states had financial crises, too.

In 1788, the proposed Constitution's chief architect, James Madison, argued that while the federal government needed its own "power of taxation" and "collectors of revenue," its overall powers would remain "few and defined" and its taxing power would be used sparingly.[1] In reply, critics of the proposed Constitution, including the famous patriot Patrick Henry, mocked Madison's view and predicted that if the Constitution were ratified, there would over time be "an immense increase of taxes" spent by an ever-growing federal government.[2]

NOW The federal budget initially proposed for 2017 called for spending more than $4 trillion, with a $500 billion deficit (i.e., spending half a trillion more than projected government revenues). An expected national debt of more than $20 trillion, much of it borrowed from foreign nations, was projected to balloon to $27 trillion by 2026. Projected interest on the national debt in 2017 would be more than $300 billion, and was expected to triple by 2026.[3]

The Budget Control Act of 2011 had called for long-term deficit reduction, but when the White House and Congress could not reach agreement in 2013, automatic spending cuts—known as "sequestration"—went into effect, and the federal government even shut down for 16 days in October 2013. The two branches ultimately produced the Bipartisan Budget Act of 2013, but could not find common ground on questions about long-term revenue and spending goals.

So, in the 1780s, as in the 2010s, nearly everyone agreed that government's finances were a huge mess and that bold action was required, and soon; but in each case, then and now, there was no consensus about what action to take, or when.

issue *A conflict, real or apparent, between the interests, ideas, or beliefs of different citizens.*

1-1 Politics and Democracy

This might seem odd. After all, it may seem that the government's financial problems, including big budget deficits and revenue shortfalls, could be solved by simple arithmetic: either spend and borrow less, or tax more, or both. But now ask: Spend or borrow less for what, and raise taxes on whom, when, how, and by how much? For example, should we cut the defense budget but continue to fund health care programs, or the reverse? Or should we keep defense and health care funding at current levels but reduce spending on environmental protection or homeland security? Should we perhaps increase taxes on the wealthy (define *wealthy*) and cut taxes for the middle class (define *middle class*), or . . . what?

Then, as now, the fundamental government finance problems were *political*, not mathematical. People disagreed not only over how much the federal government should tax and spend, but also over whether it should involve itself at all in various endeavors. For example, in 2011, the federal government nearly shut down, not mainly over disagreements between the two parties about how much needed to be cut from the federal budget (in the end, the agreed-to cuts totaled $38.5 billion), but primarily over whether any federal funding at all should go to certain relatively small-budget federal health, environmental, and other programs.

Fights over taxes and government finances; battles over abortion, school prayer, and gay rights; disputes about where to store nuclear waste; competing plans on immigration, international trade, welfare reform, environmental protection, or gun control; and contention surrounding a new health care proposal. Some of these matters are mainly about money and economic interests; others are more about ideas and personal beliefs. Some people care a lot about at least some of these matters; others seem to care little or not at all.

Regardless, all such matters and countless others have this in common: each is an **issue**, defined as a conflict, real or apparent, between the interests, ideas, or beliefs of different citizens.[4]

An issue may be more apparent than real; for example, people might fight over two tax plans that, despite superficial differences, would actually distribute tax burdens on different groups in exactly the same way. Or an issue may

politics *The activity by which an issue is agitated or settled.*

power *The ability of one person to get another person to act in accordance with the first person's intentions.*

authority *The right to use power.*

be as real as it seems to the conflicting parties, as, for example, it is in matters that pose clear-cut choices (high tariffs or no tariffs; abortion legal in all cases or illegal in all cases).

And an issue might be more about conflicts over means than over ends. For example, on health care reform or other issues, legislators who are in the same party and have similar ideological leanings (like a group of liberal Democrats, or a group of conservative Republicans) might agree on objectives but still wrangle bitterly with each other over different means of achieving their goals. Or they might agree on both ends and means but differ over priorities (which goals to pursue first), timing (when to proceed), or tactics (how to proceed).

Whatever form issues take, they are the raw materials of politics. By **politics** we mean "the activity—negotiation, argument, discussion, application of force, persuasion, etc.—by which an issue is agitated or settled."[5] Any given issue can be agitated (brought to attention, stimulate conflict) or settled (brought to an accommodation, stimulate consensus) in many different ways. And government can agitate or settle, foster or frustrate political conflict in many different ways.

As you begin this textbook, this is a good time to ask yourself which issues matter to you. In general, do you care a lot, a little, or not at all about economic issues, social issues, or issues involving foreign policy or military affairs? Do you follow any particular, ongoing debates on issues such as tightening gun control laws, expanding health care insurance, regulating immigration, or funding antipoverty programs?

As you will learn in Part II of this textbook, some citizens are quite issue-oriented and politically active. They vote and try to influence others to vote likewise; they join political campaigns or give money to candidates; they keep informed about diverse issues, sign petitions, advocate for new laws, or communicate with elected leaders; and more.

But such politically attentive and engaged citizens are the exception to the rule, most especially among young adult citizens under age 30. According to many experts, ever more young Americans are closer to being "political dropouts" than they are to being "engaged citizens" (a fact that is made no less troubling by similar trends in the United Kingdom, Canada, Scandinavia, and elsewhere).[6] Many high school and college students believe getting "involved in our democracy" means volunteering for community service, but not voting.[7] Most young Americans do not regularly read or closely follow political news; and most know little about how government works and exhibit no "regular interest in politics."[8] In response to such concerns, various analysts and study commissions have made proposals ranging from compulsory voting to enhanced "civic education" in high schools.[9]

The fact that you are reading this textbook tells us that you probably have some interest in American politics and government. Our goal in this textbook is to develop, enliven, and inform that interest through examining concepts, interests, and institutions in American politics from a historical perspective as well as through current policy debates.

Power, Authority, and Legitimacy

Politics, and the processes by which issues are normally agitated or settled, involves the exercise of power. By **power** we mean the ability of one person to get another person to act in accordance with the first person's intentions. Sometimes an exercise of power is obvious, as when the president tells the Air Force that it cannot build a new bomber, or orders soldiers into combat in a foreign land. Other times an exercise of power is subtle, as when the president's junior speechwriters, reflecting their own evolving views, adopt a new tone when writing about controversial issues such as education policy. The speechwriters may not think they are using power—after all, they are the president's subordinates and may see their boss face-to-face infrequently. But if the president speaks the phrases that they craft, then they have used power.

Power is found in all human relationships, but we are concerned here only with power as it is used to affect who will hold government office and how government will behave. We limit our view here to government, and chiefly to the American federal government. However, we repeatedly pay special attention to how things once thought to be "private" matters become "public"—that is, how they manage to become objects of governmental action. Indeed, as we discuss more later, one of the most striking transformations of American politics has been the extent to which, in recent decades, almost every aspect of human life has found its way onto the political agenda.

People who exercise political power may or may not have the authority to do so. By **authority** we mean the right to use power. The exercise of rightful power—that is, of authority—is ordinarily easier than the exercise of power not supported by any persuasive claim of right. We accept decisions, often without question, if they are made by people who we believe have the right to make them; we may bow to naked power because we cannot resist it, but by our recalcitrance or our resentment we put the users of naked power to greater trouble than the wielders of authority. In this book, we on occasion speak of "formal authority." By this we mean that the right to exercise power is vested in a

governmental office. A president, a senator, and a federal judge have formal authority to take certain actions.

What makes power rightful varies from time to time and from country to country. In the United States, we usually say a person has political authority if his or her right to act in a certain way is conferred by a law or by a state or national constitution. But what makes a law or constitution a source of right? That is the question of **legitimacy**. In the United States, the Constitution today is widely, if not unanimously, accepted as a source of legitimate authority, but that was not always the case.

Rena Schild/Shutterstock.com

IMAGE 1-1 In the spring of 2016, demonstrators in Washington, D.C., called for improving democracy in the United States through protecting voting rights and ending corruption in politics.

Defining Democracy

On one matter, virtually all Americans seem to agree: no exercise of political power by government at any level is legitimate if it is not in some sense democratic. That wasn't always the prevailing view. In 1787, as the Framers drafted the Constitution, Alexander Hamilton worried that the new government he helped create might be too democratic, whereas George Mason, who refused to sign the Constitution, worried that it was not democratic enough. Today, however, almost everyone believes that democratic government is the only proper kind. Most people believe that American government is democratic; some believe that other institutions of public life—schools, universities, corporations, trade unions, churches—also should be run on democratic principles if they are to be legitimate; and some insist that promoting democracy abroad ought to be a primary purpose of U.S. foreign policy.

Democracy is a word with at least two different meanings. First, the term *democracy* is used to describe those regimes that come as close as possible to Aristotle's definition—the "rule of the many."[10] A government is democratic if all, or most, of its citizens participate directly in either holding office or making policy. This often is called **direct or participatory democracy**. In Aristotle's time—Greece in the 4th century B.C.—such a government was possible. The Greek city-state, or *polis*, was quite small, and within it citizenship was extended to all free adult male property holders. (Slaves, women, minors, and those without property were excluded from participation in government.) In more recent times, the New England town meeting approximates the Aristotelian ideal. In such a meeting, the adult citizens of a community gather once or twice a year to vote directly on all major issues and expenditures of the town. As towns have become larger and issues more complicated, many town governments have abandoned the pure town meeting in favor of either the representative town meeting (in which a large number of elected representatives, perhaps 200–300, meet to vote on town affairs) or representative government (in which a small number of elected city councilors make decisions).

legitimacy *Political authority conferred by law or by a state or national constitution.*

democracy *The rule of the many.*

direct or participatory democracy *A government in which all or most citizens participate directly.*

representative democracy *A government in which leaders make decisions by winning a competitive struggle for the popular vote.*

The second definition of *democracy* is the principle of governance of most nations that are called democratic. It was most concisely stated by the economist Joseph Schumpeter: "The democratic method is that institutional arrangement for arriving at political decisions in which individuals [i.e., leaders] acquire the power to decide by means of a competitive struggle for the people's vote."[11] Sometimes this method is called, approvingly, **representative democracy**; at other times it is referred to, disapprovingly, as the elitist theory of democracy. It is justified by one or both of two arguments. First, it is impractical, owing to limits of time, information, energy, interest, and expertise, for the public at large to decide on public policy, but it is not impractical to expect them to make reasonable choices among competing leadership groups. Second, some people (including, as we shall see in the next chapter, many of the Framers of the Constitution) believe direct democracy is likely to lead to bad decisions because people often decide large issues on the basis of fleeting passions and in response to popular demagogues, or leaders who appeal to emotions, not reason, to gain support. This concern about direct democracy persists today, as evidenced by the statements of leaders who disagree with voter decisions. For example, voters in many states have rejected referenda that would have increased public funding for private schools. Politicians who oppose the defeated referenda speak approvingly of the "will of the

people," but politicians who favor them speak disdainfully of "mass misunderstanding."

Whenever we refer to that form of democracy involving the direct participation of all or most citizens, we use the term *direct* or *participatory* democracy. Whenever the word *democracy* is used alone in this book, it will have the meaning Schumpeter gave it. Schumpeter's definition usefully implies basic benchmarks that enable us to judge the extent to which any given political system is democratic.[12] A political system is *non*democratic to the extent that it denies equal voting rights to part of its society and severely limits (or outright prohibits) "the civil and political freedoms to speak, publish, assemble, and organize,"[13] all of which are necessary to a truly "competitive struggle for the people's vote." A partial list of nondemocratic political systems would include absolute monarchies, empires, military dictatorships, authoritarian systems, and totalitarian states.[14]

Scholars of comparative politics and government have much to teach about how different types of political systems—democratic and nondemocratic—arise, persist, and change. For our present purposes, however, it is most important to understand that America itself was once far less democratic than it is today and that it was so not by accident but by design. As we discuss in the next chapter, the men who wrote the Constitution did not use the word *democracy* in that document. They wrote instead of a "republican form of government," but by that they meant what we call "representative democracy." And, as we emphasize when discussing civil liberties and civil rights (see Chapters 5 and 6), and again when discussing political participation (see Chapter 8), the United States was not born as a full-fledged representative democracy; and, for all the progress of the past half-century or so, the nation's representative democratic character is still very much a work in progress.

For any representative democracy to work, there must, of course, be an opportunity for genuine competition for leadership. This requires in turn that individuals and parties be able to run for office, that communications (through speeches or the press, in meetings, and on the Internet) be free, and that the voters perceive that a meaningful choice exists. But what, exactly, constitutes a "meaningful choice"? How many offices should be elective and how many appointive? How many candidates or parties can exist before the choices become hopelessly confused? Where will the money come from to finance electoral campaigns? Such questions have many answers. In some European democracies, for example, very few offices—often just those in the national or local legislature—are elective, and much of the money for campaigning for these offices comes from the government. In the United States, many offices—executive and judicial as well as legislative—are elective, and most of the money the candidates use for campaigning comes from industry, labor unions, and private individuals.

Some people have argued that the virtues of direct or participatory democracy can and should be reclaimed even in a modern, complex society. This can be done either by allowing individual neighborhoods in big cities to govern themselves (community control) or by requiring those affected by some government program to participate in its formulation (citizen participation). In many states, a measure of direct democracy exists when voters can decide on referendum issues—that is, policy choices that appear on the ballot. The proponents of direct democracy defend it as the only way to ensure that the "will of the people" prevails.

As we discuss in the nearby Constitutional Connections feature, and as we explore more in Chapter 2, the Framers of the Constitution did not think that the "will of the people" was synonymous with the "common interest" or the "public good." They strongly favored representative democracy over direct democracy, and they believed that elected officials could best ascertain what was in the public interest.

a katz/Shutterstock.com

IMAGE 1-2 After the 2016 presidential election, some protestors criticized incoming President Donald Trump's plans to restrict immigration.

1-2 Political Power in America: Five Views

Scholars differ in their interpretations of the American political experience. Where some see a steady march of democracy, others see no such thing; where some emphasize how voting and other rights have been steadily expanded, others stress how they were denied to so many for so long, and so forth. Short of attempting to reconcile these competing historical interpretations, let us step back now for a moment to our definition of representative democracy and five competing views about how political power has been distributed in America.

CONSTITUTIONAL CONNECTIONS | Deciding What's Legitimate

Much of American political history has been a struggle over what constitutes legitimate authority. The Constitutional Convention in 1787 was an effort to determine whether a new, more powerful federal government could be made legitimate; the succeeding administrations of George Washington, John Adams, and Thomas Jefferson were in large measure preoccupied with disputes over the kinds of decisions that were legitimate for the federal government to make. The Civil War was a bloody struggle over slavery and the legitimacy of the federal union; the New Deal of Franklin Roosevelt was hotly debated by those who disagreed over whether it was legitimate for the federal government to intervene deeply in the economy. Not uncommonly, the federal judiciary functions as the ultimate arbiter of what is legitimate in the context of deciding what is or is not constitutional (see Chapter 16). For instance, in 2012, amidst a contentious debate over the legitimacy of the federal health care law that was enacted in 2010, the U.S. Supreme Court decided that the federal government could require individuals to purchase health insurance but could not require states to expand health care benefits for citizens participating in the federal–state program known as Medicaid. In the spring and summer of 2017, the Trump White House and the Republican-led Congress tried unsuccessfully to repeal the 2010 law.

Representative democracy is defined as any system of government in which leaders are authorized to make decisions—and thereby to wield political power—by winning a competitive struggle for the popular vote. It is obvious then that very different sets of hands can control political power, depending on what kinds of people can become leaders, how the struggle for votes is carried on, how much freedom to act is given to those who win the struggle, and what other sorts of influence (besides the desire for popular approval) affect the leaders' actions.

The actual distribution of political power in a representative democracy depends on the composition of the political elites who are involved in the struggles for power and over policy. By **elite** we mean an identifiable group of persons who possess a disproportionate share of some valued resource—in this case, political power.

At least five views exist about how political power is distributed in America: (1) the **class view** (wealthy capitalists and other economic elites determine most policies), (2) the **power elite view** (a group of business, military, labor union, and elected officials controls most decisions), (3) the **bureaucratic view** (appointed bureaucrats ultimately run everything); (4) the **pluralist view** (representatives of a large number of interest groups are in charge), and (5) the **creedal passion view** (morally impassioned elites drive political change).

The first view began with the theories of Karl Marx, who, in the 19th century, argued that governments were dominated by business owners (the "bourgeoisie") until a revolution replaced them with rule by laborers (the "proletariat").[15] But strict Marxism has collapsed in most countries. Today, a class view, though it may derive inspiration from Marx, is less dogmatic and emphasizes the power of "the rich" or the leaders of multinational corporations.

The second view ties business leaders together with other elites whose perceived power is of concern to the view's adherents. These elites may include top military officials, labor union leaders, mass media executives, and the heads of a few special-interest groups. Derived from the work of sociologist C. Wright Mills, this power elite view argues that American democracy is dominated by a few top leaders, many of them wealthy or privately powerful, who do not hold elective office.[16]

The third view is that appointed officials run everything despite the efforts of elected officials and the public to control them. The bureaucratic view was first set forth by German scholar Max Weber (1864–1920). He argued that the modern state, in order to become successful, puts its affairs in the hands of appointed bureaucrats whose competence is essential to the management of complex affairs.[17] These

elite *Persons who possess a disproportionate share of some valued resource, such as money, prestige, or expertise.*

class view *View that the government is dominated by capitalists.*

power elite view *View that the government is dominated by a few top leaders, most of whom are outside of government.*

bureaucratic view *View that the government is dominated by appointed officials.*

pluralist view *View that competition among all affected interests shapes public policy.*

creedal passion view *View that morally impassioned elites drive important political changes.*

officials, invisible to most people, have mastered the written records and legislative details of the government and do more than just implement democratic policies; they actually make those policies.

The fourth view holds that political resources—such as money, prestige, expertise, and access to the mass media—have become so widely distributed that no single elite, no social class, no bureaucratic arrangement, can control them. Many 20th-century political scientists, among them David B. Truman, adopted a pluralist view.[18] In the United States, they argued, political resources are broadly shared in part because there are so many governmental institutions (cities, states, school boards) and so many rival institutions (legislatures, executives, judges, bureaucrats) that no single group can dominate most, or even much, of the political process.

The fifth view maintains that while each of the other four views is correct with respect to how power is distributed on certain issues or during political periods of "business as usual," each also misses how the most important policy decisions and political changes are influenced by morally impassioned elites who are motivated less by economic self-interest than they are by an almost religious zeal to bring government institutions and policies into line with democratic ideals. Samuel P. Huntington articulated this creedal passion view, offering the examples of Patrick Henry and the revolutionaries of the 1770s, the advocates of Jackson-style democracy in the 1820s, the progressive reformers of the early 20th century, and the leaders of the civil rights and antiwar movements in the mid-20th century.[19]

1-3 Who Governs? To What Ends?

So, which view is correct? At one level, all are correct, at least in part: Economic class interests, powerful cadres of elites, entrenched bureaucrats, competing pressure groups, and morally impassioned individuals have all at one time or another wielded political power and played a part in shaping our government and its policies.

But, more fundamentally, understanding any political system means being able to give reasonable answers to each of two separate but related questions about it: Who governs, and to what ends?

We want to know the answer to the first question because we believe that those who rule—their personalities and beliefs, their virtues and vices—will affect what they do to and for us. Many people think they already know the answer to the question, and they are prepared to talk and vote on that basis. That is their right, and the opinions they express may be correct. But they also may be wrong. Indeed, many of these opinions must be wrong because they are in conflict. When asked, "Who governs?" some people will say "the unions" and some will say "big business"; others will say "the politicians," "the people," or "the special interests." Still others will say "Wall Street," "the military," "crackpot liberals," "the media," "the bureaucrats," or "white males." Not all these answers can be correct—at least not all of the time.

The answer to the second question is important because it tells us how government affects our lives. We want to know not only who governs, but what difference it makes who governs. In our day-to-day lives, we may not think government makes much difference at all. In one sense that is right because our most pressing personal concerns—work, play, love, family, health—essentially are private matters on which government touches but slightly. But in a larger and longer perspective, government makes a substantial difference. Consider that in 1935, 96 percent of all American families paid no federal income tax, and for the 4 percent or so who did pay, the average rate was only about 4 percent of their incomes. Today almost all families pay federal payroll taxes, and the average rate is about 21 percent of their incomes. Or consider that in 1960, in many parts of the country, African Americans could ride only in the backs of buses, had to use washrooms and drinking fountains that were labeled "colored," and could not be served in most public restaurants. Such restrictions have almost all been eliminated, in large part because of decisions by the federal government.

It is important to bear in mind that we wish to answer two different questions, and not two versions of the same question. You cannot always predict what goals government will establish by knowing only who governs, nor can you always tell who governs by knowing what activities government undertakes. Most people holding national political office are middle-class, middle-aged, white, Protestant males, but we cannot then conclude that the government will adopt only policies that are to the narrow advantage of the middle class, the middle-aged, whites, Protestants, or men. If we thought that, we would be at a loss to explain why the rich are taxed more heavily than the poor, why the War on Poverty was declared, why constitutional amendments giving rights to African Americans and women passed Congress by large majorities, or why Catholics and Jews have been appointed to so many important governmental posts.

This book is chiefly devoted to answering the question, who governs? It is written in the belief that this question cannot be answered without looking at how government makes—or fails to make—decisions about a large variety

of concrete issues. Thus, in this book we inspect government policies to see what individuals, groups, and institutions seem to exert the greatest power in the continuous struggle to define the purposes of government.

Expanding the Political Agenda

No matter who governs, the most important decision that affects policymaking is also the least noticed one: deciding what to make policy *about*, or in the language of political science, deciding what belongs on the **political agenda**. The political agenda consists of issues that people believe require governmental action. We take for granted that politics is about certain familiar issues such as taxes, energy, welfare, civil rights, and homeland security. We forget that there is nothing inevitable about having these issues—rather than some other ones—on the nation's political agenda.

For example, at one time, it was unconstitutional for the federal government to levy income taxes; energy was a nonissue because everyone (or at least everyone who could chop down trees for firewood) had enough; welfare was something for cities and towns to handle; civil rights were supposed to be a matter of private choice rather than government action; "homeland security" was not in the political lexicon, and a huge federal cabinet department by that name was nowhere on the horizon.

At any given time, what is on the political agenda is affected by at least four things:

- *Shared political values*—for example, if people believe that poverty is the result of social forces rather than individual choices, then they have a reason to endorse enacting or expanding government programs to combat poverty.
- *The weight of custom and tradition*—people usually will accept what the government customarily does, even if they are leery of what it proposes to do.
- *The importance of events*—wars, terrorist attacks, and severe or sustained economic downturns can alter our sense of the proper role of government.
- *Terms of debate*—the way in which political elites discuss issues influences how the public views political priorities.

Because many people believe that whatever the government now does it ought to continue doing, and because changes in attitudes and the impact of events tend to increase the number of things that government does, the political agenda is always growing larger. Thus, today there are far fewer debates about the legitimacy of a proposed government policy than there were in the 1920s or the 1930s.

political agenda
Issues that people believe require governmental action.

For instance, in the 1930s, when what became the Social Security program was first proposed, the debate was largely about whether the federal government should have any role whatsoever in providing financial support for older adults or disabled citizens. In stark contrast, today, not a single member of Congress denies that the federal government should have a *major* role in providing financial support for older adults or disabled citizens, or advocates ending Social Security. Instead, today's debates about the program are largely over competing plans to ensure its long-term financial solvency.

Popular views regarding what belongs on the political agenda often are changed by events. During wartime or after a terrorist attack on this country, many people expect the government to do whatever is necessary to win, whether or not such actions are clearly authorized by the Constitution. Economic depressions or deep recessions, such as the ones that began in 1929 and 2007, also lead many people to expect the government to take action. A coal mine disaster leads to an enlarged role for the government in promoting mine safety. A series of airplane hijackings leads to a change in public opinion so great that what once would have been unthinkable—requiring all passengers at airports to be searched before boarding their flights—becomes routine.

But sometimes the government enlarges the political agenda, often dramatically, without any crisis or widespread public demand. This may happen even at a time when the conditions at which a policy is directed are improving. For instance, there was no mass public demand for government

Steve Wood/REX/Newscom

IMAGE 1-3 Seeing first responders in action in the immediate aftermath of 9/11, Americans felt powerfully connected to their fellow citizens.

action to make automobiles safer before 1966, when a law was passed imposing safety standards on cars. Though the number of auto fatalities (per 100 million miles driven) had gone up slightly just before the law was passed, in the long term, highway deaths had been more or less steadily trending downward.

It is not easy to explain why the government adds new issues to its agenda and adopts new programs when little public demand exists and when, in fact, the conditions to which the policies are addressed have improved. In general, the explanation may be found in the behavior of groups, the workings of institutions, the media, and the action of state governments.

Groups

Many policies are the result of small groups of people enlarging the scope of government by their demands. Sometimes these are organized interests (e.g., corporations or unions); sometimes they are intense but unorganized groups (e.g., urban minorities). The organized groups often work quietly, behind the scenes; the intense, unorganized ones may take their causes to the streets.

For example, organized labor favored a tough federal safety law governing factories and other workplaces, not because it was unaware that factory conditions had been improving, but because the standards by which union leaders and members judged working conditions had risen even faster. As people became better off, conditions that once were thought normal suddenly became intolerable.

On occasion, a group expresses in violent ways its dissatisfaction with what it judges to be intolerable conditions. The riots in American cities during the mid-1960s had a variety of causes, and people participated out of a variety of motives. For many, rioting was a way of expressing pent-up anger at what they regarded as an unresponsive and unfair society. A sense of relative deprivation—of being worse off than one thinks one *ought* to be—helps explain why so large a proportion of the rioters were not uneducated, unemployed recent migrants to the city, but rather young men and women born in the North, educated in its schools, and employed in its factories.[20] Life under these conditions turned out to be not what they had come to expect or what they were prepared to tolerate.

The new demands of such groups need not result in an enlarged political agenda, and they often do not produce such results when society and its governing institutions are confident of the rightness of the existing state of affairs. Unions could have been voted down on the occupational safety bill; rioters could have been jailed and ignored. At one time, this is exactly what would have happened. But society itself had changed: Many people who were not workers sympathized with the plight of the injured worker and distrusted the good intentions of business in this matter. Many well-off citizens felt a constructive, not just a punitive, response to the urban riots was required and thus urged the formation of commissions to study—and the passage of laws to deal with—the problems of inner-city life. Such changes in the values and beliefs of people generally—or at least of people in key government positions—are an essential part of any explanation of why policies not demanded by public opinion nonetheless become part of the political agenda.

Government Institutions

Among the institutions whose influence on agenda-setting has become especially important are the courts, the bureaucracy, and the Senate.

The courts can make decisions that force the hand of the other branches of government. For example, when in 1954 the Supreme Court ordered schools desegregated, Congress and the White House could no longer ignore the issue. Local resistance to implementing the order led President Dwight D. Eisenhower to send troops to Little Rock, Arkansas, despite his dislike for using force against local governments. Similarly, when the Supreme Court ruled in 1973 that the states could not ban abortions during the first trimester of pregnancy, abortion suddenly became a national political issue. Right-to-life activists campaigned to reverse the Court's decision or, failing that, to prevent federal funds from being used to pay for abortions. Pro-choice activists fought to prevent the Court from reversing course and to get federal funding for abortions. In these and many other cases, the courts act like trip wires: When activated, they set off a chain reaction of events that alters the political agenda and creates a new constellation of political forces.

Indeed, the courts can sometimes be more than trip wires. As the political agenda has expanded, the courts have become the favorite method for effecting change for which there is no popular majority. Little electoral support may exist for allowing abortion on demand, eliminating school prayer, ordering school busing, or attacking tobacco companies, but in the courts elections do not matter. The courts are the preferred vehicles for the advocates of unpopular causes.

The bureaucracy has acquired a new significance in American politics not simply because of its size or power but also because it is now a source of political innovation. At one time, the federal government *reacted* to events in society and to demands from segments of society; ordinarily it did not itself propose changes and new ideas. Today, the bureaucracy is so large and includes within it so great a variety of experts and advocates, that it has become a *source* of policy proposals as well as an implementer of

those that become law. The late U.S. Senator Daniel Patrick Moynihan called this the "professionalization of reform," by which he meant, in part, that the government bureaucracy had begun to think up problems for government to solve rather than simply to respond to the problems identified by others.[21] In the 1930s, many of the key elements of the New Deal—Social Security, unemployment compensation, public housing, old-age benefits—were ideas devised by nongovernment experts and intellectuals here and abroad and then, as the crisis of the depression deepened, taken up by the federal government. In the 1960s, by contrast, most of the measures that became known as part of Lyndon Johnson's "Great Society"—federal aid to education, manpower development and training, Medicare and Medicaid, the War on Poverty, the "safe-streets" act providing federal aid to local law enforcement agencies—were developed, designed, and advocated by government officials, bureaucrats, and their political allies.

Chief among these political allies are U.S. senators and their staffs. Once the Senate was best described as a club that moved slowly, debated endlessly, and resisted, under the leadership of conservative Southern Democrats, the plans of liberal presidents. With the collapse of the one-party South and the increase in the number of liberal activist senators, the Senate became in the 1960s an incubator for developing new policies and building national constituencies.[22]

Media

The national press can either help place new matters on the agenda or publicize those matters placed there by others. There was a close correlation between the political attention given in the Senate to proposals for new safety standards for industry, coal mines, and automobiles and the amount of space devoted to these questions in the pages of the *New York Times*. Newspaper interest in the matter, low before the issue was placed on the agenda, peaked at about the time the bill was passed.[23]

It is difficult, of course, to decide which is the cause and which the effect. The press may have stimulated congressional interest in the matter or merely reported on what Congress had already decided to pursue. Nonetheless, the press must choose which of thousands of proposals it will cover. The beliefs of editors and reporters led it to select the safety issue.

Action by the States

National policy is increasingly being made by the actions of state governments. You may wonder how. After all, a state can only pass laws that affect its own people. Of course, the national government may later adopt ideas pioneered in the states, as it did when Congress passed a "Do Not Call" law to reduce how many phone calls you will get from salespeople while you are trying to eat dinner. The states had taken the lead on this issue.

cost *A burden that people believe they must bear if a policy is adopted.*

benefit *A satisfaction that people believe they will enjoy if a policy is adopted.*

But there is another way in which state governments can make national policy directly without Congress ever voting on the matter. The attorneys general of states may sue a business firm and settle the suit with an agreement that binds the industry throughout the country. The effect of one suit was to raise prices for consumers and create a new set of regulations. This is what happened in 1998 with the tobacco agreement negotiated between cigarette companies and some state attorneys general. The companies agreed to raise their prices, pay more than $240 billion to state governments (to use as they wished) and several billion dollars to private lawyers, and comply with a massive regulatory program. A decade later, the federal government passed laws that reinforced the state's regulations, culminating in the Family Smoking Prevention Tobacco Control Act of 2009.

1-4 The Politics of Different Issues

Once an issue is on the political agenda, its nature affects the kind of politicking that ensues. Some issues provoke intense conflict among interest groups; others allow one group to prevail almost unchallenged. Some issues involve ideological appeals to broad national constituencies; others involve quiet bargaining in congressional offices. We all know that private groups try to influence government policies; we often forget that the nature of the issues with which government is dealing influences the kinds of groups that become politically active.

One way to understand why government handles a given issue as it does is to examine what seem to be the costs and benefits of the proposed policy. The **cost** is any burden, monetary or nonmonetary, that some people must bear, or believe they must bear, if the policy is adopted. The costs of a government spending program are the taxes it entails; the cost of a foreign policy initiative may be the increased chance of having the nation drawn into war.

The **benefit** is any satisfaction, monetary or nonmonetary, that people believe they will enjoy if the policy is adopted. The benefits of a government

spending program are the payments, subsidies, or contracts received by some people; the benefits of a foreign policy initiative may include the enhanced security of the nation, the protection of a valued ally, or the vindication of some important principle such as human rights.

Two aspects of these costs and benefits should be borne in mind. First, it is the *perception* of costs and benefits that affects politics. People may think the cost of an auto emissions control system is paid by the manufacturer, when it is actually passed on to the consumer in the form of higher prices and reduced performance. Political conflict over pollution control will take one form when people think that the polluting industries pay the costs and another form when they think that the consumers pay.

Second, people take into account not only who benefits but also whether it is legitimate for that group to benefit. When programs providing financial assistance to women with dependent children were first developed in the early part of the 20th century, they were relatively noncontroversial because people saw the money as going to widows and orphans who deserved such aid. Later, giving aid to mothers with dependent children became controversial because some people now perceived the recipients not as deserving widows but as irresponsible women who had never married. Whatever the truth of the matter, the program had lost some of its legitimacy because the beneficiaries were no longer seen as "deserving." By the same token, groups once thought undeserving, such as men out of work, were later thought to be entitled to aid, and thus the unemployment compensation program acquired a legitimacy that it once lacked.

Politics is in large measure a process of raising and settling disputes over who *will* benefit or pay for a program and who *ought* to benefit or pay. Because beliefs about the results of a program and the rightness of those results are matters of opinion, it is evident that ideas are at least as important as interests in shaping politics. In recent years, ideas have become especially important with the rise of issues whose consequences are largely intangible, such as abortion, school prayer, and gay rights.

Though perceptions about costs and benefits change, most people most of the time prefer government programs that provide substantial benefits to them at low cost. This rather obvious fact can have important implications for how politics is carried out. In a political system based on some measure of popular rule, public officials have a strong incentive to offer programs that confer—or seem to confer—benefits on people with costs either small in amount, remote in time, or borne by "somebody else." Policies that seem to impose high, immediate costs in return for small or remote benefits will be avoided, enacted with a minimum of publicity, or proposed only in response to a real or apparent crisis.

Ordinarily, no president would propose a policy that would immediately raise the cost of fuel, even if he were convinced that future supplies of oil and gasoline were likely to be exhausted unless higher prices reduced current consumption. But when a crisis occurs, such as the Arab oil cartel's price increases beginning in 1973, it becomes possible for the president to offer such proposals—as did Nixon, Ford, and Carter in varying ways. Even then, however, people are reluctant to bear increased costs, and thus many are led to dispute the president's claim that an emergency actually exists.

Four Types of Politics

These entirely human responses to the perceived costs and benefits of proposed policies can be organized into a simple theory of politics.[24] It is based on the observation that the costs and benefits of a policy may be *widely distributed* (spread over many, most, or even all citizens) or *narrowly concentrated* (limited to a relatively small number of citizens or to some identifiable, organized group).

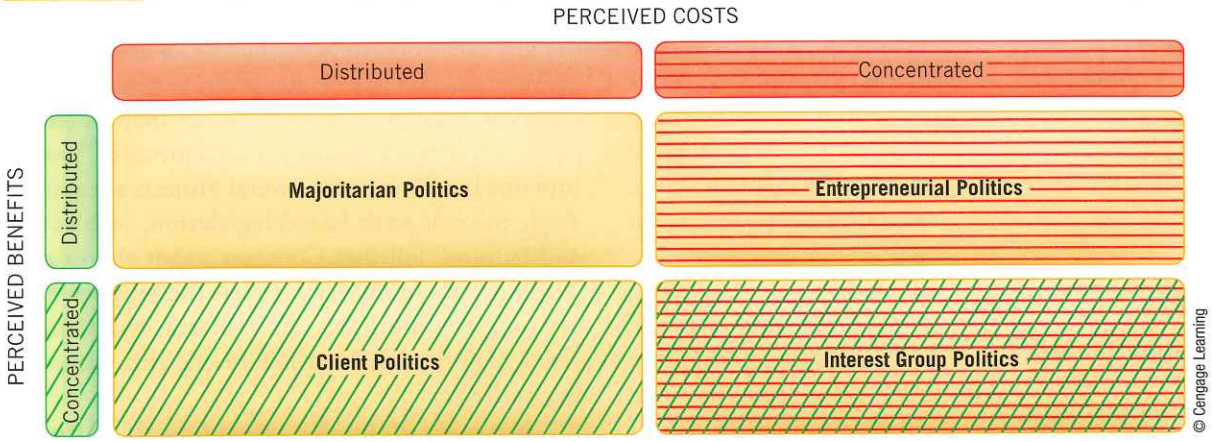
For instance, a widely distributed cost would include an income tax, a Social Security tax, or a high rate of crime; a widely distributed benefit might include retirement benefits for all citizens, clean air, national security, or low crime rates. Examples of narrowly concentrated costs include the expenditures by a factory to reduce its pollution, government regulations imposed on doctors and hospitals participating in the Medicare program, or restrictions on freedom of speech imposed on a dissident political group. Examples of narrowly concentrated benefits include subsidies to farmers or merchant ship companies, the enlarged freedom to speak and protest afforded a dissident group, or protection against competition given to an industry because of favorable government regulation.

The perceived distribution of costs and benefits shapes the *kinds of political coalitions that will form*—but it does not necessarily determine *who wins*. Four types of politics exist, and a given popular majority, interest group, client, or entrepreneur may win or lose depending on its influence and the temper of the times.

Majoritarian Politics: Distributed Benefits, Distributed Costs

Some policies promise benefits to large numbers of people at a cost that large numbers of people will have to bear (see Figure 1.1). For example, almost everyone will sooner or later receive Social Security benefits, and almost everyone who works has to pay Social Security taxes.

FIGURE 1.1 **A Way of Classifying and Explaining the Politics of Different Policy Issues**



Such **majoritarian politics** are usually not dominated by pulling and hauling among rival interest groups; instead, they involve making appeals to large segments of voters and their representatives in hopes of finding a majority. The reason why interest groups are not so important in majoritarian politics is that citizens rarely will have much incentive to join an interest group if the policy that such a group supports will benefit everybody, whether or not they are members of the group. This is the "free-rider" problem. Why join the Committee to Increase (or Decrease) the Defense Budget when what you personally contribute to that committee makes little difference in the outcome and when you will enjoy the benefits of more (or less) national defense even if you stay on the sidelines?

Majoritarian politics may be controversial, but the controversy is usually over matters of cost or ideology, not between rival interest groups. For example, intense controversy ensued over the health care plan that President Barack Obama signed into law, but the debate was not dominated by interest groups, and many different types of politics were at play (see Policy Dynamics: Inside/Outside the Box on page 17). The military budget went up during the early 1980s, down in the late 1980s, up after 2001, and down again after 2010. These changes reflected different views on how much we need to spend on our military operations abroad.

Interest Group Politics: Concentrated Benefits, Concentrated Costs

In **interest group politics**, a proposed policy will confer benefits on some relatively small, identifiable group and impose costs on another small, equally identifiable group. For example, when Congress passed a bill requiring companies to give 60 days' notice of a plant closing or a large-scale layoff, labor unions (whose members would benefit) backed the bill, and many business firms (which would pay the costs) opposed it.

Issues of this kind tend to be fought out by organized interest groups. Each side will be so powerfully affected by the outcome that it has a strong incentive to mobilize: Union members who worry about layoffs will have a personal stake in favoring the notice bill; business leaders who fear government control of investment decisions will have an economic stake in opposing it.

majoritarian politics *A policy in which almost everybody benefits and almost everybody pays.*

interest group politics *A policy in which one small group benefits and another small group pays.*

client politics *A policy in which one small group benefits and almost everybody pays.*

Interest group politics often produces decisions about which the public is uninformed. For instance, bitter debates have occurred between television broadcasters and cable companies over who may send what kind of signals to which homes. But these debates hardly draw any public notice—until after a law is passed and people see their increased cable charges.

Though many issues of this type involve monetary costs and benefits, they can also involve intangible considerations. If the American Nazi party wants to march through a predominantly Jewish neighborhood carrying flags with swastikas on them, the community may organize itself to resist out of revulsion due to the horrific treatment of Jews by Nazi Germany. Each side may hire lawyers to debate the issue before the city council and in the courts.

Client Politics: Concentrated Benefits, Distributed Costs

With **client politics** some identifiable, often small group will benefit, but everybody—or at least a large part of society—will pay the costs. Because the benefits are concentrated, the group to receive those benefits has

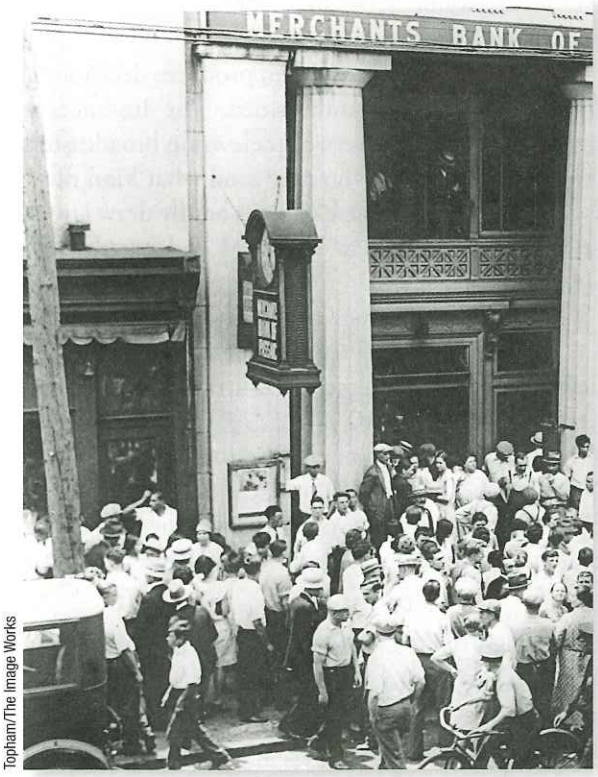
pork-barrel legislation *Legislation that gives tangible benefits to constituents in several districts or states in the hope of winning their votes in return.*

log-rolling *A legislator supports a proposal favored by another in return for support of his or hers.*

entrepreneurial politics *A policy in which almost everybody benefits and a small group pays.*

an incentive to organize and work to get them. But because the costs are widely distributed, affecting many people only slightly, those who pay the costs may be either unaware of any costs or indifferent to them because per capita they are so small.

This situation gives rise to client politics (sometimes called clientele politics); the beneficiary of the policy is the "client" of the government. For example, many farmers benefit substantially from agricultural price supports, but the far more numerous food consumers have no idea what these price supports cost them in taxes and higher food prices. Similarly, for some time airlines benefited from the higher prices they were able to charge on certain routes as a result of government regulations that restricted competition over prices. But the average passenger was either unaware that his or her costs were higher or did not think the higher prices were worth making a fuss about.



Topham/The Image Works

IMAGE 1-4 During the Great Depression, depositors besieged a bank, hoping to get their savings out.

Not all clients have economic interests. Localities can also benefit as clients when, for example, a city or county obtains a new dam, a better harbor, or an improved irrigation system. Some of these projects may be worthwhile, others may not; by custom, however, they are referred to as *pork-barrel projects*. Usually several pieces of "pork" are put into one barrel—that is, several projects are approved in a single piece of **pork-barrel legislation**, such as the "rivers and harbors" bill that Congress passes almost every year. Trading votes in this way attracts the support of members of Congress from each affected area; with enough projects a majority coalition is formed. This process is called **log-rolling**.

Not every group that wants something from government at little cost to the average citizen will get it. Welfare recipients cost the typical taxpayer a small amount each year, yet there was great resistance to increasing these benefits. The homeless have not organized themselves to get benefits; indeed, most do not even vote. Yet benefits are being provided (albeit in modest amounts). These examples illustrate the importance of popular views concerning the legitimacy of client claims as a factor in determining the success of client demands.

By the same token, groups can lose legitimacy that they once had. People who grow tobacco once were supported simply because they were farmers, and were thus seen as both "deserving" and politically important. But when people began worrying about the health risks associated with using tobacco, farmers who produce tobacco lost some legitimacy compared with those who produce corn or cotton. As a result, it became harder to get votes for maintaining tobacco price supports and easier to slap higher taxes on cigarettes.

Entrepreneurial Politics: Distributed Benefits, Concentrated Costs

In **entrepreneurial politics**, society as a whole or some large part of it benefits from a policy that imposes substantial costs on some small, identifiable segment of society. The antipollution and safety requirements for automobiles were proposed as ways of improving the health and well-being of all people at the expense (at least initially) of automobile manufacturers.

It is remarkable that policies of this sort are ever adopted, and in fact many are not. After all, the American political system creates many opportunities for checking and blocking the actions of others. The Founders deliberately arranged things so that it would be difficult to pass a new law; a determined minority therefore has an excellent chance of blocking a new policy. And any organized group that fears the loss of some privilege or the imposition

of some burden will become a very determined minority indeed. The opponent has every incentive to work hard; the large group of prospective beneficiaries may be unconvinced of the benefit or regard it as too small to be worth fighting for.

Nonetheless, policies with distributed benefits and concentrated costs are in fact adopted, and in recent decades they have been adopted with increasing frequency. A key element in the adoption of such policies has been the work of people who act on behalf of the unorganized or indifferent majority. Such people, called **policy entrepreneurs**, are those both in and out of government who find ways of pulling together a legislative majority on behalf of interests that are not well represented in the government. These policy entrepreneurs may or may not represent the interests and wishes of the public at large, but they do have the ability to dramatize an issue in a convincing manner. Ralph Nader is perhaps the best-known example of a policy entrepreneur, or as he might describe himself, a "consumer advocate." But there are other examples from both ends of the political spectrum, conservative as well as liberal.

Entrepreneurial politics can occur without the leadership of a policy entrepreneur if voters or legislators in large numbers suddenly become disgruntled by the high cost of some benefit that a group is receiving (or become convinced of the urgent need for a new policy to impose such costs). For example, voters may not care about government programs that benefit the oil industry when gasoline costs only one dollar a gallon, but they might care very much when the price rises to three dollars a gallon, even if the government benefits had nothing to do with the price increase. By the same token, legislators may not worry much about the effects of smog in the air until a lot of people develop burning eyes and runny noses during an especially severe smog attack.

In fact, most legislators did not worry very much about toxic or hazardous wastes until 1977, when the Love Canal dump site near Buffalo, New York, spilled some of its toxic waste into the backyards of an adjacent residential neighborhood and people were forced to leave their homes. Five years later, anyone who had forgotten about the Love Canal was reminded of it when the town of Times Beach, Missouri, had to be permanently evacuated because it had become contaminated with the chemical dioxin. Only then did it become widely known that more than 30,000 toxic waste sites nationwide posed public safety risks. The Superfund program was born in 1980 of the political pressure that developed in the wake of these and other highly publicized tales of toxic waste dangers. Superfund was intended to force industries to clean up their own toxic waste sites. It also authorized the Environmental Protection Agency (EPA) to act speedily, with or without cooperation from industries, in identifying and cleaning up any sites that posed a large or imminent danger.

policy entrepreneurs
Activists in or out of government who pull together a political majority on behalf of unorganized interests.

Superfund suffered a number of political and administrative problems, and only a few of the 1,300 sites initially targeted by the EPA had been cleaned up a dozen years after the program went into effect.[25] Regardless, Superfund is a good illustration of entrepreneurial politics in action. Special taxes on once largely unregulated oil and chemical companies funded the program. These companies once enjoyed special tax breaks, but as the politics of the issue changed, they were forced to shoulder special tax burdens. In effect, the politics of the issue changed from client politics to entrepreneurial politics.

Policy Dynamics: Inside/Outside the Box

Superfund also thereby illustrates how dynamic the politics of policymaking can be. Once an issue makes its way on to the political agenda, the politics of the issue can remain stable, change a little or a lot, and change very slowly or quite suddenly. And policy issues can "migrate" from one type of politics (and one of the four boxes) to another.

By the same token, the policy dynamics of some issues are simply harder to categorize and explain than the policy dynamics of others. For instance, in the mid-2000s, 13 states amended their state constitutions to prohibit or further restrict gay marriage. In 2008, California voters approved a ballot measure, Proposition 8, banning gay marriage. But virtually all of these policies were enacted at a time when popular support for gay rights including same-sex marriage was rising. In 2001, by a margin of 57 percent to 35 percent, Americans opposed gay marriage; but, by 2013, a 49 percent to 44 percent plurality favored gay marriage. In 2012, President Barack Obama, having previously ordered an end to the ban on gays in the U.S. military, publicly declared his support for legalizing same-sex marriage. Surveys indicated that the only groups still harboring wide majorities opposed to same-sex marriage were evangelical Christians and adults born in 1945 or earlier.[26] In 2013, the U.S. Supreme Court struck down a 1996 law that allowed the federal government to discriminate against same-sex married couples, and two years later, the Court declared that same-sex marriages are constitutional.

So, how best can we categorize or explain the politics of this issue? Which type of politics—majoritarian, client, interest group, or entrepreneurial—were most

important to policymaking? Why did state laws become more restrictive at the very time that both mass public opinion and elite opinion were trending toward greater acceptance? Do the still-unfolding policy dynamics of this issue fit neatly (or fit at all) in any of our four boxes? Start thinking about these questions; we revisit them in Chapters 3 and 6.

Finally, while the politics of some issues do fit neatly into one box or another, the politics of other issues reflect several different types of politics.

For example, most major pieces of social legislation reflect *majoritarian* politics—Social Security remains a prime example—but health care issues often have played out within all four boxes—majoritarian, client, interest group, and entrepreneurial—at once. This was certainly true of the politics of the Patient Protection and Affordable Care Act of 2010, better known as "Obamacare." As we illustrate in our first Policy Dynamics: Inside/Outside the Box feature, the perceived costs and benefits of the Obama plan affected the political coalitions that formed around it and involved all four types of politics.

Understanding Politics

Whether pondering one's own positions on given issues, attempting to generalize about the politics of different policy issues, or tackling questions about American government, institutions, and policies, an astute student will soon come to know what Aristotle meant when he wrote that it is "the mark of the educated person to look for precision in each class of things just so far as the nature of the subject admits."[27]

Ideally, political scientists ought to be able to give clear answers, amply supported by evidence, to the questions we have posed about American democracy, starting with "who governs?" In reality they can (at best) give partial, contingent, and controversial answers. The reason is to be found in the nature of our subject. Unlike economists, who assume that people have more or less stable preferences and can compare ways of satisfying those preferences by looking at the relative prices of various goods and services, political scientists are interested in how preferences are formed, especially for those kinds of services, such as national defense or pollution control, that cannot be evaluated chiefly in terms of monetary costs.

Understanding preferences is vital to understanding power. Who did what in government is not hard to find out, but who wielded power—that is, who made a difference in the outcome and for what reason—is much harder to discover. *Power* is a word that conjures up images of deals, bribes, power plays, and arm-twisting. In fact, most power exists because of shared understanding, common friendships, communal or organizational loyalties, and different degrees of prestige. These are hard to identify and almost impossible to quantify.

Nor can the distribution of political power be inferred simply by knowing what laws are on the books or what administrative actions have been taken. The enactment of a consumer protection law does not mean that consumers are powerful, any more than the absence of such a law means that corporations are powerful. The passage of such a law could reflect an aroused public opinion, the lobbying of a small group claiming to speak for consumers, the ambitions of a senator, or the intrigues of one business firm seeking to gain a competitive advantage over another. A close analysis of what the law entails and how it was passed and administered is necessary before much of anything can be concluded.

This book avoids sweeping claims that we have an "imperial" presidency (or an impotent one), an "obstructionist" Congress (or an innovative one), or "captured" regulatory agencies. Such labels do an injustice to the different roles that presidents, members of Congress, and administrators play in different kinds of issues and in different historical periods.

The view taken in this book is that judgments about institutions and interests can be made only after one has seen how they behave on a variety of important issues or potential issues, such as economic policy, the regulation of business, social welfare, civil rights and liberties, and foreign and military affairs. The policies adopted or blocked, the groups heeded or ignored, the values embraced or rejected—these constitute the raw material from which one can fashion an answer to the central questions we have asked: Who governs, and to what ends?

The way in which our institutions of government handle social welfare, for example, differs from the way other democratic nations handle it, and it differs as well

Lisa Lake/Getty Images

IMAGE 1-5 When the Trump White House and the Republican-led Congress tried to repeal the Affordable Care Act in 2017, many protestors urged legislators to keep the law intact.

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

Obamacare: All Four Boxes?

When Medicare was enacted in 1965, Democrats in the House and Senate voted for it by a wide margin, but roughly half of the Republicans in each chamber also supported it. But the 2010 health care bill was passed without any Republican support. In other words, the 1965 Medicare bill that President Lyndon Johnson signed into law had broad bipartisan backing, but the 2010 health care bill that President Obama signed into law had none. Using the model of the policy process explained in this chapter, here is a summary of how the costs and benefits of the Obama plan affected the political coalitions that formed around health care.

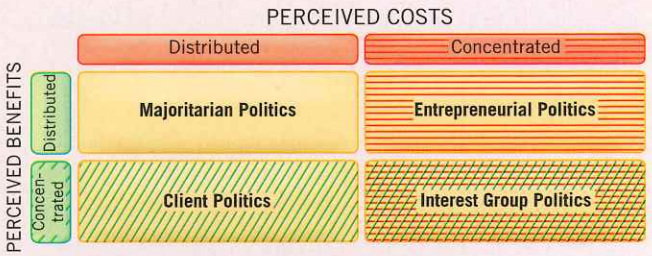
Majoritarian Politics: The bill was opposed by a majority of Americans for a variety of reasons. Many thought it too expensive ($940 billion over 10 years) or worried about the government regulations the law contained.

Client Politics: Drug manufacturers looked forward to having many new customers as more people owned health insurance. To get this benefit, the pharmaceutical companies agreed to pay up to $85 billion in higher taxes. Many hospitals thought they would be helped by having more patients who could pay their bills with health insurance.

Interest Group Politics: Labor unions wanted health care coverage, but business firms were upset by the higher taxes and fees they would have to pay. Poorer people liked it, but those earning $200,000 a year or more would see their taxes escalate. Older adults on Medicare and many doctors worried that the new law promised to cut payments to physicians, but the American Medical Association and the AARP (the largest organization representing senior citizens) endorsed the law.

Policy Entrepreneurs: In early 2010, the winners were President Obama and the Democratic leaders in the House who got a bill passed over popular and interest group opposition. In the latter half of 2010, however, the winners were the Republicans who opposed "Obamacare" and used the issue on the way to sweeping GOP* victories in the November 2010 elections. When the 112th Congress was seated in 2011, Republicans in the House made good on a pledge to vote for the outright repeal of the new law (the symbolic bill died in the Senate), and several state attorneys general challenged the law's constitutionality in the federal courts (focusing mainly on the provision mandating that individuals purchase health insurance). In 2012, the U.S. Supreme Court upheld the constitutionality of the law's individual mandate, but ruled against certain other provisions of the law, including ones pertaining to changes in the federal–state program known as Medicaid, a program that was created in 1965 alongside Medicare (see Chapter 17).

The Medicare law and the new health care law mobilized very different coalitions, in part because, between 1965 and 2010, Congress became a far more polarized institution (see Chapter 13). The Obamacare policy was based on a combination of majoritarian, client, interest group, and entrepreneurial politics. The politics of the issue was neither inside nor outside any one of the four boxes, but spread across all four.



▶ **PRACTICE POLITICAL SCIENCE** Describe a contemporary health care issue that Congress is debating. Choose one of the four boxes of politics (Majoritarian Politics, Client Politics, Interest Group Politics, Policy Entrepreneurs) and explain how the political coalitions represented within this box have changed or remained the same since the passage of the 2010 health care bill that President Obama signed into law.

*"GOP" refers to "Grand Old Party," a widely used synonym for the Republican Party.

from the way our own institutions once treated it. The description of our institutions in Part III will therefore include not only an account of how they work today but also a brief historical background on their workings and a comparison with similar institutions in other countries. We tend to assume that how we do things today is the only way they could possibly be done. In fact, a government can operate in other ways, based on some measure of popular rule. History, tradition, and belief weigh heavily on all that we do.

Although political change is not always accompanied by changes in public laws, the policy process is arguably one of the best barometers of changes in who governs. Our way of classifying and explaining the politics of different policy issues has been developed, refined, and tested over more than four decades (longer than most of our readers have been alive!). Our own students and others have valued it mainly because they have found it helps to answer such questions about who governs: How do political issues get on the public

WHAT WOULD YOU DO?

Will You Favor or Oppose the Ban on Initiatives?

To: *Governor Lucy Weber*
From: *Professor Ili Grace Sousa*
Subject: *Initiative repeal*

You have supported several successful initiatives (life imprisonment for thrice-convicted violent felons, property tax limits), but you have never stated your views on the actual initiative process, and the repeal proposal likely will surface during tomorrow's news briefing.

To Consider:

A report released yesterday and signed by more than 100 law and public policy professors statewide urges that the state's constitution be amended to ban legislation by initiative. The initiative allows state voters to place legislative measures directly on the ballot by getting enough signatures. The initiative "has led to disastrous policy decisions on taxes, crime, and other issues," the report declared.

Arguments for:

1. Ours is a representative, not a direct, democracy in which voters elect leaders and elected leaders make policy decisions subject to review by the courts.
2. Voters often are neither rational nor respectful of constitutional rights. For example, many people demand both lower taxes and more government services, and polls find that most voters would prohibit people with certain views from speaking and deprive all persons accused of a violent crime from getting out on bail while awaiting trial.
3. Over the past 100 years, hundreds of statewide ballot initiatives have been passed in 24 states. Rather than giving power to the people, special interest groups have spent billions of dollars manipulating voters to pass initiatives that enrich or benefit their own interests, not those of the public at large.

Arguments against:

1. When elected officials fail to respond to persistent public majorities favoring tougher crime measures, lower property taxes, and other popular concerns, direct democracy via the initiative is legitimate, and the courts can still review the law.
2. More Americans than ever have college degrees and easy access to information about public affairs. Studies find that most average citizens are able to figure out which candidates, parties, or advocacy groups come closest to supporting their own economic interests and personal values.
3. All told, the 24 states that passed laws by initiative also passed thousands more laws by the regular legislative process (among the tens of thousands of bills they considered). Studies find that special interest groups are severely limited in their ability to pass new laws by initiative, whereas citizens' groups with broad-based public support are behind most initiatives that pass.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Favor ban ☐ Oppose ban

agenda in the first place? How, for example, did sexual harassment, which was hardly ever discussed or debated by Congress, burst onto the public agenda? Once on the agenda, how does the politics of issues like income security for older Americans—for example, the politics of Social Security, a program that has been on the federal books since 1935 (see Chapter 17)—change over time? And if, today, one cares about expanding civil liberties (see Chapter 5) or protecting civil rights (see Chapter 6), what political obstacles and opportunities will one likely face? What role will public opinion, organized interest groups, the media, the courts, political parties, and other institutions likely play in frustrating or fostering one's particular policy preferences, whatever they might be?

Peek ahead, if you wish, but understand that the place to begin a search for how power is distributed in national politics and what purposes that power serves is with the founding of the federal government in 1787: the Constitutional Convention and the events leading up to it. Though the decisions of that time were not made by philosophers or professors, the practical men who made them had a philosophic and professorial cast of mind, and thus they left behind a fairly explicit account of what values they sought to protect and what arrangements they thought ought to be made for the allocation of political power.

LEARNING OBJECTIVES

1-1 Explain how politics drives democracy.

Politics is the activity by which an issue is agitated or settled. Politics occurs because people disagree and the disagreement must be managed. Disagreements over many political issues, including disputes over government budgets and finances, are often at their essence disagreements over what government should or should not do at all. Democracy can mean either that everyone votes on all government issues (direct or participatory democracy) or that the people elect representatives to make most of these decisions (representative democracy).

1-2 Discuss five views of how political power is distributed in the United States.

Some believe that political power in America is monopolized by wealthy business leaders, by other powerful elites, or by entrenched government bureaucrats. Others believe that political resources such as money, prestige, expertise, organizational position, and access to the mass media are so widely dispersed in American society, and the governmental institutions and offices in which power may be exercised so numerous and varied, that no single group truly has all or most political power. In this view, political power in America is distributed more or less widely. Still others suggest that morally impassioned leaders have at times been deeply influential in our politics. No one, however, argues that political resources are distributed equally in America.

1-3 Explain why "who governs?" and "to what ends?" are fundamental questions in American politics.

The political agenda consists of those issues that people with decision-making authority believe require government action. The behavior of groups, the workings of institutions, the media, and the actions of state governments have all figured in the expansion of America's political agenda, and understanding how those actors have expanded the agenda—that is, "who governs?"—is necessary to understand the nature of American politics. Similarly, the great shifts in the character of American government—its size, scope, institutional arrangements, and the direction of its policies—have reflected complex and sometimes sudden changes in elite or mass beliefs about what government is supposed to do—that is, "to what ends?" The federal government now has policies on street crime, the environment, homeland security, and many other issues that were not on the federal agenda a half-century (or, in the case of homeland security, just 15 years) ago.

1-4 Summarize the key concepts for classifying the politics of different policy issues.

One way to classify and explain the politics of different issues is in relation to the perceived costs and benefits of given policies and how narrowly concentrated (limited to a relatively small number of identifiable citizens) or widely

distributed (spread over many, most, or all citizens) their perceived costs and benefits are. This approach gives us four types of politics: *majoritarian* (widely distributed costs and benefits), *interest group* (narrowly concentrated costs and benefits), *client* (widely distributed costs and narrowly concentrated benefits), and *entrepreneurial* (narrowly concentrated costs and widely distributed benefits). Different types of coalitions are associated with each type of politics. Issues can sometimes "migrate" from one type of politics to another. Some policy dynamics involve more than one type of politics. And the politics of some issues is harder to classify and explain than the politics of others.

TO LEARN MORE

Huntington, Samuel P. *American Politics: The Promise of Disharmony*. Cambridge, MA: Harvard University Press, 1981. A fascinating analysis of the American political experience as shaped by recurring "creedal passion" periods.

Marx, Karl, and Friedrich Engels. "The Manifesto of the Communist Party." In *The Marx-Engels Reader*, 2nd ed. Edited by Robert C. Tucker, 469–500. New York: Norton, 1978. The classic and historic statement suggesting that government is a mere instrument of the economic elite (wealthy capitalists in the modern world).

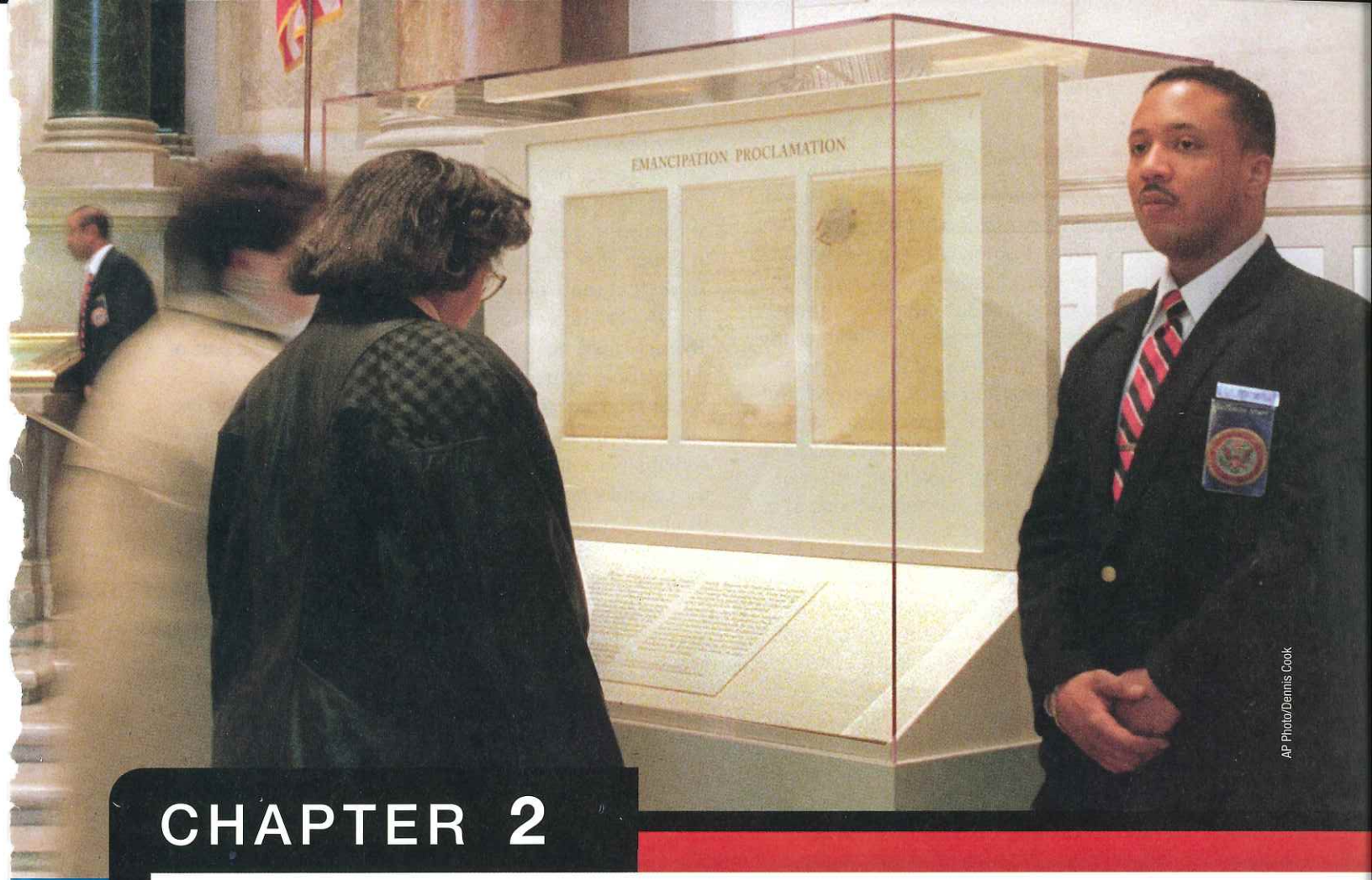
Meyerson, Martin, and Edward C. Banfield. *Politics, Planning, and the Public Interest*. New York: Free Press, 1955. An understanding of issues and politics comparable to the approach adopted in this book.

Schumpeter, Joseph A. *Capitalism, Socialism, and Democracy*, 3rd ed. New York: Harper Torchbooks, 1950 (chaps. 20–23). A lucid statement of the theory of representative democracy and how it differs from participatory democracy.

Truman, David B. *The Governmental Process: Political Interests and Public Opinion*. New York: Knopf, 1951. A pluralist interpretation of American politics.

Weber, Max. *Max Weber: Essays in Sociology*. Translated and edited by H. H. Gerth and C. Wright Mills. London: Routledge & Kegan Paul, 1948 (chap. 8). A theory of bureaucracy and its power.

Wilson, James Q. *Political Organizations*. New York: Basic Books, 1973. It is from a theory originally developed in this treatise that the four-box model of how to classify and explain the politics of different issues that is presented in this chapter was derived.



AP Photo/Dennis Cook

CHAPTER 2

The Constitution

KEY OBJECTIVES OF THIS CHAPTER

- *Representative democracy is shaped by its institutions, policies, events, and debates.*
- *Democratic ideals are reflected in U.S. founding documents.*
- *Federalist and Anti-Federalist views on the central government and democracy can be understood by looking at U.S. founding documents.*

KEY TAKEAWAYS FROM THIS CHAPTER

- The Constitution along with other founding documents reflects the tension between pluralist and elite participatory models.
- The Declaration of Independence provides a foundation for popular sovereignty.
- The U.S. Constitution provides the blueprint for a unique form of political democracy.

THEN When the Constitutional Convention was held in Philadelphia in 1787, its members were all white men. They were not chosen by popular election, and a few famous men, such as Patrick Henry of Virginia, refused to attend. One state, Rhode Island, sent no delegates at all. They assembled in secret and there was no press coverage. The delegates met to remedy the defects of the Articles of Confederation, under which the rebellious colonies had been governed; but instead of fixing the Articles, they wrote an entirely new constitution. Then they publicized it and said that it would go into effect once it had been ratified—not by state legislatures, but by popular conventions in at least nine states.

NOW Suppose you think we should have a new constitutional convention to remedy what you and others think are defects in the present document. As you will see later in this chapter, opinions about how our Constitution might be improved are quite diverse. Some critics want the Constitution to create an American version of the parliamentary system of government one finds in the United Kingdom. Others would rather that it weaken the federal government—for example, by requiring that the budget be balanced or setting a limit on tax revenue each year.

Now try to imagine your answers to these questions: How would delegates be picked? How many would there be? Is there any way to limit what the new convention does? Should the meeting be covered by live television, and should the delegates be free to send emails and Twitter messages to outsiders?

2-1 The Problem of Liberty

The goal of the American Revolution was liberty. It was not the first revolution with that object (nor was it the last), but it was perhaps the clearest case of a people violently altering the political order, simply to protect their liberties. Subsequent revolutions had more complicated or utterly different objectives. The French Revolution in 1789 sought not only liberty, but "equality and fraternity." The Russian Revolution (1917) and the Chinese Revolution (culminating in 1949) chiefly sought equality and were scarcely concerned with liberty as we understand it.

In signing the Declaration of Independence in 1776, the American colonists sought to protect the traditional liberties to which they thought they were entitled as British subjects. These liberties included the right to bring their legal cases before judges who were truly independent, rather than subordinate to the king; to be free of the burden of having British troops quartered in their homes; to engage in trade without burdensome restrictions; and, of course, to pay no taxes levied by a British Parliament in which they had no direct representation. During the 10 years or more of agitation and argument leading up to the War for Independence, most colonists believed their liberties could be protected while they remained a part of the British Empire.

Slowly but surely opinion shifted. By the time war broke out in 1775, a large number of colonists (though perhaps not a majority) had reached the conclusion that the colonies would have to become independent of Great Britain if their liberties were to be assured. The colonists had many reasons for regarding independence as the only solution, but one is especially important: they no longer had confidence in the English constitution. This constitution was not a single document, but rather a collection of laws, charters, and traditional understandings that proclaimed the liberties of British subjects. In the eyes of the colonists, these liberties were violated regularly, despite their constitutional protection. Clearly, then, the English constitution was an inadequate check on the abuses of political power. The revolutionary leaders sought an explanation of the constitution's insufficiency, and they found it in human nature.

The Colonial Mind

"A lust for domination is more or less natural to all parties," one colonist wrote.[1] Men will seek power, many colonists believed, because they are ambitious, greedy, and easily corrupted. John Adams denounced the "luxury, effeminacy, and venality" of English politics; Patrick Henry spoke scathingly of the "corrupt House of Commons"; and Alexander Hamilton described England as "an old, wrinkled, withered, worn-out hag."[2] This was in part flamboyant rhetoric designed to whip up enthusiasm for the conflict, but it was also deeply revealing of the colonial mindset. Their belief that English politicians—and, by implication, most politicians in general—tended to be corrupt was the colonists' explanation of why the English constitution was not an adequate guarantee of the liberty of the citizens. This opinion was to persist and, as we shall see, profoundly affect the way the Americans went about designing their own governments.

The liberties the colonists fought to protect were, they thought, widely understood. They were based not on the generosity of the king or the language of statutes but on a "higher law" embodying "natural rights" that were ordained by God, discoverable in nature and history, and essential to human progress. These rights, John Dickinson

wrote, are "born with us; exist with us; and cannot be taken away from us by any human power."[3] There was general agreement that the essential rights included life, liberty, and property long before Thomas Jefferson wrote them into the Declaration of Independence. (Jefferson changed "property" to "the pursuit of happiness," but almost everybody else went on talking about property.)

This emphasis on property did not mean the American Revolution was thought up by the rich and wellborn to protect their interests or that there was a struggle between property owners and the propertyless. In late-18th-century America, most people (except the black slaves) had property of some kind. The overwhelming majority of citizens were self-employed—as farmers or artisans—and rather few people benefited financially by gaining independence from England. Taxes were higher during and after the war than they were before it, trade was disrupted by the conflict, and debts mounted perilously as various expedients were invented to pay for the struggle. There were, of course, war profiteers and those who tried to manipulate the currency to their own advantage, but most Americans at the time of the war saw the conflict in terms of political rather than economic issues. It was a war of ideology.

We all recognize the glowing language with which Jefferson set out the case for independence in the second paragraph of the Declaration:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, having its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

unalienable *A human right based on nature or God.*

What almost no one recalls, but which are an essential part of the Declaration, are the next 27 paragraphs, in which Jefferson listed, item by item, the specific complaints the colonists had against George III and his ministers. None of these items focused on social or economic conditions in the colonies; all spoke instead of specific violations of political liberties. The Declaration was in essence a lawyer's brief, prefaced by a stirring philosophical claim that the rights being violated were **unalienable**—that is, based on nature and Providence, and not on the whims or preferences of people. Jefferson, in his original draft, added another complaint—that the king had allowed the slave trade to continue *and* was inciting slaves to revolt against their masters. Congress, faced with so contradictory a charge, instead decided to include a muted reference to slave insurrections and omit all reference to the slave trade.

The Real Revolution

The Revolution was more than the War of Independence. It began before the war, continued after it, and involved

De Agostini/Dea Picture Library/Getty Images

IMAGE 2-1 Signing the Declaration of Independence, painted by John Trumbull.

more than driving out the British army by force. The *real* Revolution, as John Adams explained afterward in a letter to a friend, was the "radical change in the principles, opinions, sentiments, and affections of the people."[4] This radical change had to do with a new vision of what could make political authority legitimate and personal liberties secure. Government by royal prerogative was rejected; instead, legitimate government would require the consent of the governed. Political power could not be exercised on the basis of tradition, but only as a result of a direct grant of power contained in a written constitution. Human liberty existed before government was organized, and government must respect that liberty. The legislative branch of government, in which the people were directly represented, should be superior to the executive branch.

These were indeed revolutionary ideas. No government at the time had been organized on the basis of these principles. To the colonists, such notions were not empty words, but rules to be put into immediate practice. In 1776, eight states adopted written constitutions. Within a few years, every former colony had adopted one except Connecticut and Rhode Island, two states that continued to rely on their colonial charters. Most state constitutions had detailed bills of rights defining personal liberties, and most placed the highest political power in the hands of elected representatives.

Written constitutions, representatives, and bills of rights are so familiar to us now that we don't realize how bold and unprecedented those innovations were in 1776. Indeed, many Americans did not think they would succeed; such arrangements either would be so strong that they would threaten liberty or so weak that they would permit chaos.

The 11 years that elapsed between the Declaration of Independence and the signing of the Constitution in 1787 were years of turmoil, uncertainty, and fear. George Washington headed a bitter, protracted war effort without anything resembling a strong national government to support him. The supply and financing of his army were based on a series of hasty improvisations, most

FIGURE 2.1 **North America in 1787**

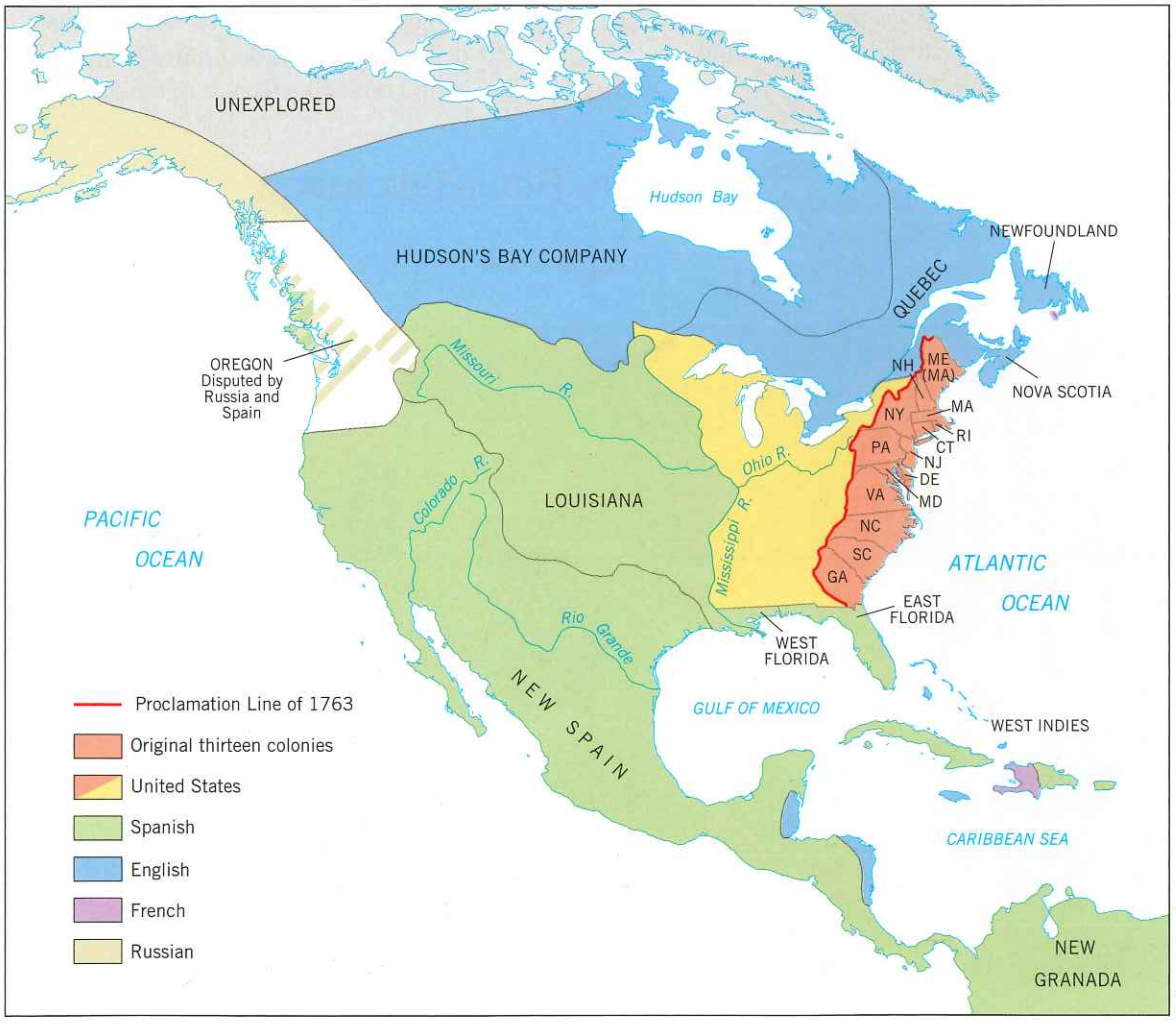
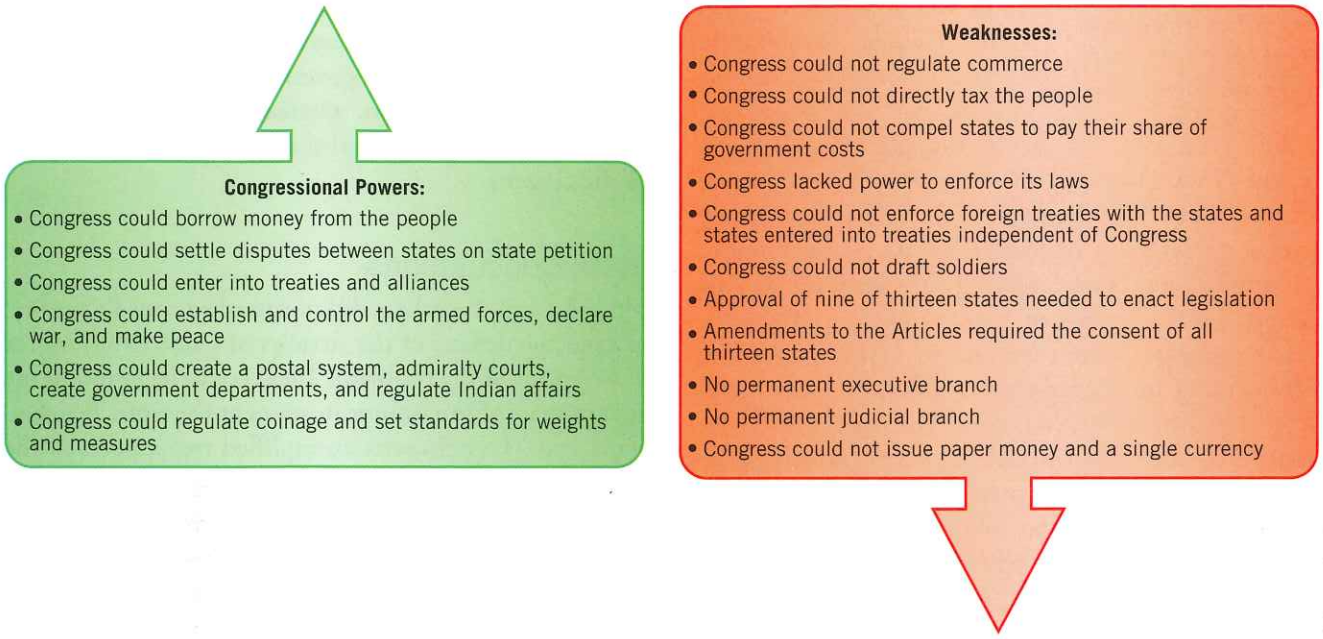


FIGURE 2.2 **Articles of Confederation**



administered badly and few supported adequately by the fiercely independent states. When peace came, many parts of the nation were a shambles. At least a quarter of New York City was in ruins, and many other communities were nearly devastated. Though the British lost the war, they still were powerful on the North American continent, with an army available in Canada (where many Americans loyal to Britain had fled) and a large navy at sea. Spain claimed the Mississippi River Valley and occupied what are now Florida and California. Men who had left their farms to fight came back to discover themselves in debt with no money and heavy taxes. The paper money printed to finance the war was now virtually worthless.

Weaknesses of the Confederation

The 13 states had formed only a faint semblance of a national government with which to bring order to the nation. The **Articles of Confederation**, which went into effect in 1781, created little more than a "league of friendship" that could not levy taxes or regulate commerce. Each state retained its sovereignty and independence, each state (regardless of size) had one vote in Congress, 9 (of 13) votes were required to pass any measure, and the delegates who cast these votes were picked and paid for by the state legislatures. Congress did have the power to make peace, and thus it was able to ratify a treaty with England in 1783. It could coin money, but there was precious little to coin; it could appoint key army officers, but the army was small and depended for support on independent state militias; it was allowed to run the post office, then, as now, a thankless job that no one else wanted. In 1785, John Hancock was elected to the meaningless office of "president" under the Articles and never showed up to take the job. Several states claimed the unsettled lands in the West, and they occasionally pressed those claims with guns. Pennsylvania and Virginia went to war near Pittsburgh, and Vermont threatened to become part of Canada. There was no national judicial system to settle these or other claims among the states. To amend the Articles of Confederation, all 13 states had to agree.

Articles of Confederation *A weak constitution that governed America during the Revolutionary War.*

IMAGE 2-2 In 1775, British and American troops exchanged fire in Lexington, Massachusetts, the first battle of the War of Independence.

Constitutional Convention *A meeting in Philadelphia in 1787 that produced a new constitution.*

Many of the leaders of the Revolution, such as George Washington and Alexander Hamilton, believed a stronger national government was essential. They lamented the disruption of commerce and travel caused by the quarrelsome states and deeply feared the possibility of foreign military intervention, with England or France playing one state off against another. A small group of men, conferring at Washington's home at Mount Vernon in 1785, decided to call a meeting to discuss trade regulation. That meeting, held at Annapolis, Maryland, in September 1786, was not well attended (no delegates arrived from New England), and so another meeting, this one in Philadelphia, was called for the following spring—in May 1787—to consider ways of remedying the defects of the Confederation.

2-2 The Constitutional Convention

The delegates assembled at Philadelphia at the **Constitutional Convention**, for what was advertised (and authorized by Congress) as a meeting to revise the Articles; they adjourned four months later, having written a wholly new constitution. When they met, they were keenly aware of the problems of the confederacy, but far from agreement as to what should be done about those problems. The protection of life, liberty, and property was their objective in 1787, as it had been in 1776, but they had no accepted political theory that would tell them what kind of national government, if any, would serve that goal.

The Lessons of Experience

They had read ancient and modern political history, only to learn that nothing seemed to work. James Madison spent a good part of 1786 studying books sent to him by Thomas Jefferson, then in Paris, in hopes of finding some model for a workable American republic. He took careful notes on various confederacies in ancient Greece and on the more modern confederacy of the United Netherlands. He reviewed the history of Switzerland and Poland and the ups and downs of the Roman republic. He concluded that there was no model; as he later put it in one of the *Federalist* papers, history consists only of beacon lights "which give warning of the course to be shunned, without pointing out that which ought to be pursued."[5] The problem seemed to be that confederacies were too weak to govern and tended to collapse from internal dissension, whereas all stronger forms of government were so powerful as to trample the liberties of the citizens.

State Constitutions

Madison and the others did not need to consult history, or even the defects of the Articles of Confederation, for illustrations of the problem. These could be found in the government of the American states at the time. Pennsylvania and Massachusetts exemplified two aspects of the problem.

The Pennsylvania constitution, adopted in 1776, created the most radically democratic of the new state regimes. All power was given to a one-house (unicameral) legislature, the Assembly, the members of which were elected annually for one-year terms. No legislator could serve more than four years. There was no governor or president, only an Executive Council that had few powers. Thomas Paine, whose pamphlets had helped precipitate the break with England, thought the Pennsylvania constitution was the best in America, and in France philosophers hailed it as the very embodiment of the principle of rule by the people. Though popular in France, it was a good deal less popular in Philadelphia. The Assembly disenfranchised the Quakers, persecuted conscientious objectors to the war, ignored the requirement of trial by juries, and manipulated the judiciary.[6] To Madison and his friends, the Pennsylvania constitution demonstrated how a government, though democratic, could be tyrannical as a result of concentrating all powers into one set of hands.

The Massachusetts constitution, adopted in 1780, was a good deal less democratic. There was a clear separation of powers among the various branches of government, the directly elected governor could veto acts of the legislature, and judges served for life. Both voters and elected officials had to be property owners; the governor, in fact, had to own at least £1,000 worth of property. The principal officeholders had to swear they were Christians.

Shays's Rebellion

But if the government of Pennsylvania was thought too strong, that of Massachusetts seemed too weak despite its "conservative" features. In January 1787, a group of

GraphicaArtis/Getty Images

IMAGE 2-3 The Framers drafted the Constitution in Philadelphia during the summer of 1787.

ex–Revolutionary War soldiers and officers, plagued by debts and high taxes and fearful of losing their property to creditors and tax collectors, forcibly prevented the courts in western Massachusetts from sitting. This became known as **Shays's Rebellion**, after one of the officers, Daniel Shays. The governor of Massachusetts asked the Continental Congress to send troops to suppress the rebellion, but it could not raise the money or the manpower. Then he turned to his own state militia, but discovered he did not have one. In desperation, private funds were collected to hire a volunteer army, which marched on Springfield and, with the firing of a few shots, dispersed the rebels, who fled into neighboring states.

Shays's Rebellion, occurring between the aborted Annapolis and the coming Philadelphia Conventions, had a powerful effect on opinion. Delegates who might have been reluctant to attend the Philadelphia meeting, especially those from New England, were galvanized by the fear that state governments were about to collapse from internal dissension. George Washington wrote a friend despairingly: "For God's sake, if they [the rebels] have real grievances, redress them; if they have not, employ the force of government against them at once."[7] Thomas Jefferson, living in Paris, took a more detached view: "A little rebellion now and then is a good thing," he wrote. "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."[8] Though Jefferson's detachment might be explained by the fact that he was in Paris and not in Springfield, others, like Governor George Clinton of New York, shared the view that no strong central government was required. (Whether Clinton would have agreed about the virtues of spilled blood, especially his, is another matter.)

The Framers

Shays's Rebellion *A 1787 rebellion in which ex–Revolutionary War soldiers attempted to prevent foreclosures of farms as a result of high interest rates and taxes.*

The Philadelphia Convention attracted 55 delegates, of whom only about 30 participated regularly in the proceedings. One state, Rhode Island, refused to send anyone. The convention met during a miserably hot Philadelphia summer, with the delegates pledged to keep their deliberations secret. The talkative and party-loving Benjamin Franklin was often accompanied by other delegates to make sure that neither wine nor his delight in telling stories would lead him to divulge delicate secrets.

Those who attended were for the most part young (Hamilton was 30; Madison, 36) but experienced. Eight delegates had signed the Declaration of Independence, 7 had been governors, 34 were lawyers and reasonably well-to-do, a few were wealthy. They were not "intellectuals," but men of practical affairs. Thirty-nine had served in the ineffectual Congress of the Confederation; a third of all delegates were veterans of the Continental Army.

Some names made famous by the Revolution were conspicuously absent. Thomas Jefferson and John Adams were serving as ministers abroad; Samuel Adams was ill; Patrick Henry was chosen to attend but refused, commenting that he "smelled a rat in Philadelphia, tending toward monarchy."

The key men at the convention were an odd lot. George Washington was a very tall, athletic man who was the best horseman in Virginia and who impressed everyone with his dignity, despite decaying teeth and big eyes. James Madison was the very opposite: quite short with a frail body, and not much of an orator, but possessed of one of the best minds in the country. Benjamin Franklin, though old and ill, was the most famous American in the world as a scientist and writer, and always displayed shrewd judgment, at least when sober. Alexander Hamilton, the illegitimate son of a French woman and a Scottish merchant, had so strong a mind and so powerful a desire that he succeeded in everything he did, from being Washington's aide during the Revolution to serving as a splendid secretary of the treasury during Washington's presidency.

The convention produced not a revision of the Articles of Confederation, as it had been authorized to do, but instead a wholly new written constitution creating a true national government unlike any that had existed before. That document is today the world's oldest written national constitution. Those who wrote it were neither saints nor schemers, and the deliberations were not always lofty or philosophical—much hard bargaining, more than a little

Virginia Plan *Proposal to create a strong national government.*

confusion, and the accidents of personality and time helped shape the final product. The delegates were split on many issues—what powers should be given to a central government, how the states should be represented, what was to be done about slavery, the role of the people—each of which was resolved through compromise. The speeches of the delegates (known to us from the detailed notes kept by Madison) did not explicitly draw on political philosophy or quote from the writings of philosophers. Everyone present was quite familiar with the traditional arguments and, on the whole, well read in history. Though the leading political philosophers were only rarely mentioned, the debate was profoundly influenced by philosophical beliefs, some formed by the revolutionary experience and others by the 11-year attempt at self-government.

From the debates leading up to the Revolution, the delegates had drawn a commitment to liberty, which, despite the abuses sometimes committed in its name, they continued to share. Their defense of liberty as a natural right was derived from the writings of the 17th-century English philosopher John Locke.

