

American Governance

CENTER FOR CIVIC EDUCATION PACKET
“WE THE PEOPLE UNITS” 1-6

Stephen Schechter, EDITOR IN CHIEF

Thomas S. Vontz, EXECUTIVE ASSOCIATE EDITOR

Thomas A. Birkland, ASSOCIATE EDITOR

Mark A. Graber, ASSOCIATE EDITOR

John J. Patrick, ASSOCIATE EDITOR

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INTRODUCTION

Governance refers to the various ways by which the act of governing takes place. It includes formal government structures but also the myriad components (such as voluntary civic associations and public and private educational systems) that make up a given political entity and comprise the communal life of its citizens. *American Governance* is a five-volume publication that provides scholarship on a wide range of essential issues related to how Americans govern themselves. It offers a comprehensive, bird's-eye view of the complete system of American governance and the complementarity of its parts.

The set includes approximately 750 signed, peer-reviewed entries that explore key topics. These include formal frameworks such as the various US and state constitutions and federal, state, and local governments, as well as action by individuals and their representative civic and political organizations. It examines the exercise of individual self-restraint, the political norms and ideals that guide the actions of citizens and leaders, the constitutional and legal frameworks that reinforce and modify those norms, and the families, schools, and

congregations that transmit values. The work also delves into the local communities, civic associations, and political associations that people form for collective deliberation and action, along with the relationships formed between a people and their elected representatives.

Each article offers a bibliography and cross-references to guide the reader to related subjects; other resources include a thematic outline, historical documents, an annotated list of useful websites, and over 300 black-and-white images.

This special package of twenty-five entries was designed exclusively for teachers participating in the James Madison Legacy Project administered by the Center for Civic Education (CCE). The entries in this package provide an in-depth analysis of key concepts associated with each of the units in CCE's *We the People: The Citizen and the Constitution* (Level 3). The entries include concepts associated with each unit.

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Unit 1

What Are the Philosophical and Historical Foundations of the American Political System?

Magna Carta

Magna Carta (the “Great Charter”) resulted from a meeting between England’s King John (1166–1216) and his rebellious barons at Runnymede on May 15, 1215. The charter was, in effect, an attempt at a peace treaty between the king and the disaffected barons. As seen by its contemporaries, the document was addressed at specific grievances the barons and their allies had with King John. In subsequent centuries, Magna Carta came to have much larger meaning, symbolizing such basic principles as constitutionalism and the rule of law.

HISTORY OF MAGNA CARTA

The quarrels that led to Magna Carta were years in the making. King Richard I (the “Lion-Hearted”; 1157–99) spent most of his reign abroad on Crusade or fighting in France. Financing these expeditions required money, which had to be extracted from reluctant subjects at home. Succeeding Richard on the throne, King John warred with France’s King Philip Augustus (1165–1223), only to see vast portions of the English king’s possessions in France, including Normandy, fall to the French. King John also sparred with Pope Innocent III (1160/1161–1216) over the election of a new archbishop of Canterbury. The pope ordered the suspension of sacraments and church services in England. Faced with the pope’s threat to release the English people from their allegiance to their monarch, King John gave in to Innocent’s terms, including agreeing to receive the kingdom as a fief from the pope. At home, complaints mounted, especially about burdensome taxes and feudal obligations. Faced with open rebellion, the king reluctantly agreed to meet with the barons at Runnymede and hear their demands. These were incorporated into the document that, sealed by the king, became what is known as Magna Carta.

Many of Magna Carta’s provisions deal with feudal relationships and thus are largely of historical interest only. Other provisions, however, anticipate some of the basic precepts of modern constitutionalism. Magna Carta pays special attention to legal process and how justice is to be imposed. Chapter 39 declares, “No free man shall be taken, imprisoned, disseised [dispossessed], outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” In Magna Carta’s “law of the land” can be found the early origins of what is known as “due process of law.” Thus the Fifth and Fourteenth Amendments to the United States Constitution declare that no person shall be deprived of life, liberty, or property without due process of law.

In the seventeenth century, Magna Carta was invoked in the struggles between Parliament and the Stuart kings. The jurist Sir Edward Coke insisted that English liberties were not

acts of grace on the king’s part but matters of right. “Magna Carta is such a Fellow,” Coke declared in a debate in the House of Commons on May 17, 1628, “that he will have no sovereign.” Ultimately, the Stuart kings’ claim to royal prerogative brought a bloodless revolution, the accession of William and Mary to the throne, and the enactment of the English Bill of Rights of 1689. That document itself is, like Magna Carta, the source of specific provisions of the US Constitution and Bill of Rights, including the right of petition and the ban on cruel and unusual punishments.

Magna Carta came to America with the first colonial charters. The Virginia Company Charter of 1606 guaranteed colonists “all liberties, franchises, and immunities” to the same extent “as if they had been abiding and born” in England. Charters of the other colonies contained similar assurances to colonists and their posterity. English laws and law books, including Coke’s commentaries on Magna Carta, helped plant the notion of fundamental rights as the colonies took root.

In the decade leading up to the American Revolution, an outpouring of resolutions and pamphlets attacked British policies, including revenue measures. The Americans made arguments that can be recognized as constitutional. They based their claims of rights firmly on Magna Carta and on English rights as guaranteed by the early charters. Petitioning the king in 1765, the Stamp Act Congress declared that the rights they articulated were “confirmed by the Great Charter of English Liberty.” In 1774 the Continental Congress traced the Americans’ rights to the promises made in the colonial charters.

LEGACY OF MAGNA CARTA

Specific provisions of the charter have their echo in modern constitutionalism. No precept in American constitutional law has been adapted to so many uses as due process of law. Not only has the Constitution’s due process clause been held to require fair procedures, but modern cases have invoked it to place substantive limits on the power of government, protecting such interests as privacy and personal autonomy.

More generally, Magna Carta is an early step on the path to written constitutions. Reducing rights and protections to written form is a leitmotif of American constitutionalism, as exemplified by the colonial charters, the state constitutions, and the US Constitution and Bill of Rights. Magna Carta’s organic development—it evolved as the years passed—helped spur the notion of a constitution that, like the common law, responds to the needs of successive generations.

Magna Carta helped nurture the idea of constitutions as superior to ordinary legislation. A statute of Edward III (1312–77) in 1368 declared that, if any statute be contrary to Magna Carta, “it shall be holden for none.” In other words Magna Carta was seen as a norm against which other laws were to be

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measured. Judicial review, as articulated by Chief Justice John Marshall in 1803, lay far in the future. But one can trace the road from Magna Carta as fundamental law to the supremacy clause of the US Constitution: that only laws “made in pursuance” of the Constitution shall be the “supreme Law of the Land.”

Ultimately, Magna Carta stands for what is called the “rule of law.” In sealing the charter, King John subscribed, however unwillingly, to the notion that ancient rights bound even the king. In the twenty-first century, it is a cornerstone of constitutionalism that no one is above the law, that all who wield the powers of government are bound to respect constitutional and legal norms. It is not likely that the barons at Runnymede were thinking about posterity’s judgment. But Magna Carta endures, eight centuries later, as a classic symbol of constitutionalism and the rule of law.

*A. E. Dick Howard,
University of Virginia School of Law*

SEE ALSO: *British Constitution; Coke, Edward; Constitutionalism; Liberty; Limited Government; Rights, Negative; Rule of Law.*

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American Revolution

The American Revolution meant different things to different people. According to John Adams, the Revolution occurred in the minds of the American people. “The child independence”

was born, Adams said, when in 1761 James Otis Jr. (1725–83) denounced the general warrants issued by the imperial government to stem smuggling by Boston merchants. The questioning of British authority was the real American Revolution. “The War was only an Effect and Consequence of it,” wrote Adams to Thomas Jefferson on August 24, 1815.

Dr. Benjamin Rush, a Pennsylvania signer of the Declaration of Independence, wrote in “An Address to the People of the United States,” published in *The American Museum* magazine in January 1787, that “there is nothing more common than to confound the terms of *the American revolution* with those of *the late American war*.” The war, he wrote, was over, but not so the American Revolution. The war was nothing more than “the first act of the great drama.” It yet remained “to establish and perfect our new forms of government; and to prepare the principles, morals, and manners of our citizens, for these forms of government, after they are established and brought to perfection” (Rush 1787).

Historians have also disagreed about the nature of the Revolution. Eighteenth- and nineteenth-century historians emphasized the imperial conflict, with American historians arguing that British violations of American constitutional rights provoked the conflict whereas contemporary British historians believed that a handful of American dissidents seeking personal fortune and power used the financial problems after the French and Indian War to create conflict within the empire. In the early twentieth century, Progressive historians, led by Carl Becker and Arthur Schlesinger Sr., argued that the Revolution had two components—an imperial conflict over home rule and a class conflict over who should rule at home. Around 1950 opposition to this interpretation suggested that by 1763 Americans had already developed their basic democratic rights and institutions, and thus no internal class conflict existed. Other historians argued that Americans were always united on basic principles and that the British policies had forced the patriotic reaction.

A decade later, another set of historians, led by Bernard Bailyn (1967), argued that the Revolution was fought primarily over ideas and principles embedded in the writings of classical political theorists from ancient Greece and Rome and in the seventeenth-century English writings associated with the conflict between Parliament and the king over the king’s prerogatives. In the 1990s, syntheses of these interpretations emerged, most prominently by Gordon S. Wood. Rejecting the consensus theory, Wood demonstrated how the unleashed social, economic, and political forces of the Revolutionary era transformed America between 1760 and 1820, changing it from a static, deferential, well-ordered, monarchical society into a liberal, democratic, market-driven, commercial one. Remarkably, all of these dramatic changes were accomplished before the country experienced the full impact of the industrial, urbanization, and transportation revolutions that occurred soon afterward.

ORIGINS OF THE REVOLUTION

Certainly in 1763, at the end of the French and Indian War (the Seven Years’ War in Europe), virtually no one in Britain’s American colonies or in Great Britain desired or even seriously contemplated colonial independence. According to Benjamin Franklin’s testimony before the House of Commons in 1766, during the debate over the repeal of the Stamp Act, the American colonies in 1763 “submitted willingly to the government of the Crown. . . . They had not only a respect, but an affection for Great Britain . . . [and] considered the Parliament as the great

bulwark and security of their liberties and privileges, and always spoke of it with the utmost respect and veneration” (1813, 140–1).

Historians traditionally have said that the Revolutionary era began with the end of the French and Indian War in 1763. A few historians, however, have placed the beginning of the Revolution in 1748 at the end of the War of the Austrian Succession. These historians argue that by 1750 the American colonies had grown so much that Britain feared that the land might be captured by the French and Spanish, whereas others in Britain worried that the colonies might voluntarily secede from the British Empire and ally with France and Spain.

By 1750 British domestic politics had stabilized, allowing far more government scrutiny over colonial affairs. For more than a century, the imperial authorities had interfered little in colonial domestic affairs. During this period of benign neglect, local colonial leaders used the assemblies’ monetary power to successfully gain control over their governments as royal governors seemed unable to restrict their assemblies. Despite their control over local affairs, colonial assemblies never overtly threatened parliamentary supremacy. Some imperial officials sensed that a dangerous change had taken place, which could presage independence. Consequently, beginning in 1748 the Board of Trade, the imperial body that administered the colonies, pressured governors to exercise greater authority over their assemblies. The outbreak of the French and Indian War gave the Board an opportunity to send troops to America not only to fight the enemy but also to strengthen the authority of governors. Britain continued to station regulars in the colonies even after the end of the war. These efforts, which continued through 1776, were denounced and usually successfully opposed by local political factions that controlled colonial assemblies. The specter of imperial oppression was raised as assembly leaders became aware of this new danger to their local autonomy. Before 1763, Parliament did not actively participate with the Board of Trade’s effort to limit the authority of the colonial assemblies. That soon changed.

A NEW KING AND A NEW IMPERIAL POLICY

A number of changes at the end of the French and Indian War contributed to the imperial dispute that led to American independence. George III (1738–1820) ascended to the throne in 1760. The young, obstinate king named new advisers who advocated abandoning the old imperial policy of benign neglect. The king ardently desired to regain the prerogatives that his predecessors had lost. The ill-suited policies of Lord Bute (1713–92), George Grenville (1712–70), George Germain (1716–85), Lord Hillsborough (1718–93), and Lord North (1732–92) were particularly offensive to many Americans.

The French and Indian War had saddled both Great Britain and the colonies with huge debts, payment of which required new sources of revenue. The draconian Treaty of Paris, signed February 10, 1763, which transferred French Canada and Spanish Florida to Great Britain, virtually guaranteed that France and Spain would seek revenge when the opportunity arose. Without the threat from these neighboring enemies, the American colonies felt less need for British protection, and Great Britain felt less dependent on colonial military assistance in the Western Hemisphere. The colonial military effort during the war also empowered the colonies.

This new sense of safety was shattered almost immediately when Indians led by Chief Pontiac (1720–69) attacked Fort

Detroit and eastward, near Philadelphia. Before the conflict ended, two thousand settlers had been killed or taken prisoner. To forestall any future conflict with Indians, the Crown issued a proclamation on October 7, 1763, prohibiting colonial settlement west of the crest of the Appalachian Mountains from Canada to the Carolinas. Conflict over this territory had sparked the beginning of the French and Indian War. American colonists did not appreciate this exclusion.

George Grenville, first lord of the treasury and new British prime minister after the resignation of the despised Lord Bute, proposed a tax on all imported molasses into the colonies. A 1733 act taxed molasses imported from the French West Indies but did not tax British West Indies molasses. Grenville’s Sugar Act lowered the 1733 tax but expanded it to include all imported molasses. Efforts were also made to reduce smuggling, which had become endemic, by holding trials in these cases in a vice admiralty court in Halifax, Nova Scotia, with no jury trial and no right of appeal.

Grenville then proposed a stamp tax that required the use of stamped paper for all legal documents, newspapers, pamphlets, and even playing cards and dice. The purpose of the Stamp Act was to collect revenue. To make the tax more palatable, stamp distributors would be Americans. The American response was immediate, widespread, vociferous, and violent, even before the December 1, 1765, the starting date of the act. Led by radicals such as Samuel Adams (1722–1803), groups of merchants and artisans soon organized, first in Connecticut and New York, but then throughout the colonies. Soon to be called Sons of Liberty, these groups were highly disciplined and quite willing to use militant force and intimidation to accomplish their goals. Homes and offices of tax distributors and other government officials were ransacked and burned, effigies were hanged and burned, petitions and resolutions in protest were sent, and nonimportation agreements were adopted to put a strain on the British economy. Before the act was to go into effect, all of the stamp distributors resigned.

Colonial assemblies and town and county meetings protested against the act. At the behest of the Massachusetts House of Representatives, twenty-eight delegates from nine colonies met in New York City on October 7, 1765, “to consult together on the present circumstances of the colonies.” After affirming their loyalty to and affection for the king and his government, the delegates felt duty bound to declare their “most essential rights and liberties” and their grievances against Parliament. Among their fourteen resolutions, the delegates stipulated that no taxes could “be imposed on them but with their own consent, given personally or by their representatives” (Cruger 1845, 27–29). They also resolved that they were not and could never be represented in Parliament. They could only be represented in their own assemblies. The Stamp Act and the expanded admiralty jurisdiction must be repealed.

Because of colonial officials’ inability to enforce the Stamp Act and the impact of the nonimportation agreements on the English economy, Parliament, after a heated debate, repealed the Stamp Act on March 18, 1766. On the same day, as a face-saving measure, Parliament passed the Declaratory Act, which contained two provisions: (1) Parliament had the authority to pass all laws “to bind the colonies and people of America . . . in all cases whatsoever”; and (2) all colonial votes, resolutions, and proceedings that questioned Parliament’s authority were “declared to be, utterly null and void.” Americans rejoiced when news of the repeal of the Stamp Act arrived.

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The rapprochement was short-lived. In 1767 Parliament passed the Townshend Acts, which placed a tax on many imported goods. Again the colonists protested with writings, demonstrations, petitions, and nonimportation agreements. Perhaps most important was a twelve-part series by John Dickinson (1732–1808) under the title “Letters from a Farmer in Pennsylvania,” in which Parliament was said to have the power only to regulate the commerce of the empire, not to levy what amounted to an internal tax. Again, the British backed down, repealing all the Townshend duties except the one on tea.

In the meantime several regiments of British regulars were stationed in Boston and New York City. The New York Assembly refused to provide barracks for the troops as required under the Quartering Act of 1765, whereupon Governor Sir Henry Moore (1713–69) dissolved the legislature. On March 5, 1770, a confrontation between a squad of British troops and a taunting mob ended in the Boston Massacre, in which five men were killed, making them martyrs. In a highly charged setting, Captain Thomas Preston (ca. 1722–98) and all but two of the soldiers were acquitted. The two soldiers found guilty of manslaughter were released after being branded on the thumb.

Another pause in the public unrest was broken when Lord Hillsborough, secretary of state for the colonies, informed Massachusetts authorities that the salaries of the governor, justices of the colony’s supreme court, and other officials would be paid by the Crown from duties collected from the tea tax. Viewed as unconstitutional, this royal intrusion would destroy the leverage the assemblies enjoyed over royal officials. In October 1772 Samuel Adams proposed that Massachusetts towns and the other colonies establish committees of correspondence to coordinate efforts. These committees, not answerable to or dissoluble by governors, soon emerged as shadow governments. Committees of safety were appointed to serve as executive bodies that used public ostracism and various threats, including tarring and feathering, to intimidate those who might cooperate with British officials. Public demonstrations intensified when ships tried to unload cargos of tea in several ports. Radical leaders opposed the principle of the tea tax and the monopoly given to the economically distressed East Indies Company, which had huge inventories of tea. Ships in several American ports were turned away, but on the evening of December 16, 1773, a group of the Sons of Liberty disguised as Indians boarded three ships in Boston harbor and dumped the tea overboard.

Parliament reacted speedily and forcefully against this willful destruction of private property. The Coercive Acts (called the Intolerable Acts in America) closed the port of Boston, revoked the royal charter, established a military government, and provided for the quartering of troops. Another measure, the Quebec Act, granted French Roman Catholics full religious toleration and legal rights, and extended Quebec’s borders southward to the Ohio River. All of the other colonies passed resolutions condemning the acts, and several sent much-needed supplies and food to Boston. Samuel Adams called for a complete trade embargo against Britain—too harsh a proposal for many. The New York Committee of Correspondence called for a continental congress to meet in September 1774.

THE CONTINENTAL CONGRESSES AND THE WAR

On September 5, 1774, fifty-six delegates from all of the colonies except Georgia met in Philadelphia at the First Continental Congress, which lasted seven weeks. The delegates petitioned the king and Parliament, approved a nonimportation measure

called the Association, and proposed to meet again the following year. War began when British troops ventured out of Boston to seize cannon and military munitions and to capture radical leaders Samuel Adams and John Hancock (1737–93). On April 19, 1775, the regulars confronted minutemen on Lexington Green, where shots were fired. The skirmishing continued as the British marched toward Concord and then retreated back to Boston, suffering severe casualties along the way.

On May 10, 1775, the Second Continental Congress assembled in Philadelphia, uncertain as to how to respond to the unfolding events. Seven days later, news arrived that the Green Mountain Boys of Vermont, led by Ethan Allen (1738–89), had captured the strategically located Fort Ticonderoga in northern New York. On June 14 Congress voted to raise a Continental Army and the next day appointed George Washington of Virginia as commander in chief. Subsequently Congress appointed eight brigadier generals, furnished paper money to pay for the army, and approved the Olive Branch Petition, drafted by John Dickinson, which called for reconciliation. On June 17 the Battle of Bunker Hill occurred in Boston; more than eleven hundred British regulars were killed or wounded before the American militiamen withdrew. British ships attacked and destroyed neighboring Charlestown with incendiary rockets. On August 23, 1775, the king declared the colonies in a state of rebellion. In September an American army invaded Canada in an unsuccessful effort to get Canada to join the other mainland colonies in their opposition to Britain. In late November Congress voted to raise a navy.

Most Americans still hoped for reconciliation when in January 1776 Thomas Paine, who had emigrated from England in December 1774, published *Common Sense*, a pamphlet that denounced monarchy and called for an immediate declaration of independence. The pamphlet electrified America, as independence now seemed feasible and preferable. On June 7, 1776, Richard Henry Lee (1732–94) presented resolutions from the Virginia provincial convention calling for a declaration of independence, a confederation government, and foreign assistance. Congress appointed committees to consider each proposal. On July 2, Congress unanimously voted for independence. Two days later its formal declaration was approved.