Unlike his English rival, Thomas Hobbes, Locke did not believe that an all-powerful government was necessary or that democracy was impossible. Hobbes had argued that in any society without an absolute, supreme ruler there is bound to be ceaseless violent turmoil—a "war of all against all." Locke disagreed. In a "state of nature," Locke argued, all men cherish and seek to protect their life, liberty, and property. But in a state of nature—that is, a society without a government—the strong can use their liberty to deprive the weak of their own liberty. The instinct for self-preservation leads people to want a government that will prevent this exploitation. But if the government is not itself to deprive its subjects of their liberty, it must be limited. The chief limitation, he said, should derive from the fact that it is created, and governs, by the consent of the governed. People will not agree to be ruled by a government that threatens their liberty; therefore, the government to which they freely choose to submit themselves must be a limited government designed to protect liberty.[9]

The Pennsylvania experience as well as the history of British government led the Framers to doubt whether popular consent alone would be a sufficient guarantor of liberty. A popular government may prove too weak (as in Massachusetts) to prevent one faction from abusing another, or a popular majority can be tyrannical (as in Pennsylvania). In fact, the tyranny of the majority can be an even graver threat than rule by the few. In the former case, the individual may have no defenses—one lone person cannot count on the succor of public opinion or the possibility of popular revolt.

The problem, then, was a delicate one: how to devise a government strong enough to preserve order but not so strong that it would threaten liberty. The answer, the delegates believed, was not "democracy" as it was then understood. To many conservatives in the late 18th century, democracy meant mob rule—it meant, in short, Shays's Rebellion (or, if they had been candid about it, the Boston Tea Party). On the other hand, *aristocracy*—the rule of the few—was no solution, since the few were likely to be self-serving. Madison, writing later in the *Federalist* papers, put the problem this way:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[10]

Striking this balance could not be done, Madison believed, simply by writing a constitution that set limits on what government could do. The example of British rule over the colonies proved that laws and customs were inadequate checks on political power. As he expressed it, "A mere demarcation on parchment of the constitutional limits [of government] is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[11]

The Challenge

The resolution of political issues, great and small, often depends crucially on how the central question is phrased. The delegates came to Philadelphia in general agreement that the Articles of Confederation contained defects that ought to be remedied. Had they, after convening, decided to make their business that of listing these defects and debating alternative remedies for them, the document that emerged would in all likelihood have been very different from what in fact was adopted. But immediately after the convention had organized itself and chosen Washington to be its presiding officer, the Virginia delegation, led by Governor Edmund Randolph but relying heavily on the draftsmanship of James Madison, presented to the convention a comprehensive plan for a wholly new national government. The plan quickly became the major item of business at the meeting; it, and little else, was debated for the next two weeks.

The Virginia Plan

When the convention decided to make the **Virginia Plan** its agenda, it had fundamentally altered the nature of its task. The business at hand was not to be the Articles and

their defects, but rather how one should go about designing a true national government. The Virginia Plan called for a strong national union organized into three governmental branches: the legislative, executive, and judicial. The legislature was to comprise two houses, the first elected directly by the people and the second chosen by the first house from among the candidates nominated by state legislatures. The executive was to be chosen by the national legislature, as were members of a national judiciary. The executive and some members of the judiciary were to constitute a "council of revision" that could veto acts of the legislature; that veto, in turn, could be overridden by the legislature. There were other interesting details, but the key features of the Virginia Plan were two: (1) a national legislature would have supreme powers on all matters on which the separate states were not competent to act, as well as the power to veto any and all state laws; and (2) at least one house of the legislature would be elected directly by the people.

The New Jersey Plan

As the debate continued, the representatives of New Jersey and other small states became increasingly worried that the convention was going to write a constitution in which the states would be represented in both houses of Congress on the basis of population. If this happened, the smaller states feared they would always be outvoted by the larger ones, and so, with William Paterson of New Jersey as their spokesman, they introduced a new plan. The **New Jersey Plan** proposed to amend, not replace, the old Articles of Confederation. It enhanced the power of the national government (though not as much as the Virginia Plan), but it did so in a way that left the states' representation in Congress unchanged from the Articles—each state would have one vote. Thus not only would the interests of the small states be protected, but Congress itself would remain to a substantial degree the creature of state governments.

New Jersey Plan *Proposal to create a weak national government.*

Great Compromise *Plan to have a popularly elected House based on state population and a state-selected Senate, with two members for each state.*

If the New Jersey resolutions had been presented first and taken up as the major item of business, it is quite possible they would have become the framework for the document that finally emerged. But they were not. Offered after the convention had been discussing the Virginia Plan for two weeks, the resolutions encountered a reception very different from what they may have received if introduced earlier. The debate had the delegates already thinking in terms of a national government that was more independent of the states, and thus it had accustomed them to proposals that, under other circumstances, might have seemed quite radical. On June 19, the first decisive vote of the convention was taken: seven states preferred the Virginia Plan, three states the New Jersey Plan, and one state was split.

With the tide running in favor of a strong national government, the supporters of the small states had to shift their strategy. They now began to focus their efforts on ensuring that the small states could not be outvoted by the larger ones in Congress. One way was to have the members of the lower house elected by the state legislatures rather than the people, with each state getting the same number of seats rather than seats proportional to its population.

The debate was long and feelings ran high, so much so that Benjamin Franklin, the oldest delegate present (at 81 years of age), suggested that each day's meeting begin with a prayer. It turned out that the convention could not even agree on this: Hamilton is supposed to have objected that the convention did not need "foreign aid," and others pointed out that the group had no funds with which to hire a minister. And so the argument continued.

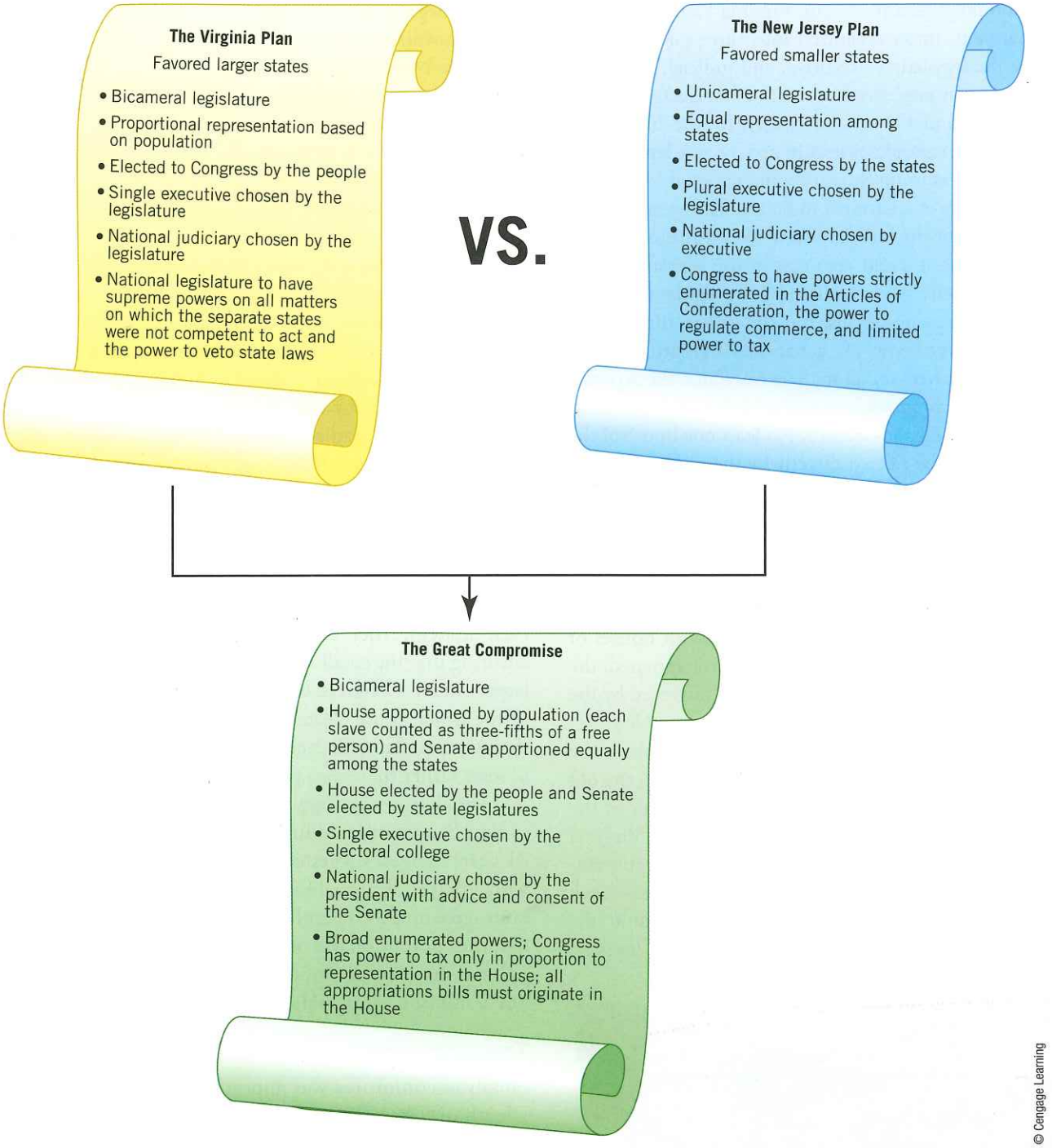
The Compromise

Finally, a committee was appointed to meet during the Fourth of July holidays to work out a compromise, and the convention adjourned to await its report. Little is known of what went on in that committee's session, though some were later to say that Franklin played a key role in hammering out the plan that finally emerged. That compromise, the most important reached at the convention, and later called the **Great Compromise** (or sometimes the Connecticut Compromise), was submitted to the full convention on July 5 and debated for another week and a half. The debate might have gone on even longer, but suddenly the hot weather moderated, and Monday, July 16, dawned cool and fresh after

Andre Jenny/Alamy

IMAGE 2-4 The Declaration of Independence and the U.S. Constitution were developed and signed in Independence Hall in Philadelphia.

FIGURE 2.3 **The Virginia Plan Versus the New Jersey Plan and the Great (Connecticut) Compromise**



a month of misery. On that day, the plan was adopted: five states were in favor, four were opposed, and two did not vote.* Thus, by the narrowest of margins, the structure of the national legislature was set as follows:

- A House of Representatives consisting initially of 65 members apportioned among the states roughly on the basis of population and elected by the people.
- A Senate consisting of two senators from each state to be chosen by the state legislatures.

The Great Compromise reconciled the interests of small and large states by allowing the former to predominate in the Senate and the latter in the House. This reconciliation was necessary to ensure that a strong national government would receive support from small as well as

*The states in favor were Connecticut, Delaware, Maryland, New Jersey, and North Carolina. Those opposed were Georgia, Pennsylvania, South Carolina, and Virginia. Massachusetts was split down the middle; the New York delegates had left the convention. New Hampshire and Rhode Island were absent.

large states. It represented major concessions on the part of several groups. Madison, for one, was deeply opposed to the idea of having the states equally represented in the Senate. He saw in that a way for the states to hamstring the national government and much preferred some measure of proportional representation in both houses. Delegates from other states worried that representation on the basis of population in the House of Representatives would enable the large states to dominate legislative affairs. Although the margin by which the compromise was accepted was razor-thin, it held firm. In time, most of the delegates from the dissenting states accepted it.

After the Great Compromise, many more issues had to be resolved, but by now a spirit of accommodation had developed. When one delegate proposed having Congress choose the president, another, James Wilson, proposed that the president be elected directly by the people. When neither side of that argument prevailed, a committee invented a plan for an "electoral college" that would choose the president. When some delegates wanted the president chosen for a life term, others proposed a seven-year term, and still others wanted the term limited to three years without eligibility for reelection. The convention settled on a four-year term with no bar to reelection. Some states wanted the Supreme Court picked by the Senate; others wanted it chosen by the president. They finally agreed to let the justices be nominated by the president and then confirmed by the Senate.

Finally, on July 26, the proposals that were already accepted, together with a bundle of unresolved issues, were handed over to the Committee of Detail, consisting of five delegates. This committee included Madison and Gouverneur Morris, who was to be the chief draftsman of the document that finally emerged. The committee hardly contented itself with mere "details," however. It inserted some new proposals and made changes in old ones, drawing for inspiration on existing state constitutions and the members' beliefs as to what the other delegates might accept. On August 6, the report—the first complete draft of the Constitution—was submitted to the convention. There it was debated item by item, revised, amended, and finally, on September 17, approved by all 12 states in attendance. (Not all *delegates* approved, however; three, including Edmund Randolph, who first submitted the Virginia Plan, refused to sign.)

2-3 Ratification Debates

A debate continues to rage over whether the Constitution created, or was even intended to create, a democratic government. The answer is complex.

The Framers did not intend to create a "pure democracy"—one in which the people rule directly. For one thing, the size of the country and the distances between settlements would have made that physically impossible. But more importantly, the Framers worried that a government in which all citizens directly participate, as in the New England town meeting, would be a government excessively subject to temporary popular passions and one in which minority rights would be insecure. They intended instead to create a **republic**, by which they meant a government in which a system of representation operates.

republic *A government in which elected representatives make the decisions.*

The Framers favored a republic over a direct democracy because they believed that government should mediate, not mirror, popular views and that elected officials should represent, not register, majority sentiments. They supposed that most citizens did not have the time, information, interest, and expertise to make reasonable choices among competing policy positions. They suspected that even highly educated people could be manipulated by demagogic leaders who played on their fears and prejudices. They knew that representative democracy often proceeds slowly and prevents sweeping changes in policy, but they cautioned that a government capable of doing great good quickly can also do great harm quickly. They agreed that majority opinion should figure in the enactment of many or most government policies, but they insisted that protection of civil rights and civil liberties—the right to a fair trial; the freedom of speech, press, and religion; or the right to vote itself—ought never to hinge on a popular vote. Above all, they embraced representative democracy because they saw it as a way of minimizing the chances that power would be abused either by a tyrannical popular majority or by self-serving officeholders.

The Framers were influenced by philosophers who had discussed democracy. Aristotle defined *democracy* as the rule of the many; that is, rule by ordinary people, most of whom would be poor. But democracy, he suggested, can easily decay into an oligarchy (rule of the rich) or a tyranny (the rule of a despot). To prevent this, a good political system must be a mixed regime, combining elements of democracy and oligarchy: most people will vote, but talented people will play a large role in managing affairs.

But, as we noted earlier in this chapter, the Framers were strongly influenced by John Locke, the 17th-century English writer who argued against powerful kings and in favor of popular dissent. In Locke's *Second Treatise of Civil Government* (1690), he argued that people can exist in a state of nature—that is, without any ruler—so long as they can find enough food to eat and a way to protect themselves. But food may not be plentiful and, as a result, life may be poor and difficult.

judicial review *The power of the courts to declare laws unconstitutional.*

federalism *Government authority shared by national and local governments.*

The human desire for self-preservation will lead people to want a government that will enable them to own property and thereby to increase their supply of food. But unlike his English rival, Thomas Hobbes, Locke argued for a government with defined and limited powers. In *Leviathan* (1651), Hobbes had argued that people live in a "war of all against all" and so an absolute, supreme ruler was essential to prevent civil war. Locke disagreed: People can get along with one another if they can securely own their farms and live off what they produce. But for that to happen a decent government must exist with the consent of the governed and be managed by majority rule. To prevent a majority from hurting a minority, Locke wrote, the government should separate its powers, with different and competing legislative and executive branches.

Thus, in 1787 the Framers tried to create a republic that would protect freedom and private property, a moderate regime that would simultaneously safeguard people and leave them alone. In designing that republic, the Framers chose, not without argument, to have the members of the House of Representatives elected directly by the people. Some delegates did not want to go even that far. Elbridge Gerry of Massachusetts, who refused to sign the Constitution, argued that though "the people do not want [i.e., lack] virtue," they often are the "dupes of pretended patriots." Roger Sherman of Connecticut agreed. But George Mason of Virginia and James Wilson of Pennsylvania carried the day when they argued that "no government could long subsist without the confidence of the people," and this required "drawing the most numerous branch of the legislature directly from the people."[12] Popular elections for the House were approved: six states were in favor, two opposed.

But though popular rule was to be one element of the new government, it was not to be the only one. State legislatures, not the people, would choose the senators; electors, not the people directly, would choose the president. As we have seen, without these arrangements there would have been no Constitution at all, for the small states adamantly opposed any proposal that would have given undue power to the large ones. And direct popular election of the president would clearly have made the populous states the dominant ones. In short, the Framers wished to observe the principle of majority rule, but they felt that, on the most important questions, two kinds of majorities were essential: a majority of the voters and a majority of the states.

The power of the Supreme Court to declare an act of Congress unconstitutional—**judicial review**—is also a way of limiting the power of popular majorities. It is not clear whether the Framers intended that there be judicial review, but there is little doubt that in the Framers' minds the fundamental law, the Constitution, had to be safeguarded against popular passions. They made the process for amending the Constitution easier than it had been under the Articles but still relatively difficult.

An amendment can be proposed either by a two-thirds vote of both houses of Congress *or* by a national convention called by Congress at the request of two-thirds of the states.† Once proposed, an amendment must be ratified by three-fourths of the states, either through their legislatures or through special ratifying conventions in each state. Twenty-seven amendments have survived this process, all of them proposed by Congress and all but one (the Twenty-First Amendment) ratified by state legislatures rather than state conventions.

In short, the answer to the question of whether the Constitution brought into being a democratic government is yes, if by *democracy* one means a system of representative government based on popular consent. The degree of that consent has changed since 1787, and the institutions embodying that consent can take different forms. One form, rejected in 1787, gives all political authority to one set of representatives, directly elected by the people. (That is the case, for example, in most parliamentary regimes, such as the United Kingdom, and in some city governments in the United States.) The other form of democracy is one in which different sets of officials, chosen directly or indirectly by different groups of people, share political power. (That is the case with the United States and a few other nations where the separation of powers is intended to operate.)

Key Principles

The American version of representative democracy was based on two major principles: the separation of powers and federalism. In America, political power was to be shared by three separate branches of government; in parliamentary democracies, that power was concentrated in a single, supreme legislature. In America, political authority was divided between a national government and several state governments—**federalism**—whereas in most European systems authority was centralized in the national government. Neither of these principles was especially controversial at Philadelphia.

The delegates began their work in broad agreement that separated powers and some measure of federalism were

†Many attempts have been made to assemble a new constitutional convention. In the 1960s, 33 states, one short of the required number, requested a convention to consider the reapportionment of state legislatures. In the 1980s, efforts were made to call a convention to consider amendments to ban abortions and to require a balanced federal budget.

necessary, and both the Virginia and New Jersey Plans contained a version of each. How much federalism should be written into the Constitution was quite controversial, however.

Under these two principles, governmental powers in this country can be divided into three categories. The powers given to the national government exclusively are the delegated or **enumerated powers**. They include the authority to print money, declare war, make treaties, conduct foreign affairs, and regulate commerce among the states and with foreign nations. Those given exclusively to the states are **reserved powers** and include the power to issue licenses and to regulate commerce wholly within a state. Those shared by both the national and the state governments are called **concurrent powers** and include collecting taxes, building roads, borrowing money, and maintaining courts.

Government and Human Nature

The desirability of separating powers and leaving the states equipped with a broad array of rights and responsibilities was not controversial at the Philadelphia Convention because the Framers' experiences with British rule and state government under the Articles had shaped their view of human nature—that people would seek their own advantage in and out of politics, and that this pursuit of self-interest, unchecked, would lead some people to exploit others. Human nature was good enough to make it possible to have a decent government based on popular consent, but it was not good enough to make it inevitable.

One solution to this problem would be to improve human nature. Ancient political philosophers such as Aristotle believed that the first task of any government was to cultivate virtue among the governed. Many Americans were of the same mind. To them Americans would first have to become good people before they could have a good government. Samuel Adams, a leader of the Boston Tea Party, said that the new nation must become a "Christian Sparta." Others spoke of the need to cultivate frugality, industry, temperance, and simplicity.

But to James Madison and the other architects of the Constitution, the deliberate cultivation of virtue would require a government too strong and thus too dangerous to liberty, at least at the national level. Self-interest, freely pursued within reasonable limits, was a more practical and durable solution to the problem of government than any effort to improve the virtue of the citizenry. He wanted, he said, to make republican government possible "even in the absence of political virtue."

Madison argued that the very self-interest that leads people toward factionalism and tyranny might, if properly harnessed by appropriate constitutional arrangements, provide a source of unity and a guarantee of liberty. This harnessing was to be accomplished by dividing the offices of the new government among many people and giving to the holder of each office the "necessary means and personal motives to resist encroachments of the others." In this way, "ambition must be made to counteract ambition" so that "the private interest of every individual may be a sentinel over the public rights."[13]

If men were angels, all this would be unnecessary. But Madison and the other delegates pragmatically insisted on taking human nature pretty much as it was, and therefore they adopted "this policy of supplying, by opposite and rival interests, the defect of better motives."[14] The **separation of powers** would work not in spite of the imperfections of human nature, but because of them, through requiring the three political institutions to work together. And through **checks and balances**, each branch of government would ensure that the others did not exceed their constitutional powers.

So it also is with federalism. By dividing power between the states and the national government, one level of government can serve as a check on the other. This should provide a "double security" to the rights of the people: "The different governments will control each other, at the same time that each will be controlled by itself."[15] This was especially likely to happen in America, Madison thought, because it was a large country filled with diverse interests—rich and poor, Protestant and Catholic, Northerner and Southerner, farmer and merchant, creditor and debtor. Each of these interests would constitute a **faction** that would seek its own advantage. One faction might come to dominate government, or a part of government, in one place, and a different and rival faction might dominate it in another. The pulling and hauling among these factions would prevent any single government—say, that of New York—from dominating all of government. The division of powers among several governments would provide virtually every faction an opportunity to gain some—but not full—power.

enumerated powers *Powers given to the national government alone.*

reserved powers *Powers given to the state government alone.*

concurrent powers *Powers shared by the national and state governments.*

separation of powers *Sharing of constitutional authority by multiple branches of government.*

checks and balances *Constitutional ability of multiple branches of government to limit each other's power.*

faction *A group with a distinct political interest.*

FIGURE 2.4 **Overview of the Constitution of the United States**

PREAMBLE

ARTICLE I.	**The Legislative Branch**	**Amendments to the Constitution**	
Section 1.	Bicameral Congress	First (1791)	Free speech, press, religion, assembly
Section 2.	Membership of the House	Second (1791)	Right to bear arms
Section 3.	Membership of the Senate	Third (1791)	No quartering of troops in homes
Section 4.	Laws governing elections	Fourth (1791)	No unreasonable searches/seizures
Section 5.	Rules of Congress	Fifth (1791)	Right to due process, grand jury, no double jeopardy, self-incrimination
Section 6.	Salaries and immunities of members	Sixth (1791)	Right to speedy and public trial, counsel
Section 7.	Passing laws	Seventh (1791)	Right to trial by jury in civil cases
Section 8.	Powers of Congress	Eighth (1791)	No excessive bail, fines, cruel/unusual punishment
Section 9.	Restrictions on powers of Congress	Ninth (1791)	Rights not enumerated retained by people
Section 10.	Restrictions on powers of states	Tenth (1791)	Powers not delegated to Congress or prohibited to states belong to states or people
ARTICLE II.	**The Executive Branch**	Eleventh (1798)	No federal cases between state, citizen of other state
Section 1.	President and vice-president	Twelfth (1804)	Modification of electoral college rules
Section 2.	Powers of the president	Thirteenth (1865)	Abolition of slavery
Section 3.	Relations of the president with Congress	Fourteenth (1868)	States can't deprive right to due process, equal protection, privileges and immunities
Section 4.	Impeachment	Fifteenth (1870)	Right to vote can't be denied by race
ARTICLE III.	**The Judicial Branch**	Sixteenth (1913)	Congress can levy individual income taxes
Section 1.	Federal Courts	Seventeenth (1913)	Direct election of senators
Section 2.	Jurisdiction of courts	Eighteenth (1919)	Prohibition of liquors
Section 3.	Treason	Nineteenth (1920)	Women's right to vote
ARTICLE IV.	**Relations among States**	Twentieth (1933)	Dates for inauguration, Congress's session
Section 1.	Full faith and credit	Twenty-first (1933)	Repeal of prohibition
Section 2.	Privileges and immunities	Twenty-second (1951)	Presidential term limits
Section 3.	New states and territories	Twenty-third (1961)	D.C. residents' vote for president
Section 4.	Federal protection of states	Twenty-fourth (1964)	Ban on poll taxes
ARTICLE V.	**Amending the Constitution**	Twenty-fifth (1967)	Appointment of new vice president, presidential incompetence
ARTICLE VI.	**National Supremacy**	Twenty-sixth (1971)	Eighteen-year-olds' right to vote
ARTICLE VII.	**Ratification procedure**	Twenty-seventh (1992)	Congressional pay raises effective only after election

Bill of Rights

Federalists *Those who favor a stronger national government.*

Antifederalists *Those who favor a weaker national government.*

The Constitution and Liberty

A more difficult question is whether the Constitution created a system of government that would respect personal liberties. In fact, that is the question that was debated in the states when the document was presented for ratification. The proponents of the Constitution called themselves the **Federalists** (though they might more accurately have been called "nationalists"). The opponents came to be known as the **Antifederalists**

TABLE 2.1 | Checks and Balances

The Constitution creates a system of *separate* institutions that *share* powers. Because the three branches of government share powers, each can (partially) check the powers of the others. This is the system of *checks and balances*. The major checks possessed by each branch are listed below.

I. Congress	1. Can check the president in these ways: (a) By refusing to pass a bill the president wants (b) By passing a law over the president's veto (c) By using the impeachment powers to remove the president from office (d) By refusing to approve a presidential appointment (Senate only) (e) By refusing to ratify a treaty the president has signed (Senate only)
	2. Can check the federal courts in these ways: (a) By changing the number and jurisdiction of the lower courts (b) By using the impeachment powers to remove a judge from office (c) By refusing to approve a person nominated to be a judge (Senate only)
II. The President	1. Can check Congress by vetoing a bill it has passed
	2. Can check the federal courts by nominating judges
III. The Courts	1. Can check Congress by declaring a law unconstitutional
	2. Can check the president by declaring actions by him or his subordinates unconstitutional or not authorized by law

In addition to these checks specifically provided for in the Constitution, each branch has informal ways of checking the others. For example, the president can try to withhold information from Congress (on the grounds of "executive privilege"), and Congress can try to get information by mounting an investigation. The exact meaning of the various checks is explained in Chapter 13 on Congress, Chapter 14 on the presidency, and Chapter 16 on the courts.

(though they might more accurately have been called "states' rights advocates").‡ To be put into effect, the Constitution had to be approved at ratifying conventions in at least nine states. This was perhaps the most democratic feature of the Constitution: It had to be accepted, not by the existing Congress (still limping along under the Articles of Confederation), nor by the state legislatures, but by special conventions elected by the people.

Though democratic, the process established by the Framers for ratifying the Constitution was technically illegal. The Articles of Confederation, which still governed, could be amended only with the approval of all 13 state legislatures. The Framers wanted to bypass these legislatures because they feared that, for reasons of ideology or out of a desire to retain their powers, the legislators would oppose the Constitution. The Framers wanted ratification with less than the consent of all 13 states because they knew that such unanimity could not be attained. And indeed the conventions in North Carolina and Rhode Island did initially reject the Constitution.

‡To the delegates a truly "federal" system was one, like the New Jersey Plan, that allowed for very strong states and a weak national government. When the New Jersey Plan lost, the delegates who defeated it began using the word federal to describe their plan even though it called for a stronger national government. Thus men who began as "Federalists" at the convention ultimately became known as "Antifederalists" during the struggle over ratification.

The Antifederalist View

The great issue before the state conventions was liberty, not democracy. The opponents of the new Constitution, the Antifederalists, had a variety of objections but were in general united by the belief that liberty could be secure

FIGURE 2.5 The Amendment Process

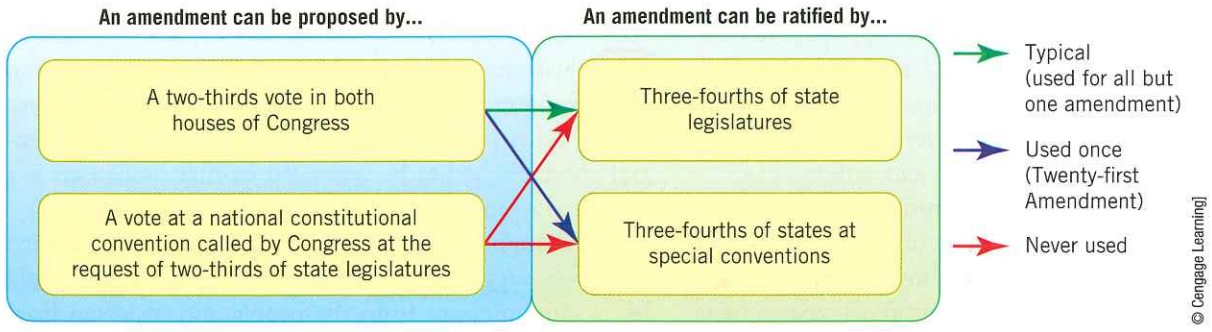


FIGURE 2.6 Ratification of the Federal Constitution by State Constitutions, 1787–1790.

coalition *An alliance of groups.*

only in a small republic in which the rulers were physically close to—and closely checked by—the ruled. Their central objection was stated by a group of Antifederalists at the ratifying convention in an essay published just after they had lost: "a very extensive territory cannot be governed on the principles of freedom, otherwise than by a confederation of republics."[16]

These dissenters argued that a strong national government would be distant from the people and would use its powers to annihilate or absorb the functions that properly belonged to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large standing army. (Since all these things have occurred, we cannot dismiss the Antifederalists as cranky obstructionists who opposed without justification the plans of the Framers.) These critics argued that the nation needed, at best, a loose confederation of states, with most of the powers of government kept firmly in the hands of state legislatures and state courts.

But if a stronger national government was to be created, the Antifederalists argued, it should be hedged about with many more restrictions than those in the constitution then under consideration. They proposed several such limitations, including narrowing the jurisdiction of the Supreme Court, checking the president's power by creating a council that would review his actions, leaving military affairs in the hands of the state militias, increasing the size of the House of Representatives so that it would reflect a greater variety of popular interests, and reducing or eliminating the power of Congress to levy taxes. And some of them insisted that a *bill of rights* be added to the Constitution.

James Madison gave his answer to these criticisms in *Federalist* No. 10 and No. 51 (reprinted in the Appendix with a reading guide). It was a bold answer, for it flew squarely in the face of widespread popular sentiment and much philosophical writing. Following the great French political philosopher Montesquieu, many Americans believed liberty was safe only in small societies governed either by direct democracy or by large legislatures with small districts and frequent turnover among members.

Madison argued quite the opposite—that liberty is safest in *large* (or as he put it, "extended") republics. People in a small community, he said, will have relatively few differences in opinion or interest; they will tend to see the world in much the same way. If anyone dissents or pursues an individual interest, he or she will be confronted by a massive majority and will have few, if any, allies. But a large republic will include people with many opinions and interests; as a result, it will be hard for a tyrannical majority to form or organize, and anyone with an unpopular view will find it easier to acquire allies. If Madison's argument seems strange or abstract, ask yourself the following question: if I have an unpopular opinion, an exotic lifestyle, or an unconventional interest, will I find greater security living in a small town or a big city?

By favoring a large republic, Madison was not trying to stifle democracy. Rather, he was attempting to show how democratic government really works, and what can make it work better. To rule, different interests must come together and form a **coalition**—that is, an alliance. In *Federalist* No. 51, he argued that the coalitions that formed in a large republic would be more moderate than those that formed in a small one because the bigger the republic, the greater the variety of interests, and thus the more a coalition of the majority would have to accommodate a diversity of interests and opinions if it hoped to succeed. He concluded that in a nation the size of the United States, with its enormous variety of interests, "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." Whether he was right in that prediction is a matter to which we return repeatedly.

The implication of Madison's arguments was daring, for he was suggesting that the national government should be at some distance from the people and insulated from

their momentary passions, because the people did not always want to do the right thing. Liberty was threatened as much (or even more) by public passions and popularly based factions as by strong governments. Now the Antifederalists themselves had no very lofty view of human nature, as is evidenced by the deep suspicion with which they viewed "power-seeking" officeholders. What Madison did was take this view to its logical conclusion, arguing that if people could be corrupted by office, they could also be corrupted by factional self-interest. Thus the government had to be designed to prevent both the politicians and the people from using it for ill-considered or unjust purposes.

To argue in 1787 against the virtues of small democracies was like arguing against motherhood. Moreover, the Federalists' counterargument involved many steps: representative democracy over direct democracy; a large republic over a small republic; diversity of economic, religious, and other interests over homogeneity of such interests; and barriers, not boosts, to majority group formation and influence. Still, the Federalists prevailed, probably because many citizens were convinced that a reasonably strong national government was essential if the nation were to stand united against foreign enemies, facilitate commerce among the states, guard against domestic insurrections, and keep one faction from oppressing another. The political realities of the moment and the recent bitter experiences with the Articles probably counted for more in ratifying the Constitution than Madison's arguments. His cause was helped by the fact that, for all their legitimate concerns and their uncanny instinct for what the future might bring, the Antifederalists could offer no agreed-upon alternative to the new Constitution. In politics, then as now, you cannot beat something with nothing.

But this does not explain why the Framers failed to add a bill of rights to the Constitution. If they were so preoccupied with liberty, why didn't they take this most obvious step toward protecting liberty, especially since the Antifederalists were demanding it? Some historians have suggested that this omission was evidence that liberty was not as important to the Framers as they claimed. In fact, when one delegate suggested that a bill of rights be drawn up, the state delegations at the convention unanimously voted the idea down. They did this for several reasons.

First, the Constitution, as written, *did* contain a number of specific guarantees of individual liberty, including the right of trial by jury in criminal cases and the privilege of the writ of **habeas corpus**. The following list identifies some of the liberties guaranteed in the Constitution (before the Bill of Rights was added):

- Writ of habeas corpus may not be suspended (except during invasion or rebellion).
- No **bill of attainder** may be passed by Congress or the states.
- No **ex post facto law** may be passed by Congress or the states.
- Right of trial by jury in criminal cases is guaranteed.
- The citizens of each state are entitled to the privileges and immunities of the citizens of every other state.
- No religious test or qualification for holding federal office is imposed.
- No law impairing the obligation of contracts may be passed by the states.

habeas corpus *An order to produce an arrested person before a judge.*

bill of attainder *A law that declares a person, without a trial, to be guilty of a crime.*

ex post facto law *A law that makes an act criminal even though the act was legal when it was committed.*

Second, most states in 1787 had bills of rights. When Elbridge Gerry proposed to the convention that a federal bill of rights be drafted, Roger Sherman rose to observe that it was unnecessary because the state bills of rights were sufficient.[17]

But third, and perhaps most important, the Framers thought they were creating a government with specific, limited powers. It could, they thought, do only what the Constitution gave it the power to do, and nowhere in that document was it given permission to infringe on freedom of speech or of the press or to impose cruel and unusual punishments. Some delegates probably feared that if any serious effort were made to list the rights that were guaranteed, later officials might assume that they had the power to do anything not explicitly forbidden.

Need for a Bill of Rights

Whatever their reasons, the Framers made at least a tactical and perhaps a fundamental mistake. It quickly became clear that without at least the promise of a bill of rights, the Constitution would not be ratified. Though the small states, pleased by their equal representation in the Senate, quickly ratified (in Delaware, New Jersey, and Georgia, the vote in the conventions was unanimous), the battle in the large states was intense and the outcome uncertain. In Pennsylvania, Federalist supporters dragged boycotting Antifederalists to the legislature in order to ensure a quorum was present so a convention could be called. There were rumors of other rough tactics.

In Massachusetts, the Constitution was approved by a narrow majority, but only after key leaders promised to obtain a bill of rights. In Virginia, James Madison fought against the fiery Patrick Henry, whose climactic

Bill of Rights *First 10 amendments to the Constitution.*

speech against ratification was dramatically punctuated by a noisy thunderstorm outside. The Federalists won by 10 votes. In New York, Alexander Hamilton argued the case for six weeks against the determined opposition of most of the state's key political leaders; he carried the day, but only by three votes, and then only after New York City threatened to secede from the state if it did not ratify. By June 21, 1788, the ninth state—New Hampshire—had ratified, and the Constitution was law.

Many people think that the first Congress moved quickly to adopt a **Bill of Rights**—that is, the first 10 amendments to the Constitution—in order to satisfy demands made in state ratifying conventions that this be done. Unfortunately, that is not quite right. Of the many criticisms of the proposed Constitution, hardly any referred to civil liberties. Take, for example, the Massachusetts Convention. Several critics, including John Hancock, said they would vote to ratify the document if the new members of Congress did all they could to get nine amendments adopted. But these amendments had nothing to do with free speech or a free press. Instead, they involved the size of the House of Representatives, congressional influence on local elections, the power of Congress to impose taxes, and the need for grand juries in criminal cases.[18] Other speakers wanted an amendment that would have House members stand for election every year. Critics in other states made the same arguments.

Despite the bitterness of the ratification struggle, the new government that took office in 1789–1790, headed by President Washington, was greeted enthusiastically. By the spring of 1790, all 13 states had ratified. There remained, however, the task of fulfilling the promise of amending the document. To that end, James Madison introduced into the first session of the First Congress a set of proposals, 12 of which were approved by Congress; 10 of these were ratified by the states and went into effect in 1791. But with only a few exceptions, these bore no relationship to the criticisms made in the state conventions. On what, then, did Madison base them? Probably on the Virginia Declaration of Rights, written by George Mason and Madison, and unanimously approved by the Virginia legislature in 1776. These amendments, which no one called a Bill of Rights as late as 1792, did not limit the power of state governments over citizens, only the power of the federal government. Later, the Fourteenth Amendment, as interpreted by the Supreme Court, extended many of the guarantees of the Bill of Rights to cover state governmental action.

The Constitution and Slavery

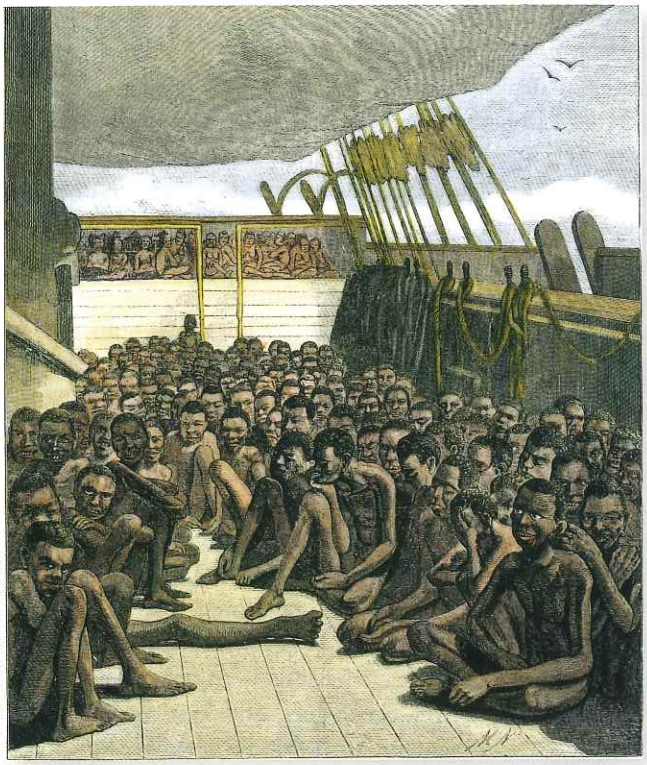
Though slaves amounted to one-third of the population of the five Southern states, nowhere in the Constitution can one find the word *slave* or *slavery*.

To some, the failure of the Constitution to address the question of slavery was a great betrayal of the promise of the Declaration of Independence that "all men are created equal." For the Constitution to be silent on the subject of slavery, and thereby to allow that odious practice to continue, was to convert, by implication, the wording of the Declaration to "all white men are created equal."

It is easy to accuse the signers of the Declaration and the Constitution of hypocrisy. They knew of slavery, many

TABLE 2.2 | The Bill of Rights

The First Ten Amendments to the Constitution Grouped by Topic and Purpose	
Protections afforded citizens to participate in the political process	• **Amendment 1:** Freedom of religion, speech, press, and assembly; the right to petition the government.
Protections against arbitrary police and court action	• **Amendment 4:** No unreasonable searches or seizures. • **Amendment 5:** Grand jury indictment required to prosecute a person for a serious crime; no "double jeopardy" (being tried twice for the same offense); forcing a person to testify against him- or herself prohibited; no loss of life, liberty, or property without due process. • **Amendment 6:** Right to speedy, public, impartial trial with defense counsel and right to cross-examine witnesses. • **Amendment 7:** Jury trials in civil suits where value exceeds $20. • **Amendment 8:** No excessive bail or fines, no cruel and unusual punishments.
Protections of states' rights and unnamed rights of people	• **Amendment 9:** Unlisted rights are not necessarily denied. • **Amendment 10:** Powers not delegated to the United States or denied to states are reserved to the states.
Other Amendments	• **Amendment 2:** Right to bear arms. • **Amendment 3:** Troops may not be quartered in homes in peacetime.



North Wind Picture Archives/Alamy

IMAGE 2-5 Deck of a slave ship captured in 1860. Thousands of slaves died on such ships.

of them owned slaves, and yet they were silent. Indeed, British opponents of the independence movement took special delight in taunting the colonists about their complaints of being "enslaved" to the British Empire while ignoring the slavery in their very midst.

Increasingly, revolutionary leaders during this period spoke to this issue. Thomas Jefferson had tried to get a clause opposing the slave trade put into the Declaration of Independence. James Otis of Boston had attacked slavery and argued that black as well as white men should be free. As revolutionary fervor mounted, so did Northern criticism of slavery. The Massachusetts legislature and then the Continental Congress voted to end the slave trade; Delaware prohibited the importation of slaves; Pennsylvania voted to tax slavery out of existence; and Connecticut and Rhode Island decided that all slaves brought into those states would automatically become free.

Slavery continued unabated in the South, defended by some whites because they thought it right, by others because they found it useful. But even in the South there were opponents, though rarely conspicuous ones. George Mason, a Virginia slaveholder and a delegate to the convention, warned prophetically that "by an inevitable chain of causes and effects, providence punishes national sins [slavery] by national calamities."[19]

The blunt fact, however, was that any effort to use the Constitution to end slavery would have meant the end of the Constitution. The Southern states would never have signed a document that seriously interfered with slavery. Without the Southern states, the Articles of Confederation would have continued, which would have left each state entirely sovereign and thus entirely free of any prospective challenge to slavery.

Thus the Framers compromised with slavery; political scientist Theodore Lowi calls this their Greatest Compromise.[20] Slavery is dealt with in three places in the Constitution, though never by name. In determining the representation each state was to have in the House, "three-fifths of all other persons" (i.e., of slaves) are to be added to "the whole number of free persons."[21] The South originally wanted slaves to count fully even though, of course, none would be elected to the House; they settled for counting 60 percent of them. The Great (or Connecticut) Compromise favored smaller states, which were mostly Northern, by giving each state two senators; but the three-fifths compromise even more strongly favored the South's slaveholding states. For example, apportioned according to its free population, the Southern states would have had a combined total of 33 House seats rather than the 47 they claimed. The three-fifths compromise is the primary reason why Southern-born presidents, House leaders, and Supreme Court justices generally dominated antebellum American national government.[22]

The convention also agreed not to allow the new government—by law or even constitutional amendment—to prohibit the importation of slaves until 1808.[23] The South thus had 20 years in which it could acquire more slaves from abroad; after that, Congress was free (but not required) to end the importation. Finally, the Constitution guaranteed that if a slave were to escape his or her master and flee to a free state, the slave would be returned by that state to "the party to whom . . . service or labour may be due."[24]

The unresolved issue of slavery was to prove the most explosive question of all. Allowing slavery to continue was a fateful decision, one that led to the worst social and political catastrophe in the nation's history—the Civil War. The Framers chose to sidestep the issue in order to create a union that, they hoped, would eventually be strong enough to deal with the problem when it could no longer be postponed. The legacy of that choice reverberates to this day.

2-4 Democracy and the Constitution: Post-Ratification Debates

The Framers were not saints or demigods. They were men with political opinions who also had economic interests and human failings. It would be a mistake to conclude that everything they did in 1787 was motivated by a

disinterested commitment to the public good. But it would be an equally great mistake to think that what they did was nothing but an effort to line their pockets by producing a government that would serve their own narrow interests. As in almost all human endeavors, the Framers acted out of a mixture of motives. What is truly astonishing is that economic interests played only a modest role in their deliberations.

Economic Interests

Some of the Framers were wealthy; some were not. Some owned slaves; some had none. Some were creditors (having loaned money to the Continental Congress or to private parties); some were deeply in debt. For nearly a century, scholars have argued over just how important these personal interests were in shaping the provisions of the Constitution.

In 1913, historian Charles Beard published *An Economic Interpretation of the Constitution*, which argued that the better-off urban and commercial classes, especially those members who held the IOUs issued by the government to pay for the Revolutionary War, favored the new Constitution because they stood to benefit from it.[25] But in the 1950s, that view was challenged by historians who, after looking carefully at what the Framers owned or owed, concluded that one could not explain the Constitution exclusively or even largely in terms of the economic interests of those who wrote it.[26] Some of the richest delegates, such as Elbridge Gerry of Massachusetts and George Mason of Virginia, refused to sign the document, while many of its key backers—James Madison and James Wilson, for example—were men of modest means or heavy debts.

In the 1980s, a new group of scholars, primarily economists applying more advanced statistical techniques, found evidence that some economic considerations influenced how the Framers voted on some issues during the Philadelphia Convention. Interestingly, however, the economic position of the *states* from which they came had a greater effect on their votes than did their *own* monetary condition.[27]

We have already seen how delegates from small states fought to reduce the power of large states and how those from slave-owning states made certain that the Constitution would contain no provision that would threaten slavery.

But contrary to what Beard asserted, the economic interests of the Framers themselves did not dominate the convention. Some delegates owned a lot of public debt they had purchased for low prices. A strong national government of the sort envisaged by the Constitution was more likely than the weak Continental Congress to pay off this debt at face value, thus making the delegates who owned it much richer. Despite this, the ownership of public debt had no significant effect on how the Framers voted in Philadelphia. Nor did the big land speculators vote their interests. Some, such as George Washington and Robert Morris, favored the Constitution, whereas others, such as George Mason and William Blount, opposed it.[28]

In sum, the Framers tended to represent their states' interests on important matters. Since they were picked by the states to do so, this is exactly what one would expect. If they had not met in secret, perhaps they would have voted even more often as their constituents wanted. With the grave and enormous exception of slavery, the Framers usually did not vote their own respective economic interests.

At the popularly elected state ratifying conventions, economic factors played a larger role. Delegates who were merchants, who lived in cities, who owned large amounts of western land, who held government IOUs, and who did not own slaves were more likely to vote to ratify the new Constitution than delegates who were farmers, who did not own public debt, and who did own slaves.[29] There were plenty of exceptions, however. Small farmers dominated the conventions in some states where the vote to ratify was unanimous.

Though interests made a difference, they were not simply elite interests. In most states, the great majority of adult white males could vote for delegates to the ratifying conventions. This means that women and blacks were excluded from the debates, but by the standards of the time—standards that did not change for over a century—the ratification process was remarkably democratic.

The Constitution and Equality

Ideas counted for as much as interests. At stake were two views of the public good. One, espoused by the Federalists, was that a reasonable balance of liberty, order, and progress required a strong national government. The other, defended by the Antifederalists, was that liberty would not be secure in the hands of a powerful, distant government; freedom required decentralization.

Today that debate has a new focus. The defect of the Constitution, to some contemporary critics, is not that the government it created is too strong but that it is too weak. In particular, the national government is too weak to resist the pressures of special interests that reflect and perpetuate social inequality.

This criticism reveals how our understanding of the relationship between liberty and equality has changed since the Founding. To Jefferson and Madison, citizens naturally differed in their talents and qualities. What had to be guarded against was the use of governmental

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

Income Tax Rates: Majoritarian, Client, or Entrepreneurial Politics?

As we noted in Chapter 1, in 1788, the proposed Constitution's chief architect, James Madison, argued that the federal government needed its own "power of taxation," whereas critics of the proposed Constitution, including Patrick Henry, opposed giving the federal government this power. Madison's view prevailed, but it was not until 1913, with the passage of the Sixteenth Amendment to the Constitution, that the federal government acquired "the power to lay and collect taxes on incomes."

The federal income tax system is progressive, meaning that tax rates rise with income levels. In 2015, there were seven federal "tax brackets": 10, 15, 25, 28, 33, 35, and 39.6 percent. A single person would pay 10 percent in federal income taxes on the first $8,925 he or she earned that year, all the way up to 39.6 percent on every dollar above $400,000 that he or she earned that year. Thus, in 2016, 39.6 percent was the "top marginal income tax rate."

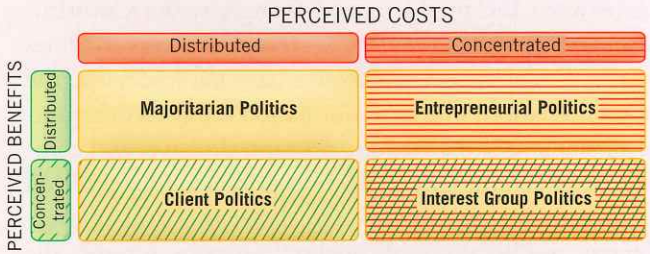
Every year Congress debates proposals to change the federal income tax system. Depending on the proposal, the politics may be viewed as majoritarian, client, or entrepreneurial.

Majoritarian Politics: Some advocates for tax reform say the system needs to be simplified, with fewer income brackets, credits, and deductions. At the same time, they argue that everyone needs to pay taxes because everyone benefits from the federal government's activities, thereby presenting their case as majoritarian politics.

Client Politics: Some politicians argue for a "flat tax," which would be one tax rate for everybody, with no credits or deductions. Advocates say this system would be more efficient, with tax returns potentially being no larger than a postcard, and fair, as everyone would pay the same tax rate. From this perspective, the proposal is viewed as majoritarian politics, as everyone has the same tax percentage levied on their income. Critics, however, contend that a flat tax would be, in effect, client politics, as the wealthy would no longer be taxed on capital gains and other investments, and therefore would shoulder less of the overall tax burden than people who do not have such income.

Entrepreneurial Politics: Some advocates for tax reform say the system needs to be even more steeply progressive, with wealthier people paying a higher percentage of income tax. After all, today's top marginal federal income rate is low by historical standards. During World War I, the rate peaked at 77 percent. During World War II, it peaked at 91 percent. For most of the period from 1945 to 1985, it was above 50 percent. Advocates for higher tax rates contend that the top percent (one, two, or slightly more, depending on your view) of people who earn more should contribute more through taxes to help the vast majority who are not able to contribute as much, thereby arguing for entrepreneurial politics. (The proposal also could be viewed as interest-group politics, with wealthy people paying more, so people with less income may receive certain benefits and services, but it typically is presented as providing benefits for society at large.)

How elected officials, lobbyists, and voters discuss tax reform depends on how they think income tax rates need to be changed (if at all), and how they perceive the consequences, both the costs and the benefits.



▶ **PRACTICE POLITICAL SCIENCE** Select and identify a tax policy proposal that Congress is debating. Argue in favor of the proposal using one of three types of politics (majoritarian, client, or entrepreneurial). Refute the argument using a different type of politics.

power to create unnatural and undesirable inequalities. This might happen, for example, if political power was concentrated in the hands of a few people (who could use that power to give themselves special privileges) or if it was used in ways that allowed some private parties to acquire exclusive charters and monopolies. To prevent the inequality that might result from having too strong a government, its powers must be kept strictly limited.

Today, some people think of inequality quite differently. To them, it is the natural social order—the marketplace and the acquisitive talents of people operating in that marketplace—that leads to undesirable inequalities, especially in economic power. The government should be powerful enough to restrain these natural tendencies and produce, by law, a greater degree of equality than society allows when left alone.

To the Framers, liberty and (political) equality were not in conflict; to some people today, these two principles are deeply in conflict. To the Framers, the task was to keep government so limited as to prevent it from creating the worst inequality—political privilege. To some modern observers, the task is to make government strong enough to reduce what they believe is the worst inequality—differences in wealth.

Constitutional Reform: Modern Views

Almost from the day it was ratified, the Constitution has been the object of debate over ways in which it might be improved. These debates have rarely involved the average citizen, who tends to revere the document even if he or she cannot recall all its details. Because of this deep and broad popular support, scholars and politicians have been wary of attacking the Constitution or suggesting many wholesale changes. But such attacks have occurred. During the 1980s—the decade in which we celebrated the bicentennial of its adoption—we heard a variety of suggestions for improving the Constitution, ranging from particular amendments to wholesale revisions. In general, today, as in the 18th century, critics typically align with one of two categories: those who think the federal government is too weak, and those who think it is too strong.

Reducing the Separation of Powers

To the first kind of critic, the chief difficulty with the Constitution is the separation of powers. By making every decision the uncertain outcome of the pulling and hauling between the president and Congress, the Constitution precludes the emergence—except perhaps in times of crisis—of the kind of effective national leadership the country needs. In this view, our nation today faces a number of challenges that require prompt, decisive, and comprehensive action. Our problem is gridlock. Our position of international leadership, the dangerous and unprecedented proliferation of nuclear weapons among the nations of the globe, and the need to find ways of stimulating economic growth while reducing our deficit and conserving our environment—all these situations require the president be able to formulate and carry out policies free of some of the pressures and delays from interest groups and members of Congress tied to local interests.

Not only would this increase in presidential authority make for better policies, these critics argue, it would also help voters hold presidents and their political parties accountable for their actions. As matters now stand, nobody in government can be held responsible for policies: Everyone takes the credit for successes and no one is willing to take the blame for failures. Typically, the president, who tends to be the major source of new programs, cannot get policies adopted by Congress without long delays and much bargaining, the result of which often is some watered-down compromise that neither the president nor Congress really likes but that each must settle for if anything is to be done at all.

Finally, critics of the separation of powers complain that the government agencies responsible for implementing a program are exposed to undue interference from legislators and special interests. In this view, the president is supposed to be in charge of the bureaucracy but in fact must share this authority with countless members of Congress and congressional committees.

Not all critics of the separation of powers agree with all these points, nor do they all agree on what should be done about the problems. But they all have in common a fear that the separation of powers makes the president too weak and insufficiently accountable. Their proposals for reducing the separation of powers include the following:

- Allow the president to appoint members of Congress to serve in the cabinet (the Constitution forbids members of Congress from holding any federal appointive office while in Congress).
- Allow the president to dissolve Congress and call for a special election (elections now can be held only on the schedule determined by the calendar).
- Allow Congress to require a president who has lost its confidence to face the country in a special election before his term would normally end.
- Require the presidential and congressional candidates to run as a team in each congressional district; thus a presidential candidate who carries a given district could be sure the congressional candidate of his party would also win in that district.
- Have the president serve a single six-year term instead of being eligible for up to two four-year terms; this would presumably free the president to lead without having to worry about reelection.
- Lengthen the terms of members of the House of Representatives from two to four years so that the entire House would stand for reelection at the same time as the president.[30]

Some of these proposals are offered by critics out of a desire to make the American system of government work more like the British parliamentary system, in which, as we will see in Chapters 13 and 14, the prime minister is the undisputed leader of the majority in the British Parliament. The parliamentary system is the major alternative in the world today to the American separation-of-powers system.

Both the diagnoses and the remedies proposed by these critics of the separation of powers have been challenged. Many defenders of our present constitutional system believe that nations, such as the United Kingdom, with a different, more unified political system have done no better than the United States in dealing with the problems of economic growth, national security, and environmental

protection. Moreover, they argue, close congressional scrutiny of presidential proposals has improved these policies more often than it has weakened them. Finally, congressional "interference" in the work of government agencies is a good way of ensuring that the average citizen can fight back against the bureaucracy; without that so-called interference, citizens and interest groups might be helpless before big and powerful agencies.

Each of the specific proposals, defenders of the present constitutional system argue, would either make matters worse or have, at best, uncertain effects. Adding a few members of Congress to the president's cabinet would not provide much help in getting his program through Congress; there are 535 senators and representatives, and probably only about half a dozen would be in the cabinet. Giving either the president or Congress the power to call a special election in between the regular elections (every two or four years) would cause needless confusion and great expense; the country would live under the threat of being in a perpetual political campaign with even weaker political parties. Linking the fate of the president and congressional candidates by having them run as a team in each district would reduce the stabilizing and moderating effect of having them elected separately. A Republican presidential candidate who wins in the new system would have a Republican majority in the House; a Democratic candidate winner would have a Democratic majority. We might as a result expect dramatic changes in policy as the political pendulum swung back and forth. Giving presidents a single six-year term would indeed free them from the need to worry about reelection, but it is precisely that worry that keeps presidents reasonably concerned about what the American people want.

Making the System Less Democratic

The second kind of critic of the Constitution thinks the government does too much, not too little. Though the separation of powers at one time may have slowed the growth of government and moderated the policies it adopted, in the past few decades government has grown helter-skelter. The problem, these critics argue, is not that democracy is a bad idea but that democracy can produce bad—or at least unintended—results if the government caters to the special-interest claims of the citizens rather than to their long-term values.

To see how these unintended results might occur, imagine a situation in which every citizen thinks the government grows too big, taxes too heavily, and spends too much. Each citizen wants the government made smaller by reducing the benefits other people get—but not by reducing the benefits he or she gets. In fact, such citizens may even be willing to see their own benefits cut, provided everyone else's benefits are cut as well, and by a like amount.

line-item veto *An executive's ability to block a particular provision in a bill passed by the legislature.*

But the political system attends to individual wants, not general preferences. It gives aid to farmers, contracts to industry, grants to professors, pensions to older adults, and loans to students. As someone once said, the government is like an adding machine: During elections, candidates campaign by promising to do more for whatever group is dissatisfied with what the incumbents are doing for it. As a result, most elections bring to office men and women committed to doing more for somebody. The grand total of all these additions is more for everybody. Few politicians have an incentive to do less for anybody.

To remedy this state of affairs, these critics suggest various mechanisms, but principally a constitutional amendment that would either set a limit on the amount of money the government could collect in taxes each year or require that each year the government have a balanced budget (i.e., not spend more than it takes in in taxes), or both. In some versions of these plans, an extraordinary majority (say, 60 percent) of Congress could override these limits, and the limits would not apply in wartime.

The effect of such amendments, the proponents claim, would be to force Congress and the president to look at the big picture—the grand total of what they are spending—rather than just to operate the adding machine by pushing the "add" button over and over again. If they could spend only so much during a given year, they would have to allocate what they spend among all rival claimants. For example, if more money were to be spent on the poor, less could then be spent on the military, or vice versa.

Some critics of an overly powerful federal government think these amendments will not be passed or may prove unworkable; instead, they favor enhancing the president's power to block spending by giving him a **line-item veto**. Most state governors can veto a particular part of a bill and approve the rest using a line-item veto. The theory is that such a veto would better equip the president to stop unwarranted spending without vetoing the other provisions of a bill. In 1996, President Clinton signed the Line Item Veto Act, passed by the 104th Congress. But despite its name, the new law did not give the president full line-item veto power (only a change in the Constitution could confer that power). Instead, the law gave the president authority to selectively eliminate individual items in large appropriations bills, expansions in certain income-transfer programs, and tax breaks (giving the president what budget experts call *enhanced rescission authority*). But it also left Congress free to craft bills in ways that would give the president few opportunities to veto (or *rescind*) favored items. For example, Congress could still force the president to accept or reject an entire appropriations bill simply by tagging

CONSTITUTIONAL CONNECTIONS | Women and the Constitution

Women were mentioned nowhere in the Constitution when it was written in 1787. Moreover, Article I, which set forth the provisions for electing members of the House of Representatives, granted the vote to those people who were allowed to vote for members of the lower house of the legislature in the states in which they resided. In no state at the time could women participate in those elections. In no state could they vote in any elections or hold any offices. Furthermore, wherever the Constitution uses a pronoun, it uses the masculine form—*he* or *him.*

In another sense, no: Wherever the Constitution or the Bill of Rights defines a right that people are to have, it either grants that right to "persons" or "citizens," not to "men," or it makes no mention at all of people or gender. For example:

- "The *citizens* of each State shall be entitled to all privileges and immunities of citizens of the several States."

[Art. I, sec. 9]

- "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."

[Art. III, sec. 3]

- "No bill of attainder or ex post facto law shall be passed."

[Art. I, sec. 9]

- "The right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

[Amend. IV]

- "No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on 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 be deprived of life, liberty, or property, without due process of law."

[Amend. V]

- "In all criminal prosecutions the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury."

[Amend. VI]

Moreover, when the qualifications for elective office are stated, the word *person*, not *man*, is used.

- "No *person* shall be a Representative who shall not have attained to the age of twenty-five years."

[Art. I, sec. 2]

- "No *person* shall be a Senator who shall not have attained to the age of thirty years."

[Art. I, sec. 3]

- "No *person* except a natural born citizen . . . 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."

[Art. II, sec. 1]

In places, the Constitution and the Bill of Rights used the pronoun *he*, but always in the context of referring back to *a person* or *citizen*. At the time, and until quite recently, the male pronoun was often used in legal documents to refer generically to both men and women.

Thus, though the Constitution did not give women the right to vote until the Nineteenth Amendment was ratified in 1920, it did use language that extended fundamental rights, and access to office, to women and men equally.

Of course, what the Constitution permitted did not necessarily occur. State and local laws denied women rights that in principle they ought to have enjoyed. Except for a brief period in New Jersey, no women voted in statewide elections until, in 1869, they were given the right to cast ballots in territorial elections in Wyoming.

When women were first elected to Congress, there was no need to change the Constitution; nothing in it restricted officeholding to men.

- When women were given the right to vote by constitutional amendment, it was not necessary to amend any existing language in the Constitution because nothing in the Constitution itself denied women the right to vote; the amendment simply added a new right: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex."

[Amend. XIX]

Source: Adapted from Robert Goldwin, "Why Blacks, Women and Jews Are Not Mentioned in the Constitution," *Commentary* (May 1987): 28–33.

on this sentence: "Appropriations provided under this act (or title or section) shall not be subject to the provisions of the Line Item Veto Act." In *Clinton et al. v. New York et al.* (1998), the Supreme Court struck down the 1996 law, holding six to three that the Constitution does not allow the president to cancel specific items in tax and spending

legislation. Clinton's successor, President George W. Bush, championed the line-item veto, but to no avail; and, when asked about the line-item veto in February 2009, President Barack Obama's press secretary, Robert Gibbs, quipped that the new president would "love to take that for a test drive."

Finally, some critics of a powerful government feel that the real problem arises not from an excess of "adding-machine" democracy but from the growth in the power of the federal courts, as described in Chapter 16. These critics would like to devise a set of laws or constitutional amendments that would narrow the authority of federal courts.

The opponents of these suggestions argue that constitutional amendments to restrict the level of taxes or to require a balanced budget are unworkable, even assuming—which they do not—that a smaller government is desirable. There is no precise, agreed-upon way to measure how much the government spends or to predict in advance how much it will receive in taxes during the year; thus, defining and enforcing a "balanced budget" is no easy matter. Since the government can always borrow money, it might easily evade any spending limits. It has also shown great ingenuity in spending money in ways that never appear as part of the regular budget.

The line-item veto may or may not be a good idea. Unless the Constitution is amended to permit it, future presidents will have to do without it. The states, where some governors have long had the veto, are quite different from the federal government in power and responsibilities. Whether a line-item veto would work as well in Washington, DC, as it does in many state capitals is something that we may simply never know.

Finally, proposals to curtail judicial power are thinly veiled attacks, the opponents argue, on the ability of the courts to protect essential citizens' rights. If Congress and the people do not like the way the Supreme Court has interpreted the Constitution, they can always amend the Constitution to change a specific ruling; there is no need to adopt some across-the-board limitation on court powers.

Who Is Right?

Some of the arguments of these two sets of critics of the Constitution may strike you as plausible or even entirely convincing. Whatever you may ultimately decide, make no decision now. One cannot make or remake a constitution based entirely on abstract reasoning or unproven factual arguments. Even when the Constitution was first written in 1787, it was not an exercise in abstract philosophy but rather an effort to solve pressing, practical problems in light of a theory of human nature, the lessons of past experience, and a close consideration of how governments in other countries and at other times had worked.

Just because the Constitution is more than 200 years old does not mean it is out of date. The crucial questions are these: How well has it worked over the long sweep of American history? How well has it worked compared with the constitutions of other democratic nations?

The only way to answer these questions is to study American government closely—with special attention to its historical evolution and to the practices of other nations. That is what this book is about. Of course, even after close study, people will still disagree about whether our system should be changed. People want different things and evaluate human experience according to different beliefs. But if we first understand how, in fact, the government works and why it has produced the policies it has, we can then argue more intelligently about how best to achieve our wants and give expression to our beliefs.

ZUMA Press, Inc./Alamy Stock Photo

IMAGE 2-6 After Hillary Clinton won the popular vote and Donald Trump won the electoral college vote in the 2016 presidential race, some protestors called for electors to ratify the popular vote.

WHAT WOULD YOU DO?

Should Pennsylvania Back Proposal for Constitutional Convention?

To: *Brian Arjun, Pennsylvania state senate majority leader*
From: *Amaia Grace, chief of staff*
Subject: *Proposal for a new constitutional convention*

In the 1990s, several states approved term limits for their members of Congress, but the Supreme Court ruled in 1995 that states do not have this authority. Now term-limit advocates are pursuing a broader strategy, calling for states to approve legislation that would require Congress to convene a special convention to consider several amendment proposals. Recommendations include enacting term limits for members of Congress and abolishing the Electoral College to permit the direct popular election of the president. The Pennsylvania House of Representatives passed such a bill last week, and several senators in your party have declared their support.

To Consider:

Yesterday Pennsylvania's House of Representatives approved a proposal for a constitutional convention, and now the proposal goes to the State Senate. The Constitution states that Congress shall hold a convention for proposing amendments at the request of two-thirds of the state legislatures, but it has never happened in U.S. history. Pennsylvania could become the twenty-eighth state to endorse the proposal, and then only six more states would have to approve for Congress to take action.

Arguments for:

1. The Twenty-Second Amendment restricts presidents to two terms, so members of Congress should face similar limits.
2. Term limits will ensure that national leaders do not become career politicians.
3. The public favors the direct popular election of the president, and a constitutional convention is the only realistic way to abolish the Electoral College.

Arguments against:

1. Limiting members of Congress to two terms would increase the power of lobbyists, congressional staffers, and administrative officials.
2. The Electoral College encourages a two-party system; a direct popular vote for the president would require runoff elections if no candidate won a majority.
3. The Constitutional Convention of 1787 was held in secret and involved only a few dozen people; today it would be heavily covered by the media and involve hundreds, perhaps thousands of people. No one knows what changes it might make.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Support legislation ☐ Oppose legislation

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

LEARNING OBJECTIVES

2-1 Explain how evolving debates about liberty led from the Revolutionary War to the Constitutional Convention.

The 13 colonies declared independence from Great Britain to protect their liberty, that is, their freedom to pursue their interests without undue and unfair interference from the monarch. After the Revolutionary War, the Articles of Confederation established a national government with limited powers in the new republic. But those powers did not ensure sufficient authority for governmental action, so the Constitutional Convention was called to strengthen the national political system while protecting states' rights and individual liberty.

2-2 Discuss the major proposals for and compromise over representation in the Constitutional Convention.

The delegates to the Constitutional Convention debated two major plans over representation in the national legislature. The Virginia Plan proposed allocating seats based on population, whereas the New Jersey Plan proposed allocating equal seats to each state. The Connecticut Compromise created a bicameral legislature with seats allocated by population in one chamber (House) and two seats given to each state in the other chamber (Senate).

2-3 Summarize the key issues presented by Federalists and Antifederalists in ratification debates for the Constitution.

The Federalists argued for a strong national government that would control factions, limit public participation in governance primarily to voting, and empower elected officials to decide which policies would be in the public interest. The Antifederalists were concerned about giving too much power to the national government and favored increased political participation in state and local governance, as well as a Bill of Rights to ensure that the national government did not encroach upon individual rights.

2-4 Discuss continuing debates about democracy and the Constitution.

From the time the Constitution was drafted, people have debated how effectively it promotes democratic governance. In the twenty-first century, critics typically have two overarching, and opposing, perspectives: the American political system does too little, or the system does too much. Some critics argue for reducing the separation of powers in the American political structure to make the government more efficient and effective. Other critics say the federal government needs to reevaluate priorities and sharply reduce spending to focus only on policies that clearly are in the national interest.

TO LEARN MORE

To find historical and legal documents: **http://teachingamericanhistory.org**

National Constitution Center: **https://constitutioncenter.org**

Congress: **www.congress.gov**

To look at court cases about the Constitution: Cornell University: **www.law.cornell.edu/supct**

Bailyn, Bernard. *The Ideological Origins of the American Revolution.* Cambridge, MA: Harvard University Press, 1967. A brilliant account of how the American colonists formed and justified the idea of independence.

Becker, Carl L. *The Declaration of Independence*. New York: Vintage, 1942. The classic account of the meaning of the Declaration.

Federalist papers. By Alexander Hamilton, James Madison, and John Jay. The definitive edition, edited by Jacob E. Cooke, was published in Middletown, CT, in 1961, by the Wesleyan University Press.

Maier, Pauline. *Ratification*: *The People Debate the Constitution, 1787–1788*. New York: Simon and Schuster, 2010. Not only is this a marvelous study of ratification, but it also is virtually the only one in existence. A splendid, comprehensive account.

McDonald, Forrest. *Novus Ordo Seclorum*. Lawrence: University of Kansas Press, 1985. A careful study of the intellectual origins of the Constitution. The Latin title means "New World Order," which is what the Framers hoped they were creating.

Sheldon, Garrett W. *The Political Philosophy of James Madison*. Baltimore: Johns Hopkins University

Press, 2001. Masterful account of Madison's political thought and its roots in classical republicanism and Christianity.

Storing, Herbert J. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press, 1981. Close analysis of the political views of those opposed to the ratification of the Constitution.

Sundquist, James L. *Constitutional Reform and Effective Government*. Rev. ed. Washington, DC: Brookings Institution Press, 1992. Systematic evaluation of proposals to incorporate features of parliamentary democracy in the American political system.

Wood, Gordon S. *The Creation of the American Republic*. Chapel Hill: University of North Carolina Press, 1969. A detailed study of American political thought before the Philadelphia Convention.

____. *The Radicalism of the American Revolution*. New York: Knopf, 1992. Magisterial study of the nature and effects of the American Revolution and the relationship between the socially radical Revolution and the Constitution.

CHAPTER 3

Federalism

KEY OBJECTIVES OF THIS CHAPTER

- *The distribution of powers among three federal branches and between national and state governments impacts policymaking.*
- *Federalism reflects the constitutional allocation of power between national and state governments.*

KEY TAKEAWAYS FROM THIS CHAPTER

- National policymaking is constrained by the sharing of power between and among the three branches of the federal government and state governments.
- The federal government and state governments interact through the use of block grants, categorical grants, and mandates to influence the policy of state governments.

THEN When the Framers drafted the Constitution, the Antifederalists opposed it primarily on the grounds that it gave too much power to national government. The Antifederalists recognized the limitations of the Articles of Confederation, but they feared that the Constitution sacrificed liberty and civic responsibility with its expansion of the power of the national government.

NOW The Federalists prevailed over the Antifederalists with the ratification of the Constitution. Amended only 27 times in more than 225 years, the Constitution is still the law of the land today. However, much as the Antifederalists predicted, the federal government has taken on responsibilities that traditionally were the province of state governments, such as social welfare policy, education, health care, and a minimum wage. States have some flexibility in implementing policies, but the national government sets the direction in many more policy areas today than it did originally; and, as the Antifederalists feared, we now have a large standing army and powerful federal courts.

These changes between then and now do not mean that the Constitution was wrong. (If we were forced to take sides, we would have sided with the Federalists—would you?) But there is no denying that the federal government has grown far beyond anything that even the most ardent Federalists had envisioned. Much of that growth has occurred in just the past half-century or so. In the last few years, the federal government has spent roughly $4 trillion every year. Adjusted for inflation, this is more than five times what it spent in 1960.

But that is only about half of the story. Over the past half-century, state and local government spending has risen steeply, too. Today, state and local governments spend more than $3 billion per year, every year. Adjusted for inflation, that was more than six times what they spent in 1960.

No less telling, virtually all of the post-1960 growth in the number of government employees has been concentrated not in Washington, but in state capitals and city halls: the federal government's full-time civilian (nonmilitary) workforce numbers about 2 million (about the same number as in 1960), whereas state and local governments employ a combined total of about 12 million full-time workers (more than double the number they employed in 1960).

Back when the Federalists and the Antifederalists debated the Constitution, neither side anticipated that what today we call "big government" would encompass all three levels of government: federal, state, and local. Then, they fussed and fought over how vast the federal government might someday become. Now the reality is that, apart from military affairs and international diplomacy, most "national" laws, policies, and programs are shaped, administered, or funded in whole or in part through a complex, and often contentious, system of federal–state relations.

3-1 Why Federalism Matters

The heated controversies that surrounded the enactment of the federal health reform law in 2010, and the ensuing legal challenge to that law, are in large part battles over how the federal government should relate to the states. To be sure, not all of the debate over Obamacare (also known as the Patient Protection and Affordable Care Act) centers on federal–state relations: For example, a contentious debate ensued over the individual mandate, which requires everyone to have health insurance or pay a penalty. But much of the ongoing controversy over the law centers on federal–state relations. For instance, states had to expand Medicaid or risk losing funding for the program. (Medicaid assists low-income women, children, families, and the disabled in obtaining medical care; we discuss this program more in Chapter 17.)

Many federal–state conflicts have ended up before the U.S. Supreme Court (for a short list, see the Landmark Cases feature on page 59), and this one did, too. In *National Federation of Business v. Sebelius* (2012), the Court, by a five-to-four majority led by Chief Justice John Roberts, held that the individual mandate was constitutional because it could be construed as a "tax," and it is clearly within the power of Congress to levy taxes. But the Court also held the law's Medicaid expansion—which forced states to expand Medicaid or lose *all* of their Medicaid funding—was overly coercive and unconstitutional. Since then, some states have chosen to expand Medicaid under the Affordable Care Act, whereas others have not.

In 2015, the Supreme Court once again took up how the states and federal government relate to one another under the Affordable Care Act. In *King v. Burwell* (2015), the court ruled on whether the federal government could issue subsidies only for health insurance purchased on state-run exchanges, or whether it could also provide them for the federally run exchange as well. Because all citizens must have health insurance because of the individual mandate, the federal government authorized states to set up exchanges where citizens could go to purchase health insurance. Furthermore, the federal government provides subsidies to individuals purchasing insurance through these exchanges (to make insurance more affordable for

lower- and middle-income Americans). Fourteen states opted to set up their own exchanges, but for citizens in the other 36 states, the federal government fully or partially runs an exchange for them. As written, the Affordable Care Act only allows the government to provide subsidies to those purchasing insurance through the state-level exchanges, and the plaintiffs in the case argued that providing the subsidies to those using the federally run exchanges is illegal. The Court decided that the government could provide subsidies to those using either type of exchange. Citizens using either a federal or a state exchange could continue to receive support from the government to purchase health care.

These are just two of the most recent of a series of cases stretching back to the start of the republic in which the Court, in effect, refereed disputes relating to "federalism." **Federalism** can be defined as a political system in which the national government shares power with local governments (state governments in the case of the United States, but other subnational governments in the case of federal systems including Australia, India, and Switzerland). Constitutionally, in America's federal system, state governments have a specially protected existence and the authority to make final decisions over many governmental activities. Even today, despite considerable expansion of federal authority over time, state and local governments are not mere junior partners in deciding important public policy matters. The national government can pass laws to protect the environment, store nuclear waste, expand low-income housing, guarantee the right to an abortion, provide special services for the handicapped, or toughen public-school graduation standards. But whether and how such federal laws are followed or funded often involves decisions by diverse state and local government officials, both elected and appointed. Policy passed in Washington, DC, must be implemented in state capitals—and local governments—across the country.

The study of federalism involves the study of **sovereignty**, the supreme (ultimate) political authority. A sovereign government is one that is legally and politically independent of any other government. A system can be either unitary, confederal, or federal. A **unitary system** is one in which sovereignty is wholly in the hands of the national government, so that the states and localities are dependent on its will. An example of a unitary system would be a nation like France: The central government makes all formal decisions, and local decisions are effectively simply enacting central government mandates. A **confederation or confederal system** is one in which the states are sovereign and the national government is allowed to do only that which the states permit. This was the case under the Articles of Confederation. A **federal system** is one in which sovereignty is shared, so that in some matters the national government is supreme and in other matters the states are supreme. As we will see throughout the chapter, that is true of the United States, though what comprises the spheres of federal and state supremacy have shifted over time. Figure 3.1 shows the differences between unitary, confederal, and federal systems.

federalism *Government authority shared by national and local governments.*

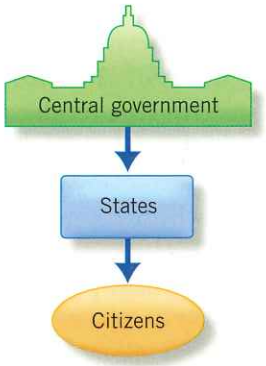
sovereignty *The ultimate political author in a system..*

unitary system *A system of government where sovereignty is fully vested in the national government, not the states.*

The Founding Fathers often took *confederal* and *federal* to mean much the same thing. Rather than establishing

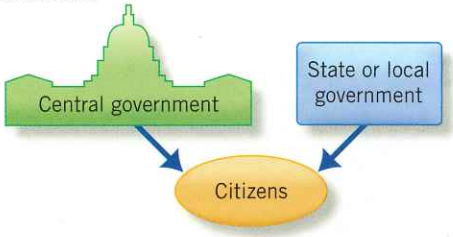
FIGURE 3.1 Lines of Power in Three Systems of Government

UNITARY SYSTEM



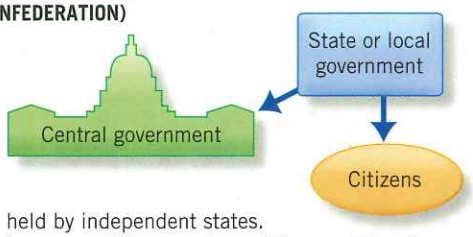
Power centralized.
State or regional governments derive authority from central government. Examples: United Kingdom, France.

FEDERAL SYSTEM



Power divided between central and state or local governments.
Both the government and constituent governments act directly upon the citizens.
Both must agree to constitutional change.
Examples: Canada, United States since adoption of Constitution.

CONFEDERAL SYSTEM (or CONFEDERATION)



Power held by independent states.
Central government is a creature of the constituent governments.
Example: United States under the Articles of Confederation.

confederation or confederal system *A system of government where state governments are sovereign, and the national government can do only what the states permit.*

federal system *A system of government where the national and state governments share sovereignty.*

a government in which sovereign authority was clearly divided between the national and state governments, they saw themselves as creating a government that combined some characteristics of a unitary regime with some of a confederal one. Or, as James Madison expressed the idea in *Federalist* No. 39, the Constitution "is, in strictness, neither a national nor a federal Constitution, but a composition of both." Where sovereignty is located in this system is a matter that the Founders did not clearly answer.

In this text, a federal regime is defined in the simplest possible terms—as one in which local units of government have a specially protected existence and can make some final decisions over some governmental activities.

Federalism or federal–state relations may seem like an arcane or boring subject until you realize that it is behind many things that matter to many people: how much you pay in certain taxes, whether you can drive faster than 55 miles per hour on certain roadways, whether or where you can buy liquor, how strictly pollution is regulated, how much money gets spent on schools, whether all or most children have health insurance coverage, and much more. For instance, as summarized in the Constitutional Connections feature on page 53, federalism is at the heart of many of the controversies surrounding the Affordable Care Act. By the same token, federalism affects almost every aspect of crime and punishment in America: Persons convicted of murder are subject to the death penalty in some states but not in others; penalties for illegal drug sales vary widely from state to state; and, as you can explore in the Policy Dynamics: Inside/Outside the Box on page 71, an unresolved conflict exists between national law and certain states' laws regarding the use of marijuana. Perhaps most importantly, federalism is critical to how certain civil liberties (Chapter 5) and civil rights (Chapter 6) are defined and protected: for instance, some state constitutions mention God, and some state laws specifically prohibit funding for religious schools.

Federalism matters, but how it matters has changed over time. In 1908, Woodrow Wilson observed that the relationship between the national government and the states "is the cardinal question of our constitutional system," a question that cannot be settled by "one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[1]

Since the adoption of the Constitution in 1787, the single most persistent source of political conflict has been the relations between the national and state governments. The political conflict over slavery, for example, was intensified because some state governments condoned or supported slavery, while others took action to discourage it. The proponents and opponents of slavery were thus given territorial power centers from which to carry on the dispute. Other issues, such as the regulation of business and the provision of social welfare programs, were in large part

AP Images/Eric Risberg

IMAGE 3-1 Prison systems and other aspects of the criminal justice system vary considerably from state to state. This is just one example of how federalism shapes public policy.

CONSTITUTIONAL CONNECTIONS

Obamacare, the Individual Mandate, and Medicaid Expansion

The Patient Protection and Affordable Care Act (Obamacare) is one of the most fundamental transformations of American health care in recent decades. But it is also one of the most controversial policies in recent years and has generated several key constitutional rulings from the Supreme Court.

For example, in *National Federation of Business v. Sebelius* (2012), the Court ruled that Congress did not have the power to impose the individual mandate under the commerce clause, but did have that power under the Constitution's tax and spending clause (the first clause of Article 1, Section 8). Because Congress has the power to tax under the Constitution, the Court argued, it has the power to force people to buy insurance or pay a tax (the heart of the individual mandate).

In that same decision, however, the Court ruled that the federal government did not have the power to force states to expand Medicaid. Under Obamacare, the states had to expand Medicaid (the federal–state joint program to provide health care to the poor and disabled) or lose *all* of their Medicaid funds. The Court held this was not constitutional. The Court argued (based on previous decisions) that the same spending clause of the Constitution gives Congress the power to attach conditions to the receipt of federal funds. But it also held that such conditions must not be coercive, and it argued that this condition—expand Medicaid or lose all Medicaid funds—was coercive (and hence prohibited). The court did not, however, establish a clear standard for what constitutes coercive; it merely held that this law was coercive.

In *King v. Burwell* (2015), the Court held that citizens using both the state-level and the federally run exchanges were eligible to receive subsidies. While this ruling left the insurance subsidies in place, it did not settle the debate over the Affordable Care Act. The debate over the Act, and how best to provide health care, will continue into the future, as we discuss in later chapters.

fought out, for well over a century, in terms of "national interests" versus "states' rights." While other nations, such as Great Britain, were debating the question of whether the national government *ought* to provide old-age pensions or regulate the railroads, the United States debated a different question—whether the national government *had the right* to do these things.

The Founding

The goal of the Founders seems clear: Federalism was one device whereby personal liberty was to be protected. (The separation of powers was another.) The Founders feared that placing final political authority in any one set of hands, even in the hands of persons popularly elected, would so concentrate power as to risk tyranny. But they had seen what happened when independent states tried to form a compact, as under the Articles of Confederation; what the states put together, they could also take apart. The alliance that existed among the states from 1776 to 1787 was a confederation, that is, a system of government in which the people create state governments, which in turn create and operate a national government (see Figure 3.1 on page 51). Since the national government in a confederation derives its powers from the states, it is dependent on their continued cooperation for its survival. By 1786, that cooperation was barely forthcoming.

A Bold, New Plan

A federation—or a "federal republic," as the Founders called it—derives its powers directly from the people, as do the state governments. As the Founders envisioned it, both levels of government, the national and the state, would have certain powers, but neither would have supreme authority over the other. James Madison, writing in *Federalist* No. 46, said that both the state and federal governments "are in fact but different agents and trustees of the people, constituted with different powers." In *Federalist* No. 28, Alexander Hamilton explained how he thought the system would work: The people could shift their support between state and federal levels of government as needed in order to keep the two in balance. "If their rights are invaded by either, they can make use of the other as the instrument of redress."

It was an entirely new plan, for which no historical precedent existed. Nobody came to the Philadelphia Convention with a clear idea of what a federal (as opposed to a unitary or a confederal) system would look like, and there was not much discussion at Philadelphia of how the system would work in practice. Few delegates then used the word *federalism* in the sense in which we now use it (it was originally used as a synonym for *confederation* and only later came to stand for something different).[2] The Constitution does not spell out the powers that the states are to have, and until the Tenth Amendment was added at the insistence of various states, it did not even include a clause saying (as did the amendment) that "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 Founders assumed from the outset that the federal government would have only those powers given to it by the Constitution; the Tenth Amendment was an afterthought, added to make that assumption explicit and allay fears that something else was intended.[3]

The Tenth Amendment has rarely had much practical significance, however. From time to time, the Supreme Court has tried to interpret that amendment as putting certain state activities beyond the reach of the federal government, but usually the Court has later changed its mind and allowed Washington to regulate such matters. For example, while the Court initially ruled that the federal government could not regulate the hours worked by employees of a city-owned mass transit system, it later reversed course and decided that the federal government could do that. The Court reasoned that running such a transportation system was not one of the powers "reserved to the states," and hence could be regulated by the federal government.[4] But, as we explain later in this chapter, the Court has recently begun to give new life to the Tenth Amendment and the doctrine of state sovereignty.

Elastic Language

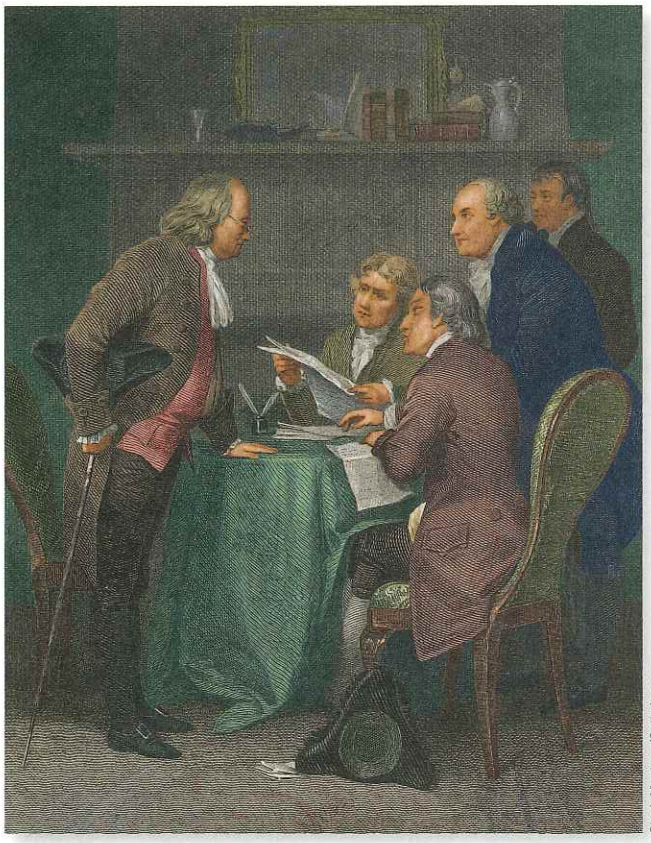
The need to reconcile the competing interests of various factions at the convention—large versus small states, southern versus northern states—was difficult enough without trying to spell out the exact relationship between the state and national governments. For example, Congress was given the power to regulate commerce "among the several states." The Philadelphia Convention would have gone on for four years rather than four months if the Founders had decided that it was necessary to describe, in clear language, how one was to tell where commerce *among* the states ended and commerce wholly *within* a single state began. The Supreme Court, as we shall see, devoted more than a century to that task before giving up.

Though some clauses bearing on federal–state relations were reasonably clear (see the box on page 59), other clauses were quite vague. The Founders realized, correctly, that they could not make an exact and exhaustive list of everything the federal government was empowered to do—circumstances would change, and new exigencies would arise. Thus they added the following elastic language to Article I: Congress shall have the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The Founders themselves carried away from Philadelphia different views of what federalism meant. One view was championed by Hamilton. Since the people had created the national government, since the laws and treaties made pursuant to the Constitution were "the supreme law of the land" (Article VI), and since the most pressing needs were the development of a national economy and the conduct of foreign affairs, Hamilton thought that the national government was the superior and leading force in political affairs and that its powers ought to be broadly defined and liberally construed.

The other view, championed by Thomas Jefferson, was that the federal government, though important, was the product of an agreement among the states; and though "the people" were the ultimate sovereigns, the principal threat to their liberties was likely to come from the national government. (Madison, a strong supporter of national supremacy at the convention, later became a champion of states' rights.) Thus the powers of the federal government should be narrowly construed and strictly limited. As Madison put it in *Federalist* No. 45, in language that probably made Hamilton wince, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

Hamilton argued for national supremacy, Jefferson for states' rights. Though their differences were greater in theory than in practice (as we shall see in Chapter 14, Jefferson



Stock Montage/Getty Images

IMAGE 3-2 Benjamin Franklin, Thomas Jefferson, Livingston Adams, and Roger Sherman writing the Declaration of Independence.

while president sometimes acted in a positively Hamiltonian manner), the differing interpretations they offered of the Constitution continue to shape political debate even today.

The Debate on the Meaning of Federalism

Since Hamilton and Jefferson fought over states' rights more than two centuries ago, this question of state versus federal supremacy has remained at the core of American politics. Indeed, the Civil War was fought, in part, over this question. That bloody conflict, however, only settled one part of the federalism question: the national government was supreme, its sovereignty derived directly from the people, and thus the states could not lawfully secede from the Union. Virtually every other aspect of the national-supremacy issue has continued to be contested throughout time. As we will see below, the Courts have generally given the federal government more power over time, but they have also recently begun to place some important restrictions on federal power as well.

The Supreme Court Speaks

As arbiter of what the Constitution means, the Supreme Court became the focal point of the debate over whether state or national power should reign supreme. In Chapter 16, we shall see in some detail how the Court made its decisions. For now it is enough to know that during the formative years of the new Republic, the Supreme Court was led by a staunch and brilliant advocate of Hamilton's position, Chief Justice John Marshall. In a series of decisions, he and the Court powerfully defended the national-supremacy view of the newly formed federal government.

The box on page 59 lists some landmark cases in the history of federal–state relations. Perhaps the most important decision was in a case, seemingly trivial in its origins, that arose when James McCulloch, the cashier of the Baltimore branch of the Bank of the United States—which had been created by Congress—refused to pay a tax levied on that bank by the state of Maryland. He was hauled into state court and convicted of failing to pay the tax. In 1819, McCulloch appealed all the way to the Supreme Court in a case known as *McCulloch v. Maryland*. The Court, in a unanimous opinion, answered two questions in ways that expanded the powers of Congress and confirmed the supremacy of the federal government in the exercise of those powers.