THE DECLARATION OF INDEPENDENCE

Three days after Richard Henry Lee’s (1732–94) proposal for independence, on June 10 Congress appointed a five-man committee to draft a declaration of independence. The drafting committee consisted of Benjamin Franklin, Roger Sherman (1721–93), John Adams, Robert R. Livingston (1746–1813), and Thomas Jefferson. Adams and Jefferson were made an executive committee, and, according to Adams, he persuaded Jefferson, who “had a happy talent for composition and a peculiar felicity of expression,” to write the draft (quoted in Schechter 1990, 455). The intended audience was the American people, the people of the world, and posterity.

The introduction to the Declaration of Independence states that it had become “necessary” to declare American independence. Not a matter of opinion, nor simply preferable or defensible, it was inescapable and therefore lawful. The second part consists of five sentences—202 words—in which Jefferson summarizes certain self-evident truths that embody the American philosophy of government. All men are created equal and possess “certain unalienable Rights” among which “are the

rights to Life, Liberty, and the pursuit of Happiness.” To secure these rights the people create governments. Whenever any particular form of government “becomes destructive of these ends,” the people have the right to abolish it and institute new forms of government.

The third and longest part of the Declaration denounces the king and others (his ministers and Parliament) for “a long train of abuses and usurpations” leading to “absolute Despotism.” The fourth section lists the actions of the American people in trying to obtain redress of their grievances and a denunciation of the British for turning a deaf ear “to the voice of justice and of consanguinity.” The conclusion declares the united colonies free and “Independent States.” In many respects, the Declaration of Independence is the literary expression of the concept of American liberty in the same way that the Statue of Liberty is a visual expression of that concept.

DIPLOMACY

European countries watched with great interest as the conflict between Britain and the colonies intensified. France and Spain were especially eager for revenge as they sought to weaken the power and wealth of Britain.

In November 1775 the Second Continental Congress named a secret committee to communicate with friends in Britain, Ireland, and other countries. The committee soon started meeting secretly with a French envoy, who indicated that France wished America well while disclaiming any desire to recapture Canada. Desperately needing war material, especially gunpowder, Congress soon started smuggling French goods through St. Eustatius in the Dutch West Indies. The new French king, Louis XVI (1754–93), was advised by his controller general, Anne-Robert-Jacques Turgot (1727–81), to avoid war with Britain and pay off the country’s huge debt. The new French foreign minister, Charles Gravier, comte de Vergennes (1719–87), advised just the opposite. In one of the great documents in American history, Vergennes advised the king, in his report titled “Considerations,” that France should secretly aid the Americans. Inevitably, Vergennes said, France and Britain would again be at war; better to be so with the American colonists as allies rather than as enemies. In May 1776 the king formally adopted Vergennes’s advice, and secret financial aid started flowing from France to America.

In September 1776, Congress sent a three-man diplomatic committee to France consisting of Silas Deane (1737–89), Arthur Lee (1740–92), and Benjamin Franklin. Franklin, the last to arrive, landed in France in December 1776. He would become America’s sole minister to France in 1778.

With the Declaration of Independence and the news of the surrender of a 5,500-member army at Saratoga, in New York, the French felt confident that reconciliation between Britain and its colonies was unlikely. On February 6, 1778, after bringing its fleet into combat readiness, France signed two treaties with the United States—a treaty of alliance and a treaty of amity and commerce. Both parties agreed not to make peace with Britain before the other had also reached a settlement. France again disclaimed any intention to recapture Canada but indicated that it would attempt to capture British islands in the West Indies. War commenced between Britain and France on June 17, 1778. In July 1778 a French fleet arrived off the coast of New York. Two years later, French general Jean-Baptiste-Donatien de Vimeur, comte de Rochambeau (1725–1807), led an army of

6,500 to serve as an expeditionary force taking up residence in Newport, Rhode Island. France continued to send supplies and provide financial aid to the Continental government.

Spain, a traditional British enemy, secretly negotiated with France. Spain’s navy also needed upgrading. In late 1779 Congress sent John Jay, its former president, to be the first US minister to Spain, but Spain refused to recognize the United States for fear that it would set a bad precedent for Spain’s New World colonies. Thus, although Spain secretly aided America, no treaty of alliance between the two countries was signed. On April 12, 1779, Spain signed a secret treaty with France, and on June 21 Spain declared war on Britain, hoping to regain Florida, the Mediterranean island of Minorca, and Gibraltar.

On his second diplomatic mission to Europe, John Adams was authorized to negotiate a peace treaty and a commercial treaty with Britain. Unable to get along with Vergennes, Adams in the summer of 1780 traveled to The Hague, where he prematurely announced his official status as US minister to the Netherlands. After Britain attacked St. Eustatius in December 1780, the Netherlands recognized the United States on April 19, 1782. In October 1782 the two countries signed a treaty of amity and commerce, and Adams was able to obtain important loans from Dutch bankers.

With the surrender of the British at Yorktown in Virginia in October 1781, all of the belligerents realized that the fighting must soon end. On February 27, 1782, Parliament voted to end the war. Lord North resigned as prime minister on March 20, 1782. Peace negotiations began in Paris in the spring of 1782 with John Jay, John Adams, Benjamin Franklin, and Henry Laurens (1723–92) negotiating with Richard Oswald ((1705–84), an old Scottish merchant, for the British. A preliminary treaty was signed on November 30, 1782, a general armistice was reached on January 20, 1783, and the final treaty of peace was signed on September 3, 1783.

POPULATION AND SOCIETY

In 1776 approximately 2.5 million people lived in the thirteen mainland colonies. Almost 500,000 enslaved blacks were scattered throughout all of the colonies, most densely in the South. About 750,000 of the white inhabitants were not of English origin. The colonies contained about 500,000 adult white men and about 1.25 million women and children. New England was the most densely settled, the South the least. Philadelphia was the largest city, with a population of about 35,000; next was New York, with about 25,000; and Boston, with about 15,000. No town in Virginia had more than 3,000 inhabitants, but Virginia was the largest colony both geographically and in population. Massachusetts and Pennsylvania were next in population.

Colonial American society was highly deferential. Political preference in royal colonies was largely a factor of family and economic connections in England. Colonial governors rewarded friends with positions and generous land grants. These placemen (persons rewarded with public office) supported the new imperial policy.

A second group of elites came from well-to-do families not so favorably connected to those in power in England or in their colony. These elites often opposed the imperial policy. A third group of elites consisted of self-made men who had built their fortunes in business, in speculation, or in war profiteering. These men often opposed the imperial policy and came to

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advocate independence, but they wanted to maintain a hierarchical social, political, and economic society, naturally with them at the apex. They did not wish to empower the masses.

A small group of radical leaders effectively led yeoman farmers, merchants, artisans, and the more common laborers. Committed to the Enlightenment concept of republicanism, these radicals (men such as Thomas Paine and Samuel Adams) advocated independence and a radical change in the institutions of government. The elite feared these radical leaders not only because they would lose their control over government but because they believed that republicanism in the short term would lead to the tyranny of the multitude and in the end to anarchy.

LOYALISTS

It is uncertain how many Americans remained loyal to Britain during the Revolution. Some Loyalists left America, some took up arms and fought for their king, whereas others avoided taking a public stance. More Loyalists (perhaps 100,000) per capita emigrated from America during the Revolution than Frenchmen from France during the French Revolution. Colonial officials and Loyalists who emigrated from America to Britain always maintained that there were huge numbers of Loyalists who kept a low profile for fear of incarceration, banishment, physical punishment, or execution. These expatriot Loyalists (men such as Thomas Hutchinson and Andrew Oliver) consistently gave bad advice to Parliament and the succession of British ministers.

The punishment of Loyalists and pacifists intensified whenever the danger of British forces increased. In Morristown, New Jersey, a local court sentenced 105 suspected Loyalists to be hanged. Offered reprieves if they would enlist in the Patriot army for the duration of the war, four prisoners refused the offer and were executed. The others chose to serve in the army.

Some historians estimate that Loyalists made up 20 percent of the population. Alexander Hamilton thought that 50 percent of New Yorkers were Loyalists. Although John Adams is often quoted as saying that one-third of Americans favored the Revolution, one-third opposed it, and one-third were apathetic; this assessment appeared in an 1815 letter in which Adams was referring to the French Revolution, not the American Revolution. Certainly Loyalist numbers increased when the British army was in the immediate area. As Washington retreated across New Jersey into Pennsylvania in late 1776, his army dwindled from 19,000 to little more than 2,000, whereas General William Howe's army of 32,000 increased to more than 40,000 as Loyalists joined the seemingly unstoppable regulars. Loyalist regiments from New Jersey, New York, and the Carolinas took to the field, often fighting along with British regulars and their Indian allies. The fighting in the Carolinas amounted to a civil war that often witnessed merciless treatment of prisoners on both sides. When Patriot Americans were captured or when the British army occupied an area, some prominent Americans formally switched their allegiance. Such was the case with Richard Stockton in New Jersey, Tench Coxe in Philadelphia, and Rawlins Lowndes in Charleston, South Carolina.

Religion often predisposed some to Loyalism. Many Anglicans, especially Anglican ministers, remained loyal to their king. Pacifists were often Loyalists or at least were assumed to be Loyalists, especially Quakers and Moravians. In late 1777, just before the British captured Philadelphia, twenty wealthy Quaker and Anglican merchants suspected of being spies were arrested and, without trials, were exiled to Virginia's Shenandoah Valley,

where they remained under house arrest for almost a year. Most states passed laws disenfranchising Loyalists and authorizing the confiscation and sales of their estates. In some states disenfranchisement continued after the war.

NATIVE AMERICANS

In 1776 approximately 200,000 Indians from eighty-five different nations lived east of the Mississippi River. The Declaration of Independence denounced the British for using Indians to mercilessly attack Americans. During the war most Indians allied with the British, a few tribes fought with the Americans, and a few remained neutral. Among the Iroquois in New York, the Mohawk, Seneca, Onondaga, and Cayuga fought with the British, whereas the Oneida and Tuscarora allied with the Americans, as did the Christianized Stockbridge of Massachusetts and the Catawba in the Carolinas. The British also had allies in the Miami, Wyandot, Delaware, and Shawnee in the Ohio River Valley, and the Cherokee, Choctaw, and Creeks in the South. Those Indians who allied with the British did so because they felt that the British would be victorious, that they had better trade relations and Indian agents, and that the British offered them the best chance to retain their homeland against the relentless land-acquiring Americans.