The first question was whether Congress had the right to set up a bank, or any other corporation, since such a right is nowhere explicitly mentioned in the Constitution. Marshall said that, though the federal government possessed only those powers enumerated in the Constitution, the "extent"—that is, the meaning—of those powers required interpretation. Though the word *bank* is not in that document, one finds there the power to manage money: to lay and collect taxes, issue a currency, and borrow funds. To carry out these powers, Congress may reasonably decide that chartering a national bank is "necessary and proper." Marshall's words were carefully chosen to endow the **"necessary and proper" clause** with the widest possible sweep:

"necessary and proper" clause *Section of the Constitution allowing Congress to pass all laws "necessary and proper" to its duties, and that has permitted Congress to exercise powers not specifically given to it (enumerated) by the Constitution.*

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.[5]

The second question was whether a federal bank could lawfully be taxed by a state. To answer it, Marshall went back to first principles. The government of the United States was not established by the states, but by the people, and thus the federal government was supreme in the exercise of those powers conferred upon it. Having already concluded that chartering a bank was within the powers of Congress, Marshall then argued that the only way for such powers to be supreme was for their use to be immune from state challenge and for the products of their use to be protected against state destruction. Since "the power to tax involves the power to destroy," and since the power to destroy a federal agency would confer upon the states supremacy over the federal government, the states may not tax any federal instrument. Hence the Maryland law was unconstitutional.

McCulloch won, and so did the federal government. Half a century later, the Court decided that what was sauce for the goose was sauce for the gander. It held that just as state governments could not tax federal bonds, the federal government could not tax the interest people earn on state and municipal bonds. In 1988, the Supreme Court reversed course and decided that Congress was now free, if it wished, to tax the interest on such state and local bonds.[6] Municipal bonds, which for nearly a century were a tax-exempt investment protected (so their holders thought) by the Constitution, were now protected only by politics. So far, Congress hasn't tried to tax them.

Nullification

The Supreme Court can decide a case without settling the issue. The struggle over states' rights versus national supremacy continued to rage in Congress, during presidential

nullification *The doctrine that a state can declare null and void a federal law that, in the state's opinion, violates the Constitution.*

elections, and ultimately on the battlefield. The issue came to center on the doctrine of **nullification**. When Congress passed laws (in 1798) to punish newspaper editors who published stories critical of the federal government, James Madison and Thomas Jefferson opposed the laws, suggesting (in statements known as the Virginia and Kentucky Resolutions) that the states had the right to "nullify" (i.e., declare null and void) a federal law that, in the states' opinion, violated the Constitution. The laws expired before the claim of nullification could be settled in the courts.

Later, John C. Calhoun of South Carolina revived the doctrine of nullification, first in opposition to a tariff enacted by the federal government and later in opposition to federal efforts to restrict slavery. Calhoun argued that if Washington attempted to ban slavery, the states had the right to declare such acts unconstitutional and thus null and void. This time the issue was settled—by war. The northern victory in the Civil War determined once and for all that the federal union is indissoluble and that states cannot declare acts of Congress unconstitutional, a view later confirmed by the Supreme Court.[7]

Dual to Cooperative Federalism

After the Civil War, the debate about the meaning of federalism focused on the interpretation of the commerce clause of the Constitution. Out of this debate emerged the

HOW THINGS WORK | The States and the Constitution

The Framers made some attempt to define the relations between the states and the federal government and how the states were to relate to one another. The following points were made in the original Constitution—before the Bill of Rights was added.

Restrictions on Powers of the States

States may not make treaties with foreign nations, coin money, issue paper currency, grant titles of nobility, pass a bill of attainder or an ex post facto law, or, without the consent of Congress, levy any taxes on imports or exports, keep troops and ships in time of peace, or enter into an agreement with another state or with a foreign power.

[Art. I, sec. 10]

Guarantees by the Federal Government to the States

The national government guarantees to every state a "republican form of government" and protection against foreign invasion and (provided the states request it) protection against domestic insurrection.

[Art. IV, sec. 4]

An existing state will not be broken up into two or more states or merged with all or part of another state without that state's consent.

[Art. IV, sec. 3]

Congress may admit new states into the Union.

[Art. IV, sec. 3]

Taxes levied by Congress must be uniform throughout the United States: they may not be levied on some states but not others.

[Art. I, sec. 8]

The Constitution may not be amended to give states unequal representation in the Senate.

[Art. V]

Rules Governing How States Deal with Each Other

"Full faith and credit" shall be given by each state to the laws, records, and court decisions of other states. (For example, a civil case settled in the courts of one state cannot be retried in the courts of another.)

[Art. IV, sec. 1]

The citizens of each state shall have the "privileges and immunities" of the citizens of every other state. (No one is quite sure what this is supposed to mean.)

[Art. IV, sec. 2]

If a person charged with a crime by one state flees to another, he or she is subjected to extradition—that is, the governor of the state that finds the fugitive is obliged to return the person to the governor of the state where he or she is wanted.

[Art. IV, sec. 2]

doctrine of **dual federalism**, which held that though the national government was supreme in its sphere, the states were equally supreme in theirs, and that these two spheres of action should and could be kept separate. Applied to commerce, the concept of dual federalism implied that there were such things as *inter*state commerce, which Congress could regulate, and *intra*state commerce, which only the states could regulate, and that the Court could determine which was which.

For a long period the Court tried to decide what was interstate commerce based on the kind of business that was conducted. Transporting things between states was obviously interstate commerce, and so subject to federal regulation. Thus federal laws affecting the interstate shipment of lottery tickets,[8] prostitutes,[9] liquor,[10] and harmful foods and drugs[11] were upheld. On the other hand, manufacturing,[12] insurance,[13] and farming[14] were in the past considered *intra*state commerce, and so only the state governments were allowed to regulate them.

Such product-based distinctions turned out to be hard to sustain. For example, if you ship a case of whiskey from Kentucky to Kansas, how long is it in interstate commerce (and thus subject to federal law), and when does it enter intrastate commerce and become subject only to state law? For a while, the Court's answer was that the whiskey was in interstate commerce so long as it was in its "original package,"[15] but that only precipitated long quarrels as to what was the original package and how one is to treat things, like gas and grain, which may not be shipped in packages at all. And how could one distinguish between manufacturing and transportation when one company did both or when a single manufacturing corporation owned factories in different states? And if an insurance company sold policies to customers both inside and outside a given state, were there to be different laws regulating identical policies that happened to be purchased from the same company by persons in different states?

In time, the effort to find some clear principles that distinguished interstate from intrastate commerce was pretty much abandoned. Commerce was like a stream flowing through the country, drawing to itself contributions from thousands of scattered enterprises and depositing its products in millions of individual homes. The Court began to permit the federal government to regulate almost anything that affected this stream, so that by the 1940s not only had farming and manufacturing been redefined as part of interstate commerce,[16] but even the janitors and window washers in buildings that housed companies engaged in interstate commerce were now said to be part of that stream.[17]

More generally, over time, the power of the federal government expanded and intruded on areas once thought solely to be the province of the states. Today, unlike in the 19th century, it is more difficult to define many areas of clearly national or state dominance. The example of interstate commerce discussed above is one, but other areas, such as school policy and highways, also illustrate the point. For example, at one time, highways were the responsibility of state governments, but with the establishment of the interstate highway system in the 1950s, the federal government took on a large role in transportation policy. Likewise, while education has long been considered primarily a state and local government concern, over time the federal government has become more involved through the Elementary and Secondary Education Act, the No Child Left Behind Act, and former President Barack Obama's Race to the Top initiative. Today, some speak of a program of **cooperative federalism**, where the national and state governments share responsibilities in most policy areas. If dual federalism is a layer cake with the state and federal governments having separate spheres of sovereignty (hence separate layers), cooperative federalism is a marble cake where the two blend together. Table 3.1 shows areas of state power, areas of federal power, and areas where the states and federal government share powers in the contemporary United States.

dual federalism *Doctrine holding that the national government is supreme in its sphere, the states are supreme in theirs, and the two spheres should be kept separate.*

cooperative federalism *Idea that the federal and state governments share power in many policy areas.*

State Sovereignty

It would be a mistake to think that the doctrine of dual federalism is entirely dead, however. Until recently, Congress—provided that it had a good reason—could pass a law regulating almost any kind of economic activity anywhere in the country, and the Supreme Court would call it constitutional. But in *United States v. Lopez* (1995), the Court held that Congress had exceeded its commerce clause power by prohibiting guns in a school zone. This marked the first in a series of decisions in which the court began to reassert a greater role for state (as opposed to national) power.

The Court reaffirmed the view that the commerce clause does not justify any federal action when, in May 2000, it overturned the Violence Against Women Act of 1994. This law allowed women who were the victims of a crime of violence motivated by gender to sue the guilty party in federal court. In *United States v. Morrison*, the Court, in a five-to-four decision, said that attacks against women are not, and do not substantially affect, interstate commerce, and hence Congress cannot constitutionally

TABLE 3.1 | Government Powers: Federal, State, and Both

Powers of the Federal Government	Powers of the State Government	Powers Exercised by Both the Federal and State Governments
• Subject to Article V of the Constitution, deciding on the process by which amendments to the Constitution are to be proposed and ratified	• Ratifying amendments to the Constitution through state legislatures or ratifying conventions	• Taxing citizens and businesses
• Declaring war	• Conducting elections for public offices, initiatives, and referenda	• Chartering banks and corporations
• Maintaining and deploying military forces	• Establishing local governments	• Building and maintaining roads
• Making foreign policy, international treaties, and trade deals	• Regulating intrastate commerce	• Borrowing money and managing public debts
• Printing money	• Licensing occupations and land uses	• Administering criminal justice institutions
• Regulating interstate commerce	• Enacting laws to promote public safety, health, and morals (the "police power")	• Regulating Native American gaming (casino) businesses
• Maintaining postal offices and services		

pass such a law. Chief Justice William Rehnquist said that "the Constitution requires a distinction between what is truly national and what is truly local." The states, of course, can pass such laws, and many have.

The Court has moved to strengthen states' rights on other grounds as well. In *Printz v. United States* (1997), the Court invalidated a federal law that required local police to conduct background checks on all gun purchasers. The Court ruled that the law violated the Tenth Amendment by commanding state governments to carry out a federal regulatory program. Writing for the five-to-four majority, Justice Antonin Scalia declared, "The Federal government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program. . . . Such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

The Court has also given new life to the Eleventh Amendment, which protects states from lawsuits by citizens of other states or foreign nations. In 1999, the Court shielded states from suits by copyright owners who claimed infringement of copyrights issued by state agencies, and immunized states from lawsuits by people who argued that state regulations create unfair economic competition. In *Alden v. Maine* (1999), the Court held that state employees could not sue to force state compliance with federal fair-labor laws. In the Court's five-to-four majority opinion, Justice Anthony M. Kennedy stated, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation." A few years later, in *Federal Maritime Commission v. South Carolina Ports Authority* (2002), the Court further expanded states' sovereign immunity from private lawsuits. Writing for the five-to-four majority, Justice Clarence Thomas declared that dual sovereignty "is a defining feature of our nation's constitutional blueprint," adding that the states "did not consent to become mere appendages of the federal government" when they ratified the Constitution.

Not all Court decisions, however, support greater state sovereignty. In 1999 in *Saenz v. Roe*, for example, the Court ruled seven to two that state welfare programs may not restrict new residents to the welfare benefits they would have received in the states from which they moved. Likewise, in *Gonzales v. Raich* (2005), the Court ruled that Congress can criminalize marijuana even in states where it is approved for medicinal purposes. Furthermore, in 2012 in *Arizona v. United States*, the Court held that only the federal government—and not state governments—had the right to regulate immigration laws and enforcement. More generally, to empower states is not to disempower Congress, which, as it has done since the late 1930s, can still make federal laws regarding almost anything as long as it does not go too far in "commandeering" state resources or gutting states' rights.

The Court's recent ruling on gay marriage offers another illustration of federal law trumping state ones. Traditionally, marriage has been a state matter, not a federal one. As gays and lesbians began to push for greater equality, including the right to marry (see Chapter 6), many states responded by banning same-sex marriage. In 2015, the Court ruled in *Obergefell v. Hodges* that such bans were unconstitutional, and established a right to marriage for gay and lesbian couples under the Constitution. While marriage laws are generally a state matter, such laws cannot contravene the Constitution.

This ongoing debate about state versus national sovereignty calls to mind President Wilson's quote from earlier in the chapter: Federalism really is at the heart of American politics, and cannot be resolved definitively, but rather is contested again and again. Over time, the spheres of activity of the state and national governments have shifted, and will continue to do so moving forward.

Finally, we would note that not only the Court shapes federalism. As we discuss in later chapters, American

LANDMARK CASES | Federal–State Relations

- ***McCulloch v. Maryland* (1819):** The Constitution's "necessary and proper" clause permits Congress to take actions (in this case, to create a national bank) when it is essential to a power that Congress has (in this case, managing the currency).
- ***Gibbons v. Ogden* (1824):** The Constitution's commerce clause gives the national government exclusive power to regulate interstate commerce.
- ***Wabash, St. Louis and Pacific Railroad v. Illinois* (1886):** The states may not regulate interstate commerce.
- ***United States v. Lopez* (1995):** The national government's power under the commerce clause does not permit it to regulate matters not directly related to interstate commerce (in this case, banning firearms in a school zone).
- ***Printz v. United States* (1997):** The national government's authority to require state officials to administer or enforce a federal regulation is limited.
- ***Alden v. Maine* (1999):** Congress may not act to subject nonconsenting states to lawsuits in state courts.
- ***Reno v. Condon* (2000):** The national government's authority to regulate interstate commerce extends to restrictions on how states gather, circulate, or sell certain information about citizens.
- ***United States v. Morrison* (2000):** The national government's power to regulate interstate commerce does not extend to giving female victims of violence the right to sue perpetrators in federal court.
- ***Federal Maritime Commission v. South Carolina Ports Authority* (2002):** Expanded states' sovereign immunity from private lawsuits and declared that the states "did not consent to become mere appendages of the federal government" when they ratified the Constitution.
- ***Kelo v. City of New London* (2005):** The Constitution allows a local government to seize property, not only for "public use" such as building highways, but also to "promote economic development" in a "distressed" community.
- ***National Federation of Independent Business v. Sebelius* (2010):** The national government's authority to "alter" or "amend" programs that it jointly funds and administers with the states is limited.
- ***Arizona v. United States* (2012):** Only the federal government may regulate immigration laws and enforcement.
- ***King v. Burwell* (2015):** Individuals using both the state-run and federally run health insurance exchanges may receive health insurance subsidies from the federal government.
- ***Obergefell v. Hodges* (2015):** People have a constitutional right to same-sex marriage in the United States.

national institutions have recently become more characterized by gridlock and the inability to produce new policies. In response, many interest groups and activists have turned to state houses to press their agendas. As a result, policy debates that once raged in the halls of Congress—on issues such as abortion, gun control, environmental protection, and so forth—are now largely fought at the state level.[18] This ensures that federalism will remain a relevant topic in the years to come.

3-2 Governmental Structure

Federalism refers to a political system that comprises local (territorial, regional, provincial, state, or municipal) units of government, as well as a national government, that can make final decisions with respect to at least some governmental activities and whose existence is specially protected. Almost every nation in the world has local units of government of some kind, if for no other reason than to decentralize the administrative burdens of governing. But these governments are not federal unless the local units exist independent of the preferences of the national government and can make decisions on at least some matters without regard to those preferences.

The United States, Canada, Australia, India, Germany, and Switzerland are federal systems, as are a few other nations. France, Great Britain, Italy, and Sweden are not; they are unitary systems because such local governments as they possess can be altered or even abolished by the national government and cannot plausibly claim to have final authority over any significant governmental activities.

The special protection that subnational governments enjoy in a federal system derives in part from the constitution of the country, but also from the habits, preferences,

and dispositions of the citizens and the actual distribution of political power in society. The constitution of the former Soviet Union in theory created a federal system, as claimed by that country's full name—the Union of Soviet Socialist Republics—but for most of their history, none of these "socialist republics" were in the slightest degree independent of the central government. Were the American Constitution the only guarantee of the independence of the American states, they would long since have become mere administrative subunits of the government in Washington. Their independence results in large measure from the commitment of Americans to the idea of local self-government and from the fact that Congress consists of people who are selected by and responsive to local constituencies.

"The basic political fact of federalism," writes David B. Truman, "is that it creates separate, self sustaining centers of power, prestige, and profit."[19] Political power is locally acquired by people whose careers depend for the most part on satisfying local interests. As a result, though the national government has come to have vast powers, it exercises many of those powers through state governments. What many of us forget when we think about "the government in Washington" is that it spends much of its money and enforces most of its rules not directly on citizens, but on other, local units of government. A large part of the welfare system, all of the interstate highway system, virtually every aspect of programs to improve cities, the largest part of the effort to supply jobs to the unemployed, the entire program to clean up our water, and even much of our military manpower (in the form of the National Guard) are enterprises in which the national government does not govern so much as it seeks, by regulation, grant, plan, argument, and cajolery, to get the states to govern in accordance with nationally (though often vaguely) defined goals.

Sometimes, however, confusion or controversy about which government is responsible for which functions surfaces at the worst possible moment and lingers long after attempts have been made to sort it all out. Sadly, in our day, this is largely what "federalism" has meant in practice to citizens from New Orleans and the Gulf Coast region affected by Hurricane Katrina in 2005.

Before, during, and after Hurricanes Katrina and Rita struck in 2005, federal, state, and local officials could be found fighting among themselves over everything from who was supposed to maintain and repair the levees to who should lead disaster-relief initiatives. In the weeks after the hurricanes hit, it was widely reported that the main first responders and disaster-relief workers came not from government, but from myriad religious and other charitable organizations. Not only that, but government agencies, such as the Federal Emergency Management Agency (FEMA), often acted in ways that made it harder, not easier, for these volunteers and groups to deliver help when and where it was most badly needed.

Federalism needs to be viewed dispassionately through a historical lens wide enough to encompass both its worst legacies (for instance, state and local laws that once legalized racial discrimination against African Americans) and its best (for instance, African Americans winning mayors' offices and seats in state legislatures when there were very few African Americans in Congress).

Federalism, it is fair to say, has the virtues of its vices and the vices of its virtues. To some, federalism means allowing states to block action, prevent progress, upset national plans, protect powerful local interests, and cater to the self-interest of hack politicians. Harold Laski, a British observer, described American states as "parasitic and poisonous,"[20] and William H. Riker, an American political scientist, argued that "the main effect of federalism since the Civil War has been to perpetuate racism."[21] By contrast, another political scientist, Daniel J. Elazar, argued that the "virtue of the federal system lies in its ability to develop and maintain mechanisms vital to the perpetuation of the unique combination of governmental strength, political flexibility, and individual liberty, which has been the central concern of American politics."[22]

So diametrically opposed are the views of Riker and Elazar that one wonders whether they are talking about the same subject. They are, of course, but they each stress different aspects of the same phenomenon. Whenever the opportunity to exercise political power is widely available (as among the 50 states, more than 3,000 counties, and many thousands of municipalities in the United States), it is obvious that in different places different people will make use of that power for different purposes. There is no question that allowing states and cities to make autonomous, binding political decisions will allow some people in some places to make those decisions in ways that maintain racial segregation, protect vested interests, and facilitate corruption. It is equally true, however, that this arrangement also enables other people in other places to pass laws that attack segregation, regulate harmful economic practices, and purify politics, often long before these ideas gain national support or become national policy.

The existence of independent state and local governments means that different political groups pursuing different political purposes will come to power in different places. The smaller the political unit, the more likely it is to be dominated by a single political faction. James Madison understood this fact perfectly and used it to argue (in *Federalist* No. 10) that it would be in a large (or "extended") republic, such as the United States as a whole, that one

would find the greatest opportunity for all relevant interests to be heard. When William Riker condemns federalism, he is thinking of the fact that in some places the ruling factions in cities and states have opposed granting equal rights to African Americans. When Daniel Elazar praises federalism, he is recalling that, in other states and cities, the ruling factions have taken the lead (long in advance of the federal government) in developing measures to protect the environment, extend civil rights, and improve social conditions. If you live in California, whether you like federalism depends in part on whether you like the fact that California has, independent of the federal government, cut property taxes, strictly controlled coastal land use, heavily regulated electric utilities, and increased (at one time) and decreased (at another time) its welfare rolls.

Increased Political Activity

Federalism has many effects, but its most obvious effect has been to facilitate the mobilization of political activity. Unlike Don Quixote, the average citizen does not tilt at windmills. He or she is more likely to become involved in organized political activity if he or she feels a reasonable chance exists of producing a practical effect. The chances of having such an effect are greater where there are many elected officials and independent governmental bodies, each with a relatively small constituency, than where there are few elected officials, most of whom have the nation as a whole for a constituency. In short, a federal system, by virtue of the decentralization of authority, lowers the cost of organized political activity; a unitary system, because of the centralization of authority, raises the cost. We may disagree about the purposes of organized political activity, but the fact of widespread organized activity can scarcely be doubted—or if you do doubt it, that is only because you have not yet read Chapters 8 and 11.

It is impossible to say whether the Founders, when they wrote the Constitution, planned to produce such widespread opportunities for political participation. Unfortunately, they were not very clear (at least in writing) about how the federal system was supposed to work, and thus most of the interesting questions about the jurisdiction and powers of our national and state governments had to be settled by a century and a half of protracted and often bitter conflict.

Different States, Different Policies

The states play a key role in many, if not most, policy areas, such as social welfare, public education, law enforcement, criminal justice, health care and hospitals, roads and highways, and managing water supplies. On these and many other matters, state constitutions and laws are far more detailed and sometimes confer more rights than the federal one. For example, the California constitution includes an explicit right to privacy, says that noncitizens have the same property rights as citizens, and requires the state to use "all suitable means" to support public education.

laboratories of democracy
Idea that different states can implement different policies, and the successful ones will spread.

This diversity is a benefit of federalism: that different states can construct different policies that better fit with their local needs. This is the classic idea of "**laboratories of democracy**": States can try out different policies, and if they are successful, others states can copy them.[23] This is indeed a benefit to federalism: Many successful policies are first adopted in one place (such as health care reforms, welfare reforms, and so forth), and then copied in other states (or even in the federal government) when they prove to be successful.[24]

But this sort of experimentation generates a cost as well. Because different states have different policies, different citizens will be treated differently depending on their state of residence. For example, as we explained in

Stock Montage/Getty Images

IMAGE 3-3 Federalism has permitted experimentation. Women were able to vote in the Wyoming Territory in 1888, long before they could do so in most states.

initiative *Process that permits voters to put legislative measures directly on the ballot.*

referendum *Procedure enabling voters to reject a measure passed by the legislature.*

recall *Procedure whereby voters can remove an elected official from office.*

the Constitutional Connections box, part of Obamacare called for states to expand Medicaid to provide health insurance to the working poor. Some states have chosen to expand Medicaid under Obamacare (such as California, North Dakota, and West Virginia), whereas others (such as Texas, Oklahoma, and Florida) have not. So a low-income resident of one state would qualify for benefits in some states, but not others. Likewise, in some states, those convicted of certain crimes are subject to the death penalty, but not in others. The benefit of policy differences means that we pay a price in terms of equality.

More generally, this variation in federalism highlights the two competing values at stake here: equality and participation. On the one hand, federalism, by allowing states to design different policies for health care, education, criminal justice, and so forth, means that citizens in different jurisdictions will be treated differently (and hence pay a cost in terms of equality). But at the same time, federalism allows for participatory input: for more say in how schools are governed, where roads are built, how criminal justice policies are set, and so forth. Indeed, the differences in policy discussed above are largely (though not completely) a function of the differences in participation. So we cannot have more equality without having less participation, and vice versa. Having the benefit of "laboratories of democracy" means that not all citizens will be treated equally.

Why do these various policies differ so much across states? The most fundamental answer is that participation is different: Different people, with different preferences, participate in the decision-making process in different states. But they can also differ because different states have different institutions as well, especially in terms of direct democracy. As we saw in Chapter 2, the federal Constitution is based on a republican, not a democratic, principle: Laws are to be made by the representatives of citizens, not by the citizens directly. But many state constitutions open one or more of three doors to direct democracy. About half of the states provide for some form of legislation by initiative. The **initiative** allows voters to place legislative measures (and sometimes constitutional amendments) directly on the ballot by getting enough signatures (usually between 5 and 15 percent of those who voted in the last election) on a petition. About half of the states permit the **referendum**, a procedure that enables voters to reject a measure adopted by the legislature. Sometimes the state constitution specifies that certain kinds of legislation (e.g., tax increases) must be subject to a referendum whether the legislature wishes it or not. The **recall** is a procedure, in effect in more than 20 states, whereby voters can remove an elected official from office. If enough signatures are gathered on a petition, the official must go before voters, who can vote to keep the person in office, remove the person from office, or remove the person and replace him or her with someone else. In 2003, California voters recalled then governor Gray Davis and replaced him with Arnold Schwarzenegger, and in 2012, Wisconsin governor Scott Walker faced a recall election, but survived and remained in office.

The existence of the states is guaranteed by the federal Constitution: no state can be divided without its consent, each state must have two representatives in the Senate (the only provision of the Constitution that may not be amended), every state is assured of a republican form of government, and the powers not granted to Congress are reserved for the states. By contrast, cities, towns, and counties enjoy no such protection; they exist at the pleasure of the states. Indeed, states have frequently abolished certain kinds of local governments, such as independent school districts.

This explains why there is no debate about city sovereignty comparable to the debate about state sovereignty. The constitutional division of power between them is settled: The state is supreme. But federal–state relations can be complicated because the Constitution invites elected leaders to struggle over sovereignty. Which level of government has the ultimate power to decide where nuclear waste gets stored, how much welfare beneficiaries are paid, what rights prisoners enjoy, or whether supersonic jets can land at local airports? American federalism answers such questions, but on a case-by-case basis through intergovernmental politics and court decisions.

3-3 Federal Money, State Programs

As we discussed above, over time, we have moved to a system where both the national and state governments contribute to most policy areas. One key way this occurs is via various federal grant programs, where the federal government provides the money—and accompanying rules—for programs implemented at the state level. To understand contemporary federalism, we need to understand how national monies help to shape policy at all levels of government.

Grants-In-Aid

Perhaps the oldest example of national funds being used at the state level is federal **grants-in-aid**. The first of these programs began even before the Constitution was adopted, in the form of land grants made by the national government to the states in order to finance education. (State universities all over the country were built with the proceeds from the sale of these land grants; hence the name *land-grant colleges*.) Land grants were also made to support the building of wagon roads, canals, railroads, and flood-control projects. These measures were hotly debated in Congress (President Madison thought some were unconstitutional), even though the use to which the grants were put was left almost entirely to the states.

Cash grants-in-aid began almost as early. In 1808, Congress gave $200,000 to the states to pay for their militias, with the states in charge of the size, deployment, and command of these troops. However, grant-in-aid programs remained few in number and small in price until the 20th century, when scores of new ones came into being. Today, federal grants go to hundreds of programs, including such giant federal–state programs as Medicaid (see Table 3.2). Overall, in fiscal year 2015 (the most recent data available), the federal government spent $624 billion on federal grants-in-aid, representing 16.9 percent of federal outlays in that year.[25]

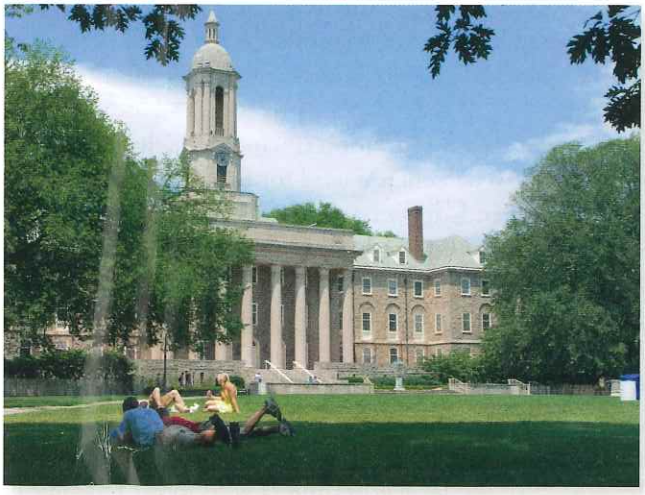
The grants-in-aid system, once under way, grew quickly because it helped state and local officials resolve a dilemma. On the one hand, they wanted access to the superior taxing power of the federal government. On the other hand, prevailing constitutional interpretation, at least until the late 1930s, held that the federal government could not spend money for purposes not authorized by the Constitution. The solution was obviously to have federal money put into state hands: Washington would pay the bills; the states would run the programs.

grants-in-aid *Money given by the national government to the states.*

To state officials, federal money seemed so attractive for several reasons. First, the money was there. Thanks to the high-tariff policies of the Republicans, Washington in the 1880s had huge budget surpluses. Second, in the 1920s, as those surpluses dwindled, Washington inaugurated the federal income tax. It automatically brought in more money as economic activity (and thus personal income) grew. Third, the federal government, unlike the states, managed the currency and could print more at will. (Technically, it borrowed this money, but it was under no obligation to pay it all back because, as a practical matter, it had borrowed from itself.) States could not do this; if they borrowed money (and many could not), they had to pay it back, in full.

These three economic reasons for the appeal of federal grants were probably not as important as a fourth reason: politics. Federal money seemed to a state official to be "free" money. Governors did not have to propose, collect, or take responsibility for federal taxes. Instead, a governor could denounce the federal government for being profligate in its use of the people's money. Meanwhile, he or she could claim credit for a new public works or other projects funded by Washington and, until recent decades, expect little or no federal supervision in the bargain.[26]

That every state had an incentive to ask for federal money to pay for local programs meant, of course, that it would be very difficult for one state to get money for a given program without every state getting it. The senator from Alabama who votes for the project to improve navigation on the Tombigbee River will have to vote in favor of



Johnny Stockshooter/Alamy

IMAGE 3-4 Some of the nation's top academic institutions, such as Penn State, began as land-grant colleges.

TABLE 3.2 | Federal Grants to State and Local Governments (2015)

The federal government spent more than $624 billion on grants to states in 2015.	
Among the biggest items:	
Health care (including Medicaid)	$368 billion
Income security	$101 billion
Transportation	$60.8 billion
Education, training, employment, and social services	$60.5 billion
Community and regional development	$14.4 billion

Source: Office of Management and Budget, FY2017 Budget, Historical Table 12.2, "Total Outlays for Grants to State and Local Governments, by Function and Fund Group: 1940–2021."

projects improving navigation on every other river in the country if the senator expects his or her Senate colleagues to support such a request. Federalism as practiced in the United States means that when Washington wants to send money to one state or congressional district, it must send money to many states and districts.

Shortly after September 11, 2001, for example, President George W. Bush and congressional leaders in both parties pledged new federal funds to increase public safety payrolls, purchase the latest equipment to detect bioterror attacks, and so on. Since then, New York City and other big cities have received tens of millions of federal dollars for such purposes, but so have scores of smaller cities and towns. The grants allocated by the Department of Homeland Security were based on so-called fair-share formulas mandated by Congress, which are basically the same formulas the federal government uses to allocate certain highway and other funds among the states. These funding formulas not only spread money around but also generally skew funding toward states and cities with low populations. Thus, Wyoming received seven times as much federal homeland security funding per capita as New York State did, and Grand Forks County, North Dakota (population 70,000), received $1.5 million to purchase biochemical suits, a semi-armored van, decontamination tents, and other equipment to deal with weapons of mass destruction.[27]

Grand Forks County was not the only recipient of such programs: thousands of state and local police departments were as well. For example, the St. Louis Area Regional Response System (which administers these grants for the St. Louis area) has spent $9.4 million on equipment for area police departments since 2003, including a Bearcat armored truck, two helicopters, night-vision goggles, and body armor. Such equipment was used in the clashes between police and protesters in 2014 following the death of Michael Brown in Ferguson, Missouri (a suburb of St. Louis).[28] In the wake of Brown's death, such programs were put under the spotlight with calls for tighter regulation on the provision of military-grade equipment to local police forces. The White House did impose some limits, but stopped short of cutting off such grant programs altogether.[29]

Scott Olson/Getty Images

IMAGE 3-5 Police armed with military gear clashed with protesters following the death of Michael Brown in 2014. The military gear was provided to police departments by federal grants.

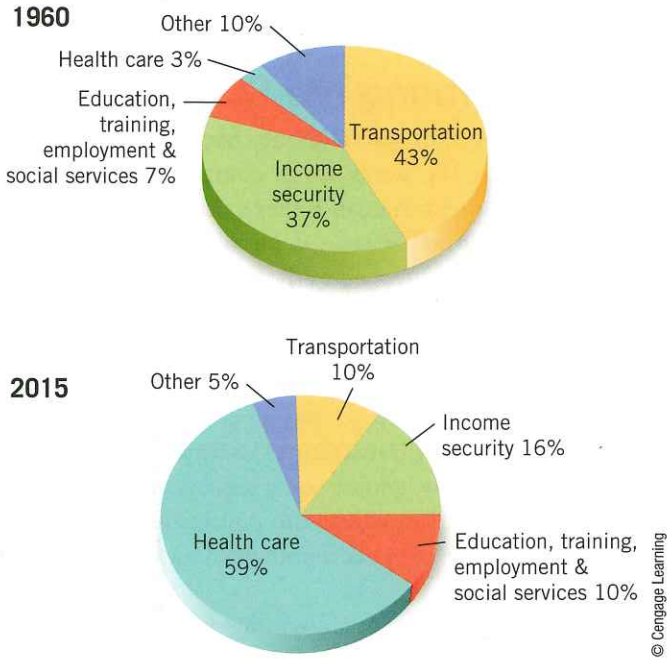
Meeting National Needs

Until the 1960s, most federal grants-in-aid were conceived by or in cooperation with the states and were designed to serve essentially state purposes. Large blocs of voters and a variety of organized interests would press for grants to help farmers, build highways, or support vocational education. During the 1960s, however, an important change occurred: the federal government began devising grant programs based less on what states were demanding and more on what federal officials perceived to be important *national* needs (see Figure 3.2). Federal officials, not state and local ones, were the principal proponents of grant programs to aid the urban poor, combat crime, reduce pollution, and deal with drug abuse.

The rise in federal activism in setting goals and the occasional efforts, during some periods, to bypass state officials by providing money directly to cities or even local citizen groups had at least two separate but related effects: one effect was to increase federal grants to state and local governments, and the other was to change the purposes to which those monies were put. Whereas federal aid amounted to less than 2 percent of state general revenue in 1927, by 2014 federal aid accounted for about one-third of state general revenue.[30] Figure 3.2 on page 65 shows the purposes of state and federal aid in 1960 vs. 2015. In 1960, about 3 percent of federal grants to state and local governments were for health care. Today, however, one federal–state health care program alone, Medicaid, accounts for approximately half of all federal grants (and overall health care accounts for nearly 60 percent of federal grants to states). And whereas in 1960 more than 40 percent of all federal grants to state and local governments went to transportation (including highways), today only about 10 percent are used for that purpose.

These trends have important consequences for how we think about the size of government. While the overall level of federal spending has skyrocketed (increasing about five times in real dollars since 1960), the size of the federal workforce has stayed roughly constant over the past 60 years. Meanwhile, the state and local workforce has tripled over that same time span.[31] When we think of "big government," it is largely big federal money implemented by a big state and local government workforce. That makes understanding these sorts of federal grants all the more important.

FIGURE 3.2 The Changing Purpose of Federal Grants to State and Local Governments, 1960–2015



Source: Office of Management and Budget, FY2017 Budget, Historical Table 12.2, "Total Outlays for Grants to State and Local Governments, by Function and Fund Group: 1940–2021."

The Intergovernmental Lobby

State and local officials, both elected and appointed, began to form an important new lobby—the "intergovernmental lobby," made up of mayors, governors, superintendents of schools, state directors of public health, county highway commissioners, local police chiefs, and others who had come to depend on federal funds.[32] Today, federal agencies responsible for health care, criminal justice, environmental protection, and other programs have people on staff who specialize in providing information, technical assistance, and financial support to state and local organizations, including the "Big 7": the U.S. Conference of Mayors, the National Governors Association, the National Association of Counties, the National League of Cities, the Council of State Governments, the International City/County Management Association, and the National Conference of State Legislatures. Reports by these groups and publications like *Governing* magazine are read routinely by many federal officials to keep a handle on issues and trends in state and local government.

National organizations of governors or mayors press for more federal money, but not for increased funding for any particular city or state. Thus most states, dozens of counties, and more than a hundred cities have their own offices in Washington, DC. These groups also spend big on lobbying the federal government: according to the Center for Responsive Politics, in 2016, territory, state, and local governments collectively spent almost $70 million lobbying Congress, with Los Angeles County alone spending almost $1 million (and many other states and localities spending nearly as much).[33] Back home, state and local governments have created new positions, or redefined old ones, in response to new or changed federal funding opportunities.

categorical grants *Federal grants for specific purposes, such as building an airport.*

The purpose of the intergovernmental lobby has been the same as that of any private lobby—to obtain more federal money with fewer strings attached. For a while, the cities and states did in fact get more money, but since the early 1980s their success in obtaining federal grants has been more checkered, though this has not stopped their lobbying efforts.

Categorical Grants

The effort to loosen the strings took the form of shifting, as much as possible, the federal aid from **categorical grants** to block grants. A categorical grant is one for a specific purpose defined by federal law: to build an airport or a college dormitory, for example, or to make welfare payments to low-income mothers. Such grants usually require that the state or locality put up money to "match" some part of the federal grant, though the amount of matching funds can be quite small (sometimes only 10 percent or less). Governors and mayors complained about these categorical grants because their purposes were often so narrow that it was impossible for a state to adapt federal grants to local needs. A mayor seeking federal money to build parks might have discovered that the city could get money only if it launched an urban-renewal program that entailed bulldozing several blocks of housing or small businesses.

One response to this problem was to consolidate several categorical or project grant programs into a single block grant devoted to some general purpose and with fewer restrictions on its use. Block grants began in the mid-1960s, when such a grant was created to fund health care programs. Though many block grants were proposed between 1966 and 1980, only five were enacted. Of the three largest, one consolidated various categorical grant programs aimed at cities (Community Development Block Grants), another created a program to aid local law enforcement (Law Enforcement Assistance Act), and a third authorized new kinds of locally managed programs for the unemployed (CETA, or the Comprehensive Employment and Training Act).

In theory, block grants and revenue sharing were supposed to give the states and cities considerable freedom in

deciding how to spend the money while helping to relieve their tax burdens. To some extent they did. However, for four reasons, neither the goal of "no strings" nor the one of fiscal relief was really attained. First, the amount of money available from block grants and revenue sharing did not grow as fast as the states had hoped nor as quickly as did the money available through categorical grants.

Second, the federal government steadily increased the number of strings attached to the spending of this supposedly "unrestricted" money.

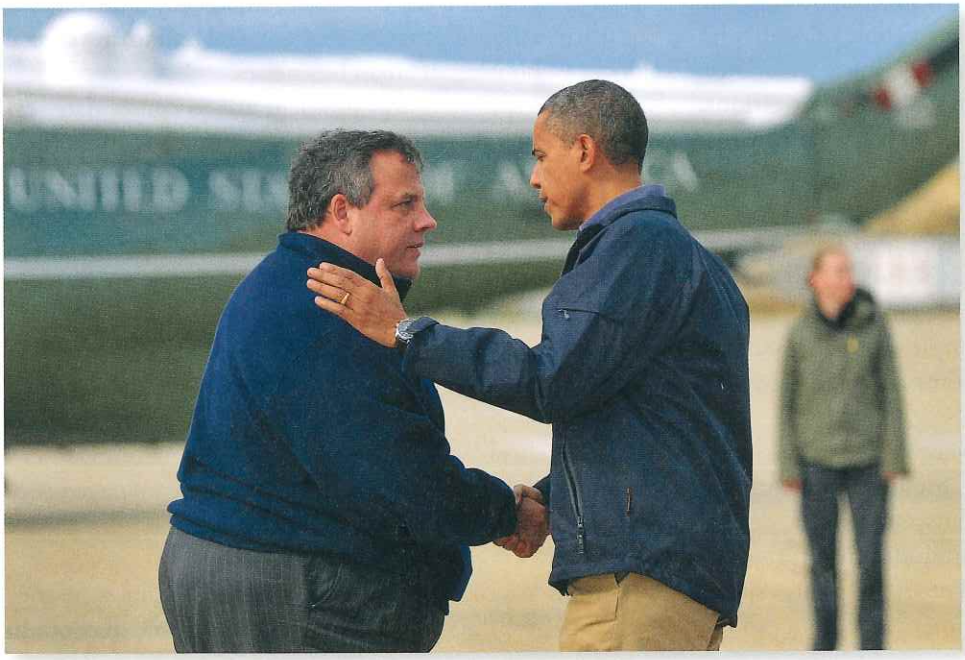
Third, block grants grew more slowly than categorical grants because of the different kinds of political coalitions supporting each. Congress and the federal bureaucracy liked categorical grants for the same reason the states disliked them—the specificity of these programs enhanced federal control over how the money was to be used. Federal officials, joined by liberal interest groups and organized labor, tended to distrust state governments. Whenever Congress wanted to address some national problem, its natural inclination was to create a categorical grant program so that it, and not the states, would decide how the money would be spent.

Fourth, even though governors and mayors like block grants, these programs cover such a broad range of activities that no single interest group has a vital stake in pressing for their enlargement. Categorical grants, on the other hand, often are a matter of life and death for many agencies—state departments of welfare, of highways, and of health, for example, are utterly dependent on federal aid. Accordingly, the administrators in charge of these programs will press strenuously for their expansion. Moreover, categorical programs are supervised by special committees of Congress, and as we shall see in Chapter 13, many of these committees have an interest in seeing their programs grow.

Rivalry Among the States

The more important federal money becomes to the states, the more likely the states are to compete among themselves for the largest share of it. For a century or more, the growth of the United States—in population, business, and income—was concentrated in the industrial Northeast. In recent decades, however, that growth—at least in population and employment, if not in income—has shifted to the South, Southwest, and Far West. This change has precipitated an intense debate over whether the federal government, by the way it distributes its funds and awards its contracts, is unfairly helping some regions and states at the expense of others. Journalists and politicians have dubbed the struggle as one between Snowbelt (or Frostbelt) and Sunbelt states.

Whether there is in fact anything worth arguing about is far from clear: The federal government has had great difficulty in figuring out where it ultimately spends what funds for what purposes. For example, a $1 billion defense contract may go to a company with headquarters in California, but much of the money may actually be spent in Connecticut or New York, as the prime contractor in California buys from subcontractors in the other states. It is even less clear whether federal funds actually affect the growth rate of the regions. The uncertainty about the facts has not prevented a debate about the issue, however. That debate focuses on the formulas written into federal laws by which block grants are



Jewel Samad/AFP/Getty Images

IMAGE 3-6 New Jersey Governor Chris Christie greets President Barack Obama, who visited the state to see the devastation caused by superstorm Sandy in October 2012.

allocated. These formulas take into account such factors as a county's or city's population, personal income in the area, and housing quality. A slight change in a formula can shift millions of dollars in grants in ways that favor either the older, declining cities of the Northeast or the newer, still-growing cities of the Southwest.

With the advent of grants based on distributional formulas (as opposed to grants for a particular project), the results of the census, taken every 10 years, assume monumental importance. A city or state shown to be losing population may, as a result, forfeit millions of dollars in federal aid. Senators and representatives now have access to computers that can tell them instantly the effect on their states and districts of even minor changes in a formula by which federal aid is distributed. These formulas rely on objective measures, but the exact measure is selected with an eye toward its political consequences. There is nothing wrong with this in principle, since any political system must provide some benefits for everybody if it is to stay together. Given the competition among states in a federal system, however, the struggle over allocation formulas becomes especially acute.

Federal Aid and Federal Control

So important has federal aid become for state and local governments that mayors and governors, along with others, began to fear that Washington was well on its way to controlling other levels of government. "He who pays the piper calls the tune," they muttered. In this view, the constitutional protection of state government to be found in the Tenth Amendment was in jeopardy as a result of the strings attached to the grants-in-aid on which the states were increasingly dependent.

Block grants were an effort to reverse this trend by allowing the states and localities freedom to spend money as they wished. But as we have seen, the new device did not in fact reverse the trend. Categorical grants—those with strings attached—continued to grow even faster.

Two kinds of federal controls are applied to state governmental activities. The traditional control tells the state government what it must do if it wants to get some grant money. These strings often are called **conditions of aid**. A newer form of control tells the state government what it must do, period. These rules are called **mandates**. Most mandates have little or nothing to do with federal aid—they apply to all state governments whether or not they accept grants.

Mandates

Most mandates concern civil rights and environmental protection. States may not discriminate in the operation of their programs, no matter who pays for them. Initially the antidiscrimination rules applied chiefly to distinctions based on race, sex, age, and ethnicity, but of late they have broadened to include physical and mental disabilities as well. Various pollution control laws require the states to comply with federal standards for clean air, pure drinking water, and sewage treatment.[34]

conditions of aid *Terms set by the national government that states must meet if they are to receive certain federal funds.*

mandates *Terms set by the national government that states must meet whether or not they accept federal grants.*

waiver *A decision by an administrative agency granting some other party permission to violate a law or rule that would otherwise apply to it.*

Stated in general terms, these mandates seem reasonable enough. It is hard to imagine anyone arguing that state governments should be free to discriminate against people because of their race or national origin. In practice, however, some mandates create administrative and financial problems, especially when the mandates are written in vague language, thereby giving federal administrative agencies the power to decide for themselves what state and local governments are supposed to do.

But not all areas of public law and policy are equally affected by mandates. Federal–state disputes about who governs on such controversial matters as minors' access to abortion and medical uses for banned narcotics make headlines. It is mandates that fuel everyday friction in federal–state relations, particularly those levied by Washington but paid for by the states. One study concluded that "the number of unfunded federal mandates is high in environmental policy, low in education policy, and moderate in health policy."[35] But why?

Some think that how much Washington spends in a given policy area is linked to how common federal mandates, funded or not, are in that same area. There is some evidence for that view. For instance, annual federal grants to state and local governments for environmental protection—a policy area where unfunded mandates are pervasive—have been about $7 billion, whereas federal grants for health care—an area where unfunded mandates have been less pervasive—amounted to over $300 billion. The implication is that when Washington itself spends less on something it wants done, it squeezes the states to spend more for that purpose. Washington is more likely to grant state and local governments waivers in some areas than in others. A **waiver** is a decision by an administrative agency granting some other party permission to violate a law or administrative rule that would otherwise apply to it. For instance, in general, education waivers have been easy for state and local governments to get, but environmental protection waivers have proven almost impossible to acquire.[36]

However, caution is in order. Often, the more one knows about federal–state relations in any given area, the harder it becomes to generalize about present-day federalism's fiscal,

administrative, and regulatory character, the conditions under which "permissive federalism" prevails, or whether new laws or court decisions will considerably tighten or further loosen Washington's control over the states.

Mandates are not the only way in which the federal government imposes costs on state and local governments. Certain federal tax and regulatory policies make it difficult or expensive for state and local governments to raise revenues, borrow funds, or privatize public functions. Other federal laws expose state and local governments to financial liability, and numerous federal court decisions and administrative regulations require state and local governments to do or not do various things, either by statute or through an implied constitutional obligation.[37]

It is clear that the federal courts have helped fuel the growth of mandates. As interpreted by the U.S. Supreme Court, the Tenth Amendment provides state and local officials no protection against the march of mandates. Indeed, many of the more controversial mandates result not from congressional action but from court decisions. For example, many state prison systems have been, at one time or another, under the control of federal judges who required major changes in prison construction and management in order to meet standards the judges derived from their reading of the Constitution.

The Supreme Court has of late made it much easier for citizens to control the behavior of local officials. A federal law, passed in the 1870s to protect newly freed slaves, makes it possible for a citizen to sue any state or local official who deprives that citizen of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States. A century later, the Court decided that this law permitted a citizen to sue a local official if the official deprived the citizen of *anything* to which the citizen was entitled under federal law (and not just those federal laws protecting civil rights). For example, a citizen can now use the federal courts to obtain from a state welfare office a payment to which he or she may be entitled under federal law.

Conditions of Aid

By far the most important federal restrictions on state action are the conditions attached to the grants the states receive. In theory, accepting these conditions is voluntary—if you don't want the strings, don't take the money. But when the typical state depends for a quarter or more of its budget on federal grants, many of which it has received for years and on which many of its citizens depend for their livelihoods, it is not clear exactly how "voluntary" such acceptance is. During the 1960s, some strings were added, the most important of which had to do with civil rights. But beginning in the 1970s, the number of conditions began to proliferate and has expanded in each subsequent decade to the present.

Some conditions are specific to particular programs, but most are not. For instance, if a state builds something with federal money, it must first conduct an environmental impact study, it must pay construction workers the "prevailing wage" in the area, it often must provide an opportunity for citizen participation in some aspects of the design or location of the project, and it must ensure that the contractors who build the project have nondiscriminatory hiring policies. The states and the federal government, not surprisingly, disagree about the costs and benefits of such rules. Members of Congress and federal officials feel they have an obligation to develop uniform national policies with respect to important matters and to prevent states and cities from misspending federal tax dollars. State officials, on the other hand, feel these national rules fail to take into account diverse local conditions, require the states to do things that the states must then pay for, and create serious inefficiencies.

What state and local officials discovered, in short, was that "free" federal money was not quite free after all. In the 1960s, federal aid seemed entirely beneficial; what mayor or governor would not want such money? But just as local officials found it attractive to do things that another level of government then paid for, in time federal officials learned the same thing. Passing laws to meet the concerns of national constituencies—leaving the cities and states to pay the bills and manage the problems—began to seem attractive to Congress.

Because they face different demands, federal and local officials find themselves in a bargaining situation in which each side is trying to get some benefit (solving a problem, satisfying a pressure group) while passing on to the other side most of the costs (taxes, administrative problems). The bargains struck in this process used to favor the local officials, because members of Congress were essentially servants of local interests: they were elected by local political parties, they were part of local political organizations, and they supported local autonomy. Beginning in the 1960s, however, changes in American politics that will be described in later chapters shifted the orientation of many in Congress toward favoring Washington's needs over local needs.

3-4 A Devolution Revolution?

In 1981, President Ronald Reagan tried to reverse this trend. He asked Congress to consolidate scores of categorical grants into just six large block grants. Congress obliged. Soon state and local governments started getting

less federal money, but with fewer strings attached to such grants. During the 1980s and into the early 1990s, however, many states also started spending more of their own money and replacing federal rules on programs with state ones.

With the election of Republican majorities in the House and Senate in 1994, a renewed effort was led by Congress to cut total government spending, roll back federal regulations, and shift important functions back to the states. The first key issue was welfare—that is, Aid to Families with Dependent Children (AFDC). Since 1935, there had been a federal guarantee of cash assistance to states that offered support to low-income, unmarried mothers and their children. In 1996, President Bill Clinton signed a new federal welfare law that ended any federal guarantee of support and, subject to certain rules, turned the management of the program entirely over to the states, aided by federal block grants.

These and other Republican initiatives were part of a new effort called **devolution**, which aimed to pass on to the states many federal functions. It is an old idea, but one that actually acquired new vitality because Congress, rather than the president, was leading the effort. Members of Congress traditionally liked voting for federal programs and categorical grants; that way they could take credit for what they were doing for particular constituencies. Under its new conservative leadership, Congress, especially the House, was looking for ways to scale back the size of the national government. President Clinton seemed to agree when, in his 1996 State of the Union address, he proclaimed that the era of big national government was over.

devolution *The transfer of power from the national government to state and local governments.*

But was it over? No. By 2010, the federal government was spending about $30,000 per year per household, which, adjusted for inflation, was its highest annual per-household spending level since World War II.[38] Federal revenues represented almost 30 percent of gross domestic product, close to the late 1970s annual average, and inflation-adjusted federal debt totals hit new highs. Adjusted for inflation, total spending by state and local governments has also increased rapidly in recent years as well, reaching about $3.26 trillion in 2014, with revenues of approximately $3.6 trillion.[39]

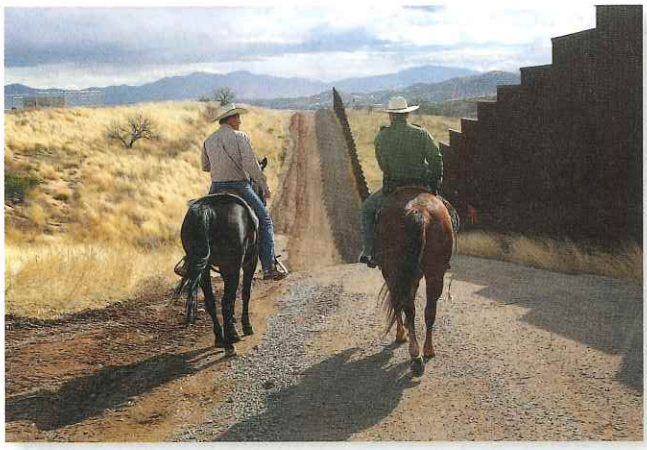
Devolution did not become a revolution. AFDC was ended and replaced by a block grant program called Temporary Assistance for Needy Families (TANF). But far larger federal–state programs, most notably Medicaid, were not turned into block grant programs. Moreover, both federal and state spending on most programs, including the block-granted programs, increased after 1996. Although by no means the only new or significant block grant, TANF now looked like the big exception that proved the rule. The devolution revolution was curtailed by public opinion. Today, as in 1996, most Americans favor "shifting responsibility to the states," but not if that also means cuts in government programs that benefit most citizens (not just low-income families), uncertainty about who is eligible to receive benefits, or new hassles associated with receiving them.

Devolution seems to have resulted in more, not fewer, government rules and regulations. In response to the federal effort to devolve responsibility to state and local governments, states have not only enacted new rules and regulations of their own, but also prompted Washington to issue new rules and regulations on environmental protection and other matters.[40] For example, several states and cities successfully sued the Environmental Protection Agency to force it to regulate carbon dioxide and other greenhouse gases as pollutants.[41]

Still, where devolution did occur, it has had some significant consequences. The devolution of welfare policy has been associated with dramatic decreases in welfare rolls. Scholars disagree about how much the reductions were due to the changes in law and how much they were caused by economic conditions and other factors. Substantial debate also exists over whether new benefits are adequate, or whether the jobs most recipients have gotten

Wendy Maeda/The Boston Globe/Getty Images

IMAGE 3-7 Federal, state, and local law enforcement officials work together to investigate the bombing of the 2013 Boston Marathon.



John Moore/Getty Images

IMAGE 3-8 The U.S. Border Patrol works with local ranchers on the U.S.–Mexico border to address issues such as drug smuggling and illegal immigration.

through welfare-to-work programs are adequate.[42] But few now doubt that welfare devolution has made a measurable difference in how many people receive benefits and for how long (we discuss these debates more extensively in Chapter 17).

Subject to state discretion, scores of local governments are now designing and administering welfare programs (job placement, child care, and others) through for-profit firms and a wide variety of nonprofit organizations, including local religious congregations. In some big cities, more than a quarter of welfare-to-work programs have been administered through public–private partnerships that have included various local community-based organizations as grantees.[43]

Funding is perhaps the main challenge states face today when assuming more responsibility for public programs. Today, most states have budget shortfalls and face mounting debts for the foreseeable future. While this was due in part to the 2008 financial crisis, a longer-term factor was the role of public sector unions, especially members' pensions.[44] Many such pensions are severely underfunded and could pose serious limits to states' future spending levels unless changes are made.[45] Consequently, several states (most notably Wisconsin) limited collective bargaining rights for public employees, though it remains to be seen how widely such proposals will spread or how states will manage these challenges more generally.

As states look to reduce costs, they need to consider which responsibilities are theirs to shoulder and which ones the federal government must bear. A 2011 study by the Government Accountability Office found extensive duplication of services both across federal government agencies and between the federal government and the states.[46] Areas of overlap include economic development, food regulation, and counterterrorism. But identifying bureaucratic overlap is easier than eliminating it (as we will see in Chapter 15), and federal public officials typically have very different views than their state counterparts about what qualifies as "wasteful" spending. Consequently, how states will address their long-term debt, and the implications for further devolution in policymaking, remains to be seen. And, as noted in a 2013 study by the Congressional Budget Office, intergovernmental programs involve administrative costs at multiple levels of government; any major cost-cutting efforts have to be coordinated between Washington and the states, and that never proves easy.[47]

Congress and Federalism

Just as it remains to be seen whether the Supreme Court will continue to revive the doctrine of state sovereignty, so it is not yet clear whether the devolution movement will regain momentum, stall, or be reversed. But whatever the movement's fate, the United States will not become a wholly centralized nation. There remains more political and policy diversity in America than one is likely to find in any other large, industrialized nation. The reason is not only that state and local governments have retained certain constitutional protections but also that members of Congress continue to think of themselves as the representatives of localities *to* Washington and not as the representatives *of* Washington to the localities. As we shall see in Chapter 13, American politics, even at the national level, remains local in its orientation.

But if this is true, why do these same members of Congress pass laws that create so many problems for—and stimulate so many complaints from—mayors, governors, and other state and local officials? Members of Congress represent different constituencies from the same localities. For example, one member of Congress from Los Angeles may think of the city as a collection of businesspeople, homeowners, and taxpayers, whereas another may think of it as a group of African Americans, Hispanics, and nature lovers. If Washington wants to simply send money to Los Angeles, these two representatives could be expected to vote together. But if Washington wants to impose mandates or restrictions on the city, these representatives might very well vote on opposite sides, each voting as his or her constituents would most likely prefer.

When somebody tries to speak "for" a city or state in Washington, that person has little claim to any real authority. The mayor of Philadelphia may favor one program, the governor of Pennsylvania may favor another, and individual local and state officials—school superintendents, the

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

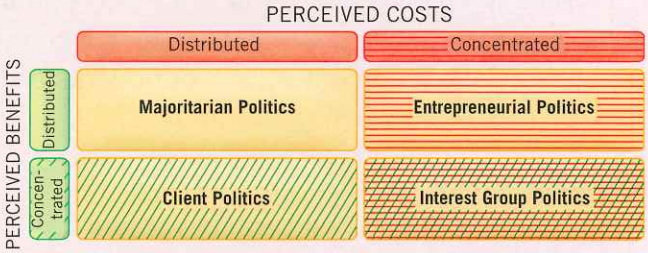
Marijuana Legalization: Entrepreneurial, Not Majoritarian, Politics

In 1996, California citizens passed Proposition 215, a ballot measure permitting the "compassionate use" of marijuana for medicinal purposes. Since then, other states have allowed various forms of legalized marijuana. Eight states—Colorado, Washington, Oregon, Alaska, California, Nevada, Maine, and Massachusetts—and the District of Columbia have legalized recreational marijuana, and another 20 have legalized some form of medicinal marijuana (and others have decriminalized the possession of small amounts of marijuana). Despite these steps, marijuana remains illegal under the federal Controlled Substances Act of 1970, setting up a conflict between state and federal authorities.

On the surface, marijuana legalization seems to be an example of majoritarian politics—the costs and the benefits are both widely distributed. By this logic, the debate should be over which side has the most compelling argument. For example, over time, support for marijuana legalization has grown considerably, from less than 20 percent in 1970 to nearly 60 percent today—with 69 percent of millennials supporting legalization. Much of this growth in support likely comes from recognition that many of the fears of legalization opponents have not come to pass where medicinal and/or recreational marijuana has been legalized, thereby suggesting that legalization proponents have the stronger argument.

But this shift in popular support has not translated into broader action for marijuana legalization in many states or at the federal level. Why? It is because powerful interests oppose legalization, and hence this issue is better categorized as entrepreneurial politics. Police departments receive millions of dollars annually to fight the war on drugs, and some of that money would likely evaporate if marijuana were legalized. Prison guards—and private prison companies—also have a vested interest in ensuring that drug users are imprisoned. Furthermore, the federal government itself can act to complicate state-level legalization by, for example, forcing banks to not accept money from legalized marijuana (the federal government could charge banks under federal drug-trafficking laws), imposing stiff federal taxes on marijuana dispensaries, or enforcing federal laws (the Supreme Court ruled that federal authorities could enforce federal laws banning marijuana even where states have legalized it). These are significant hurdles for legalization supporters to overcome.

As is typically the case for entrepreneurial politics, supporters need to find an entrepreneur to help them overcome these hurdles, and finding one nationally has been difficult. Some liberal and libertarian politicians may well be sympathetic to the cause, but they have chosen to invest their energies on other issues they see as more pressing, such as bank regulation or criminal justice reform. The other path to broader passage would be for the issue to be more salient, but while the issue has majority support, it is a very low priority for most voters, suggesting that this is not likely to become a particularly salient issue absent some significant shift.



▶ **PRACTICE POLITICAL SCIENCE** Find data about what local, state, or national government spends to enforce drug laws through policing and imprisonment. Explain what the data implies about the entrepreneurial politics of issues related to drug legalization.

Sources: Abigail Geiger, "Support for Marijuana Legalization Continues to Rise," Pew Research Center Fact Tank: News in Numbers, 12 October 2016; Kendell Benson, "Money, Not Morals, Drives Marijuana Prohibition Movement, OpenSecrets Blog, 5 August 2014; German Lopez, "How Marijuana Legalization Became a Majority Movement," *Vox*, 1 October 2014; "The Trouble with Marijuana Legalization: Banks," *Governing*, 5 January 2015; Jack Healy, "Legal Marijuana Faces Another Federal Hurdle: Taxes," *New York Times*, 9 May 2015.

insurance commissioner, public health administrators—may favor still others. In bidding for federal aid, those parts of the state or city that are best organized often do the best, and increasingly these groups are not the political parties but rather specialized occupational groups such as doctors or schoolteachers. If one is to ask, therefore, why a member of Congress does not listen to his or her state anymore, the answer is, "What do you mean by *the state*? Which official, which occupational group, which party leader speaks for the state?"

Finally, Americans differ in the extent to which we prefer federal as opposed to local decisions. When people

WHAT WOULD YOU DO?

Should States Adopt the Common Core National Education Standards?

To: *Secretary of Education Lucy Sadie*
From: *White House Special Assistant Talya Ili*
Subject: *National curricular standards for elementary and secondary schools*

There has been a large debate in recent years about whether states should adopt the Common Core Educational Standards. The Common Core standards seek to set uniform national benchmarks for student achievement in every grade level in English/language arts and mathematics. The goal is to help students be prepared for college and the workforce in the 21st century.

The president is making a push for national standards, and the major arguments for and against this proposal follow. Will you present the initiative and address states' concerns at the National Governors Association meeting next week?

To Consider:

The president seeks a national curriculum for all kindergarten through grade 12 schoolchildren. Supporters argue that such standards will prepare students for the jobs of the 21st century, but opponents argue that federally mandated standards will do more harm than good.

Arguments for:

1. American jobs in the 21st century will require advanced skills in literacy, mathematics, and information technology that all schools must teach.
2. Variations in state curriculum standards leave students ill-prepared for high-paying jobs and for college.
3. If the national government does not invest in creating a uniform school curriculum now, then increased funding will be needed for remedial instruction later.

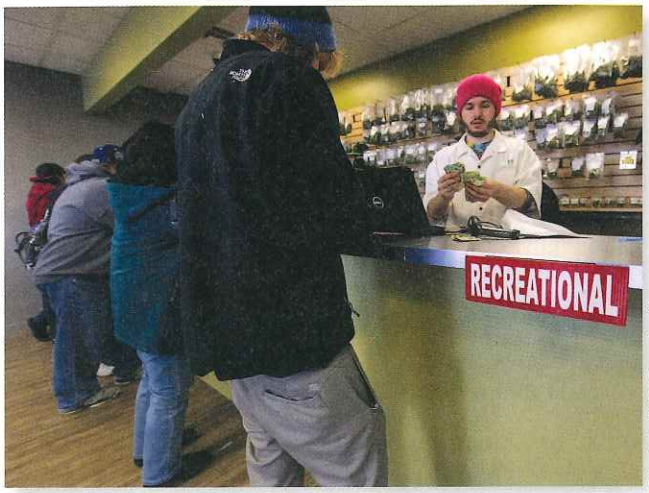
Arguments against:

1. States are better able to determine educational standards that will prepare their diverse populations for the workforce than the federal government.
2. Imposing a national curriculum will stifle state and local creativity in education and will be so basic that it will make little difference in college preparation.
3. The national government has a history of imposing educational mandates on states with insufficient funding, and governors are skeptical of receiving sufficient funding to successfully implement a national curriculum for students with varying needs.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Support bill ☐ Oppose bill

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.



Brian Cahn/ZUMA Press, Inc./Alamy

IMAGE 3-9 A marijuana dispensary in Colorado. While legal in some states, marijuana remains illegal under federal law.

are asked which level of government gives them the most for their money, relatively poor citizens are likely to mention the federal government first, whereas relatively well-to-do citizens are more likely to mention local government. If we add to income other measures of social diversity—race, religion, and region—there emerge even sharper differences of opinion about which level of government works best. It is this social diversity—and the fact that it is represented not only by state and local leaders but also by members of Congress—that keeps federalism alive and makes it so important. Americans simply do not agree on enough things, or even on which level of government ought to decide on those things, to make possible a unitary system.

LEARNING OBJECTIVES

3-1 Discuss the historical origins of federalism, and explain how it has evolved over time.

The Framers of the Constitution created a federal system of government for the United States because they wanted to balance the power of the central government with states that would exercise independent influence over most areas of people's lives, outside of national concerns such as defense, coining money, and so forth. Since the Founding, the balance of power between the national government and the states has shifted over time. Overall, the federal government's power and responsibilities have increased, particularly with the expansion of programs in the 20th and 21st centuries. Still, states exercise broad latitude in implementing policies, and they frequently provide models for the federal government to consider in creating national policies.

3-2 Summarize the pros and cons of federalism in the United States.

Debates over federalism come down to debates over equality versus participation. Federalism means that citizens living in different parts of the country will be treated differently, not only in spending programs, such as welfare, but also in legal systems that assign in different places different penalties to similar offenses or that differentially enforce civil rights laws. But federalism also means that more opportunities exist for participation in making decisions—in influencing what is taught in schools and in deciding where highways and government projects are to be built. Indeed, differences in public policy—that is, unequal treatment—are in large part the result of participation in decision making. It is difficult, perhaps impossible, to have more of one of these values without having less of the other.

3-3 Describe how funding underlies federal–state interactions and how this relationship has changed over time.

Funding is perhaps the key link between federal and state governments: In fiscal year 2014, the federal government provided approximately $577 billion in grants to state and local governments. Many of these grants fund programs designed in Washington but implemented at the state level. Such programs can be contentious because of the mandates and requirements imposed by the federal government on the states.

3-4 Discuss whether the devolution of programs to the states beginning in the 1980s really constitutes a revolution in federal–state relations.

Devolution was not a revolution, but it did generate important changes in programs like welfare. More generally, it continued the shift toward federal programs administered by states.

TO LEARN MORE

State news: **www.stateline.org**

Council of State Governments: **www.csg.org**

National Governors Association: **www.nga.org**

Supreme Court decisions: **www.findlaw.com/casecode/supreme.html**

Beer, Samuel H. *To Make a Nation: The Rediscovery of American Federalism*. Cambridge, Mass.: Harvard University Press, 1993. The definitive study of the philosophical bases of American federalism.

Conlan, Timothy. *From New Federalism to Devolution*. Washington, DC: Brookings Institution, 1998. A masterful overview of the politics of federalism from Richard Nixon to Bill Clinton.

Daniel, Ronald, Donald F. Kettl, and Howard Kureuther, eds. *On Risk and Disaster: Lessons from Hurricane Katrina*. Philadelphia: University of Pennsylvania Press, 2006. Several experts evaluate the government response.

Derthick, Martha N. *Keeping the Compound Republic*. Washington, DC: Brookings Institution, 2001. A masterful analysis of trends in American federalism from the Founding to the present.

Diamond, Martin. "The Federalist's View of Federalism." In *Essays in Federalism*, edited by George C. S. Benson, 21–64. Claremont, Calif.: Institute for Studies in Federalism of Claremont Men's College, 1961. A profound analysis of what the Founders meant by federalism.

Grodzins, Morton. *The American System*. Chicago: Rand McNally, 1966. Argues that American federalism has always involved extensive sharing of functions between national and state governments.

Melnick, R. Shep. *Between the Lines: Interpreting Welfare Rights*. Washington, DC: Brookings Institution, 1994. An examination of how trends in statutory interpretation have affected broader policy developments, including the expansion of the agenda of national government, the persistence of divided government, and the resurgence and decentralization of Congress.

Riker, William H. *Federalism: Origin, Operation, Significance*. Boston: Little, Brown, 1964. A classic explanation and critical analysis of federalism here and abroad.

Teske, Paul. *Regulation in the States*. Washington, DC: Brookings Institution, 2004. States have responded to devolution by adding new regulations of their own.

Erin Alexis Randolph/Shutterstock.com

CHAPTER 4

American Political Culture

KEY OBJECTIVES OF THIS CHAPTER

- *The role of government is shaped by the core beliefs of U.S. citizens.*
- *Cultural factors influence political attitudes and socialization.*

KEY TAKEAWAYS FROM THIS CHAPTER

- Different interpretations of core values—including individualism, equality of opportunity, free enterprise, rule of law, and limited government—affect the relationship between citizens and the federal government and that citizens have with each other.
- As a result of globalization, U.S. political culture has both influenced and been influenced by the values of other countries.

political culture *A patterned and sustained way of thinking about how political and economic life ought to be carried out.*

THEN In 1835, a French political official, Alexis de Tocqueville, visited the United States to conduct research on its prison systems. Based on two years of travel across the country, de Tocqueville wrote a two-volume study titled *Democracy in America* that continues to be one of the defining texts of American political culture. De Tocqueville argued that democracy endured in the United States because of geography, laws, and "the manners and customs of the people."[1] He concluded that the attitude of Americans about the merits of democracy was fundamental to its success here.

NOW In the 21st century, several issues divide Americans: reducing the rapidly growing national debt, combating terrorism, providing health care, determining the appropriate scope of responsibility and power for the federal government, and so forth. But the political parties and interest groups (both of which we will discuss later in this textbook) that disagree about these issues share a common belief in preserving the principles of American constitutionalism—liberty, equality of opportunity, and so on—even if they differ over how to put those principles into practice. The Tea Party movement that has developed in recent years, for example, derives its name from a historic event in American politics, and its adherents say they seek to return American democracy to its founding principles. People in the United States today may have very different views of what democracy means for policymaking, but they continue to display the same veneration for democracy that de Tocqueville identified more than 175 years ago.

The United States, the United Kingdom, and France are all western nations with well-established representative democracies. Millions of people in each country (maybe including you) have been tourists in one or both of the other two countries. Ask any American who has spent time in either country what it is like and you will probably hear generalizations about the "culture"—"friendly" or "cold," "very different" or "surprisingly like home," and so on.

But "culture" also counts when it comes to politics and government. Politically speaking, at least three major differences exist among and between countries: constitutional, demographic, and cultural. Each difference is important, and the differences tend to feed each other. Arguably, however, the cultural differences are not only the most consequential but also often the trickiest to analyze. As we will see, that holds true not only for cross-national differences between America and other countries but also when it comes to deciphering political divides within America itself. And the differences usually endure over time.

4-1 Political Culture

Constitutional differences tend to be fairly obvious and easy to summarize. The United States and France each have a written constitution, whereas the United Kingdom does not. The United States separates powers between three equal branches of its national government. By contrast, the United Kingdom has a parliamentary system in which the legislature chooses a prime minister from within its own ranks. And France has a semi-presidential or quasi-parliamentary system divided into three branches: the president selects a prime minister from the majority party in the lower house of the parliament, and the prime minister exercises most executive powers.

Demographic differences are also straightforward. America is a large land with close to 330 million citizens. The dominant language is English, but millions of people also speak Spanish. About one-sixth of its population is Hispanic. More than 80 percent of its adults identify themselves as Christians, but they are divided between Catholics (about a quarter) and more than a dozen different Protestant denominations. By comparison, France and the United Kingdom are each home to about 60 million people and have small but growing immigrant and foreign-born subpopulations. Most French (more than 80 percent) are Catholic; most British belong to the Church of England (Anglican, the official state religion) or the Church of Scotland. But in neither country do many people go to church.

The differences among these three democracies go much deeper. Each country has a different **political culture**—a patterned and sustained way of thinking about how political and economic life ought to be carried out. Most Americans, British, and French think that democracy is good, favor majority rule, and believe in respecting minority rights. And few in each nation would say that a leader who loses office in an election has any right to retake office by force. Even so, their political cultures differ. Cross-national surveys consistently find that Americans are far more likely than the French or British to believe that everybody should be equal politically, but far less likely to think it important that everybody should be equal economically. For example, in one large survey in the early post–Cold War era, the French and British were more than twice as likely as Americans to agree that "it is government's responsibility to take care of the very poor," and less than a third as likely as Americans to agree that "government should *not* guarantee every citizen food and basic shelter."[2]

When it comes to ensuring political equality or equality before the law, Americans are more committed from an early age. For instance, a classic study compared how children aged 10 to 14 in the United States, Great Britain, and France responded to a series of questions about democracy and the law. They were asked to imagine the following:

> One day the President (substitute the Queen in England, President of the Republic in France) was driving his car to a meeting. Because he was late, he was driving very fast. The police stopped the car. Finish the story.[3]

The children from each country ended the story quite differently. French children declared that the president would not be reprimanded. British children said the queen would not be punished. But American children were most likely to say that the president would be fined or ticketed, just like any other person should be.

Cross-national differences wrought by political culture seem to be even sharper between the United States and such countries as Argentina, Brazil, Mexico, and the Philippines. Why do these countries, whose constitutions are very much like the American one, have so much trouble with corruption, military takeovers, and the rise of demagogues? Each of these nations has had periods of democratic rule, but only for a short period of time, despite having an elected president, a separately elected congress, and an independent judiciary.

The Granger Collection, NYC

IMAGE 4-1 Alexis de Tocqueville (1805–1859) was a young French aristocrat who came to the United States to study the American prison system. He wrote the brilliant *Democracy in America* (2 volumes, 1835–1840), a profound analysis of our political culture.

Some have argued that democracy took root in the United States but not in other countries that copied its constitution because America offered more abundant land and greater opportunities for people. No feudal aristocracy occupied the land, taxes remained low, and when one place after another filled up, people kept pushing west to find new opportunities. America became a nation of small, independent farmers with relatively few landless peasants or indentured servants.

However, as Alexis de Tocqueville, the perceptive French observer of American politics, noted in the 1830s, much of South America contains fertile land and rich resources, but democracy has not flourished there. The constitution and the physical advantages of the land cannot by themselves explain the persistence of any nation's democratic institutions. Nor can they account for the fact that American democracy survived a Civil War and thrived as wave after wave of immigrants became citizens and made the democracy more demographically diverse. What can begin to account for such differences are the customs of the people—what de Tocqueville called their "moral and intellectual characteristics,"[4] and what social scientists today call political culture.

Japan, like the United States, is a democracy. But while America is an immigrant nation that has often favored open immigration policies, Japan remains a Japanese nation in which immigration policies are highly restrictive and foreign-born citizens are few. America, like Saudi Arabia, is a country in which most people profess religious beliefs, and many people identify themselves as orthodox believers. But America's Christian majority favors religious pluralism and church–state separation, whereas Saudi Arabia's Muslim majority supports laws that maintain Islam as the state religion. In Germany, courts have held that non-Christian religious symbols and dress, but not Christian ones, may be banned from schools and other public places. In France, the government forbids wearing any religious garb in schools. In the United States, such rulings or restrictions would be unthinkable.

The Political System

The American view of the political system contains at least five important elements:

- ***Liberty:*** Americans are preoccupied with their rights. They believe they should be free to do pretty much as they please, with some exceptions, as long as they don't hurt other people.
- ***Equality:*** Americans believe everybody should have an equal vote and an equal chance to participate and succeed.

- ***Democracy:*** Americans think government officials should be accountable to the people.
- ***Civic duty:*** Americans generally feel people ought to take community affairs seriously and help out when they can.[5]
- ***Individual responsibility:*** A characteristically American view is that, barring some disability, individuals are responsible for their own actions and well-being.

By vast majorities, Americans believe that every citizen should have an equal chance to influence government policy and to hold public office, and they oppose the idea of letting people have titles such as "Lord" or "Duke," as in England. By somewhat smaller majorities, they believe people should be allowed to vote even if they can't read or write or vote intelligently.[6] Though Americans recognize that people differ in their abilities, they overwhelmingly agree with the statement, "Teaching children that all people are really equal recognizes that all people are equally worthy and deserve equal treatment."[7]

At least three questions can be raised about this political culture. First, how do we know that the American people share these beliefs? For most of our history there were no public opinion polls, and even after they became commonplace, they were rather crude tools for measuring the existence and meaning of complex, abstract ideas. There is in fact no way to prove that values such as those listed above are important to Americans. But neither is there good reason for dismissing the list out of hand. One can infer, as have many scholars, the existence of certain values by a close study of the kinds of books Americans read, the speeches they hear, the slogans to which they respond, and the political choices they make, as well as by noting the observations of insightful foreign visitors. Personality tests, as well as opinion polls—particularly those asking similar questions in different countries—also supply useful evidence, some of which will be reviewed in the following paragraphs.

Bettmann/Getty Images

IMAGE 4-2 Despite differences in ethnic backgrounds, ideological views, religious beliefs, and more, Americans historically have demonstrated strong popular support for a shared political culture. All schoolchildren, for example, are taught to say the Pledge of Allegiance.

Second, if these values are important to Americans, how can we explain the existence in our society of behavior that is obviously inconsistent with them? For example, if white Americans believe in equality of opportunity, why did so many of them for so long deny that equality to African Americans? That people act contrary to their professed beliefs is an everyday fact of life: People believe in honesty, yet they steal from their employers and sometimes under-report their taxable income. In addition to values, self-interest and social circumstances also shape behavior. Gunnar Myrdal, a Swedish observer of American society, described race relations in this country as "an American dilemma" resulting from the conflict between the "American creed" (a belief in equality of opportunity) and American behavior (denying African Americans full citizenship).[8] But the creed remains important because it is a source of change: as more and more people become aware of the inconsistency between their values and their behavior, that behavior slowly changes.[9]

Race relations in this country would take a very different course if instead of an abstract but widespread belief in equality there were an equally widespread belief that one race is inherently inferior to another. The late political scientist Samuel P. Huntington put it this way: "Critics say that America is a lie because its reality falls so far short of its ideals. America is not a lie, it is a disappointment. And it can be a disappointment only because it is also a hope."[10]

Third, if Americans agree on certain political values, why has there been so much political conflict in our history? How could a people who agree on such fundamentals fight a bloody civil war, engage in violent labor–management disputes, take to the streets in riots and demonstrations, and sue each other in countless court battles? Conflict, even violent struggles, can occur over specific policies even among those who share, at some level of abstraction, common beliefs. Many political values may be irrelevant to specific controversies: No abstract value, for example, would settle the question of whether steelworkers ought to organize unions. More important, much of our conflict has occurred precisely because we have strong beliefs that happen, as each of us interprets them, to be in conflict. Equality of opportunity seems an attractive idea, but sometimes it can be pursued only by curtailing another value that most people hold dear: personal liberty. The states went to war in 1861 over one aspect of that conflict—the rights of slaves versus the rights of slave-owners.

Indeed, the Civil War illustrates the way certain fundamental beliefs about how a democratic regime ought to be organized have persisted despite bitter conflict over the policies adopted by particular governments. When the

southern states seceded from the Union, they formed not a wholly different government but one modeled, despite some important differences, on the U.S. Constitution. Even some of the language of the Constitution was duplicated, suggesting that the southern states believed not that a new form of government or a different political culture ought to be created, but rather that the South was the true repository of the existing constitutional and cultural order.[11]

Perhaps the most frequently encountered evidence that Americans believe themselves bound by common values and common hopes is the persistence of the word *Americanism* in our political vocabulary. From the 19th century onward, *Americanism* and *the American dream* have been familiar terms not only in Fourth of July speeches but also in everyday discourse. For many years, the House of Representatives had a committee called the House Un-American Activities Committee. Hardly any example of such a way of thinking can be found abroad: There is no "Britishism" or "Frenchism," and when Britons and French people become worried about subversion, they call it a problem of internal security, not a manifestation of "un-British" or "un-French" activities.

We have ended slavery, endorsed civil rights, and expanded the scope of free discussion, but these gains have not ended political conflict. We argue about abortion, morality, religion, immigration, and affirmative action. Some people believe that core moral principles are absolute, whereas others feel they are relative to the situation. Some people believe all immigrants should become like every other American, whereas others argue that we should, in the name of diversity and multiculturalism, celebrate group differences.

The 2016 presidential campaign illustrated these divisions in the sharply contrasting candidacies of Hillary Clinton and Donald Trump. Upon taking office after his surprise election victory, President Trump moved quickly to enact several of his campaign promises by executive order, such as temporarily halting immigration from certain countries, though these actions soon faced scrutiny in the courts. How the vast ideological differences between the president's political supporters and opponents will affect American political culture—or whether his election signifies a change in that culture—is still to be determined.

Much depends on how we define a good citizen. Some people define a good citizen as a person who votes, pays his or her taxes, obeys the law, and supports the military; others describe a good citizen as skeptical of government and ready to join protest movements and boycott products he or she does not like. These competing opinions reflect differences in age and education. Older people are more likely to take the first view, whereas younger people who are college educated are more likely to take the second.[12] But these conflicts, though they affect every American, should not obscure the underlying level of agreement or the reality of a widely shared political culture.

Topham/The Image Works

IMAGE 4-3 In the 1950s Senator Joseph McCarthy of Wisconsin was the inspiration for the word *McCarthyism* after his highly publicized attacks on alleged communists working in the federal government.

The Economic System

Americans judge the economic system using many of the same standards by which they judge the political system, albeit with some very important differences. As it is in American politics, liberty is important in the U.S. economy. Thus Americans support the idea of a free-enterprise economic system, calling the nation's economy "generally fair and efficient" and denying that it "survives by keeping the poor down."[13] However, there are limits to how much freedom they think should exist in the marketplace. People support government regulation of business in order to keep some firms from becoming too powerful and to correct specific abuses.[14]

Americans are more willing to tolerate economic inequality than political inequality. They believe in maintaining "equality of opportunity" in the economy but not "equality of results." If everyone has an equal opportunity to get ahead, then it is all right for people with more ability to earn higher salaries and for wages to be set based on how hard people work rather than on their economic needs. Hardly anyone is upset by the fact that Bill Gates, Warren Buffett, and Donald Trump are rich men. Although Americans are quite willing to support education and training programs to help disadvantaged people get ahead, they are strongly opposed to anything that looks like preferential treatment (e.g., hiring quotas) in the workplace.[15]

The leaders of very liberal political groups, such as civil rights and feminist organizations, are more willing than the average American to support preferential treatment in the hiring and promotion of minorities and women. They do so because, unlike most citizens, they believe that whatever disadvantages minorities and women face are the result

of failures of the economic system rather than the fault of individuals. Even so, these leaders strongly support the idea that earnings should be based on ability and oppose the idea of having any top limit on what people can earn.[16]

This popular commitment to economic individualism and personal responsibility may help explain how Americans think about particular public policies, such as welfare and civil rights. Polls show that Americans are willing to help people "truly in need" (this includes older adults and the disabled) but not those deemed "able to take care of themselves" (this includes, in the public's mind, people "on welfare"). Also, Americans dislike preferential hiring programs and the use of quotas to deal with racial inequality.

At the core of these policy attitudes is a widely (but not universally) shared commitment to economic individualism and personal responsibility. Some scholars, among them Donald Kinder and David Sears, interpret these individualistic values as "symbolic racism"—a kind of plausible camouflage for anti-black attitudes.[17] But other scholars, such as Paul M. Sniderman and Michael Gray Hagen, argue that these views are not a smokescreen for bigotry or insensitivity but a genuine commitment to the ethic of self-reliance.[18] Since many Americans fall on both sides of this issue, debates about welfare and civil rights tend to be especially intense. What is striking about the American political culture is that in this country the individualist view of social policy is by far the most popular.[19]

Views about specific economic policies change. Americans are now much more inclined than they once were to believe that the government should help the needy and regulate business. But the commitment to certain underlying principles has been remarkably enduring. In 1924, almost half of the high school students in Muncie, Indiana, said that "it is entirely the fault of the man himself if he cannot succeed" and disagreed with the view that differences in wealth showed that the system was unjust. More than half a century later, the students in this same high school were asked the same questions again, with the same results.[20]

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

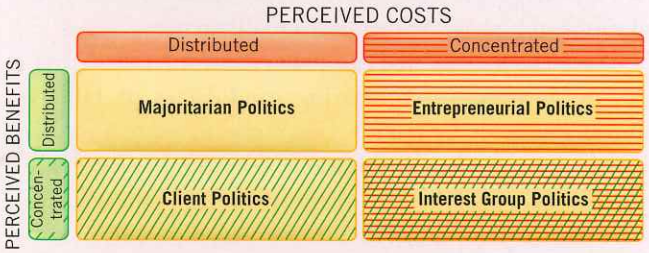
Bilingual Education: Majoritarian or Client Politics?

Hispanics are the largest and fastest-growing minority group in America. The nation's 54 million Hispanics represent about 17 percent of the total U.S. population. They comprise more than a third of the population in several states, including California, New Mexico, and Texas. By 2050, about one in four U.S. residents will be Hispanic.

Some analysts have asserted that Hispanic immigrants to the United States, the vast majority of whom come from Mexico, will remain strangers to American political culture. But all the evidence suggests that, if anything, Hispanic immigrants over time are far more likely to embrace and emulate, rather than to reject or refashion, American political culture.

To assist immigrants in their transition, the federal government began in the late 1960s to promote bilingual education, or teaching children in their native language as well as in English. Proponents of bilingual education make a case for majoritarian politics: Everyone supports the education system through taxes (primarily state and local), and everyone benefits from bilingual schooling in the long run because it helps immigrants to succeed professionally and advance American productivity.

Critics of bilingual education programs, however, say they benefit only the groups who participate, and that even those benefits are questionable, if people do not learn English quickly. In 1998, California voters approved Proposition 227, which removed bilingual education from most public schools in the state. Nearly two decades later, though, voters overturned the law with Proposition 58, which ended English-only instruction, in 2016. Nationally, the 2002 No Child Left Behind law encouraged English instruction and testing over time. The future of bilingual education in the United States will depend largely on whether the programs are viewed as having a narrow or broad public interest.



▶ **PRACTICE POLITICAL SCIENCE** Describe California's changing demographics since 1998. Research the results of California's 2016 referendum on bilingual education. Explain how California's changing demographics contributed to the change in California voters' preferences about the state's bilingual education policy as having a narrow or broad public interest from 1998 to 2016.

Sources: U.S. Census Bureau; Pew Hispanic Research Center, *An Awakened Giant: The Hispanic Electorate Is Likely to Double by 2030*, 14 November 2012, www.pewhispanic.org/2012/11/14/an-awakened-giant-the-hispanic-electorate-is-likely-to-double-by-2030/; Jack Citrin, et al., "Testing Huntington: Is Hispanic Immigration a Threat to American Identity?" *Perspectives on Politics*, vol. 5, no. 1, March 2007, 31–48; Samuel P. Huntington, *Who Are We? The Challenges to America's National Identity*. New York: Simon & Shuster, 2004; David Nieto, "A Brief History of Bilingual Education in the United States," *Perspectives on Urban Education*, Spring 2009, 61–72.

4-2 How We Compare: Comparing America with Other Nations

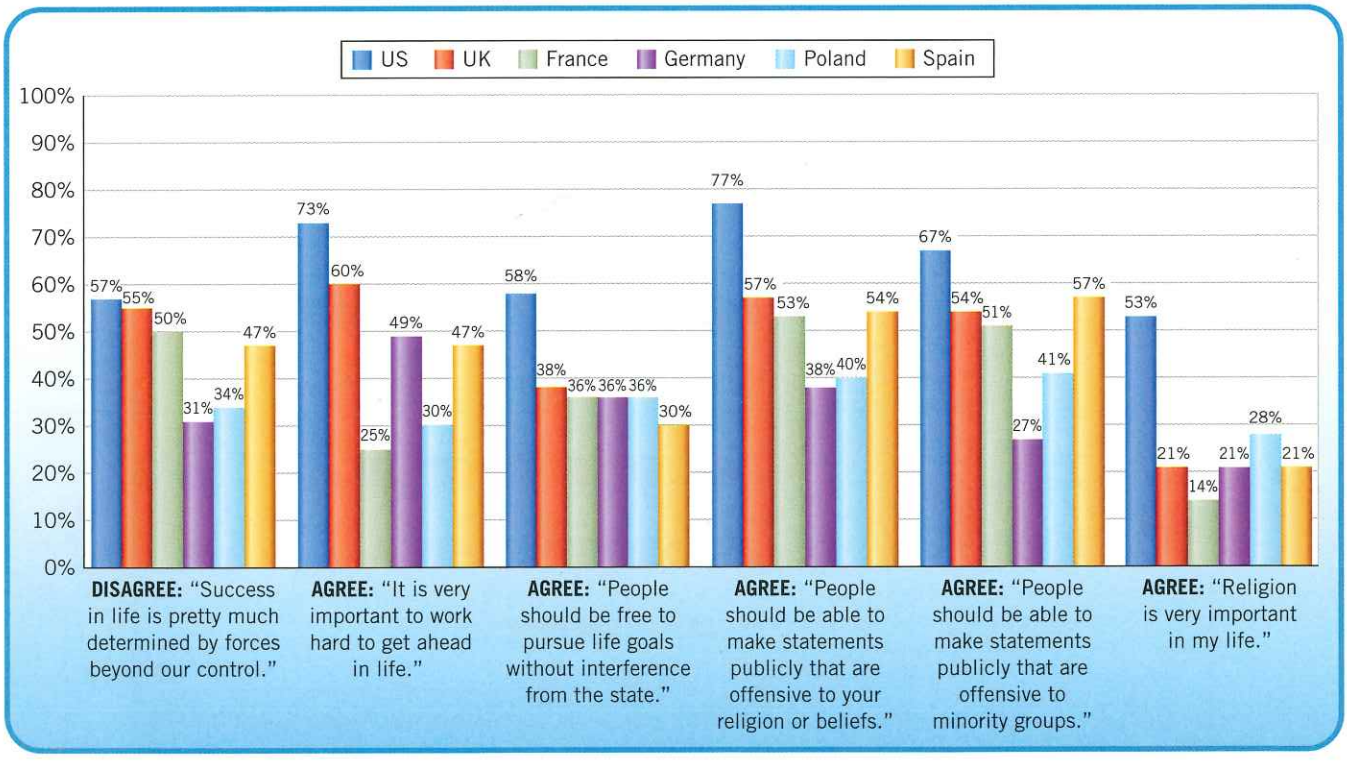
Americans' attitudes toward politics and public life differ from those of people in European democracies in some important ways. In Figure 4.1, we see that more than 70 percent of Americans think working hard is important to get ahead in life, compared with 49 percent of Germans and 25 percent of French. A majority of people in Germany, Italy, and Poland think success in life is determined by forces outside an individual's control; Americans disagree. Americans also think religion is very important in their lives, but fewer people in the United Kingdom, Germany, and Spain say the same. Following are some examples from politics, the economy, and religion that further illustrate different attitudes among Americans versus people in other democracies.

The Political System

Sweden has a well-developed democratic government, with a constitution, free speech, an elected legislature, competing political parties, and a reasonably honest and nonpartisan bureaucracy. But the Swedish political culture is significantly different from ours; it is more deferential than participatory. Though almost all adult Swedes vote in national elections, few participate in politics in any other way. They defer to the decisions of experts and specialists who work for the government, rarely challenge governmental decisions in court, believe leaders and legislators ought to decide issues on the basis of "what is best" more than on "what the people want," and value equality as much as (or more than) liberty.[21] Whereas Americans are contentious, Swedes value harmony; while Americans tend to assert their rights, Swedes tend to observe their obligations.

The contrast in political cultures is even greater when one looks at a nation such as Japan, with a wholly different history and set of traditions. One study compared the values expressed by a small number of upper-status Japanese with those of some similarly situated Americans. Whereas the Americans emphasized the virtues of individualism, competition, and equality in their political, economic, and social relations, the Japanese attached greater value to maintaining good relations with colleagues, having decisions made by groups, preserving social harmony, and displaying respect for hierarchy. The Americans were more concerned than the Japanese with

FIGURE 4.1 **Attitudes in the United States and Other Democracies**



Sources: Richard Wike, "5 Ways Americans and Europeans Are Different," *Fact Tank: News in the Numbers*, Pew Research Center, 19 April 2016, www.pewresearch.org/fact-tank/2016/04/19/5-ways-americans-and-europeans-are-different/; Angelina E. Theodorou, "Americans Are in the Middle of the Pack Globally When It Comes to Importance of Religion," Pew Research Center, 23 December 2015, www.pewresearch.org/fact-tank/2015/12/23/americans-are-in-the-middle-of-the-pack-globally-when-it-comes-to-importance-of-religion/.

civic duty *A belief that one has an obligation to participate in civic and political affairs.*

civic competence *A belief that one can affect government policies.*

rules and with treating others fairly but impersonally, with due regard for their rights. The Japanese, on the other hand, stressed the importance of being sensitive to the personal needs of others, avoiding conflict, and reaching decisions through discussion rather than the application of rules.[22]

A classic study of political culture in five nations found that Americans, and to a lesser degree citizens of the United Kingdom, had a stronger sense of **civic duty** (a belief that one has an obligation to participate in civic and political affairs) and a stronger sense of **civic competence** (a belief that one can affect government policies) than the citizens of Germany, Italy, and Mexico. More than half of all Americans and one-third of all Britons in the early 1960s believed the average citizen ought to "be active in one's community," compared with only a tenth in Italy and a fifth in Germany.

Moreover, many more Americans and Britons than Germans, Italians, or Mexicans believed they could "do something" about an unjust national law or local regulation.[23] Some thirty years later, a study of citizen participation in politics found that while America lagged behind Austria, the Netherlands, Germany, and the United Kingdom in voter participation, when it came to campaigning, attending political meetings, becoming active in the local community, and contacting government officials, Americans were as active—or substantially more active—than citizens elsewhere.[24]

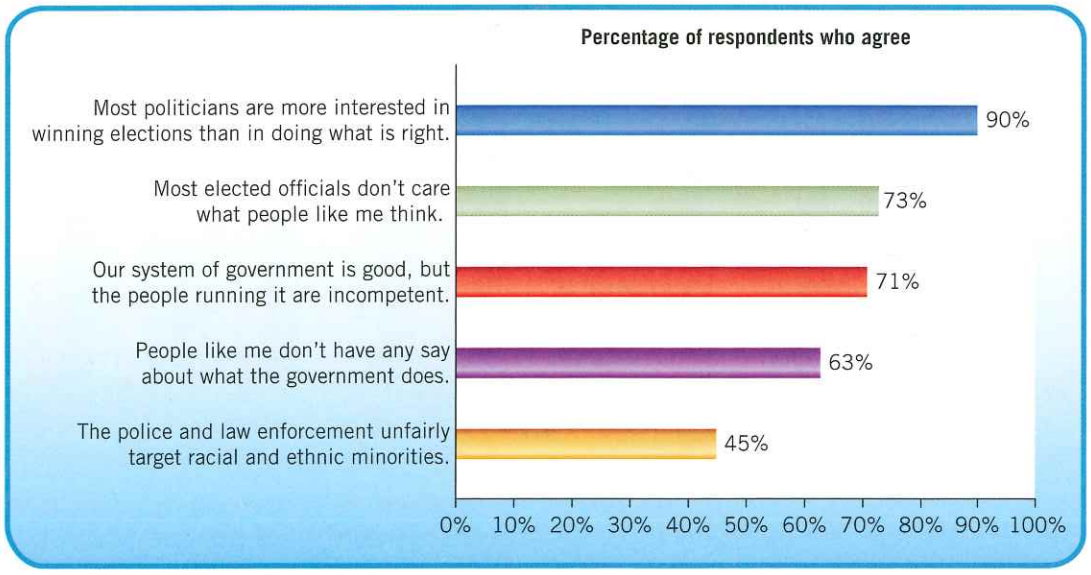
More recently, a 2014 study of democratic attitudes in countries in the Western Hemisphere found that the United States ranked highest among some two dozen nations for political tolerance, defined as "the respect by citizens for the political rights of others, especially those with whom they may disagree."[25] But at the same time, Americans today are somewhat skeptical of the ability of the federal government to solve problems. In that same study, the United States ranked fifteenth—below Nicaragua, Chile, and Mexico—in thinking that the U.S. political system was legitimate or had strong citizen support.[26]

A 2016 survey of American political culture found that more than 60 percent of people had little to no confidence that the federal government will solve problems or tell the truth, and believed that public officials are more interested in winning elections than in pursuing the common good. Furthermore, nearly three-quarters of those surveyed viewed the wealthiest Americans as benefiting from a system that is structured in their favor and said that political correctness had become a problem in keeping people from expressing their views.[27] Whether these views indicate a fundamental shift in American political culture remains to be seen.

The Economic System

In American political culture, equality for most people refers to equality of opportunity. But not all democracies define equality this way. For example, the political culture

FIGURE 4.2 **Opinions of Political Leaders**



Source: James Davison Hunter and Carl Desportes Bowman, "The Vanishing Center of American Democracy," Figure 2: Opinions of Political Leaders, p. 20; www.iasc-culture.org/survey_archives/VanishingCenter.pdf.

of Sweden is not only more deferential than ours but also more inclined to favor equality of results over equality of opportunity. Sidney Verba and Gary Orren compared the views of Swedish and American trade union and political party leaders on a variety of economic issues. In both countries, the leaders were chosen from either blue-collar unions or the major liberal political party (the Democrats in the United States, the Social Democrats in Sweden).

The results are quite striking. By margins of four or five to one, the Swedish leaders were more likely than their American counterparts to believe in giving workers equal pay. Moreover, by margins of at least three to one, the Swedes were more likely than the Americans to favor putting a top limit on incomes.[28]

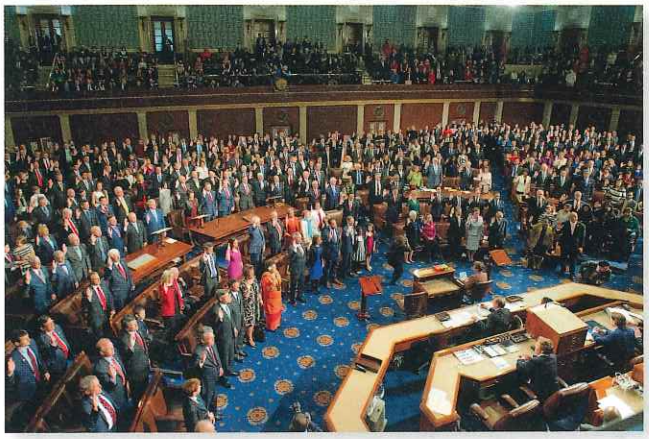
Just what these differences in beliefs mean in terms of dollars and cents was revealed by the answers to another question. Each group was asked what should be the ratio between the income of an executive and that of a menial worker (a dishwasher in Sweden, an elevator operator in the United States). The Swedish leaders said the ratio should be a little over two to one. That is, if the dishwasher earned $200 a week, the executive should earn no more than $440 to $480 a week. But the American leaders were ready to let the executive earn between $2,260 and $3,040 per week when the elevator operator was earning $200.

Americans, compared with people in many other countries, are more likely to think that freedom is more important than equality and less likely to think that hard work goes unrewarded or that the government should guarantee citizens a basic standard of living. These cultural differences make a difference in politics. In fact, there is less income inequality in Sweden than in the United States—the Swedish government sees to that.

The Civic Role of Religion

In the 1830s, de Tocqueville was amazed at how religious Americans were in comparison to his fellow Europeans. From the first days of the new Republic to the present, America has been among the most religious countries in the world. The average American is more likely than the average European to believe in God, to pray on a daily basis, and to acknowledge clear standards of right and wrong.[29]

Religious people donate more than three times as much money to charity as secular people, even when the incomes of the two groups are the same, and they volunteer their time twice as often. And this is true whether religious people go to a church, mosque, synagogue, temple, or other place of organized worship regularly. Moreover, religious people are more likely to give money and donate



dpa picture alliance/Alamy Stock Photo

IMAGE 4-4 Members of the House in the 115th Congress take the oath of office following an opening prayer.

time to nonreligious organizations, such as the Red Cross, than secular people.[30] It is clear that religion in America has a large effect on our culture.

Religion also affects our politics. The religious revivalist movement of the late 1730s and early 1740s (known as the First Great Awakening) transformed the political life of the American colonies. Religious ideas fueled the break with England, a country that had, in the words of the Declaration of Independence, violated "the laws of nature and nature's God." Religious leaders were central to the struggle over slavery in the 19th century and the temperance movement of the early 20th century.

Both liberals and conservatives have used the pulpit to promote political change. The civil rights movement of the 1950s and 1960s was led mainly by black religious leaders, most prominently Martin Luther King, Jr. In the 1980s, a conservative religious group known as the Moral Majority advocated constitutional amendments that would allow prayer in public schools and ban abortion. In the 1990s, another conservative religious group, the Christian Coalition, attracted an enormous amount of media attention and became a prominent force in many national, state, and local elections.

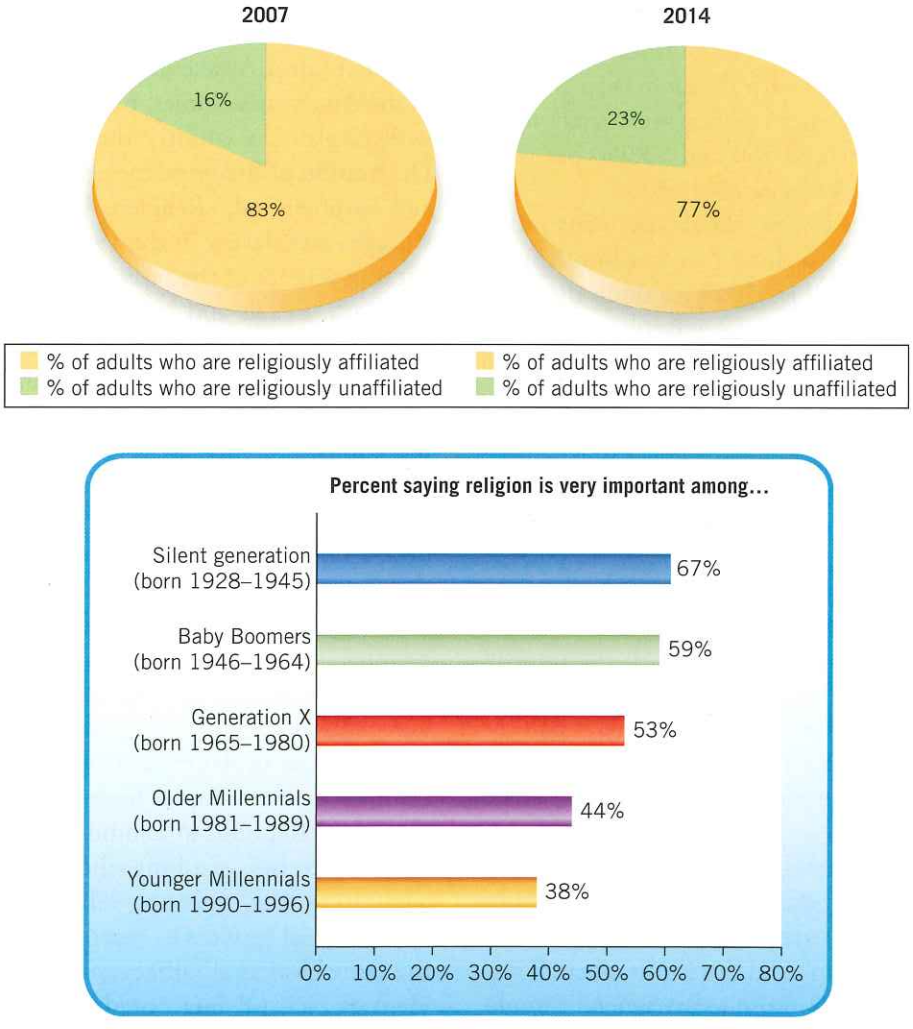
Candidates for national office in most contemporary democracies mention religion rarely, if they mention it at all. Not so in America. During the 2000 presidential campaign, for example, both Democratic candidate Al Gore and Republican candidate George W. Bush gave major speeches extolling the virtues of religion and advocating the right of religious organizations that deliver social services to receive government funding on the same basis as all other nonprofit organizations. President Barack Obama opted to keep the White House "faith-based" office that Bush had established, expanded the office to cabinet centers at every federal cabinet

department, and made frequent references to religion in public addresses. Soon after taking office, President Donald Trump signed an executive order permitting tax-exempt religious organizations to participate in some political activity, though the change from existing policy was limited.

The general American feeling about religion became apparent when a federal appeals court in 2002 tried to ban the Pledge of Allegiance because it contained the phrase "under God." There was an overwhelming and bipartisan condemnation of the ruling. To a degree that would be almost unthinkable in many other democracies, religious beliefs will probably continue to shape political culture in America for many generations to come. The Supreme Court, by deciding that the man who brought the case was not entitled to do so, left the Pledge intact without deciding whether it was constitutional.

Finally, although the number has declined in the past decade, just over three-fourths of Americans declare a religious affiliation. Two-thirds of Americans born before the end of World War II say religion is very important in their lives, as do more than half of people born between 1946 and 1980. But the number drops below 50 percent for people born in the 1980s, and just under 40 percent of people born in the early to mid-1990s say religion is very important to them (see Figure 4.3). How this shift in religious affiliation will affect our political culture in the years to come remains to be seen.

FIGURE 4.3 **Americans' Beliefs About Religion**



Source: Pew Research Center, "2014 Religious Landscape Study, 4 June–30 Sept. 2014," cited in Pew Research Center, "U.S. Public Becoming Less Religious," 3 November 2015. Available at www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/.

CONSTITUTIONAL CONNECTIONS | "A Religious People"

Justice William O. Douglas was the U.S. Supreme Court's longest-serving member, beginning his term in 1939 and ending it in 1975. When Douglas died in 1980, he was widely remembered as the Court's most consistently liberal voice, a major force in legalizing abortion rights, and a proponent of the "wall-of-separation" doctrine regarding church–state relations (see Chapter 5). In *Zorach v. Clauson* (1952), however, Douglas held that a New York City policy permitting public school students to be released during the school day to receive religious instruction off school grounds was not only constitutional but consistent with Americans' best "traditions" as "a religious people":

> *We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship. . . . We make room for a wide variety of beliefs. . . . When the state encourages religious instruction or cooperates with religious authorities, it follows the best of our traditions.*

Source: *Zorach v. Clauson*, 343 U.S. 306 (1952).

4-3 Sources of Political Culture

That Americans bring a distinctive way of thinking to their political life is easier to demonstrate than to explain. But even a brief, and necessarily superficial, effort to understand the sources of our political culture can help make its significance clearer.

The American Revolution, as we discussed in Chapter 2, was essentially a war fought over liberty: an assertion by the colonists of what they took to be their rights. Though the Constitution, produced 11 years after the Revolution, had to deal with other issues as well, its animating spirit reflected the effort to reconcile personal liberty with the needs of social control. These founding experiences, and the political disputes that followed, have given to American political thought and culture a preoccupation with the assertion and maintenance of rights. This tradition has imbued the daily conduct of U.S. politics with a kind of adversarial spirit quite foreign to the political life of countries that did not undergo a libertarian revolution or that were formed out of an interest in other goals, such as social equality, national independence, or ethnic supremacy.

The adversarial spirit of the American political culture reflects not only our preoccupation with rights but also our long-standing distrust of authority and of people wielding power. The colonies' experiences with British rule were one source of that distrust. But another, older source was the religious belief of many Americans, which saw human nature as fundamentally depraved. To the colonists, all of humankind suffered from original sin, symbolized by Adam and Eve eating the forbidden fruit in the Garden of Eden. Since no one was born innocent, no one could be trusted with power. Thus, the Constitution had to be designed in such a way as to curb the darker side of human nature. Otherwise, everyone's rights would be in jeopardy.

The contentiousness of a people animated by a suspicion of government and devoted to individualism could easily have made democratic politics so tumultuous as to be impossible. After all, one must be willing to trust others with power if there is to be any kind of democratic government, and sometimes those others will be people not of one's own choosing. The first great test case took place around 1800 in a battle between the Federalists, led by John Adams and Alexander Hamilton, and the Democratic Republicans, led by Thomas Jefferson and James Madison. The two factions deeply distrusted each other: the Federalists had passed laws designed to suppress Jeffersonian journalists, Jefferson suspected the Federalists were out to subvert the Constitution, and the Federalists believed Jefferson intended to sell out the country to France. But as we shall see in Chapter 9, the threat of civil war never materialized, and the Jeffersonians came to power peacefully. Within a few years, the role of an opposition party became legitimate, and people abandoned the idea of making serious efforts to suppress their opponents. By happy circumstance, people came to accept that liberty and orderly political change could coexist.

The Constitution, by creating a federal system and dividing political authority among competing institutions, provided ample opportunity for widespread—though hardly universal—participation in politics. The election of Jefferson in 1800 produced no political catastrophe, and those who had predicted one were, to a degree, discredited. But other, more fundamental features of American life contributed to the same end. One of the most important of these was religious diversity.

The absence of an established or official religion for the nation as a whole, reinforced by a constitutional

class-consciousness *A belief that one is a member of an economic group whose interests are opposed to people in other such groups.*

orthodox *A belief that morality and religion ought to be of decisive importance.*

prohibition of such an establishment and by the migration to this country of people with different religious backgrounds, meant that religious diversity was inevitable. Since there could be no orthodox or official religion, it became difficult for a corresponding political orthodoxy to emerge. Moreover, the conflict between the Puritan tradition, with its emphasis on faith and hard work, and the Catholic Church, with its devotion to the sacraments and priestly authority, provided a recurrent source of cleavage in American public life. The differences in values between these two groups showed up not only in their religious practices but also in areas involving the regulation of manners and morals, and even in people's choice of political party. For more than a century, candidates for state and national offices were deeply divided over whether the sale of liquor should be prohibited, a question that ultimately arose out of competing religious doctrines.

Even though there was no established church, there was certainly a dominant religious tradition—Protestantism, and especially Puritanism. The Protestant churches provided people with both a set of beliefs and an organizational experience that had profound effects on American political culture. Those beliefs encouraged, or even required, a life of personal achievement as well as religious conviction: a believer had an obligation to work, save money, obey the secular law, and do good works. Max Weber explained the rise of capitalism in part by what he called the *Protestant ethic*—what we now sometimes call the *work ethic*.[31] Such values had political consequences, as people holding them were motivated to engage in civic and communal action.

Churches offered ready opportunities for developing and practicing civic and political skills. Since most Protestant churches were organized along congregational lines—that is, the church was controlled by its members, who put up the building, hired the preacher, and supervised the finances—they were, in effect, miniature political systems with leaders and committees, conflict and consensus. Developing a participatory political culture was undoubtedly made easier by the existence of a participatory religious culture. Even some Catholic churches in early America were under a degree of lay control. Parishioners owned the church property, negotiated with priests, and conducted church business.

All aspects of culture, including the political, are preserved and transmitted to new generations primarily by the family. Though some believe that the weakening of the family unit has eroded the extent to which it transmits anything, particularly culture, and has enlarged the power of other sources of values—the mass media and the world of friends, fashion, leisure, and entertainment—there is still little doubt that the ways in which we think about the world are largely acquired within the family. In Chapter 7, we shall see that the family is the primary source of one kind of political attitude: identification with one or another political party. Even more important, the family shapes in subtle ways how we think and act on political matters. Psychologist Erik Erikson noted certain traits that are more characteristic of American than of European families—the greater freedom enjoyed by children, for example, and the larger measure of equality among family members. These familial characteristics promote a belief, carried through life, that every person has rights deserving protection and that a variety of interests have a legitimate claim to consideration when decisions are made.[32]

The combined effect of religious and ethnic diversity, an individualistic philosophy, fragmented political authority, and the relatively egalitarian American family can be seen in the absence of a high degree of class-consciousness among Americans. **Class-consciousness** means thinking of oneself as a worker whose interests are in opposition to those of management, or vice versa. In this country, most people, whatever their jobs, think of themselves as "middle class."

Though the writings of Horatio Alger are no longer popular, Americans still seem to believe in the message of those stories—that the opportunity for success is available to people who work hard. This may help explain why the United States is the only large industrial democracy without a significant socialist party and why the nation has been slow to adopt certain welfare programs.

4-4 The Culture War

Almost all Americans share some elements of a common political culture. Why, then, is there so much cultural conflict in American politics? For many years, the most explosive political issues have included abortion, gay rights, drug use, school prayer, and pornography. Viewed from a Marxist perspective, politics in the United States is utterly baffling: instead of two economic classes engaged in a bitter struggle over wealth, we have two cultural classes locked in a war over values.

As first formulated by sociologist James Davison Hunter, the idea is that there are, broadly defined, two cultural classes in the United States: the orthodox and the progressive. On the **orthodox** side are people who believe that morality is as important as, or more important than,

self-expression and that moral rules derive from the commands of God or the laws of nature—commands and laws that are relatively clear, unchanging, and independent of individual preferences. On the **progressive** side are people who think that personal freedom is as important as, or more important than, certain traditional moral rules and that those rules must be evaluated in light of the circumstances of modern life—circumstances that are quite complex, changeable, and dependent on individual preferences.[33]

progressive *A belief that personal freedom and solving social problems are more important than religion.*

Most conspicuous among the orthodox are fundamentalist Protestants and evangelical Christians, and so critics who dislike orthodox views often dismiss them as the fanatical expressions of "the Religious Right." But many people who hold orthodox views are not fanatical or deeply religious or right-wing on most issues: they simply have strong views about drugs, pornography, and sexual morality. Similarly, the progressive side often includes members of liberal Protestant denominations (e.g., Episcopalians and Unitarians) and people with no strong religious beliefs, and so their critics often denounce them as immoral, anti-Christian radicals who have embraced the ideology of secular humanism, the belief that moral standards do not require religious justification. But few progressives are immoral or anti-Christian, and most do not regard secular humanism as their defining ideology.

Groups supporting and opposing the right to abortion have had many angry confrontations in recent years. The latter have been arrested while attempting to block access to abortion clinics; some clinics have been firebombed and at least seven physicians have been killed. A controversy over what schoolchildren should be taught about sexual orientation was responsible, in part, for the firing of the head of the New York City school system; in other states, there have been fierce arguments in state legislatures and before the courts over whether gay and lesbian couples should be allowed to marry or adopt children. Although most Americans want to keep heroin, cocaine, and other drugs illegal, a significant number of people want to legalize (or at least decriminalize) use of certain substances (such as marijuana). The Supreme Court has ruled that there cannot be state-sponsored prayer in public schools, but this has not stopped many parents and school authorities from trying to reinstate school prayer, or at least prayer-like moments of silence. The discovery that a federal agency, the National Endowment for the Arts, had given money to support exhibitions and performances that many people thought were obscene led to a furious congressional struggle over the future of the agency.

The culture war differs from other political disputes (over such matters as taxes, business regulations, and foreign policy) in several ways: money is not always at stake, compromises are almost impossible to arrange, and the conflict is more profound. It is animated by deep differences in people's beliefs about private and public morality—that is, about the standards that ought to govern individual behavior and social arrangements. It is about what kind of country we ought to live in, not just about what kinds of policies our government ought to adopt.

Two opposing views exist about the importance of the culture war. One view, developed by Morris Fiorina and others, holds that politically, the culture war is a myth. While political leaders are polarized, most Americans occupy a middle position. Journalists write about the split between "blue states" (those that vote Democratic) and "red states" (those that vote Republican), but in fact popular views on many policy issues are similar across both kinds of states.[34]

The rival view, developed by Alan Abramowitz and others, holds that more and more people are choosing their party affiliations on the basis of the party's position on moral issues. Moreover, a growing percentage of the public is politically engaged; that is, they do more to express their political views than simply vote.[35] Choosing between these two theories (which are discussed more fully in Chapter 7) will take time, as we watch what happens in future elections.

Mistrust of Government

One aspect of public opinion worries many people. Since the late 1950s there has been a more or less steady decline in the proportion of Americans who say they trust the government in Washington to do the right thing. In the past, polls showed that about three-quarters of Americans said they trusted Washington most of the time or just about always. The percentage of people who say they trust the government has on occasion gone up (e.g., during the first term of the Reagan presidency, and again just after the 9/11 terrorist attacks), but by and large trust has been waning since at least the mid-1960s. In the past decade, trust in government has dropped below 30 percent (see Figure 4.4).

In interpreting this data, we should remember that people often are talking about government officials, not the system of government. Americans historically have been much more supportive of the country and its institutions than Europeans are of theirs. Even so, the decline in public confidence in our officials is striking and of

concern. There are all sorts of explanations for why it has happened.

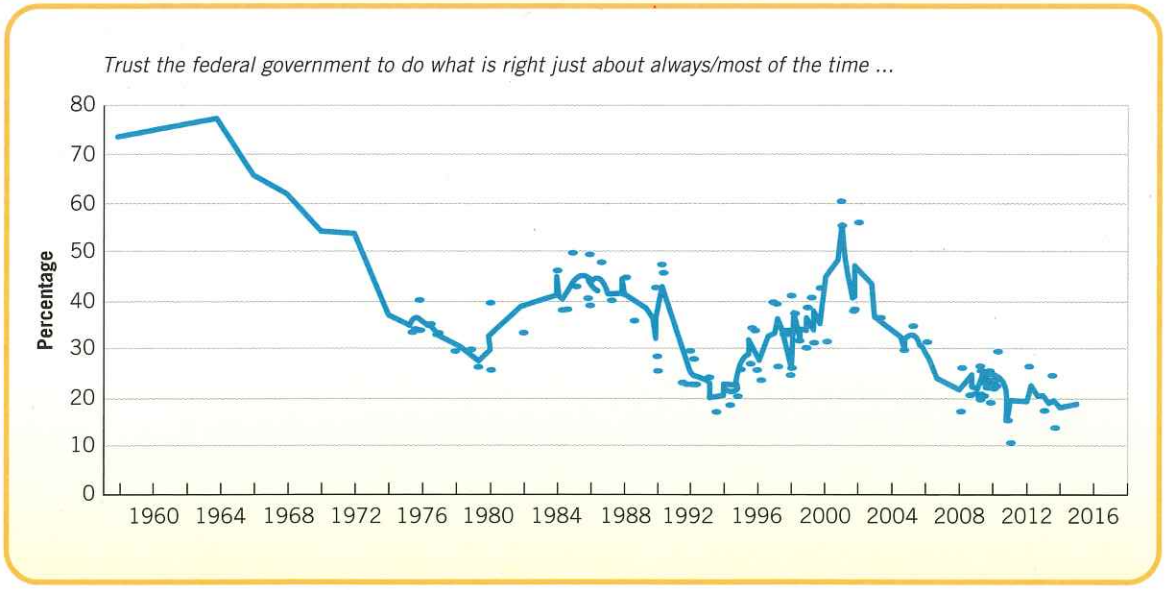
In the 1960s, there was our unpopular war in Vietnam; in the 1970s, President Richard Nixon had to resign because of his involvement in the Watergate scandal; in the 1990s, President Bill Clinton went through scandals that led to his impeachment by the House of Representatives (but he was not convicted of that charge by the Senate). Beginning in 2003, President George W. Bush presided over a divisive war in Iraq. President Barack Obama faced great difficulty in winning bipartisan support for his policies, and in Obama's last year in office, Washington had become so polarized that the Republican-led Senate refused to consider the president's Supreme Court nomination.

But there is another way of looking at the matter. Maybe in the 1950s we had an abnormally *high* level of confidence in government, one that could never be expected to last no matter what any president did. After all, when President Dwight Eisenhower took office in

Bloomberg/Getty Images

IMAGE 4-5 Demonstrators from the Occupy Wall Street movement protested income inequality for several weeks in New York City in the fall of 2011, before New York City police cleared their camp area in lower Manhattan.

FIGURE 4.4 **Trust in the Federal Government, 1958–2015**



Source: "Trust in Government: 1958–2015," from "Beyond Distrust: How Americans View Their Government," Pew Research Center, 23 November 2015, www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/.

1952, we had won a war against fascism, overcome the Depression of the 1930s, possessed a near monopoly of the atom bomb, had a currency that was the envy of the world, and dominated international trade. Moreover, in those days not much was expected out of Washington. Hardly anybody thought there should be important federal laws about civil rights, crime, illegal drugs, the environment, the role of women, highway safety, or almost anything else now on the national agenda. Since nobody expected much, nobody was upset that they didn't get much.

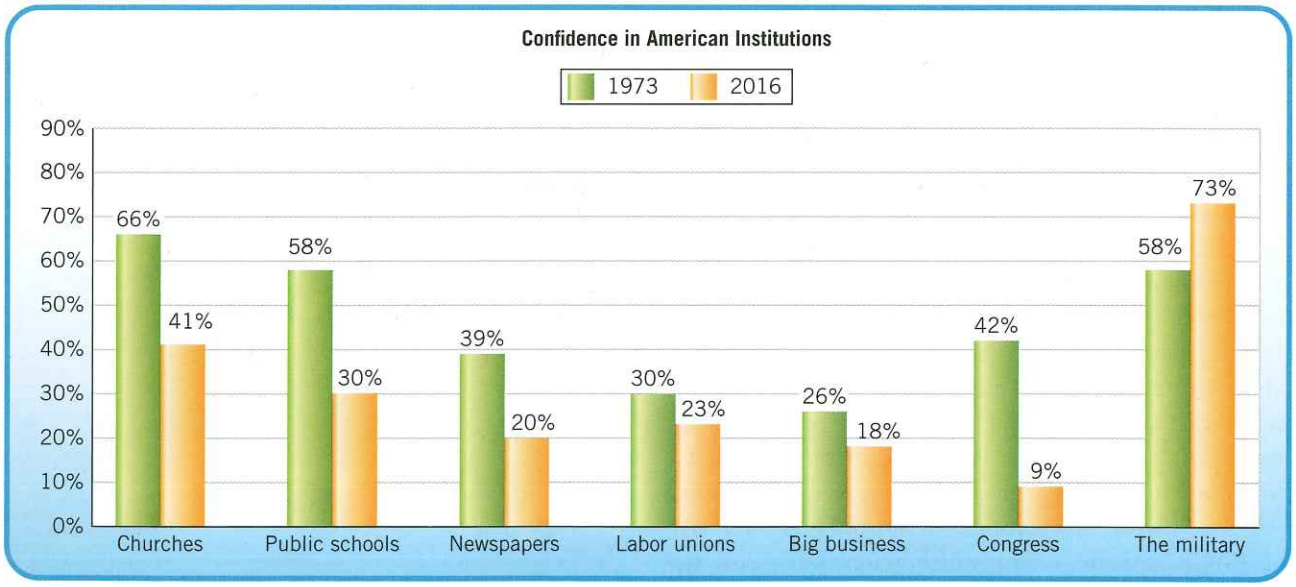
The 1960s and 1970s changed all of that. Domestic turmoil, urban riots, a civil rights revolution, the war in Vietnam, economic inflation, and a new concern for the environment dramatically increased what we expected Washington to do. And since these problems are very difficult ones to solve, many people became convinced that our politicians couldn't do much.[36]

Those events also pushed the feelings Americans had about their country—that is, their patriotism—into the background. We liked the country, but there weren't many occasions when expressing that approval seemed to make much sense. But on September 11, 2001, when terrorists crashed hijacked airliners into the World Trade Center in New York City and the Pentagon in Washington, all of that changed. There was an extraordinary outburst of patriotic fervor; flags were displayed everywhere, fire and police heroes were widely celebrated, and there was strong national support for our going to war in Afghanistan to find the key terrorist, Osama bin Laden, and destroy the tyrannical Taliban regime that he supported. By November of that year, about half of all Americans of both political parties said they trusted Washington officials to do what is right most of the time, the highest level in many years.

Those who had hoped or predicted that this new level of support would last, not ebb and flow, have been disappointed. In October 2001, more than half of Americans surveyed said they trusted the federal government to do what is right always or most of the time. But by the summer of 2002, only 40 percent expressed such trust in the federal government. In the fall of 2006, the fraction that said they trusted the federal government to do what is right always or most of the time had fallen below 30 percent, and as of April 2017, the figure had dropped to 20 percent (with an all-time low of 15 percent in the fall of 2011).[37]

Less than 20 percent of all Americans have a lot of confidence in Congress, but it—and the rest of the government—should not feel lonely. With few exceptions, Americans have lost confidence in many institutions. As Figure 4.5 shows, newspapers, public schools, television news, and labor unions have all suffered a big drop in public confidence during the past three decades. Only the military has gained support (73 percent of us say we have "a great deal" or "a lot" of confidence in it). This support may have implications for politics. One recent study of people who endorsed President Trump's candidacy found that they showed authoritarian characteristics, that is,

FIGURE 4.5 **Confidence in American Institutions**



Source: "Americans' Confidence in Institutions Stays Low," Gallup Poll, 13 June 2016 , www.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx/.

civil society *Voluntary action that makes cooperation easier.*

support for and obedience to strong leaders, as well as aggressive responses to perceived threats from outsiders.[38] But another study finds that Trump supporters are populist, not authoritarian, with strong nationalist sentiments and opposition to elites.[39]

Because Americans are less likely than they once were to hold their leaders in high esteem, to have confidence in government policies, and to believe the system will be responsive to popular wishes, some observers like to say that Americans today are more "alienated" from politics. Perhaps this is true, but careful studies of the subject have not yet been able, for example, to demonstrate any relationship between overall levels of public trust in government or confidence in leaders, on the one hand, and the rates at which people come out to vote, on the other. There is, however, some evidence that the less voters trust political institutions and leaders, the more likely they are to support candidates from the nonincumbent major party (in two-candidate races) and third-party candidates.[40]

Civil Society

Distrust of governmental and other institutions makes more important the role of **civil society**, the collection of private, voluntary groups that—independent of the government and the commercial market—make human cooperation easier and provide ways of holding the government accountable for its actions.

The individualism of the American political culture makes civil society especially important. As we shall see in Chapter 11, Americans are more likely than people in other democracies to join voluntary groups. These organizations teach people how to cooperate, develop community service skills, and increase social capital. This last phrase refers to the connections people have with each other through friendship, personal contact, and group efforts.

Several scholars, such as Robert Putnam, argue that the more social capital a community has, the greater the level of trust among its members. And the more trust that exists, the easier it is to achieve common goals such as improving a neighborhood, combating intolerance, and producing useful projects outside of government. Putnam worries that our social capital may be decreasing because people are less and less likely to join voluntary associations. In Putnam's famous phrase, we once bowled in leagues; now we bowl alone. We once joined the PTA, the NAACP, and the Veterans of Foreign Wars; now we stay home and watch television or spend time on our computers.[41]

There are three qualifications to this argument. First, Americans still join more groups than people in most other democracies. Second, young Americans today are more likely to say volunteering is an important civic duty than this group was some 30 years ago.[42] Third, in ethnically and racially diverse communities, we "hunker down"—that is, we don't trust our neighbors, contribute to charities, cooperate with others, or join voluntary groups.[43] Just where we most need social capital, we do not have as much as we would like.

Furthermore, in the post-9/11 world, young people in the United States have demonstrated increased interest in public affairs and civic engagement. But this heightened involvement seems to be most pronounced for people with high incomes; Putnam describes this division as "a growing civic and social gap in the United States between upper-middle-class young white people and their less affluent counterparts."[44] In his 2015 book *Our Kids: The American Dream in Crisis*, Putnam examines how children in economically well-off families are far more likely to experience social capital in their homes, schools, and activities than children whose families face severe economic difficulties.[45] Without social capital, economic and social mobility become daunting, not realistic, goals. A major societal challenge for the 9/11 generation will be to expand opportunities for making the American dream a reality and keeping public confidence in American political culture.

Political Tolerance

Democratic politics depends crucially on citizens' reasonable tolerance of the opinions and actions of others. If unpopular speakers were always shouted down, if government efforts to censor newspapers were usually met with popular support or even public indifference, if peaceful demonstrations were regularly broken

The Washington Post/The Washington Post/Getty Images

IMAGE 4-6 Many communities in the United States offer English language lessons, tutoring, and other services for immigrants.

up by hostile mobs, if the losing candidates in an election refused to allow their victorious opponents to take office, then the essential elements of a democratic political culture would be missing, and democracy would fail. Democracy does not require perfect tolerance; if it did, the passions of human nature would make democracy forever impossible. But at a minimum, citizens must have a political culture that allows the discussion of ideas and the selection of rulers in an atmosphere reasonably free of oppression.

Public opinion surveys show that the overwhelming majority of Americans agree with concepts such as freedom of speech, majority rule, and the right to circulate petitions—at least in the abstract. But when we get down to concrete cases, a good many Americans are not very tolerant of groups they dislike. Suppose you must decide which groups will be in a community public auditorium. Which of these groups would *you* say should be permitted to hold a meeting?

1. A religious group hosting a revival meeting
2. A parent organization that opposes mandatory annual testing in schools
3. Concerned citizens protesting the building of a cellphone tower near their homes
4. A women's rights organization campaigning for stronger legislation to punish sexual harassment in the workplace
5. A civil rights group that advocates for transgender rights
6. Atheists preaching against God
7. Students organizing a sit-in to protest school dress codes

One person's civic intolerance can be another person's heartfelt display of civic concern. Some Americans believe that serious civic problems are rooted in a breakdown of moral values.[46] Correctly or not, some citizens worry that the nation is becoming too tolerant of behaviors that harm society, and they favor defending common moral standards over protecting individual rights.

Nonetheless, this majority tolerance for many causes should not blind us to the fact that most of us have some group or cause from which we are willing to withhold political liberties—even though we endorse those liberties in the abstract.

If most people dislike one or another group strongly enough to deny it certain political rights that we usually take for granted, how is it that such groups (and such rights) survive? The answer, in part, is that most of us don't act on our beliefs. We rarely take the trouble—or have the chance—to block another person from making a speech or teaching school. Some scholars have argued that among people who are in a position to deny other people rights—officeholders and political activists, for example—the level of political tolerance is somewhat greater than among the public at large, but that claim has been strongly disputed.[47]

But another reason may be just as important. Most of us are ready to deny *some* group its rights, but we usually can't agree on which group that should be. Sometimes we can agree, and then the disliked group may be in for real trouble. There have been times (1919–1920, and again in the early 1950s) when socialists and communists were disliked by most people in the United States. On each occasion the government took strong actions against them. Today, fewer people agree that these left-wing groups are a major domestic threat, and so their rights are now more secure.

Finally, the courts are sufficiently insulated from public opinion that they can act against majority sentiments and enforce constitutional protections (see Chapter 16). Most of us are not willing to give all rights to all groups, but most of us are not judges.

These facts should be a sober reminder that political liberty cannot be taken for granted. Men and women are not, it would seem, born with an inclination to live and let live, at least politically, and many—possibly most—never acquire that inclination. Liberty must be learned and protected. Happily, the United States, during much of its recent history, has not been consumed by revulsion for any one group, at least not revulsion strong enough to place the group's rights in jeopardy.

Nor should any part of society pretend that it is always more tolerant than another. In the 1950s, for example, ultraconservatives outside the universities were attacking the rights of professors to say and teach certain things. In the 1960s and 1970s, ultraliberal students and professors inside the universities were attacking the rights of other students and professors to say certain things.

The American system of government is supported by a political culture that fosters a sense of civic duty, takes pride in the nation's constitutional arrangements, and provides support for the exercise of essential civil liberties. In recent decades, mistrust of government officials (though not of the system itself) has increased, and confidence in their responsiveness to popular feelings has declined.

Although Americans value liberty in both the political system and the economy, they believe equality is important in the political realm. In economic affairs, they wish to see equality of opportunity but accept inequality of results.

Not only is our culture generally supportive of democratic rule, it also has certain distinctive features that make our way of governing different from what one finds in other democracies. Americans are preoccupied

WHAT WOULD YOU DO?

Will You Support the Creation of Required Civics Courses for all U.S. High Schools?

To: *Jae Lulu, White House Chief of Staff*
From: *Ella Sophia, Secretary of Education*
Subject: *Civics education in schools*

The decline in political knowledge that Americans have about our governmental system is alarming. We need to work in partnership with Congress and the states to promote civic education in secondary schools. In her upcoming State of the Union message, the president needs to make a case for high school civics education and endorse the creation of a bipartisan task force to develop guidelines for such classes.

To Consider:

A recent survey shows that only 24 percent of twelfth graders scored proficient or higher in civics, a statistic that does not bode well for an informed and engaged U.S. citizenry.

Arguments for:

1. A recent survey finds that only about 6 in 10 Americans can name the vice president, and more than half believe incorrectly that the Supreme Court prohibits public school classes that compare world religions.
2. Schools have a responsibility to teach students the principles of American constitutionalism, such as federalism and separation of church and state.
3. If the federal government does not take the initiative in promoting civics education, then states will develop their own standards, which will weaken understanding of our shared political principles.

Arguments against:

1. Civics education needs to be incorporated into existing courses, not taught separately, so students understand how public activity affects their education, career paths, and lives.
2. Individuals need to take responsibility for understanding the political system in which they live.
3. Based on their individual historical experiences, states are better prepared than the federal government to determine how the underlying principles of American politics should be taught in their classrooms.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Support ☐ Oppose

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

with their rights, and this fact, combined with a political system that (as we shall see) encourages the vigorous exercise of rights and claims, gives to our political life an *adversarial* style. Unlike Swedes or Japanese, we do not generally reach political decisions by consensus, and we often do not defer to the authority of administrative agencies. American politics, more than that of many other nations, is shot through at every stage with protracted conflict.

But as we shall learn in the next chapter, that conflict is not easily described as, for example, always pitting liberals against conservatives. Not only do we have a lot of conflict, it is often messy conflict, a kind of political Tower of Babel. Foreign observers sometimes ask how we stand the confusion. The answer, of course, is that we have been doing it for more than 200 years. Maybe our Constitution is two centuries old, not in spite of this confusion, but because of it. We shall see.

LEARNING OBJECTIVES

4-1 Explain the concept of political culture and its key components in the United States.

Political culture refers to long-standing patterns in how people view government, politics, and the economy. Key components of American political culture include liberty, equality (of opportunity), democracy, civic duty, and individual responsibility.

4-2 Discuss how the political culture of the United States differs from that in other countries.

The question of whether the United States is "exceptional" among democracies sparks much debate among social scientists and historians. While characteristics of American exceptionalism are difficult to identify and measure, surveys discussed in this chapter do show that Americans view government, politics, religion, and economics differently than citizens of other advanced industrialized democracies.

American political culture has imbued people with more tolerance and a greater respect for orderly procedures and personal rights than can be found in nations with constitutions like ours. Americans are willing to let whoever wins an election govern without putting up a fuss, and the U.S. military does not intervene.

4-3 Identify the key sources of political culture in the United States.

People learn the concepts of political culture from their families, schools, organizations (including religious groups), and interactions with the government—federal, state, and local.

4-4 Evaluate how conflicts in American political culture affect public confidence in government and tolerance of different political views.

Compared to the 1950s, we are much less likely to think the government does the right thing or cares about what we think. But when we look at our system of government—the Constitution and our political culture—we are very pleased with it. Americans are much more patriotic than people in many other democracies. And we display a great deal of support for churches in large measure because we are more religious than most Europeans.

TO LEARN MORE

Polling organizations that frequently measure aspects of political culture:

www.ropercenter.cornell.edu

www.gallup.com

U.S. Census Bureau: **www.census.gov**

Almond, Gabriel, and Sidney Verba. *The Civic Culture*. Princeton, NJ: Princeton University Press, 1963. Classic study of the political cultures of five nations—the United States, Germany, Great Britain, Italy, and Mexico—as they were in 1959.

Hartz Louis. *The Liberal Tradition in America*. New York: Harcourt Brace Jovanovich, 1955. A stimulating interpretation of American political thought since the Founding, emphasizing the notion of a liberal consensus.

Lipset, Seymour Martin. *The First New Nation*. Rev. ed. New York: Norton, 1979. How the origins of American society gave rise to the partially competing values of equality and achievement, and the ways in which these values shape political institutions.

McClosky, Herbert, and John Zaller. *The American Ethos: Public Attitudes toward Capitalism and Democracy*. Cambridge, MA: Harvard University Press, 1984. Study of the ways in which Americans evaluate political and economic arrangements.

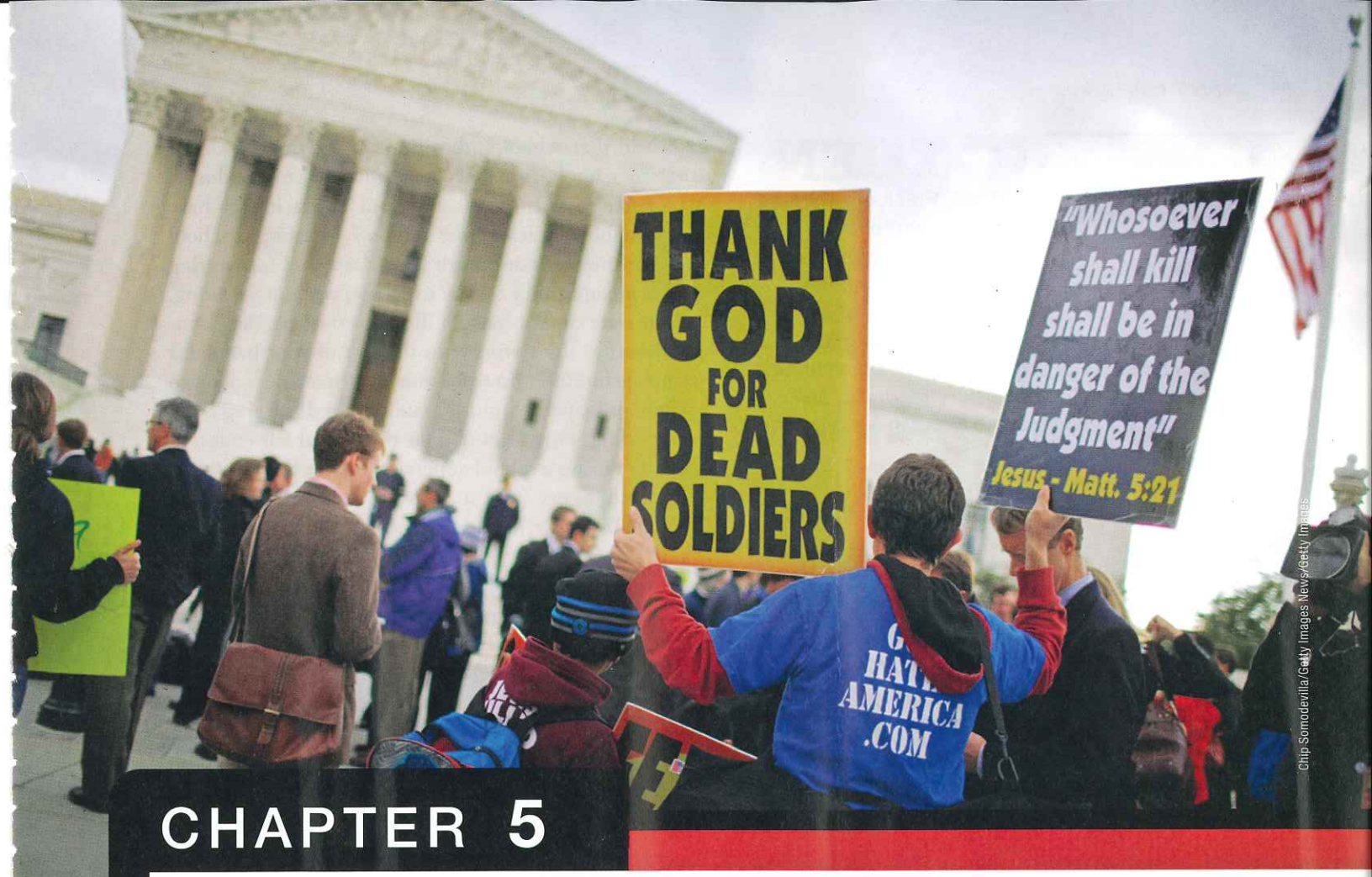
Nivola, Pietro S., and David W. Brady, eds. *Red and Blue Nation? Characteristics and Causes of America's Polarized Politics*. Washington, DC: Brookings Institution, 2006. Compares the arguments of those who do and do not believe that a culture war exists.

Putnam, Robert D. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon & Schuster, 2000. An important argument that American political culture has been harmed by the decline in membership in organizations that bring people together for communal activities.

Putnam, Robert D., and David E. Campbell. *American Grace: How Religion Unites and Divides Us*. New York: Simon & Schuster, 2010. State-of-the-art study of Americans' religious identities and how they matter to civic life.

Tocqueville, Alexis de. *Democracy in America*, edited by Phillip Bradley. 2 vols. New York: Knopf, 1951. First published in 1835–1840, this was and remains the greatest single interpretation of American political culture.

Wilson, James Q., and Peter Schuck, eds. *Understanding America: Anatomy of an Exceptional Nation*. New York: Public Affairs, 2008. Topical essays on American political culture by leading experts.



Chip Somodevilla/Getty Images News/Getty Images

CHAPTER 5

Civil Liberties

KEY OBJECTIVE OF THIS CHAPTER

- *The Supreme Court's interpretation of the First and Second Amendments reflects a commitment to individual liberty.*

KEY TAKEAWAY FROM THIS CHAPTER

- Efforts to balance social order and individual freedom are reflected in interpretations of the First Amendment that limit speech, including defamatory, offensive, and obscene statements and gestures and that which creates a "clear and present danger" based on the ruling in *Schenck v. United States* (1919).

Civil liberties *Rights—chiefly, rights to be free of government interference—accorded to an individual by the Constitution: free speech, free press, and so on.*

THEN In 1803, President Thomas Jefferson wrote to the governor of Pennsylvania complaining about the "licentiousness" of newspapers and urging him and other state leaders to bring about "a few prosecutions of the most prominent offenders." This would, Jefferson said, have a "wholesome effect in restoring the integrity of the presses."[1]

NOW Today, such a recommendation likely would spark much public criticism. Prosecuting publishers who had attacked the government would strike many people as outrageous.

There are two key differences between then and now. First, as you will see later in this chapter, the Supreme Court decided in 1833 that the Bill of Rights restricted only the federal government. The only limits on state governments with regard to free speech, a free press, and religious freedom were those found in state constitutions. This law changed after the ratification of the Fourteenth Amendment in 1868 and was (slowly) interpreted by the Supreme Court to mean that the states must also honor freedom for speech, publications, and churches.

The second change occurred in the minds of the American people. Gradually, but especially in the 20th century, they acquired a libertarian view of personal freedom. According to this perspective, the government at every level ought to leave people alone with respect to what they say, write, read, or worship.

If you think that civil liberties are an issue only for people who make inflammatory speeches, think again. Imagine, for a moment, that you are a high school student. Dogs trained to sniff out drugs go down your high school corridors and detect marijuana in some lockers. The school authorities open and search your locker without permission or a court order. You are expelled from school without any hearing. Have your liberties been violated?

Angry at what you consider unfair treatment, you decide to wear a cloth American flag sewn to the seat of your pants, and your fellow students decide to wear black armbands to class to protest how you were treated. The police arrest you for wearing a flag on your seat, and the school punishes your classmates for wearing armbands contrary to school regulations. Have your liberties, or theirs, been violated?

You file suit in federal court to find out. We cannot be certain how the court would decide the issues in this particular case, but in similar cases in the past the courts have held that school authorities can use dogs to detect drugs in schools and that these officials can conduct a "reasonable" search of you and your effects if they have a "reasonable suspicion" that you are violating a school rule. But they cannot punish your classmates for wearing black armbands, they cannot expel you without a hearing, and the state cannot make it illegal to treat the flag "contemptuously" (by sewing it to the seat of your pants, for example). In 2007, however, the Supreme Court allowed a school principal to punish a student for displaying a flag saying "Bong Hits 4 Jesus" that the official felt endorsed drug use during a school-supervised event. So a student's free-speech rights (and a school's authority to enforce discipline) now lie somewhere between disgracing a flag (okay) and encouraging drug use (not okay).[2]

Your claim that these actions violated your constitutional rights would have astonished the Framers of the Constitution. They thought they had written a document that stated what the federal government *could* do, not one that specified what state governments (such as school systems) *could not* do. And they thought they had created a national government of such limited powers that it was not even necessary to add a list—a bill of rights—stating what that government was forbidden from doing. It would be enough, for example, that the Constitution did not authorize the federal government to censor newspapers; an amendment prohibiting censorship would be superfluous.

The people who gathered in the state ratifying conventions weren't so optimistic. They suspected—rightly, as it turned out—that the federal government might well try to do things it was not authorized to do, and so they insisted that the Bill of Rights be added to the Constitution. But even they never imagined that the Bill of Rights would affect what *state* governments could do. Each state would decide that for itself, in its own constitution. And if by chance the Bill of Rights did apply to the states, surely its guarantees of free speech and freedom from unreasonable search and seizure would apply to big issues—the freedom to attack the government in a newspaper editorial, for example, or to keep the police from breaking down the door of your home without a warrant. The courts would not be deciding who could wear what kinds of armbands or under what circumstances a school could expel a student.

Civil liberties are the rights—chiefly, rights to be free of government interference—accorded to an individual by the Constitution: free exercise of religion, free speech, and so on. Civil rights, to be discussed in the next chapter, usually refer to protecting certain groups from discrimination based on characteristics such as their sex, sexual orientation, race, or ethnicity.

In practice, however, there is no clear line between civil liberties and civil rights. For example, is the right to an abortion a civil liberty or a civil right? In this chapter,

we take a look at free speech, free press, religious freedom, and the rights of the accused. In the next chapter, we look at discrimination and abortion.

5-1 The Courts and Conflicts over Civil Liberties

We often think of "civil liberties" as a set of principles that protect the freedoms of all of us all of the time. That is true—up to a point. But in fact, the Constitution and the Bill of Rights contain a list of *competing* rights and duties. Clashes over civil liberties often end up in the courts.

Rights in Conflict

Political struggles over civil liberties follow much the same pattern as interest group politics involving economic issues, even though the claims in question are made by individuals. Indeed, formal, organized interest groups are concerned with civil liberties. The Fraternal Order of the Police complains about restrictions on police powers, whereas the American Civil Liberties Union defends and seeks to expand those restrictions. Catholics have pressed for public support of parochial schools; Protestants and Jews have argued against it. Sometimes the opposing groups are entirely private; sometimes one or both are government agencies.

Competition over civil liberties becomes obvious when one person asserts one constitutional right or duty and another person asserts a different one. For example:

- At the funeral of a Marine killed in Iraq, Fred Phelps and others from a church picketed it with signs saying "Thank God for Dead Soldiers" and other outrageous remarks. (The opening photo for this chapter shows such picketers outside the Supreme Court.) The Marine's father sued the church, saying the picketers caused him suffering. Free speech versus extreme emotional distress.
- The U.S. government has an obligation to "provide for the common defense" and, in pursuit of that duty, has claimed the right to keep secret certain military and diplomatic information. The *New York Times* claimed the right to publish such secrets as the "Pentagon Papers" without censorship, citing the Constitution's guarantee of freedom of the press. A duty and a right in conflict.
- Carl Jacob Kunz delivered inflammatory anti-Jewish speeches on the street corners of a Jewish neighborhood in New York City, suggesting, among other things, that Jews be "burned in incinerators." The Jewish people living in that area were outraged. The New York City police commissioner revoked Kunz's license to hold public meetings on the streets. When he continued to air his views on the public streets, Kunz was arrested for speaking without a permit. Freedom of speech versus the preservation of public order.

Even a disruptive high school student's right not to be a victim of arbitrary or unjustifiable expulsion is in partial conflict with the school's obligation to maintain an orderly environment in which learning can take place. To address these conflicts, courts must weigh which constitutional protection merits higher protection, and those judgments may change over time. (When the Supreme Court decided the cases given earlier, Phelps, the *New York Times*, and Kunz all won.[3])

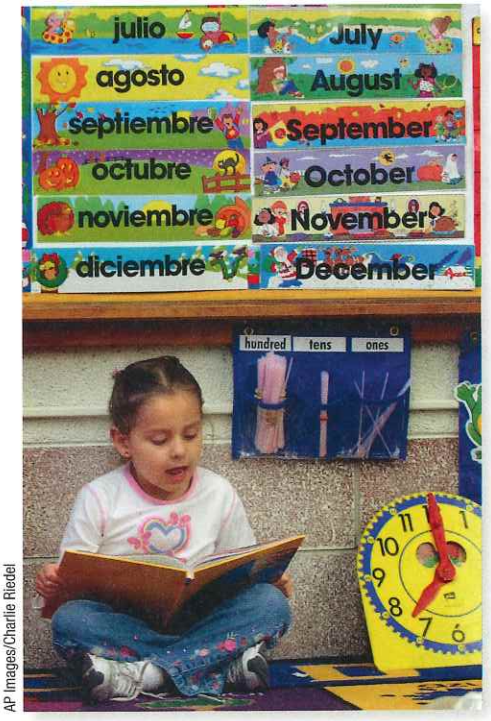
War has usually been the crisis that has restricted the liberty of some minority. For example:

- The Sedition Act of 1798, declared that to write, utter, or publish "any false, scandalous, and malicious writing" with the intention of defaming the president, Congress, or the government, or of exciting against the government "the hatred of the people" was a crime. The occasion was a kind of half-war between the United States and France, stimulated by fear in this country of the violence following the French Revolution of 1789. The policy entrepreneurs were Federalist politicians who believed that Thomas Jefferson and his followers were supporters of the French Revolution and would, if they came to power, encourage here the kind of anarchy that seemed to be occurring in France.
- The Espionage and Sedition Acts of 1917–1918 made crimes of uttering false statements that would interfere with the American military; sending through the mail material "advocating or urging treason, insurrection, or forcible resistance to any law of the United States"; or uttering or writing any disloyal, profane, scurrilous, or abusive language intended to incite resistance to the United States or to curtail war production. The occasion was World War I, and the impetus was the fear that Germans in this country were spies and also that radicals were seeking to overthrow the government. Under these laws, more than 2,000 persons were prosecuted (about half were convicted), and thousands of aliens were rounded up and deported. The policy entrepreneur leading this massive crackdown (the so-called Red Scare) was Attorney General A. Mitchell Palmer.
- The Smith Act was passed in 1940, the Internal Security Act in 1950, and the Communist Control Act in 1954. These laws made it illegal to advocate the overthrow of the U.S. government by force or violence (Smith Act), required members of the Communist Party to register with the government (Internal Security Act), and declared the Communist Party to be part of a conspiracy to overthrow the government (Communist Control Act). The occasion was World War II and the Korean War, which, like earlier wars, inspired

fears that foreign agents (Nazi and Soviet) were trying to subvert the government. For the latter two laws, the policy entrepreneur was Senator Joseph McCarthy, who attracted a great deal of attention with his repeated (and sometimes inaccurate) claims that Soviet agents were working inside the U.S. government.

These laws had in common an effort to protect the nation from threats, real and imagined, posed by people who claimed to be exercising their freedom to speak, publish, organize, and assemble. In each case, a real threat (a war) led the government to narrow the limits of permissible speech and activity. Almost every time such restrictions were imposed, the Supreme Court was called upon to decide whether Congress (or sometimes state legislatures) had drawn those limits properly. In most instances, the Court tended to uphold the legislatures. But as time passed and the war or crisis ended, popular passions abated and many of the laws proved unimportant.

Though uncommon, some use is still made of the sedition laws. In the 1980s, various white supremacists and Puerto Rican nationalists were charged with sedition. In each case, the government alleged that the accused had not only spoken in favor of overthrowing the government but had actually engaged in violent actions such as bombings. Later in this chapter, we shall see how the Court has increasingly restricted the power of Congress and state legislatures to outlaw political speech; to be found guilty of sedition now, it usually is necessary to do something more serious than just talk about it.



AP Images/Charlie Riedel

IMAGE 5-1 A Hispanic girl studies both English and Spanish in a bilingual classroom.

Cultural Conflicts

In the main, the United States was originally the creation of white European Protestants. Blacks were, in most cases, slaves, and American Indians were not citizens. Catholics and Jews in the colonies composed a small minority, often a persecuted one. The early schools tended to be religious—that is, Protestant—ones, many of which received state aid. It is not surprising that under these circumstances a view of America arose that equated "Americanism" with the values and habits of white Anglo-Saxon Protestants.

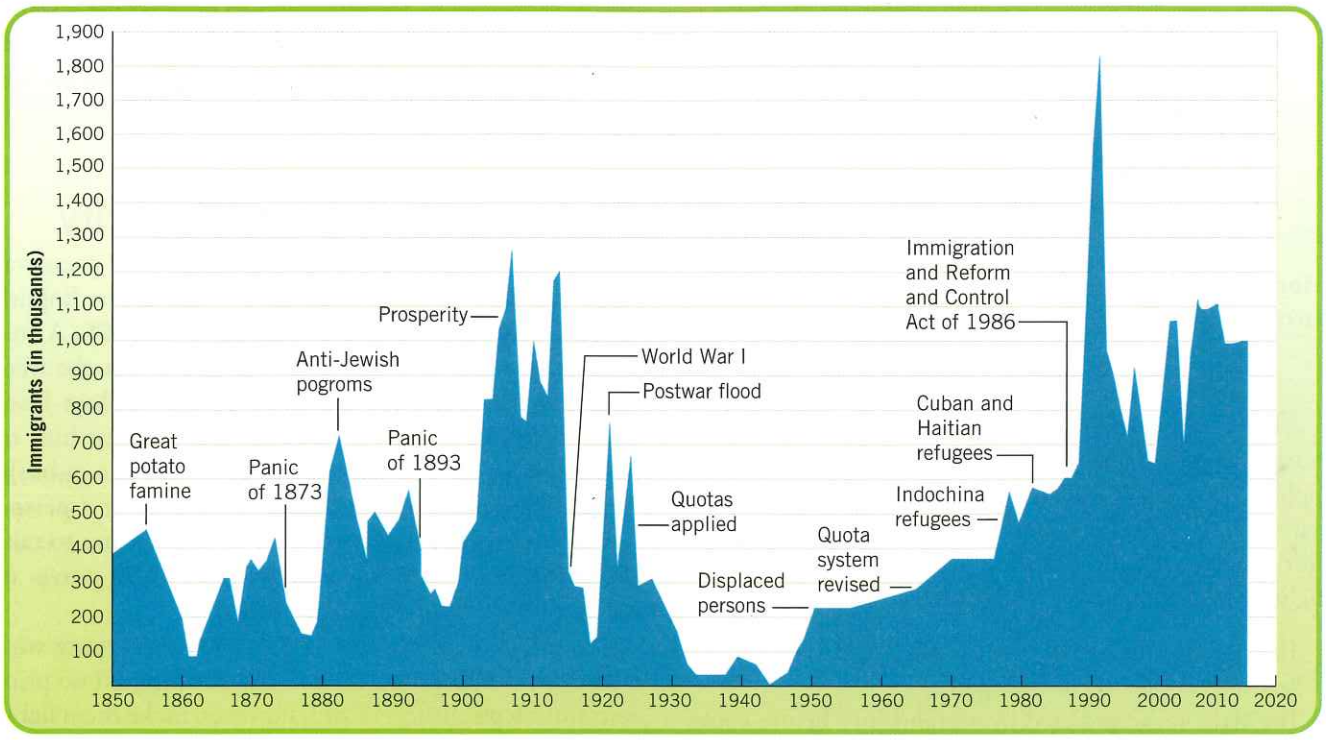
But immigration to this country brought a flood of new settlers, many of whom came from very different backgrounds (see Figure 5.1). In the mid-19th century, the potato famine led millions of Irish Catholics to migrate here. At the turn of the century, religious persecution and economic disadvantage brought more millions of people, many Catholic or Jewish, from southern and eastern Europe.

In recent decades, political conflict and economic want have led Hispanics (mostly from Mexico but increasingly from all parts of Latin America), Caribbeans, Africans, Middle Easterners, Southeast Asians, and Asians to come to the United States—most legally, but some illegally. Among them have been Buddhists, Catholics, Muslims, and members of many other religious and cultural groups.

Ethnic, religious, and cultural differences have given rise to different views as to the meaning and scope of certain constitutionally protected freedoms. For example:

- Many Jewish groups find it offensive for a crèche (i.e., a scene depicting the birth of Christ in a manger) to be displayed in front of a government building such as city hall at Christmastime, whereas many Catholics and Protestants regard such displays as an important part of our cultural heritage. Does a religious display on public property violate the First Amendment requirement that the government pass no law "respecting an establishment of religion"?
- Many English-speaking people believe that the public schools ought to teach all students to speak and write English because the language is part of our nation's cultural heritage. Some Hispanic groups argue that schools should teach pupils in both English and Spanish, since Spanish is part of the Hispanic cultural heritage. Is bilingual education constitutionally required?
- The Boy Scouts of America once refused to allow gay men to become scout leaders even though several states and localities prohibit discrimination based on sexual orientation. Many civil libertarians challenged this policy as discriminatory, while the Boy Scouts defended it because their organization was a private association free to make its own rules. When are private organizations subject to public laws? In this case, in 2000 the Supreme

FIGURE 5.1 **People Granted Permanent Resident Status in the United States, 1850–2015**



Source: Office of Immigration Statistics, *2015 Yearbook of Immigration Statistics* (Washington, DC: U.S. Department of Homeland Security, 2016), Table 1, "Persons Obtaining Lawful Permanent Resident Status: Fiscal Years 1820 to 2015," www.dhs.gov/immigration-statistics/yearbook/2015/table1.

Court upheld the Boy Scouts' defense on the grounds of their right to associate freely, but in 2015, the organization announced that it would lift the ban. And in 2017, the Scouts announced that children would be permitted to join troops based on their gender identity, thus opening the organization to transgender boys.

Even within a given cultural tradition there are important differences of opinion as to the balance between community sensitivities and personal self-expression. To some people, the sight of a store carrying pornographic books or a theater showing a pornographic movie is deeply offensive; to others, pornography is offensive but such establishments ought to be tolerated to ensure that laws restricting them do not also restrict politically or artistically important forms of speech; to still others, pornography itself is not especially offensive. What forms of expression are entitled to constitutional protection?

Applying the Bill of Rights to the States

For many years after the Constitution was signed and the Bill of Rights was added to it as amendments, the liberties these documents detailed applied only to the federal government. The Supreme Court made this clear in a case decided in 1833.[4] Except for Article I, which, among other things, banned ex post facto laws and guaranteed the right of habeas corpus, the Constitution was silent on what the states could not do to their residents.

due process of law *Denies the government the right, without due process, to deprive people of life, liberty, and property.*

equal protection of the laws *A standard of equal treatment that must be observed by the government.*

This began to change after the Civil War, when new amendments were ratified in order to ban slavery and protect newly freed slaves. The Fourteenth Amendment, ratified in 1868, was the most important addition. It said that no state shall "deprive any person of life, liberty, or property without **due process of law**" (a phrase now known as the "due process clause") and that no state shall "deny to any person within its jurisdiction the **equal protection of the laws**" (a phrase now known as the "equal protection clause").

Beginning in 1897, the Supreme Court started to use these two phrases as a way of applying certain rights to state governments. It first said that no state could take private property without paying just compensation, and then in 1925 held, in the *Gitlow* case, that the federal guarantees of free speech and free press also applied to the states. In

freedom of expression *Right of people to speak, publish, and assemble.*

freedom of religion *People shall be free to exercise their religion, and government may not establish a religion.*

prior restraint *Censorship of a publication.*

1937, it went much further and said in *Palko v. Connecticut* that certain rights should be applied to the states because, in the Court's words, they "represented the very essence of a scheme of ordered liberty" and were "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[5]

The Supreme Court began the process of selective incorporation by which most, but not all, federal rights also applied to the states. But which rights are so "fundamental" that they ought to govern the states? There is no entirely clear answer to this question, but in general the entire Bill of Rights is now applied to the states except for the following:

- The right not to have soldiers forcibly quartered in private homes (Third Amendment)
- The right to be indicted by a grand jury before being tried for a serious crime (Fifth Amendment)
- The right to a jury trial in civil cases (Seventh Amendment)
- The ban on excessive bail and fines (Eighth Amendment)

The Second Amendment that protects "the right of the people to keep and bear arms" may or may not apply to the states. In 2008, the Supreme Court in *District of Columbia v. Heller* held for the first time that this amendment did not allow the federal government to ban the private possession of firearms. But the case arose in the District of Columbia, which is governed by federal law. The decision raised two questions. First, will this ruling be incorporated so that it also applies to state governments? In 2010, the Supreme Court said in *McDonald v. Chicago* that the decision in the Heller case also applied to the states.[6] Second, will it still be possible to regulate gun purchases and gun use even if the government cannot ban guns? Based on other court cases, the answer seems to be yes.

5-2 The First Amendment and Freedom of Expression

The First Amendment contains the language that has been at issue in most of the cases to which we have thus far referred. It has roughly two parts: one protecting **freedom of expression** ("Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievances") and the other protecting **freedom of religion** ("Congress shall make no law respecting an establishment of religion; or abridging the free exercise thereof").

Speech and National Security

The traditional view of free speech and a free press was expressed by William Blackstone, the great English jurist, in his *Commentaries*, published in 1765. A free press is essential to a free state, he wrote, but the freedom that the press should enjoy is the freedom from **prior restraint**—that is, freedom from censorship, or rules telling a newspaper in advance what it can publish. Once a newspaper has published an article or a person has delivered a speech, that paper or speaker has to take the consequences if what was written or said proves to be "improper, mischievous, or illegal."[7]

The U.S. Sedition Act of 1798 was in keeping with traditional English law. Like it, the act imposed no prior restraint on publishers; it did, however, make them liable to punishment after the fact. The act was an improvement over the English law, however, because unlike the British model, it entrusted the decision to a jury, not a judge, and allowed the defendant to be acquitted if he or she could prove the truth of what had been published. Although several newspaper publishers were convicted under the act, none of these cases reached the Supreme Court. When Jefferson became president in 1801, he pardoned the people who had been imprisoned under the Sedition Act. Though Jeffersonians objected vehemently to the law, their principal objection was not to the idea of holding newspapers accountable for what they published but to letting the *federal* government do this. Jefferson was perfectly prepared to have the *states* punish what he called the "overwhelming torrent of slander" by means of "a few prosecutions of the most prominent offenders."[8]

It would be another century before the federal government would attempt to define the limits of free speech and writing. Perhaps recalling the widespread opposition to the sweep of the 1798 act, Congress in 1917–1918 placed restrictions not on publications that were critical of the government but only on those that advocated "treason, insurrection, or forcible resistance" to federal laws or attempted to foment disloyalty or mutiny in the armed services.

In 1919, this new law was examined by the Supreme Court when it heard the case of Charles T. Schenck, who had been convicted of violating the Espionage Act

because he had mailed circulars to men eligible for the draft, urging them to resist. At issue was the constitutionality of the Espionage Act and, more broadly, the scope of Congress's power to control speech. One view held that the First Amendment prevented Congress from passing *any* law restricting speech; the other held that Congress could punish dangerous speech. For a unanimous Supreme Court, Justice Oliver Wendell Holmes announced a rule by which to settle the matter.

selective incorporation process *The process whereby the Court has applied most, but not all, parts of the Bill of Rights to the states.*

CONSTITUTIONAL CONNECTIONS | Selective Incorporation

The **selective incorporation process**—the process by which the Supreme Court has applied most, but not all, parts of the Bill of Rights to the states—began in earnest in 1925 and has continued ever since, most recently with the Supreme Court's decision in the Second Amendment case of *McDonald v. Chicago*.

The selective incorporation process has never been straightforward or simple. For instance, in *Palko v. Connecticut* (1937), the Supreme Court held that states must observe all "fundamental" rights, but declared that the Fifth Amendment's protection against "double jeopardy" (being tried, found innocent, and then tried again for the same crime), which was the issue at hand in the case, was *not* among those rights. It was only about three decades later, in its decision in *Benton v. Maryland* (1969), that the Court partially incorporated the double jeopardy provision of the Fifth Amendment. Still, to this day no provision of the Fifth Amendment has been fully incorporated, and the provision regarding the right to be indicted by a grand jury has not been incorporated at all.

Similarly, in *Powell v. Alabama* (1932), the Supreme Court incorporated the right to counsel bestowed by the Sixth Amendment, but only in capital punishment cases. In *Gideon v. Wainwright* (1962), the Court extended that right to all felony defendants that might, if convicted, go to prison for years or for life. In the decade thereafter, the Court issued six more Sixth Amendment selective incorporation decisions. In the last of these, *Argersinger v. Hamlin* (1972), the Court extended the right to legal counsel to any defendant facing a sentence that might result in incarceration.

The Third Amendment, which establishes the right not to have soldiers forcibly "quartered in any home without the consent" of the homeowner, and the Seventh Amendment, which establishes the right to a trial in civil cases, each remains wholly unincorporated. The Eighth Amendment's prohibition against "cruel and unusual punishment" is partially incorporated, whereas its provision forbidding excessive bail or fines remains wholly unincorporated.

Year	Amendment	Provision	Case
1925	First	Free speech	*Gitlow v. New York*
1931	First	Free press	*Near v. Minnesota*
1932	Sixth	Legal counsel	*Powell v. Alabama*
1937	First	Free assembly	*De Jonge v. Oregon*
1937	Fifth	Double jeopardy	*Palko v. Connecticut*
1947	First	No religious establishment	*Everson v. Board of Education*
1948	Sixth	Public trial	*In re Oliver*
1949	Fourth	Unreasonable searches and seizures	*Wolf v. Colorado*
1958	First	Free association	*NAACP v. Alabama*
1961	Fourth	Warrantless searches and seizures	*Mapp v. Ohio*
1963	First	Free petition	*NAACP v. Button*
1963	Sixth	Legal counsel	*Gideon v. Wainwright*
1965	Sixth	Confront witnesses	*Pointer v. Texas*
1966	Sixth	Impartial jury	*Parker v. Gladden*
1967	Sixth	Speedy trial	*Klopfer v. North Carolina*
1967	Sixth	Compel witnesses	*Washington v. Texas*
1968	Sixth	Jury trial	*Duncan v. Louisiana*
1972	Sixth	Legal counsel	*Argersinger v. Hamlin*
2010	Second	Keep and bear arms	*McDonald v. Chicago*

clear-and-present-danger test *Law should not punish speech unless there was a clear and present danger of producing harmful actions.*

It soon became known as the **clear-and-present-danger test**:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[9]

The Court held that Schenck's leaflets did create such a danger, and so his conviction was upheld. In explaining why, Holmes said that not even the Constitution protects a person who has been "falsely shouting fire in a theatre and causing a panic." In this case, things that might safely be said in peacetime may be punished in wartime.

The clear-and-present-danger test may have clarified the law, but it kept no one out of jail. Schenck went, and so did the defendants in five other cases in the period 1919–1927, even though during this time Holmes, the author of the test, shifted his position and began writing dissenting opinions in which he urged that the test had not been met and so the defendant should go free.

In 1925, Benjamin Gitlow was convicted of violating New York's sedition law—a law similar to the federal Sedition Act of 1918—by passing out some leaflets, one of which advocated the violent overthrow of our government. The Supreme Court upheld his conviction but added, as we have seen, a statement that changed constitutional history: Freedom of speech and of the press were now among the "fundamental personal rights" protected by the due process clause of the Fourteenth Amendment from infringements by *state* action.[10] Thereafter, state laws involving speech, the press, and peaceful assembly were struck down by the Supreme Court for being in violation of the freedom-of-expression guarantees of the First Amendment, made applicable to the states by the Fourteenth Amendment.[11]

Bettmann/Getty Images

IMAGE 5-2 Women picketed in front of the White House, urging President Warren Harding to release political radicals arrested during his administration.

The clear-and-present-danger test was a way of balancing the competing demands of free expression and national security. As the memory of World War I and the ensuing Red Scare evaporated, the Court began to develop other tests, ones that shifted the balance more toward free expression. Some of these tests are listed in Table 5.1 on page 105.

But when a crisis reappears, as it did in World War II and the Korean War, the Court has tended to defer, up to a point, to legislative judgments about the need to protect national security. For example, it upheld the conviction of 11 leaders of the Communist Party for having advocated the violent overthrow of the U.S. government, a violation of the Smith Act of 1940.

This conviction once again raised the hard question of the circumstances under which words can be punished. Hardly anybody would deny that actually *trying* to overthrow the government is a crime; the question is whether *advocating* its overthrow is a crime. In the case of the 11 communist leaders, the Court said that the

LANDMARK CASES | Incorporation

- ***Gitlow v. New York* (1925):** Supreme Court says the First Amendment applies to states.
- ***Palko v. Connecticut* (1937):** Supreme Court says that states must observe all "fundamental" liberties.
- ***McDonald v. Chicago* (2010):** The Second Amendment that allows the people to keep and bear arms applies to state governments as well as the federal government.

government did not have to wait to protect itself until "the *putsch* [rebellion] is about to be executed, the plans have been laid and the signal is awaited." Even if the communists were not likely to be successful in their effort, the Court held that specifically advocating violent overthrow could be punished. "In each case," the opinion read, the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[12]

But as the popular worries about communists began to subside and the membership of the Supreme Court changed, the Court began to tip the balance even further toward free expression. By 1957, the Court made it clear that for advocacy to be punished, the government would have to show not just that a person believed in the overthrow of the government but also that he or she was using words "calculated to incite" that overthrow.[13]

By 1969, the pendulum had swung to the point where the speech would have to be judged likely to incite "imminent" unlawful action. When Clarence Brandenburg, a Ku Klux Klan leader in Ohio, made a speech before Klan members in which he called for "revengeance [*sic*]" against blacks and Jews (described with racial slurs) and called for a march on Washington, he was arrested and convicted for "advocating" violence. The Supreme Court reversed the conviction, holding that the First Amendment protects speech that abstractly advocates violence unless that speech will incite or produce "imminent lawless action."[14] And while the Supreme Court ruled in 1942 that "fighting words" did not have constitutional protection, it narrowed the definition of that concept significantly in subsequent cases, though it has not overturned the ruling to date.[15]

This means that no matter how offensive or provocative some forms of expression may be, they nevertheless have powerful constitutional protections. In 1977, a group of American Nazis wanted to parade through the streets of Skokie, Illinois, a community with a large Jewish population. The residents, outraged, sought to ban the march. Many feared violence if it occurred. But the lower courts, under prodding from the Supreme Court, held that, noxious and provocative as the anti-Semitic slogans of the Nazis may be, the Nazi party had a constitutional right to speak and parade peacefully.[16]

Similar reasoning led the Supreme Court in 1992 to overturn a Minnesota statute that made it a crime to display symbols or objects, such as a Nazi swastika or a burning cross, that are likely to cause alarm or resentment among an ethnic or racial group, such as Jews or African Americans.[17] On the other hand, if you are convicted of actually hurting someone, you may be given a tougher sentence if it can be shown that you were motivated to assault them by racial or ethnic hatred.[18] To be punished for such a hate crime, your bigotry must result in some direct and physical harm, and not just the display of an odious symbol.

libel *Writing that falsely injures another person.*

What Is Speech?

If most political speaking or writing is permissible, save that which actually incites someone to take illegal actions, what *kinds* of speaking and writing qualify for this broad protection? Though the Constitution says that the legislature may make "no law" abridging freedom of speech or the press, and although some justices have argued that this means literally *no* law, the Court has held that at least four forms of speaking and writing are not automatically granted full constitutional protection: libel, obscenity, symbolic speech, and commercial and youthful speech.

Libel

A **libel** is a written statement that defames the character of another person. (If the statement is spoken, it is called a *slander*.) The libel or slander must harm the person being attacked. In some countries, such as the United Kingdom, it is easy to sue another person for libel and to collect. In this country, it is much harder. For one thing, you must show that the libelous statement was false. If it was true, you cannot collect no matter how badly it harmed you.

A beauty contest winner was awarded $14 million (later reduced on appeal) when she proved that *Penthouse* magazine had libeled her. Actress Carol Burnett collected a large sum from a libel suit brought against a gossip newspaper. But when Theodore Roosevelt sued a newspaper for falsely claiming that he was a drunk, the jury awarded him damages of only six cents.[19]

If you are a public figure, it is much harder to win a libel suit. A public figure such as an elected official, a candidate for office, an army general, or a well-known celebrity must prove not only that the publication was false and damaging but also that the words were published with "actual malice"—that is, with reckless disregard for their truth or falsity or with knowledge that they were false.[20] Israeli General Ariel Sharon was able to prove that the statements made about him by *Time* magazine were false and damaging but not that they were the result of "actual malice."

For a while, people who felt they had been libeled would bring suit in the United Kingdom against an American author. One Saudi leader sued an American author who had accused him of financing terrorism, even though

Tim Boyle/Newsmakers/Getty Images News /Getty Images

IMAGE 5-3 A Ku Klux Klan member used their constitutional right to free speech to utter "white power" chants in Skokie, Illinois.

she had not sold her book in the United Kingdom (but word about it had been on the Internet). This strategy, called "libel tourism," was ended in 2010 when Congress unanimously passed and the president signed a bill that bars enforcement in U.S. courts of libel actions against Americans if what they published would not be libelous under American law.

Obscenity

Obscenity is not protected by the First Amendment. The Court has always held that obscene materials, because they have no redeeming social value and are calculated chiefly to appeal to one's sexual rather than political or literary interests, can be regulated by the state. The problem, of course, arises with the meaning of *obscene*. In the period from 1957 to 1968, the Court decided 13 major cases involving the definition of obscenity, which resulted in 55 separate opinions.[21] Some justices, such as Hugo Black, believed that the First Amendment protected all publications, even wholly obscene ones. Others believed that obscenity deserved no protection and struggled heroically to define the term. Still others shared the view of former Justice Potter Stewart, who objected to "hard-core pornography" but admitted that the best definition he could offer was "I know it when I see it."[22]

It is unnecessary to review in detail the many attempts by the Court to define obscenity. The justices have made it clear that nudity and sex are not, by definition, obscene and that they will provide First Amendment protection to anything that has political, literary, or artistic merit, allowing the government to punish only the distribution of "hardcore pornography." Their most recent definition of this is as follows: to be obscene, the work, taken as a whole, must be judged by "the average person applying contemporary community standards" to appeal to the "prurient interest" or to depict "in a patently offensive way, sexual conduct specifically defined by applicable state law" and to lack "serious literary, artistic, political, or scientific value."[23]

After Albany, Georgia decided that the movie *Carnal Knowledge* was obscene by contemporary local standards, the Supreme Court overturned the distributor's conviction on the grounds that the authorities in Albany failed to show that the film depicted "patently offensive hard-core sexual conduct."[24]

It is easy to make sport of the problems the Court has faced in trying to decide obscenity cases (one conjures up images of black-robed justices leafing through the pages of *Hustler* magazine, taking notes), but these problems reveal, as do other civil liberties cases, the continuing problem of balancing competing claims. One part of the community wants to read or see whatever it wishes; another part wants to protect private acts from public degradation. The first part cherishes liberty above all; the second values decency above liberty. The former fears that *any* restriction on literature will lead to *pervasive* restrictions; the latter believes that reasonable people can distinguish (or reasonable laws can require them to distinguish) between patently offensive and artistically serious work.

Anyone strolling today through an "adult" bookstore must suppose that no restrictions at all exist on the distribution of pornographic works. This condition does not arise simply from the doctrines of the Court. Other factors operate as well, including the priorities of local law enforcement officials, the political climate of the community, the procedures that must be followed to bring a viable court case, the clarity and workability of state and local laws on the subject, and the difficulty of changing the behavior of many people by prosecuting one person. The current view of the Court is that localities can decide for themselves whether to tolerate hard-core pornography; but if they choose not to, they must meet some fairly strict constitutional tests.

The protections given by the Court to expressions of sexual or erotic interest have not been limited to books, magazines, and films. Almost any form of visual or auditory communication can be considered "speech" and thus protected by the First Amendment. In one case, even nude dancing was given protection as a form of "speech,"[25] although in 1991 the Court held that nude dancing was only "marginally" within the purview of First Amendment protections, and so it upheld an Indiana statute that banned *totally* nude dancing.[26]

Some feminist organizations have attacked pornography on the grounds that it exploits and degrades women. They persuaded Indianapolis, Indiana, to pass an ordinance that defined pornography as portrayals of

the "graphic, sexually explicit subordination of women" and allowed people to sue the producers of such material. Sexually explicit portrayals of women in positions of equality were not defined as pornography. The Court disagreed. In 1986, it affirmed a lower-court ruling that such an ordinance was a violation of the First Amendment because it represented a legislative preference for one form of expression (women in positions of equality) over another (women in positions of subordination).[27]

One constitutionally permissible way to limit the spread of pornographic materials has been to establish rules governing where in a city they can be sold. When one city adopted a zoning ordinance prohibiting an "adult" movie theater from locating within 1,000 feet of any church, school, park, or residential area, the Court upheld the ordinance, noting that the purpose of the law was not to regulate speech but to regulate the use of land. And in any case, the adult theater still had much of the city's land area in which to find a location.[28]

With the advent of the Internet, it has become more difficult for the government to regulate obscenity. The Internet spans the globe. It offers an amazing variety of materials—some educational, some entertaining, some sexually explicit. But it is difficult to apply the Supreme Court's standard for judging whether sexual material is obscene—the "average person" applying "contemporary community standards"—to the Internet because there is no easy way to tell what "the community" is. Is it the place where the recipient lives or the place where the material originates? And since no one is in charge of the Internet, who can be held responsible for controlling offensive material? Since anybody can send anything to anybody else without knowing the age or location of the recipient, how can the Internet protect children?

symbolic speech *An act that conveys a political message.*

When Congress tried to ban obscene, indecent, or "patently offensive" materials from the Internet, the Supreme Court struck down the law as unconstitutional. The Court went even further with child pornography. Though it has long held that child pornography is illegal even if it is not obscene because of the government's interest in protecting children, it would not let Congress ban pornography involving computer-designed children. Under the 1996 law, it would be illegal to display computer simulations of children engaged in sex even if no real children were involved. The Court said "no." It held that Congress could not ban "virtual" child pornography without violating the First Amendment because, in its view, the law might bar even harmless depictions of children and sex (e.g., in a book on child psychology).[29]

Symbolic Speech

Ordinarily, you cannot claim that an illegal act should be protected because that action is meant to convey a political message. For example, if you burn your draft card in protest against the foreign policy of the United States, you can be punished for the illegal act (burning the card), even if your intent was to communicate your beliefs. The Court reasoned that giving such **symbolic speech** the same protection as real speech would open the door to permitting all manner of illegal actions—murder, arson, rape—if the perpetrator meant thereby to send a message.[30]

TABLE 5.1 | Testing Restrictions on Expression

The Supreme Court has used various standards and tests to decide whether a restriction on freedom of expression is constitutionally permissible.

1. **Preferred position** The right of free expression, though not absolute, occupies a higher, or more preferred, position than many other constitutional rights, such as property rights. This is still a controversial rule; nonetheless, the Court always approaches a restriction on expression skeptically.
2. **Prior restraint** With scarcely any exceptions, the Court will not tolerate a prior restraint on expression, such as censorship, even when it will allow subsequent punishment of improper expressions (such as libel).
3. **Imminent danger** Punishment for uttering inflammatory sentiments will be allowed only if there is an imminent danger that the utterances will incite an unlawful act.
4. **Neutrality** Any restriction on speech, such as a requirement that parades or demonstrations not disrupt other people in the exercise of their rights, must be neutral—that is, it must not favor one group more than another.
5. **Clarity** If you must obtain a permit to hold a parade, the law must set forth clear (as well as neutral) standards to guide administrators in issuing that permit. Similarly, a law punishing obscenity must contain a clear definition of obscenity.
6. **Least-restrictive means** If it is necessary to restrict the exercise of one right to protect the exercise of another, the restriction should use the least-restrictive means to achieve its end. For example, if press coverage threatens a person's right to a fair trial, the judge may only do what is minimally necessary to achieve that end, such as transferring the case to another town rather than issuing a "gag order."

Cases cited, by item: (1) *United States v. Carolene Products*, 304 U.S. 144 (1938); (2) *Near v. Minnesota*, 283 U.S. 697 (1931); (3) *Brandenburg v. Ohio*, 395 U.S. 444 (1969); (4) *Kunz v. New York*, 340 U.S. 290 (1951); (5) *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976); (6) *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

On the other hand, a statute that makes it illegal to burn the American flag is an unconstitutional infringement of free speech.[31] Why is there a difference between a draft card and the flag? The Court argues that the government has a right to run a military draft and so can protect draft cards, even if this incidentally restricts speech. But the only motive that the government has in banning flag-burning is to restrict this form of speech, and that would make such a restriction improper.