Approximately 13,000 Indian warriors fought with the British, a much smaller number with the Americans. Indians were often used as scouts, had war parties that raided on the frontier, and joined Loyalists and British regulars in larger coordinated attacks. Indians played an important role in the Battle of Oriskany in central New York in 1777, which helped lead to the critical American victory at Saratoga a few months later. The Iroquois participated in repeated attacks in the Mohawk River Valley in 1778 and 1779, and again from 1780 to 1782, killing and capturing isolated farm families and decimating more than a dozen villages. These attacks were temporally interrupted but persisted until the 1779 expedition led by General John Sullivan (1740–95) that destroyed thirty Indian villages and burned much of their crops in the field in western New York and northern Pennsylvania.

In the Treaty of Peace of 1783, the British ceded all of the land east of the Mississippi to the Americans with no consideration for the Indians—no matter on which side they had fought. After the war, the tribes primarily dealt with the state governments and were continually pressured into giving up large portions of their land.

THE WAR

Once France, Spain, and the Netherlands joined the American colonies in fighting the British, the American Revolution became a world war. The four European belligerents all had their war goals. The West Indies became a major battleground as the British and French navies devoted great effort in protecting their own islands and trying to capture their enemies' colonies. Spain concentrated its wartime effort in recapturing its former settlements along the lower Mississippi River and the coasts of East and West Florida. The Netherlands restricted its fighting to the high seas.

The war on mainland America can be divided into two phases: the northern war (1775–78) and the southern war (1778–81). As commander in chief, Washington maintained a Fabian strategy, avoiding combat unless absolutely necessary or only when his army had numerical superiority. This strategy

frustrated some delegates to Congress and some army officers, who plotted to replace Washington with a commander more inclined toward offensive action. These covert schemes all failed, especially after reports circulated of Washington's heroics at the Battle of Monmouth in New Jersey in June 1778.

At first the British had contempt for the American military, thinking its soldiers to be country bumpkins who would never stand up against the power and bravery of the British army and navy and the 30,000 professional German mercenaries who fought with them. That attitude persisted well into the fighting.

Britain's initial strategy was to capture New York City and adjacent counties to use the port for staging various campaigns. The primary goal was to separate and subdue New England—the source of most of the prewar disturbances—from the other colonies. When the British failed to obtain this objective, particularly with the capture of General John Burgoyne's 5,500-man army by the Americans at Saratoga in October 1777, the British changed their strategy. Thinking that Loyalists were more numerous in the South, they shifted their military attacks there, capturing Savannah, Georgia, on December 29, 1779, and Charleston, South Carolina, on May 12, 1780. Generals Henry Clinton (1730–95) and Charles Cornwallis (1738–1805) advanced northward through South and North Carolina, winning and losing various engagements. Clinton returned to New York City while Cornwallis moved into Virginia, where he conducted raids throughout the state from his base camp at Yorktown. Cornwallis surrendered in October 1781 when besieged by American and French armies numbering more than 17,000 and French fleets arriving from Newport, Rhode Island, and from the West Indies. Although skirmishes continued, the surrender at Yorktown virtually ended the military side of the war.

THE TREATY OF PEACE

The peace negotiations that had begun in Paris in the spring of 1782 were completed by December of that year. A preliminary treaty was signed by John Adams, John Jay, Benjamin Franklin, and Henry Laurens on November 30, 1782. Soon thereafter the three other belligerents signed separate peace agreements with Britain. The final treaty of peace was signed on September 3, 1783.

The treaty acknowledged the independence of the United States, with the Mississippi River as its western border. The right to navigate the Mississippi from its sources to the ocean was guaranteed to both the subjects of Great Britain and the citizens of the United States. All military activity was to cease, and prisoners of war were to be released. No runaway slaves, artillery, or archival records were to be taken away with the evacuating British army. Americans were to retain their traditional fishing rights on the Grand Banks, off the coast of Newfoundland, and the Gulf of Saint Lawrence. Creditors would not meet with any lawful impediments in collecting prewar debts. Congress was to recommend to the states that the rights and confiscated property of Loyalists be returned to them, and no future confiscations or prosecutions would be undertaken for wartime activities. A secret provision stipulated that the southern boundary of the United States would be lower if the Spanish retained possession of East and West Florida, higher if the British retained possession.

THE ARTICLES OF CONFEDERATION

The Virginia resolutions submitted to Congress on June 7, 1776, called not only for independence but for “a plan of

confederation.” A government that united the states was necessary to gain independence and maintain a safe and peaceful existence after independence. On June 12 Congress appointed a committee to draft articles of confederation. On July 12, 1776, Chairman John Dickinson reported the first draft, which called for a strong general government; but during the months of intermittent debate that followed, various powers shifted from the general government to the states, so that the final proposal adopted on November 15, 1777, created a permanent alliance of independent states. Congress ordered three hundred printed copies of the Articles and submitted its proposal to the states along with a cover letter that explained the difficulties involved in writing the constitution.

The Articles were to go into effect when ratified by the legislatures of all thirteen states. Most of the states ratified quickly. The exception was Maryland. As a state without any western land claims under its colonial charter, Maryland wanted the states with large land holdings, especially Virginia, to cede their western lands to Congress for the good of the Union before they would ratify the Articles. With a worsening military situation and a potential invasion by Cornwallis, the Maryland legislature conceded and ratified the Articles on February 2, 1781, without, however, relinquishing its “right or interest . . . to the back country,” relying on the other states to see the “justice” of its claim. Maryland's delegates in Congress signed the Articles on March 1, 1781, thus adopting the new form of government.

The Articles provided for a unicameral Congress with no separate executive. The states retained their sovereignty, freedom, and independence, as well as all powers that were not expressly delegated to Congress. Delegates to Congress were to be elected annually in a manner to be determined by the state legislatures and could serve only three years within any six-year period. Each state was to choose two to seven delegates but was to have only one vote in Congress, despite the vast differences in the sizes of the states. Congress could send and receive ambassadors and enter into treaties. Most important matters—the power to enter into treaties, declare war, borrow money, admit new states, and so on—needed the approval of nine states. Amendments to the Articles needed to be approved by Congress and ratified by all of the state legislatures. Congress was limited in its judicial powers. It could create a court to try piracy and other felonies committed on the high seas and an appellate court to consider cases of captures and prizes. Through a cumbersome process Congress could create a commission to settle land disputes between states. Congress could set the standard of weights and measures, regulate the alloy and value of coins, regulate trade with Indians, and establish and maintain post offices. It was to meet at least once annually. States were to pay their own delegates to Congress, who were subject to recall. Congress could not regulate commerce or levy taxes without the approval of the states. It had no coercive power and could not act directly on individuals. Even before the Articles were ratified, amendments were proposed to strengthen the powers of Congress, but none of those amendments were adopted.

STATE CONSTITUTIONS

As the governments under colonial charters started to crumble, new unofficial provincial congresses assumed leadership. All of these bodies felt the need of a legitimate authority to govern. Since May 1775 John Adams had advocated that the Second Continental Congress should instruct the colonies to create new

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constitutions. In the fall of 1775, the provincial congresses of New Hampshire and South Carolina sought advice from the Continental Congress as to how to proceed. On November 3, 1775, Congress recommended to New Hampshire and then on the next day to South Carolina that they adopt temporary constitutions during the present difficult times. Both colonies complied, drafting and implementing new constitutions based on the sovereignty of the people.

Similar uncertainty in other colonies led to a resolution of Congress drafted with a preamble both written by John Adams and adopted on May 10 and 15, 1776. It called on the colonies to jettison their colonial charters and adopt constitutions amenable to the people, not to the king. New York delegate James Duane (1733–97), a reluctant revolutionary, complained to Adams that the resolution smacked of independence. Adams replied, “No, it is independence.”

Thomas Paine’s *Common Sense*, published in January 1776, had called for new democratic state constitutions that would abandon the structure of both the British and colonial governments. He asserted that old and complex concepts of separation of powers and balanced government were no longer needed. New republican forms of governments, in which the people would be their own governors, should be structurally simple and uncomplicated.

Paine’s proposal frightened John Adams, who anonymously responded in a short pamphlet, *Thoughts on Government*, published in Philadelphia in March 1776. Adams wanted Americans to adopt republican forms of government. “There is no good government but what is Republican” (2000, 243). He explained that “the very definition of a Republic is ‘an Empire of Laws, and not of men’” (243). But there was “an inexhaustible variety” of republics with endless “possible combinations of the powers of society” (244). His best combination consisted of a system based on separation of powers into three distinct branches of government. The bicameral legislature would include a lower house that would “be in miniature, an exact portrait of the people at large” (244). An upper house was also necessary—a senate or a council to be elected by the assembly—because “a people cannot be long free, nor ever happy, whose government is in one Assembly” (244). There should be a governor, elected annually by the assembly, who should be armed with a veto, but “stripped of most of those badges of domination, called prerogatives” (245). In addition the great officers of state should be elected by joint ballot of the legislature. A requirement for rotation in office should limit the terms of all legislators and officers of state, perhaps service for only three years, then exclusion for three years. The senate would serve as the mediator between the assembly and the governor. The judiciary should be nominated by the governor and confirmed by the senate or, if a more popular government was desired, judges should be elected by the joint ballot of the legislature or the election by one house with the concurrence of the other. The judiciary would serve as a check on the legislature and the governor, and they, in turn, would check the judiciary. Judges should serve for good behavior and their salaries should be “ascertained and established by law” (265).

Pennsylvania followed Paine’s advice, and its constitution of 1776 became the most democratic constitution adopted during the Revolutionary era. It called for a unicameral legislature elected annually without a separate executive or judiciary. Every bill introduced needed to be published in a newspaper before being reconsidered in the next legislative session, thus in essence

making the people the second branch of the legislature. A supreme executive council served as the executive, but had no legislative function.

All of the other colonies drafted new constitutions except Connecticut and Rhode Island, which merely revised their liberal colonial charters by eliminating references to the king and the imperial government and substituting the authority of the people instead. New Hampshire and South Carolina replaced their temporary constitutions with new constitutions. Georgia and the independent district of Vermont followed Pennsylvania’s model. New York departed from that model, writing a constitution in 1777 that provided for a separation of powers with a popularly elected governor. The Massachusetts Constitution of 1780, primarily written by John Adams, was congruent with his recommendations in *Thoughts on Government*, as was the 1784 New Hampshire Constitution.