The American people were outraged by the flag-burning decision, and in response the House and Senate passed by huge majorities (380 to 38 and 91 to 9) a law making it a federal crime to burn the flag. But the Court struck this law down as unconstitutional.[32] Now that it was clear that only a constitutional amendment could make flag-burning illegal, Congress was asked to propose one. But it would not. Earlier members of the House and Senate had supported a law banning flag-burning with more than 90 percent of their votes, but when asked to make that law a constitutional amendment, they could not muster the necessary two-thirds majorities. The reason is that Congress is much more reluctant to amend the Constitution than to pass new laws. Several members decided that flag-burning was wrong, but not so wrong or so common as to justify an amendment.

Commercial and Youthful Speech

If people have a right to speak and publish, do corporations, interest groups, and children have the same right? By and large the answer is yes, though there are some exceptions.

When the attorney general of Massachusetts tried to prevent the First National Bank of Boston from spending money to influence votes in a local election, the Court stepped in and blocked him. The Court held that a corporation, like a person, has certain First Amendment rights. Similarly, when the federal government tried to limit the spending of a group called Massachusetts Citizens for Life (an antiabortion organization), the Court held that such organizations have First Amendment rights.[33] The Court has also told states that they cannot forbid liquor stores from advertising their prices and informed federal authorities that they cannot prohibit casinos from plugging gambling.[34]

When the California Public Utility Commission tried to compel one of the utilities it regulates (the Pacific Gas and Electric Company) to enclose in its customers' monthly bills statements written by groups attacking the utility, the Supreme Court blocked the agency and said that forcing it to disseminate political statements violated the firm's free-speech rights. "The identity of the speaker is not decisive in determining whether speech is protected," the Court said. "Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." In this case, the right to speak includes the choice of what *not* to say.[35]

Even though corporations have some First Amendment rights, the government can place more limits on commercial than on noncommercial speech. The legislature can place restrictions on advertisements for cigarettes, liquor, and gambling; it can even regulate advertising for some less harmful products provided that the regulations are narrowly tailored and serve a substantial public interest.[36] If the regulations are too broad or do not serve a clear interest, then ads are entitled to some constitutional protection. For example, the states cannot bar lawyers from advertising or accountants from personally soliciting clients.[37]

A big exception to the free-speech rights of corporations and labor unions groups was imposed by the McCain-Feingold campaign finance reform law passed in 2002. Many groups, ranging from the American Civil Liberties Union and the AFL-CIO to the National Rifle Association and the Chamber of Commerce, felt that the law banned legitimate speech. Under its terms, organizations could not pay for "electioneering communications" on radio or television that "refer" to candidates for federal office within 60 days before the election. But the Supreme Court temporarily struck down these arguments, upholding the law in *McConnell v. Federal Election Commission.* The Court said ads that only mentioned but did not "expressly advocate" a candidate were ways of influencing the election. Some dissenting opinion complained that a Court that had once given free-speech protection to nude dancing ought to give it to political speech.[38] But seven years later, the Court, in *Citizens United v. Federal Election Commission*, decided that the part of the McCain-Feingold law that denied corporations and labor unions the right to run ads (independent of a political party's or candidate's campaign) about the election violated their rights to free speech under the Constitution.

Under certain circumstances, young people may have less freedom of expression than adults. In 1988, the Supreme Court held that the principal of Hazelwood High School could censor articles appearing in the student-edited newspaper. The newspaper was published using school funds and was part of a journalism class. The principal ordered the deletion of stories dealing with student pregnancies and the impact of parental divorce on

Robert Pearce/The Sydney Morning Herald via Fairfax Media/Getty Images

IMAGE 5-4 "Symbolic speech." When young men burned their draft cards during the 1960s to protest the Vietnam War, the Supreme Court ruled that it was an illegal act for which they could be punished.

LANDMARK CASES | Free Speech and Free Press

- ***Schenck v. United States* (1919):** Speech may be punished if it creates a clear and present danger of illegal acts.
- ***Chaplinksy v. New Hampshire* (1942):** "Fighting words" are not protected by the First Amendment.
- **New York Times *v. Sullivan* (1964):** To libel a public figure, there must be "actual malice."
- ***Tinker v. Des Moines* (1969):** Public school students may wear armbands to class protesting against America's war in Vietnam when such display does not disrupt classes.
- ***Miller v. California* (1973):** Obscenity defined as appealing to prurient interests of an average person with materials that lack literary, artistic, political, or scientific value.
- ***Texas v. Johnson* (1989):** There may not be a law to ban flag-burning.
- ***Reno v. ACLU* (1997):** A law that bans sending "indecent" material to minors over the Internet is unconstitutional because "indecent" is too vague and broad a term.
- ***FEC v. Wisconsin Right to Life* (2007):** Prohibits campaign finance reform law from banning political advocacy.
- ***Citizens United v. FEC* (2010):** The part of the McCain-Feingold campaign finance reform law that prevents corporations and labor unions from spending money on advertisements (independent of political candidates or parties) in political campaigns is unconstitutional.

students. The student editors sued, claiming their First Amendment rights had been violated. The Court agreed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" and that they cannot be punished for expressing on campus their personal views. But students do not have exactly the same rights as adults if the exercise of those rights impedes the educational mission of the school. Students may lawfully say things on campus, as individuals, that they cannot say if they are part of school-sponsored activities (such as plays or school-run newspapers) that are part of the curriculum. School-sponsored activities can be controlled so long as the controls are "reasonably related to legitimate pedagogical concerns."[39]

free-exercise clause
First Amendment requirement that law cannot prevent free exercise of religion.

establishment clause
First Amendment ban on laws "respecting an establishment of religion."

5-3 The First Amendment and Freedom of Religion

Everybody knows, correctly, the language of the First Amendment that protects freedom of speech and the press, though most people are not aware of how complex the legal interpretations of these provisions have become. But many people also believe, wrongly, that the language of the First Amendment clearly requires the "separation of church and state." It does not.

What that amendment actually says is quite different and maddeningly unclear. It has two parts. The first, often referred to as the **free-exercise clause**, states that Congress shall make no law prohibiting the "free exercise" of religion. The second, which is called the **establishment clause**, states that Congress shall make no law "respecting an establishment of religion."

The Free-Exercise Clause

The free-exercise clause is the clearer of the two, though by no means is it lacking in ambiguity. It obviously means that Congress cannot pass a law prohibiting Catholics from celebrating Mass, requiring Baptists to become Episcopalians, or preventing Jews from holding a bar mitzvah. Since the First Amendment has been applied to the states via the due process clause of the Fourteenth Amendment, it means that state governments cannot pass such laws either. In general, the courts have treated religion like speech: You can pretty much do or say what you want so long as it does not cause some serious harm to others.

Even some laws that do not seem on their face to apply to churches may be unconstitutional if their enforcement imposes particular burdens on churches or greater burdens on some churches than others. For example, a state cannot apply a license fee on door-to-door solicitors when the solicitor is a Jehovah's Witness selling religious tracts.[40] By the same token, the courts ruled that the city of Hialeah, Florida, cannot ban animal sacrifices by members of an Afro-Caribbean religion called Santeria. Since killing animals generally is not illegal (if it were, there could be no hamburgers or chicken sandwiches served in Hialeah's restaurants, and rat traps would be unlawful), the ban in this case was clearly directed against a specific religion and hence was unconstitutional.[41]

Having the right to exercise your religion freely does not, however, mean that you are exempt from laws binding other citizens, even when the law goes against your religious beliefs. A man cannot have more than one wife, even if (as once was the case with Mormons) polygamy is thought desirable on religious grounds.[42] For religious reasons, you may oppose being vaccinated or having blood transfusions, but if the state passes a compulsory vaccination law or orders that a blood transfusion be given to a sick child, the courts will not block it on grounds of religious liberty.[43] Similarly, if you belong to an Indian tribe that uses a drug, such as peyote, in religious ceremonies, you cannot claim that your freedom was abridged if the state decides to ban the use of that drug, provided the law applies equally to all.[44] Since airports have a legitimate need for tight security measures, begging can be outlawed in them even if some of the people doing the begging are part of a religious group (in this case, the Hare Krishnas).[45]

In 1993, Congress passed the Religious Freedom Restoration Act, which stated that a law that attempted to be religiously neutral might still violate the free exercise clause if it interfered with a religious practice. (The law was passed in response to the ruling about the use of peyote by Indian tribes, as many religious groups opposed the decision.) Four years later, the Supreme Court ruled that the act did not apply to state and local laws, leading several states to pass their own comparable legislation.[46]

In 2014, the Supreme Court applied the federal law to find that some companies may be exempt from the Affordable Care Act's "contraceptive mandate," which had required health insurance provided by companies to include birth-control coverage for female employees.[47] The Obama administration, which had spearheaded health-care reform, subsequently stated that health insurance for companies that objected to the mandate would provide contraceptive coverage without additional cost either for employers or employees.[48] In 2017, the Trump White House issued an executive order instructing federal agencies to limit the regulatory burden on nonprofit organizations seeking exemption from the contraceptive mandate.

Many conflicts between religious belief and public policy are difficult to settle definitively. What if you believe on religious grounds that war is immoral? The draft laws have always exempted a conscientious objector from military duty, and the Court has upheld such exemptions. But the Court has gone further: It has said that people cannot be drafted even if they do not believe in a Supreme Being or belong to any religious tradition, so long as their "consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war."[49] Do exemptions on such grounds

create an opportunity for some people to evade the draft because of their political preferences? In trying to answer such questions, the courts often have had to try to define religion—no easy task.

And even when there is no question about your membership in a bona fide religion, the circumstances under which you may claim exemption from laws that apply to everybody else are unclear. What if you, a member of the Seventh-Day Adventists, are fired by your employer for refusing on religious grounds to work on Saturday, and then it turns out that you cannot collect unemployment insurance because you refuse to take an available job—one that also requires you to work on Saturday? Or what if you are a member of the Amish sect, which refuses, contrary to state law, to send its children to public schools past the eighth grade? The Court has ruled that the state must pay you unemployment compensation and cannot require you to send your children to public schools beyond the eighth grade.[50]

These decisions show that even the "simple" principle of freedom of religion gets complicated in practice and can lead to the courts giving, in effect, preference to members of one church over members of another.

The Establishment Clause

What in the world did the members of the First Congress mean when they wrote into the First Amendment language prohibiting Congress from making a law "respecting" an "establishment" of religion? The Supreme Court has more or less consistently interpreted this vague phrase to mean that the Constitution erects a "**wall of separation**" between church and state.

That phrase, so often quoted, is not in the Bill of Rights nor in the debates of the First Congress that drafted the Bill of Rights; it comes from the pen of Thomas Jefferson, who was opposed to having the Church of England as the established church of his native Virginia. (At the time of the Revolutionary War, there were established churches—that is, official, state-supported churches—in at least 8 of the 13 former colonies.) But it is not clear that Jefferson's view was the majority view.

wall of separation *Court ruling that government cannot be involved with religion.*

During much of the debate in Congress, the wording of this part of the First Amendment was quite different and much plainer than what finally emerged. Up to the last minute, the clause was intended to read "no religion shall be established by law" or "no national religion shall be established." The meaning of those words seems quite clear: Whatever the states may do, the federal government cannot create an official, national religion or give support to one religion in preference to another.[51]

But Congress instead adopted an ambiguous phrase, and so the Supreme Court had to decide what it meant. It has declared that these words do not simply mean "no national religion" but mean as well no government involvement with religion at all, even on a nonpreferential basis. They mean, in short, erecting a "wall of separation" between church and state.[52] Though the interpretation of the establishment clause remains a topic of great controversy among judges and scholars, the Supreme Court has more or less consistently adopted this wall-of-separation principle.

Its first statement of this interpretation was in 1947. The case involved a New Jersey town that reimbursed parents for the costs of transporting their children to school, including parochial (in this case Catholic) schools. The Court decided that this reimbursement was constitutional, but it made it clear that the establishment clause of the First Amendment applied (via the Fourteenth Amendment) to the states and that it meant, among other things, that the government cannot require a person to profess a belief or disbelief in any religion; it cannot aid one religion, some religions, or all religions; and it cannot spend any tax money, however small the amount might be, in support of any religious activities or institutions.[53] The reader may wonder, in view of the Court's reasoning, why it allowed the town to pay for busing children to Catholic schools. The answer it gave is that busing is a religiously neutral activity, akin to providing fire and police protection to Catholic schools. Busing, available to public and private schoolchildren alike, does not breach the wall of separation.

Since 1947, the Court has applied the wall-of-separation theory to strike down as unconstitutional most

Judy Griesedieck/ Time & Life Pictures/Getty Images

IMAGE 5-5 Public schools cannot organize prayers, but private ones can.

efforts to have any officially conducted or sponsored prayer in public schools, even if it is nonsectarian,[54] voluntary,[55] or limited to reading a passage of the Bible.[56] Since 1992, it has been unconstitutional for a public school to ask a rabbi or minister to offer a prayer—an invocation or a benediction—at the school's graduation ceremony. Since 2000, it has been unconstitutional for a student to lead a prayer at a public high school football game because it was done "over the school's public address system, by a speaker representing the student body, under the supervision of the school faculty, and pursuant to school policy."[57] The Court made clear, however, that public school students could pray voluntarily during school provided that the school or the government did not sponsor that prayer. But in 2012, a federal district court ruled that a prayer banner that had hung in a public high school auditorium for nearly 50 years had to be removed because its presence in that setting was unconstitutional.[58]

Moreover, the Court has held that laws prohibiting teaching the theory of evolution or requiring giving equal time to "creationism" (the biblical doctrine that God created humankind) are religiously inspired and thus unconstitutional.[59] A public school may not allow its pupils to take time out from their regular classes for religious instruction if this occurs within the schools, though "released-time" instruction is all right if it is done outside the public school building.[60] The school prayer decisions in particular have provoked a storm of controversy, but efforts to get Congress to propose to the states a constitutional amendment authorizing such prayers have failed.

Almost as controversial have been Court-imposed restrictions on public aid to parochial schools, though here the wall-of-separation principle has not been used to forbid any and all forms of aid. For example, it is permissible for the federal government to provide aid for constructing buildings on denominational (as well as nondenominational) college campuses[61] and for state governments to loan free textbooks to parochial school pupils,[62] grant tax-exempt status to parochial schools,[63] allow parents of parochial schoolchildren to deduct their tuition payments on a state's income tax returns,[64] and pay for computers and deaf children's sign language interpreters at private and religious schools.[65] But the government cannot pay a salary supplement to teachers who teach secular subjects in parochial schools,[66] reimburse parents for the cost of parochial school tuition,[67] supply parochial schools with services such as counseling,[68] give money with which to purchase instructional materials, require that "creationism" be taught in public schools, or create a special school district for Hasidic Jews.[69]

The Court sometimes changes its mind on these matters. In 1985, it said the states could not send teachers into parochial schools to teach remedial courses for needy children, but 12 years later it decided they could. "We no longer presume," the Court wrote, "that public employees will inculcate religion simply because they happen to be in a sectarian environment."[70]

Perhaps the most important establishment-clause decision in recent times was the Court ruling that vouchers can be used to pay for children being educated at religious and other private schools. The case began in Cleveland, Ohio, where the state offered money to any family (especially poor ones) whose children attended a school that had done so badly that it was under a federal court order requiring it to be managed directly by the state superintendent of schools. The money, a voucher, could be used to send a child to any other public or private school, including one run by a religious group. The Court held that this plan did not violate the establishment clause because the aid went not to the school, but to the families who were to choose a school.[71]

If you find the twists and turns of Court policy in this area confusing, you are not alone. The wall-of-separation principle has not been easy to apply, and in the past 50-plus years, the Court has faced numerous questions about church–state matters. The Court has tried to sort out the confusion by developing a three-pronged test to decide under what circumstances government involvement in religious activities is improper[72]:

1. It has a strictly secular purpose.
2. Its primary effect neither advances nor inhibits religion.
3. It does not foster an excessive government entanglement with religion.

No sooner had the test been developed than the Court decided that it was all right for the government of Pawtucket, Rhode Island, to erect a Nativity scene as part of a Christmas display in a local park.[73] But five years later, it said Pittsburgh could not put a Nativity scene in front of the courthouse, but could display a menorah (a Jewish symbol of Chanukah) next to a Christmas tree and a sign extolling liberty. The Court ruled that the crèche had to go (because, being too close to the courthouse, a government endorsement was implied) but the menorah could stay (because, being next to a Christmas tree, it would not lead people to think that Pittsburgh was endorsing Judaism).

When the Ten Commandments are displayed in or near a public building, a deeply divided Court has made some complicated distinctions. It held that two Kentucky counties putting up the Ten Commandments in their courthouses was unconstitutional because the purpose was religious. Even though one Kentucky courthouse surrounded the Ten Commandments with displays of the

LANDMARK CASES | Religious Freedom

- ***Pierce v. Society of Sisters* (1925):** Though states may require public education, they may not require that students attend only public schools.
- ***Everson v. Board of Education* (1947):** The wall-of-separation principle is announced.
- ***Zorach v. Clauson* (1952):** States may allow students to be released from public schools to attend religious instruction.
- ***Engel v. Vitale* (1962):** There may not be a prayer, even a nondenominational one, in public schools.
- ***Lemon v. Kurtzman* (1971):** Three tests are described for deciding whether the government is improperly involved with religion.
- ***Lee v. Weisman* (1992):** Public schools may not have clergy lead prayers at graduation ceremonies.
- ***Santa Fe Independent School District v. Doe* (2000):** Students may not lead prayers before the start of a football game at a public school.
- ***Zelman v. Simmons-Harris* (2002):** Voucher plan to pay school bills is upheld.
- ***Town of Greece v. Galloway* (2014):** Local legislative session may begin with a prayer.
- ***Burwell v. Hobby Lobby* (2014):** Certain companies may be exempt from providing contraceptive coverage in health insurance if that violates their owners' religious beliefs.

Declaration of Independence and the Star Spangled Banner so as to make the Commandments part of America's political heritage, the Court said it was still a religious effort. (The Court did note that there was a frieze containing Moses in the Supreme Court's own building, but said this was not religious.) But when the Ten Commandments were put up outside the Texas state capitol, this was upheld. Justice Stephen Breyer, who forbid the Kentucky display but allowed the Texas one, wrote that in Texas the Commandments now revealed a secular message, and, besides, no one had sued to end this display until 40 years after it was erected.[74]

Though the Court has struck down prayer in public schools, it has upheld prayer in Congress. (Since 1789, the House and Senate have opened each session with a prayer).[75] In 2014, the Court ruled that beginning a town legislative session with a prayer does not violate the Constitution's establishment clause.[76] Furthermore, while a public school cannot have a chaplain, the armed services can. The Court has said that the government cannot "advance" religion, but it has not objected to the printing of the phrase "In God We Trust" on the back of every dollar bill.

These distinctions show that the Court tends to use the wall-of-separation test for public schools but that it tries to strike a reasonable balance for Congress or state office buildings, perhaps because schools have a young and captive population, whereas public forums have adult and voluntary membership.

It is obvious that despite its efforts to set forth clear rules governing church–state relations, the Court's actual decisions are hard to summarize. It is deeply divided—some would say deeply confused—on these matters, and so the efforts to define the "wall of separation" will continue to prove to be as difficult as the Court's earlier efforts to decide what is interstate and what is local commerce (see Chapter 3).

5-4 Crime and Due Process

Whereas the central problem in interpreting the religion clauses of the First Amendment has been to decide what they mean, the central problem in interpreting those parts of the Bill of Rights that affect people accused of a crime has been to decide not only what they mean but also how to put them into effect. It is not obvious what constitutes an "unreasonable search," but even if we settle that question, we still must decide how best to protect people against such searches in ways that do not unduly hinder criminal investigations.

That protection can be provided in at least two ways. One is to let the police introduce in court evidence relevant to the guilt or innocence of a person, no matter how it was obtained, and then, after the case is settled, punish the police officer (or his or her superiors) if the evidence was gathered improperly (e.g., by an unreasonable search). The other way is to exclude improperly gathered evidence from the trial in the first place, even if it is relevant to determining the guilt or innocence of the accused.

Most democratic nations, including the United Kingdom, use the first method; the United States uses the second. Because of this, many of the landmark cases decided

exclusionary rule *Improperly gathered evidence may not be introduced in a criminal trial.*

by the Supreme Court have been bitterly controversial. Opponents of these decisions have argued that a guilty person should not go free just because the police officer blundered, especially if the mistake was minor. Supporters rejoin that there is no way to punish errant police officers effectively other than by excluding tainted evidence; moreover, nobody should be convicted of a crime except by evidence that is above reproach.[77]

The Exclusionary Rule

The American method relies on what is called the **exclusionary rule**. That rule holds that evidence gathered in violation of the Constitution cannot be used in a trial. The rule has been used to implement two provisions of the Bill of Rights: the right to be free from unreasonable searches and seizures (Fourth Amendment) and the right not to be compelled to give evidence against oneself (Fifth Amendment).*

Not until 1949 did the Supreme Court consider whether to apply the exclusionary rule to the states. In a case decided that year, the Court made it clear that the Fourth Amendment prohibited the police from carrying out unreasonable searches and obtaining improper confessions, but held that it was not necessary to use the exclusionary rule to enforce those prohibitions. It noted that other nations did not require that evidence improperly gathered had to be excluded from a criminal trial. The Court said that the local police should not improperly gather and use evidence, but if they did, the remedy was to sue the police department or punish the officer.[78]

*We shall consider here only two constitutional limits—those bearing on searches and confessions. Thus we omit many other important constitutional provisions affecting criminal cases, such as rules governing wiretapping, prisoner rights, the right to bail and to a jury trial, the bar on ex post facto laws, the right to be represented by a lawyer in court, the ban on "cruel and unusual" punishment, and the rule against double jeopardy.

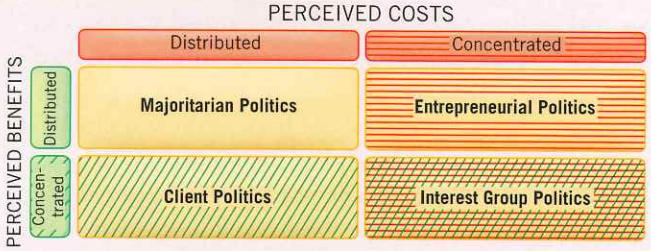
POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

Creating the White House Office of Faith-Based and Community Initiatives: Majoritarian or Interest-Group Politics?

After taking office in 2001, President George W. Bush created the Office of Faith-Based and Community Initiatives by executive order. The office was responsible for linking religious groups and social services; as originally enacted in the 1996 welfare reform law, religious organizations would be eligible for public funds to provide nonreligious programs, such as after-school activities, mentoring programs, and other social services. Such programs would be well within constitutional boundaries for religion and public life. As John J. Dilulio Jr., the first director of the office, later wrote, "Faith-friendly federal neutrality unto religious pluralism—neither a Christian nation nor a secular state—is precisely what [James] Madison and most of the other framers wanted for America."[79]

Advocates for these initiatives presented them as majoritarian politics—everyone pays for government funding through taxes, and American society at large benefits from the success of people who participate in the programs, all without encroaching on the First Amendment's protections for religious freedom. A case also could be made for client politics, with everyone paying and only program participants directly benefiting. The legitimacy of such initiatives was not in question, though, given strong support at the time for having the federal government facilitate participation in nonreligious social programs run by organizations with religious affiliations.

Implementation of these goals raised several challenges that illustrate interest-group politics at work. Some religious organizations proposed program requirements that posed potential conflicts with state laws, such as prohibitions on employer discrimination based on sexual orientation. Critics, in turn, declared that such requirements intruded upon the separation of church and state guaranteed in the First Amendment. With both sides passionately arguing their case, and limited broad public attention to the debate, interest-group concerns dominated the discussion. President Barack Obama renamed the office in 2009, calling it the Office of Faith-Based and Neighborhood Partnerships, to emphasize the community-service component of the program over religious affiliations of participating groups. As of the summer of 2017, the Trump White House had not appointed a director for the office.[80]



PRACTICE POLITICAL SCIENCE Describe the perspective conveyed in John J. Dilulio Jr.'s writing about the framers' beliefs regarding the relationship between the federal government and religion. Explain how Dilulio Jr.'s perspective exemplifies majoritarian politics. Explain how interest-group politics challenged the implementation of faith-based initiatives.

But in 1961, the Supreme Court changed its mind about the use of the exclusionary rule. It all began when the Cleveland police broke into the home of Dollree Mapp in search of a suspect in a bombing case. Not finding him, they instead arrested her for possessing some obscene pictures found there. The Court held that this was an unreasonable search and seizure because the police had not obtained a search warrant, though they had had ample time to do so. Furthermore, such illegally gathered evidence could not be used in the trial of Mapp.[81] Beginning with this case—*Mapp v. Ohio*—*the* Supreme Court required the use of the exclusionary rule as a way of enforcing a variety of constitutional guarantees.

Search and Seizure

After the Court decided to exclude improperly gathered evidence, the next problem was to decide what evidence was improperly gathered. What happened to Dollree Mapp was an easy case; hardly anybody argued that it was reasonable for the police to break into someone's home without a warrant, ransack their belongings, and take whatever they could find that might be incriminating. But that left a lot of hard choices still to be made.

When can the police search you without it being unreasonable? Under two circumstances: when they have a search warrant or when they have lawfully arrested you. A **search warrant** is an order from a judge authorizing the search of a place; the order must describe what is to be searched and seized, and the judge can issue it only if he or she is persuaded by the police that good reason (**probable cause**) exists to believe that a crime has been committed and that the evidence bearing on that crime will be found at a certain location. (The police can also search a building if the occupant gives them permission.)

In addition, you can be searched if the search occurs when you are lawfully arrested. When can you be arrested? You can be arrested if a judge has issued an arrest warrant for you, if you commit a crime in the presence of a police officer, or if the officer has probable cause to believe you have committed a serious crime (usually a felony). If you are arrested and no search warrant has been issued, the police—not a judge—decide what they can search. What rules should they follow?

In trying to answer that question, the courts have elaborated a set of rules that are complex, subject to frequent change, and quite controversial. In general, the police, after arresting you, can search you, things in plain view, and things or places under your immediate control. As a practical matter, things "in plain view" or "under your immediate control" mean the room in which you are arrested but not other rooms of the house.[82] If the police want to search the rest of your house or a car parked in your driveway, they will first have to go to a judge to obtain a search warrant. But if the police arrest a college student on campus for underage drinking and then accompany that student back to his or her dormitory room so that the student can get proof that he or she was old enough to drink, the police can seize drugs in plain view in that room.[83] And if marijuana is growing in plain view in an open field, the police can enter and search that field even though it is fenced off with a locked gate and a "No Trespassing" sign.[84]

search warrant *A judge's order authorizing a search.*

probable cause *Reasonable cause for issuing a search warrant or making an arrest; more than mere suspicion.*

What if you are arrested while driving your car—how much of it can the police search? The answer to that question has changed almost yearly. In 1979, the Court ruled that the police could not search a suitcase taken from a car of an arrested person, and in 1981 it extended this protection to any "closed, opaque container" found in the car.[85] But the following year, the Court decided that all parts of a car, closed or open, could be searched if the officers had probable cause to believe they contained contraband (i.e., goods illegally possessed). And the rules governing car searches have recently been relaxed even further. Officers who have probable cause to search a car can also search the things passengers are carrying in the car. And if the car is stopped for a traffic infraction, the car can be searched if the officer develops a "reasonable, articulable suspicion" that the car is involved in other illegal activity.[86]

In this confusing area of the law, the Court is attempting to protect those places in which a person has a "reasonable expectation of privacy." Your body is one such place, and so the Court has held that the police cannot compel you to undergo surgery to remove a bullet that might be evidence of your guilt or innocence in a crime.[87] But the police can require you to take a Breathalyzer test to determine whether you have been drinking while driving.[88] Your home is another place where you have an expectation of privacy, but a barn next to your home is not, nor is your backyard viewed from an airplane, nor is your home if it is a motor home that can be driven away, and so the police need not have a warrant to look into these places.[89]

If you work for the government, you have an expectation that your desk and files will be private; nonetheless, your supervisor may search the desk and files without a warrant, provided that he or she is looking for something related to your work.[90] But bear in mind that the Constitution protects you only from *the government*; a private employer has a great deal of freedom to search your desk and files.

WHAT WOULD YOU DO?

Will You Support the Patriot Act Provision on Library Records?

To: *Nicole Maxwell, Supreme Court justice*
From: *Benjamin Andrew, law clerk*
Subject: *Patriot Act and libraries*

The Patriot Act allows the FBI to seek the records of possible terrorists from banks, businesses, and libraries. Many libraries claim this will harm the constitutional rights of Americans. You support these rights, but are also aware of the need to protect national security.

To Consider:

Two public libraries have asked the Supreme Court to strike down provisions of the Patriot Act that allow the Federal Bureau of Investigation to see the borrowing records of persons who are under investigation.

Arguments for:

1. The Patriot Act does not target individuals who have not violated a criminal law and who do not threaten human life.
2. For the FBI to collect information about borrowers, it must first obtain permission from a federal judge.
3. Terrorists may use libraries to study and plan activities that threaten national security.

Arguments against:

1. Freedom of speech and expression are fundamental constitutional guarantees that should not be infringed.
2. The law might harm groups engaged in peaceful protests.
3. The law allows the government to delay notifying people that their borrowing habits are being investigated.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Uphold this provision ☐ Overturn this provision

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

good faith exception *An error in gathering evidence sufficiently minor that it may be used in a trial.*

public safety exception *The police can question a non-Mirandized suspect if there is an urgent concern for public safety.*

inevitable discovery *The police can use evidence if it would inevitably have been discovered.*

Confessions and Self-Incrimination

The constitutional ban on being forced to give evidence against oneself was originally intended to prevent the use of torture or "third-degree" police tactics to extract confessions. But it has since been extended to cover many kinds of statements uttered not out of fear of torture but from a lack of awareness of one's rights, especially the right to remain silent, whether in the courtroom or in the police station.

For many decades, the Supreme Court had held that involuntary confessions could not be used in federal criminal trials but had not ruled that they were barred from state trials. But in the early 1960s, it changed its mind in two landmark cases: *Escobedo* and *Miranda*.[91] The story of the latter and of the controversy that it provoked is worth telling.

Ernesto A. Miranda was convicted in Arizona of the rape and kidnapping of a young woman. The conviction was based on a written confession that Miranda signed after two hours of police questioning. (The victim also identified him.) Two years earlier, the Court had decided that the rule against self-incrimination applied to state courts.[92] Now the question arose of what constitutes an "involuntary" confession. The Court decided that a confession should be presumed involuntary unless the person in custody had been fully and clearly informed of his or her right to be silent, to have an attorney present during any questioning, and to have an attorney provided free of charge if he or she could not afford one. The accused could waive these rights and offer to talk, but the waiver must be truly voluntary. Since Miranda did not have a lawyer present when he was questioned and had not knowingly waived his right to a lawyer, the confession was excluded from evidence in the trial and his conviction was overturned.[93]

Miranda was tried and convicted again, this time on the basis of evidence supplied by his girlfriend, who testified that he had admitted to her that he was guilty. Nine years later, he was released from prison; four years after that, he was killed in a barroom fight. When the Phoenix police arrested the prime suspect in Ernesto Miranda's murder, they read him his rights from a "*Miranda* card."

Everyone who watches cops-and-robbers shows on television probably knows the "Miranda warning" by heart. The police now read it routinely to people whom they arrest. It is not clear whether it has much impact on who does or does not confess or what effect, if any, it may have on the crime rate.

In time, the *Miranda* rule was extended to mean that you have a right to a lawyer when you appear in a police lineup[94] and when you are questioned by a psychiatrist to determine whether you are competent to stand trial.[95] The Court threw out the conviction of a man who had killed a child because the accused, without being given the right to have a lawyer present and having undergone harsh questioning, had led the police to the victim's body.[96] You do not have a right to a *Miranda* warning, however, if while in jail you confess a crime to another inmate who turns out to be an undercover police officer.[97]

Some police departments have tried to get around the need for a Miranda warning by training their officers to question suspects before giving them a Miranda warning and then, if the suspect confesses, giving the warning and asking the same questions over again. But the Supreme Court has not allowed this and has struck the practice down.[98]

Relaxing the Exclusionary Rule

Cases such as *Miranda* were highly controversial and led to congressional efforts, mostly unsuccessful, to modify or overrule the decisions by statute. But as the rules governing police conduct became increasingly more complex, pressure mounted to find an alternative. Some thought that any evidence should be admissible, with the question of police conduct left to lawsuits or other ways of punishing official misbehavior. Others said the exclusionary rule served a useful purpose but had simply become too technical to be an effective deterrent to police misconduct (the police cannot obey rules that they cannot understand). And still others maintained that the exclusionary rule was a vital safeguard to essential liberties and should be kept intact. The Court has refused to let Congress abolish *Miranda* because it is a constitutional rule.[99]

The courts began to decide some cases in ways that modified—but retained—the exclusionary rule. The police were given greater freedom to question juveniles.[100] If the police got a warrant they thought was valid but the judge had used the wrong form, they could use it under the **good faith exception**.[101] The Supreme Court has allowed the police to question a suspect without first issuing a *Miranda* warning if the questions were motivated by overriding considerations of public safety, referred to as a **public safety exception**.[102] And the Court changed its mind about the killer who led the police to the victim's body. Under the **inevitable discovery** rule, the Court

civil forfeiture *A procedure in which law-enforcement officers take assets from people who are suspected of illegal activity, but have not been charged with a crime.*

decided that if a victim will be discovered anyway, the evidence will not be excluded.[103]

A related issue to confessions and self-incrimination that has gained increased public attention in recent years is **civil forfeiture**, or the practice of law-enforcement officers taking assets (such as money or property) from people suspected of involvement with legal activity, but not charged with a crime. In modern American politics, civil forfeiture developed in the 1980s as a tool in the war on drugs, as it allowed governments to collect funds quickly from suspected criminals and use that money for fighting crime or providing restitution to victims. More recently, though, people who have been pulled over for traffic stops have been asked to turn over cash in their cars (sometimes thousands of dollars, often for alleged purposes such as buying a used car) or face arrest. Others who have family members who have drug problems or legal infractions sometimes have been ordered to turn over their cars or even their homes. The courts may weigh in on this highly controversial issue in the near future.[104]

Terrorism and Civil Liberties

The horrific terrorist attacks of September 11, 2001, raised important questions about how far the government can go in investigating and prosecuting individuals. Americans have hotly debated civil liberties questions about both information gathering and prosecuting suspected terrorists.

Information Gathering and Surveillance

A little more than one month after the attacks, Congress passed a new law, the USA Patriot Act, designed to increase federal powers to investigate terrorists.† Its main provisions are as follows:

- *Telephone taps.* The government may, if it has a court order, tap any telephone a suspect uses instead of having to get a separate order for each telephone.
- *Internet taps.* The government may, if it has a court order, tap Internet communications.
- *Voice mail.* The government may, with a court order, seize voice mail.
- *Grand jury information.* Investigators can now share with other government officials things learned in secret grand jury hearings.
- *Immigration.* The attorney general may hold any noncitizen who is thought to be a national security risk for up to seven days. If the alien cannot be charged with a crime or deported within that time, he or she may still be detained if he or she is certified to be a security risk.
- *Money laundering.* The government gets new powers to track the movement of money across U.S. borders and among banks.
- *Crime.* This provision eliminates the statute of limitation on terrorist crimes and increases the penalties.

When it was first passed in October 2001, the Patriot Act made certain provisions temporary to allay concerns of civil libertarians. The law was renewed in March 2006 and again in May 2011, after extensive debate each time, but ultimately with only a few changes. Controversial parts of the law included the use of secret "national security letters" by the Federal Bureau of Investigation to gain access to records from banks, libraries, and telephone companies. One of the most heavily scrutinized parts of the law was Section 215, which allowed the National Security Agency (NSA)—the U.S. intelligence agency responsible for code-breaking and electronic surveillance—to conduct domestic surveillance through bulk collection of telephone metadata.[105]

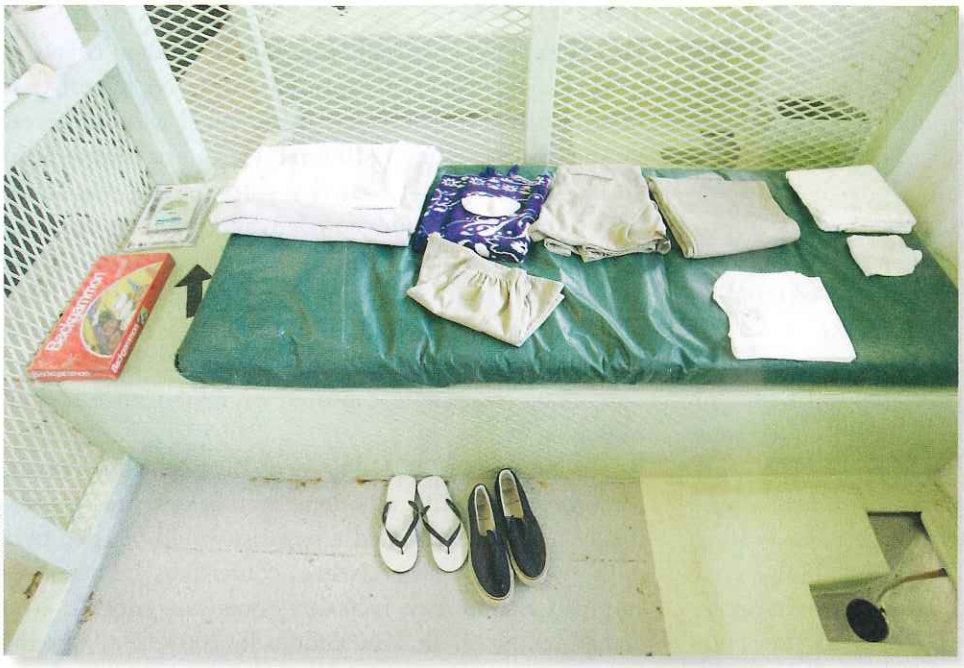
The Patriot Act had some historical precedent. For much of the 20th century, presidents of both parties authorized telephone taps without warrants when they believed the person being tapped was a foreign spy. Some presidents also did so to collect information about their political enemies. In 1978, Congress decided to bring this practice under legislative control. It passed the Foreign Intelligence Surveillance Act (FISA), which required the president to go before a special court, comprising seven judges selected by the chief justice, to obtain approval for electronic eavesdropping on persons who were thought to be foreign spies. The FISA court would impose a standard lower than that which governs the issuance of warrants against criminals. For criminals, a warrant must be based on showing "probable cause" that the person is engaged in a crime; for FISA warrants, the government need show only that the person is likely to be working for a foreign government.

In late 2005, the *New York Times* revealed that the NSA had a secret program to intercept telephone calls and email messages, without seeking a warrant, between certain people abroad and Americans in the United States. (The *Times* had known about the program for a year, but

†The name of the law is an acronym derived from the official title of the bill, drawn from the first letters of the following capitalized words: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot).

detainees.[115] Subsequent reforms were incorporated into the law in 2009.[116]

Of the nearly 800 individuals who have been held at the Guantanamo Bay detention camp, more than half were released during the Bush administration, and another quarter were released during the Obama administration. Upon taking office in 2009, President Obama issued an executive order to close the Guantanamo prison within one year. The administration subsequently announced that some detainees would be tried in the United States, but strong congressional and public opposition stymied this plan. When Obama left office in 2017, 41 detainees remained in the prison.[117] The Trump White House expressed interest in keeping Guantanamo Bay open and detaining more suspected terrorists there.



Mark Wilson/Getty Images

IMAGE 5-6 Inside a cell at the terrorist prison in Guantanamo, where Muslim inmates received a copy of the Koran, a chess set, and an arrow pointing toward Mecca.

LANDMARK CASES | Criminal Charges

- ***Mapp v. Ohio* (1961):** Evidence illegally gathered by the police may not be used in a criminal trial.
- ***Gideon v. Wainwright* (1964):** Persons charged with a crime have a right to an attorney even if they cannot afford one.
- ***Miranda v. Arizona* (1966):** Court describes warning that police must give to arrested persons.
- ***United States v. Leon* (1984):** Illegally obtained evidence may be used in a trial if it was gathered in good faith without violating the principles of the *Mapp* decision.
- ***Dickerson v. United States* (2000):** The *Mapp* decision is based on the Constitution and cannot be altered by Congress passing a law.
- ***Rasul v. Bush* and *Hamdi v. Rumsfeld* (2004):** Terrorist detainees must have access to a neutral court to decide whether they are legally held.
- ***Hamdan v. Rumsfeld* (2006):** The executive branch cannot unilaterally set up military commissions to try suspected terrorists; Congress must authorize their creation.
- ***Boumedine v. Bush* (2008):** Congress may not suspend the writ of habeas corpus for suspected terrorists held at Guantanamo Bay.

waited to collect additional information before publishing, in part because administration officials expressed concern that making the program public would hinder national security.) The Bush administration, which had secretly authorized the program in 2002, argued that the intercepts were designed not to identify criminals or foreign spies, but to alert the country to potential terrorist threats. It could not rely on FISA because its procedures took too long and its standards of proof were too high.[106]

In 2002, the court that hears appeals from the FISA court had noted that the president, as commander in chief, has the "inherent authority" to conduct warrantless searches to obtain foreign intelligence information. When the NSA's secret program became public in 2005, critics said it imperiled Americans' civil liberties by conducting domestic surveillance without court approval. The Bush administration argued that after 9/11, Congress's authorization for the president to exercise "all necessary and appropriate" uses of military force included warrantless intercepts of terrorist communications.[107]

Public debate about the domestic surveillance program spurred Congress to pass a bill in 2008 that allowed the government to intercept foreign communications with people in the United States, provided the FISA court had approved the surveillance methods. But the administration could begin the surveillance before a FISA ruling was issued if it declared the need to be urgent. However, if Americans living overseas were the target of surveillance, then there must first be a FISA warrant. In addition, private telephone and Internet companies that aided in the surveillance were exempt from lawsuits so long as they had received "substantial evidence" that the program was authorized by the president.[108]

In 2013, controversy erupted again when news organizations revealed that nine U.S. Internet companies had collaborated with the NSA and British intelligence agencies on a secret and extensive surveillance program. This information became public through the unauthorized release of thousands of classified government documents by NSA contractor Edward Snowden, who asserted that leaking files to journalists was necessary to make the American people aware of the agency's alleged constitutional violations. Under risk of arrest in the United States for spying, Snowden eventually was granted temporary asylum in Russia, while an intense public debate weighed whether his actions had harmed national security or provided much-needed scrutiny of government surveillance.[109]

In the aftermath of the Snowden controversy and continuing questions about NSA surveillance, certain provisions of the Patriot Act expired on June 1, 2015. Many members of Congress—both Democrats and Republicans—objected to the mass collection of telephone records that the law had permitted. On June 2, 2015, President Obama signed into law the USA Freedom Act, which addressed congressional concerns by requiring the federal government to get special judicial approval (by the Foreign Intelligence Surveillance Court) to receive data collections from telephone companies.[110]

Prosecuting Suspected Terrorists

Another significant legal issue for the United States as it has waged war and captured suspected terrorists is whether those suspects may be detained without access to the courts. The traditional view, first announced during World War II, was that spies sent to this country by the Nazis could be tried by a military tribunal instead of by a civilian court. They were neither citizens nor soldiers, but "unlawful combatants."[111] The Bush administration relied on this view when it authorized the detention at the U.S. military base in Guantanamo Bay, Cuba, of people captured by American forces in Afghanistan.

In November 2001, President Bush issued an executive order stating that any noncitizen believed to be a terrorist or to have harbored a terrorist would be tried by a military, rather than a civilian, court. But the detainees at Guantanamo Bay included American citizens, who demanded access to U.S. courts. In 2004, the Supreme Court issued two rulings that said that suspected terrorists, both Americans and noncitizens, had the right to challenge their detention before a neutral decision maker.[112] The Bush administration subsequently created military tribunals to review the status of the alleged "enemy combatants" at Guantanamo Bay, but the Supreme Court ruled in 2006 that the executive branch could not create military commissions unilaterally—that is, without congressional approval.[113] Congress then passed the Military Commissions Act of 2006, which authorized the use of military commissions to try alien enemy combatants.

The Military Commissions Act of 2006 stated that each commission must comprise at least five military officers and must allow the defendant certain fundamental rights (such as to see evidence and to testify). Decisions could be appealed to the U.S. Court of Military Commission Review, whose members are selected by the secretary of defense, in Washington, DC. Further appeals could be made to the federal appeals court for the District of Columbia and the Supreme Court.[114] The law had prohibited defendants from challenging their detention in federal court, but the Supreme Court ruled in 2008 that the constitutional writ of habeas corpus applies to

5-5 Civil Liberties and American Democracy

In some ways, civil liberties questions are both like and unlike ordinary policy debates. Like most issues, civil liberties problems often involve competing interests—in this case, conflicting rights or conflicting rights and duties—and so we have groups mobilized on both sides of issues involving free speech and crime control. Like some other issues, civil liberties problems also can arise from the successful appeals of a policy entrepreneur, and so we have periodic reductions in liberty resulting from popular fears, usually aroused during or just after a war.

But civil liberties are unlike many other issues in at least one regard: More than struggles over welfare spending or defense or economic policy, debates about civil liberties reach down into our fundamental political beliefs and political culture, challenging us to define what we mean by religion, Americanism, and decency. The most important of these challenges focuses on the meaning of the First Amendment: What is "speech"? How much of it should be free? How far can the state go in aiding religion? How do we strike a balance between national security and personal expression? The zigzag course followed by the courts in judging these matters has, on balance, tended to enlarge freedom of expression.

Almost as important has been the struggle to strike a balance between the right of society to be protected from criminals and terrorists, and the right of people (including criminals and terrorists) to have constitutional guarantees of due process. As with free speech cases, the courts generally have broadened the rights of individuals at some expense to the power of the police. But in recent years, the Supreme Court has pulled back from some of its more sweeping applications of the exclusionary rule.

The resolution of these issues by the courts is political in the sense that differing opinions about what is right or desirable compete, with one side or another prevailing (often by a small majority). In this competition of ideas, federal judges, though not elected, often are sensitive to strong currents of popular opinion. When politics has produced new action against apparently threatening minorities, judges are inclined, at least for a while, to give serious consideration to popular fears and legislative majorities. And when no strong national mood is discernible, the opinions of elites influence judicial thinking (as described in Chapter 16).

At the same time, courts resolve political conflicts in a manner that differs in important respects from the resolution of conflicts by legislatures or executives. First, the very existence of the courts, and the relative ease with which one may enter them to advance a claim, facilitates challenges to accepted values. An unpopular political or religious group may have little or no access to a legislature, but it will have substantial access to the courts.

Second, judges often settle controversies about rights not simply by deciding the case at hand, but rather by formulating a general rule to cover like cases elsewhere. This has an advantage (the law tends to become more consistent and better known) but a disadvantage as well: a rule suitable for one case may be unworkable in another. Judges reason by analogy and sometimes assume two cases are similar when in fact important differences exist. For example, a definition of "obscenity" or "fighting words" may suit one situation but be inadequate in another.

Third, judges interpret the Constitution, whereas legislatures often consult popular preferences or personal convictions. However much their own beliefs influence what judges read into the Constitution, almost all of them are constrained by its language.

Taken together, the desire to find and announce rules, the language of the Constitution, and the personal beliefs of judges have led to a general expansion of civil liberties. As a result, even allowing for temporary reversals and frequent redefinitions, any value thought to hinder freedom of expression and the rights of the accused has generally lost ground to the claims of the First, Fourth, Fifth, and Sixth Amendments.

LEARNING OBJECTIVES

5-1 Discuss why the courts are so important in defining civil liberties, for both the national government and the states.

The courts are independent of the executive and legislative branches, both of which respond to public pressures. In wartime or in other crisis periods, people want "something done." The president and members of Congress know this. The courts usually are a brake on the people's demands. Of course, the courts can make mistakes or get things confused, as many people believe they have with the establishment clause and the rights of criminal defendants. Still, when

it comes to government respecting civil liberties like the freedom to express unpopular beliefs, the courts are often citizens' last best hope.

After the Fourteenth Amendment was adopted in 1868, the Supreme Court began the slow but steady process of "incorporation" by which federal rights deemed "fundamental" also applied to the states. Today, the entire Bill of Rights is now applied to the states except the Third Amendment right not to have soldiers forcibly quartered in private homes, the Fifth Amendment right to be indicted by a grand jury before being tried for a serious crime, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment ban on excessive bail and fines. Although states still may regulate gun purchases and gun use, the latest incorporated right is the Second Amendment right to own and "bear arms," which the Court applied to the states in a 2010 decision.

5-2 Describe which forms of expression are not protected by the Constitution, and why.

Forms of expression not protected by the Constitution include: threats of "imminent, lawless action" (speech that incites others to commit illegal acts or that directly and immediately provokes another person to violent behavior); libel (injurious written statements about another person); obscenity (writing or pictures that the average person, applying the standards of his or her community, believes appeal to the prurient interest and lack literary, artistic, political, or scientific value); and certain types of symbolic (actions that convey a political message) or commercial and youthful (expression by corporations, interest groups, and children) speech.

5-3 Explain how the Constitution protects religious freedom.

The First Amendment bans the federal government, but not the states, from having an "established," tax-supported church. Some states had tax-funded churches well into the 19th century, but the Supreme Court has long since outlawed state-sponsored churches. The First Amendment also prohibits the federal government from interfering with people's religious activities.

5-4 Evaluate how, in the 21st century, the Constitution protects civil liberties for people accused of a crime or designated as "enemy combatants."

The Constitution includes several due-process protections for people accused of committing a crime: the exclusionary rule (evidence gathered in violation of the Constitution cannot be used in a trial), the need for a search warrant (an order from a judge authorizing the search of a place), the *Miranda* rules (warnings that police must give to a person being arrested regarding the rights of the accused), and others. The Supreme Court has ruled that terrorist detainees and enemy combatants (persons who are neither citizens nor prisoners of war) have constitutionally guaranteed due-process protections.

5-5 Summarize the evolution of civil liberties in the United States.

The Bill of Rights guarantees to the people certain freedoms upon which the national government may not infringe, and the courts have extended many of those protections at the state level as well. While freedoms from government must be balanced against public interests, such as national security, the courts over time generally have ruled in favor of broad interpretations of civil liberties, requiring the government to meet a high standard to justify restrictions.

TO LEARN MORE

Court cases: **www.law.cornell.edu**

Civil Rights Division of the Department of Justice: **www.usdoj.gov**

American Civil Liberties Union: **www.aclu.org**

American Center for Law and Justice: **https://aclj.org**

Americans United for Separation of Church and State: **www.au.org**

Institutional Religious Freedom Alliance: **www.irfalliance.org**

Abraham, Henry J., and Barbara A. Perry. *Freedom and the Court*, 7th ed. New York: Oxford University Press, 1998. Analysis of leading Supreme Court cases on civil liberties and civil rights.

Amar, Akhil Reed. *The Constitution and Criminal Procedure: First Principles.* New Haven, CT: Yale

SAUL LOEB/Getty Images

CHAPTER 6

Civil Rights

KEY OBJECTIVE OF THIS CHAPTER

- *Constitutional provisions have supported and motivated social movements and policy responses in the advancement of civil rights.*

KEY TAKEAWAY FROM THIS CHAPTER

- The application and interpretation of the following Supreme Court rulings and legislative policies illustrate how constitutional provisions can motivate policy responses as represented by the Civil Rights Act of 1964, Title IX of the Civil Rights Act Amendments (1972), the Voting Rights Act of 1965, *Brown v. Board of Education I* (1954), and *Brown v. Board of Education II* (1955).

THEN In 1830, Congress passed a law requiring all Indians (they were so called in the law) east of the Mississippi River to move to the Indian Territory west of the river, and the army set about implementing it. In the 1850s, a major political fight broke out in Boston over whether the police department should be obliged to hire an Irish officer. Until 1920, women could not vote in most elections. In the 1930s, the Cornell University Medical School had a strict quota limiting the number of Jewish students who could enroll. In the 1940s, President Franklin D. Roosevelt ordered that all Japanese Americans be removed from their homes in California and placed in relocation centers far from the coast. Until 1954, public schools in many states were required by law to be segregated by race. Until 1967, 16 states outlawed marriages between whites and nonwhites. Until 2003, 14 states outlawed consensual sexual relations between same-sex partners.

NOW Now it would be inconceivable that the army would forcibly relocate Native Americans. No one can be denied entry into a police department by reason of race, ethnicity, or religion. Women not only have long had the right to vote, but actually now vote at higher rates than men do. Unlike during World War II, today no group of people can be forcibly relocated or held against their will en masse, and even suspected terrorists and "enemy combatants" cannot be detained indefinitely without having their day in court. The quotas that once limited Jews' access to colleges and universities are history. State laws requiring segregated public schools and banning interracial marriage are history, too. And, within just the past decade, state laws forbidding consensual sexual relations between same-sex partners have been eliminated, as have restrictions on same-sex marriage.

civil rights *The rights of people to be treated without unreasonable or unconstitutional differences.*

Still, then, as now, if the government passes a law that treats different groups of people differently, that law is not necessarily unconstitutional.

Civil rights refer to cases in which some group, usually defined along racial or ethnic lines, is denied access to facilities, opportunities, or services that are available to other groups. The pertinent question regarding civil rights is not whether the government has the authority to treat different people differently; it is whether such differences in treatment are reasonable. Many laws and policies make distinctions among people—for example, the tax laws require people with higher incomes to pay taxes at a higher rate than those with lower incomes—but not all such distinctions are defensible. The courts have long held that classifying people on the basis of their income and taxing them at different rates is quite permissible because such classifications are not arbitrary or unreasonable and are related to a legitimate public need (i.e., raising revenue). Increasingly, however, the courts have said that classifying people on the basis of their race or ethnicity is unreasonable.[1] The tests the courts use are summarized in Table 6.3 on page 137.

Robert W. Kelley/The LIFE Picture Collection/Getty Images

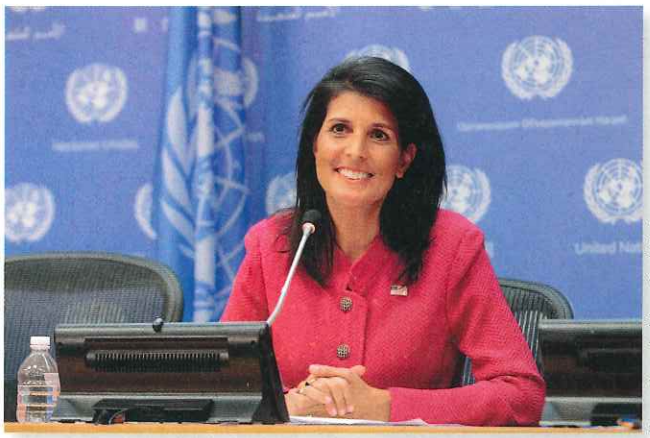
IMAGE 6-1 Reverend Dr. Martin Luther King, Jr. and other civil rights leaders participated in the March on Washington for Jobs and Freedom, popularly known as the March on Washington, on August 28, 1963 .

To explain the victimization of certain groups and the methods by which they have begun to overcome it, we start with racial classifications and the case of African Americans. The strategies used by or on behalf of African Americans have typically set the pattern for the strategies used by other groups. At the end of this chapter, we look at the issues of women's rights and gay rights.

6-1 Race and Civil Rights

In July 2013, the National Urban League (NUL), led by its president, Marc H. Morial, the former mayor of New Orleans, came to Philadelphia for its annual conference. With the National Association for the Advancement of Colored People (NAACP), the NUL is among the nation's most historic and important civil rights organizations. Its 2013 conference theme was "Redeem the Dream." Fifty years earlier, in 1963, Reverend Dr. Martin Luther King, Jr. delivered his historic "I Have a Dream" speech in Washington, DC. In its 2013 *State of Black America* report, the NUL credited civil rights laws (see Table 6.1 on page 126) for the progress made over the past half-century or so in closing white–black gaps in education and standards of living:

- The white–black high school completion rate gap has closed by 57 points; whereas only 25 percent of blacks graduated from high school in 1963, by 2013 the fraction had risen to 85 percent, and there had been a threefold increase in the number of blacks enrolled in college.
- The white–black poverty rate gap fell by 23 points; whereas 48 percent of blacks lived in poverty in 1963, by 2013 the fraction had fallen to 28 percent.
- The number of black homeowners increased by 14 percent.



Europa Newswire/Alamy Stock Photo

IMAGE 6-2 Former South Carolina Governor Nikki Haley was appointed U.S. Permanent Representative to the United Nations in the Trump administration.

But the same report also documented numerous racial gaps and disparities in housing, education, health care, employment, and overall economic opportunity:

- In 2013, as in 1963, the black–white unemployment ratio was still 2 to 1, regardless of education, gender, region, or income level.
- In 2013, as in 1963, more than a third of all black children (38 percent) still lived in poverty.
- In 2013, as in 1963, blacks employed in the public sector earned less than whites in the same jobs, and a still-wider black–white wage disparity persisted in the private sector.

Citing the history surrounding Reverend Dr. King's "I Have a Dream" speech, Morial and other leaders called on all citizens to come together to eliminate these and other racial gaps and disparities in housing, education, employment, and other areas. As late as the mid-20th century, African Americans in many parts of the country could not vote, attend integrated schools, ride in the front seats of buses, or buy homes in white neighborhoods. Conditions were especially oppressive in those parts of the country, notably the Deep South, where blacks were often in the majority. There, the politically dominant white minority felt keenly the potential competition for jobs, land, public services, and living space posed by large numbers of people of another race. But even in the North, black gains often seemed to be at the expense of lower-income whites who lived or worked near them, not at the expense of upper-status whites who lived in suburbs.

African Americans were not allowed to vote at all in many areas; they could vote only with great difficulty in others; and even in those places where voting was easy, they often lacked the material and institutional support for effective political organization. If your opponent feels deeply threatened by your demands and can deny you access to the political system that will decide the fate of those demands, you are, to put it mildly, at a disadvantage. Yet from the end of Reconstruction to the 1960s—for nearly a century—many blacks in the South found themselves in just such a position.

To the dismay of those who prefer to explain political action in terms of economic motives, people often attach greater importance to the intangible costs and benefits of policies than to the tangible ones. Thus, even though the average black represented no threat to the average white, antiblack attitudes—racism—produced some appalling actions. Between 1882 and 1946, 4,715 people, about three-fourths of them African Americans, were lynched in the United States.[2] Some of these brutalities were perpetrated by small groups of vigilantes acting with much ceremony, but others were the actions of frenzied mobs.

In the summer of 1911, a black man charged with murdering a white man in Livermore, Kentucky, was dragged by a mob to the local theater, where he was hanged. The audience, which had been charged admission, was invited to shoot the swaying body (those in the orchestra seats could empty their revolvers; those in the balcony were limited to a single shot).[3]

Though the public in other parts of the country was shocked by such events, little was done because lynching was a local, not a federal, crime. It obviously would not require many such horrific killings for African Americans in these localities to decide it would be foolhardy to try to vote or enroll in a white school. And even in those states where black Americans did vote, popular attitudes were not conducive to blacks buying homes or taking jobs on an equal basis with whites.

Even among those professing to support equal rights, a substantial portion opposed African Americans' efforts to obtain them and federal action to secure them. In 1942, a national poll showed that only 30 percent of white people thought black and white children should attend the same schools; in 1956, the proportion had risen, but only to 49 percent, still less than a majority. (In the South, white support for school integration was even lower—14 percent favored it in 1956, about 31 percent in 1963.) As late as 1956, a majority of Southern whites were opposed to integrated public transportation facilities. Even among whites who generally favored integration, there was in 1963 (*before* the inner-city riots that occurred later in the decade) considerable opposition to the black civil rights movement: nearly half of the whites classified in a survey as moderate integrationists thought demonstrations hurt the black cause, nearly two-thirds disapproved of actions taken by the civil rights movement, and more than a third felt civil rights should be left to the states.[4]

In short, the political position in which African Americans found themselves until the 1960s made it difficult for them to advance their interests through a feasible legislative strategy; their opponents were aroused, organized, and powerful. Thus, if black interests were to be championed in Congress or state legislatures, blacks would have to have white allies. Though some such allies could be found, they were too few to make a difference in a political system that gives a substantial advantage to strongly motivated opponents of any new policy. For that to change, one or both of two things would have to happen: additional allies would have to be recruited (a delicate problem, given that many white integrationists disapproved of aspects of the civil rights movement), or the struggle would have to be shifted to a policymaking arena in which the opposition enjoyed less of an advantage.

Partly by plan, and partly by accident, black leaders followed both of these strategies simultaneously. By publicizing their grievances and organizing a civil rights movement that (at least in its early stages) concentrated on dramatizing the denial to blacks of essential and widely accepted liberties, African Americans were able to broaden their base of support both among political elites and among the general public, thereby elevating the importance of civil rights issues on the political agenda. By waging a patient, prolonged, but carefully planned legal struggle, black leaders shifted decision-making power on key civil rights issues from Congress, where they had been stymied for generations, to the federal courts.

After this strategy had achieved some substantial successes—once blacks had become enfranchised and legal barriers to equal participation in political and economic affairs had been lowered—the politics of civil rights became more conventional. African Americans were able to assert their demands directly in the legislative and executive branches of government with reasonable (though scarcely certain) prospects of success. Civil rights became less a matter of gaining entry into the political system and more one of waging interest-group politics within that system. (See Table 6.1 for a summary of major civil-rights laws.)

At the same time, the goals of civil rights politics broadened. The struggle to gain entry into the system had focused on the denial of fundamental rights (to vote, to organize, to obtain equal access to schools and public facilities); since then, dominant issues have included economic progress, professional advancement, and improvement of housing and neighborhoods. But these battles can reveal denial of fundamental legal rights as well.

With housing, for example, both government agencies, such as the Federal Housing Authority, and private lenders have pursued strategies to make home ownership

Everett Collection Historical/Alamy

IMAGE 6-3 Segregated water fountain in Oklahoma City (1939).

TABLE 6.1 | Key Provisions of Major Civil Rights Laws

1957	Voting	Made it a federal crime to try to prevent a person from voting in a federal election. Created the Civil Rights Commission.
1960	Voting	Authorized the attorney general to appoint federal referees to gather evidence and make findings about allegations that African Americans were deprived of their right to vote. Made it a federal crime to use interstate commerce to threaten or carry out a bombing.
1964	Voting	Made it more difficult to use devices such as literacy tests to bar African Americans from voting.
	Public accommodations	Barred discrimination on grounds of race, color, religion, or national origin in restaurants, hotels, lunch counters, gasoline stations, movie theaters, stadiums, arenas, and lodging houses with more than five rooms.
	Schools	Authorized the attorney general to bring suit to force the desegregation of public schools on behalf of citizens.
	Employment	Outlawed discrimination in hiring, firing, or paying employees on grounds of race, color, religion, national origin, or sex.
	Federal funds	Barred discrimination in any activity receiving federal assistance.
1965	Voter registration	Authorized appointment by the Civil Service Commission of voting examiners who would require registration of all eligible voters in federal, state, and local elections, general or primary, in areas where discrimination was found to be practiced or where less than 50 percent of voting-age residents were registered to vote in the 1964 election.
	Literacy tests	Suspended use of literacy tests or other devices to prevent African Americans from voting.
1968	Housing	Banned, by stages, discrimination in sale or rental of most housing (excluding private owners who sell or rent their homes without the services of a real-estate broker).
	Riots	Made it a federal crime to use interstate commerce to organize or incite a riot.
1972	Education	Prohibited sex discrimination in education programs receiving federal aid.
	Discrimination	If any part of an organization receives federal aid, no part of that organization may discriminate on the basis of race, sex, age, or physical disability.
1991	Discrimination	Made it easier to sue over job discrimination and collect damages; overturned certain Supreme Court decisions. Made it illegal for the government to adjust, or "norm," test scores by race.

more difficult for black Americans, such as "redlining" neighborhoods, that is, either denying loans or making them more expensive. After the horrific, fatal injuries that Baltimore resident Freddie Gray, a 25-year-old African American man, received in police custody in 2015, riots ensued in the city. Its long-standing problems of segregation and poverty commanded national attention, particularly their roots, at least partly, in purposely discriminatory public policy.[5]

The Campaign in the Courts

The Fourteenth Amendment was both an opportunity and a problem for black activists. Adopted in 1868, it seemed to guarantee equal rights for all: "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."

The key phrase was "equal protection of the laws." Read broadly, it might mean that the Constitution should be regarded as color-blind: No state law could have the effect of treating whites and blacks differently. Thus, a law segregating blacks and whites into separate schools or neighborhoods would be unconstitutional. Read narrowly, "equal protection" might mean only that blacks and whites had certain fundamental legal rights in common (such as the right to sign contracts, to serve on juries, or to buy and sell property), but otherwise they could be treated differently.

In a series of decisions beginning in the 1870s, the Supreme Court took the narrow view, albeit often by narrow majorities. Adopted in 1870, the Fourteenth Amendment had been proposed as a means to reinforce the Civil Rights Act of 1866. That Act was intended by Congress to ensure that former slaves' citizenship rights would be respected not only by the federal government but also by the state governments, both North and South. But in its 5-to-4 majority decision in the *Slaughter-House Cases* (1873), the Court ruled that the "privileges and immunities" clause of the

Fourteenth Amendment did not protect citizens from discriminatory actions by state governments.

Though in 1880 it declared unconstitutional a West Virginia law requiring juries to comprise only white men,[6] the Court decided in 1883 that it was unconstitutional for Congress to prohibit racial discrimination in public accommodations such as hotels.[7] The difference between the two cases seemed, in the eyes of the Court, to be this: Serving on a jury was an essential right of citizenship that the state could not deny to any person on racial grounds without violating the Fourteenth Amendment, but registering at a hotel was a convenience controlled by a private person (the hotel owner) who could treat blacks and whites differently if he or she wished.

The major decision that determined the legal status of the Fourteenth Amendment for more than half a century was *Plessy v. Ferguson*. Louisiana had passed a law requiring blacks and whites to occupy separate cars on railroad trains operating in that state. When Adolph Plessy, who was seven-eighths white and one-eighth black, refused to obey the law, he was arrested. He appealed his conviction to the Supreme Court, claiming that the law violated the Fourteenth Amendment. In 1896, the Court rejected his claim, holding that the law treated both races equally even though it required them to be separate. The equal protection clause guaranteed political and legal but not social equality. "Separate-but-equal" facilities were constitutional because if "one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."[8]

"Separate but Equal"

Thus began the **separate-but-equal doctrine**. Three years later, the Court applied it to schools as well, declaring in *Cumming v. Richmond County Board of Education* that a decision in a Georgia community to close the black high school while keeping open the white high school was not a violation of the Fourteenth Amendment because blacks could always go to private schools. Here the Court seemed to be saying that not only could schools be separate, they could even be unequal.[9]

What the Court has made, the Court can unmake. But to get it to change its mind requires a long, costly, and uncertain legal battle. The NAACP was the main organization that waged that battle against the precedent of *Plessy v. Ferguson*. Formed in 1909 by a group of whites and blacks in the aftermath of a race riot, the NAACP did many things, including lobbying in Washington and publicizing black grievances (especially in the pages of *The Crisis*, a magazine edited by W. E. B. Du Bois). But its most influential role was played in the courtroom.

It was a rational strategy. Fighting legal battles does not require forming broad political alliances or changing public opinion, tasks that would have been very difficult for a small and unpopular organization. A court-based approach also enabled the organization to remain nonpartisan. But it was a slow and difficult strategy. The Court had adopted a narrow interpretation of the Fourteenth Amendment. To get the Court to change its mind would require the NAACP to bring before it cases involving the strongest possible claims that a black had been unfairly treated—and under circumstances sufficiently different from those of earlier cases, so that the Court could find some grounds for changing its mind.

separate-but-equal doctrine *The doctrine established in* Plessy v. Ferguson *(1896) that African Americans could constitutionally be kept in separate but equal facilities.*

The steps in that strategy were these: First, persuade the Court to declare unconstitutional laws creating schools that were separate but obviously unequal. Second, persuade it to declare unconstitutional laws supporting schools that were separate but unequal in not-so-obvious ways. Third, persuade it to rule that racially separate schools were inherently unequal and hence unconstitutional.

Can Separate Schools Be Equal?

The first step was accomplished in a series of court cases stretching from 1938 to 1948. In 1938, the Court held that Lloyd Gaines had to be admitted to an all-white law school in Missouri because no black law school of equal quality existed in that state.[10] In 1948, the Court ordered the all-white University of Oklahoma Law School to admit Ada Lois Sipuel, a black woman, even though the state planned to build a black law school later. For education to be equal, it had to be equally available.[11] It still could be separate, however: The university admitted Ms. Sipuel but required her to attend classes in a section of the state capitol, roped off from other students, where she could meet with her law professors.

The second step was taken in two cases decided in 1950. Heman Sweatt, an African American man, was treated by the University of Texas Law School much as Ada Sipuel had been treated in Oklahoma: "admitted" to the all-white school but relegated to a separate building. Another African American man, George McLaurin, was allowed to study for his Ph.D. in a "colored section" of the all-white University of Oklahoma. The Supreme Court unanimously decided that these arrangements were unconstitutional because, by imposing racially based barriers on the black students' access to professors, libraries, and other students, they created unequal educational opportunities.[12]

The third step, the climax of the entire drama, began in Topeka, Kansas, where Linda Brown wanted to enroll

in her neighborhood school but could not because she was black and the school was by law reserved exclusively for whites. When the NAACP took her case to the federal district court in Kansas, the judge decided the black school Linda could attend was substantially equal in quality to the white school she could not attend and, therefore, denying her access to the white school was constitutional. To change that, the lawyers would have to persuade the Supreme Court to overrule the district judge on the grounds that racially separate schools were unconstitutional even if they were equal. In other words, the separate-but-equal doctrine would have to be overturned by the Court.

It was a risky and controversial step to take. Many states, Kansas among them, were trying to make their all-black schools equal to those of whites by launching expensive building programs. If the NAACP succeeded in getting separate schools declared unconstitutional, the Court might well put a stop to the building of these new schools. Blacks could win a moral and legal victory but suffer a practical defeat—the loss of these new facilities. Despite these risks, the NAACP decided to go ahead with the appeal.

Brown v. Board of Education

On May 17, 1954, a unanimous Supreme Court, speaking through an opinion written and delivered by Chief Justice Earl Warren, found that "in the field of public education the doctrine of 'separate but equal' has no place" because "separate educational facilities are inherently unequal."[13] *Plessy v. Ferguson* was overruled, and "separate but equal" was dead.

The ruling was a landmark decision, but the reasons for it and the means chosen to implement it were as important and as controversial as the decision itself. There were at least three issues. First, how would the decision be implemented? Second, on what grounds were racially separate schools unconstitutional? Third, what test would a school system have to meet in order to be in conformity with the Constitution?

Implementation The *Brown* case involved a class-action suit; that is, it applied not only to Linda Brown but to all others similarly situated. This meant that black children everywhere now had the right to attend formerly all-white schools. This change would be one of the most far-reaching and conflict-provoking events in modern American history. It could not be effected overnight or by the stroke of a pen. In 1955, the Supreme Court decided it would let local federal district courts oversee the end of segregation by giving them the power to approve or disapprove local desegregation plans. This was to be done "with all deliberate speed."[14]

In the South, "all deliberate speed" turned out to be a snail's pace. Massive resistance to desegregation broke

AP Images/Douglas Martin

IMAGE 6-4 Dorothy Counts, the first black student to attend Harding High School in Charlotte, North Carolina, maintained her poise as she was taunted by shouting, gesticulating white students in September 1957.

out in many states. Some communities simply defied the Court; some sought to evade its edict by closing their public schools. In 1956, more than 100 Southern members of Congress signed a "Southern Manifesto" that condemned the *Brown* decision as an "abuse of judicial power" and pledged to "use all lawful means to bring about a reversal of the decision."

In the late 1950s and early 1960s, the National Guard and regular army paratroopers were used to escort black students into formerly all-white schools and universities. It was not until the 1970s that resistance collapsed and most Southern schools were integrated. The use of armed force convinced people that resistance was futile, the disruption of the politics and economy of the South convinced leaders that it was imprudent, and the voting power of blacks convinced politicians that it was suicidal. In addition, federal laws began providing financial aid to integrated schools and withholding it from segregated ones. By 1970, only 14 percent of Southern black schoolchildren still attended all-black schools.[15]

The Rationale As the struggle to implement the *Brown* decision continued, the importance of the rationale for that decision became apparent. The case was decided in a way that surprised many legal scholars.

The Court could have said that the equal protection clause of the Fourteenth Amendment makes the Constitution, and thus state laws, color-blind. Or it could have said that the authors of the Fourteenth Amendment meant to ban segregated schools. It did neither. Instead, it said segregated education is bad because it "has a detrimental effect upon the colored children" by generating "a feeling of inferiority as to their status in the community" that may "affect their hearts and minds in a way unlikely ever to be undone."[16] This conclusion was supported by a footnote reference to social science studies of the apparent impact of segregation on black children.

Why did the Court rely on social science as much as or more than the Constitution in supporting its decision? Apparently for two reasons. One was the justices' realization that the authors of the Fourteenth Amendment may *not* have intended to outlaw segregated schools. The schools in Washington, DC, were segregated when the amendment was proposed, and when this fact was mentioned during the debate, it seems to have been made clear that the amendment was not designed to abolish this segregation. When Congress debated a civil rights act a few years later, it voted down provisions that would have ended segregation in schools.[17] The Court could not easily base its decision on a constitutional provision that had, at best, an uncertain application to schools. The other reason grew out of the first. On so important a matter, the chief justice wanted to speak for a unanimous court. Some justices did not agree that the Fourteenth Amendment made the Constitution color-blind. In the interests of harmony, the Court found an ambiguous rationale for its decision.

de jure segregation
Racial segregation that is required by law.

de facto segregation
Racial segregation that occurs in schools, not as a result of the law, but as a result of patterns of residential settlement.

Desegregation Versus Integration That ambiguity led to the third issue. If separate schools were inherently unequal, what would "unseparate" schools look like? Since the Court had not said race was irrelevant, an "unseparate" school could be either one that blacks and whites were free to attend if they chose or one that blacks and whites in fact attended whether they wanted to or not. The first might be called a desegregated school, and the latter an integrated school. Think of the Topeka case. Was it enough that there was now no barrier to Linda Brown's attending the white school in her neighborhood? Or was it necessary that there be black children (if not Linda, then some others) actually going to that school together with white children?

As long as the main impact of the *Brown* decision lay in the South, where laws had prevented blacks from attending white schools, this question did not seem important. Segregation by law (**de jure segregation**) was now clearly unconstitutional. But in the North, laws had not kept blacks and whites apart; instead, all-black and all-white schools were the result of residential segregation, preferred living patterns, informal social forces, and administrative practices (such as drawing school district lines so as to produce single-race schools). This often was called segregation in fact (**de facto segregation**).

MPI/Getty Images

IMAGE 6-5 In 1963, Governor George Wallace of Alabama stood in the doorway of the University of Alabama to block the entry of black students. Facing him was U.S. Deputy Attorney General Nicholas Katzenbach.

WHAT WOULD YOU DO?

Should Affirmative Action Programs in Higher Education Continue to Be Supported?

To: *Justice Roberta Wilson*
From: *Robert Gilbert, law clerk*
Subject: *Affirmative action in higher education*

Affirmative-action programs in higher education in the 21st century face strong political scrutiny. In the 1970s, the Supreme Court said such programs could be instituted as a means of overcoming institutional problems of past discrimination, but the Court has wrestled with the specifics of doing so. For example, it has said that diversity goals are permissible, but not quotas. In recent years, the Court has questioned whether the need for affirmative-action programs still exists. The Court needs to decide whether affirmative-action programs are constitutional, so schools operate uniformly, and constitutionally, in making decisions about admissions.

To Consider:

The Supreme Court has announced that it will decide whether affirmative-action programs in colleges and universities are necessary in the 21st century as a means of redress for past discrimination against racial minorities and women.

Arguments for:

1. Diversity is an important goal in higher education, as numerous schools, including military academies, have said in briefs for earlier cases.
2. The effects of segregation and discrimination continue in American politics today, and affirmative-action programs provide a necessary means of countering those problems.
3. Institutions of higher education grant preference to applicants for several reasons, including family ties to the school. Taking race, ethnicity, or gender into account has the same goal of incorporating a range of interests and perspectives into an entering class.

Arguments against:

1. Colleges and universities focus on higher learning and should seek intellectual, not individual, diversity.
2. Race is a suspect classification, and no state program that chiefly serves one race can be allowed.
3. Institutions of higher education should make admissions decisions on merit criteria, not on other considerations.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision:

- ☐ Continue affirmative-action programs in higher education
- ☐ Ban affirmative-action programs in higher education

CONSTITUTIONAL CONNECTIONS | Suspect Classifications

Beginning with the *Brown* case, virtually every form of racial segregation imposed by law has been struck down as unconstitutional. Race has become a **suspect classification** such that any law making racial distinctions is now subject to **strict scrutiny**. To be upheld as constitutional, a suspect classification must be related to a "compelling government interest," be "narrowly tailored" to achieve that interest, and use the "least restrictive means" available. But the Court has also determined that though race is a suspect classification, the Constitution is not "color-blind," and so the government may make racial distinctions for the purpose of remedying past racial discrimination. Later in this chapter we discuss affirmative action—the laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.

In 1968, the Supreme Court settled the matter. In New Kent County, Virginia, the school board had created a "freedom-of-choice" plan under which every pupil would be allowed without legal restriction to attend the school of his or her choice. As it turned out, all the white children chose to remain in the all-white school, and 85 percent of the black children remained in the all-black school. The Court rejected this plan as unconstitutional because it did not produce the "ultimate end," which was a "unitary, nonracial system of education."[18] In the opinion written by Justice William Brennan, the Court seemed to be saying that the Constitution required actual racial mixing in the schools, not just the repeal of laws requiring racial separation.

This impression was confirmed three years later when the Court considered a plan in North Carolina under which pupils in Mecklenburg County (which includes Charlotte) were assigned to the nearest neighborhood school without regard to race. As a result, about half the black children now attended formerly all-white schools, with the other half attending all-black schools. The federal district court held that this was inadequate and ordered some children to be bused into more distant schools in order to achieve a greater degree of integration. The Supreme Court, now led by Chief Justice Warren Burger, upheld the district judge on the grounds that the court plan was necessary to achieve a "unitary school system."[19]

This case—*Swann v. Charlotte-Mecklenburg Board of Education*—pretty much set the guidelines for all subsequent cases involving school segregation. The essential features of those guidelines are as follows:

- To violate the Constitution, a school system, by law, practice, or regulation, must have engaged in discrimination. Put another way, a plaintiff must show intent to discriminate on the part of the public schools.
- The existence of all-white or all-black schools in a district with a history of segregation creates a presumption of intent to discriminate.
- The remedy for past discrimination will not be limited to freedom of choice, or what the Court called "the walk-in school." Remedies may include racial quotas in the assignment of teachers and pupils, redrawn district lines, and court-ordered busing.
- Not every school must reflect the social composition of the school system as a whole.

suspect classification *Classifications of people based on their race or ethnicity; laws so classifying people are subject to "strict scrutiny."*

strict scrutiny *The standard by which "suspect classifications" are judged. To be upheld, such a classification must be related to a "compelling government interest," be "narrowly tailored" to achieve that interest, and use the "least restrictive means" available.*

Relying on *Swann*, district courts supervised redistricting and busing plans in localities all over the nation, often in the face of bitter opposition from the community. In Boston, the control of the city schools by a federal judge, W. Arthur Garrity, lasted for more than a decade and involved him in every aspect of school administration. One major issue not settled by *Swann* was whether busing and other remedies should cut across city and county lines. In some places, the central-city schools had become virtually all black. Racial integration could be achieved only by bringing black pupils to white suburban schools or moving white pupils into central-city schools.

In a series of split-vote decisions, the Court ruled that court-ordered intercity busing could be authorized only if it could be demonstrated that the suburban areas as well as the central city had in fact practiced school segregation. Where that could not be shown, such intercity busing would not be required. The Court was not persuaded that intent had been proved in Atlanta, Detroit, Denver, Indianapolis, and Richmond, but it was persuaded that intent had been proved in Louisville and Wilmington.[20]

The importance the Court attaches to intent means that if a school system that was once integrated develops a majority population of black students as a result of white residents moving to the suburbs, the Court will not require that district lines constantly be redrawn or new busing plans be adopted to adjust to the changing distribution of the population.[21] This in turn means that as long as black people and white people live in different neighborhoods for whatever reason, there is a good chance that some schools in both areas will be heavily of one race.

If mandatory busing plans or other integration measures cause whites to move out of a city at a faster rate than they otherwise would (a process often called "white flight"), then efforts to integrate the schools may in time create more single-race schools. Ultimately, integrated schools will exist only in integrated neighborhoods or where the quality of education is so high that both black and white students will enroll in the school, even at some cost for travel and inconvenience.

Mandatory busing to achieve racial integration has been a deeply controversial program and has generated considerable public opposition. Surveys show that a majority of people oppose it.[22] A 1992 poll showed that 48 percent of whites in the Northeast and 53 percent of Southern whites felt it was "not the business" of the federal government to ensure "that black and white children go to the same schools."[23] Presidents Richard Nixon, Gerald Ford, and Ronald Reagan opposed busing; all three supported legislation to prevent or reduce it, and Reagan petitioned the courts to reconsider busing plans. The courts refused to reconsider, and Congress has passed only minor restrictions on busing.

The reason why Congress has not followed public opinion on this matter is complex. It has been torn between the desire to support civil rights and uphold the courts and the desire to represent the views of its constituents. Because it faces a dilemma, Congress has taken both sides of the issue simultaneously. By the late 1980s, busing was a dying issue in Congress, in part because no meaningful legislation seemed possible and in part because popular passion over busing had somewhat abated.

Then, in 1992, the Supreme Court made it easier for local school systems to reclaim control over their schools from the courts. In DeKalb County, Georgia (a suburb of Atlanta), the schools had been operating under court-ordered desegregation plans for many years. Despite this effort, full integration had not been achieved, largely because the county's neighborhoods had increasingly become either all black or all white. The Court held that local schools could not be held responsible for segregation caused solely by segregated living patterns and so the courts would have to relinquish their control over the schools. In 2007, the Court said race could not be the decisive factor in assigning students to schools that had either never been segregated (as in Seattle) or where legal segregation had long since ended (as in Jefferson County, Kentucky).[24]

Str/FILE UPI Photo Service/Newscom

IMAGE 6-6 In the 1970s, antibusing protestors picketed against sending children out of neighborhoods to desegregate schools.

The Campaign in Congress

The campaign in the courts for desegregated schools, though slow and costly, was a carefully managed effort to alter the interpretation of a constitutional provision. But to get new civil rights laws out of Congress required a far more difficult and decentralized strategy, one that was aimed at mobilizing public opinion and overcoming the many congressional barriers to action.

The first problem was to get civil rights on the political agenda by convincing people that something had to be done. This could be achieved by dramatizing the problem in ways that tugged at the conscience of whites who were not racist but were ordinarily indifferent to black problems. Brutal lynching of blacks had shocked these whites, but the practice of lynching was on the wane in the 1950s.

Civil rights leaders could, however, arrange for dramatic confrontations between blacks claiming some obvious right and the whites who denied it to them. Beginning in the late 1950s, these confrontations began to occur in the form of sit-ins at segregated lunch counters and "freedom rides" on segregated bus lines. At about the same time, efforts were made to get blacks registered to vote in counties where whites had used intimidation and harassment to prevent it.

The best-known campaign occurred in 1955–1956 in Montgomery, Alabama, where blacks, led by a young minister named Martin Luther King, Jr., boycotted the local bus system after it had a black woman, Rosa Parks, arrested because she refused to surrender her seat on a bus to a white man. These early demonstrations were based

LANDMARK CASES | Civil Rights

- **Dred Scott case, *Scott v. Sanford* (1857):** Congress had no authority to ban slavery in a territory. A slave was considered a piece of property.
- ***Plessy v. Ferguson* (1896):** Upheld separate-but-equal facilities for white and black people on railroad cars.
- ***Brown v. Board of Education* (1954):** Said separate public schools are inherently unequal, thus starting racial desegregation.
- ***Green v. County School Board of New Kent County* (1968):** Banned a freedom-of-choice plan for integrating schools, suggesting blacks and whites must actually attend racially mixed schools.
- ***Swann v. Charlotte-Mecklenburg Board of Education* (1971):** Approved busing and redrawing district lines as ways of integrating public schools.

on the philosophy of **civil disobedience**—that is, peacefully violating a law, such as one requiring blacks to ride in a segregated section of a bus, and allowing oneself to be arrested as a result.

civil disobedience
Opposing a law one considers unjust by peacefully disobeying it and accepting the resultant punishment.

But the momentum of protest, once unleashed, could not be centrally directed or confined to nonviolent action. A rising tide of anger, especially among younger blacks, resulted in the formation of more militant organizations and the spontaneous eruption of violent demonstrations and riots in dozens of cities across the country. From 1964 to 1968, there were in the North as well as the South several "long, hot summers" of racial violence.

The demonstrations and rioting succeeded in getting civil rights on the national political agenda, but at a cost: many whites, opposed to the demonstrations or appalled by the riots, dug in their heels and fought against making any concessions to "lawbreakers," "troublemakers," and "rioters." In 1964 and again in 1968, more than two-thirds of the whites interviewed in opinion polls said the civil rights movement was pushing too fast, had hurt the black cause, and was too violent.[25]

In short, a conflict existed between the agenda-setting and coalition-building aspects of the civil rights movement. This was especially a problem since conservative Southern legislators still controlled many key congressional committees that had for years been the graveyard of civil rights legislation. The Senate Judiciary Committee was dominated by a coalition of Southern Democrats and conservative Republicans, and the House Rules Committee was under the control of a chairman hostile to civil rights bills, Howard Smith of Virginia. Any bill that passed the House faced an almost certain filibuster in the Senate. Finally, President John F. Kennedy was reluctant to submit strong civil rights bills to Congress.

Several developments made it possible to break the deadlock. First, public opinion was changing. From the mid-1950s to the mid-1990s, surveys found that the proportion of whites who were willing to have their children attend a school that was half black increased sharply (though the proportion of whites willing to have their children attend a school that was predominantly black increased by much less). About the same change could be found in white attitudes toward allowing blacks equal access to hotels and buses.[26] Of course, support in principle for these civil rights measures was not necessarily the same as support in practice; nonetheless, clearly a major shift was occurring in popular approval of at least the principles of civil rights. At the leading edge of this change were young, college-educated people.[27]

Second, certain violent reactions by white segregationists to black demonstrators were vividly portrayed by the media (especially television) in ways that gave the civil rights cause a powerful moral force. In May 1963, the head of the Birmingham police, Eugene "Bull" Connor, ordered his men to use attack dogs and high-pressure fire hoses to repulse a peaceful march by African Americans demanding desegregated public facilities and increased job opportunities. The pictures of that confrontation (such as the one on page 135) created a national sensation and contributed greatly to the massive participation—by whites and blacks alike—in the "March on Washington" that summer. About a quarter of a million people gathered in front of the Lincoln Memorial to hear the Reverend Dr. Martin Luther King, Jr. deliver the aforementioned "I Have a Dream" speech, which is now widely regarded as one of the most significant public addresses in American history, and which today is read, studied, or memorized in whole or in part by millions of schoolchildren each year.

The following summer in Neshoba County, Mississippi, three young civil rights workers (two white and one black) were brutally murdered by Klansmen aided by the local sheriff. When the FBI identified the murderers, the effect on national public opinion was galvanic; no white Southern leader could any longer offer persuasive opposition to federal laws protecting voting rights when white law enforcement officers had killed students working to protect those rights. And the next year, a white woman, Viola Liuzzo, was shot and killed while driving a car used to transport civil rights workers. Her death was the subject of a presidential address.

Third, President John F. Kennedy was assassinated in Dallas, Texas, in November 1963. Many people originally (and wrongly) thought he had been killed by a right-wing conspiracy. Even after the assassin had been caught and shown to have left-wing associations, the shock of the president's murder—in a Southern city—helped build support for efforts by the new president, Lyndon B. Johnson (a Texan), to obtain passage of a strong civil rights bill as a memorial to the slain president.

Fourth, the 1964 elections not only returned Johnson to office with a landslide victory but also sent a huge Democratic majority to the House and retained the large Democratic margin in the Senate. This made it possible for Northern Democrats to outvote or outmaneuver Southerners in the House.

The cumulative effect of these forces, as well as other significant events, led to the enactment of five civil rights laws between 1957 and 1968. Three (1957, 1960, and 1965) were chiefly directed at protecting the right to vote; one (1968) was aimed at preventing discrimination in housing; and one (1964), the most far-reaching of all, dealt with voting, employment, schooling, and public accommodations.

The passage of the 1964 act was the high point of the legislative struggle. Liberals in the House had drafted a bipartisan bill, but it was now in the House Rules Committee, where such proposals had often disappeared without a trace. In the wake of Kennedy's murder, a discharge petition was filed—with President Johnson's support—to take the bill out of committee and bring it to the floor of the House. But the Rules Committee, without waiting for a vote on the petition (which it probably realized it would lose), sent the bill to the floor, where it passed overwhelmingly. In the Senate, an agreement between Republican minority leader Everett Dirksen and President Johnson smoothed the way for passage in several important respects. The House bill was sent directly to the Senate floor, thereby bypassing the Southern-dominated Judiciary Committee. Nineteen Southern senators began an eight-week filibuster against the bill. On June 10, 1964, by a vote of 71 to 29, cloture (the Senate rule to end a filibuste—see Chapter 13) was invoked to end the filibuster—the first time in history this happened for a filibuster aimed at blocking civil rights legislation.

Since the 1960s, congressional support for civil rights legislation has grown. Indeed, while once calling a bill a civil rights measure would have been the kiss of death, today that is no longer the case. For example, in 1984 the Supreme Court decided the federal ban on discrimination in education applied only to the "program or activity" receiving federal aid and not to the entire school or university.[28] In 1988, Congress passed a bill to overturn this decision by making it clear that antidiscrimination rules applied to the entire educational institution and not just to that part (say, the physics lab) receiving federal money.

When President Reagan vetoed the bill (because, in his view, it would diminish the freedom of church-affiliated schools), Congress overrode the veto. In the override vote,

Bettmann/Getty Images

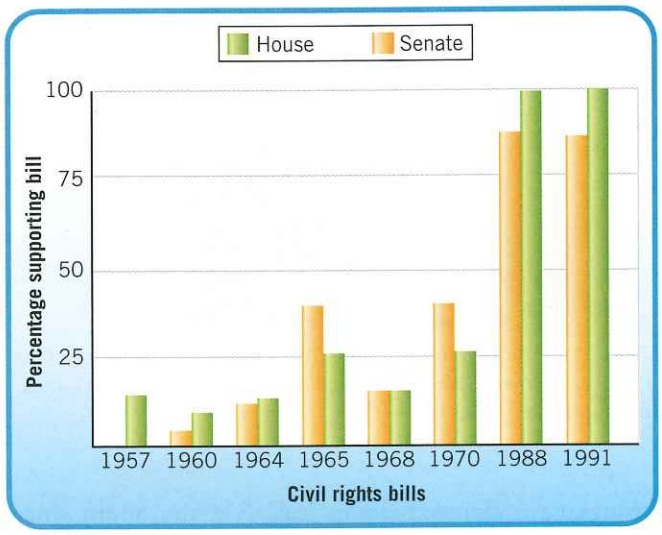
AP Images/Bob Jordan

IMAGES 6-7 and 6-8 In 1960, black students from North Carolina Agricultural and Technical College staged the first "sit-in" when they were refused service at a lunch counter in Greensboro (left). Twenty years later, graduates of the college returned to the same lunch counter (right). Though prices had risen, the service had improved.

AP Images/Bill Hudson

IMAGE 6-9 This picture of a police dog lunging at a black man during a racial demonstration in Birmingham, Alabama, in May 1963 was one of the most influential photographs ever published. It was widely reprinted throughout the world and was frequently referred to in congressional debates on the Civil Rights Act of 1964.

FIGURE 6.1 Increase in Support Among Southern Democrats in Congress for Civil Rights Bills, 1957–1991



Source: Congressional Quarterly, *Congress and the Nation*, vols. 1, 2, 3, 7, 8.

TABLE 6.2 | Increase in Number of Black Elected Officials

	1970	2010
Federal Office	10	43
State Office	169	642
Local Office	1,290	9,800

Source: "A Time to Reflect: Charting the Quality of Life for Black Americans: Politics," *USA Today*, 21 February, 2011.

every Southern Democrat in the Senate and almost 90 percent of those in the House voted for the bill. This was a dramatic change from 1964, when more than 80 percent of the Southern Democrats in Congress voted against the civil rights act (see Figure 6.1). This change partly reflected the growing political strength of Southern blacks. In 1960, less than one-third of voting-age blacks in the South were registered to vote; by 1971 more than half were, and by 1984 two-thirds were.

In 2008, Barack Obama was elected president and became the first African American to hold the nation's highest elected office. That monumental historic moment, which included Obama winning two Southern states, was preceded by four decades of growth in the number of black elected officials at all levels of government. Between 1970 and 2010, the total number of black elected officials rose from fewer than 1,500 to more than 9,500 (see Table 6.2). In the presidential elections of 2008 and 2012, voter turnout rates among African Americans equaled or exceeded that of whites. Such parity in voter turnout rates and the aforementioned increase in the number of black elected officials could not have happened without civil rights laws like the Voting Rights Act (VRA) of 1965.

In 2006, following more than 20 public hearings, and with support from then President George W. Bush, Congress reauthorized the VRA's key provisions for another quarter-century, including the section (Section 4) designating the "preclearance" formula used to determine which state or local jurisdictions must have any major changes to their voting laws or procedures approved in advance by the U.S. Department of Justice or by a federal court. Along with the need to remain vigilant in checking any recurrence of old methods of discrimination, the bill's bipartisan backers also cited concerns about "racial gerrymandering," the proliferation of "voter identification" laws, and other measures that could adversely and disproportionately affect minority participation in the electoral process.

But, in 2013, in the case of *Shelby County v. Holder*, the Supreme Court struck down the VRA's preclearance formula as unconstitutional. Writing for the Court's five-to-four majority, Chief Justice John Roberts declared that

AFP/Getty Images

IMAGE 6-10 Reverend Dr. Martin Luther King, Jr. delivered his historic "I Have a Dream" speech on the Washington, DC, mall on August 28, 1963.

"things have changed dramatically" in the South since 1965; he also issued a statement from the bench indicating that Congress "may draft another formula based on current conditions."[29] Writing for the four dissenting justices, Justice Ruth Bader Ginsburg declared that the majority had "failed to grasp why the VRA has proven effective." Issuing a summary of her dissent from the bench—a move that indicated the deep division in the Court on this ruling—Ginsburg noted that Congress had approved an extension of the VRA in 2006 because it found that "40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following 100 years of disregard for the dictates of the 15th amendment."[30]

In response to the ruling, President Obama issued a statement in which he observed that the decision "upsets decades of well-established practices that help to make sure voting is fair, especially in places where voting discrimination has been historically prevalent."[31] He also called on Congress to pass voting rights legislation with a new formula for determining which jurisdictions required federal preclearance for changes in voting procedures.

While Congress has not acted, several states have passed legislation to enact changes such as online voter registration, voter-identification requirements, and restrictions on early voting and the number of places where voters may cast ballots. In 2016, federal courts overturned such laws in Kansas, North Carolina, North Dakota, Texas, and Wisconsin, declaring that they disproportionately affected racial minorities and thus were racially discriminatory. (In overturning the North Carolina law, the U.S. Court of Appeals for the Fourth Circuit stated that the state legislature acted for partisan reasons, namely, to restrict voting for people who likely would oppose the majority party. Nevertheless, "even if done for partisan ends, that constituted racial discrimination.")[32] In 2017, the Supreme Court declined to hear appeals to reinstate voter-identification laws in North Carolina and Texas. (See Chapter 8, page 170, for further discussion of voter-identification laws.)

6-2 Women and Equal Rights

The political and legal efforts to secure civil rights for African Americans were accompanied by efforts to expand the rights of women. There was an important difference between the two movements, however: whereas African Americans were arguing against a legal tradition that explicitly aimed to keep them in a subservient status, women had to argue against a tradition that claimed to be protecting them. For example, in 1908 the Supreme Court upheld an Oregon law that limited female laundry workers to a 10-hour workday against the claim that it violated the Fourteenth Amendment. The Court justified its decision with this language:

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing . . . the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.[33]

The origin of the movement to give more rights to women was probably the Seneca Falls Convention held in 1848. Its leaders began to demand the right to vote for women. Though this was slowly granted by several states, especially in the West, it was not until 1920 that the Nineteenth Amendment made it clear that no state may deny the right to vote on the basis of sex. The great change in the status of women, however, took place during World War II when the demand for workers in our defense plants led to the employment of millions of women, such as "Rosie the Riveter," in jobs they had rarely held before. After the war, the feminist movement took flight with the publication in 1963 of *The Feminine Mystique* by Betty Friedan.

Congress responded by passing laws that required equal pay for equal work, prohibited discrimination on the basis of sex in employment and among students in any school or university receiving federal funds, and banned discrimination against pregnant women on the job.[34]

At the same time, the Supreme Court was altering the way it interpreted the Constitution. The key passage was the Fourteenth Amendment, which prohibits any state from denying to "any person" the "equal protection

of the laws." For a long time the traditional standard, as we saw in the 1908 case, was a kind of protective paternalism. By the early 1970s, however, the Court had changed its mind. In deciding whether the Constitution bars all, some, or no sexual discrimination, the Court had a choice among three standards. (See Table 6.3 for a summary and examples of the three standards.)

The first standard is the *rational basis* standard. This says that when the government treats some classes of people differently from others—for example, applying statutory rape laws to men but not to women—the different treatment must be reasonable and not arbitrary.

The second standard is *intermediate scrutiny*. When women complained that some laws treated them unfairly, the Court adopted a standard somewhere between the reasonableness and strict scrutiny tests. Thus, a law that treats men and women differently must be more than merely reasonable, but the allowable differences need not meet the strict scrutiny test.

And so, in 1971, the Court held that an Idaho statute was unconstitutional because it required that males be preferred over females when choosing people to administer the estates of deceased children. To satisfy the Constitution, a law treating men and women differently "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of legislation so that all persons similarly circumstanced shall be treated alike."[35]

The third standard is *strict scrutiny*. This says that some instances of drawing distinctions between different groups of people—for example, by treating white and black people differently—are inherently suspect; thus, the Court will subject them to strict scrutiny to ensure they are clearly necessary to attain a legitimate state goal. Over time, some members of the Court have wanted to make classifications based on sex inherently suspect and subject to the strict scrutiny test, but no majority has yet embraced this position.[36]

Federal legislation also has addressed sex discrimination. The Civil Rights Act of 1964 prohibits sex discrimination in the hiring, firing, and compensation of employees. Legislation passed in 1972, popularly known as Title IX (which is part of the Education Amendments of 1972), bans sex discrimination in local education programs receiving federal aid. These laws apply to *private*, and not just government, actions. The Lilly Ledbetter Fair Pay Act of 2009 extends the time period for workers to file a lawsuit against their employer alleging pay discrimination.[37]

In 2016, the Obama administration announced that Title IX applied to protections for transgender students in schools, specifically that schools should recognize a student's gender identity. The issue sparked controversy when North Carolina passed legislation requiring people to use public bathrooms that match the gender on their birth certificate. After several states filed suit against the new federal guidelines, a federal court issued a nationwide injunction, which the Obama administration appealed. In early 2017, the Trump administration said it would drop the appeal, and then rescinded the Title IX guidelines for transgender students, saying the federal government should not decide the issue for states. In March 2017, the Supreme Court declined to hear a Virginia lawsuit about whether a transgender student may choose which bathroom to use, sending the case back to a lower court for reconsideration after the White House decision.[38]

TABLE 6.3 | How the Court Decides Whether You Discriminate

The Supreme Court has produced three different tests to decide whether a government policy produces unconstitutional discrimination. Don't be surprised if you find it a bit hard to tell them apart.

Test	Description	Examples
Rational basis	If the policy uses reasonable means to achieve a legitimate government goal, it is constitutional.	If the government says you can't buy a drink until you are age 21, this meets the rational basis test: the government wants to prevent children from drinking, and age 21 is a reasonable means to define when a person is an adult. And a state can ban advertising on trucks unless the ad is about the truck owner's own business.
Intermediate scrutiny	If the policy "serves an important government interest" and is "substantially related" to serving that interest, it is constitutional.	Men can be punished for statutory rape even if women are not punished because men and women are not "similarly situated." And men can be barred from entering hospital delivery rooms even though (obviously) women are admitted.
Strict scrutiny	To be constitutional, the discrimination must serve a "compelling government interest," it must be "narrowly tailored" to attain that interest, and it must use the "least restrictive means" to attain it.	Distinctions based on race, ethnicity, religion, or voting must pass the strict scrutiny test. You cannot bar black children from a public school or black adults from voting, and you cannot prevent one religious group from knocking on your door to promote its views.

Women's Rights and the Supreme Court

Over the years, the Court has decided many cases involving sexual classification. The following lists provide several examples of illegal sexual discrimination (violating either the Constitution or a civil rights act) and legal sexual distinctions (violating neither).

Illegal Discrimination

- A state cannot set different ages at which men and women legally become adults.[39]
- A state cannot set different ages at which men and women are allowed to buy beer.[40]
- Women cannot be barred from jobs by arbitrary height and weight requirements.[41]
- Employers cannot require women to take mandatory pregnancy leaves.[42]
- Girls cannot be barred from Little League baseball teams.[43]
- Business and service clubs, such as the Junior Chamber of Commerce and Rotary Club, cannot exclude women from membership.[44]
- Though women as a group live longer than men, an employer must pay them monthly retirement benefits equal to those received by men.[45]
- High schools must pay the coaches of girls' sports the same as they pay the coaches of boys' sports.[46]

Decisions Allowing Differences Based on Sex

- A law that punishes males but not females for statutory rape is permissible; men and women are not "similarly situated" with respect to sexual relations.[47]
- All-boy and all-girl public schools are permitted if enrollment is voluntary and quality is equal.[48]
- States can give widows a property-tax exemption not given to widowers.[49]
- The navy may allow women to remain officers longer than men without being promoted.[50]

The lower federal courts have been especially busy in the area of sexual distinctions. They have said that public taverns may not cater to men only and that girls may not be prevented from competing against boys in noncontact high school sports; on the other hand, hospitals may bar fathers from the delivery room. Women may continue to use their maiden names after marriage.[51]

In 1996, the Supreme Court ruled that women must be admitted to the Virginia Military Institute, until then an all-male state-supported college that had for many decades supplied what it called an "adversative method" of training to instill physical and mental discipline in cadets. In practical terms, this meant the school was very tough on students. The Court said that for a state to justify spending tax money on a single-sex school, it must supply an "exceedingly persuasive justification" for excluding the other gender. Virginia countered by offering to support an all-female training course at another college, but this was not enough.[52] This decision came close to imposing the strict scrutiny test, and so it has raised important questions about what could happen to all-female or traditionally black colleges that accept state money.

Perhaps the most far-reaching cases defining the rights of women have involved the draft and abortion. In 1981, the Court held in *Rostker v. Goldberg* that Congress may require men but not women to register for the draft without violating the due-process clause of the Fifth Amendment.[53] In the area of national defense, the Court will give great deference to congressional policy. For many years, women could be pilots and sailors but not on combat aircraft or combat ships. The issue played a role in preventing the ratification of the Equal Rights Amendment to the Constitution because of fears that it would reverse *Rostker v. Goldberg*. But in 1993, the secretary of defense opened air and sea combat positions to all persons regardless of gender; only ground-troop combat positions were still reserved for men. Two decades later the ban on women serving in

LANDMARK CASES | Women's Rights

- ***Reed v. Reed* (1971):** Gender discrimination violates the equal protection clause of the Constitution.
- ***Craig v. Boren* (1976):** Gender discrimination can be justified only if it serves "important governmental objectives" and is "substantially related to those objectives."
- ***Rostker v. Goldberg* (1981):** Congress can draft men without drafting women.
- ***United States v. Virginia* (1996):** State may not finance an all-male military school.

combat was lifted as well, and in the summer of 2015, for the first time, two women graduated from Ranger School, the Army's elite combat training and leadership course.

Sexual Harassment

When Paula Corbin Jones accused President Bill Clinton of sexual harassment, the judge threw the case out of court because she had not submitted enough evidence such that, if the jury believed her story, she would have made a legally adequate argument that she had been sexually harassed.

What, then, is sexual harassment? Drawing on rulings by the Equal Employment Opportunities Commission, the Supreme Court has held that harassment can take one of two forms. First, it is illegal for someone to request sexual favors as a condition of employment or promotion. This is the "quid pro quo" rule. If a person does this, the employer is "strictly liable." Strict liability means the employer can be found at fault even if he or she did not know a subordinate was requesting sex in exchange for hiring or promotion.

Second, it is illegal for an employee to experience a work environment that has been made hostile or intimidating by a steady pattern of offensive sexual teasing, jokes, or obscenity. But employers are not strictly liable in this case; they can be found at fault only if they were "negligent"—that is, they knew about the hostile environment but did nothing about it.

In 1998, the Supreme Court decided three cases that made these rules either better or worse, depending on your point of view. In one, it determined that a school system was not liable for the conduct of a teacher who seduced a female student because the student never reported the actions. In a second, it held that a city was liable for a sexually hostile work environment confronting a female lifeguard even though she did not report this to her superiors. In the third, it decided that a female employee who was not promoted after having rejected the sexual advances of her boss could recover financial damages from the firm. But, it added, the firm could have avoided paying this bill if it had put in place an "affirmative defense" against sexual exploitation, although the Court never said what such a policy might be.[54]

Sexual harassment is a serious matter, but because few federal laws govern it, we are left with somewhat vague and often inconsistent court and bureaucratic rules to guide us.

Privacy and Sex

Regulating sexual matters has traditionally been left up to the states, which do so by exercising their **police powers**. These powers include more than the authority to create police departments; they include all laws designed to promote public order and secure the safety and morals of the citizens. Some have argued that the Tenth Amendment to the Constitution, by reserving to the states all powers not delegated to the federal government, meant that states could do anything not explicitly prohibited by the Constitution. But that changed when the Supreme Court began expanding the power of Congress over business and when it started to view sexual matters under the newly discovered right to privacy.

police powers *State power to effect laws promoting health, safety, and morals.*

Until that point, it had been left up to the states to decide whether and under what circumstances a woman could obtain an abortion. For example, New York allowed abortions during the first 24 weeks of pregnancy, whereas Texas banned it except when the mother's life was threatened. That began to change in 1965 when the Supreme Court held that the states could not prevent the sale of contraceptives because by so doing it would invade a "zone of privacy." Privacy is nowhere mentioned in the Constitution, but the Court argued that it could be inferred from "penumbras" (literally, shadows) cast off by various provisions of the Bill of Rights.[55]

Eight years later the Court, in its famous *Roe v. Wade* decision, held that a "right to privacy" is "broad enough to encompass a woman's decision whether or not to terminate a pregnancy."[56] The case, which began in Texas, produced this view: During the first three months (or trimester) of pregnancy, a woman has an unfettered right to an abortion. During the second trimester, states may regulate abortions but only to protect the mother's health. In the third trimester, states might ban abortions.

In reaching this decision, the Court denied that it was trying to decide when human life began—at the moment of conception, at the moment of birth, or somewhere in between. But that is not how critics of the decision saw things. To them, life begins at conception, and so the human fetus is a "person" entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment. People having this view began to use the slogans "right to life" and "pro-life." Supporters of the Court's action saw matters differently. In their view, no one can say for certain when human life begins; what one *can* say, however, is that a woman is entitled to choose whether or not to have a baby. These people took the slogans "right to choose" and "pro-choice."

Almost immediately, the congressional allies of pro-life groups introduced constitutional amendments to overturn *Roe v. Wade*, but none passed Congress. Nevertheless, abortion foes did persuade Congress, beginning in 1976, to bar the use of federal funds to pay for abortions

LANDMARK CASES | Privacy and Abortion

- ***Griswold v. Connecticut* (1965):** Found a "right to privacy" in the Constitution that would ban any state law against selling contraceptives.
- ***Roe v. Wade* (1973):** State laws prohibiting abortion were unconstitutional.
- ***Webster v. Reproductive Health Services* (1989):** Allowed states to ban abortions from public hospitals and permitted doctors to test to determine whether fetuses were viable.
- ***Planned Parenthood v. Casey* (1992):** Reaffirmed *Roe v. Wade* but upheld certain limits on its use.
- ***Gonzales v. Carhart* (2007):** Federal law may ban certain forms of partial-birth abortion.
- ***Whole Women's Health v. Hellerstedt* (2016):** Overturned Texas law requiring hospital standards at abortion clinics and admitting privileges for clinic doctors at nearby hospitals, for creating an "undue burden" upon women seeking the procedure.

except when the life of the mother is at stake. The chief effect of the provision, known as the Hyde Amendment (after its sponsor, former U.S. Representative Henry Hyde), has been to deny the use of Medicaid funds to pay for abortions for low-income women.

Despite pro-life opposition, the Supreme Court for 16 years steadfastly reaffirmed and even broadened its decision in *Roe v. Wade*. It struck down laws requiring, before an abortion could be performed, a woman to have the consent of her husband, an "emancipated" but underage girl to have the consent of her parents, and a woman to be advised by her doctor as to the facts about abortion.[57]

But in 1989, under the influence of justices appointed by President Reagan, the Court began in the *Webster* case to uphold some state restrictions on abortions. When that happened, many people predicted that in time *Roe v. Wade* would be overturned, especially if President George H. W. Bush was able to appoint more justices. He appointed two (Souter and Thomas), but *Roe* survived. The key votes were cast by Justices O'Connor, Souter, and Kennedy. In 1992, in its *Casey* decision, the Court by a vote of five-to-four explicitly refused to overturn *Roe*, declaring that there was a right to abortion.

At the same time, however, it upheld a variety of restrictions imposed by the state of Pennsylvania on women seeking abortions. These included a mandatory 24-hour waiting period between the request for an abortion and the performance of it, the requirement that teenagers obtain the consent of one parent (or, in special circumstances, of a judge), and a requirement that women contemplating an abortion be given pamphlets about alternatives to it. Similar restrictions had been enacted in many other states, all of which looked to the Pennsylvania case for guidance as to whether they could be enforced. In allowing these restrictions, the Court overruled some of its own earlier decisions.[58] On the other hand, the Court did strike down a state law that would have required married women to obtain the consent of their husbands before having an abortion.

After a long political and legal struggle, the Court in 2007 upheld a federal law that bans certain kinds of partial-birth abortions. The law does not allow an abortion in which the fetus, still alive, is withdrawn until its head is outside the mother and then it is killed. But the law does not ban a late-term abortion if it is necessary to protect the physical health of the mother or if it is performed on an already dead fetus, even if the doctor has already killed it.[59]

The debate over abortion continues today, especially at the state level, as we mentioned in Chapter 3. Between 2011 and 2013, 205 new abortion laws were passed, many of them seeking to restrict access to abortion (in contrast, between 2001 and 2010, only 189 new laws were passed).[60] Many of these laws put restrictions on the facilities where abortions can be performed, though others restrict how and when doctors and other health care providers can perform abortions.

In 2016, an eight-member Supreme Court (following the death of Justice Antonin Scalia) decided five to three to overturn a Texas law that had required abortion clinics to provide hospital-standard low-risk surgical facilities, and to give doctors hospital admitting privileges within 30 miles of the clinic. The law had led to the closing of the majority of clinics in the state, and the Court ruled that the restrictions created an "undue burden" (a test created in the 1992 *Casey* case) for women seeking to have an abortion. The Court also voted unanimously not to issue a ruling over whether religious nonprofit organizations and hospitals should have to follow the "contraceptive mandate" in the Affordable Care Act. Instead, the Court returned to appeals courts seven cases that had issued conflicting decisions (eight in favor of the mandate and one

opposed; not all of the rulings were appealed) to work out a compromise, with no taxes or penalties imposed on groups opposing the provision in the meantime.

There is one irony in all of this: "Jane Roe," the pseudonym for the woman who started the suit that became *Roe v. Wade*, never had an abortion and was not active in the lawsuit. Many years later, using her real name, Norma McCorvey, she became an evangelical Christian and participated in antiabortion demonstrations. Testifying before the U.S. Senate in 1998, she declared her commitment to "undoing the law that bears my name."[61] McCorvey died in 2017.

6-3 Affirmative Action

A common thread running through the politics of civil rights is the argument between **equality of results** and **equality of opportunity**. These concepts are central to the debate over affirmative action as a means of attaining equal rights for Americans regardless of race or gender. They also apply to civil-rights battles for people with disabilities, as discussed in Table 6.4 below.

Equality of Results

One view, expressed by some civil rights and feminist organizations, is that the burdens of racism and sexism can be overcome only by taking race or sex into account in designing remedies. It is not enough that people be given rights; they also must be given benefits. If life is a race, everybody must be brought up to the same starting line (or possibly even to the same finish line). This means that the Constitution is not and should not be color-blind or sex-neutral.

equality of results *Making certain that people achieve the same result.*

equality of opportunity *Giving people an equal chance to succeed.*

affirmative action *Laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.*

In education, this implies that the races must actually be mixed in the schools, by busing if necessary. In hiring, it means that **affirmative action** must be used in

TABLE 6.4 | The Rights of the Disabled

In 1990, the federal government passed the Americans with Disabilities Act (ADA), a sweeping law that extended many of the protections enjoyed by women and racial minorities to disabled persons.

Who Is a Disabled Person?	Anyone who *has* a physical or mental impairment that substantially limits one or more major life activities (e.g., holding a job), anyone who has a *record* of such impairment, or anyone who is *regarded* as having such an impairment is considered disabled.
What Rights Do Disabled Persons Have?	
Employment	Disabled persons may not be denied employment or promotion if, with "reasonable accommodation," they can perform the duties of that job. (Excluded from this protection are people who currently use illegal drugs, gamble compulsively, or are homosexual or bisexual.) Reasonable accommodation need not be made if this would cause "undue hardship" on the employer.
Government Programs and Transportation	Disabled persons may not be denied access to government programs or benefits. New buses, taxis, and trains must be accessible to disabled persons, including those in wheelchairs.
Public Accommodations	Disabled persons must enjoy "full and equal" access to hotels, restaurants, stores, schools, parks, museums, auditoriums, and the like. To achieve equal access, owners of existing facilities must alter them "to the maximum extent feasible"; builders of new facilities must ensure they are readily accessible to disabled persons, unless this is structurally impossible.
Telephones	The ADA directs the Federal Communications Commission to issue regulations to ensure telecommunications devices for hearing- and speech-impaired people are available "to the extent possible and in the most efficient manner."
Congress	The rights under this law apply to employees of Congress.
Rights Compared	The ADA does not enforce the rights of disabled persons in the same way as the Civil Rights Act enforces the rights of African Americans and women. Racial or gender discrimination must end *regardless of cost*; denial of access to disabled persons must end unless "undue hardship" or excessive costs would result.

reverse discrimination
Using race or sex to give preferential treatment to some people.

the hiring process. Affirmative action refers to laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership. It means that it is not enough that women should simply be free to enter the labor force; they should be given the material necessities (e.g., free daycare) that will help them enter it. On payday, workers' checks should reflect not just the results of competition in the marketplace, but the results of plans designed to ensure that people earn comparable amounts for comparable jobs. Of late, affirmative action has been defended in the name of diversity or multiculturalism—the view that every institution (firm, school, or agency) and every college curriculum should reflect the cultural (i.e., ethnic) diversity of the nation.

Equality of Opportunity

The second view holds that if it is wrong to discriminate *against* African Americans and women, it is equally wrong to give them preferential treatment over other groups. To do so constitutes **reverse discrimination**. The Constitution and laws should be color-blind and sex-neutral.[62]

In this view, allowing children to attend the school of their choice is sufficient; busing them to attain a certain racial mixture is wrong. Eliminating barriers to job opportunities is right; using numerical "targets" and "goals" to place minorities and women in specific jobs is wrong. If people wish to compete in the market, they should be satisfied with the market verdict concerning the worth of their work.

Each of these views is intertwined with other deep philosophical differences. Supporters of equality of opportunity tend to have orthodox beliefs; they favor letting private groups behave the way that they want (and so may defend the right of a men's club to exclude women). Supporters of the opposite view are likely to be progressive in their beliefs and insist that private clubs meet the same standards as schools or business firms. Adherents to the equality-of-opportunity view often attach great importance to traditional models of the family and so are skeptical of subsidized daycare and federally funded abortions. Adherents to the equality-of-results view prefer greater freedom of choice in lifestyle questions and so take the opposite position on daycare and abortion.

Of course, the debate is more complex than this simple contrast suggests. Take, for example, the question of affirmative action. Both the advocates of equality of opportunity and those of equality of results might agree that there is something odd about a factory or university that hires no African Americans or women, and both might press it to prove that its hiring policy is fair. Affirmative action in this case can mean *either* looking hard for qualified women and minorities and giving them a fair shot at jobs *or* setting a numerical goal for the number of women and minorities that should be hired and insisting that that goal be met. Persons who defend the second course of action call these goals "targets"; persons who criticize that course call them "quotas."

The issue has largely been fought in the courts. Between 1978 and 1990, about a dozen major cases involving affirmative-action policies were decided by the Supreme Court; in about half the policies were upheld, and in the other half they were overturned. The different outcomes reflect two things: the differences in the facts of the cases and the arrival on the Court of three justices (Kennedy, O'Connor, and Scalia) appointed by a president, Ronald Reagan, who was opposed to (at least) the broader interpretation of affirmative action. As a result of these decisions, the law governing affirmative action is now complex and confusing.

Consider one issue: Should the government be allowed to use a quota system to select workers, enroll students, award contracts, or grant licenses? In the *Bakke* decision in 1978, the Court said the medical school of the University of California at Davis could not use an explicit numerical quota in admitting minority students but could "take race into account."[63] So no numerical quotas, right?

Wrong. Two years later, the Court upheld a federal rule that set aside 10 percent of all federal construction contracts for minority-owned firms.[64] All right, maybe quotas can't be used in medical schools, but they can be used in the construction industry?

Not exactly. In 1989, the Court overturned a Richmond, Virginia, law that set aside 30 percent of its construction contracts for minority-owned firms.[65] Well, maybe the Court just changed its mind between 1980 and 1989.

No. One year later it upheld a federal rule that gave preference to minority-owned firms in the awarding of broadcast licenses.[66] Then in 1993, it upheld the right of white contractors to challenge minority set-aside laws in Jacksonville, Florida.[67]

Making sense of these twists and turns is challenging because a deeply divided Court is still wrestling with the issues, and Congress (as with the Civil Rights Act of 1991) is modifying or superseding earlier Court decisions. But a few general standards seem to be emerging. In simplified form, they are as follows:

- The courts will subject any quota system created by state or local governments to "strict scrutiny" and will look for a "compelling" justification for it.

- Quotas or preference systems cannot be used by state or local governments without first showing that such rules are needed to correct an actual past or present pattern of discrimination.[68]
- In proving there has been discrimination, it is not enough to show that African Americans (or other minorities) are statistically underrepresented among employees, contractors, or union members; the actual practices that have had this discriminatory impact must be identified.[69]
- Quotas or preference systems created by *federal* law will be given greater deference, in part because Section 5 of the Fourteenth Amendment gives to Congress powers not given to the states to correct the effects of racial discrimination.[70]
- It may be easier to justify in court a voluntary preference system (e.g., one agreed to in a labor–management contract) than one that is required by law.[71]
- Even when you can justify special preferences in *hiring* workers, the Supreme Court is not likely to allow racial preferences to govern who gets *laid off*. A worker laid off to make room for a minority worker loses more than a worker not hired in preference to a minority applicant.[72]

Complex as they are, these rulings still generate a great deal of passion. Supporters of the decisions barring certain affirmative action plans hail these decisions as steps back from an emerging pattern of reverse discrimination. In contrast, civil rights organizations have denounced those decisions that have overturned affirmative action programs.

In thinking about these matters, most Americans distinguish between compensatory action and preferential treatment. They define *compensatory action* as "helping disadvantaged people catch up, usually by giving them extra education, training, or services." A majority of the public supports this. They define preferential treatment as "giving minorities preference in hiring, promotions, college admissions, and contracts." Large majorities oppose this.[73] These views reflect an enduring element in American political culture—a strong commitment to individualism ("nobody should get something without deserving it") coupled with support for help for the disadvantaged ("somebody who is suffering through no fault of his or her own deserves a helping hand").

Where does affirmative action fit into this culture? Polls suggest that if affirmative action is defined as "helping," people will support it, but if it is defined as "using quotas," they will oppose it. On this matter, blacks and whites sometimes see things differently. Blacks think they should receive preferences in employment to create a more diverse workforce and to make up for past discrimination; whites oppose using goals to create diversity or to remedy past ills. In sum, the controversy over affirmative action depends in part on what you mean by it and on your racial identity.[74]

A small construction company named Adarand tried to get a contract to build guardrails along a highway in Colorado. Though it was the low bidder, it lost the contract because of a federal government program that favored small businesses owned by "socially and economically disadvantaged individuals"—that is, by racial and ethnic minorities. Adarand filed suit against the U.S. Department of Transportation, saying the program violated constitutional guarantees of due process and equal protection of the laws. In a five-to-four decision, the Court agreed with Adarand and sent the case back to Colorado for a new trial.

The essence of the Court's decision was that *any* discrimination based on race must be subject to strict scrutiny, even if its purpose is to help, not hurt, a racial minority. Strict scrutiny means two things:

- Any racial preference must serve a "compelling government interest."
- The preference must be "narrowly tailored" to serve that interest.[75]

To serve a compelling governmental interest, it is likely that any racial preference will have to remedy a clear pattern of past discrimination. No such pattern had been shown in Colorado.

This decision prompted a good deal of political debate about affirmative action. In California, an initiative was put on the 1996 ballot to prevent state authorities from using "race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group" in public employment, public education, or public contracting. When the votes were counted, it passed. Michigan, Nebraska, and Washington have adopted similar measures, and other states may do so.

But the *Adarand* case and the passage of the California initiative did not mean affirmative action was dead. Though the federal Court of Appeals for the Fifth Circuit had rejected the affirmative action program of the University of Texas Law School,[76] the Supreme Court did not take up that case. It waited for several more years to rule on a similar matter arising from the University of Michigan. In 2003, the Supreme Court overturned the admissions policy of the University of Michigan that had given to every African American, Hispanic, and Native American applicant a bonus of 20 points out of the 100 needed to guarantee admission to the University's undergraduate program.[77] This policy was not "narrowly tailored."

LANDMARK CASES | Affirmative Action

- ***Regents of the University of California v. Bakke* (1978):** In a confused set of rival opinions, the decisive vote was cast by Justice Powell, who said that a quota-like ban on Bakke's admission was unconstitutional but that "diversity" was a legitimate goal that could be pursued by taking race into account.
- ***United Steelworkers v. Weber* (1979):** Despite the ban on racial classifications in the 1964 Civil Rights Act, this case upheld the use of race in an employment agreement between the steelworkers union and a steel plant.
- ***Richmond v. Croson* (1989):** Affirmative action plans must be judged by the strict scrutiny standard that requires any race-conscious plan to be narrowly tailored to serve a compelling interest.
- ***Grutter v. Bollinger* and *Gratz v. Bollinger* (2003):** Numerical benefits cannot be used to admit minorities into college, but race can be a "plus factor" in making those decisions.
- ***Parents v. Seattle School District* (2007):** Race cannot be used to decide which students may attend especially popular high schools because this was not "narrowly tailored" to achieve a "compelling" goal.
- ***Schuette v. Coalition to Defend Affirmative Action* (2014):** Public institutions of higher education may not give preference in admission based on race, sex, color, ethnicity, or national origin.
- ***Fisher v. University of Texas at Austin et al* (2016):** A university may consider race as one of many factions in admissions decisions to create a diverse group of students.

In rejecting the bonus system, the Court reaffirmed its decision in the 1978 *Bakke* case in which it had rejected a university using a "fixed quota" or an exact numerical advantage to the exclusion of "individual" considerations.

But that same day, the Court upheld the policy of the University of Michigan Law School that used race as a "plus factor" but not as a numerical quota.[78] It did so even though using race as a plus factor increased by threefold the proportion of minority applicants who were admitted. In short, admitting more minorities serves a "compelling state interest," and doing so by using race as a plus factor is "narrowly tailored" to achieve that goal. But, in 2006, Michigan voters approved a ballot measure banning the use of race as a consideration in academic admissions, public employment, and government contracting. In 2012, a U.S. Circuit Court struck down the ban, but only in relation to academic admissions; two years later, the U.S. Supreme Court upheld the ban for academic admissions.[79]

In *Fisher v. University of Texas* (2013), the Court, in a seven-to-one decision, sent another affirmative action case involving college admissions back to the Fifth Circuit Court of Appeals for reconsideration. Invoking the *Bakke* (1978) and *Grutter* (2003) decisions (see the Landmark Cases box above), the majority declared that the lower court had failed to apply the strict scrutiny test. But in 2016, the Supreme Court upheld the University of Texas's admissions program (by a four-to-three vote, because of one vacancy and one recusal on the Court), ruling that consideration of race as one of several factors to ensure diversity among students was constitutionally permissible.

6-4 Gay Rights

At first, the Supreme Court was willing to let states decide how many rights gay individuals should have. Georgia, for example, passed a law banning sodomy (i.e., any sexual contact involving the sex organs of one person and the mouth or anus of another). In *Bowers v. Hardwick* (1986), the Supreme Court decided, by a five-to-four majority, that the Constitution indicated no reason to prevent a state from having such a law. There was a right to privacy, but it was designed simply to protect "family, marriage, or procreation."[80]

But 10 years later, the Court seemed to take a different position. The voters in Colorado had adopted a state constitutional amendment that made it illegal to pass any law to protect persons based on their "homosexual, lesbian, or bisexual orientation." The law did not penalize gays and lesbians; instead, it said they could not become the object of specific legal protection of the sort that had traditionally been given to racial or ethnic minorities. (Ordinances to give specific protection to homosexuals had been adopted in some Colorado cities.) The Supreme Court struck down the Colorado constitutional

amendment because it violated the equal protection clause of the federal Constitution.[81]

Now we faced a puzzle: a state can pass a law banning homosexual sex, as Georgia did, but a state cannot adopt a rule preventing cities from protecting homosexuals, as Colorado did. The matter was finally put to rest in 2003. In *Lawrence v. Texas*, the Court, again by a five-to-four vote, overturned a Texas law that banned sexual contact between persons of the same sex. The Court repeated the language it had used earlier in cases involving contraception and abortion. If "the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion" into sexual matters. The right of privacy means the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." It specifically overruled *Bowers v. Hardwick*.[82]

In 2003, the same year as the *Lawrence* decision, the Massachusetts Supreme Judicial Court decided, by a four-to-three vote, that gays and lesbians must be allowed to be married in the state.[83] In response, the Massachusetts legislature passed a bill that would amend that state's constitution to ban gay marriage. But that amendment required another ratification vote, which took place in 2007, and the amendment was defeated. In the mid-2000s, while Massachusetts legalized same-sex marriage and officials in other states considered doing the same, 13 states amended their state constitutions to prohibit or further restrict it. State by state, a complicated set of political and legal actions and counteractions had begun.

For instance, in California, the mayor of San Francisco began issuing marriage licenses to hundreds of gay couples. In 2004, the California Supreme Court overturned the mayor's decisions. The next year, the state legislature voted to make same-sex marriages legal, but Governor Arnold Schwarzenegger vetoed the bill. In 2008, the state's voters approved a ballot measure, Proposition 8, banning gay marriage. But, in 2010, a federal district judge overturned that vote. After a federal appeals court put the lower federal court's decision on hold, a case concerning Proposition 8 made its way before the U.S. Supreme Court.

In March 2013, the Court heard oral arguments in each of two same-sex marriage cases. In *Hollingsworth v. Perry*, the central issue was the constitutionality of California's Proposition 8: Does the Proposition 8 ban on same-sex marriage violate the Constitution's "equal protection" or other provisions? In *United States v. Windsor*, the central issue was the constitutionality of the Defense of Marriage Act (DOMA), a 1996 federal law that bars the federal government from recognizing same-sex marriage couples in relation to health, tax, and other benefits that it affords to heterosexual married couples: Does the DOMA violate the Constitution by depriving all persons who are legally married under the laws of their respective states the same recognition, benefits, and rights, and is same-sex marriage a fundamental right that all states must respect?

In June 2013, the Court issued opinions that in each case were widely understood as victories for same-sex marriage proponents, but that also in each case left the central constitutional questions for another day. In the Proposition 8 case, the Court held, by a five-to-four majority, that the private parties who brought the suit did not have standing to defend the law in federal court after California state officials had declined to do so. The practical effect was to let stand the lower federal court's decision striking down Proposition 8 as unconstitutional and thereby overturn the ban on same-sex marriage in California without, however, affecting laws in other states that prohibit same-sex marriage. In the more significant DOMA case, the Court held, by a five-to-four majority, that the 1996 law was unconstitutional because it deprived gay couples married in states where same-sex marriage is legal of the same federal health, tax, and other benefits that heterosexual married couples receive. But the Court stopped far short of declaring that same-sex marriage is a fundamental right that all states must respect. Still, in the months following

LANDMARK CASES | Gay Rights

- ***Boy Scouts of America v. Dale* (2000):** A private organization may ban gays from its membership.
- ***Lawrence v. Texas* (2003):** State law may not ban sexual relations between same-sex partners.
- ***United States v. Windsor* (2013):** Gay couples married in states where same-sex marriage is legal must receive the same federal health, tax, and other benefits that heterosexual married couples receive.
- ***Obergefell v. Hodges* (2015):** Same-sex couples have a constitutional right to marry.

Justin Sullivan/Getty Images

IMAGE 6-11 Proposition 8 opponents celebrated a ruling to overturn the initiative, which had denied same-sex couples the right to marry in the state of California.

the Court's decisions on Proposition 8 and the DOMA, new legal challenges to laws banning same-sex marriage were launched in a half-dozen states. In 2015, the Court ruled, five to four, in *Obergefell v. Hodges* that gay marriage is constitutional.

Thus far, the Court has continued to treat sexual orientation cases involving private groups differently from the way that it has treated such cases involving government agencies or benefits. The Court has maintained that private groups are free to exclude homosexuals from their membership. For example, in 2000 the Court decided, by a five-to-four vote, that the Boy Scouts of America could exclude gay men and boys because that group had a right to determine its own membership.[84] In May 2013, following more than a decade of controversy over the decision and the policy, the Boy Scouts of America announced that it would admit openly gay boys but continue to exclude openly gay men from leadership and membership in the organization. Two years later, the organization lifted this ban, and in 2017, it announced that transgender boys may participate in Scout programs.

Overall, such changes reflect not only an evolving understanding of the Constitution and other laws but also broad shifts in social norms and mores. A generation ago, the American Psychological Association classified homosexuality as a mental disorder (that practice was ended in 1973), and openly gay individuals were extremely rare in most parts of the country. Today, not only are many leading Americans openly gay, but society has become far more accepting of gays and lesbians in nearly all walks of life. As we discuss in Chapter 7, there has been a sea change in public opinion on gay rights, and now many rights for gays and lesbians—including the right to marry—have majority support among the U.S. public. (See the Policy Dynamics box in this chapter on page 147.) While the Supreme Court does not always respond to public opinion, it does reflect these sorts of broad social shifts in norms and attitudes.

6-5 Looking Back—and Ahead

The civil rights movement in the courts and in Congress profoundly changed the nature of African American participation in politics by bringing Southern blacks into the political system so they could become an effective interest group. The decisive move was to enlist Northern opinion in this cause, a job made easier by the Northern perception that civil rights involved simply an unfair contest between two minorities: Southern whites and Southern blacks. That perception changed when it became evident the court rulings and legislative decisions would apply to the North as well as the South, leading to the emergence of Northern opposition to court-ordered busing and affirmative action programs.

By the time this reaction developed, the legal and political system had been changed sufficiently to make it difficult—if not impossible—to limit the application of civil rights laws to the special circumstances of the South or to alter by legislative means the decisions of federal courts. Though the courts can accomplish little when they have no political allies (as revealed by the massive resistance to early school-desegregation decisions), they

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

Support for Gay Rights: On the Way to Majoritarian?

Some ideas about public policy grab media attention, garner political support, and go on to become public laws; other ideas never even make it on to the "public agenda." Political scientists have many different theories, taxonomies, and models about the policy process. In Chapter 1, we outlined our way of classifying and explaining the politics of different issues: majoritarian politics, client politics, interest group politics, and entrepreneurial politics (see Chapter 1, pages 12–15). First, take a moment now to reflect on what you have learned so far in this chapter about the policy dynamics surrounding the civil rights laws that have affected all Americans, most especially African Americans, other minorities, and women. How might you begin to characterize the politics of the changes in law and policy that expanded civil rights for each group?

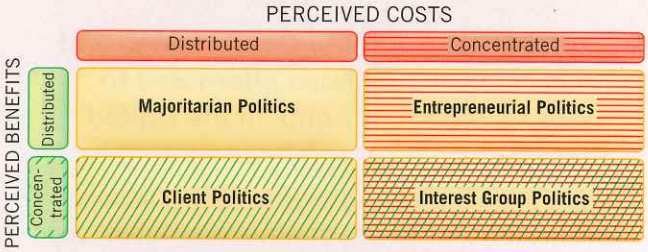
Next, how might you explain the still-unfolding politics of gay rights? This much seems clear: the politics of the issue have changed in recent years. For example, when President Clinton tried lifting the ban on gays in the military in 1993, the political reaction among both the public at large and leaders in both parties caused him in the first instance to back off the plan, and in the next instance to support not only the "Don't Ask, Don't Tell" (DADT) policy for the military but also the Defense of Marriage Act (DOMA) of 1996. When he came to office in 2009, President Obama supported both DADT and DOMA. But by 2013 he had lifted the ban on gays in the military and supported the repeal of DOMA. In June 2013, the Supreme Court declared that DOMA was unconstitutional, and in June 2015, it declared that gay marriage was legal (see pages 145–146).

In the past 20 years, public opinion has flipped completely on this issue. In 1996, 27 percent of the public supported gay marriage and 68 percent were opposed. Today, 61 percent support gay marriage and 37 percent oppose. As we will discuss in Chapter 7, support for gay marriage is strongly predicted by age, with younger voters being more supportive. But today all age groups show majority support for this policy. Even among those ages 65 and older, 53 percent support same-sex marriage. In 2012, Tammy Baldwin (D-WI), a seven-term member of the U.S. House of Representatives, became the first openly gay politician elected to the U.S. Senate.

Public opinion data on other gay rights issues shows a similar, but less marked, shift over time. Are these issues now becoming less like "culture war" issues featuring battles between diametrically opposed interest groups and more like majoritarian issues such as Social Security or Medicare? What role will the public, the mass media, and policy entrepreneurs play in the fight to end DADT, DOMA, and other issues? How will these factors shape this issue in the years to come?

Chip Somodevilla/ Staff/Getty Images

IMAGE 6-12 U.S. Senator Tammy Baldwin from Wisconsin is the first openly gay person to win election to Congress (in both chambers—she was elected to two terms in the U.S. House of Representatives before running successfully for the Senate in 2012).



▶ **PRACTICE POLITICAL SCIENCE** Explain how presidents, Congress, and the U.S. Supreme Court shaped the expansion of gay rights prior to the 2015 U.S. Supreme Court decision that legalized same-sex marriage in all 50 states. Explain how changing public opinion and cultural factors interacted to affect these policymaking changes on issues related to gay rights.

Sources: Emanuella Grinberg, "Wisconsin's Tammy Baldwin Is First Openly Gay Person Elected to Senate," CNN.com, November 7, 2012; Gallup, "Support for Same-Sex Marriage Remains High at 61%," 19 May, 2016. http://www.gallup.com/poll/191645/americans-support-gay-marriage-remains-high.aspx.

can accomplish a great deal, even in the face of adverse public opinion, when they have some organized allies. The feminist movement has paralleled in organization and tactics many aspects of the black civil rights movement, but with important differences. Women sought to repeal or reverse laws and court rulings that in many cases were ostensibly designed to protect rather than subjugate them. The conflict between protection and liberation was sufficiently intense to defeat the effort to ratify the Equal Rights Amendment.

Among the most divisive civil rights issues in American politics are abortion and affirmative action. From 1973 to 1989, the Supreme Court seemed committed to giving constitutional protection to all abortions within the first trimester; since 1989, it has approved various state restrictions on the circumstances under which abortions can be obtained.

There has been a similar shift in the Court's view of affirmative action. Though it will still approve some quota plans, it now insists they pass strict scrutiny to ensure they are used only to correct a proven history of discrimination, they place the burden of proof on the party alleging discrimination, and they are limited to hiring and not extended to layoffs. Congress has modified some of these rulings with new civil rights legislation.

Finally, while it remains to be seen whether both court doctrines and legislative initiatives on gay rights will follow patterns like those that expanded civil rights protections for African Americans, other minorities, and women, it is clear that the policy dynamics surrounding same-sex marriage are quite different from what they were only a dozen years ago (see Policy Dynamics: Inside/Outside the Box, page 147).

LEARNING OBJECTIVES

6-1 Explain how Supreme Court rulings and federal legislation have attempted to end racial discrimination in the United States.

After the Supreme Court ruled that school segregation was unconstitutional, Congress and the executive branch debated over how they would implement the decision. But in time, these institutions began spending federal money and using federal troops and law enforcement officials in ways that greatly increased the rate of integration.

6-2 Explain how Supreme Court rulings and federal legislation have attempted to advance women's rights in the United States.

While court rulings and laws state that treating men and women differently in several areas, such as pay and membership in professional organizations, is discrimination, the Supreme Court also says a difference in treatment can be justified constitutionally if the difference is fair, reasonable, and not arbitrary. Sex differences need not meet the "strict scrutiny" test. It is permissible to punish men for statutory rape, to create single-sex public schools (so long as they meet certain requirements), and to draft men without drafting women.

6-3 Discuss the evolution of affirmative action programs after the Supreme Court and Congress ended racial segregation.

To overcome the effects of past discrimination, many institutions, including businesses, schools, and the federal government, have created programs that specifically aim to increase the number of minorities or women in their organization. In some cases, the Supreme Court has upheld affirmative action programs, but more recent Court rulings have overturned such programs or said they may not be necessary in the near future.

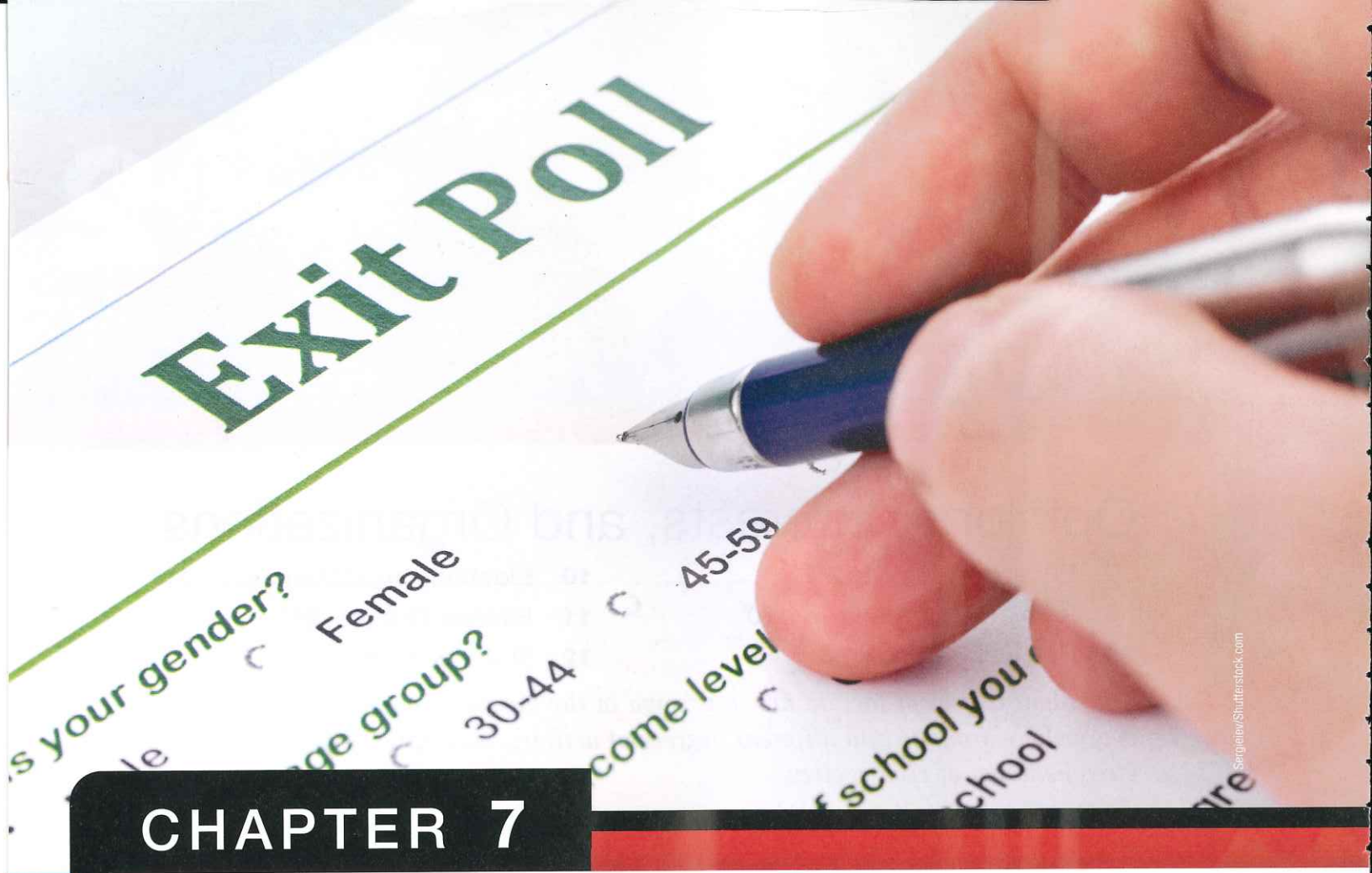
6-4 Discuss how Court doctrine and public opinion on gay rights have changed in the 21st century.

As late as 1986, the Supreme Court upheld a state law forbidding certain homosexual acts. But in 2003 the Court struck down state laws banning consensual sexual relations between same-sex partners. In the 2000s, while some states legalized same-sex marriage and other states outlawed it, public opinion shifted in favor of allowing gays and lesbians to marry, rising from 35 percent, a minority, in favor in 2001 to 47 percent, a plurality, in favor in 2012.

In 2013, the Court struck down as unconstitutional the federal Defense of Marriage Act, declaring that the federal government must provide gay couples married in states where same-sex marriage is legal with the same health, tax, and other benefits that heterosexual married couples receive. In 2015, the Supreme Court ruled that same-sex marriage is constitutional.

6-5 Summarize how American political institutions and public opinion have expanded civil rights.

American civil rights have expanded through the joint efforts of political institutions and public opinion. In some areas, public opinion has mobilized the national government to act, whereas in other areas, court rulings and legislation have spurred public reaction.



Sergiev/Shutterstock.com

CHAPTER 7

Public Opinion

KEY OBJECTIVE OF THIS CHAPTER

- *Public opinion polling and polling results impact elections, political behavior, and the policy process and therefore demands our critical scrutiny.*

KEY TAKEAWAY FROM THIS CHAPTER

- The media's report of public opinion data that can impact elections and policy debates is affected by such scientific polling types and methods as opinion polls, benchmark or tracking polls, and entrance and exit polls, as well as sampling techniques, identification of respondents, mass survey or focus group, and sampling error. The type and format of questions can also have an impact.

Defined simply, **public opinion** refers to how people think or feel about particular things. In this chapter, we take a close look at what "public opinion" is, how it is formed, and how public opinion influences government policy. In later chapters, we examine the workings of political parties, interest groups, and government institutions and consider what effect they have on whether public opinion affects government policy. Let's begin this journey by recognizing how perspectives on the role public opinion is supposed to play in the country's representative democracy have changed since the nation was founded.

Steve Debenport/E+/Getty Images

IMAGE 7-1 Exit polls are conducted on Election Day to collect data on what voters think about candidates, issues, and other related topics.

THEN The Founding Fathers believed that most average citizens lacked the time, information, energy, interest, and experience to decide on public policy. The Constitution's chief architect, James Madison, argued that direct popular participation in the decisions of government was a recipe for disaster, and that "it is the reason, alone, of the public that ought to control and regulate the government."[1] Madison and the other Framers looked to "the representatives of the people," most particularly the U.S. Senators who were not directly elected until 1913, "as a defense to the people against their own temporary errors and delusions."[2]

NOW Try imagining any candidate for the U.S. Senate or, for that matter, for any federal, state, or local office, winning election or reelection, or maintaining high public approval ratings after he or she had questioned "rule by the people" or doubted the majority's opinions the way that the Framers routinely, matter-of-factly, and publicly did.

Ironically, today, about the only circumstances under which elected leaders can get away with sounding the least bit that way is when public opinion polls get the public talking about how little most people know about government or civics. For example, in 2016, a study from the Annenberg Public Policy Center at the University of Pennsylvania found that only 26 percent of Americans could name the 3 branches of government, and nearly 40 percent did not know which branch had the constitutional authority to declare war. While almost 9 in 10 Americans could identify Donald Trump and Hillary Clinton as the 2016 presidential nominees, fewer than 40 percent could identify Mike Pence and Tim Kaine as the vice-presidential nominees.[3] This study is only the latest to show that most Americans know little about the basic functions and figures of American democracy. Later in the chapter, we'll consider whether this lack of information matters for politics and policy.

public opinion *How people think or feel about particular things.*

In the Gettysburg Address, Abraham Lincoln said the United States has a government "of the people, by the people, and for the people." That suggests the government should do what the people want. If that is the case, it is puzzling that:

- Today, the federal government is running budget deficits of over a trillion dollars a year, but most people want a balanced budget.
- Large majorities called for stricter gun control legislation in the wake of the 2012 Sandy Hook school shooting, yet no such national reforms passed.
- Most people want to limit the role of money in politics, but each election cycle, more and more is spent on campaigns.

As we will see later in the chapter, public policy typically follows public opinion, but not always, as these examples attest. Some people, reflecting on these gaps between what the government does and what the people want, may become cynical and think our system is democratic in name only. That would be a mistake. Government policy often seems to be at odds with public opinion for several very good reasons.

First, it bears repeating that the Framers of the Constitution did not try to create a government that would do from day to day "what the people want." They created a government for the purpose of achieving certain substantive goals. The Preamble to the Constitution lists six of these: "to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."

poll *A survey of public opinion.*

random sampling *Method of selecting from a population in which each person has an equal probability of being selected.*

One means of achieving these goals was popular rule, as provided for by the right of the people to vote for members of the House of Representatives (and later for senators and presidential electors). But other means were provided as well: representative government, federalism, the separation of powers, a Bill of Rights, and an independent judiciary. These were all intended to be checks on public opinion. In addition, the Framers knew that in a nation as large and diverse as the United States, any such thing as "public opinion" would be rare; rather, there would be many "publics" (i.e., factions) holding many opinions. The Framers hoped the struggle among these many publics would protect liberty (no one "public" would dominate) while at the same time permit the adoption of reasonable policies that commanded the support of many factions.

Second, it is not easy to know what the public thinks. These days we are so inundated with public opinion polls that we may imagine that they tell us what the public believes. That may be true on a few rather simple, clear-cut, and widely discussed issues, but it is not true with respect to most matters on which the government must act. The best pollsters know the limits of their methods, and citizens should know them as well.

7-1 What Is Public Opinion?

Some years ago, researchers at the University of Cincinnati asked 1,200 local residents whether they favored passage of the Monetary Control Bill. About 21 percent said they favored the bill, 25 percent said they opposed it, and the rest said they hadn't thought much about the matter or didn't know. But there was no such thing as the Monetary Control Bill. The researchers made it up. About 26 percent of the people questioned in a national survey also expressed opinions on the same nonexistent piece of legislation.[4] In many surveys, large majorities favor expanding most government programs *and* paying less in taxes (see the discussion in Chapter 18). On some issues, the majority in favor one month gives way to the majority opposed the next, often with no obvious basis for the shift. This raises an important question: How much confidence should we place in surveys that presumably tell us "what the American people think" about legislation and other issues?

The first major academic studies of public opinion and voting, published in the 1940s, painted a distressing picture of American democracy. The studies found that, while a small group of citizens knew a lot about government and had definite ideas on many issues, the vast majority knew next to nothing about government and had only vague notions of even much-publicized public policy matters that affected them directly.[5] In the ensuing decades, however, other studies painted a somewhat more reassuring picture. These studies suggested that, while most citizens are poorly informed about government and care little about most public policy issues, they are nonetheless pretty good at using limited information (or cues) to figure out what policies, parties, or candidates most nearly reflect their values or favor their interests, and then acting (or voting) accordingly.[6]

The more closely scholars have studied public opinion on particular issues, the less uniformed, indifferent, or fickle it has seemed to be. For example, a study by political scientist Terry M. Moe analyzed public opinion concerning whether the government should provide parents with publicly funded grants, or vouchers, that they can apply toward tuition at private schools. He found that although most people are unfamiliar with the voucher issue, "they do a much better job of formulating their opinions than skeptics would lead us to expect." When supplied with basic information, average citizens adopt "their positions for good substantive reasons, just as the informed do."[7] As this example suggests, and as we will see in this chapter, while there are important limits to what public opinion can tell us, it is less fickle and transient than it seems at first glance.

How Do We Measure Public Opinion?

If properly conducted, a survey of public opinion—popularly called a **poll**—can capture the opinions of 300 million citizens by interviewing as few as 1,500 of them. To draw valid conclusions from such a poll, two particular ingredients are needed: a properly drawn sample and carefully worded questions.

No poll, whatever it asks and however it is worded, can provide us with a reasonably accurate measure of how people think or feel unless the persons polled are selected via **random sampling**, a process through which any given voter or adult has an equal chance of being interviewed. Through a process called stratified or multistage area sampling, the pollster makes a list of all the geographical units in the country—say, all the counties—and groups (or "stratifies") them by the size of their population. The pollster then selects at random units from each group or stratum in proportion to its total population. Within each selected county, smaller and smaller geographical units (down to particular blocks or streets) are chosen, and then, within the smallest unit, individuals are selected at random (by,

CONSTITUTIONAL CONNECTIONS | Majority Opinion and Public Policy

For the most part, the Framers of the Constitution thought that public opinion should play only a limited and indirect role in making public policy (see Chapters 1 and 2). They favored representative democracy over direct democracy. They doubted that most people would have the time, energy, interest, information, or expertise to deliberate and decide well on policy matters. They worried that majority opinion would often be fickle, factious, and overly influenced by short-term thinking. Thus, in *Federalist* No. 63, James Madison reflected on the need to defend "the people against their own temporary errors and delusions" and the "tyranny of their own passions." On the other hand, however, the Framers believed that while the opinions held by a temporary or "transient" majority should carry little weight with elected policymakers, the opinions expressed by a persistent majority—for example, a majority that persists over the staggered terms of House and Senate and over more than a single presidential term—should be heard and, in many (though not in all) cases heeded. When it came to civil liberties and civil rights, Madison and the other Framers were not willing to empower even persistent majorities or subject fundamental freedoms to a popular vote. Still, they believed that, on most public policy issues, a truly representative democratic government would and should enact the policies persistently favored by most people.

for example, choosing the oldest occupant of every fifth house). These methods were initially developed to conduct in-person polls. Such polls are extremely expensive and time-intensive to conduct, so pollsters gradually shifted to interviewing respondents by (landline) telephone. Today, with the decline of landlines and the rise of cell phones, leading polling firms still do some interviews via landlines, but also do many via cell phones as well, though the basic idea of random sampling remains the same.

If this process is repeated using equally randomized methods, the pollster might get slightly different results. The difference between the results of two surveys or samples is called **sampling error**. For example, if one random sample shows that 70 percent of all Americans approve of the way the president is handling the job, and another random sample taken at the same time shows that 65 percent do, the sampling error is 5 percent.

When properly conducted, polls are quite accurate, though certainly not infallible. Since 1952, most major polls have in fact picked the winner of the presidential election. In 2016, nearly all of the polls predicted that Hillary Clinton would win the popular vote—as she did by almost 2.9 million votes—though they did not foresee that she would lose the election by not winning 270 electoral votes (we will return to this point in Chapter 10). Likewise, **exit polls**—interviews with randomly selected voters conducted at polling places on election day in a representative sample of voting districts—have proven to be quite accurate. While errors in prediction occasionally occur, especially in close elections, in general, polling is typically accurate.

For any population over 500,000, pollsters need to make about 15,000 telephone calls to reach a number of respondents (technically, the number computes to 1,065) sufficient to ensure that the opinions of the sample differ only slightly (by plus or minus 3 percent) from what the results would have been had they interviewed the entire population from which the sample was drawn. That can be very expensive to do. As a result, firms have begun to investigate other methods of conducting polls, such as recruiting volunteers online. Such methods have worked well in some instances, but not in others. Whether such techniques can be shown to be as high quality as standard random sampling remains to be seen.[8]

sampling error *The difference between the results of random samples taken at the same time.*

exit polls *Polls based on interviews conducted on election day with randomly selected voters.*

question wording *The way in which survey questions are phrased, which influences how respondents answer them.*

How Do We Ask Questions?

The first step to obtaining quality information from a poll is to draw the sample correctly. The second is to ask the questions correctly. Pollsters aim to write their questions clearly and plainly, so as to avoid ambiguity and loaded language. They do so because how they ask the questions determines the answers they get.

Survey researchers spend considerable time worrying about **question wording**: the specific phrases used to describe policies in survey questions. For example, in

one canonical study, researchers conducted an experiment. Half of the respondents were asked how much they supported government welfare programs, and half were asked how much they supported government aid to the poor. Researchers expected the two items to give very similar results, as welfare programs are the government's efforts to aid the poor. However, when they conducted the study, the two items gave very different results, with many more respondents supporting aid to the poor.[9] When researchers did a follow-up study to investigate this discrepancy, they found a surprising result: while researchers saw welfare and aid to the poor as the same thing, respondents did not. For respondents, government welfare programs meant policies such as food stamps or public housing. But aid to the poor included not only those items, but also other policies such as homeless shelters, soup kitchens, and food banks. Respondents viewed these latter programs more positively, and hence were more supportive of aid to the poor.[10] By equating welfare and aid to the poor, researchers had set up a misleading comparison.

The debate over abortion rights provides another example of how question wording can yield flawed conclusions. Imagine that we wanted to answer a seemingly basic question about abortion attitudes: Are more Americans pro-life or pro-choice? Many surveys purport to answer this question. In a recent one, 68 percent of Americans said the phrase "pro-choice" described them "very well" or "somewhat well." In that same survey, just a few questions later, 71 percent said the same thing about the phrase "pro-life."[11] As these numbers make clear, many respondents consider themselves *both pro-life and pro-choice*. Ordinary Americans' views on abortion are complex and not easily captured by these sorts of simplistic terms: Americans generally support the principles of choice, but want abortion to be limited to particular circumstances.[12] They are both pro-choice and pro-life, and do not fit neatly into one category or the other. To actually understand where the public stands on this issue—or any other one—we need to avoid asking questions that oversimplify difficult policy issues.

Not only can the wording of a question influence the results, but so can the order in which we ask the items. For example, in one study, researchers wanted to understand public support for gay rights, and asked about both gay marriage and civil unions. If they asked about civil unions before gay marriage, 49 percent supported civil unions. But if they asked about gay marriage first, support for civil unions increased to 56 percent.[13] Why the shift? Some respondents seem to be uneasy with full gay marriage, but could support civil unions as a middle ground. By asking about gay marriage first, and then asking about civil unions, it allowed respondents to see civil unions as a compromise position. But when civil unions were asked first, respondents lacked this contrast effect, and hence support for them was lower. Asking the questions in a different order affected the results.

You might be thinking at this point that we can never trust public opinion data, but that fear is unwarranted. Public opinion data can offer us very valuable insights into what the public wants from its leaders and its government, but to do that, a survey needs to be conducted with care. When you see a poll reported in the news, carefully scrutinize the questions and look for particular wordings or order effects that could affect the results. Look for other high-quality polls conducted around the same time, and see whether they offer similar results. If you find multiple polls using different, well-worded questions that yield similar results, then you have found something you can trust. In contrast, if just one poll with an oddly worded question shows support for a particular policy, then you should be more skeptical of that result.

7-2 What Drives Opinion?

To understand public opinion and how it shapes government policy, we need to understand why it differs across individuals. What factors make people hold different attitudes and beliefs? A complete answer to that question is beyond the scope of this book (and is not really even knowable), but political scientists focus on three main factors that shape attitudes: political socialization and the family, demographic factors, and individuals' partisanship and ideology. While these are not the only factors that explain why people believe what they do (e.g., the mass media also matters, as we discuss in Chapter 12), they are among the most important.

Political Socialization and the Family

For a long time, scholars have known that people acquire their political views from their families. The great majority of high school students know the party affiliation of their parents, and only a tiny minority of children supports a party opposite that of their parents.[14] Likewise, children's views on the issues tend to be broadly similar to those of their parents. Children do not automatically adopt the views of their parents, but rather, just as parents influence a child's religion or general outlook on life, they influence a child's political views as well. We refer to this process as **political socialization**. A child's first experience

with politics is in the home, and so it should not be surprising that the parents' views shape the child's views.

This happens via two mechanisms. First, some evidence shows that some political attitudes can be passed genetically from parents to child, just like height or eye color.[15] We should note that while some political scientists accept this evidence, others dispute it.[16] The fairest thing to say is that there is suggestive evidence for the genetic transmission of political traits, but more work is needed to definitively establish it. Second, and much less controversially, scholars argue that children learn from the political cues provided by their parents. If the parents sit around the dinner table—or the evening television—and discuss politics and global affairs, the children learn where their parents stand on the issues of the day (and where the children think they themselves should stand). Such effects are especially pronounced in highly politicized families where politics is a more frequent topic of conversation.[17]

Of course, to say that parents and the family greatly shape one's political outlook is not to say that they determine it completely. The political environment in which they come of age also heavily influences children's attitudes. Political scientists call this the **impressionable years hypothesis**: Young people's political attitudes are very strongly influenced by what happens during their formative years (roughly their mid-teens through their mid-20s, when they are in high school and college).[18] For most people, this period is the first time they really notice politics, and these initial events shape how they see the political world. Those who came of age in the 1960s, during the Civil Rights movement, the protests against the Vietnam War, and student unrest, saw the political world fundamentally differently from their parents, who came of age during the years immediately after World War II. Likewise, today's students, who do not remember a world before 9/11, see the political world differently from their parents (who came of age during the end of the Cold War). Early experiences shape political attitudes and persist throughout the life cycle.

political socialization *Process by which one's family influences one's political views.*

impressionable years hypothesis *Argument that political experiences during the teens and early 20s powerfully shape attitudes for the rest of the life cycle.*

We can examine political attitudes over the life cycle to see this. Americans who were born in 1941, and who would be 77 in 2018, came of age during the presidency of Dwight Eisenhower, a popular Republican. As a result, these voters are consistently more Republican than Democratic, even today. However, those born 11 years later in 1952 (and would be age 66 in 2018) are somewhat more Democratic, having grown up during the Great Society with President Lyndon Johnson. Likewise, young voters today, who first experienced politics during the Obama years, are more Democratic. But those who came of age during the Ronald Reagan and George H. W. Bush years (the parents of today's young adults) are more Republican.[19] The early experiences during our formative years powerfully shape our political views.

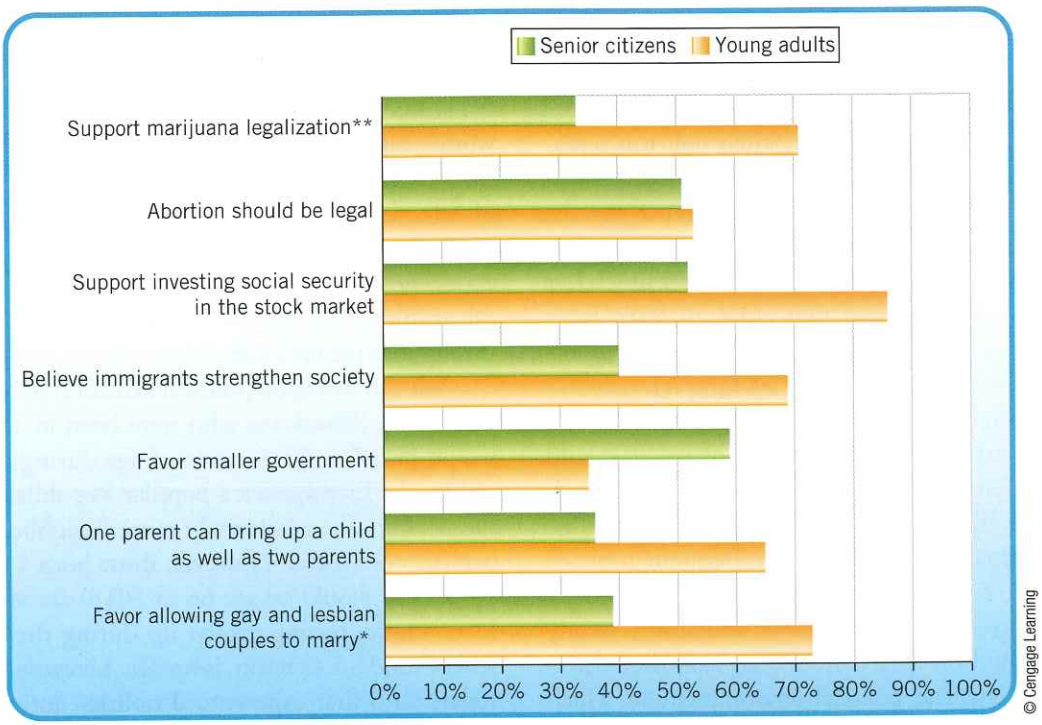
This helps us understand that it is not the case that young people are more liberal and older people are more conservative. Compared with older Americans, for example, citizens aged 18 to 29 are more likely to favor gay marriage and to support a stronger safety net (the liberal view), but also more likely to favor letting people invest some of their Social Security contribution in the stock market (the conservative view). Furthermore, on other salient issues, such as abortion and gun control, differences are nonexistent to very slight. As we see in Figure 7.1, the reality of age differences in opinion is more complex than many suppose.

The largest gaps between younger and older voters come from their different attitudes toward government's regulation of appropriate behavior. Such differences stem from broad changes in society. For example, when today's senior citizens were growing up, family structures were more traditional: there were two parents, the man worked, and the woman stayed home. Different arrangements—single parents, divorce, and so forth—were stigmatized. As a result, these older voters are more likely to favor traditional gender roles and family structures.[20] Even more strikingly, a generation ago, homosexuality was criminalized and seen as a mental disorder. But today, it is broadly accepted and part of society. It should not be terribly surprising, then, to learn that support for gay rights,

Planetpix/Alamy Stock Photo

IMAGE 7-2 A family watches a speech by former Senator Rick Santorum (R-PA) during the 2012 South Carolina primary. Exposure to politics as a young person has a strong effect on one's political attitudes.

FIGURE 7.1 **Opinion Gaps Between Young Adults and Senior Citizens**



Source: Pew Research Center, "The Generation Gap and the 2012 Election," November 2011; *From Pew Research Center, "Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed," June 2015; **From Pew Research Center, "Support for Marijuana Legalization Continues to Rise," October 2016.

especially same-sex marriage, is markedly higher among younger voters (see Figure 7.1). Both of these examples highlight the importance of the impressionable years and socialization: Because today's teens and seniors grew up in vastly different environments, they have vastly different attitudes.

gender gap *Difference in political views between men and women.*

This same pattern of higher youth support holds true even in subgroups opposed to gay marriage. For example, overall, white evangelical Protestants are sharply opposed to same-sex marriage (only 27 percent support same-sex marriage). But even among this group, younger voters are much more supportive: Millennial white evangelicals are twice as likely to support same-sex marriage as senior citizen white evangelicals (43 versus 19 percent).[21] As younger voters continue to replace older voters in the electorate, attitudes on same-sex marriage and similar issues will continue to evolve.

Demographic Factors

The family, however, is not the only factor that shapes why we believe what we believe. Our demographic traits—our race and ethnicity, gender, age, social class/income, religion, and so forth—also powerfully shape and influence our political attitudes. While many different demographic factors shape political attitudes, we consider only a few of the most salient ones here in the interest of space: gender, race and ethnicity, religion, and social class/income. Together, these demographic factors highlight how who we are shapes what we believe.

The Gender Gap

Journalists often point out that women have "deserted" Republican candidates to favor Democratic ones. In some cases, this is true. But it would be equally correct to say that men have "deserted" Democratic candidates for Republican ones. The **gender gap** is the difference in political views between men and women. As we see in Chapters 9 and 10, women are more likely than men to identify as Democrats and to vote for Democratic candidates.

Behind the gender gap in partisan self-identification and voting are differences between men and women over prominent political issues and which issues matter most. Many initially assumed that abortion drove the gender gap, but this turns out to be incorrect. On average,

there have consistently been only very modest differences between men and women on abortion over time. Instead, two other factors drive the gender gap: women hold more liberal social welfare and foreign policy attitudes than men, and they are more likely to see social welfare issues as more important.[22] Women are more likely than men to favor activist government, universal health care, environmental protection regulations, antipoverty programs, and laws supporting same-sex marriage, and are less likely than men to favor cutting taxes at the expense of social services or to support military interventions. Figure 7.2 shows these trends graphically.

Race and Ethnicity

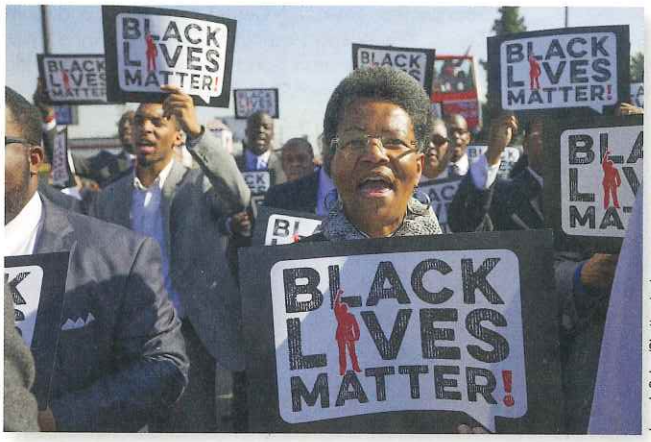
Perhaps the most striking political difference between African Americans and whites is that African Americans are overwhelmingly Democratic, and have been so since the Civil Rights movement in the 1960s[23]; we return to this point more in Chapters 9 and 10.

Blacks and whites hold many similar political attitudes. Both blacks and whites want our courts to be tougher in handling criminals, oppose the idea of making abortion legal in all cases, agree that government is typically wasteful, and think that everyone has it in his or her own power to succeed.[24] Similarly, African Americans and whites both strongly agree that blacks and whites can get along in America.[25]

There are, however, sharp differences between white and black attitudes on other public policy questions, as we see in Figure 7.3. For example, blacks are much more likely than whites to support affirmative action and to oppose the use of military force. African Americans are also, in general, more supportive of efforts to help the poor and disadvantaged. But perhaps the largest black-white opinion gap concerns attitudes toward the criminal justice system. African Americans are much more likely to think that the criminal justice system is unfair and is biased against minorities.

Why are African Americans so much more negative toward the criminal justice system? Much of the answer stems from their differential experiences with it. African Americans are more likely to have had negative interactions with the criminal justice system, as have their African American friends and family.[26]

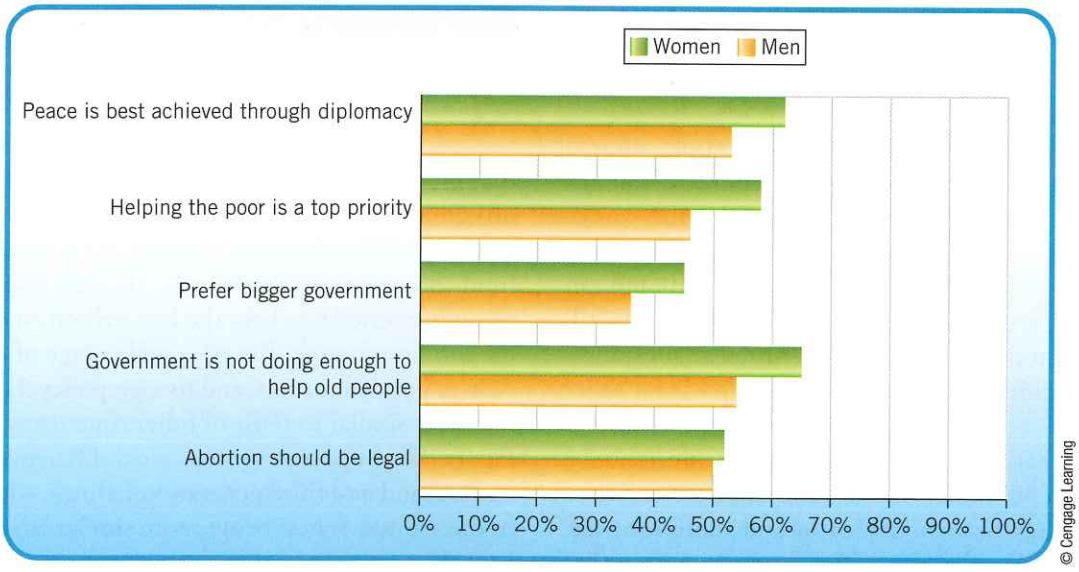
The fact that numerous African Americans have been killed by police or died in police custody in recent years—such as Michael Brown, Eric Garner, Freddie Gray, Tamir



Joseph Sohm/Shutterstock.com

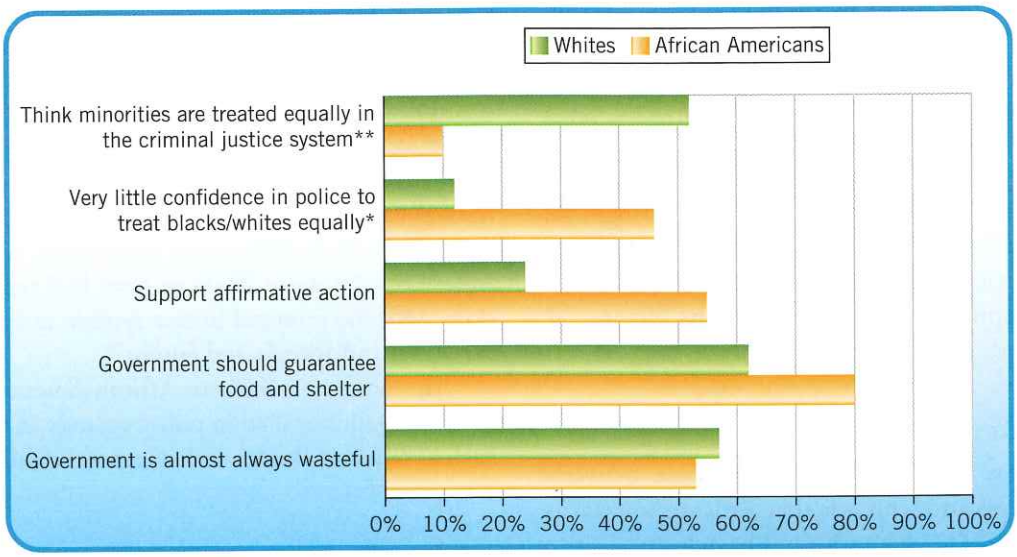
IMAGE 7-3 The Black Lives Matter movement has highlighted issues of racial equality in recent years.

FIGURE 7.2 **The Gender Gap in Public Opinion**



Source: Pew Research Center, "The Gender Gap: Three Decades Old, As Wide As Ever," March 2012.

FIGURE 7.3 Public Opinion in Black and White

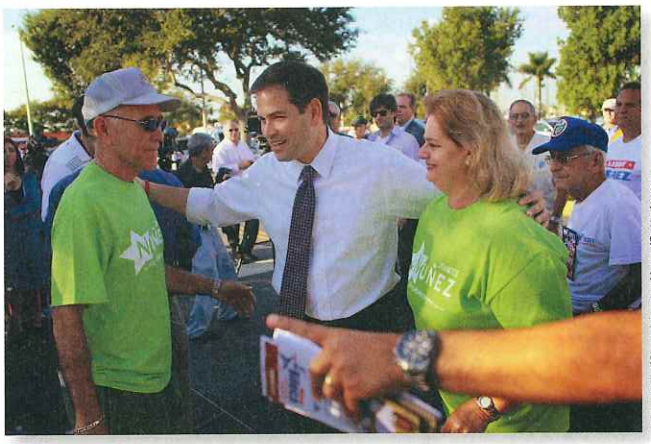


Source: Pew Research Center, "The Black and White of Public Opinion," October 2005. *From Pew Research Center, "Ferguson Highlights Deep Divisions Between Blacks and Whites in America," November 2014. **From Dan Balz and Scott Clement, "On Racial Issues, America Is Divided Both Black and White and Red and Blue," *Washington Post*, December, 2014.

Rice, Sandra Bland, Walter Scott, and numerous others—has brought this issue to the forefront of national discussions. These deaths helped to spark the Black Lives Matter movement and have led to numerous calls for reforms to policing and the criminal justice system. Partially as a result of this increased attention to issues of race, a larger number of white respondents today say that racism is a big problem in American society. It is true that African Americans are much more likely to identify racism as a serious problem than whites are (73 versus 44 percent). But the percentage of whites saying racism is a big problem in American society has increased 17 percentage points since 2010.[27] This underlines an important truth about public opinion: it is dynamic, and it changes in response to changes in society.

But contemporary America is not simply limited to African Americans and whites; the country contains a multitude of ethnic groups from around the world. Most notably, Latinos are now the largest minority group in America, numbering more than 50 million people. While research on Latino public opinion is still in its infancy, today a growing body of research explores how Latinos differ—and how they do not—from other Americans.

We note that it is difficult to speak of "Latino" public opinion. With 50 million Latinos coming from a diverse array of countries throughout Central and South America, one cannot say that all Latinos share a particular point of view. That said, some broad patterns do emerge. On issues

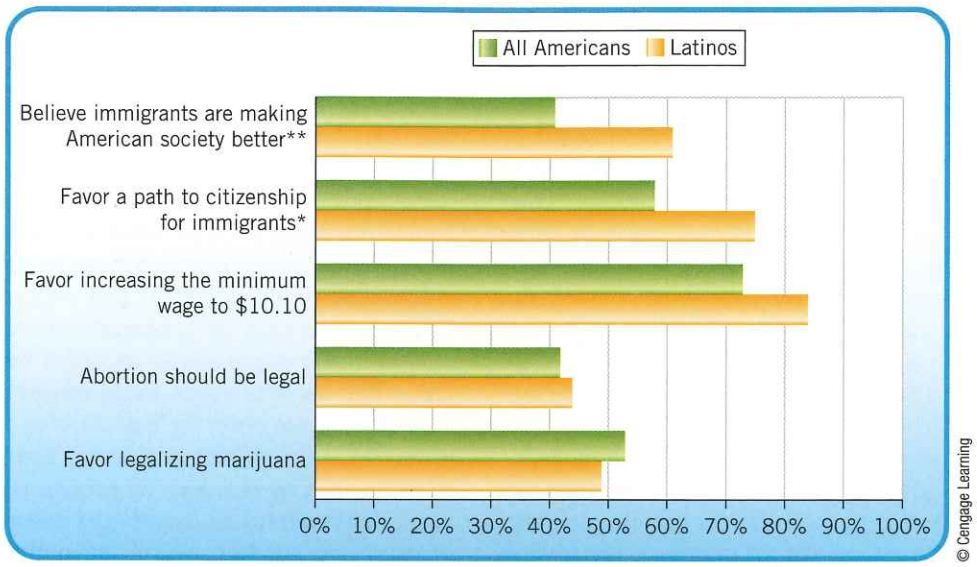


Joe Raedle/Getty Images News/Getty Images

IMAGE 7-4 Marco Rubio, the Hispanic son of exiles from Cuba, is a Republican elected by Florida to the U.S. Senate in 2010.

that most directly speak to the concerns and experiences of Latinos—issues such as immigration reform or bilingual education—Latinos' attitudes are markedly different from those of other Americans. They are also more likely to support efforts to help the less well off, such as raising the minimum wage. But on a wide range of other issues, such as jobs, education, and foreign policy, Latinos' views look very similar to those of other Americans, as we see in Figure 7.4. Important generational differences also exist, with second and third generation Latinos, who were born in the United States, being more similar to other Americans than first generation Latino immigrants, who came here from other nations.[28]

FIGURE 7.4 Latino Public Opinion



Source: Pew Research Center, "Latino Voters and the 2014 Midterm Elections: Geography, Close Races and Views of Social Issues," October 2014. *From Latino Decisions, "Latino Voter Attitudes Towards Immigration Reform Policy," January 2013. **From Pew Research Center, "Modern Immigration Wave Brings 59 Million to the U.S.," September 2015.

Religion

As we discussed in Chapter 4, Americans are a religious people, especially compared with the more secular nations of Western Europe. Given this religiosity, it is perhaps not surprising that religion shapes public opinion on many political issues. While we typically think that religious people are all on the conservative end of the spectrum, that is not in fact the case. As we will see, the relationship between religion and public opinion is more nuanced than this stereotype would suggest.

Fifty years ago, discussions of religion and politics focused more on differences between denominations, which at that time largely meant Protestants, Catholics, and Jews. Such divisions remain useful: In general, Jewish Americans, as well as African American Protestants, tend to remain on the left, evangelical (or born-again) Protestants are more on the right, and Catholics and mainline Protestants fall more in the middle of the ideological spectrum.

But in recent years, scholars have noticed another important division: the divide between those who are more religious and those who are less so. Those who are more religious are more conservative—often considerably more conservative—on issues of sex and the family, such as abortion and gay marriage.[29] For example, among Christians who attend church weekly (and hence are more religious), 39 percent support banning abortion in all circumstances, but among those who seldom or never attend worship services, that figure is only 11 percent.[30] As we saw above, evangelicals (most of whom take a conservative view on social issues) are strongly opposed to gay marriage. Such links are not terribly surprising: Many religious traditions, especially Christian traditions, take a conservative position on issues of reproduction and the family, so it is not surprising that religious individuals adopt them. Indeed, when asked, those who are highly religious say that their faith drives their position on these types of issues.[31] This suggests that the stereotype that highly religious people are more conservative is true at least some of the time.

Yet on other issues, we see a quite different pattern. How religious one is has no effect on attitudes toward immigration (controlling for other relevant demographics). And on the death penalty and support for environmental spending, those who are more religious are more *liberal* (i.e., more opposed to the death penalty and more supportive of environmental spending).[32] This stands in sharp contrast to the stereotype that religious individuals are always more conservative. But such findings should not surprise us: Many of these same faith traditions speak out against the death penalty and support greater environmental stewardship. For example, in 2010, the Southern Baptist Convention—the largest evangelical Christian denomination—denounced the government's handling of the Deepwater Horizon oil spill and called for greater efforts at environmental stewardship and conservation.[33] Likewise, some evangelical pastors have also begun promulgating a message more focused on helping the poor and feeding the sick than on abortion, gay marriage, and

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

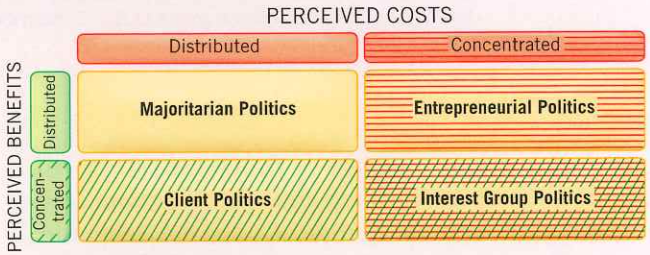
Immigration Reform: Client or Majoritarian Politics?

Immigration reform was one of the hot-button issues of the 2016 election, with Clinton and Trump taking vastly different positions on the issue—Trump promised to build a wall on the Mexican border and crack down on illegal immigrants, whereas Clinton pushed to give a pathway to citizenship for undocumented immigrants. But this divide is only the latest incarnation of an issue that stretches back many years, with similar debates occurring under Presidents Obama and Bush as well. Why is immigration reform such a politically charged topic?