POLITICAL AND SOCIAL CHANGES

The American Revolution was not democratic in its origins, but the results as embodied in state constitutions created a new, more democratic political society. State governments were now based on the sovereignty of the people. Magistrates were only to be trustees accountable to the people through free and frequent elections, and through the legislature’s impeachment power. More officials were now to be popularly elected or appointed by bodies elected by the people. Governments were dominated by assemblies that were elected by a broadened constituency. District elections for seats in the state senate and assembly brought the elections closer to the people, and mandatory rotation in office requirements increased the number of people who could serve. Most assembly elections were annual, but were held every six months in Connecticut and Rhode Island. Dual office holding and titles of nobility were prohibited.

Determining the percentage of white adult men who could vote is difficult. It varied with each state. Voter turnout often depended on the importance of the election or how contested it was. For instance, ten times as many voters cast ballots in the highly contested 1787 gubernatorial election in Massachusetts as in the noncontested election the preceding year. Weather might also affect voter turnout.

Most new state constitutions reduced colonial property qualifications for voting by 50 percent or eliminated them altogether, allowing taxpayers the right to vote. Some states provided for, in essence, almost universal manhood suffrage. In most other states, 50 to 80 percent of males met the minimum requirements for voting for the assembly. Larger property holdings were often required for voting for senators and governors when they were popularly elected. Some states (such as New York) allowed freed black men to vote; most probably did not extend the suffrage to them.

The power of senates and governors were greatly reduced and their ability to check assemblies was diminished if not removed entirely. Except in Massachusetts and New York, governors no longer had a veto power, and in both those cases, the legislatures could override the veto by a two-thirds vote of both houses. Judges were usually appointed by the assemblies that controlled the salaries of all public officials. Outside of government, the Revolutionary experience with mobs and extralegal bodies set precedents for the turbulent decade that followed the end of the war.

A wide variety of social changes also occurred during the Revolutionary years. The status of landholding changed.

Primogeniture and entail were repealed in most of the states. Many of the confiscated Loyalist estates were broken up and sold in smaller parcels. The public domain established by states ceding their western lands to Congress provided not only a source of revenue for the new country, but also inexpensive lands that could be easily purchased by most free men.

Slavery was affected by the war. Many slaves—men and women—obtained their freedom by running away from their masters and joining the British. Many others joined the American army and navy, and became free because of their service. Virginia, with the largest slave population, enacted a law in 1782 that made manumission during one's lifetime or in one's will easier, a measure that helped free 10,000 slaves during the next eight years. The first state abolition societies were founded during this time, and the northern states, starting with Pennsylvania, passed gradual emancipation acts, which provided that children born to slave mothers after a certain date would be free. The children would remain with their mothers until they reached adulthood, when they would be free to venture out on their own. Twelve of the thirteen states followed the example set in the Continental Association of 1774 and prohibited the African slave trade. In Massachusetts the Supreme Court, using the state's Declaration of Rights provision, which stated that all men were created equal, ruled in 1783 that slavery was unconstitutional. Vermont also prohibited slavery in its constitution.

The Revolution brought a new secularism to America. Several states disestablished their churches, and fewer states mandated taxes to support the salaries of ministers. In Virginia, Jefferson's bill for religious freedom, drafted in 1779, was shepherded through the legislature by James Madison in January 1786. Being a Protestant was still necessary, however, to vote and hold office in eleven of the thirteen states. That requirement would be removed for office holding in the new federal Constitution of 1787.

Most states recodified their laws, greatly reducing the penalty for most crimes. In Virginia the recodification, drafted by a committee chaired by Jefferson, reduced the number of capital crimes from about forty down to only two—murder and treason.

The war years saw the role of women expand greatly as men were off fighting. When the men left for public service, women ran the farms and the family businesses. Nevertheless women could not vote or hold office, and after the war most were forced to return to their familiar status. Single women and widows, however, owned property and exercised many legal rights. Printers such as Ann Timothy in Charleston, Mary Holt in New York, and Elizabeth Oswald in Philadelphia ran newspapers after the death or during the absence of their husbands. Mary Catherine Goddard assisted her brother William in printing the *Maryland Journal*. She also served as postmistress of Baltimore. Like many other women, Mercy Otis Warren (1728–1814), the author of plays and histories of the Revolution and wife of Massachusetts political leader James Warren, and Abigail Adams (1744–1818), the wife of John Adams, greatly influenced their husbands on many issues.

All of American society became less deferential. More than 100,000 Loyalists emigrated from America during the war, many of whom had formed the colonial aristocracy. Those who remained in America or returned after the end of war had their

fortunes greatly diminished. Patriot yeoman farmers, town artisans, professionals, and merchants were empowered by their wartime experience.

After the end of the war, American prosperity returned but lasted for less than two years before the country was mired in a postwar depression. The Confederation Congress was unable to coordinate a national strategy to combat the political, economic, and diplomatic problems facing the country. In 1787 a new Constitution was proposed, debated, and adopted. One of the key issues in the debate over ratifying the federal Constitution was whether it was a counter-revolution, reversing much that had been accomplished during and after the Revolution, or the fruition of that struggle, which would now end in a strong and lasting Union.

*John P. Kaminski,
Center for the Study of the American Constitution,
University of Wisconsin–Madison*

SEE ALSO: *Articles of Confederation; British Constitution; Constitution; Declaration of Independence; Federalism, Theory of; Federalism in American History; State Constitutions: History; Washington, George.*

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The Declaration of Independence presents the case of thirteen British colonies to become the "thirteen united States of America." Approved by the Second Continental Congress on July 4, 1776, the Declaration is a cogent claim of statehood for a nascent people. It also prescribes purposes, principles, and limits of a just government. The Declaration eventually transcended the time, place, and purpose of its origin. It became an enduring symbol and standard of equality, liberty, and self-government for Americans and other peoples of the world.

ORIGIN OF THE DECLARATION

A rebellion in America against British colonial rulers was the occasion for a decision about independent statehood. Protests against imperial policies, which started in the 1760s, led to war against British military forces, beginning April 19, 1775, and continuing with increasing intensity into the first half of 1776. In response to this crisis, representatives of thirteen British colonies came to Philadelphia in May 1775 to convene the Second Continental Congress. They would decide whether or not to sever long-standing connections to the United Kingdom of Great Britain and to declare their independence.

Richard Henry Lee of Virginia, on June 7, 1776, introduced to the Congress three resolutions for deliberation and decision about (1) declaring independence, (2) seeking treaties of alliance with foreign states, and (3) making a plan for the confederation of thirteen independent states. Discussion of Lee’s resolutions continued for more than three weeks. Meanwhile, on June 11, Congress appointed a Committee of Five to compose an explanation and justification for secession from the British Empire. The committee members were John Adams of Massachusetts, Benjamin Franklin of Pennsylvania, Thomas Jefferson of Virginia, Robert Livingston of New York, and Roger Sherman of Connecticut. The committee appointed Jefferson the draftsman of a declaration of independence. However, committee members, especially Adams and Franklin, offered general advice and particular editorial assistance to their designated writer, who completed his draft on June 28.

In Congress the debates on independence ended on July 2, when twelve colonies voted in favor of Richard Henry Lee’s June 7 resolution: "That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved" (Maier 1997, 41). The next task of the entire Congress was to review and edit the document drafted by Jefferson, which presented reasons for declaring independence.

After making several changes in style and substance, Congress ratified the Declaration of Independence on July 4, 1776. A few days later, New York became the thirteenth state to approve the decision for independence. Thus the document was finally titled "The Unanimous Declaration of the thirteen united States of America."

Jefferson justly claimed authorship of the Declaration, and this achievement was duly inscribed on the great man’s gravestone, according to his directions. However, members of the Second Continental Congress contributed to the author’s work, as did prominent political thinkers, such as the English philosophers John Locke and Algernon Sidney, whose ideas Jef-

erson had absorbed through study of their books. The Declaration also manifested Jefferson's familiarity with ideas and words commonly expressed in various American political and legal publications from 1774 to 1776. "There was no one author from whom the ideas of the Declaration were taken" (Lutz 1990, 142).

The Declaration "was intended to be an expression of the American mind. . . . All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.," said Jefferson in a letter to Henry Lee dated May 8, 1825 (Becker 1958, 26). The ideas Jefferson expressed so well were "absolutely conventional among Americans of his time" (Maier 1997, 135).

WHAT THE DECLARATION DECLARED

The first part of the Declaration of Independence announces the claim of "one people" to be free from control by "another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." Thus the Declaration invokes a higher moral law to justify the independence and equality of "thirteen united States of America" among the world's sovereign states. The first part ends with a statement of intent to inform "the opinions of mankind" about "the causes which impel them to the separation" from the United Kingdom of Great Britain.

When the Declaration of Independence initially was distributed throughout America, the people primarily were interested in its claims to the equality of America's newly proclaimed "united States" with the other sovereign entities in their late-eighteenth-century political world. David Armitage offers evidence that most Americans thought the Declaration's statements about the equality and natural rights of individuals "were strictly subordinate to these claims regarding the rights of states" (2007, 17). Armitage reports, for example, that when the Declaration was read to Continental soldiers in western Pennsylvania, they shouted: "Now we are a people! We have a name among the states of this world!" (2007, 17).

The second part of the Declaration presents the late-eighteenth-century American understanding of four interconnected principles: natural equality, natural rights, popular sovereignty, and the right to revolution. In tandem, these ideas constitute a universal theory of the proper ends and limits of government. This eloquent expression of political thought eventually overshadowed other parts of the Declaration to become the document's signature statement.

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 abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration's assertion "that all men are created equal" refers to the *natural equality* of every human being. Individuals

certainly are unequal in many ways, such as variations in their mental and physical abilities, but all have the same human nature. And all humans, by nature equal, duly receive from "their Creator certain unalienable Rights." They are *natural rights* to "Life, Liberty, and the pursuit of Happiness" among others, immutably embodied in human nature, and possessed equally by each human being. These natural rights can neither be alienated nor divested by anyone. Governments may not justly deny or abolish them. Rather, it is the primary purpose of a government to protect equally the exercise of natural rights by every person within its authority.

A just government, according to the Declaration, receives its authority "from the consent of the governed." This is the principle of *popular sovereignty*. No persons have the right to rule others without their consent. No government can exercise power legitimately unless it is accountable to the people, who have mutually agreed to establish it, and subsequently to live under its authority. Thus the people have a right to self-government.

The Declaration of Independence sets forth universal standards by which people can criticize and judge their government. A good government, for example, protects equally the natural rights of the people under its authority. A just government's sole source of authority and legitimacy is the consent of the people it governs. If the government does not act according to these standards, then the people may "alter or abolish it." This *right to revolution* justly may be used only as a last resort against an unyielding tyranny. And a prudent people readily will replace tyranny with a government more likely to secure their natural rights and popular sovereignty.

The third part of the Declaration is a bill of indictments against King George III, the symbol and chief executor of Britain's imperial government in America. The Declaration turns to the past in charging the king's government with violations of particular rights deeply rooted in the history of the British people and inscribed in their charters of liberty under law. However, the Declaration also claims that the king's actions violate universal principles of natural rights and popular sovereignty, which transcend and subsume the historical claims to rights of a particular people, such as those of British descent. Thus the Declaration points toward a distinctive future for America, the first new nation ever founded on ideas derived from natural law and directed to all peoples of the world.

The Declaration presents "to a candid world" a list of grievances against "an absolute tyranny." There are complaints about violations of long-standing British rights to representative government, which King George has denied to his subjects in the American colonies. For example, the Declaration claims that the king "has dissolved Representative Houses repeatedly, for opposing with manly Firmness his invasions on the Rights of the People." He is also charged with "imposing taxes without our Consent." Other accusations refer to violations of due process rights, such as fair trials and impartial judicial administration. Further, the king is accused of oppressively "taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments."

The thirteenth item in the list of grievances is a key to comprehending all the accusations against King George. It accuses the king of conspiring with Parliament "to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his Assent to their Acts of pretended Legislation." Thus the Declaration claims wrongful collaboration between the king and Parliament to enact and impose laws

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unjustly on the people of America. Each British colony in America had its own representative legislature, which made laws by majority vote in behalf of the people. When the Parliament, in concert with the king, began to enact and enforce unwanted laws in the colonies, Americans judged these actions illegitimate and as usurpations of power properly exercised by the people's representatives in their colonial governments. The Declaration directs accusations of illegality to King George, because his American subjects perceived the monarch—and not Parliament, which did not directly represent people in the colonies—to be their legitimate link with Great Britain.

The fourth part of the Declaration includes an ultimate and irrevocable pronouncement, “That these United Colonies are, and of Right ought to be Free and Independent States.” This conclusion is made “in the Name, and by the Authority of the good People of these Colonies.” It acknowledges “a firm reliance on the protection of divine Providence.”

The Second Continental Congress, by its unanimous approval of the Declaration, constituted America's first national political compact. It created “with the same act a national people and thirteen state peoples” (Lutz 1990, 140). Jefferson and James Madison called it “the fundamental act of union of these States” (Jaffa 2000, 256).

IDEAS OF THE DECLARATION IN CIVIC CULTURE AND GOVERNANCE

From 1776 until the present, ideas in the Declaration of Independence have been at the core of Americanism: what America stands for, how America should be governed, and what it means to be an American. John Hancock, president of the Second Continental Congress, sent copies of the freshly printed Declaration to leaders of the thirteen American states. In an attached letter he wrote, “The important Consequences . . . from this Declaration of Independence, considered as the Ground & Foundation of Government . . . will naturally suggest the Propriety of proclaiming it in such a Manner, that the People may be universally informed of it” (Maier 1997, 155).

Most of America's first state constitutions included, in their preambles and declarations of rights, terms and themes from the Declaration of Independence. The opening statements of Virginia's Declaration of Rights, written several weeks before July 4, 1776, include words and ideas very similar to those in the second part of the Declaration. State constitutions created weeks, months, or even years later also express, more or less, the Declaration's perspective on the ends and limits of government.

The federal Constitution of 1787 provides a system of government refigured by the Declaration of Independence. So these two founding documents jointly are America's perpetual political compact (Lutz 1990, 138). The United States Constitution does not include phrases taken directly from the Declaration. But its purposes, principles, and procedures reflect the Declaration's standards of free and just government. For example, the Preamble proclaims that the Constitution's ultimate purpose is “to secure the Blessings of Liberty to ourselves and our Posterity.” And the Constitution's principles of limited government, such as separation of powers, checks and balances, and federalism, are supposed to prevent tyranny and protect the “unalienable rights” of individuals to “Life, Liberty, and the Pursuit of Happiness.” Further, Article VII of the Constitution provides for its ratification by consent of the people, through their elected representatives in conventions conducted by the

States. Finally, the Constitution's Article V also exemplifies popular sovereignty, by representation, in its provisions for the proposal and ratification of amendments, which require approval by the people's representatives in Congress and the States.

The 1787 Constitution addressed imperfectly the high ideals in the Declaration of Independence. But fulfillment of these standards during America's founding era was far from complete. And going forward, it remained an unfinished constitutional and cultural project.

The Declaration's propositions about equality, liberty, and popular sovereignty did spur bold public actions to close the obvious gap between grand ideals and unjust realities, such as slavery, racial prejudice, and exclusion of women from participation in governance. For instance, on January 13, 1777, nine black Americans in Boston presented an antislavery petition to the General Court of Massachusetts. The petition was put aside but not forgotten. At the Constitutional Convention of 1787, Massachusetts was the only one of America's states to have abolished slavery. Vermont joined the United States in 1791 with a Constitution that prohibited slavery; it had been abolished there since 1777.

The Declaration of Independence even inspired some slaveholders to become emancipators. In 1788 Peter Sublett of Powhatan County, Virginia, set free his fifteen enslaved people. He announced in a public statement: “I believe that all men are by nature equally free & independent and therefore from a clear conviction of the injustice and criminality of depriving my Fellow Creatures of their natural and dearest Right, do and hereby [sic] emancipate and set free the following Men, Women, and Children” (Wilkins 2001, 66). However, not many slaveholders, especially in the southern states, followed the extraordinary founding-era example of Sublett.

When the people celebrated the Declaration's fiftieth anniversary in 1826, slavery was still the critical contradiction of America's founding ideals. Jefferson, owning more than one hundred slaves, died that fourth of July, as did his founding-era compatriot John Adams, an antislavery advocate. The issue of slavery in a country dedicated to equality and liberty vexed, perplexed, and divided the people of America.

The Declaration of Independence, however, was a continuing source of motivation for constitutional and cultural reformers. In 1848, for example, proponents of equal rights for women gathered in Seneca Falls, New York. They wrote a Declaration of Sentiments modeled on the Declaration of Independence to promote the cause of women's rights. A most important grievance of these protesters was denial to women of the right to vote and otherwise participate equally with men in “government by consent of the governed.”

Several antislavery activists, such as Frederick Douglass, were involved in the Seneca Falls Convention. Douglass, who had been a slave in Maryland, escaped bondage to become a leader in the cause of equal rights to liberty and self-government. His July 4, 1852, speech in Rochester, New York, movingly presented a black American's perspective on unjust laws and traditions. Douglass asked: “What to the American slave is your 4th of July? I answer, a day that reveals to him more than all other days of the year, the gross injustice and cruelty to which he is the constant victim. To him your celebration is a sham; . . . your shouts of liberty and equality, hollow mockery” (Wilkins 2001, 130). Douglass denounced the celebratory hypocrisy but embraced the object of the celebration, America's

founding document. He called for the equal application of its uplifting ideals to everyone in America.

During the Civil War (1861–1865), Douglass was an unofficial adviser of President Abraham Lincoln, whose civic morality and political principles were derived from the Declaration of Independence. “I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence,” said Lincoln on February 22, 1861, at Independence Hall in Philadelphia (Jaffa 2000, 258). Before and during his presidency, Lincoln called for the rededication of America to its founding principles in the Declaration of Independence. In the aftermath of the Civil War, the Constitution was changed to abolish slavery (Thirteenth Amendment), to prevent the states from unjustly denying to anyone their rights to life, liberty, and property or “the equal protection of the laws” (Fourteenth Amendment), and to protect the right to vote of black Americans (Fifteenth Amendment). These Civil War Amendments “have served in some measure to read into the Constitution principles in the Declaration of Independence” (Maier 1997, 214).

From the Civil War era until the twenty-first century, the Declaration of Independence has guided certain constitutional and cultural changes. The late-nineteenth- and twentieth-century movements for woman suffrage and the civil rights of black Americans were conducted in terms of the Declaration’s ideals. The American dreams of Susan B. Anthony and Martin Luther King Jr., among many others like them, were directed to a more perfect realization of their homeland’s founding principles. According to the historian Roger Wilkins, the achievements of these reformers have vindicated America’s faith and hope in its founding principles. As he puts it, “the Declaration of Independence, for all the ambiguity around it, constitutes the Big Bang in the physics of freedom and equality in America” (2001, 140).

Ideas of the Declaration have been cords of union for the socially diverse people of America, an extraordinary population of different and overlapping ethnic, racial, and religious identities. From this perennial pluralism has come an abiding national unity based on America’s founding documents. Common commitments among the people to certain principles and values, such as equality, liberty, and self-government, have forged an American civic identity, transmitted by citizens of each generation to their successors. So the political compact, which founded the United States, has been a symbol and instrument of America’s national community and continuity.

The Declaration’s legacy, however, has transcended the history of America to become a factor in global affairs. Its “self-evident” truths imply a political order and civic morality relevant to all peoples, of any place or time, who embrace liberty and oppose tyranny. In his final letter to the American people, Jefferson said that the Declaration of Independence is “an instrument pregnant with our own, and the fate of the world.” He predicted that peoples everywhere, sooner or later, would “assume the blessings and security of self-government” (letter to Roger C. Weightman, June 24, 1826). The Declaration, which embodies Jefferson’s faith in freedom, has continued to inspire peoples throughout the world in their causes of national independence and liberty.

*John J. Patrick,
Indiana University*

SEE ALSO: *Adams, John; Common Law; Compact and Covenant; Consent; Conservatism; Declaration of Sentiments, Seneca Falls (1848); Happiness; Inequality in American History; Jefferson, Thomas; Liberalism; Liberty; Locke, John; Natural Law; Natural Rights; Popular Sovereignty; Rights, Negative; Rights, Positive.*

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Constitutionalism

The first problem in political life is to secure order. The second problem is to confer legitimacy on the authority required to constitute order. What is the justification of political authority and the duty of obligation that it entails? Since antiquity God, nature, tradition, and superior force have been invoked as sources of political legitimacy. Out of the diffusion of authority in feudal society, constitutionalism emerged in early modern European history as a form of governance designed to reconcile the apparently conflicting yet intrinsically complementary relationship between liberty and authority in the Western political tradition.