While immigration reform is a complex and multifaceted issue, basically some want tougher immigration law enforcement and more focus on border security, and others want a path to citizenship for undocumented immigrants. The former are typically Republicans and the latter typically Democrats, though not always. Those who favor tougher immigration laws contend that people who entered the U.S. illegally should not be permitted to stay here. They say the federal government should focus on border protection and law enforcement, not a reward for law-breakers. Immigration reform, in their view, is client politics—the American public at large pays for illegal immigrants through providing them education and emergency medical services (pursuant to Supreme Court decisions). Providing a path to citizenship also means that people lose confidence that the federal government will uphold the law, so the long-term health of American democracy suffers to benefit a few.

Supporters of a "path to citizenship" present it as majoritarian politics—everyone, including undocumented immigrants, pays for this opportunity through hard work and taxes, and everyone benefits by ensuring an economically productive, just, and humane society. They also make a client politics case that the children of illegal immigrants should not suffer for their parents' mistakes and should have a path to citizenship; but these groups also make the majoritarian politics argument that the United States as a whole benefits from comprehensive immigration reform.

If an issue is perceived as client politics, then the group that benefits needs to be viewed as deserving of those benefits in order for legislation to pass. If an issue is viewed as majoritarian politics, then the legislation must be seen as being in the general public interest. Is immigration reform an example of client or majoritarian politics? How is it perceived by different groups and why? What will happen under the Trump administration remains to be seen.



▶ **PRACTICE POLITICAL SCIENCE** Refute the arguments made by opponents of a "path to citizenship." Refute the arguments made by proponents of a "path to citizenship." Support one of these perspectives using recent evidence from the enforcement of immigration laws.

school prayer.[34] Such efforts suggest that the relationship between religion and public opinion will continue to evolve in the 21st century.

Social Class and Income

Americans speak of "social class" with embarrassment. The norm of equality tugs at our consciences, urging us to judge people as individuals, not as parts of some social group (such as "the lower class"). Social scientists speak of "class" with confusion. They know it exists but quarrel constantly about how to define it: by income? occupation? wealth? schooling? prestige? personality?

Let's face up to the embarrassment and skip over the confusion. Truck drivers and investment bankers look differently, talk differently, and vote differently. There is nothing wrong with saying that the first group consists of "working-class" (or "blue-collar") people and the latter of "upper-class" (or "white-collar") people. Moreover, though different definitions of class produce slightly different groupings of people, most definitions overlap to such an extent that it does not matter too much which we use.

However defined, public opinion and voting have been less determined by class in the United States than in Europe, and these cleavages have weakened everywhere in recent years. In the 1950s, V. O. Key found that differences in political opinion were closely associated with occupation. He noted that people holding managerial or professional jobs had distinctly more conservative views on social welfare policy and more internationalist views on foreign policy than manual workers.[35] During the next decade, this pattern changed greatly. Opinion surveys done in the late 1960s showed that business and professional people had views quite similar to those of manual

workers on matters such as the poverty program, health insurance, American policy in Vietnam, and government efforts to create jobs.[36]

Similar patterns have continued to hold over time: differences between social classes and incomes are relatively modest on a wide variety of public policy questions.[37] There are, however, some important differences on certain economic issues, especially between the very rich (the "1 percent" or the "0.1 percent") and everyone else. In general, the very wealthy are (relative to the general public) less supportive of the social safety net, government health insurance, government regulation, and redistribution (especially via taxes).[38] As we will see, these differences can have important consequences for public policy.

The Limits of Demographics

As we have seen throughout this section, various groups in America hold different opinions—blacks differ from whites, women from men, and so forth. But such patterns are, at best, averages, and do not describe everyone. Plumbers and professors may have similar incomes, but they rarely have similar views, and businesspeople in New York City often take a very different view of government than businesspeople in Houston or Birmingham. Your best friend may be a conservative African American Republican, or your wealthy neighbor may be far to the left on economic issues. In short, knowing someone's demographics gives us a good guess as to their views on the issues, but it is just that: a good guess. To really understand their views, we need to know more than just their demographic attributes.

Political Partisanship and Ideology

After familial socialization, the largest influence on what citizens believe is their political partisanship and their ideological beliefs. When we talk about **partisanship** or partisan identity, we mean people's attachment to their political party: Do they think of themselves as a Democrat or a Republican? We address partisanship in more detail in Chapter 9, but here, we consider its influence on citizens' attitudes.

Simply put, partisanship has a powerful, even fundamental, influence on citizens' attitudes. On issue after issue—taxes, spending on social programs, gun control, and many others—Democrats and Republicans have different opinions. Identifying with a party powerfully shapes an individual's beliefs.[39]

Such differences between ordinary Democrats and Republicans are driven by differences among elected officials. Ordinary Democrats and Republicans look to Democratic and Republican officials to know where to stand on the issues.[40] When people watch a media report about a political issue, the media typically use elected officials from the parties to represent the various positions,[41] meaning that the political parties define the competing perspectives on the issues for most people. Because Democratic and Republican elected officials diverge on these issues, so do ordinary voters (though the differences between ordinary voters are much more muted, as we will see).

partisanship *An individual's identification with a party; whether they consider themselves a Democrat, Republican, or Independent.*

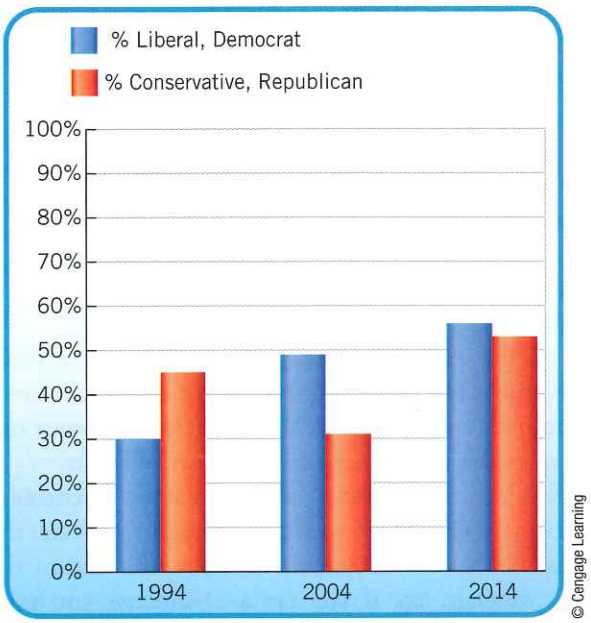
party sorting *The alignment of partisanship and issue positions so that Democrats tend to take more liberal positions and Republicans tend to take more conservative ones.*

This is not just blind obedience. Rather, it reflects the fact that people identify with a party because it shares their values, and as a result, they will follow the lead of their party's officials. So, if you are a Democrat, you might look to, say, Elizabeth Warren or Bernie Sanders to see where they stand on the issue, and follow suit. Likewise, a Republican might do the same with Donald Trump or Paul Ryan. The attitudes of ordinary Democrats and Republicans reflect the opinions of elite Democrats and Republicans.

If ordinary Americans' attitudes reflect the attitudes of political elites, then this raises an important question: Are ordinary voters now polarized? Over the past 50 years or so, elected Democrats and Republicans (especially in Congress) have become much more sharply divided.[42] As we see in Chapter 13, Democratic members of Congress are essentially all on the left, and elected Republicans are essentially all on the right. Is the same thing true of ordinary Democrats and Republicans? The answer is no. The most careful analysis of the attitudes of ordinary Democrats and Republicans indicates that they are relatively moderate on most issues.[43] Elites may be polarized, but ordinary voters are not.

But how can this be: If ordinary Americans' attitudes reflect those of elites, and elites are polarized, how is the mass public not? The answer is that ordinary voters have sorted, but they have not polarized.[44] **Party sorting** is the process of aligning issue positions and party. So today, unlike 40 years ago, ordinary Democrats tend to take the liberal position on the issues, and ordinary Republicans, the conservative one. For example, according to data from the Pew Research Center, in 1994, only 30 percent of Democrats took positions that were (on average) liberal, but by 2014, that had jumped to 56 percent (the corresponding figures for Republicans are 45 percent and 53 percent).[45] Over time, voters' views on the issues have become more consistent with their partisanship, as we see in Figure 7.5.

FIGURE 7.5 Growing Ideological Consistency, 1994–2014



Source: Pew Research Center, "Political Polarization in the American Public," June 2014.

political ideology *A more or less consistent set of beliefs about what policies government ought to pursue.*

While Americans have sorted, they have not gone all the way to the ideological poles. As the numbers from Pew make clear, there is still a great deal of heterogeneity among the mass public: Nearly half of each party takes positions that are centrist or on the opposite ideological side from their party. Likewise, in that same study, 39 percent of Americans take views that are best described as centrist. Sorted, rather than polarized, best describes ordinary Americans.

But one might logically ask: If sorting continues, will ordinary Americans come to be deeply polarized? It certainly is possible. If everyone sorted, then the country would certainly be more polarized. However, such a situation is unlikely. While people now take more consistent positions on the issues (i.e., Democrats are on the left, Republicans are on the right), they are largely just to the left or right of the center. They are "slightly liberal" or "slightly conservative" more than "very liberal" or "very conservative."[46] Furthermore, as we see below, most Americans are not terribly well informed about politics, nor are they especially interested in it. Given this, they are unlikely to adopt the sort of extreme positions that would be required to generate extensive mass polarization. Sorting does increase mass polarization, but only very slightly. We can say the electorate has become quite a bit better sorted, but not really very polarized.

While ordinary voters have not polarized, the same is not true for those who are most active in politics. Among those who are politically active and participate in campaigns, polarization is a more accurate description of what has happened.[47] They have moved to the extremes, and as we see in later chapters, this has important consequences for elected officials.

Political Ideology

Partisanship is not the only core fundamental identity that shapes public opinion: so does one's ideology, whether one is a liberal or a conservative. Up to now the words *liberal* and *conservative* have been used as though everyone agrees on what they mean and as if they accurately describe general sets of political beliefs held by large segments of the population. Neither of these assumptions is correct. Like many useful words—*love, justice, happiness*—they are as vague as they are indispensable.

When we refer to people as liberals, conservatives, socialists, or radicals, we are implying that they have a patterned set of beliefs about how government and other important institutions in fact operate and how they ought to operate, and in particular about what kinds of policies government ought to pursue. These groups are said to display to some degree a **political ideology**—that is, a more or less consistent set of beliefs about what policies government ought to pursue.

Political scientists measure the extent to which people have a political ideology in two ways. The first is by determining how frequently people use broad political categories (such as "liberal," "conservative," "radical") to describe their own views, which is sometimes referred to as symbolic ideology. The second method involves a simple mathematical procedure: measuring how accurately one can predict a person's view on a subject at one time based on his or her view on that subject at an earlier time, or measuring how accurately one can predict a person's view on one issue based on his or her view on a different issue. The higher the accuracy of such predictions (or correlations), the more we say a person's political opinions display "constraint" or ideology.

Looking at the first method (can Americans identify themselves as liberal, moderate, or conservative), it seems as though many Americans can select an ideological orientation for themselves. For example, in 2012, 22 percent identified as liberals, 36 percent identified as conservatives, and 37 percent identified as moderates, and those patterns have been roughly stable for over a decade.[48] Yet that simple question belies a host of complexity. When we dig slightly deeper, we find that many people adopt those labels without having much of an understanding

of what they mean. When given an option to say they "don't know" which label best describes them, many Americans choose that option—indeed, it is often the plurality response. Furthermore, many people's views on the issues (what they think of taxes and spending, gun control, abortion, and so forth) are only weakly correlated with the label (liberal, conservative, or moderate) they use to describe themselves.[49] Ordinary Americans know where they stand on the issues, but they do not necessarily deeply comprehend the ideological labels used in politics. Except when asked by pollsters, most Americans do not actually use the words *liberal, conservative*, or *moderate* in explaining or justifying their preferences for parties, candidates, or policies, and not many more than half can give plausible definitions of these terms.

What about the second method of measuring ideology? Here, the evidence is—as it has been for 50 years—that most Americans are not deeply ideological. Most people's views are not tightly aligned into neat liberal or conservative bundles, unlike elites. The vast majority of Americans simply do not think about politics in an ideological or very coherent manner. Partly in recognition of these and related limitations, pollsters have increasingly taken a fresh approach to documenting and analyzing average Americans' ideological cast and character. Essentially, rather than asking people to identify themselves as "liberal," "conservative," or "moderate," they ask people multiple questions about politics and government, and then use the answers to sort them into a half-dozen or more different groups.

One prominent example, conducted by the Pew Research Center, began in 1987 and has been updated several times since, most recently in 2014. To see where you fit, you can take the survey at typology.people-press.org/typology. Americans, it finds, are divided into eight different groups, each defined by certain key characteristics (see Table 7.1). By this measure, approximately one-third of Americans (and 40 percent of registered voters) are ideologically consistent (i.e., largely liberal or conservative on the issues). But perhaps not surprisingly, a majority of Americans are somewhere in the middle, taking conservative positions on some issues but liberal positions on others. And fully 10 percent of Americans are bystanders, largely removed from the political process.

Dig deeper into the data on these groups (also available via the same website cited above), such as the related survey findings regarding each group's socioeconomic status and views on religion and other matters that affect politics, and you will see that the old three-way (liberal-conservative-moderate) self-identification surveys probably obscured more than they revealed regarding most Americans' opinions about many different political issues. This underlines what we said above about polarization. The politically active and engaged—the steadfast liberals and conservatives—are divided and ideological. But most Americans, even if they have sorted and now take the party's views on some issues, are moderate, centrist, and less ideological. Ideology is more for elites than for ordinary voters.

TABLE 7.1 | Ideology Typology: Eight Types

	General Public (%)	Registered Voters (%)	Politically Engaged (%)
Partisan Anchors	**36**	**43**	**57**
• Steadfast conservatives *(socially conservative populists)*	12	15	19
• Business conservatives *(pro-Wall Street, pro-immigrant)*	10	12	17
• Solid liberals *(liberal across the board)*	15	17	21
Less Partisan, Less Predictable	**54**	**57**	**43**
• Young outsiders *(conservative views on government, not social issues)*	14	15	11
• Hard-pressed skeptics *(financially stressed and pessimistic)*	13	13	9
• Next-generation left *(young, liberal on social issues, less so on social safety net)*	12	13	11
• Faith and family left *(racially diverse and religious)*	15	16	12
• **Bystanders** *(young, diverse, on the sidelines of politics)*	10	0	0
	100	100	100
N	10,013	7,999	4,767

Note: 2014 Political Typology. Figures may not add to 100 percent because of rounding. The politically engaged are registered to vote, closely follow public affairs, and say they always or nearly always vote.

Source: Pew Research Center, "Beyond Red vs. Blue: The Political Typology," June 2014.

political elites *Persons with a disproportionate share of political power.*

heuristics *Informational shortcuts used by voters to make a decision.*

Liberal and Conservative Elites

Although the terms *liberal* and *conservative* do not adequately describe the political views held by most average Americans, they do capture the views held by many, perhaps most, people who are in the country's political elite. As we discussed in Chapter 1, every society has an elite because in every society government officials have more power than the general public, some people make more money than others, and some people are more popular than others. The former Soviet Union even had an official name for the political elite—the *nomenklatura*.

In America, we often refer to **political elites** more casually as "activists"—people who hold office, run for office, work in campaigns or on newspapers, lead interest groups and social movements, and speak out on public issues. Being an activist is not an all-or-nothing proposition: People display differing degrees of activism, from full-time politicians to persons who occasionally get involved in a campaign (see Chapter 8). But the more a person is an activist, the more likely it is that he or she will display ideological consistency on the conventional liberal-conservative spectrum.

The reasons for this greater consistency seem to be information and peers. First, we consider information. In general, the better informed people are about politics and the more interest they take in politics, the more likely they are to have consistently liberal or conservative views.[50] This higher level of information and interest may lead them to find relationships among issues that others don't see and to learn from the media and elsewhere what are the "right" things to believe. This does not mean no differences exist among liberal elites (or among conservative ones), only that the differences occur within a liberal (or conservative) consensus that is more well defined, more consistent, and more important to those who share it than would be the case among ordinary citizens.

Second is the matter of peers. Politics does not make strange bedfellows. On the contrary, politics is a process of like attracting like. The more active you are in politics, the more you will associate with people who agree with you on some issues; the more time you spend with those people, the more your other views will shift to match theirs.

The greater ideological consistency of political elites can be seen in Congress. As we note in Chapter 13, Democratic members of Congress tend to be consistently liberal, and Republican members of Congress tend to be consistently conservative—*far more* consistently than Democratic voters and Republican voters. By the same token, the delegates to presidential nominating conventions are far more ideological (liberal in the Democratic convention, conservative in the Republican one) than is true of voters who identify with the Democratic or Republican parties. For elites and activists, ideology is more central to their political world view than for ordinary voters.

7-3 Political Information and Public Opinion

As we mentioned at the beginning of this chapter, considerable evidence shows that Americans don't know much about politics. For example, according to one recent study, more than one in three Americans could not name a single branch of government, and only a quarter knows that a two-thirds vote of the House and Senate is needed to override a presidential veto.[51] Similar studies show that Americans are no better informed about basic current events types of questions that ask, for example, the identity of the Speaker of the House, the party in control of the House or Senate, and so forth.[52] Such results are nothing new: Dating back to the dawn of modern survey research, political scientists have shown that Americans know little about politics. By any measure, most Americans are woefully ignorant of the details of American political life, and have been for some time.

Many scholars and political reformers are troubled by this lack of knowledge about the basic dimensions of American government and politics. They argue that if Americans do not know much about politics, they will be hard-pressed to guide politicians and select good representatives at the ballot box. The opinions we discussed previously will be based on ephemera and will not reflect a real understanding of the underlying issues. This concern is nothing new in American politics—it goes all the way back to the Founding Fathers. The Founders were suspicious of too much popular control, and they consequently set up a system in which many of the decisions of government were removed from direct popular control (recall that only the House of Representatives was directly elected before the 20th century).

But is this in fact the case? While there is no disputing that Americans are ill informed, does this information deficit harm American democracy? Some scholars say no: Americans may not know much about the specific details of politics and public life, but that does not mean they cannot make reasonable decisions. After all, what does knowing the identity of the chief justice of the Supreme Court have to do with casting a ballot for president or Congress? These skeptics argue that citizens can use information shortcuts, or **heuristics**, to make well-informed decisions.

Such heuristics seem to work well in at least some cases. In the late 1980s, California voters were asked to vote on a series of ballot propositions that would have changed the rates for automobile insurance. Surveys showed that many voters did not understand the details of the various proposals, yet many still voted in ways that were consistent with their underlying interests. How? They knew (largely from advertising) where key groups, such as the insurance industry and trial lawyers, stood on the measures. They used those group endorsements to figure out how they should vote.[53] Likewise, an analysis of voters in recent presidential elections suggests that many (though not all) voters vote the way they would vote if they were fully informed (i.e., knew where the candidates stood in great detail on every issue).[54] While these examples concern voting in elections, the same logic would apply equally well to forming opinions on particular policies: Even if a citizen did not understand the intricacies of, say, tax policy, she could reasonably deduce what her position "should" be by knowing where relevant political actors stand on it.[55]

Before we become too sanguine, however, it is important to note that other scholarship suggests there are important limits to heuristics, and they can sometimes lead voters astray and result in making worse decisions, not better ones.[56] For example, voters assume that politicians from working-class backgrounds will be more hospitable to working-class interests (using a heuristic that the politician's class background will be an indicator of their behavior), but this is not the case.[57] Furthermore, when voters lack information, this affects their political attitudes. Some argue that at least some of the public support for the Bush tax cuts was due to low (or incorrect) information on the part of many voters.[58] Perhaps even more tellingly, when given additional information about various policies, citizens' preferences changed, sometimes quite dramatically, even among those who were generally well informed about politics.[59] It seems that information about policies can have a large and consequential impact on people's political attitudes. Heuristics and shortcuts are a partial substitute, but just that: a partial one. At least in some circumstances, a lack of information about politics can be detrimental to the political process.

7-4 Public Opinion and Public Policy

So far, we have spent the chapter delving into the origins and measurement of public opinion. But we have not said anything about the consequences of public opinion: Does public opinion matter? In particular, does public opinion shape public policy?

Happily, the answer to that question is yes, at least most of the time. An encyclopedic study looked at every law for which there were relevant public opinion polls over several decades. It found that when public opinion changed, policy change usually followed. Furthermore, such changes were almost always congruent: When opinion became more liberal (conservative), the policy itself moved to the left (right). This was especially true for more salient policies, or for particularly large shifts in opinion.[60] This seems to be a "good" outcome for democratic theory: Government decisions do, in fact, reflect the will of the people.

But as we suggested at the outset of the chapter, policies do not always follow the majority's will. Sometimes, to understand why, we need to understand the role of parties, interest groups, the media, and political institutions, as we will see in later chapters. But sometimes policy does not reflect majority will because the minority is more politically powerful.

This typically occurs because the minority is more politically engaged and active, and pressures politicians accordingly. Gun control is perhaps the best-known example of this situation. Surveys consistently show that a majority of Americans favors gun control. However, among the minority who oppose action, the issue is a much higher priority. For example, gun-control opponents weigh the issue more heavily when choosing a candidate and were more likely to have given money to relevant interest groups.[61] A study of the members of the leading anti-gun-control organization (the National Rifle Association) found that they were more politically engaged and active than other Americans (and more so than gun-control proponents).[62] In this setting, politicians will respond to the better-organized minority rather than the apathetic majority.

Another example—and a deeply troubling one—is that several studies have shown that government policy is often more responsive to the preferences of the economic elite than to the views of other citizens.[63] Those at the top of the economic ladder are more likely to participate in politics[64] and, as a result, these studies suggest, politicians heed their views more fully. Given that the economic elite have divergent preferences on some issues (notably, issues of regulation, taxes, and so forth; see our discussion of social class earlier in the chapter), this inequality in responsiveness has real consequences. Put more directly, both examples highlight that government policy responds to those who participate in politics. To understand policy, we need to understand who participates. We turn to that task in the next chapter.

WHAT WOULD YOU DO?

Should You Support the Comprehensive Immigration Reform Bill?

To: *Senator Matthew Joseph*
From: *Rachel N. James, legislative assistant*
Subject: *Vote on "path-to-citizenship" immigration bill*

Your state has only a small illegal immigration problem, but voters have concerns about both maintaining law and order, and providing economic opportunities and a "path to citizenship" for people who have resided in this country for many years. While there have been many proposals to address this issue in recent years, none have been enacted into law, and hence the need for a new bill. As you contemplate both your vote on the bill and your possible presidential bid as a Republican, note that public opinion on the subject is divided by party, race and ethnicity, and age. For example, a September 2014 Pew Research Center poll asked about priorities in dealing with illegal immigration: 53 percent of Republicans and 43 percent of those over the age of 65 favor tougher border security, whereas 41 percent of Hispanics and 33 percent of Democrats placed more importance on creating a path to citizenship. You might also consider whether the issue better fits into majoritarian or client politics (see the "Policy Dynamics: Inside/Outside the Box " feature on page 162).

To Consider:

The U.S. House of Representatives is weighing a bill that would result in the most comprehensive immigration reform in more than a decade. Proponents say it will both improve border security and provide opportunities for legal residency for more than 11 million illegal immigrants in the United States. The bill received a mixed reception, however, as critics denounced the provisions for illegal immigrants, saying they amount to "amnesty" for law breakers.

Arguments for:

1. Your state contains a small but slowly growing proportion of first-generation Americans who favor a "path to citizenship" for immigrants who have lived in this country for years, regardless of their legal status.
2. Some argue that illegal immigrants often take menial jobs that nobody else wants, and they contribute to the U.S. economy by paying taxes and buying goods and services.
3. A path to citizenship, with fines and other penalties for being in the country illegally, is the most realistic option for individuals who have family and other long-term ties in the United States.

Arguments against:

1. Your party leaders oppose comprehensive immigration reform, saying that enhanced border security must be a higher priority.
2. Some argue that illegal immigrants take jobs away from native-born Americans and cost more in public services, such as education and emergency health care, than they contribute to the economy.
3. People who entered the country illegally must not be rewarded for breaking the law, and enforcement can be effective with sufficient resources.

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Vote for bill ☐ Vote against bill

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

LEARNING OBJECTIVES

7-1 Discuss what "public opinion" is and how we measure it.

Public opinion refers to how people think or feel about particular things, including but not limited to politics and government. Today, it is commonly measured by means of scientific survey research or polls based on random samples of given populations and carefully worded questions.

7-2 Outline the major factors that shape public opinion.

Many different factors shape public opinion, but three key ones are political socialization and the family, demographics, and partisanship and political ideology. Political socialization refers to the influence of one's family on one's political views. Demographics refer to our underlying characteristics (race, gender, age, etc.) that shape our political beliefs. Finally, political partisanship and ideology are core values that shape and guide what people want from government, and hence influence their views on the issues.

7-3 Summarize the arguments for and against the claim that low levels of political knowledge among ordinary voters affect American democracy.

In general, Americans don't know much about politics and government. Some argue that this is not a terrible limitation, as citizens can use heuristics (information shortcuts) to substitute for low levels of knowledge. However, shortcuts are not a perfect substitute for information, and when citizens have more information about a policy, their preferences can change. This suggests that a lack of information does affect American democracy in at least some settings.

7-4 Discuss the relationship between public opinion and public policy.

Generally speaking, public opinion drives policy: When opinion changes, so does policy, especially on salient issues or when the opinion change is especially large. But when a minority group is particularly politically consequential (typically because they are more politically engaged on the issue), government policy follows the minority view, rather than the majority one.

TO LEARN MORE

CBS News/*New York Times* poll: **http://topics.nytimes.com/top/reference/timestopics/subjects/n/newyorktimes-poll-watch/**

Gallup opinion poll: **www.gallup.com**

Pew Research Center, U.S. Politics & Policy: **www.people-press.org**

Rasmussen Reports: **www.rasmussenreports.com**

Roper Center for Public Opinion Research: **www.ropercenter.uconn.edu**

Wall Street Journal/NBC News polls: **http://topics.wsj.com/subject/P/Polls/3573**

Erikson, Robert S., and Kent L. Tedin. *American Public Opinion,* 8th ed. New York: Pearson, 2010. An excellent summary of how opinion is measured, what it shows, and how it affects politics.

Fiorina, Morris, Samuel Abrams, and Jeremy Pope. *Culture War? The Myth of a Polarized America.* 3rd ed. New York: Pearson Longman, 2010. The definitive study on polarization in the American public.

Gilens, Martin. *Affluence and Influence: Economic Inequality and Political Power in America.* Princeton, NJ: Princeton University Press, 2012. An argument that the wealthy have greater sway over policy than other Americans.

Jennings, M. Kent, and Richard G. Niemi. *Generations and Politics.* Princeton, NJ: Princeton University Press, 1981. A classic study of political socialization.

Key, V. O., Jr. *The Responsible Electorate.* Cambridge, MA: Harvard University Press, 1966. An argument, with evidence, that American voters are not fools.

Moe, Terry M. *Schools, Vouchers, and the American Public.* Washington, DC: Brookings Institution Press, 2001. A masterful study of how public opinion matters to education policy, suggesting that most people, with only slight information, form reasonable views.

Weissberg, Robert. *Polling, Policy, and Public Opinion.* New York: Palgrave Macmillan, 2002. A critique of what we think we know from opinion polling, showing the many ways in which polls can give us misleading answers.

Zaller, John. *The Nature and Origins of Mass Opinion.* Cambridge, England: Cambridge University Press, 1992. A pathbreaking study of how the public forms an opinion, illustrating the ways in which elite views help shape mass views.

Rob Crandall/Shutterstock.com

CHAPTER 8

Political Participation

KEY OBJECTIVES OF THIS CHAPTER

- *Various political actors influence public policy outcomes.*
- *The Constitution along with legislation protects voting rights.*
- *Numerous factors influence voter choices.*

KEY TAKEAWAYS FROM THIS CHAPTER

- Political participation is influenced by a variety of media coverage, analysis, and commentary on political events.
- Demographic characteristics and political efficacy or engagement are used to predict the likelihood of whether an individual will vote.

Defined simply, **political participation** refers to the many different ways that people take part in politics and government: voting or trying to influence others to vote, joining a political party or giving money to a candidate for office, keeping informed about government or debating political issues with others, signing a petition, protesting a policy, advocating for a new law, or just writing a letter to an elected leader. Some scholars of the subject argue that, in addition to these activities, almost any form of civic engagement, such as helping out at a local homeless shelter or attending a school board meeting, should also count as political participation. And some believe that the rise of the Internet, political blogs, and social media make traditional ideas about what constitutes political participation obsolete (we will have more to say about how the Internet and social media have, and have not, changed politics in Chapter 12).

But no matter how they define it, most academics who study political participation pay close attention to voting and begin with a puzzle: Despite successive legal and other changes that might be expected to increase electoral participation, voter turnout rates in America today are lower than they were for previous generations, and scores of millions of Americans now sit out each presidential and midterm national election.

THEN In most states, well into the 19th century, only property-owning white men could vote. After the Civil War and into the mid-20th century, many states used all manner of stratagems to keep blacks from voting. Women did not receive the right to vote until 1920, when the Nineteenth Amendment to the Constitution was ratified. Before 1961, residents of the District of Columbia could not vote in presidential elections; the Twenty-Third Amendment to the Constitution gave them that right. Into the 1960s, most whites had only limited formal education; women and many minority groups faced legal, social, and other barriers or disincentives to voting; and there was nothing resembling today's steady stream of political news via multiple media outlets.

NOW National laws extend voter eligibility to all persons age 18 or older (courtesy of the Twenty-sixth Amendment to the Constitution, ratified in 1971). No state may restrict voting based on discriminatory tests, taxes, or residency requirements. In areas where many non–English speakers live, election authorities must supply ballots written in the appropriate native languages. People in all 50 states can register to vote when applying for a driver's license, and most states now allow voters to vote by absentee ballot before Election Day, even if they are not residing outside their home state. Many states also permit people to register on the same day that they vote, and some states now conduct their elections entirely through the mail. Over the past half-century, formal education levels have risen among all groups, and news, information, and opinions about politics and government are just about everywhere one turns (or clicks).

political participation
The many different ways that people take part in politics and government.

voting-age population (VAP) *Citizens who are eligible to vote after reaching the minimum age requirement.*

And yet, between 1860 and 1900, the percentage of eligible voters participating in presidential elections ranged between 65 and 80 percent. By comparison, over the past several decades, the percentage of eligible voters participating in presidential elections has dipped as low as 50 percent: half of eligible voters do not vote. Over the same period, voter turnout in midterm national elections has averaged well below 50 percent. In 2006, the Democrats took majority control of the U.S. House of Representatives, and then in 2010, the Republicans won the House majority back from the Democrats; but in each of these two recent, power-shifting midterm national elections, about 80 million U.S. residents age 18 or older did not vote. In the 2014 midterm elections, participation was at its lowest level in 70 years.[1] Young voters, despite averaging more years of formal education, facing fewer legal barriers, and enjoying more access to information than any previous generation could have imagined, are nonetheless mostly nonvoters; for example, in the five midterm national elections since 1998, barely one in five 18- to 24-year-olds cast a ballot.

What explains nonvoting? Are voter turnout rates in America today really as bad as they seem, either in historical terms or relative to rates in other modern democracies? And what about other forms of political participation in America today?

8-1 A Close Look at Nonvoting

Start with the fact that voter turnout can be measured in at least two different ways, and they give different answers about the prevalence of nonvoting.[2] All U.S. residents age 18 or older constitute the **voting-age population (VAP)**. But many residents of the United States who are of voting age (18 or older) are not, in fact, eligible to vote. Two such groups are noncitizens who reside in

voting-eligible population (VEP) *Citizens who have reached the minimum age to be eligible to vote, excluding those who are not legally permitted to cast a ballot.*

America and convicted felons who in most states are disenfranchised by state laws. Unlike the VAP, the **voting-eligible population (VEP)** measure excludes from the calculation U.S. residents age 18 or older who are not legally permitted to cast a ballot. For example, in 2016 the VAP numbered approximately 251 million, but that included about 20 million noncitizens, prisoners, and disenfranchised felons. Measured by the VAP, the national voter turnout rate was 54.7 percent in 2016, but measured by the VEP it was 59.3 percent; and since 1948, as the percentage of the population age 18 and older that consists of noncitizens and disenfranchised convicted felons has increased, the gap between the VAP and the VEP measures of voter turnout has also grown (see Figure 8.1).

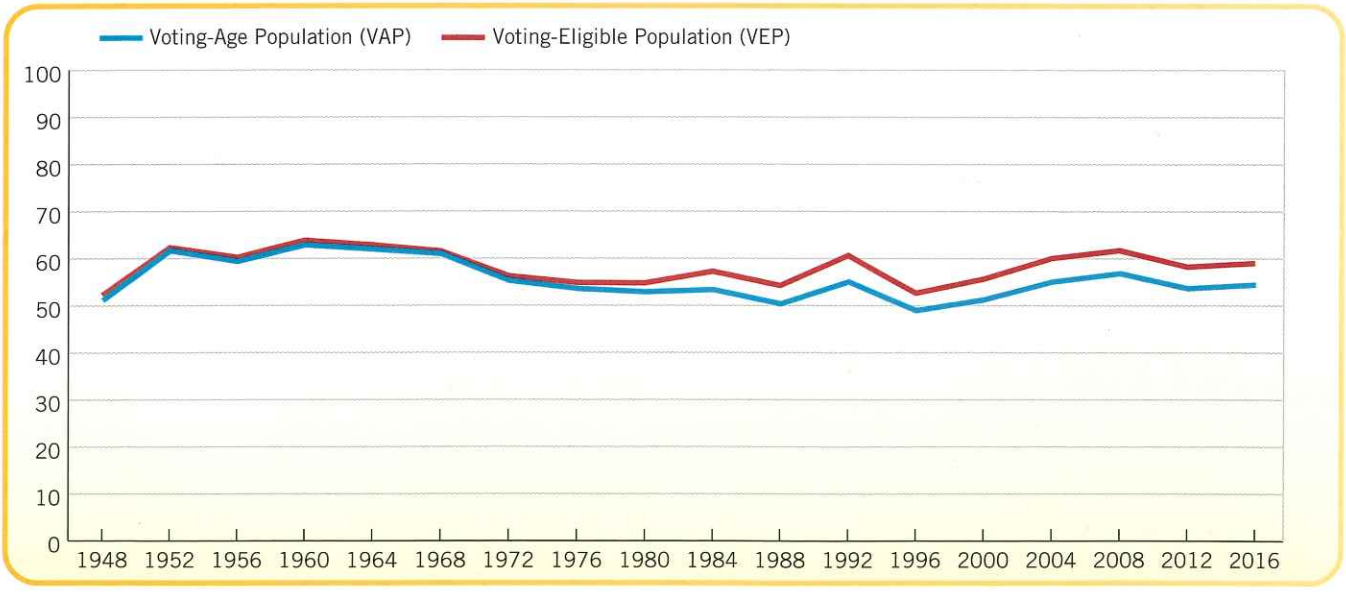
Another important nuance about nonvoting concerns registered versus unregistered voters. Take a look at Table 8.1. Column A compares democratic nations in terms of the percentage of their VAP who went to the polls in their most recent national elections. The United States ranks dead last, with 53.6 percent voter turnout (that was the VAP turnout in 2012). From this perspective, U.S. turnout looks not like other developed nations like France or Italy, but rather like former communist countries such as Estonia, Poland, or Slovenia.

Now, however, look at Column B. It compares the same nations in terms of percentage of registered voters (those eligible voters who have completed a registration form by a set date) who went to the polls in the same elections. The United States looks much better, landing in the middle of the pack, with 84.3 percent of registered voters having voted in 2012. Here, our voter turnout appears much more like the voter turnout in other advanced, industrialized democracies.

Although we vote at lower rates in the United States than people do abroad, the meaning of our voting is different. For one thing, we elect far more public officials than the citizens of any other nation do. There are more than a half million elective offices in the United States, and just about every other week of the year there is an election going on somewhere in this country.

A citizen of Massachusetts, for example, votes not only for the U.S. president but also for two senators, the state governor, the member of the House of Representatives for his or her district, a state representative, a state senator, the state attorney general, the state auditor, the state treasurer, the secretary of state, a county commissioner, a sheriff, and clerks of various courts, as well as (in the cities) for the mayor, the city councilor, and school committee members and (in towns) for selectmen, town-meeting members, a town moderator, library trustees, health board members, assessors, water commissioners, the town clerk, housing authority members, the tree warden, and the commissioner of the public burial ground. (We have probably forgotten others.)

FIGURE 8.1 Two Methods of Calculating Turnout in Presidential Elections, 1948–2016



Source: Data until 2000 from Michael P. McDonald and Samuel L. Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* 95 (December 2001): 966. Data from 2004 forward are from Michael McDonald, United States Election Project, Voter Turnout Data, www.electproject.org.

TABLE 8.1 | Two Ways of Calculating Voting Turnout, Here and Abroad

A		B	
	Turnout as Percentage of Voting-Age Population		**Turnout as Percentage of Registered Voters**
Belgium	87.2	Luxembourg	91.1
Turkey	84.3	Belgium	89.4
Sweden	82.6	Denmark	85.9
Denmark	80.3	Sweden	85.8
Iceland	80.0	Turkey	85.2
Norway	77.9	**United States**	**84.3**
France	71.2	Iceland	81.4
The Netherlands	71.0	France	80.4
Italy	68.5	Norway	78.2
Germany	66	Italy	75.2
Canada	62.1	The Netherlands	74.6
United Kingdom	61.1	Germany	71.5
Luxembourg	55.1	Canada	68.3
United States	**53.6**	United Kingdom	66.9

Source: Drew DeSilver, "U.S. Voter Turnout Trails Most Developed Countries," Pew Research Center Fact Tank, 2 August 2016.

In many European nations, by contrast, voters get to make just one choice once every four or five years: they can vote for or against a member of parliament. When only one election for one office occurs every several years, that election is bound to assume more importance to voters than many elections for scores of offices. But one election for one office probably has less effect on how the nation is governed than many elections for thousands of offices. Americans may not vote at high rates, but voting affects a far greater part of the political system here than abroad.

This suggests that the number of elections might explain why Americans turn out at lower levels than in other nations. But there are other structural reasons as well. Many Americans cannot vote because they have not registered: According to the U.S. Census Bureau, only 70 percent of eligible citizens are actually registered to vote.[3] Registration is the simplest barrier to voting, but also the most profound: No matter one's interest in politics, if you are not registered, you cannot vote.

Still, simply getting more people registered to vote is not a cure-all for nonvoting, for in each national election since 2006, about half of all nonvoters were registered. When registered nonvoters were asked why they did not vote, several of the most common answers were that they had scheduling conflicts (such as work or school), were uninterested in voting, had an illness or disability that prevented them from voting, or did not like the candidates who were running.[4]

In response to a common reason why registered voters fail to vote (school, work, or other scheduling conflicts), some have proposed making Election Day a national holiday or holding national elections on weekends. Such proposals, though popular, remain only proposals. States have taken steps, however, to make voting easier for citizens. As of 2016, 27 states and the District of Columbia afforded voters the option of "no-fault" absentee voting, meaning that voters can vote absentee without having to demonstrate they are residing outside their home state or giving any other explanation. Three states—Washington, Oregon, and Colorado—conduct their elections entirely via mail (see the Constitutional Connections box on page 176 for more information). While reformers had hoped that such reforms would dramatically increase voter turnout, the evidence suggests that their effect is very modest, on the order of a few percentage points at most.[5]

If voter turnout rates are to increase substantially in the United States, then ever greater numbers of nonregistered voters must become registered to vote. In addition to the roughly 40 million registered nonvoters, another 40 million or so voting-age citizens were not registered to vote in each of several recent national elections.

In most European nations, registration is done for you, automatically, by the government. By contrast, in America, the entire burden of registering to vote falls on the individual voters: they must learn how and when and where to register; they must take the time and trouble to go somewhere and fill out a registration form; and they must re-register if they move. It takes more effort to register to vote in this country than it does to register in other democracies, so it should not be surprising that fewer people are registered here than abroad.

But would making it less burdensome to register necessarily result in higher percentages of Americans becoming registered voters and voting? In 1993, Congress passed a law designed to make it easier to register to vote. Known as the motor-voter law, the law allows people in all 50 states to register to vote when applying for driver's licenses. The law also requires states to provide mail-based registration, and to offer registration at some state offices, such as those that serve the disabled or low-income families.

As with early, mail-in, and absentee balloting (see the Constitutional Connections feature on page 176), the evidence regarding the impact of the motor-voter law on voter participation remains hard to interpret definitively.

Millions of citizens have registered to vote via state motor vehicle bureaus or other state offices, but a study found "that those who register when the process is costless are less likely to vote."[6] In recent years, including 2016, motor-voter law–related means of registration were the single most widely used method (see Figure 8.2). While the motor-voter law has certainly increased registration, there is little evidence it has led to a substantial increase in voter participation. Other studies of efforts to facilitate registration have come to similar conclusions: increasing registration increases turnout only modestly.[7]

Recently, however, several states have begun to adopt a reform that might have a larger effect on voter turnout: automatically registering all eligible citizens to vote unless they explicitly opt out of doing so (typically, using driver's license and state ID records). So far, nine states have adopted this reform: Oregon, California, West Virginia, Vermont, Connecticut, Colorado, Illinois, Rhode Island and Alaska, and similar legislation has been introduced in several other states. Oregon—the first to adopt such a law in 2015—found that in 2016, they automatically registered more than 225,000 residents based on interactions with the state's department of motor vehicles. Of those, nearly 100,000 individuals voted in the November presidential election, a turnout rate of 43 percent. Scholars consider this an impressive rate for those automatically registered,[8] though what will happen in the future—and in other states—remains to be seen.

Campaigns have recently begun to invest more heavily in old-fashioned get-out-the-vote (GOTV) drives to boost voter turnout. Many careful studies have found that such efforts do increase participation, though the exact amount depends on many different factors, including the type of message used, how the campaign makes contact with the voter (e.g., through a mailer, a phone call, or an in-person visit from a canvasser), the salience of the election, and so forth.[9]

Arguably the most effective GOTV message is the "social pressure" message. In this message, subjects are told before the election that whether they vote in the election is a matter of public record (as it is in nearly all states), and after the election, the campaign will inform their neighbors whether or not they voted (they send a mailer indicating who voted on the block, and who did not). This message is powerful: People do not want their nonvoting revealed to their neighbors! Those who received this message were more than 8 percent more likely to turn out and vote.[10] This may not sound like much in the abstract, but in a close election, it could well make the difference between who wins and who loses.

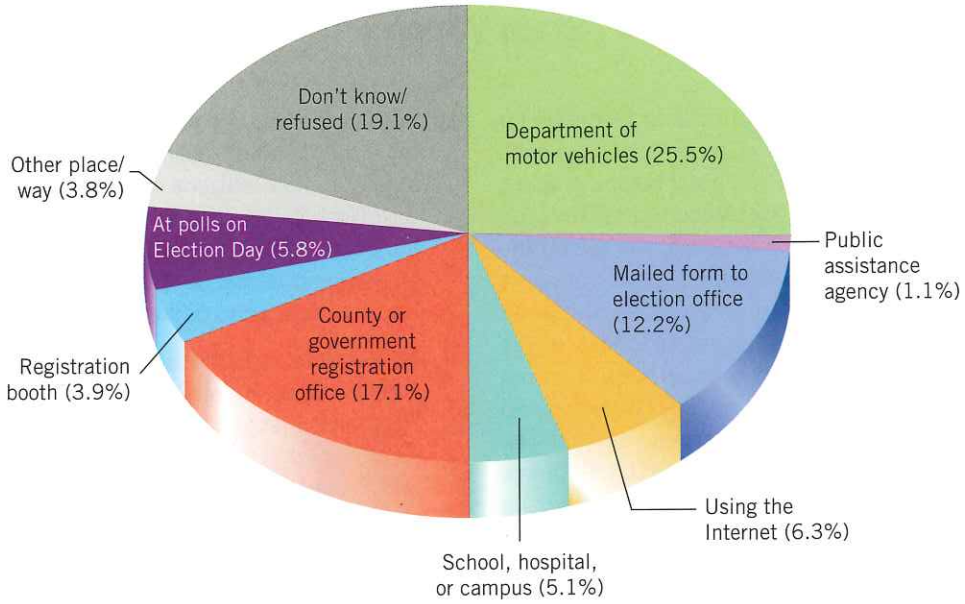
Such efforts, replicated on a large scale, can help to reshape the electorate. For example, in 2008 and 2012, the Obama campaign conducted a massive GOTV effort. The Obama campaign organized 2.2 million volunteers to have 24 million conversations with Americans and register 1.8 million additional voters.[11] While Republican operations were not quite as large, they, too, were impressive. One estimate suggests that the 2012 Romney and Obama campaigns together generated over 400 million voter contacts (obviously contacting many voters multiple times), with a net increase of almost 2.6 million voters as a result.[12] Perhaps even more importantly, these studies found that being involved in such activities helps to bring many new people into the political process, integrating them into their communities more fully, illustrating that the effects of GOTV efforts extend beyond the ballot box.[13]

But such efforts are not a panacea. While Obama's effort was especially successful, it is unclear whether future efforts will achieve such considerable success. Indeed, some argue that Hillary Clinton's lack of an Obama-style campaign hurt her during the 2016 election.[14] Furthermore, more generally, political scientists have shown that GOTV efforts often heighten participatory inequalities by targeting those who are already most likely to vote, rather than those who are more marginal.[15] While particular efforts have targeted more marginal voters to increase their participation,[16] such efforts are relatively rare. This suggests that while GOTV drives can help to reshape the electorate, they are not likely to expand significantly U.S. voter turnout.

Of course, voting is only one way of participating in politics. It is important—we could hardly be considered a democracy if nobody voted—but it is not all-important. Joining civic associations, supporting social movements, writing to legislators, fighting city hall—all these and other activities are ways of participating in politics. It is possible that, through these measures, Americans participate in politics more than most Europeans—or anybody else, for that matter. Moreover, low rates of registration may indicate that people are reasonably well satisfied with how the country is governed. If 100 percent of all adult Americans registered and voted (especially under a system that makes registering relatively difficult), it could mean that people were deeply upset about how things were run. In short, it is not at all clear whether low voter turnout is a symptom of political disease or a sign of political good health.

The important question about participation is not how much participation there is but how different kinds of participation affect the kind of government we get. This question cannot be answered just by looking at voter turnout, the subject of this chapter; it also requires us to look at the composition and activities of political parties, interest groups, and the media (the subjects of later chapters).

FIGURE 8.2 **Method of Voter Registration, 2016**



Source: U.S. Bureau of the Census, "Voting and Registration In the Election of 2016," May 2017.

Nonetheless, voting is important. To understand why participation in American elections takes the form that it does, we must first understand how laws have determined who shall vote and under what circumstances.

8-2 The Rise of the American Electorate

It is ironic that relatively few citizens vote in American elections, since it was in this country that the mass of people first became eligible to vote. At the time the Constitution was ratified, the vote was limited to property owners or taxpayers, but by the administration of Andrew Jackson (1829–1837) it had been broadened to include virtually all white male adults. Only in a few states did property restrictions persist: they were not abolished in New Jersey until 1844 or in North Carolina until 1856. And, of course, African American males could not vote in many states, in the North as well as in the South, even if they were not slaves. Women could not vote in most states until the 20th century; Chinese Americans were widely denied the vote; and being in prison is grounds for losing the franchise in many states even today. Aliens, on the other hand, often were allowed to vote if they had at least begun the process of becoming citizens. By 1880, only an estimated 14 percent of all adult men in the United States could not vote; in England in the same period, about 40 percent of adult men were disenfranchised.[17]

From State to Federal Control

Initially, it was left entirely to the states to decide who could vote and for what offices. The Constitution gave Congress the right to pick the day on which presidential electors would gather and to alter state regulations regarding congressional elections. The only provision of the Constitution requiring a popular election was the clause in Article I stating that members of the House of Representatives be chosen by the "people of the several states."

Because of this permissiveness, early federal elections varied greatly. Several states picked their members of the House at large (that is, statewide) rather than by district; others used districts but elected more than one representative from each. Some had their elections in odd-numbered years, and some even required that a congressional candidate win a majority, rather than simply a plurality, of votes to be elected (when that requirement was in effect, runoff elections—in one case, as many as 12—were necessary). Furthermore, presidential electors and senators were at first picked by state legislatures rather than by the voters directly.

Congress, by law and constitutional amendment, has steadily reduced state prerogatives in these matters. In 1842, a federal law required that all members of the House be elected by districts; other laws over the years required that all federal elections be held in even-numbered years on the Tuesday following the first Monday in November.

CONSTITUTIONAL CONNECTIONS | State Voting Laws and Procedures

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ." Thus begins Article I, Section 4, of the Constitution. The United States is unique among modern democracies in the extent to which the laws and procedures under which its citizens vote vary according to where in the nation they reside. As discussed elsewhere in this chapter, the states are no longer as free as they once were to decide who could vote for what office, but the shift to federal control has not eliminated differences in state voting laws and procedures. With few exceptions, the federal courts, including the U.S. Supreme Court, have let present-day differences in states' voting laws and procedures stand.

Currently, in addition to the traditional Election Day trek to a polling place or "voting booth" in one's home voting district, voting-age Americans can cast ballots in three other ways.

- ***Early Voting:*** 37 states and the District of Columbia permit people to cast in-person ballots before Election Day, and without requiring that they furnish any excuse for doing so. The early voting periods ranged from the Friday before Election Day to 45 days before Election Day. The average early voting period was about 20 days in 2016.
- ***Absentee Voting:*** All states permit absentee voting by mail for military personnel, their voting-age dependents, and U.S. citizens living overseas. All states also mail absentee ballots to certain other voters; but in 27 states and the District of Columbia, no excuse for absentee voting is required, whereas in 20 other states, an excuse is required. (As noted earlier, voting in Washington, Oregon, and Colorado is all done by mail, so absentee ballots are not required.) In seven states, certain citizens receive "permanent absentee ballot" privileges; in most, the citizens granted this status must give evidence of a chronic illness or disability. In Alaska, this status is also afforded to citizens who live in remote parts of the state.
- ***Mail Voting:*** A ballot is automatically mailed to every eligible citizen, no request required. While there are no traditional Election-Day precincts, states do provide locations for voters to turn in ballots on Election Day and to vote in person. Three states—Oregon, Washington, and Colorado—conduct their elections this way.

It happens that the 15 states with the most restrictive voting laws and procedures—no early voting, and an excuse required for absentee voting—are all located in the eastern half of the country, with the highest concentration in the Northeast. Constitutionally, states have also been permitted to decide whether to deny voting rights to voting-age citizens who have been convicted of felony crimes. There continue to be wide state-by-state disparities in felon disenfranchisement laws and procedures. For instance, as of 2015, some states allow currently incarcerated prisoners to vote, others permit convicted felons to vote once they have served their prison sentence, whereas yet others permanently disenfranchise convicted felons. The Sentencing Project estimates that nearly 6 million Americans cannot vote because of a felony conviction.

Source: National Conference of State Legislatures, "Absentee and Early Voting," October 2016; Jean Chung, "Felony Disenfranchisement: A Primer," The Sentencing Project, May 2016.

literacy test *A requirement that citizens show that they can read before registering to vote.*

poll tax *A requirement that citizens pay a tax in order to register to vote.*

The most important changes in elections have been those that extended suffrage to women, African Americans, and 18-year-olds, and made mandatory the direct popular election of U.S. senators. The Fifteenth Amendment, adopted in 1870, said that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Reading those words today, one would assume they gave African Americans the right to vote. That is not what the Supreme Court of the 1870s thought they meant. By a series of decisions, it held that the Fifteenth Amendment did not necessarily confer the right to vote on anybody; it merely asserted that if someone was denied that right, the denial could not be explicitly on the grounds of race. And the burden of proving that it was race that led to the denial fell on the black citizen who was turned away at the polls.[18]

This interpretation opened the door to three especially notorious but then-legal devices to keep blacks from voting. One was a **literacy test** (a large proportion of former slaves were illiterate); another was a requirement that a **poll tax** be paid (most former slaves were poor); and the third was the practice of keeping blacks from voting in

primary elections (in the one-party South, the only meaningful election was the Democratic primary). To allow whites who were illiterate or poor to vote, a **grandfather clause** was added to the law, saying that a person could vote, even if he did not meet the legal requirements, if he or his ancestors voted before 1867 (blacks, of course, could not vote before 1867). When all else failed, blacks were intimidated, threatened, or harassed if they showed up at the polls.

There began a long, slow legal process of challenging in court each of these restrictions in turn. One by one, the Supreme Court set most of them aside. The grandfather clause was declared unconstitutional in 1915,[19] and the **white primary** finally fell in 1944.[20] Some of the more blatantly discriminatory literacy tests also were overturned.[21] The practical result of these rulings was slight: only a small proportion of voting-age blacks were able to register and vote in the South, and they were found mostly in the larger cities. A dramatic change did not begin until 1965, with the passage of the Voting Rights Act. This act suspended the use of literacy tests and authorized the appointment of federal examiners who could order the registration of blacks in states and counties (mostly in the South) where fewer than 50 percent of the voting-age population were registered or had voted in the last presidential election. It also provided criminal penalties for interfering with the right to vote.

grandfather clause *A clause in registration laws allowing people who do not meet registration requirements to vote if they or their ancestors had voted before 1867.*

white primary *The practice of keeping blacks from voting in the southern states' primaries through arbitrary use of registration requirements and intimidation.*

Though implementation in some places was slow, the number of African Americans voting rose sharply throughout the South. For example, in Mississippi the proportion of voting-age blacks who registered rose from 5 percent to over 70 percent from 1960 to 1970. These changes had a profound effect on the behavior of many white southern politicians: Alabama Governor George Wallace stopped making pro-segregation speeches and began courting the black vote.

Women were kept from the polls by law more than by intimidation, and when the laws changed, women almost immediately began to vote in large numbers. By 1915, several states, mostly in the West, had begun to permit women to vote. But it was not until the Nineteenth

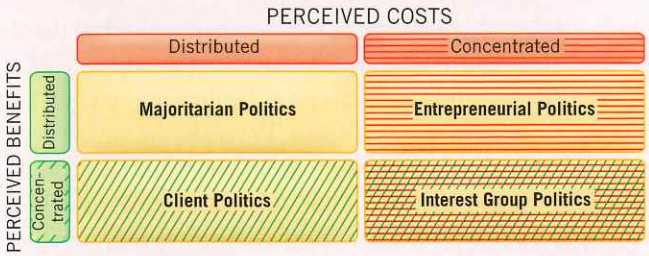
POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

Expanding Voting: Majoritarian Politics

As we discussed in the text, in recent decades, a number of states have expanded access to the ballot. A few states now allow all-mail balloting, whereas others allow no-excuse absentee balloting or early voting before Election Day (see the Constitutional Connections box on page 176 for more information). Such efforts to broaden access to the ballot are best thought of as majoritarian politics. Benefits are dispersed to all citizens from expanded access to the ballot, since it makes it easier for everyone to take part in elections. Citizens no longer need to go to a polling place on Election Day and stand in line to cast a ballot; rather, they can vote in a more convenient manner. However, as we noted in the body of the chapter, such reforms have done little to boost turnout.

At the same time, costs are dispersed among all voters as well. Voters who vote early may vote differently than voters who cast their ballot on Election Day. Those who vote early necessarily miss some of the campaign, and hence may have voted differently if important information comes out after they have cast their ballot. Furthermore, some have raised concerns about the security of vote by mail in particular (for both all-mail and absentee ballots). When voting in person, safeguards are in place to protect the integrity of the ballot, but many of them are gone when voting by mail, leading to the potential for abuse.

As is typically the case with majoritarian politics, the ultimate debate has come down to which side has the more compelling argument (since the costs and benefits are so widely dispersed). In the end, in most places, the arguments about increasing the ease of voting have carried the day. To respond to criticisms, some states have put in place systems to try and reduce fraud, though it is unclear how serious a problem it is or how to best stop it.

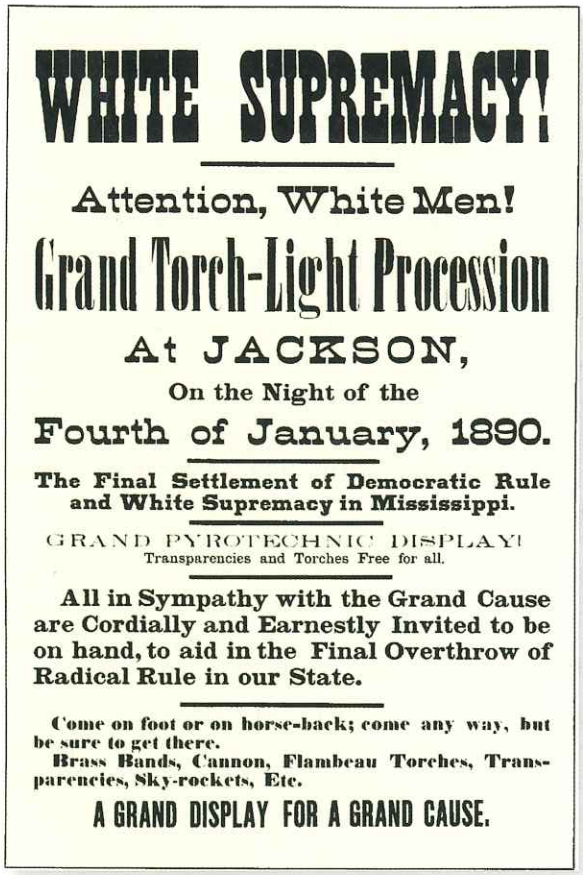


▶ **PRACTICE POLITICAL SCIENCE** Refute the arguments made by proponents of expanded access to the ballot. Refute the arguments made by opponents of expanded access to the ballot. Support one of these perspectives using relevant evidence from a recent election.

Source: Adam Liptak, "Error and Fraud at Issue as Absentee Voting Rises," *New York Times*, 7 October, 2012.

Flip Schulke Archives/Corbis Premium Historical/Getty Images

IMAGE 8-1 After the Civil Rights Act of 1964 was passed, blacks and whites voted together in a small Alabama town.



WHITE SUPREMACY!

Attention, White Men!

Grand Torch-Light Procession

At JACKSON,

On the Night of the

Fourth of January, 1890.

The Final Settlement of Democratic Rule and White Supremacy in Mississippi.

GRAND PYROTECHNIC DISPLAY!
Transparencies and Torches Free for all.

All in Sympathy with the Grand Cause are Cordially and Earnestly Invited to be on hand, to aid in the Final Overthrow of Radical Rule in our State.

Come on foot or on horse-back; come any way, but be sure to get there.
Brass Bands, Cannon, Flambeau Torches, Transparencies, Sky-rockets, Etc.

A GRAND DISPLAY FOR A GRAND CAUSE.

The Granger Collection, NYC

IMAGE 8-2 After Reconstruction ended in 1876, black voting shrank under the attacks of white supremacists.

Amendment to the Constitution was ratified in 1920, after a struggle lasting many decades, that women generally were allowed to vote. At one stroke, the size of the eligible voting population almost doubled. Contrary to the hopes of some and the fears of others, no dramatic changes occurred in the conduct of elections, the identity of the winners, or the substance of public policy. Initially, at least, women voted more or less in the same manner as men, though not quite as frequently.

The political impact of the youth vote was also less than expected. The Voting Rights Act of 1970 gave 18-year-olds the right to vote in federal elections beginning January 1, 1971. It also contained a provision lowering the voting age to 18 in state elections, but the Supreme Court declared this unconstitutional. As a result, a constitutional amendment, the twenty-sixth, was proposed by Congress and ratified by the states in 1971. The 1972 elections became the first in which all people between the ages of 18 and 21 could cast ballots (before then, four states had allowed those under 21 to vote). About 25 million people suddenly became eligible to participate in elections, but their turnout (42 percent) was lower than for the population as a whole, and they did not flock to any particular party or candidate.

LANDMARK CASES | Right to Vote

- ***Smith v. Allwright* (1944):** Because political parties select candidates for public office, they may not exclude blacks from voting in their primary elections.

Every presidential election year since 1972 has been accompanied by predictions that the "youth vote" is likely to surge. Such predictions were especially prevalent in 2008, when 23 million citizens under age 30, representing 52 percent of the 18- to 29-year-old voting population, voted. That was a higher fraction than in 1996 (37 percent), 2000 (41 percent), and 2004 (48 percent), but lower than 1972 (55 percent) and the same as 1992 (52 percent). In 2012, that figure dropped back to 45 percent, but it returned to 50 percent in 2016.[22] We return to the questions of why young people in particular do not vote, and the consequences of that, later in the chapter.

Library of Congress Prints and Photographs Division

IMAGE 8-3 The campaign to win the vote for women nationwide succeeded with the adoption of the Nineteenth Amendment in 1920.

Voter Turnout

The proportion of the voting-age population that has gone to the polls in presidential elections has remained about the same—between 50 and 63 percent of those eligible—at least since 1928, and appears today to be much smaller than it was in the latter part of the 19th century (see Figure 8.3). In every presidential election between 1860 and 1900, at least 70 percent of the eligible population apparently went to the polls, and in some years (1860 and 1876) almost 80 percent seem to have voted. Since 1900, in not a single presidential election has turnout reached 70 percent, and on two occasions (1920 and 1924), it did not even reach 50 percent.[23] Even outside the South, where efforts to disenfranchise African Americans make data on voter turnout especially hard to interpret, turnout seems to have declined: Over 85 percent of the voting-age population participated in presidential elections in non-Southern states between 1884 and 1900, but only 68 percent participated between 1936 and 1960, and even fewer have done so since then.[24]

Scholars have vigorously debated the meaning of these figures. One view is that this decline in turnout, even allowing for the shaky data on which the estimates are based, has been real and is the result of a decline of popular interest in elections and a weakening of the competitiveness of the two major parties. During the 19th century, according to this theory, the parties fought hard, worked strenuously to get as many voters as possible to the polls, afforded the mass of voters a chance to participate in party politics through caucuses and conventions, kept the legal barriers to participation (such as complex registration procedures) low, and looked forward to close, exciting elections. After 1896, by which time the South had become a one-party Democratic region and the North heavily Republican, both parties became more conservative, national elections usually resulted in lopsided victories for the Republicans, and citizens began to lose interest in politics because it no longer seemed relevant to their needs. The parties ceased functioning as organizations to mobilize the mass of voters and fell under the control of leaders, mostly conservative, who resisted mass participation.[25]

Australian ballot
A government-printed ballot of uniform dimensions to be cast in secret that many states adopted around 1890 to reduce voting fraud associated with party-printed ballots cast in public.

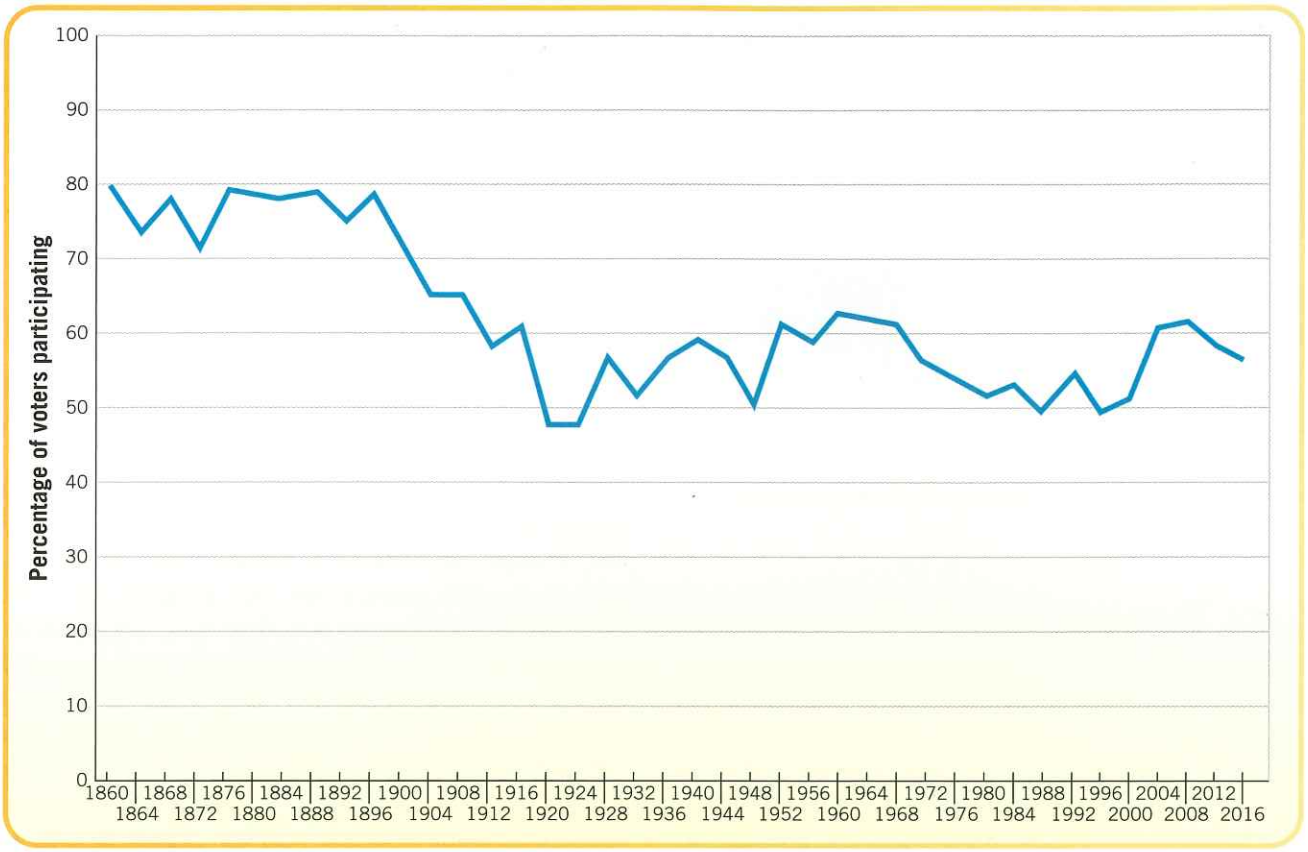
There is another view, however. It argues that the decline in voter turnout has been more apparent than real. Though elections were certainly more of a popular sport in the 19th century than they are today, the parties were no more democratic then than now, and voters then may have been more easily manipulated. Until around the beginning of the 20th century, voting fraud was commonplace because it was easy to pull off. The political parties, not the government, printed the ballots; they often were cast in public, not private, voting booths; few serious efforts were made to decide who was eligible to vote, and the rules that did operate were easily evaded.

Under these circumstances, it was easy for a person to vote more than once, and the party machines made heavy use of these repeat voters, or "floaters." "Vote early and often" was not a joke; it was a fact. The parties often controlled the counting of votes, padding the totals whenever they feared losing. As a result of these machinations, the number of votes counted was often larger than the number cast, and often the number cast was in turn larger than the number of individuals eligible to vote.

Around 1890, the states began adopting the **Australian ballot**. This was a government-printed ballot of uniform size and shape that was cast in secret, created to replace the old party-printed ballots cast in public. By 1910, only three states were without the Australian ballot. Its use cut back on (but certainly did not eliminate) vote buying and fraudulent vote counts.

In short, if votes had been legally cast and honestly counted in the 19th century, the statistics on election turnout might well be much lower than the inflated figures we now have.[26] To the extent that this is true, voter participation may not have declined as much as some have suggested. Nevertheless, most scholars believe that turnout probably did actually decline somewhat after the 1890s. One reason was that voter registration regulations became more burdensome: there were longer residency requirements;

FIGURE 8.3 **Voter Participation in Presidential Elections, 1860–2016**



Note: Several southern states did not participate in the 1864 and 1868 elections.

Sources: For 1860–1928: Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970,* part 2, 1071; 1932–1944: *Statistical Abstract of the United States*, 1992, 517; for 1948–2000: Michael P. McDonald and Samuel L. Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* 95 (December 2001): 966; for 2004–2012: American National Election Studies (ANES); for 2016: onward U.S. Election Project.

voter identification laws
Laws requiring citizens to show a government-issued photo ID in order to vote.

aliens who had begun but not completed the process of becoming citizens could no longer vote in most states; it became harder for African Americans to vote; educational qualifications for voting were adopted by several states; and voters had to register long in advance of the elections. These changes, designed to "purify" the electoral process, were aspects of the progressive reform impulse (described in Chapter 9) and served to cut back on the number of people who could participate in elections.

Strict voter registration procedures, like most reforms in American politics, had unintended as well as intended consequences. These changes not only reduced fraudulent voting but also reduced voting in general because they made it more difficult for certain groups of perfectly honest voters—those with little education, for example, or those who had recently moved—to register and vote. This was not the first time, and it will not be the last, that a reform designed to cure one problem created another.

Following the controversy over Florida's vote count in the 2000 presidential election, many proposals were made to overhaul the nation's voting system. In 2002, Congress passed a measure that for the first time requires each state to have in place a system for counting the disputed ballots of voters whose names were left off official registration lists. In addition, the law provides federal funds for upgrading voting equipment and procedures and for training election officials. But it stops short of creating a uniform national voting system. Paper ballots, lever machines, and punch-card voting systems will still be used in some places, while optical scan and direct recording electronic equipment will be used in others. Since then, however, there have been fewer such calls to reform voting technology.

In the past decade, the major legal challenge to voter laws has been the rise of **voter identification laws**. Thirty-four states have passed laws that require voters to

show a government-issued photo identification to vote, and 32 such laws were in place for the 2016 election.[27] Proponents claim such laws are needed to prevent voter fraud (having someone pretend to be someone else at the polling place). However, numerous careful studies and government reports have found that such in-person voter fraud is extremely rare.[28] Indeed, despite claims of voter fraud in 2016, there was little to no evidence of it, according to elections officials.[29]

Critics of such laws argue that many citizens lack photo identification and hence cannot vote: Several studies suggest that approximately 10 percent of the population does not have valid photo identification. While nearly all laws include a provision for voters to obtain such identification, many of those without identification also lack the paperwork needed to get them. Furthermore, those without proper identification are overwhelmingly poor and/or racial minorities.[30] Several studies also suggest that these voter ID laws may not be enforced uniformly: Minority voters are more likely to be asked to show an ID, even after relevant demographic factors are taken into account.[31]

Given this, many such laws have been challenged in court. While the Supreme Court ruled in 2008 that such laws are not necessarily unconstitutional,[32] subsequent court challenges have struck down some laws, while leaving others intact, depending on the specifics of the law. There is no doubt there will continue to be legal challenges to these laws into the future. Regardless of their legal status, however, such laws do not seem to have much impact on overall turnout. The best evidence shows that if these laws affect aggregate turnout at all, they reduce it by at most a few percentage points.[33]

Even after all the legal changes are taken into account, citizen participation in elections seems to have declined. Between 1960 and 1980, the proportion of voting-age people casting a ballot in presidential elections fell by about 10 percentage points, a drop that cannot be explained by how ballots were printed, how registration rules were rewritten, nor the other changes reviewed above. Nor can these factors explain why 1996 witnessed not only the lowest level of turnout (49 percent) in a presidential election since 1924 but also the single steepest four-year decline (from 55 percent in 1992) since 1920. No matter what election we use, turnout today is lower than it was early in the 20th century.

Actual trends in turnout aside, what if they held an election and everyone came? Would universal turnout change national election outcomes and the content of public policy? It has long been argued that because the poor, less educated, and minorities are overrepresented among nonvoters, universal turnout would strongly benefit Democratic candidates and liberal causes. But careful studies of this question have found that the "party of nonvoters" largely mirrors the demographically diverse and ideologically divided population that goes to the polls, and that even if everyone voted, the outcome would change by only a very small amount—not enough to actually change the balance of an election or many policies.[34]

Xinhua/Alamy Stock Photo

IMAGE 8-4 Supporters of both major nominees gather outside the second 2016 presidential debate in St. Louis, MO.

8-3 Who Participates in Politics?

To understand better why voter turnout declined and what, if anything, that decline may mean, we must first determine who participates in politics.

Forms of Participation

While voting is perhaps the quintessential form of political participation, citizens can be involved in the political process in many other ways. For example, people can be involved in a campaign: they can volunteer to staff a phone bank or participate in a get-out-the-vote drive, or they can write a check to a candidate or a party. They can also participate by attending community meetings; contacting public officials to direct their attention to a particular problem; working through an interest group; participating in a protest, demonstration, or social movement; and so forth. When political scientists think of participation, we think of any method that citizens engage in to try to influence politics.

As we saw above approximately 50–60 percent of the public has voted in recent presidential elections. Other types of political participation are less common. For example, in most election years, approximately 20 percent display a yard sign, bumper sticker, or button; 15 percent give money to a candidate or party; 10 percent attend

activists *People who tend to participate in all forms of politics.*

a political meeting or rally; and only 5–6 percent volunteer for a campaign or party. Such patterns have been quite consistent for more than 50 years, suggesting that it is not simply that today's citizens participate less than those of yesteryear.[35]

Such numbers perhaps should not surprise us: After all, political participation is a costly activity, requiring resources (time, money, and so forth) as well as interest in politics. That said, however, we should not conclude that Americans are not interested in their communities, as studies have found that Americans frequently participate in apolitical ways, for example, by volunteering with a religious or charitable organization. Furthermore, relative to citizens from other nations, Americans are more involved in politics and community affairs (even though fewer of us turn out to vote, as we saw in Table 8.1).[36]

In one study, scholars analyzed the ways in which people participate in politics and came up with six forms of participation that are characteristic of six different kinds of U.S. citizens. About one-fifth (22 percent) of the population is completely inactive: they rarely vote, they do not get involved in organizations, and they probably do not even talk about politics very much. These inactive citizens typically have little education and low incomes and are relatively young. Many are African American. At the opposite extreme are the complete **activists**, constituting about one-ninth of the population (11 percent). These people are highly educated, have high incomes, and tend to be middle-aged rather than young or old. They tend to participate in all forms of politics.

Between these extremes are four categories of limited forms of participation. The *voting specialists* are people who vote but do little else; they tend not to have much schooling or income and to be substantially older than the average person. *Campaigners* not only vote but also like to get involved in campaign activities. They are better educated than the average voter, but what seems to distinguish them most is their interest in the conflicts, passions, and struggles of politics; their clear identification with a political party; and their willingness to take strong positions. *Communalists* have a social background much like that of campaigners but have a very different temperament: They do not like the conflict and tension of partisan campaigns. They tend to reserve their energy for community activities of a more nonpartisan nature, forming and joining organizations to deal with local problems and contacting local officials about these problems. Finally, there are *parochial participants*, who do not vote and stay out of election campaigns and civic associations but are willing to contact local officials about specific, often personal, problems.[37]

© Leonard Zhukovsky/Shutterstock.com

IMAGE 8-5 After Hurricane Sandy in 2012, volunteers help to rebuild homes destroyed in Far Rockaway, New York.

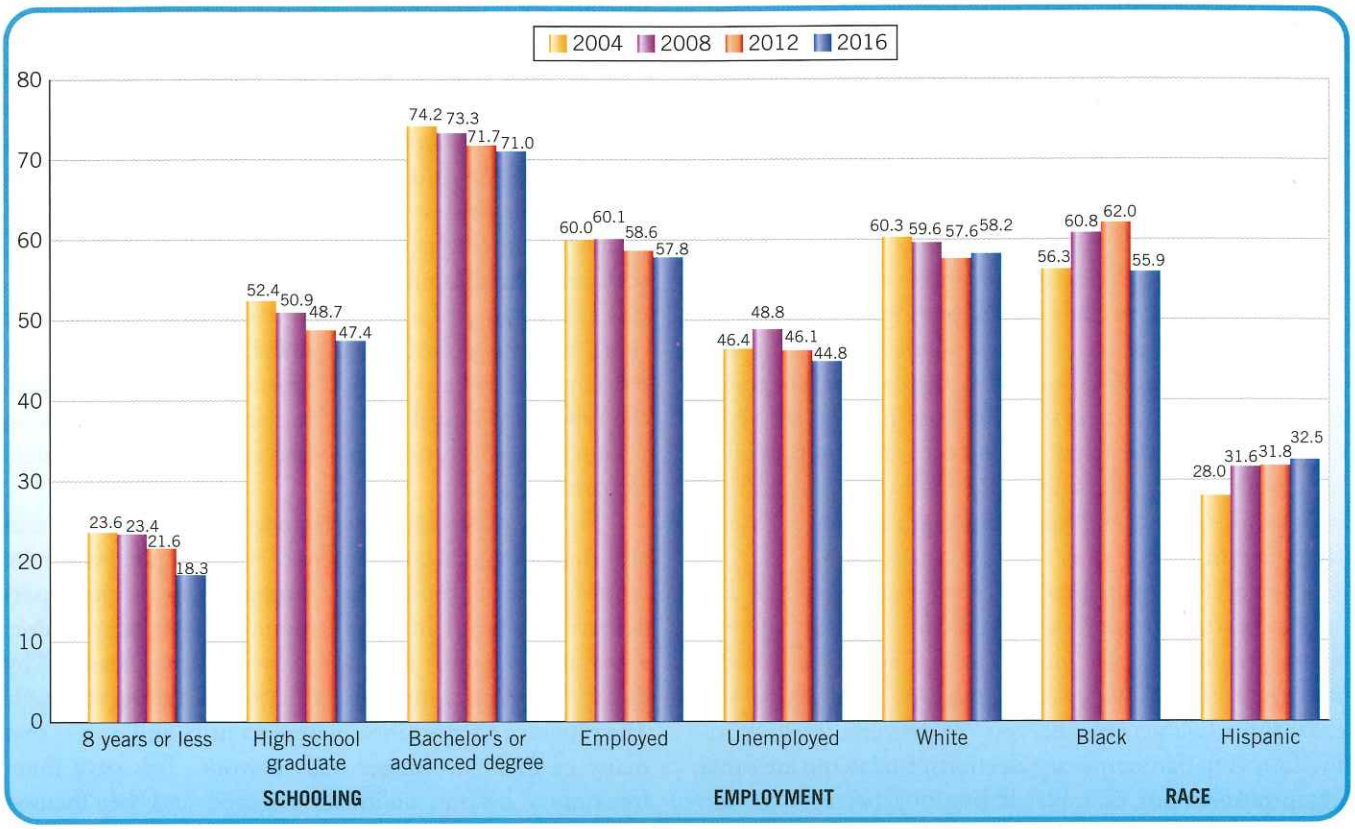
What Drives Participation?

But who participates in politics? The characterizations above suggest that some people are deeply involved, whereas others are content to sit on the political sidelines. What groups actually participate most in elections? Figure 8.4 shows what percentages of various demographic groups voted in several recent presidential elections.

Several interesting patterns immediately jump out. First, education has an enormous effect on voter turnout: Those who have more education are much more likely to participate in politics, and the same is true of those who are employed. Likewise, while there are effectively no black–white differences in turnout, we find large effects for Hispanics, who are more than 20 percent less likely to vote. Why do these differences occur? Political scientists have identified many factors that increase political participation; here we focus on several of the most important.

First, and perhaps most importantly, citizens need the resources necessary to participate in politics, which include factors such as time, money, and civic skills. Time is an obvious prerequisite to participating in politics: If you do not have the free time to be politically active, you cannot participate. Likewise, if you are going to donate to a campaign, you need the financial resources to make the contribution. With more money, you can also afford to have a stable residence and avoid the need to reregister because you changed your address. Finally, civic skills are the communication and organization abilities that help people participate in politics. These include factors such as comfort with public speaking, experience organizing meetings, the ability to speak and understand English (and American politics/culture), and so forth. So if you are a strong public speaker, can write well, and frequently organize people into meetings (setting the agenda, running the meeting, etc.), then you

FIGURE 8.4 **Voter Turnout in Presidential Elections by Schooling, Employment, and Race, 2004–2016**



Source: Adapted from U.S. Bureau of the Census, Historical CPS Time Series Tables.

may find it easier to do these tasks in politics as well.[38] Resources are, in effect, the "raw ingredients" of political participation; without these background characteristics, it is difficult to participate.

Differences in resources help to explain differences across these groups, especially with factors such as employment and education. Those with more education (or who are employed) have more of the resources necessary to participate in politics. For example, those with more education have higher levels of civic skills, and they typically have higher incomes as well. Likewise, those who are employed have the opportunity to develop civic skills (running meetings, being organized, etc.) through their jobs. As a result, these groups participate more.

Differences in resources also help to explain why voting-eligible Hispanics participate at lower levels than voting-eligible whites or blacks. Scholars have found that once they adjust for relevant resource-related factors (such as age, education, residential mobility, income, and employment), the gaps become smaller.[39] For example, some Hispanics have limited English proficiency, which is often a barrier to participating in politics. Likewise, those who are second- or third-generation Latinos—those who grew up in America and hence are more familiar with

JASON CONNOLLY/AFP/Getty Images

IMAGE 8-6 Young people attend a rally in support of Senator Bernie Sanders during the 2016 Democratic Primary.

American culture and politics, and who have family members who have voted in America—are more likely to participate. Put slightly differently, Hispanic citizens tend to have fewer political resources than other Americans, but conditional on that, their participation is similar to that of other groups.[40]

But resources alone do not explain who participates in politics. After all, some people with advanced degrees always vote, while others never come to the polls.

Resources are only a start in fully understanding participation. Engagement with politics also matters. To participate, you must believe your voice matters in the political process, and you have to be interested in politics. Absent these, you are unlikely to participate, no matter what your level of resources.[41]

This interest in politics can come from many places, but schools are a particularly important source. Education helps to foster civic norms in students, and helps them to realize that their participation in government matters. Such effects are especially strong among those who take government and/or civics classes, where they are instilled with the importance of political participation. As a result, these individuals participate more later in life.[42] Thus education increases participation in two ways: by providing civic skills and by increasing political interest. Given this, education is one of the most important pathways to participation in America.

Third, for many people, being mobilized is a key step to participation: When asked why they participated, many politically active citizens said they did so because they were asked.[43] We saw above that political parties and campaigns (via get-out-the-vote efforts) are key mobilizing factors in contemporary elections. But so too are other organizations. For example, it has long been noted that more religious citizens are more likely to participate in politics. Scholars have found that the reason why is that churches foster social networks that encourage participation. Many people at a place of worship are involved in their community more broadly, and they encourage their friends there to participate politically as well. As a result, more religious people participate more not because of resources, but because of mobilization.[44] Likewise, churches have provided a valuable mechanism for bringing Latino voters into the political system.[45] Such mobilization also takes place through the Kiwanis Club, a bowling league, or even just among friends.

Mobilization becomes even more important when we realize that participation is habit-forming. Those who are mobilized by a get-out-the-vote message in one election are more likely to vote in future elections, even without receiving another get-out-the-vote message.[46] Likewise, young voters who participate in one election are more likely to participate in future elections,[47] and, more generally, for most citizens, voting is a habit: Once they begin to vote, they are likely to continue, as with any habit.[48] Being mobilized in one election can have important spillover consequences for future elections as well.

Fourth, some people become politically active because they care deeply about a particular issue. For example, they may be upset at drug dealers using a corner park in their neighborhood and organize a local neighborhood watch, partnering with the police to drive the drug dealers out. In so doing, they learn valuable skills about how to organize their neighbors, how to work with local officials, and so forth. These skills are directly transferable to other types of political participation. Indeed, many who first become involved with politics or community life because of a particular issue often then become more broadly politically involved.[49] Such pathways to participation are especially important for those who lack the types of political resources discussed above. Lacking resources, passion and motivation can inspire some voters to participate.

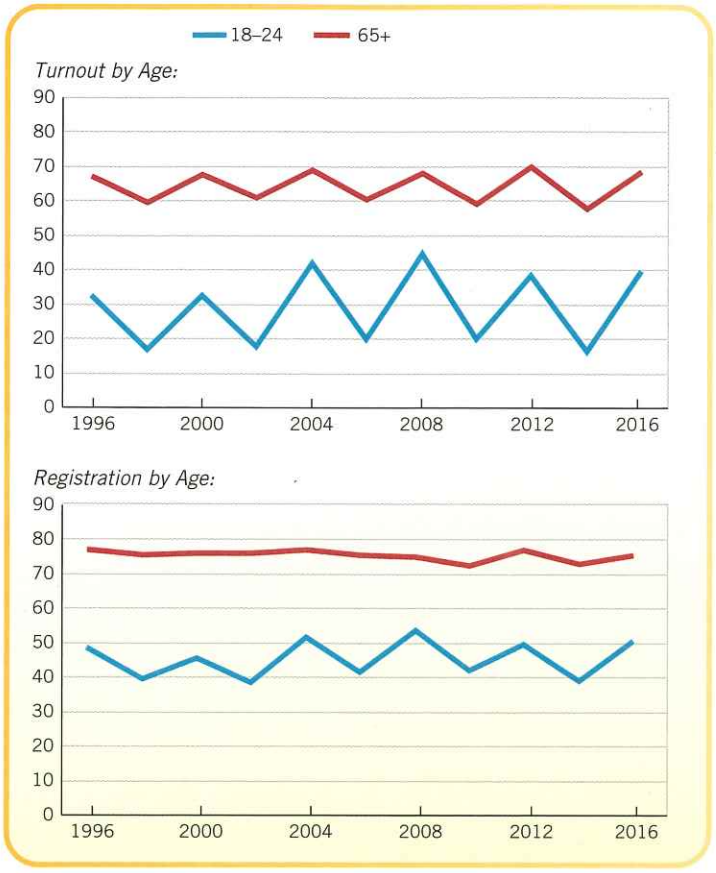
Finally, experiences with government programs can also shape political participation. For example, before the creation of the Social Security program, senior citizens participated far less than other Americans, but today, seniors are among the most politically involved Americans. Why did Social Security increase participation among the aged? The program gave seniors income security and meant that many of them no longer had to work. This gave them free time to become politically engaged, and they focused much of their attention on the program most directly relevant to their lives: Social Security. Seniors, in the wake of the program's passage, became more involved in politics and argued on behalf of the program, thereby strengthening it. Thus citizens create programs (by participating in government), but programs also create citizens by giving them valuable political skills.[50]

Political Participation Among Young People

Above, we saw how some groups participate more, while others participate less. One of the most striking inequalities in participation occurs with respect to age. Older voters are more likely to be registered to vote and are more likely to actually show up to the polls on Election Day. For example, in midterm and presidential elections alike, Americans ages 18 to 24 register at much lower rates and also fail to vote at much higher rates than do Americans age 65 and older, as we see in Figure 8.5.

Yet while young people participate much less in politics, they are no less engaged with their communities than older voters. What explains this disconnect? Why

FIGURE 8.5 **Voter Registration and Turnout by Age**



Source: Adapted from U.S. Bureau of the Census, Historical CPS Time Series Tables, Table A-1, Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups, 1964–2016.

do young people eschew politics but not community and civic life more generally? These younger voters think community service is important, but they do not feel the same way about politics. They are more cynical about politics, and many think that political participation does not matter.[51]

Does this lower youth political participation matter? Some argue that it does not. They say that younger voters traditionally have voted at lower levels and, over time, as these voters mature, they will participate more, as their parents and grandparents did. But even if this is true, there is still an important reason to be concerned with low levels of youth turnout and participation. Quite simply, politicians respond to those who vote far more than those who do not. Above, we saw the example that Social Security helped senior citizens become more involved with politics by providing them with political skills and resources. And as seniors became more involved, the government strengthened Social Security. But it is critical to note this second step: Government responded because seniors were politically involved. Governments are generally responsive to public opinion (as we saw in Chapter 7), but they are particularly responsive to those who participate more. So, to the extent that younger people do not vote or participate in politics, politicians have less incentive to respond to their concerns. Therefore programs that largely benefit young people—things like expanded Pell grants and student loan debt relief—receive less attention from policymakers than they likely would if young people voted at the same level as senior citizens. If you want government to respond to your demands, you must take part in the political process.

WHAT WOULD YOU DO?

Will You Make Election Day a Holiday?

To: *Senator Mia Lily Jae*
From: *L. Luke Brian, legislative analyst*
Subject: *Voting reform legislation*

In recent years, only 6 in 10 Americans voted in presidential elections, and only a third or so cast ballots for congressional elections. In a few recent presidential primaries and statewide special elections, turnout has run 10 percent or less. Studies show that often citizens miss the opportunity to vote because of complications with work or child care. To address this problem, legislators from both parties support celebrating Veterans Day on Election Day, which would create a national holiday for voting. Eligible voters who do not go to the polls would be fined.

To Consider:

With bipartisan concern about maximizing voter turnout for upcoming elections, both the House and the Senate are considering bills to combine Veterans Day with Election Day and/or impose fines on nonvoters. Members of Congress declare that increasing turnout is vital to the continued health of American democracy.

Arguments for:

1. This proposal honors veterans by recognizing their service with the fundamental requirement of representative democracy, rule by the people through voting.
2. A voting holiday ensures that people who cannot take time off from work to vote or have other responsibilities have the opportunity to exercise their democratic right.
3. Imposing a fine for nonvoting sends a moral message that voting is a civic duty in a democracy. More citizens will feel morally obliged to vote if all citizens are legally obliged to do so.

Arguments against:

1. Just as veterans volunteer their service, so too should citizens volunteer to exercise their democratic responsibilities.
2. Voting is a right, but citizens have a civic duty to exercise that right, and the government should not, in effect, exercise that duty on their behalf. Moreover, people can vote by absentee ballot at their convenience.
3. Compulsory voting does not guarantee informed voting. It is both unwise and undemocratic to legally oblige people to vote.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Vote for bill ☐ Vote against bill

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

LEARNING OBJECTIVES

8-1 Discuss how American voter turnout compares to other advanced industrialized democracies.

American voter turnout is generally lower than in other advanced industrialized democracies. But it is important to note that American elections differ from their European counterparts across many dimensions. Americans elect far more officials, have far more frequent elections, and are required to register to vote (rather than being automatically enrolled). Efforts to increase registration, such as the motor-voter law, have gotten more names onto the voting rolls, but often these new additions do not vote as frequently as other registered voters. Most states now permit people to vote early, as an absentee, and by mail, but neither these measures, nor various "get-out-the-vote" tactics, have yet been shown to increase voter turnout in ways that result in most eligible citizens voting in most elections.

8-2 Describe the historical expansion of suffrage in America and how this affected voter participation.

Initially, only white male property holders could vote, but over time, those barriers were lifted. Today, nearly all citizens can vote, though there have been heated debates in recent years about voter identification laws.

8-3 Outline what factors explain who participates in politics.

Many factors determine participation, but we identified several key ones: having the resources (such as time, income, and civic skills), being psychologically engaged with politics, being mobilized, being motivated, and having experiences with government programs.

TO LEARN MORE

Information for voters:

Congress.org: **www.congress.org**

League of Women Voters: **www.lwv.org**

Voter Information Services: **www.vis.org**

Voting Guide: **www.vote411.org**

National Mail Voter Registration Form: **www.fec.gov/votregis/vr.shtml**

Voter turnout statistics: **www.electproject.org**

Burnham Walter Dean. *Critical Elections and the Mainsprings of American Politics*. New York: Norton, 1970. A classic argument about the decline of voter participation, linking it to changes in the economic system.

Eisner, Jane. *Taking Back the Vote: Getting American Youth Involved in Our Democracy*. Boston: Beacon Press, 2004. Highly readable account of why millennium-generation, college-age Americans volunteer a lot but vote little, with recommendations for getting young people more interested in politics.

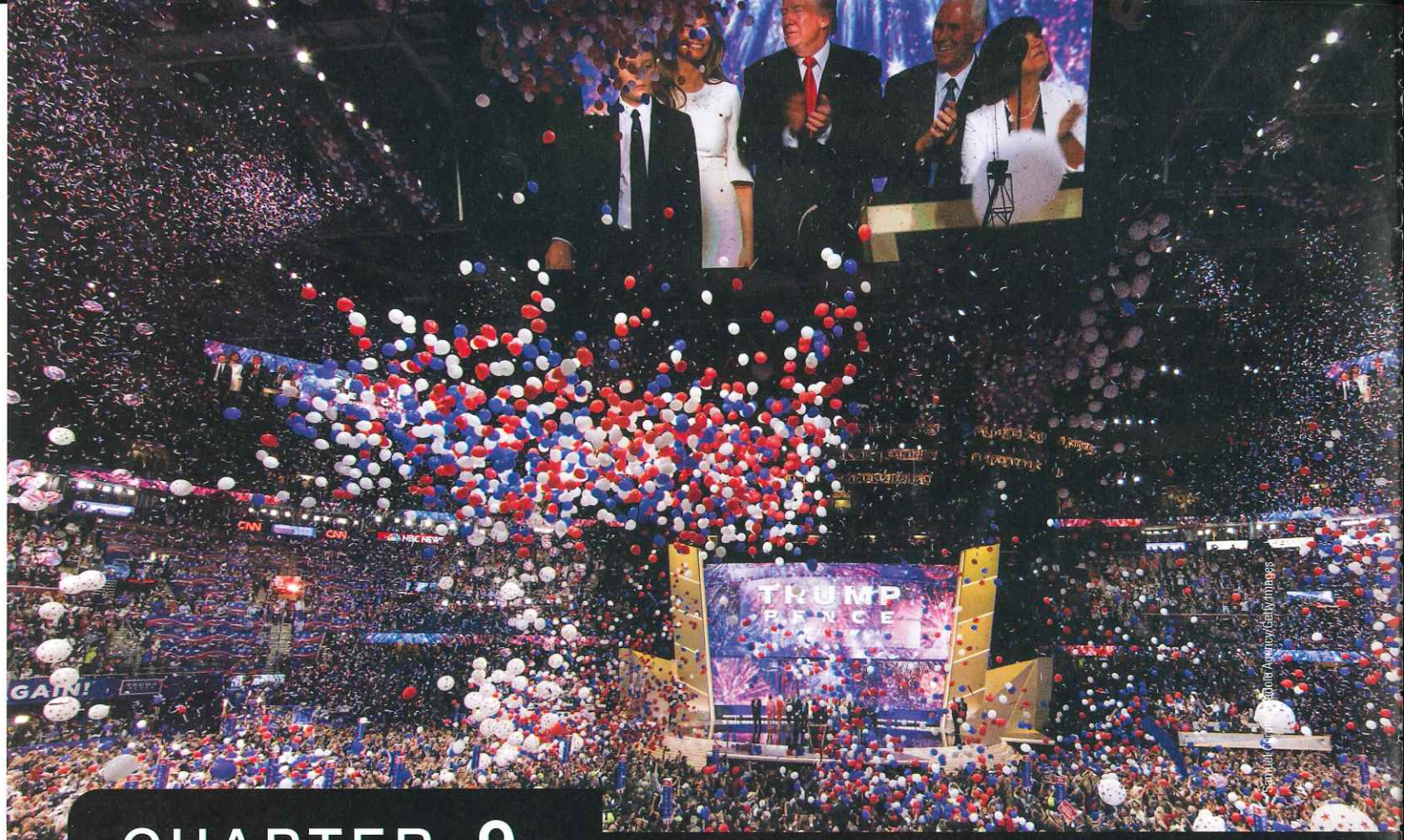
Green, Donald P., and Alan S. Gerber. *Get Out the Vote: How to Increase Voter Turnout*, 3rd ed. Washington, DC: Brookings Institution Press, 2015. Excellent review of the evidence on what works—and what doesn't—to get more people to the polls.

Niemi, Richard, Herbert F. Weisberg, and David C. Kimball, eds. *Controversies in Voting Behavior*, 5th ed. Washington, DC: Congressional Quarterly Press, 2010. Essays on voting and related topics that summarize the most advanced empirical research and offer competing perspectives on what the data show.

Sniderman, Paul M., and Benjamin Highton, eds. *Facing the Challenge of Democracy: Explorations in the Analysis of Public Opinion and Political Participation*. Princeton, NJ: Princeton University Press, 2011. Essays on political participation and related topics that highlight new and unresolved research questions and, in many cases, update classic studies.

Verba, Sidney, Norman H. Nie, and Jae-on Kim. *Participation and Political Equality*. Cambridge, England: Cambridge University Press, 1978. Classic comparative study of political participation in seven nations.

Wattenberg, Martin P. *Is Voting for Young People?* 3rd ed. New York: Pearson, 2012. An account of why youth voter turnout in America has been so low and a case for compulsory voting.



CHAPTER 9

Political Parties

KEY OBJECTIVES OF THIS CHAPTER

- *The ideologies of the two major parties shape policy debates.*
- *As linkage institutions, political parties impact the electorate and the government.*

KEY TAKEAWAYS FROM THIS CHAPTER

- The Democratic party is generally influenced by liberal ideology and the Republican party is generally influenced by conservative ideology.
- Parties modify their policies and messaging to appeal to various demographic coalitions.

In recent years, partisan control of the elected branches of government has flipped between the parties several times. In 2006, Democrats had reason to smile. They won control of the House and the Senate that year, and then they achieved a unified government after Barack Obama won the 2008 presidential election. Democrats were less happy in 2010 when Republicans won back control of the House; Republicans would later win back control of the Senate in 2014. In 2016, it was Republicans who were smiling, when Donald Trump's surprise victory in the presidential election gave Republicans unified control of government for the first time since the George W. Bush administration. In this one decade we went from divided government, to unified Democratic government, back to divided government, to unified Republican government!

With all of these shifts in party control, you might think that voters' underlying party loyalties also shifted a great deal, but you would be wrong. Over this period, party loyalty among voters stayed basically the same. For instance, at the time of the 2016 election, Gallup polls found that about 28 percent of voters self-identified as Republicans, 40 percent as Independents, and 29 percent as Democrats. This is basically the same breakdown that existed 12 years earlier under the Bush administration.[1] As we will see later in the chapter, partisan identities remain quite stable over time, even if the party in control of the presidency or Congress changes more frequently.

Today, parties are central to the way we think about politics in the United States. But this is far from inevitable: the very existence and endurance of political parties in the United States is significant, given how the Framers of the Constitution opposed them.

THEN The Founders disliked parties, thinking of them as "factions" motivated by ambition and self-interest. George Washington, dismayed by the quarreling between Alexander Hamilton and Thomas Jefferson in his cabinet, devoted much of his farewell address to condemning parties. Indeed, in that address, Washington remarked: "the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it. It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosity of one part against another, foments occasionally riot and insurrection."[2] Clearly, Washington viewed parties with a deep and abiding disdain.

political party *A group that seeks to elect candidates to public office.*

This hostility toward parties was understandable: the legitimacy and success of the newly created federal government were still very much in doubt. When Jefferson organized his followers to oppose Hamilton's policies, it seemed to Hamilton and *his* followers that Jefferson was opposing not just a policy or a leader but also the very concept of a national government. Jefferson, for his part, thought Hamilton was not simply pursuing bad policies but was subverting the Constitution itself. Before political parties could become legitimate, it was necessary for people to separate in their minds quarrels over policies and elections from disputes over the legitimacy of the new government itself. The ability to make that distinction was slow in coming; thus, parties were objects of profound suspicion, at first defended only as temporary expedients.

NOW American political parties are the oldest in the world, dating back to the first decade of the republic. Thirty years ago many claimed they were in decline, but today they have resurged in many ways. New parties and affiliated movements (like the Green Party launched in 2000 by consumer advocate Ralph Nader, or the Tea Party movement that developed after the 2008 presidential election) may come and go, but two parties, the Democratic and Republican, still dominate the country's campaigns and elections. Nor have party leaders been replaced by media consultants, pollsters, or others whose profession is raising money or devising strategies for whichever candidates bid highest for their services. What distinguishes political parties from other groups, and why are they a fundamental feature of American politics? This chapter aims to explain what parties are, what they do, and why they have remained such an important part of American politics for over 200 years.

9-1 What Is a Party?

A **political party** is a group that seeks to elect candidates to public office by supplying them with a label—a "party identification"—by which they are known to the electorate.[3] This definition is purposefully broad so that it includes both familiar parties (Democratic, Republican) and unfamiliar ones (Whig, Libertarian, Socialist Workers) and covers periods in which a party is very strong (having an elaborate and well-disciplined organization that provides money and workers to its

candidates) as well as periods in which it is quite weak (supplying nothing but the label to candidates).

Political scientists think of parties as having three parts. A party exists as an *organization* that recruits and campaigns for candidates, as a *label* in the minds of voters, and as a *set of leaders* who try to organize and control the legislative and executive branches of government.[4] Parties help candidates get elected (by nominating and recruiting candidates, and then giving signals to voters about which candidates to support), and then organize and run government once they are in office.

First, parties recruit and support candidates in elections. Party leaders work to find potential candidates and recruit them to run for office, and then help them win the party's nomination. They then help these candidates raise money, conduct polls and focus groups, and develop advertisements to successfully win the general election as well.

Second, parties exist in the heads of voters. When Americans walk into a polling place, many of them identify as either a Democrat or a Republican. As we will see later in the chapter, this label—whether voters consider themselves Democrats or Republicans—powerfully shapes how they evaluate political leaders and how they vote in elections.

Third, parties coordinate behavior among elite politicians in office. As we see in Chapter 13, the majority party in the House and the Senate has the responsibility of organizing the chamber. Furthermore, congressional parties also work with the president to try to implement his legislative agenda. Sometimes, the president and congressional parties are in near-complete agreement on an issue, as when nearly all House Democrats supported—and all House Republicans opposed—final passage of the Patient Protection and Affordable Care Act, better known as Obamacare.[5] But at other times, the president and the party diverge greatly on what they want. For example, while former President Obama worked to expand free trade during his presidency, many Democrats in Congress opposed these deals.[6] Whether congressional Republicans will diverge from President Trump on salient issues such as free trade, taxes, or immigration remains to be seen.

In this chapter, we discuss the first two dimensions of party politics: how parties help elect candidates and how they shape the behavior of ordinary voters. We defer the third aspect of parties—parties as coordination devices among elected politicians—to later chapters (see especially Chapter 13 on Congress and Chapter 14 on the presidency).

What makes a party powerful? A powerful party is one whose label has a strong appeal for voters, whose organization can decide who will be candidates and how their campaigns will be managed, and whose leaders can dominate one or all branches of government. In the late 19th century, political parties in America reached their zenith in all three areas: voters were very loyal to their parties (largely because of patronage and other factors), party leaders dominated the Congress, and party bosses controlled who ran for office. In the 20th century, parties weakened considerably along all three dimensions. But in more recent decades, parties have regained some of their strength, though they are not as powerful as they were in the 19th century. As we will see throughout this chapter, the reasons for the decay and resurgence of parties are deeply rooted in political factors.

Political Parties at Home and Abroad

While American parties have been weaker or stronger over time, in general, they have been weaker than parties in many other advanced industrialized democracies, especially parliamentary democracies. Several important reasons account for this disparity in power.

First, in many other systems, parties control access to the ballot. In the great majority of American states, the party leaders do not select people to run for office; by law, those people are chosen by the voters in primary elections. Though sometimes the party can influence who will win a primary contest, it is ultimately up to the voters to decide. In Europe, by contrast, there is no such thing as a primary election—the only way to become a candidate for office is to persuade party leaders to put your name on the ballot. This obviously gives party leaders much more sway over their members: if ordinary members get out of line, the party can threaten to remove their name from the ballot in the next election.

Second, in a parliamentary system, the legislative and executive branches are unified, rather than divided as they are in America. If an American political party wins control of Congress, it does not—as in most European nations with a parliamentary system of government—also win the right to select the chief executive of the government. The American president, as we have seen, is independently elected; this means that the president will choose his or her principal subordinates not from among members of Congress but from among persons outside of Congress. Should the president pick a representative or senator for his or her cabinet, the Constitution requires that person to resign from Congress in order to accept the job. Thus, an opportunity to be a cabinet secretary is not an important reward for members of Congress, and so the president cannot use the prospect of that reward as a way of controlling congressional action, as the prime minister could in a parliamentary system.

Guillaume Destombes/Shutterstock.com

IMAGE 9-1 11 candidates competed in the first round of the 2017 French presidential election. France, like many European countries, has a multi-party system, rather than a 2-party system like the United States.

Third, the federal system of government in the United States decentralizes political authority and thus decentralizes political party organizations. For nearly two centuries, most important governmental decisions were made at the state and local levels—decisions regarding education, land use, business regulation, and public welfare—and thus it was at the state and local levels that the important struggles over power and policy occurred. Moreover, most people with political jobs—either elective or appointive—worked for state and local governments, and thus a party's interest in obtaining these jobs for its followers meant it had to focus attention on who controlled city hall, the county courthouse, and the state capitol. While power has increasingly been concentrated in Washington, DC, many important decisions are still made at the state and local levels.

Federalism, in short, meant American political parties would acquire jobs and money from local sources and fight local contests. This, in turn, meant the national political parties would be coalitions of local parties, and though these coalitions would have a keen interest in capturing the presidency (with it, after all, came control of large numbers of federal jobs), the national party leaders rarely had as much power as the local ones. The Republican leader of Cuyahoga County, Ohio, for example, could often ignore the decisions of the Republican national chair and even the Ohio state chair. All of these factors help to explain why American parties are (generally) weaker than parties in other nations.

9-2 The Rise and Decline of the Political Party

Our nation began without parties and, over time, their power has waxed and waned. Today, while parties are powerful in some respects, they are weaker in others. We can see this process in five broad periods of party history: (1) when political parties were created (roughly from the Founding to the 1820s); (2) when the more or less stable two-party system emerged (roughly from the time of President Andrew Jackson to the Civil War); (3) when parties developed a comprehensive organizational form and appeal (roughly from the Civil War to the 1930s); (4) when party "reform" began to alter the party system (beginning in the early 1900s but taking effect chiefly from the New Deal until the late 1960s); and (5) the period of polarization and resurgence (from the late 1960s through to today).

The Founding

The first organized political party in American history was made up of the followers of Thomas Jefferson, who, beginning in the 1790s, called themselves *Republicans* (hoping to suggest thereby that their opponents were secret monarchists).* The followers of Alexander Hamilton kept the label *Federalist*, which once referred to all supporters of the new Constitution (hoping to imply that their opponents were "Antifederalists," or enemies of the Constitution).

These early parties were loose caucuses of political notables in various localities, with New England strongly Federalist and much of the South passionately Republican. Jefferson and his ally James Madison thought their Republican Party was a temporary arrangement designed to defeat John Adams, a Federalist, in his bid to succeed Washington in 1796. (Adams narrowly defeated Jefferson, who, under the system then in effect, became vice president because he had the second most electoral votes.) In 1800, Adams's bid to succeed himself intensified party activity even more, but this time Jefferson won and the Republicans assumed office. The Federalists feared that Jefferson would dismantle the Constitution, but Jefferson adopted a conciliatory posture, saying in his inaugural address that "we are all Republicans, we are all Federalists."[7] It was not true, of course: the Federalists detested Jefferson, and some were planning to have New England secede from the Union. But it was good politics, expressive of the need that every president has to persuade the public that, despite partisan politics, the presidency exists to serve all the people.

So successful were the Republicans that the Federalists virtually ceased to exist as a party. Jefferson was reelected in 1804 with almost no opposition; Madison easily won two terms; James Monroe carried 16 of 19 states in 1816 and was reelected without opposition in 1820. Political parties had seemingly disappeared, just as Jefferson had hoped. The parties that existed in these early years were essentially small groups of local notables. Political participation was limited, and nominations for most local offices were arranged rather casually.

*The Jeffersonian Republicans were not the party that today we call Republican. In fact, present-day Democrats consider Jefferson to be the founder of their party.

The Jacksonians

What often is called the second party system emerged around 1824 with Andrew Jackson's first run for the presidency and lasted until the Civil War became inevitable. Its distinctive feature was that political participation became a mass phenomenon. For one thing, the number of voters to be reached had become quite large. Only about 365,000 popular votes were cast in 1824. But as a result of laws that enlarged the number of people eligible to vote and an increase in the population, by 1828 well over a million votes were tallied. By 1840, the figure was well over 2 million. (In England at this time, there were only 650,000 eligible voters.) In addition, by 1832 presidential electors were selected by popular vote in virtually every state. (As late as 1816, electors were chosen by the state legislatures, rather than by the people, in about half the states.) Presidential politics had become a truly national, genuinely popular activity; in many communities, election campaigns had become the principal public spectacle.

The party system of the Jacksonian era was built from the bottom up rather than from the top down, as it had been since the Founding. No change better illustrates this transformation than the abandonment of the system of having caucuses comprising members of Congress nominate presidential candidates. The caucus system was an effort to unite the legislative and executive branches by giving the former some degree of control over who would have a chance to capture the latter. The caucus system became unpopular when the caucus candidate for president in 1824 ran third in a field of four in the general election. It was completely discredited that same year when Congress denied the presidency to Jackson, the candidate with the greatest share of the popular vote.

To replace the caucus, the party convention was invented. The first convention in American history was held by the Anti-Masonic Party in 1831; the first convention of a major political party was held by the anti-Jackson Republicans later that year (it nominated Henry Clay for president). The Democrats held a convention in 1832 that ratified Jackson's nomination for reelection and picked Martin Van Buren as his running mate. The first convention to select a man who would be elected president and who was not already the incumbent president was held by the Democrats in 1836; they chose Van Buren.

The Civil War and Sectionalism

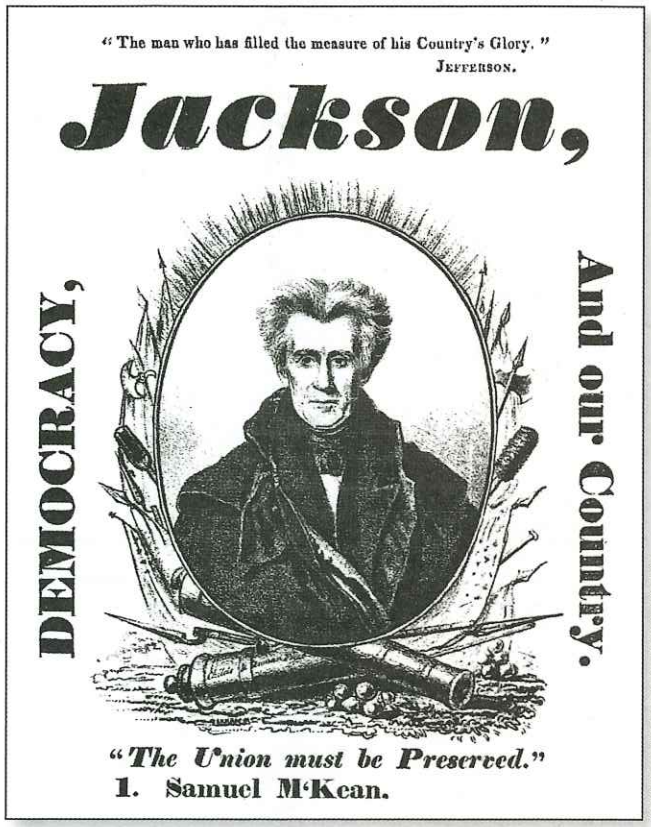
Though the party system created in the Jacksonian period was the first truly national system, with Democrats (followers of Jackson) and Whigs (opponents of Jackson) fairly evenly balanced in most regions, it could not withstand the deep split in opinion created by the agitation over slavery. Both parties tried, naturally, to straddle the issue, since neither wanted to divide its followers and thus lose the election to its rival. But slavery and sectionalism were issues that could not be straddled. The old parties divided and new ones emerged. The modern Republican Party (not the old Democratic-Republican Party of Thomas Jefferson) began as a third party. As a result of the Civil War, it became a major party (the only third party ever to gain major-party status) and dominated national politics, with only occasional interruptions, for three-quarters of a century.

Republican control of the White House, and to a lesser extent Congress, was in large measure the result of two events that gave to Republicans a marked advantage in the competition for the loyalties of voters. The first of these was the Civil War. This bitter, searing crisis deeply polarized popular attitudes. Those who supported the

CONSTITUTIONAL CONNECTIONS | "The Spirit of Party"

Noted historian Richard Hofstadter wrote about the Constitution as "A Constitution against Parties." That was the title Hofstadter gave to the second chapter of his 1969 book, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840*. For the republic's first half-century, most national leaders did not accept the idea that parties were a necessary and desirable feature of American government. For example, near the end of his second term as president, George Washington wrote a letter that later became known as his "Farewell Address." It reads in part:

> Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally. This Spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind. . . . The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension . . . is itself a frightful despotism. . . . [The] common and continual mischiefs of the spirit of party are sufficient to make it the interest and the duty of a wise people to discourage and restrain it.



Courtesy of The Tennessee Historical Society

IMAGE 9-2 When Andrew Jackson ran for president in 1828, more than a million votes were cast for the first time in American history. This poster, from the 1832 election, was part of the emergence of truly mass political participation.

Union became Republicans for generations; those who supported the Confederacy, or who had opposed the war, became Democrats.

As it turned out, this partisan division was nearly even for a while: Though the Republicans usually won the presidency and the Senate, they often lost control of the House. There were many northern Democrats. In 1896, however, another event—the presidential candidacy of William Jennings Bryan—further strengthened the Republican Party. Bryan, a Democrat, alienated many voters in the populous northeastern states while attracting voters in the South and Midwest. The result was to confirm and deepen the split in the country, especially North versus South, begun by the Civil War. From 1896 to the 1930s, with rare exceptions, northern states were solidly Republican, southern ones solidly Democratic.

This split had a profound effect on the organization of political parties, for it meant that most states were now one-party states. As a result, competition for office at the state level had to go on *within* a single dominant party (the Republican Party in Massachusetts, New York, Pennsylvania, Wisconsin, and elsewhere; the Democratic Party in Georgia, Mississippi, South Carolina, and elsewhere).

mugwumps *or* **progressives** *Republican Party faction of the 1890s to the 1910s, comprising reformers who opposed patronage.*

Consequently, there emerged two major factions within each party, but especially within the Republican Party. One comprised the party regulars—the professional politicians, the "stalwarts," the Old Guard. They were preoccupied with building up the party machinery, developing party loyalty, and acquiring and dispensing patronage—jobs and other favors—for themselves and their faithful followers. Their great skills were in organization, negotiation, bargaining, and compromise; their great interest was in winning.

The other faction, variously called **mugwumps** or **progressives** (or "reformers"), was opposed to the heavy emphasis on patronage; disliked the party machinery because it permitted only bland candidates to rise to the top; was fearful of the heavy influx of immigrants into American cities and of the ability of the party regulars to organize them into "machines"; and wanted to see the party take unpopular positions on certain issues (such as free trade). Their great skills lay in the areas of advocacy and articulation; their great interest was in principle.

At first the mugwumps tried to play a balance-of-power role, sometimes siding with the Republican Party (of which they were members), at other times defecting to the Democrats (as when they bolted from the Republican Party to support Grover Cleveland, the Democratic nominee, in 1884). But later, as the Republican strength grew throughout the nation, progressives within that party became increasingly less able to play a balance-of-power role, especially at the state level. If the progressives were to have any power, they came to believe, it would require an attack on the very concept of partisanship itself.

The Era of Reform

Progressives began to espouse measures to curtail or even abolish political parties. They favored primary elections to replace nominating conventions because the latter were viewed as manipulated by party bosses; they favored nonpartisan elections at the city level and in some cases at the state level as well; they argued against corrupt alliances between parties and businesses. They wanted strict voter registration requirements that would reduce voting fraud (but would also, as it turned out, keep ordinary citizens who found the requirements cumbersome from voting); they pressed for civil service reform to eliminate patronage; and they made heavy use of the mass media as a way of attacking the abuses of partisanship and of promoting their own ideas and candidacies.

The progressives were more successful in some places than in others. In California, for example, progressives led by Governor Hiram Johnson in 1910–1911 were able to institute the direct primary and to adopt procedures—called the *initiative* and the *referendum*—so citizens could vote directly on proposed legislation, thereby bypassing the state legislature. Governor Robert La Follette brought about similar changes in Wisconsin.

The effect of these changes was to reduce substantially the worst forms of political corruption and ultimately to make boss rule in politics difficult if not impossible. But they also had the effect of making political parties, whether led by bosses or by statesmen, weaker, less able to hold officeholders accountable, and less able to assemble the power necessary for governing the fragmented political institutions created by the Constitution. In Congress, party lines began to grow fainter, as did the power of congressional leadership. Above all, the progressives did not have an answer to the problem first faced by Jefferson: If there is not a strong political party, by what other means will candidates for office be found, recruited, and supported?

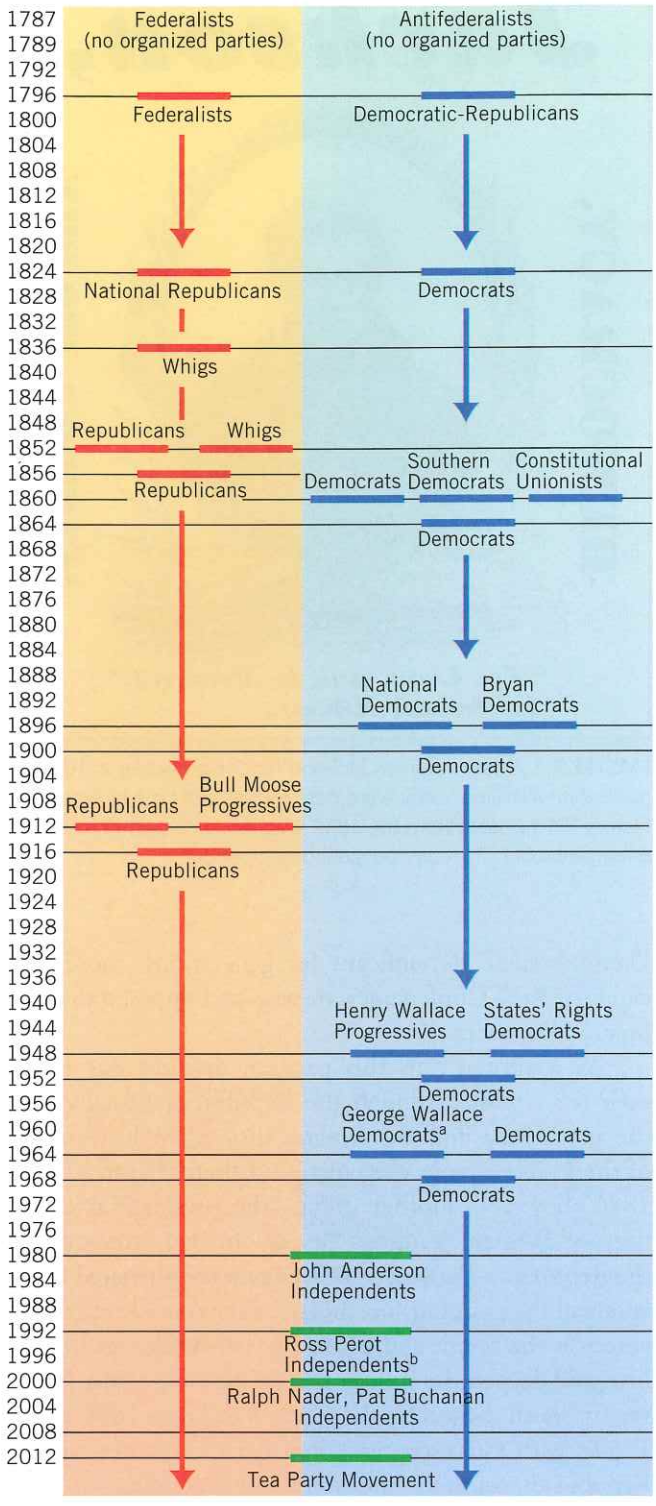
Polarization and Resurgence

By the mid- to late-20th century, political parties reached their nadir in America. In Congress, levels of party voting were quite low, and congressional Democrats were divided into Northern and Southern wings, which disagreed vociferously on segregation and civil rights for African Americans. Parties as organizations were weakened by the progressive-era reforms discussed previously, and voters' attachments to their parties weakened as well (see Figure 9.2 later in the chapter). Elections came to be much more about the candidate than the party, with the candidate responsible for his or her own fate (in sharp contrast to earlier eras of strong parties). Many scholars argued that parties were in a state of decline.[8]

But slowly, this situation began to change. In the aftermath of major civil rights fights in Congress, segregation was outlawed, and the parties began to gradually take their modern positions on race, with Democrats more supportive of government efforts to address racial inequalities, and Republicans less so. This helped to transform the South—which had been solidly Democratic since the Civil War 100 years earlier—into a competitive, two-party region (and today, one that more strongly favors Republicans).[9]

At the same time, the parties began to diverge not just on race, but on a whole host of issues, taking more distinct stands on taxes, abortion, women's rights, and so forth. As we discuss later, this change was due in part to the increasing importance of activists: as the party machines died, they were replaced with issue activists motivated by positions on particular issues. This helped to drive apart the parties on the major issues of the day and make ideology—rather than patronage—the glue that holds

FIGURE 9.1 Cleavages and Continuity in the Two-Party System



[a]American Independent Party.
[b]United We Stand America or Reform Party.

the parties together. Today, at the elite level, the parties are fairly characterized as polarized, with Democrats on the left and Republicans on the right. We will see this in Chapter 13 when we examine congressional roll-call voting—congressional elites today are nearly as divided as they were in the late 19th century. We also see this in the 2016 party platforms in Table 9.1: The parties sharply diverge on many key issues, such as climate change, abortion, health care reform, immigration, financial regulation, and same-sex marriage.

TABLE 9.1 | Party Platform Differences, 2016

Policy	Democratic Position	Republican Position
Climate Change	Climate change is an urgent threat and a defining challenge of our time. . . . While Donald Trump has called climate change a "hoax," 2016 is on track to break global temperature records. . . . The best science tells us that without ambitious, immediate action across our economy to cut carbon pollution and other greenhouse gases, all of these impacts will be far worse in the future.	The United Nations' Intergovernmental Panel on Climate Change is a political mechanism, not an unbiased scientific institution. Its unreliability is reflected in its intolerance toward scientists and others who dissent from its orthodoxy. . . . We reject the agendas of both the Kyoto Protocol and the Paris Agreement.
Abortion	Democrats are committed to protecting and advancing reproductive health, rights, and justice. We believe unequivocally, like the majority of Americans, that every woman should have access to quality reproductive health care services, including safe and legal abortion—regardless of where she lives, how much money she makes, or how she is insured.	We assert the sanctity of human life and affirm that the unborn child has a fundamental right to life which cannot be infringed. We support a human life amendment to the Constitution and legislation to make clear that the Fourteenth Amendment's protections apply to children before birth.
Health Care Reform	Democrats believe that health care is a right, not a privilege, and our health care system should put people before profits. Thanks to the hard work of President Obama and Democrats in Congress, we took a critically important step toward the goal of universal health care by passing the Affordable Care Act, which has covered 20 million more Americans and ensured millions more will never be denied coverage because of a preexisting condition. Democrats will never falter in our generations-long fight to guarantee health care as a fundamental right for every American.	It [The Affordable Care Act] must be removed and replaced with an approach based on genuine competition, patient choice, excellent care, wellness, and timely access to treatment. To that end, a Republican president, on the first day in office, will use legitimate waiver authority under the law to halt its advance and then, with the unanimous support of Congressional Republicans, will sign its repeal.
Immigration	And while we continue to fight for comprehensive immigration reform, we will defend and implement President Obama's Deferred Action for Childhood Arrivals and Deferred Action for Parents of Americans executive actions to help DREAMers, parents of citizens, and lawful permanent residents avoid deportation. We will build on these actions to provide relief for others, such as parents of DREAMers.	The executive amnesties of 2012 and 2014 [about immigration] are a direct violation of federal law and usurp the powers of Congress as outlined in Article I of the Constitution. These unlawful amnesties must be immediately rescinded by a Republican president. . . . We support building a wall along our southern border and protecting all ports of entry. The border wall must cover the entirety of the southern border and must be sufficient to stop both vehicular and pedestrian traffic.
Financial Reform Regulation	We will also vigorously implement, enforce, and build on President Obama's landmark Dodd-Frank financial reform law, and we will stop dead in its tracks every Republican effort to weaken it. We will stop Republican efforts to hamstring our regulators through budget cuts, and we will ensure they have the resources and independence to fully enforce the law and hold both individuals and corporations accountable when they break the rules.	The consequences [of the Dodd-Frank law] have been bad for everyone except federal regulators. . . . Predictably, central planning of our financial sector has not created jobs, it has killed them. It has not limited risks, it has created more. It has not encouraged economic growth, it has shackled it.
Same-Sex Marriage	Democrats applaud last year's [2015] decision by the Supreme Court that recognized that LGBT people—like other Americans—have the right to marry the person they love. . . . Democrats will fight for the continued development of sex discrimination law to cover LGBT people. We will also fight for comprehensive federal nondiscrimination protections for all LGBT Americans, to guarantee equal rights in areas such as housing, employment, public accommodations, credit, jury service, education, and federal funding.	We condemn the Supreme Court's ruling in *United States v. Windsor*, which wrongly removed the ability of Congress to define marriage policy in federal law. We also condemn the Supreme Court's lawless ruling in *Obergefell v. Hodges*. . . . In *Obergefell*, five unelected lawyers robbed 320 million Americans of their legitimate constitutional authority to define marriage as the union of one man and one woman.

Source: 2016 Democratic and Republican Party Platforms, archived at the American Presidency Project, www.presidency.ucsb.edu.

critical *or* **realignment periods** *A period when a major, lasting shift occurs in the popular coalition supporting one or both parties.*

We also can see today's stronger parties reflected in the resurgent strength of parties as nominating bodies. In the era of party bosses, the party itself selected the nominee, but as we discussed above, the progressives dismantled this system and replaced it with a system of primary elections. The weakened state and local parties that followed from progressive reforms meant that members of Congress needed to develop their own personal organizations to win reelection. At the presidential level, a series of reforms (described below) similarly weakened the power of party bosses to select the nominee in the 1970s. But in the ensuing decades, parties have returned to become more important. Parties now help to shape the field of candidates and influence who wins.[10] To be clear, party bosses can no longer pick candidates, and the elite cannot simply choose the candidate they like—take Hillary Clinton in 2008 or Donald Trump in 2016, for example. But party leaders have reasserted themselves in the candidate selection process, as we will see below.

The rise of such polarized parties has led some to bemoan this development and call for a weakening of parties. However, it is important to remember that stronger parties come with some benefits as well. In 1950, a committee of political scientists published a famous report arguing that we needed stronger parties to give voters clear and distinct policy alternatives.[11] Today, we arguably have parties that can do this for voters, and as a result, it is easier for them to make such choices.[12] But at the same time, such divided parties can generate gridlock and division. Polarized parties generate benefits, but they also come at a real cost as well.

Party Realignments

The strength of the major parties has clearly experienced important turning points, when we have had an alternation of dominance by one party and then the other. To help explain these major shifts in the tides of politics, scholars have developed the theory of **critical** or **realignment periods**. During such periods a sharp, lasting shift occurs in the popular coalition supporting one or both parties. The issues that separate the two parties change, and so the kinds of voters supporting each party change. This shift may occur at the time of an election or just after, as the new administration draws in new supporters.[13]

There seem to have been five major realignments in American politics: 1800, when the Jeffersonian Republicans defeated the Federalists; 1828, when the Jacksonian Democrats came to power; 1860, when the Whig Party collapsed and the Republicans under Lincoln came to power; 1896, when the Republicans defeated William Jennings Bryan; and 1932, when the Democrats under Roosevelt came into office.

At least two kinds of realignment occur: one in which a major party is so badly defeated that it disappears and a new party emerges to take its place (this happened to the Federalists in 1800 and to the Whigs in 1856–1860), and another in which the two existing parties continue but voters shift their support from one to the other (this happened in 1896 and 1932).

The year 1860 offers a clear case of realignment. By 1860, the existing parties could no longer straddle the fence on the slavery issue. The Republican Party was formed in 1856 on the basis of clear-cut opposition to slavery; the Democratic Party split in half in 1860, with one part (led by Stephen A. Douglas and based in the North) trying to waffle on the issue and the other (led by John C. Breckinridge and drawing its support from the South) categorically denying that any government had any right to outlaw slavery. The remnants of the Whig Party, renamed the Constitutional Union Party, tried to unite the nation by writing no platform at all, thus remaining silent on slavery. Lincoln and the antislavery Republicans won in 1860; Breckinridge and the proslavery Southern Democrats came in second. From that moment on, the two major political parties acquired different sources of support and stood (at least for a decade) for different principles. The parties that had tried to straddle the fence were eliminated. The Civil War fixed these new party loyalties deep in the popular mind, and the structure of party competition was set for nearly 40 years.

While such examples are still quite useful historically (and help to demarcate the different party systems in American politics), many scholars question the idea of realignment today.[14] They note that while parties have changed dramatically in recent decades, there is no single realigning election. Instead, the process has occurred gradually.[15] Furthermore, it is not that one issue replaced another, but rather that the parties have been divided on multiple salient issues: abortion, gay rights, the size of the economy, and so on.[16] While it is clear that parties will continue to change and evolve over time, the exact process of that change is less clear.

9-3 The Functions of Political Parties

Previously, we saw that parties exist primarily to help elect particular candidates to office. To actually achieve this goal, parties need to recruit candidates to run for office,

nominate them, and then work to help them get elected in the general election by appealing to voters. All three activities are vital for parties to actually hold power.

Recruiting Candidates

The first step to electing candidates to office is convincing them to run. In the last chapter, we saw that most people do not get involved in politics on their own: they need to be asked. Political candidates are no different: many of them did not think about running until someone asked them to consider doing so. Party leaders are typically the people doing the asking.[17] Recruiting the right candidates is crucial to winning elections.

Party leaders often work tirelessly to recruit candidates. Before the 2006 election, Rahm Emanuel (then the chair of the Democratic Congressional Campaign Committee) worked for months to recruit good candidates to run for Congress. He held meetings with many members of Congress to enlist their help in identifying good potential candidates, and then asked them to make appeals to convince these candidates to run.[18]

Party leaders expend this effort to recruit candidates because the right candidates greatly increase the chances that their party will win close elections. Having the right candidate is not the only factor, but it is certainly an important one. For example, some of those targeted by Emanuel in 2006 were military veterans who had served in Iraq. Given the lingering unhappiness with the War in Iraq, Democrats selected several Iraq War veterans to run as candidates, as these individuals could very credibly critique the president's military policy and help overcome Republicans' traditional advantage on foreign policy and national security issues.[19] In 2010, many observers thought Republicans could have captured the Senate, but the party ran several poor-quality candidates that led to Democratic victories in races that initially favored Republicans. Remembering this, Republicans in 2014 worked hard to recruit much higher-quality candidates, and partially as a result, took back the Senate.[20]

While state and local parties run many of these efforts, the national parties are also increasingly involved in this process, as the example of Rahm Emanuel illustrates. In the late 1960s and early 1970s, Republicans began to convert their national party into a well-financed, highly staffed organization devoted to finding and electing Republican candidates, especially to Congress. Money went to recruit and train Republican candidates, give them legal and financial advice, study issues and analyze voting trends, and conduct national advertising campaigns on behalf of the party as a whole. Shortly thereafter, Democrats followed suit, and also began having the national party work to recruit and train candidates.

Which candidates the parties recruit matters not just to who wins, but what happens to policy afterward. For example, Nebraska had a long tradition of centrism and a lack of polarization in its state legislature; indeed, the legislature is officially nonpartisan. But in recent years, the chamber has polarized quickly, as party leaders have recruited quite extreme candidates to run.[21] So party leaders' recruitment decisions shape policy in important ways.

primary elections *An election held to determine the nominee from a particular party.*

closed primary *A primary election where only registered party members may vote for the party's nominee.*

open primary *A primary election where all voters (regardless of party membership) may vote for the party's nominee.*

Nominating Candidates

Once a party has recruited candidates, it needs to decide which candidates will run under the party's label in the general election. Historically, parties did this via party caucuses and conventions (see the discussion above). But since the progressive era, most such nominations have occurred via **primary elections**.

Two main types of primary elections exist: closed primaries and open primaries. In a **closed primary**, only registered members of a political party may vote to select the nominee. Before the primary, voters must register with either the Democratic or the Republican Party. When they go to the polls to vote in the primary, they are given the ballot only for their party. The primary is closed to those outside the party. In this sort of primary system, Independent voters (those who are not registered with either major party) typically do not get to vote in the primary election.

In contrast, in an **open primary**, voters do not need to declare their party affiliation before going to the polls (indeed, in some states with open primaries, voters do not declare a party affiliation when they register). Citizens can vote in the primary of either party, but they can only vote in one party's primary (i.e., you can vote in the Democratic or the Republican primary, but not the Democratic *and* the Republican primary). One concern with open primaries is that there can be crossover voting: Voters from one party can vote in the other party's primary, and this may affect the outcome. While such crossover voting does occur, however, it typically does not decide the election outcomes.[22]

Both open and closed primaries are used widely throughout the United States. Somewhat more states use open primary systems, but closed primaries are by no means uncommon. To find out exactly what type

WHAT WOULD YOU DO?

Will You Support a Closed or Open Primary?

To: *Brian Cal, state senator*
From: *Leo Jacob, legislative assistant*
Subject: *Open vs. Closed Primary Elections*

Some in your state have proposed changing the primary election from a closed primary (where only those registered with the party can vote in the primary) to an open primary (where all registered voters, regardless of party, could vote in the primary).

To Consider:

State legislators are currently debating a measure to change the state's electoral system from a closed primary (where only registered party members can vote) to an open primary (where any registered voter can vote). Supporters claim this allows more voters a voice in the process and supports moderate candidates, but opponents claim this is unfair to party members, who should decide their party's nominee, and opens the possibility for mischief from party "raiding."

Arguments for:

1. An open primary lets all voters—not just party members—decide which candidates run in the general election.
2. By appealing to all voters, not just voters from one party, open primaries might produce more moderate candidates.

Arguments against:

1. The party members themselves should decide who runs under the party's label in the general election.
2. Members of the other party can "raid" a party's primary to support the least appealing candidate, unfairly helping their own party.

What Will You Decide? Enter **MindTap** to make your choice and support it in writing, and for sources to help inform your decision.

Your decision: ☐ Keep closed primary ☐ Support open primary

Source: Pew Research Center, "More Prioritize Border Security in Immigration Debate," 2014.

of primary system your state uses, you can consult the National Conference of State Legislators, which records (among many other things) the type of primary system used in each state (see www.ncsl.org).

Some states have also recently experimented with the "top-two" primary election system. In these types of systems, all candidates compete on one primary election ballot, and the top two candidates—regardless of party—advance to the general election. Thus in this type of primary, a voter could vote for a Democrat for one office but a Republican for another, giving voters even more freedom than in an open primary. This system is used in California and Washington, as well as for the Nebraska state legislature. A similar procedure is used in Louisiana: All candidates appear on the same primary ballot, and if a candidate receives 50 percent of the vote, they are directly elected to the office. If not, a runoff election chooses between the top two finishers.

Scholars of primary systems argue that two consequences flow from a state's choice of primary system. First, states with closed primaries tend to have stronger parties. The primary system is probably both a cause and an effect of the strength of the parties. Having strong parties means that the parties can mobilize in the state to prevent opening the primary process. A closed primary is also beneficial to party leaders: Because voters register with a party, party leaders know which voters will be most receptive to their political messages. Unsurprisingly, many party leaders favor closed primaries for just this reason.

Second, many reformers argue that open or top-two primaries favor moderate candidates. They claim that because all voters—rather than just members of one party—vote in these primaries, candidates will adopt more centrist positions. While intuitively appealing, there is little empirical support for this claim. It seems that the types of voters who actually vote in open (or top-two) primaries is not much different than in closed primaries, so the candidates they produce are not very different.[23] Hence, the type of primary system (open vs. closed vs. top two) does not really affect candidate polarization.

Nominations via Convention

As we discussed above, in most places, nominations occur through primary elections (though a few places, such as Utah, do make some use of conventions). But there is one major election where the nomination occurs via a convention: the national conventions to nominate candidates for president.

The national committee selects the time and place of the next national convention and issues a "call" for the convention that sets forth the number of delegates each state and territory is to have and the rules under which delegates must be chosen. These delegates then select the party's nominee at the convention.

super-delegates *Party leaders and elected officials who become delegates to the national convention without having to run in primaries or caucuses.*

There are two main types of delegates. First, there are the so-called pledged delegates. These are the delegates awarded through the presidential primaries and caucuses, with the understanding that they will support a particular candidate at the convention. So, when you vote in a presidential primary or a caucus, you are actually voting for delegates pledged to one candidate or another. Each party has a formula for awarding delegates based on the results of the election: Democrats award delegates proportionately, Republicans use a mix of proportional representation and winner-take-all systems.

Each party has a given number of pledged delegates and uses complex formulas to determine how many come from each state (and territory). For the Democrats, this takes into account the vote each state cast for Democratic candidates in past elections and the number of electoral votes of each state; for the Republicans, this takes into account the number of representatives in Congress and whether the state in past elections cast its electoral votes for the Republican presidential candidate and elected Republicans to the Senate, the House, and the governorship. Thus, the Democrats give extra delegates to large states, whereas the Republicans give extra ones to loyal states.

But pledged delegates are not the only type of delegates. Second, there are unpledged delegates, who are party leaders and elected officials; they are often called "**super-delegates**." These super-delegates typically are not bound to vote for one candidate or another (as pledged delegates are), but can choose which candidate to support. To win the nomination, a candidate must have support from both pledged delegates and super-delegates, though super-delegates typically follow the lead of the pledged delegates. Super-delegates can be crucial, however, if the pledged delegate count is very close, as it was in 2008 between Barack Obama and Hillary Clinton, or as it was in 2016 between Hillary Clinton and Bernie Sanders. In both cases, the eventual nominee—Obama in 2008 and Clinton in 2016—needed super-delegate support to clinch the nomination.

Reformers designed this system to weaken the power of party bosses. If delegates chosen through primaries and caucuses largely elect the candidate, party bosses implicitly have less power. Previously, party leaders chose the nominees in the proverbial smoke-filled rooms. Adlai Stevenson in 1952 and Hubert Humphrey in 1968 won

invisible primary *Process by which candidates try to attract the support of key party leaders before an election begins.*

the Democratic presidential nominations without even entering a single primary—party bosses chose them. Reformers wanted to weaken the power of the party bosses, so both parties designed reforms to reshape how delegates were chosen in the 1970s and 1980s. These reforms were designed to give power to the people, rather than to party elites.

While these reforms did make the nomination process more democratic, they had an unintended consequence: they empowered activists. Candidates choose the people who will serve as their pledged delegates at the convention, and they often choose people who are active in local politics and will be loyal to them. Many of these people are activists who are deeply involved with particular issues. Their views are not like the views of ordinary voters. Since 1972, scholars have done extensive surveys of convention delegates, and they have uncovered a consistent pattern of results: Democratic delegates are more liberal than Democratic voters, and Republican delegates are more conservative than Republican voters. Activists, unlike ordinary voters, are deeply divided.

The fact that these activists are more polarized pushes candidates to take more polarized positions to win and maintain their support.[24] By moving away from party bosses (who prioritize winning) to activists (who prioritize purity), the current system pushes candidates away from the center. While activists want to nominate a candidate who is electable, they also want someone who takes the "right" position on the issues.

This creates a tension for party leaders: They too want a candidate who will excite activists, but they also want a candidate who can win in November. To avoid nominating a candidate outside the mainstream, party leaders have worked to reassert themselves in the process. One way is by using super-delegates, which give party leaders and elected officials some say at the convention. Another is through the so-called invisible primary. Candidates who hope to win elected office, especially the presidency, must survive the **invisible primary**, the process of attracting key party and interest group figures to your camp.[25] The idea is that key party elites—elected party officials, state and local party chairpersons, key interest group leaders, party fundraisers, senior staffers, and so forth—are trying to settle on which candidate they think will be the best nominee. They then tilt resources toward that person so they have an advantage in the actual primaries and caucuses. Those resources certainly include money, but they are also the best fundraisers and staffers, key interest group leaders who will help supply volunteers, and so forth.

Of course, we should be careful not to push this argument too far: Elites play an important role in winnowing down the list of candidates, but what elites want is not always what happens. For instance, Hillary Clinton—the clear choice of many party insiders headed into 2008—was not the eventual nominee that year. And in 2016, few—if any—Republican elites wanted Donald Trump to be the party's nominee before the primaries began in 2016. Party leaders certainly try to influence the process, but the voters ultimately decide.

Ricky Carioti/The Washington Post/Getty Images

IMAGE 9-3 Hillary Clinton addresses the 2016 Democratic National Convention.

Helping Candidates Win Elections

Finally, once candidates have been recruited to run, and they have been nominated, the party has to help them win in the general election. First, parties help their candidates by giving them a party label. As we will discuss, voters overwhelmingly vote for the candidate who shares their party label: In recent years, more than 90% of Democratic (Republican) voters have supported the Democratic (Republican) nominee for president. This means that candidates typically can count on their party's supporters to vote for them if they show up to the polls.

But not all of a party's supporters get to the polls, however. The second way parties help candidates win elections is to engage in get-out-the-vote campaigns. In Chapter 8, we discussed the Obama campaign's groundbreaking efforts to mobilize volunteers to register and then turn out voters for President Obama. While other campaigns have not been as large or as sophisticated, conducting get-out-the-vote campaigns has become a key role played by parties and affiliated groups in recent years.

Richard Levine/Alamy Stock Photo

IMAGE 9-4 Volunteers help to register new voters before the 2016 election.

Third, parties also provide a variety of services to their candidates. One important service is the get-out-the-vote drives discussed above, but they also gather additional resources to share with candidates: lists of supporters (say, from the lists of those who declare a party affiliation in order to vote in a closed primary), polling and other public opinion data, campaign staffers, and so forth. Parties are in service to their candidates.

Given the escalating cost of campaigns, perhaps the most important resource campaigns can provide candidates is money. While rules limit how much money a party can contribute directly to candidates (in federal elections, the national parties may donate only $5,000 per candidate per election), these donations have value beyond the amount given. When a party gives a donation to a candidate, they are signaling to other donors—individuals, interest groups, political action committees (see Chapter 10), and so forth—that this is a high-quality candidate whom they should support. A donation from a party, while not much in dollar amounts, can be a powerful signal to other donors.[26]

9-4 Parties as Organizations

Because political parties exist at the national, state, and local levels, you might suppose they are arranged like a big corporation, with a national board of directors giving orders to state managers who in turn direct the activities of rank-and-file workers at the county and city levels. For better or for worse, that is not the case. The various levels are independent of one another, and while they do coordinate for some activities, as we have seen, there is nothing like a top-down, hierarchical system in place.

national convention *A meeting of party delegates held every four years, which nominates the party's candidate for president.*

national committee *Delegates who run party affairs between national conventions.*

congressional campaign committee *A party committee in Congress that provides funds to members and would-be members.*

national chair *Day-to-day party manager elected by the national committee.*

The national Democratic and Republican Parties are structured quite similarly. In both parties, ultimate authority is in the hands of the **national convention** that meets every four years to nominate a presidential candidate. Between these conventions, party affairs are managed by a **national committee** made up of delegates from each state and territory. In Congress, each party has a **congressional campaign committee** that helps members of Congress running for reelection or would-be members running for an open seat or challenging a candidate from the opposition party. The day-to-day work of the party is managed by a full-time, paid **national chair** elected by the committee.

Beneath them are the state parties, and then the local parties. In every state, a Democratic and a Republican state party is organized under state law. Each typically consists of a state central committee, below which are county committees and sometimes city, town, or even precinct committees. The members of these committees are chosen in a variety of ways—sometimes in primary elections, sometimes by conventions, sometimes by a building-block process whereby people elected to serve on precinct or town committees choose the members of county committees, who in turn choose state committee members.

The National Parties

The main responsibility for national parties is to call the national party convention, which we have discussed in detail. Apart from the convention, the national party primarily serves to represent the party in the media and to raise money. As mentioned, the party's fundraising apparatus is an important component of candidate success. And given changes in the political environment, parties now raise large sums of money. During the 2016 election cycle, the presidential candidates raised $1.54 billion, but the parties raised $1.63 billion.[27] Some of this party money is transferred to specific candidates, but other parts are distributed to state and local parties as well.

The resurgent strength of the national party has also strengthened state and local parties, a point we return to below.[28]

political machines *A party organization that recruits members by dispensing patronage.*

State and Local Parties

One of the difficulties in writing about state and local parties is that there is not just one state party but 100 (one for each party in each of the 50 states), and there are literally thousands of local parties, and no two are exactly alike. Some states and locales have strong parties, whereas others are weak and more a party in name than anything else.

But regardless of the exact form of state and local parties, they have all undergone a fundamental change from earlier generations. Before, state and local parties were often **political machines** (see the earlier discussion of the historical evolution of the party system). Political machines are party organizations that recruit their members by using tangible incentives—money, political jobs, an opportunity to get favors from government—and are characterized by a high degree of leadership control over member activity. At one time, many local party organizations were machines, and the struggle over political jobs—patronage—was their chief concern.

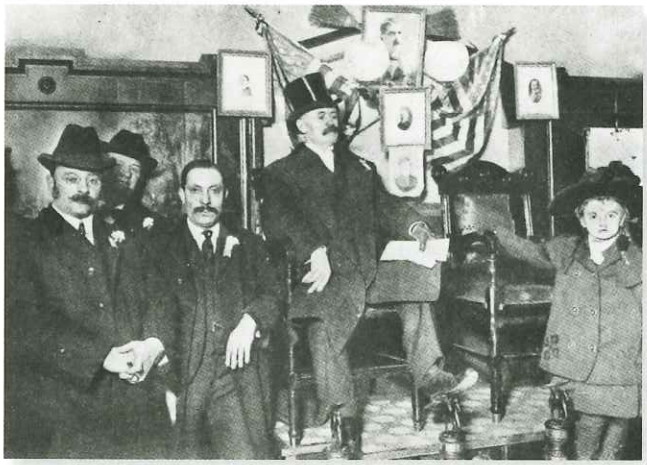
Such machines were long a core component of American party politics, especially in the 19th century. For example, the famous Tammany Hall machine in New York City wielded patronage as a powerful tool: During the 1870s, it was estimated that one of every eight voters in New York City had a federal, state, or city job.[29] The federal bureaucracy was one important source of those jobs. The New York Custom House alone employed thousands of people, virtually all of whom were replaced if their party lost the presidential election. The postal system was another source, and it was frankly recognized as such. When James N. Tyner became postmaster general in 1876, he was "appointed not to see that the mails were carried, but to see that Indiana was carried."[30] Elections and conventions were so frequent and the intensity of party competition so great that being a party worker was for many a full-time paid occupation.

Well before the arrival of vast numbers of poor immigrants from Ireland, Italy, and elsewhere, old-stock Americans had perfected the machine, run up the cost of government, and systematized voting fraud. Kickbacks on contracts, payments extracted from officeholders, and funds raised from businesspeople made some politicians rich but also paid the huge bills of the elaborate party organization. When immigrants began flooding the eastern cities, the party machines were there to provide them with all manner of services in exchange for their support at the polls: the machines were a vast welfare organization operating before the creation of the welfare state.

The abuses of the machine were well known and gradually curtailed. Stricter voter registration laws reduced fraud, civil service reforms cut down the number of patronage jobs, and competitive bidding laws made it harder to award overpriced contracts to favored businesses. The Hatch Act (passed by Congress in 1939) made it illegal for federal civil service employees to take an active part in political management or political campaigns by serving as party officers, soliciting campaign funds, running for partisan office, working in a partisan campaign, endorsing partisan candidates, taking voters to the polls, counting ballots, circulating nominating petitions, or being delegates to a party convention. (They may still vote and make campaign contributions.)

These restrictions gradually took federal employees out of machine politics, but they did not end the machines. Many cities—Chicago, Philadelphia, and Albany—found ways to maintain the machines even though city employees were technically under the civil service. Far more important than the various progressive reforms that weakened the machines were changes among voters. As voters grew in education, income, and sophistication, they depended less and less on the advice and leadership of local party officials. And as the federal government created a bureaucratic welfare system, the parties' welfare systems declined in value.

It is easy either to scorn the political party machine as a venal and self-serving organization or to romanticize it as an informal welfare system. In truth, it was a little of both. Above all, it was a frank recognition of the fact that politics requires organization; the machine was the supreme expression of the value of organization. Even allowing for voting fraud, in elections where party machines were active, voter turnout was huge: More people participated in politics when mobilized by a party machine than when appealed to via television or good-government associations.[31]



By permission of the Houghton Library/Harvard University

IMAGE 9-5 Former Senator George Washington Plunkitt of Tammany Hall explains machine politics from atop the bootblack stand in front of the New York County Courthouse around 1905.

By the mid-1980s, the traditional party organization (one based on machine-style politics with strong, hierarchical organization) existed in only a few places.[32] In the intervening years, even those have largely died out, though vestiges survive in a few places, such as the Democratic machine in Cook County, Illinois (Chicago), or the Republican machine in Nassau County, New York.

Today, most state and local parties take a far different form. Without the staffing of the machines, they have come to be dominated by intense policy advocates, particularly those from social movements such as civil rights, peace, feminism, environmentalism, libertarianism, abortion, and so forth. The result is that in many places the party has become a collection of people drawn from various social movements.[33] For a candidate to win the party's support, he or she often has to satisfy the "litmus test" demands of the ideological activists in the party. Former Democratic Senator Barbara Mikulski noted that social movements have become an important source of candidates for the parties, effectively become their modern-day farm clubs. People who feel intensely about particular issues have replaced machines in most places.

In the years following the decline of the machine parties, many argued that state and local parties were effectively dead, and could exert little influence. Yet more recent research suggests that today's parties are actually quite effective and powerful, albeit not to the same extent as political machines of the previous era. This is largely due to the influence of money. As the national parties have become more adept at fundraising, they (and their donors) have channeled money to help boost state parties, and state parties themselves have become more adept fundraisers (and as we discuss in the next chapter, recent campaign finance rule changes have helped to make this shift possible).[34] State and local parties have used this increased money to build stronger infrastructures and provide more services to candidates.[35] As a result, today's state and local parties have become important political players.

9-5 Parties in the Electorate: Partisanship

Above, we saw how parties are organized, how they recruit candidates, and so forth. Our three-part categorization of parties from the beginning of the chapter described parties as organizations. But parties also exist as powerful symbols in the minds of voters. Voters have a **partisan identification**: a stable, long-term attachment to a political party (this is sometimes also called a voter's **partisanship**).

As we discussed in Chapter 7, two major factors help explain who is a Democrat and who is a Republican: parents' partisanship and the political environment as one comes of age politically (refer back to the discussion of socialization in Chapter 7). First, a voter's partisanship is heavily influenced by her parents' partisanship: Parents who are Republicans (typically) have children who are Republicans.[36] Second, the political environment as one comes of age politically also powerfully shapes one's partisanship: Voters who came of age under Ronald Reagan and George H. W. Bush are more Republican than those who first experienced politics under Bill Clinton. Such partisanship is remarkably stable: Voters who were Democratic at age 18 tend to be Democratic at age 75, despite all that happened in between.[37] Partisanship is akin to being part of a like-minded group or political team.[38]

partisan identification *A voter's long-term, stable attachment to one of the political parties.*

partisanship *Another name for partisan identity.*

Of course, to say that partisanship is stable is not to say that it never changes. Partisanship is a stable identity, but in response to major events, it can—and does—change.[39] In response to the economic boom of the 1990s, voters moved toward the Democratic Party. In response to the 9/11 attacks and the ensuing focus on terrorism and national security—two issues where voters think Republicans are more competent than Democrats—more voters identified as Republicans.[40]

If we look at the distribution of partisanship in the electorate over time, we see this same pattern: underlying stability with changes in response to major events. Figure 9.2 shows the rise and fall of partisan identification from the 1950s to today.

Several patterns stand out. First, in the 1950s, the Democrats had a substantial partisan advantage over Republicans: While almost 60 percent of the population identified as Democrats, only about 40 percent identified as Republicans. Over time, as the party coalitions shifted, that edge has declined sharply. Today, that gap in identification is only a few percentage points, much less than what it was some 60 years ago. There are many reasons for this shift, but perhaps the most important one is the decline of the solid South. In the 1950s, nearly all white Southerners would have identified as Democrats (as they'd done since the Civil War, see the historical discussion above). As the parties moved apart on the issues, most notably civil rights, white Southerners gradually became Republicans.[41]

Second, and more striking, is the relatively modest number of Independents. In the popular press, we hear reports of how Independents are the largest group in the

POLICY DYNAMICS: INSIDE/OUTSIDE THE BOX

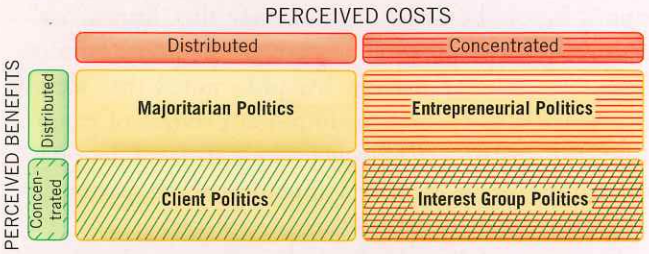
The Auto Industry Bailout: Party-Based Client Politics?

Chrysler, Ford, and General Motors are known as the "Big Three" American auto companies. When the Big Three ran into big financial trouble in 2008, they asked the federal government for billions of dollars in loans. Most Americans opposed the bailout, but the majorities against helping the auto industry were not as wide as those against bailing out the "too big to fail" banks, insurance companies, and investment firms.

Reactions to various auto industry bailout bills broke down along party lines. Most Big Three blue-collar employees have been represented by the United Auto Workers, a labor union that has favored Democrats. Many Republican leaders, and most self-identified GOP voters, opposed any auto industry bailout by Washington. Instead, they favored having the Big Three enter bankruptcy proceedings. By contrast, many Democratic leaders, and most self-identified Democratic voters, favored the federal government loaning money to the Big Three to tide them over, provided that executive bonuses were curtailed and that taxpayers, functioning as shareholders, were paid back fully once the economy recovered and car sales improved.

But the pro-bailout policy had one supremely important Republican ally: President George W. Bush. Several top Republicans in Congress insisted that any bailout would cost taxpayers billions and benefit "the unions" without either saving the industry or benefitting most consumers. Rejecting such claims, in 2008 Bush directed that $17.4 billion from the antirecession Troubled Asset Relief Program go to bail out Chrysler and General Motors; and, in December 2008, he supported various bills in Congress that succeeded his own initial plan.

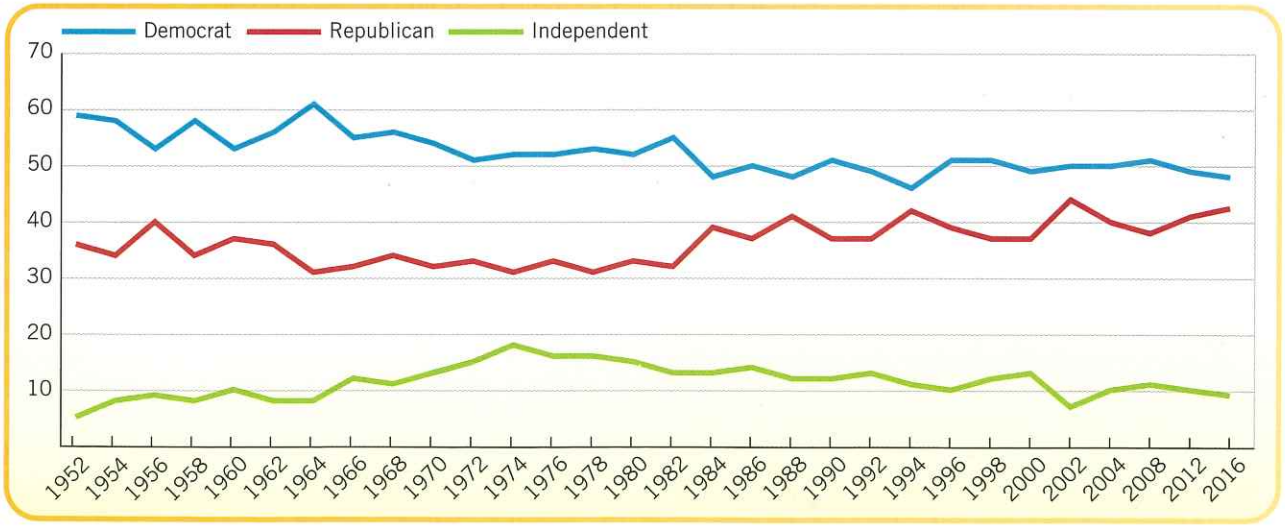
In 2009, President Barack Obama, a Democrat, made $60 billion more available to the companies. In the end, the companies ended up repaying much of what the government loaned them, though the bailout did cost the public about $12.3 billion. Public opinion toward the bailout remained starkly different by party: While 63% of Democrats approved of the bailout, only 25% of Republicans did.



▶ **PRACTICE POLITICAL SCIENCE** Articulate a claim as to whether the federal government should have or should not have bailed out American auto companies in 2008 and 2009. Research the current financial health of the American auto industry. Analyze the evidence to explain its significance in justifying your claim.

Sources: ProPublica, "Failed Bailout Investments," http://projects.propublica.org/bailout/list/losses, accessed February 2015; Gallup, "Republicans, Democrats Differ Over U.S. Automaker Bailout," February 2012.

FIGURE 9.2 **Voter Partisanship, 1952–2016**



Source: ANES Guide to Public Opinion and Electoral Behavior, 1952–2008; 2012–2016 provided by the authors' analysis of the ANES data.

electorate, making up sometimes as much as 40 percent of Americans.[42] However, Figure 9.2 shows considerably fewer Independents, and their numbers have declined from their high of approximately 20 percent in the early 1970s (they have stabilized in recent years at around 10 percent of the public).

What explains this difference? Here, we have grouped so-called Independent "leaners" in with the parties. When political scientists (and most major polling firms) ask someone about their partisanship, they first ask them whether they are a Democrat, a Republican, or an Independent. If they identify as an Independent, they are asked whether they lean toward the Democratic or Republican parties. It turns out that almost all Independents lean toward one party or the other. In the 2012 American National Election Study, 44 percent of Americans initially identified as Independents. But when asked the follow-up leaner item, 16 percent leaned toward the Democrats, 18 percent leaned toward the Republicans, and the remaining 10 leaned toward neither party. Most Independents actually are closer to one party or the other.

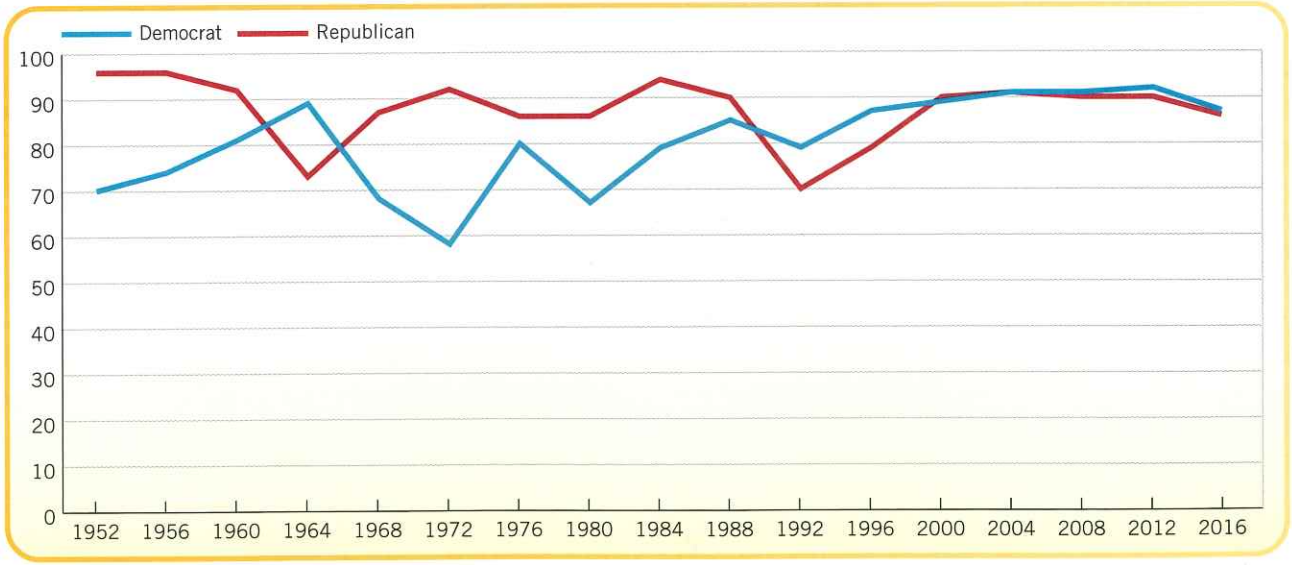
Why do we group such leaners with partisans? When political scientists study their behavior, these Independent leaners look a great deal like partisans in attitudes and vote choice.[43] If they look and act so much like partisans, why do Independent leaners call themselves Independent? For many, calling oneself an "Independent" seems to signal that they are moderate and not beholden to a particular party (even if they consistently vote for one party or the other). It reflects the positive valence of the word "Independent" as much as anything about their political beliefs.[44] It turns out that most Independents aren't really that Independent, so here we treat them as partisans.

If this partisanship was only a label that voters applied to themselves but did not affect their behavior, we would not need to worry ourselves with it. But as political scientists have shown, a voter's partisanship powerfully shapes their attitudes and behavior. As we saw in Chapter 7, partisanship has a powerful effect on one's opinions. This same power extends to vote choice as well. In Figure 9.3, we see that in recent years partisanship has become an extremely powerful predictor of vote choice for president. For simplicity, we include only the presidential vote here, but other votes—for Congress, governor, state legislator, and so on—would follow very similar patterns as well.

Until the 1990s, Republican voters were more loyal than Democratic ones, sometimes considerably so. But since the 1990s, both parties have been (roughly) equally loyal to their party's presidential nominee, and today, party voting hovers around 90 percent; that is, about 90 percent of Democrats support the Democratic nominee, and about 90 percent of Republicans support the Republican nominee for president (again, party loyalty levels for other offices would be similar). As we will see in Chapter 10, other factors (such as the economy and issues) also shape vote choice, but partisanship is the dominant factor.[45]

Partisanship also colors how partisans evaluate the political world. On the eve of the 2016 election, with President Obama still in power, Republicans were quite pessimistic about the economy: only 16 percent thought the economy was getting better, but 81 percent thought it was getting worse. But in the days after Trump's upset

FIGURE 9.3 **Party Voting in Presidential Elections, 1952–2016**



Source: Authors' analysis of ANES Data.

two-party system *An electoral system with two dominant parties that compete in national elections.*

plurality system *An electoral system in which the winner is the person who gets the most votes, even if he or she does not receive a majority; used in almost all American elections.*

victory in 2016, their attitudes shifted dramatically: 49 percent now said it was getting better, and only 44 percent said it was getting worse (Democrats became more pessimistic after the election, though to a smaller degree).[46] While the fundamentals of the economy did not shift in this brief interval, the party of the incoming president did, which makes all the difference.[47] Similarly, in 2006, during the bird flu scare, Republicans were much more confident than Democrats that the government could respond appropriately to the issue. But in 2014 during the Ebola scare, it was Democrats who had greater confidence in the government to respond appropriately.[48] The difference between 2006 and 2014 was the party of the president: Republicans trusted the government with a Republican in the oval office, and Democrats did the same when their party was in power. The same is true of trust in government more generally: We trust the government to do what is right when "our" party is in power, but not when the opposing party is in power.[49] Partisans see the world through partisan-colored lenses.

This partisan slant in interpreting the political world is most obvious in how Democrats and Republicans evaluate objective facts. In 1988, at the end of the Reagan presidency, researchers asked voters whether the unemployment rate and the inflation rate had gotten better, gotten worse, or stayed about the same while Reagan was in office. During Reagan's tenure, unemployment had gone from a high of 9.7 percent in 1982 to 5.5 percent in 1988,[50] and inflation fell from 13.5 in 1980 to 4 percent in 1988.[51] Clearly, both inflation and unemployment got better during Reagan's tenure in office. While only about 25% of strong Democrats said inflation had gotten "much better" or "somewhat better," about 70% of Republicans said that was the case (with similar results on unemployment). Almost as many strong Democrats said inflation got "much worse" as said it got "much better" or "somewhat better," despite the clear improvement in the actual inflation rate. In 2000, at the end of the Clinton presidency, researchers repeated a similar exercise, asking about the budget deficit and crime rate (both of which had fallen sharply since Clinton took office). Here, we see the same pattern of partisan bias, but in the opposite direction: Democrats were accurate, Republicans were not.[52] Some interpret these sorts of patterns to mean that ordinary voters are stupid, but this is not correct. Instead, it is correct to say that such patterns reflect partisans' engagement with the political world: They see important differences between the parties and are engaged in the process. They cheer when their side wins, and weep when it loses. Parties powerfully shape how ordinary Americans interpret the political world.

9-6 The Two-Party System

So far, we have seen how the U.S. political parties function, and how they differ from political parties elsewhere. But we have not really touched on the most striking difference between the United States and the rest of the world: America has a two-party system, whereas most other democracies have multiple parties. In the world at large a **two-party system** is a rarity; by one estimate fewer than 30 nations have one.[53] Most European democracies are multiparty systems. We have only two parties with any chance of winning nationally, and these parties have, over time, been rather evenly balanced—between 1888 and 2016, the Republicans won 18 presidential elections and the Democrats 15. Furthermore, whenever one party has achieved a temporary ascendancy and its rival has been pronounced dead (as were the Democrats in the first third of the 20th century and the Republicans during the 1930s and the 1960s), the "dead" party has displayed remarkable powers of recuperation, coming back to win important victories.

At the state and congressional district levels, however, the parties are not evenly balanced. For a long time, the South was so heavily Democratic at all levels of government as to be a one-party area, whereas upper New England and the Dakotas were strongly Republican. All regions are more competitive today than once was the case, though important divisions exist between the parties at smaller levels (i.e., with Democrats doing better in major cities, and Republicans doing better in rural areas).[54]

Scholars do not entirely agree on why the two-party system should be so permanent a feature of American political life, but two explanations are of major importance. The first has to do with the system of elections, the second with the distribution of public opinion.

Elections at every level of government are based on the plurality, winner-take-all method. The **plurality system** means that in all elections for representative, senator, governor, or president, and in almost all elections for state legislator, mayor, or city councilor, the winner gets the *most* votes, even if he or she does not get a *majority* of all votes cast. We are so familiar with this system that we sometimes forget there are other ways of running an election. For example, one could require that the winner get a majority of the votes, thus producing runoff elections if nobody got a majority on the first try. France does this in

choosing its national legislature. In the first election, candidates for parliament who win an absolute majority of the votes cast are declared elected. A week later, remaining candidates who received at least one-eighth, but less than one-half, of the vote go into a runoff election; those who then win an absolute majority are also declared elected.

The French method encourages many political parties to form, each hoping to win at least one-eighth of the vote in the first election and then to enter into an alliance with its ideologically nearest rival in order to win the runoff. In the United States, the plurality system means that a party must make all the alliances it can before the first election—there is no second chance. Hence, every party must be as broadly based as possible; a narrow, minor party has no hope of winning.

The winner-take-all feature of American elections has the same effect. Only one member of Congress is elected from each district. In many European countries, the elections are based on proportional representation. Each party submits a list of candidates for parliament, ranked in order of preference by the party leaders, and then the nation votes. A party winning 37 percent of the vote gets 37 percent of the seats in parliament; a party winning 2 percent of the vote gets 2 percent of the seats. Since even the smallest parties have a chance of winning something, minor parties have an incentive to organize.

The most dramatic example of the winner-take-all principle is the electoral college (see Chapter 14). In every state but Maine and Nebraska, the candidate who wins the most popular votes in a state wins *all* of that state's electoral votes. In 2016, Donald Trump won Utah's six electoral college votes by winning only 45 percent of the votes cast in that state; the remaining votes were divided primarily between Hillary Clinton and Independent candidate Evan McMullin. Even prominent minor party candidates—like Ross Perot in 1992, Ralph Nader in 2000, and McMullin, Gary Johnson, or Jill Stein in 2016—have been unable to win electoral college votes. Voters often are reluctant to "waste" their votes on a minor-party candidate who cannot win.

The presidency is the great prize of American politics; to win it, you must form a party with as broad appeal as possible. As a practical matter, this means there will be, in most cases, only two serious parties—one made up of those who support the party already in power, and the other made up of everybody else. Only one third party ever won the presidency—the Republican Party in 1860—and it had by then pretty much supplanted the Whig Party. No third party is likely to win, or even come close to winning, the presidency anytime soon.

The second explanation for the persistence of the two-party system is found in the opinions of the voters. National surveys have found that most Americans see "a difference in what Democratic and Republican parties stand for." This percentage has increased in recent years as the parties have moved apart ideologically.[55] The public sees the two parties as having different platforms and issues, with different policy specialties. For the most part, the majority has deemed Democrats better at handling such issues as poverty, the environment, and health care and the Republicans better at handling such issues as national defense, foreign trade, and crime; but voters generally have split on which party is best at handling the economy and taxes.[56]

As we learned in Chapter 7, however, public opinion is often dynamic, not static. Mass perceptions concerning the parties are no exception. As voters see the parties handle the issues, they change their opinion about which party would do a better job with those issues. For instance, by 2004, a few years after President George W. Bush passed his No Child Left Behind education plan, Republicans cut into the Democrats' traditional edge concerning which party does better on public schools. After 2004, as the war in Iraq became unpopular, Republicans lost ground to Democrats on national defense. And on certain complicated or controversial issues, such as immigration policy, opinions can shift quickly in response to real or perceived changes in policy by those the public views as each party's respective leaders or spokespersons.

While there have been periods of division in American politics, citizens still come together under the umbrella of the two major parties. There has not been a massive and persistent body of opinion that has rejected the prevailing economic system (and thus we have not had a Marxist party with mass appeal); there has not been in our history an aristocracy or monarchy (and thus no party has sought to restore aristocrats or monarchs to power). Churches and religion have almost always been regarded as matters of private choice that lie outside politics (and thus no party has sought to create or abolish special government privileges for one church or another). In some European nations, the organization of the economy, the prerogatives of the monarchy, and the role of the church have been major issues with long and bloody histories. In these countries, these issues have been so divisive that they have helped prevent the formation of broad coalition parties.

But Americans have had other deep divisions—between white and black, for example, and between North and South—and yet the two-party system has endured. This suggests that our electoral procedures are of great importance—the winner-take-all, plurality election rules have made it useless for anyone to attempt to create an all-white or an all-black national party except as an act of momentary defiance or in the hope of taking enough votes away from the two major parties to force the

presidential election into the House of Representatives. (That may have been George Wallace's strategy in 1968.)

For many years, there was an additional reason for the two-party system: The laws of many states made it difficult, if not impossible, for third parties to get on the ballot. In 1968, for example, the American Independent Party of George Wallace found that it would have to collect 433,000 signatures (15 percent of the votes cast in the last statewide election) in order to get on the presidential ballot in Ohio. Wallace took the issue to the Supreme Court, which ruled, six to three, that such a restriction was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment.[57] Wallace got on the ballot. In 1980, John Anderson, running as an Independent, was able to get on the ballot in all 50 states; in 1992, Ross Perot did the same. But for the reasons already indicated, the two-party system will probably persist even without the aid of legal restrictions.

Minor Parties

The electoral system may prevent minor parties from winning, but it does not prevent them from forming. Minor parties—usually called, erroneously, "third parties"—have been a permanent feature of American political life.

Broadly speaking, four types of minor parties exist. Most notable are the ideological parties, ones that have a comprehensive view of American society and government that is radically different from that of the mainstream parties. Many of these, though not all, have been left-wing parties, such as the Socialist Party (1901 to the 1960s), Socialist Labor Party (1888 to 2009), and the Communist Party (1920s to the present). They usually are not interested in immediate electoral success and thus persist despite their poor showing at the polls. One such party, however, the Socialist Party of Eugene Debs, won nearly 6 percent of the popular vote in the 1912 presidential election. During its heyday, 1,200 candidates were elected to local offices, including 79 mayors. Part of the Socialist appeal arose from its opposition to municipal corruption, its opposition to American entry into World War I, and its critique of American society. No ideological party has ever carried a state in a presidential election.

The other three types of minor parties have focused more on short-term issues or divisions in the electorate. For example, single-issue parties focus their energies primarily on one issue. The most notable examples include the Free Soil Party, which opposed the spread of slavery (1848–1852), the American ("Know Nothing") Party, which opposed immigrants and Catholics (1856), and the Woman's Party, which fought for the right to vote for women (1913–1920). Third, economic protest parties typically focus on the economic grievances of a particular group, such as farmers; the Greenback Party (1876–1884) and the Populist Party (1892–1908) are the most prominent examples. Finally, the factional parties have split from a major party over some difference with them. Famous examples include the "Bull Moose" Progressive Party, which split from the Republican Party in 1912, and the States' Rights ("Dixiecrat") Party, which split from the Democratic Party in 1948.

None of these minor parties, however, has had much electoral success. Apart from the Republicans, who quickly became a major party, the only minor parties to carry states and thus win electoral votes were one party of economic protest (the Populists, who carried five states in 1892) and several factional parties (most recently, the States' Rights Democrats in 1948 and the American Independent Party of George Wallace in 1968). Though factional parties may hope to cause the defeat of the party from which they split, they have not always been able to achieve this. Harry Truman was elected in 1948 despite the defections of both the leftist progressives, led by Henry Wallace, and the right-wing Dixiecrats, led by J. Strom Thurmond. It seems likely that Hubert Humphrey would have lost in 1968 even if George Wallace had not been in the race (Wallace voters would probably have switched to Nixon rather than to Humphrey, though of course one cannot be certain). It is quite possible, on the other hand, that a Republican might have beaten Woodrow Wilson in 1912 if the Republican Party had not split in two (the regulars supporting William Howard Taft, the progressives supporting Theodore Roosevelt).

What is striking is not that we have had so many minor parties but that we have not had more. Several major political movements did not produce a significant third party: the Civil Rights movement of the 1960s, the antiwar movement of the same decade, and, most important, the labor movement of the 20th century. African Americans were part of the Republican Party after the Civil War and part of the Democratic Party after the New Deal (even though the southern wing of that party for a long time kept them from voting). The antiwar movement found candidates with whom it could identify within the Democratic Party (Eugene McCarthy, Robert F. Kennedy, George McGovern), even though a Democratic president, Lyndon B. Johnson, was chiefly responsible for the U.S. commitment in Vietnam. After Johnson only narrowly won the 1968 New Hampshire primary, he withdrew from the race. Unions have not tried to create a labor party—indeed, they were for a long time opposed to almost any kind of national political activity. Since labor became a major political force in the 1930s, the largest industrial unions have been content to operate as a part (a very large part) of the Democratic Party.

One reason some potential sources of minor parties never formed such parties, in addition to the dim chance of success, is that the direct primary and the national convention made it possible for dissident elements of a major party—unless they become completely disaffected—to remain in the party and influence the choice of candidates and policies. The antiwar movement had a profound effect on the Democratic Conventions of 1968 and 1972; African Americans have played a growing role in the Democratic Party, especially with the candidacy of Jesse Jackson in 1984 and 1988 and Barack Obama in 2008 and 2012; only in 1972 did the unions feel that the Democrats nominated a presidential candidate (McGovern) unacceptable to them.

The impact of minor parties on American politics is hard to judge. One bit of conventional wisdom holds that minor parties develop ideas that the major parties later come to adopt. The Socialist Party, for example, supposedly called for major social and economic policies that the Democrats under Roosevelt later embraced and termed the New Deal. It is possible the Democrats did steal the thunder of the Socialists, but it hardly seems likely that they did it because the Socialists had proposed these things or proved them popular. (In 1932, the Socialists received only 2 percent of the vote and in 1936 less than one-half of 1 percent.) Roosevelt probably adopted the policies in part because he thought them correct and in part because dissident elements within his *own* party—leaders such as Huey Long of Louisiana—were threatening to bolt the Democratic Party if it did not move to the left. Even Prohibition was adopted more as a result of the efforts of interest groups such as the Anti-Saloon League than as the consequence of its endorsement by the Prohibition Party.

The minor parties that have probably had the greatest influence on public policy have been the factional parties. Mugwumps and liberal Republicans, by bolting the regular party, may have made that party more sensitive to the issue of civil service reform; the Bull Moose and

Ken Durden/Shutterstock.com

IMAGE 9-6 Tea Party members at a rally. The Tea Party is not truly a minor party, but has influenced the Republican Party in recent years.

La Follette Progressive Parties probably helped encourage the major parties to pay more attention to issues of business regulation and party reform; the Dixiecrat and Wallace movements probably strengthened the hands of those who wished to go slow on desegregation. The threat of a factional split is a risk that both major parties must face, and it is in the efforts that each makes to avoid such splits that one finds the greatest impact of minor parties—or at least that was the case in the 20th century.

The Tea Party movement that has recently evolved is not a single national party, but it shares characteristics with minor parties. Tea Party activists have been active in recent elections and have helped to defeat some long-standing Republican elected officials—such as former House majority leader Eric Cantor, who lost in a 2014 primary election. While the movement is diverse, many of its members share a set of core values focused on reducing taxes, government spending, and the federal debt. Whether the Tea Party will continue to influence the Republican Party into the future remains to be seen.

LEARNING OBJECTIVES

9-1 Describe the roles of American political parties and how they differ from parties in other democracies.

A political party is an organization that works to elect candidates to public office and identifies candidates by a clear name or label. American parties tend to be somewhat weaker than their counterparts elsewhere for several structural reasons (control of access to the ballot, divided legislative/executive power, and federalism).

9-2 Summarize the historical evolution of the party system in America.

Initially, there were no parties in America: George Washington called parties "factions." But as soon as it was time to select his replacement, the republic's first leaders realized they had to

organize their followers to win the election, and parties were born. They gradually strengthened during the 19th century, before progressive reforms weakened their power in the early to mid-20th century. More recently, however, the parties have become both stronger and more polarized.

9-3 Explain the major functions of political parties.

Parties help candidates win office, and then coordinate their behavior once in office. To win office, they recruit candidates, nominate them (either via primaries or conventions), and then help them win the general election.

9-4 Explain how parties are organized in America.

The parties have a federalized structure: there is a national party, and state and local parties organized beneath them. While the different levels operate independently of one another, there are important areas of collaboration between them.

9-5 Define partisan identification, and explain how it shapes the political behavior of ordinary Americans.

Partisan identification refers to Americans' attachment to a political party. For most people, it is like belonging to a political team. Party identification powerfully shapes vote choice in elections: more than 90 percent of partisans supported their party's candidate in recent elections. It also influences their evaluation of political leaders and institutions, with partisans more trusting of the government when their party is in control.

9-6 Summarize the arguments for why America has a two-party system.

The United States has a two-party political system because of two structural features in American politics: single-member districts and winner-take-all elections. Both features encourage the existence of two major parties, as smaller parties face great difficulty in winning elective office.

TO LEARN MORE

Democratic National Committee: **www.democrats.org**

Republican National Committee: **www.gop.com**

Green Party: **www.gp.org**

Libertarian Party: **www.lp.org**

Reform Party: **www.reformparty.org**

Aldrich, John H. *Why Parties? The Origin and Transformation of Political Parties in America*. Chicago: University of Chicago Press, 1995. Explains why we have parties.

Cohen, Martin, David Karol, Hans Noel, and John Zaller. *The Party Decides: Presidential Nominations Before and After Reform*. Chicago: University of Chicago Press, 2008. Argues that party elites have reclaimed the presidential nomination process via the invisible primary process.

Hershey, Marjorie. *Party Politics in America*, 16th ed. New York: Routledge, 2014. Discusses the ways parties shape American politics.

Hofstadter, Richard. *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780–1840*. Berkeley: University of California Press, 1969. Brilliant history of how political parties came to be viewed by most leaders as necessary and desirable political institutions.

Key, V. O., Jr. *Southern Politics*. New York: Knopf, 1949. A classic account of the one-party South.

Klar, Samara, and Yanna Krupnikov. *Independent Politics: How American Disdain for Parties Leads to Political Inaction*. New York: Cambridge University Press, 2016. Argues that Americans identify as Independents largely because they dislike political conflict, and this in turn limits political activity.

Nader, Ralph. *Crashing the Party: Taking on the Corporate Government in an Age of Surrender*. New York: St. Martin's Press, 2002. An impassioned attack on the two-party system by a well-known activist who ran for president as a minor-party candidate in 2000 and 2004.

Riordan, William L. *Plunkitt of Tammany Hall*. New York: Knopf, 1948. (First published in 1905.) Insightful account of how an old-style party boss operated.

Schattschneider, E. E. *Party Government*. New York: Holt, Rinehart and Winston, 1942. An argument for a more disciplined and centralized two-party system.

Wilson, James Q. *The Amateur Democrat*. Chicago: University of Chicago Press, 1962. Analysis of the issue-oriented political clubs that rose in the 1950s and 1960s.