The role of constitutionalism for government and politics is analogous to that of the rule of law in society for individuals. A basic degree of separation between law and politics is a functional requirement of the rule of law. Yet how can a rule of law for government be framed capable of limiting the passions, interests, and ambitions that seek to control political life? The

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constitutionalist answer to this question lies in positing the idea of sovereignty in the nation-state as the foundation of constitutional legitimacy in modern governance.

The construction of territorial state sovereignty was intended to establish stable political order for the protection of citizens' individual rights of liberty, private property, and personal security against internal violence and external predation. Although rhetorically the concept of sovereignty resonates of power and majesty, in terms of historical sociology it emerged in response to social differentiation and economic exchange. The rationale of sovereignty was not more effective domination of persons, but recognition of their legal status as bearers of liberty and property rights capable of pursuing their interests apart from government tutelage and supervision.

AMERICAN CONSTITUTIONS IN THE MAKING

Constitutionalism in America was a variation of the distinctive form of common law liberty and rights-minded nation-state sovereignty that issued from the English Civil War and Glorious Revolution of 1688. After a century and a half of substantially autonomous development under England's lightly regulated mercantile system, the American colonists rebelled against British rule. Declaring independence as a separate people and nation, they framed state constitutions of republican government for the protection of individual liberty and community security.

The constitutional rationale of American nationality appeared in the Circular Letter of the Massachusetts General Court, 1768, which stated that "in all free States the Constitution is fixed; & as the supreme Legislative derives its Power & Authority from the Constitution, it cannot overleap the bounds of it, without destroying its own foundation." No less important was the assertion that "it is an essential unalterable Right, in nature . . . that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent" (Beloff 1989).

In throwing off British authority the American people assumed responsibility, as it were, for resolving the conundrum of sovereignty in political modernity. How could unitary and indivisible supreme coercive authority, the received definition of sovereignty according to treatises on public law, be made compatible with individual natural rights? The answer lay in delegation, division, separation, and balance of government power institutionalized in representative republican constitutions.

The revolutionary convictions of the American people tended toward the making of a nation-state. In their geographic, social, and economic diversity, however, Americans had incentives to form a multiplicity of independent nation-states with the potential for internecine conflict. The solution to the problem of peacekeeping among rival states lay in transforming the practice of interstate treaty alliance or confederation into the principle of federal republican constitutional union.

To resist British authority, Americans in 1774 organized a Continental Congress of delegates appointed by each colony to act as an executive council representing the colonies as a whole. Congress prepared "Articles of Confederation and perpetual Union" between the states of America, which was ratified by the states in 1781. The thorny question of the locus of sovereignty was now transferred to the people of America. It was resolved in ambiguous language stating that "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

The Articles of Confederation failed to meet the country's external security and internal economic productivity needs. To strengthen the Union, a coterie of national-minded statesmen, with the approval of Congress, organized a Federal Convention in 1787. Deliberating in closed session and voting on the basis of state equality, delegates drafted a plan of government providing for a two-chamber legislature elected by the people and the state legislatures; an executive magistrate chosen by state-appointed electors; and a Supreme Court and inferior courts appointed by the president with the consent of the upper legislative chamber. The Constitution limited the powers of the states by creating a national government with direct authority to tax and legislate for citizens in the states, and by withdrawing state legislative authority with respect to commerce between the states, currency and finance, and contractual obligation.

By constitutional direction and with the approval of Congress, popularly elected state ratifying conventions debated the merits of the plan of government. Anti-Federalist critics objected that the Constitution would subvert the state governments and create a consolidated national government. Federalist supporters claimed that the Constitution, in the words of James Madison, provided "a Republican remedy for the diseases most incident to Republican Government," that is, excessive and irresponsible exercise of state legislative authority in the name of the people. Madison believed the genius of American constitutionalism resided and was articulated in "the extended republic of the United States," premised on the idea that "the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government." The republican cause could thus be carried to a very great extent "by a judicious modification and mixture of the federal principle" (Rossiter 1961, 325).

THE NATURE OF CONSTITUTIONAL UNION

The Constitution was a peace pact intended to preserve the Union from debilitating interstate conflict. Republican values defined American nationality in federal, state, and local jurisdictions. The Constitution delegated specific powers to the federal government, reserving powers not delegated to the states or the people. Fidelity to the Constitution was secured through a political ethic of mutual restraint whereby neither government could reduce the other to itself or otherwise destroy it. Institutional forms and electoral incentives built into the Constitution were more integrative than decentralizing. Economic interests and ideological convictions aroused in the ratification debate were channeled by constitutional incentives into a rudimentary party system. A pattern of constitutional politics emerged in which the electoral majority legislated policy based on national powers while the minority had recourse to states' rights to protect its interests.

In the nineteenth century, territorial expansion, demand for internal improvements, and capitalist market development provoked constitutional controversy. The central issue concerned the disposition of sovereignty between the states and the federal government. From the Revolution to the 1830s Americans were sufficiently like-minded to recognize compromise as the price of Union. The moral and constitutional propriety of slavery in republican society, however, an issue over which Americans had agreed to disagree since the making of the Constitution, proved irreconcilable.

Conflicting southern and northern claims to national honor and constitutional fidelity produced a crisis of constitutional

legitimacy. Following the election of President Abraham Lincoln in 1860, seven states adopted ordinances of secession. Four more states seceded in reaction to the president's proclamation calling state militia into national service to suppress rebellion against the United States. In 1863 Lincoln issued the Emancipation Proclamation, declaring that liberation of slaves in rebellious states was "an act of justice, warranted by the Constitution, upon military necessity." After the Civil War, Congress adopted legislation organizing republican governments in the former rebellious states, and approved constitutional amendments to prohibit slavery and confer civil and political rights on all persons without regard to race, color, or previous condition of servitude.

The extent to which the Civil War and Reconstruction revised or revolutionized constitutional governance in the United States was bitterly disputed well into the twentieth century. Did the Reconstruction amendments complete the Constitution by fulfilling the promise of liberty and equality in the Declaration of Independence? Did mutually destructive exercise of the war power obliterate the commitment to limited government implicit in the federal system of divided sovereignty? Did Confederate defeat signify repudiation of state sovereignty and consolidation of power in the national government? And if secession was justified as an exercise of the right to revolution, did military conquest of the South expunge from American political theory the very ground on which the claim to national independence rested?

The end of the war was not a propitious moment for dispassionate reflection on its consequences for American governance. Perhaps the most judicious assessment of the constitutional significance of the war was implicit in Lincoln's judgment in April 1861 that secession was unjustified rebellion against the Constitution, and armed rebellion was war. The Union was saved, the Constitution was preserved, and the threat to national security from a new foreign government in North America was averted.

CHALLENGE OF PROGRESSIVE CONSTITUTIONALISM

From the perspective of the twenty-first century it can be argued that the existence of slavery in the United States delegitimized American constitutionalism from the outset. In this view the destruction of slavery by military force was a revolution that redirected American governance from the low road of complicity with racial and minority group oppression to the high road of egalitarian, welfare-statist constitutionalism. This interpretation, however, puts the ideological cart before the constitutional horse.

Black enfranchisement after the Civil War conformed to classical liberal natural rights principles of private property, contract, and economic liberty. The conferral of statutory and constitutional rights demarcated spheres of liberty intended to limit the exercise of state power. Blacks were legally integrated into society on an individual basis rather than as members of a protected group or class. The persistence of white racial prejudice was an insuperable barrier to biracial social integration in the foreseeable future. Nevertheless significant Supreme Court decisions confirmed individual equal rights constitutionalism consistent with the limited government principles of the Founding.

Constitutional change in the late nineteenth century was driven by societal differentiation, technological innovation, and

social pluralism resulting from immigration, urbanization, and industrial development. Political demands arose for legal protection of property rights and entrepreneurial liberty on the one hand, and for federal commercial and state police power regulation of capitalist market exchange on the other hand. From the 1880s to the 1930s courts adopted laissez faire interpretations that favored entrepreneurial liberty and economic expansion, while legislatures created administrative agencies to regulate corporate economic power threatening to republican equality of opportunity.

In World War I, which the United States entered in 1917, President Woodrow Wilson, under delegation of legislative authority by Congress to the executive, exercised sweeping power to redistribute the functions of executive agencies for efficient prosecution of the war. In the crisis of the Great Depression in the 1930s, President Franklin D. Roosevelt directed the establishment of a bureaucratic regulatory state based on an amalgam of industrial corporate interests and social democratic class rights. Liberal regulatory welfare statism, institutionalized in the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act, obviated the natural rights republicanism of the Founders. After the Supreme Court approved constitutionally questionable New Deal legislation, legal liberalism promoted the theory of a "living Constitution" to legitimize welfare-statist constitutionalism.

The regulatory welfare state was confirmed in the era of World War II and the Cold War. In defending the United States against National Socialism in Germany in the 1940s and against Communism in the Soviet Union from the 1950s through the 1980s, Americans were moved to eradicate the incubus of racism that persisted after the abolition of slavery. Enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, prohibiting discrimination on account of race and establishing equal protection of the laws, marked the high point of the civil rights movement and the "second Reconstruction."

At the moment of its historic ascendancy, however, liberal constitutionalism was challenged by massive eruptions of urban violence, property destruction, and acts of civil disobedience. In response to popular demands for law and order, the political landscape changed. Liberal statists and participatory democrats joined in a coalition to defend and expand liberal welfare statism against a revitalized modern conservative movement calling for limited government, free-market capitalism, and individual natural-rights constitutionalism at home and strong national defense abroad. Throughout the Cold War era, Democratic and Republican administrations, resigned to a prudential if grudging kind of bipartisanship, maintained the basic structure of the New Deal regulatory welfare state.

CONSTITUTIONALISM IN THE TWENTY-FIRST CENTURY

The end of the Cold War in 1990 inspired dreams of world peace in a cosmopolitan, multicultural community. The basis on which such a society might be created, however, is not obvious. Globalization dissolves the principle of territorial national sovereignty on which modern constitutional government and international law are premised. The result is a borderless void, defiant of authority and order, in which the political interests of business corporations, financiers, and nongovernmental organizations clash all the more vigorously. In these circumstances the United Nations is not to be mistaken for a legitimate world government. The futurist imagination of progressive legal

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theorists therefore envision a kind of surrogate authority in the form of populist neo-constitutionalism based on the values of equality, equity, freedom, and dignity. The trouble with this theory is that, in the absence of fixed constitutional forms and procedures historically developed in nation states, popular sovereignty tends to devolve into totalitarian oppression.

Constitutionalism is too political a subject to be confined in a zone of legal positivist moral neutrality. It is meaningless to say that because every society has ways of organizing and directing its political life it is a constitutional state. The normative challenge of constitutionalism is to determine the ends, principles, and institutional structures that define the content of legitimate political authority and obligation under which human beings may flourish.

In the modern era two paths toward state formation have been pursued. The first one is delineated in the sovereign nation-state of the eighteenth and nineteenth centuries, in which limited government power is legitimized by citizens' natural-law individual rights claims to liberty, property, contract, and political consent through representative republican institutions. The second path is twentieth-century sovereign corporate statism, in which coordination of social classes, industrial groups, and democratic masses results in a bureaucratically administered totality. In this form of governance, rights are not "spheres of liberty against the state" but entitlement to rights "objectively and politically satisfied by the state, normally through processes of material distribution and economic pacification" (Thornhill 2008, 190).

After the collapse of Communism, the first path of modern constitutionalism in the form of the bourgeois liberal representative republic could plausibly present itself as the "resolved mystery" of the liberty vs. authority dyad and the coercive-mass-democracy vs. libertarian-individual-rights conundrum. The fundamental issue in modern governance concerns the real meaning of liberty in the constitution of political right. Does liberty consist in rights intrinsic to the nature of human beings as responsible individual moral agents free from restraints unjustifiably imposed by others? Or is liberty realized through class entitlement and egalitarian wealth transfer administered by centralized bureaucracy?

It is difficult enough to decide this question in the framework of sovereign nation-state constitutionalism. In the outer space of globalization the nature of liberty defies

resolution. The quest for a neo-constitutionalism of human rights based on transnationalism is a contradiction in terms. Outside the protective limits of nation-state sovereignty, constitutionalism breaks down into elitist factions with populist appeals. Grounded in republican representation and individual natural rights, responsible liberty under limited government is the measure of constitutional legitimacy and authority in modern political life.

*Herman J. Belz,
University of Maryland*

SEE ALSO: *Articles of Confederation; Civil War Amendments; Conservatism; Constitution; Constitutional Authority; Constitutional Government; Democracy; Extended Republic, Theory of; Federalism, Theory of; Governance; Government; Liberalism; Liberty; Limited Government; Madison, James; Progressive Movement, 1890 to 1920; Republicanism; Rights, Negative; Rights, Positive; Rule of Law; Sovereignty; State Constitutions.*

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Unit 2

How Did the Framers Create the Constitution?

Constitution

A constitution is the fundamental law and framework of government in a political community, such as a state or a federation of states. It legitimately constitutes the purposes, principles, powers, prohibitions, and institutions of government grounded in the rule of law—and not in the arbitrary will of a ruler. The constitution also prescribes relationships of the people with government in regard to rights, privileges, regulations, and mutual obligations. If aptly designed and administered, constitutional government enables the people under its authority to have relative security, peace, liberty, and justice.

From antiquity to early modernity, constitutions were informal and “unwritten”; that is, the elements of constitutional government were not officially presented in a single document but rather embodied in a series of documents, customs, and traditions, some of which were written and others not. For example, the unwritten constitution of England (after 1707 the United Kingdom of Great Britain) has been a corpus of common law, charters, executive proclamations, statutes, customs, and traditions, which have evolved over many centuries to constitute limited government and the rule of law.

In the world today, however, the written constitution in a single document prevails. It began in America when England’s first wave of settlers planted and cultivated seeds of governance based on constitutional documents. The many seedbeds developed slowly, steadily, and pervasively during the long colonial era, from 1607 to 1775. Fruition came with the founding of the United States of America, when citizens of the new nation wrote their first state and federal constitutions.

COLONIAL ROOTS OF AMERICA’S CONSTITUTION

The main ideas and events from which written constitutions emerged in America were in place from the very beginning of the colonial period, especially in the New England colonies. In November of 1620, for example, near the end of their arduous journey from England to America aboard the ship *Mayflower*, Pilgrims and others, founded the community of New Plymouth. In their founding document, called the Plymouth Combination but later renamed the Mayflower Compact, the people unanimously agreed to “solemnly and mutually, in the presence of God and one another, Covenant and Combine our selves together in a Civil Body Politick, for our better ordering and preservation” (Lutz 1998, 32). Male passengers of the *Mayflower* acknowledged God as their witness and signed this document. Thus they used their Judaic-Christian concept of covenant, by which Puritan church congregations were founded, to forge a social compact among individuals. Each one freely consented, in conjunction with the whole people, to create and join an indivisible community of equals.

The Mayflower Compact presaged the widespread coupling of covenants and compacts to found or expand civil societies

and governments in Massachusetts and other English colonies of North America. The Mayflower Compact was not a constitution, but it paved the way for a constitution. In 1636, for example, representatives of the people enacted the Pilgrim Code of Law in order to form a federation of Plymouth and nearby towns. They based the legitimacy of this new political community on the Mayflower Compact and the Charter of Massachusetts Bay issued by England’s King Charles I in 1629.

Charters were legal documents of foundation that the government of England issued to establish political authority in a royal colony or proprietary colony (the latter was managed for profit by a commercial enterprise). For example, the Massachusetts Bay Charter, following the precedent of the 1606 Charter of Virginia, set the terms of colonial governance, including a pledge that the people would have the same legal and political rights as the king’s subjects residing in England. The combination of a charter from England with a covenant-compact of a colonial people, the Pilgrim Code of Law, was an early example of how most English colonies in America established their fundamental laws and frameworks of government within the political authority of the mother country. A few scholars have thus suggested that the Pilgrim Code of Law is a candidate for consideration as America’s first constitution (Elazar 1997, 24; Lutz 1998, 61).

Like the Pilgrim Code of Law, the 1639 Fundamental Orders of Connecticut was a compact among the people. It established civil government for a small group of towns in a region of colonial Connecticut. However, this founding document was more complex and detailed than its Plymouth counterpart. Some historians have therefore called it the first written constitution in America and the world. “To modern eyes, it looks more like a constitution than does the Pilgrim Code of Law,” writes Donald S. Lutz (1988, 42).

Several years after enactment of the Fundamental Orders, England’s King Charles II issued the Connecticut Charter of 1662. The king’s colonial charter, intertwined with the colonial people’s compact of 1639, was a constitution for all the communities of Connecticut. In 1776, following America’s Declaration of Independence, all reference to British authority was erased from this charter, and it thus became the sovereign state of Connecticut’s first constitution, which endured until the people replaced it in 1818.

The Rhode Island Charter of 1663 was interwoven with the colony’s 1647 Acts and Orders and became another example of a durable constitution. It conjoined English imperial authority, signified by a colonial charter, with a covenant-compact made by the colonial people. After deletion of references to British authority in 1776, the Rhode Island Charter of 1663 became the sovereign state of Rhode Island’s first constitution, which lasted until 1843.

The blending of two kinds of founding documents—charters written in England and compacts written by people in

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the colonies—fostered “a constitutional perspective uniquely American.” People in the colonies became “used to having a written document defining the context of their politics” (Lutz 1998, xxi). The cumulative experience of creating compacts and amending charters during the long colonial era was an important antecedent of constitution making during America’s founding period.

There were at least four other factors that contributed, more or less, to the conception and inception of state and federal constitutions in the new American nation. These factors were: (1) the republican political models of classical antiquity and the Italian Renaissance; (2) prominent political philosophers of the seventeenth- and eighteenth-century English, Scottish, and French Enlightenments, especially John Locke, David Hume, and Montesquieu; (3) English legal and constitutional scholars of the sixteenth through eighteenth centuries, such as Edward Coke and William Blackstone; and (4) the English common law and constitutional tradition, which included such landmark documents as the 1215 Magna Carta, 1628 Petition of Right, 1679 Habeas Corpus Act, and the 1689 Bill of Rights.

Before the mid-1980s, most scholars of American constitutionalism variously emphasized items in the preceding list of factors. Since then a new perspective on the sources of American constitutionalism has emerged that primarily emphasizes colonial-era achievements (Elazar 1997 and Lutz 1987). Lutz has marshaled compelling evidence to demonstrate the importance of colonial American antecedents to the extraordinary burst of constitution making during America’s founding period, which culminated in the framing of the United States Constitution in 1787 and its ratification in 1788 (Lutz 1980, 1984, 1987, 1988, and 1998).

CHARACTER AND CONTENT OF AMERICA’S CONSTITUTION

The character of America’s Constitution comes from the nation’s founding compact, “The unanimous Declaration of the thirteen united States of America.” The Declaration declares, for example, that the primal purpose of government is protection of natural rights to “Life, Liberty, and the pursuit of Happiness.” It also says that “the consent of the governed” is the government’s legitimate source of authority. Furthermore, the Declaration implies that the nascent American nation necessarily is a federation of states and not a unitary nation-state. The Declaration’s ideals about ends and limits of government have made it “the conscience of the Constitution” and a shaper and keeper of America’s constitutional character (Sandefur 2014, 2).

There is no mention of the Declaration of Independence in the text of the US Constitution. Nonetheless, principles of government in this Constitution reflect the Declaration’s ideals and intent. Framers of America’s federal and state constitutions, for example, believed that government is instituted to protect the safety, security, and liberty of the people. They assumed that rights to liberty are at risk if government is excessively empowered and insufficiently limited, and thereby open to movement toward tyranny. The Framers also thought liberty to be at risk if the government is insufficiently empowered and excessively limited, and therefore susceptible to licentiousness and descent toward anarchy. Thus the Framers simultaneously empowered and restrained government to prevent the polar extremes of tyranny and anarchy. Their desired outcome was *ordered liberty*, the midpoint on the political spectrum, where government is neither too strong nor too weak, and civil liberty prevails within the rule of law.

In *Federalist* No. 51, James Madison masterfully defined and explained the perennial constitutional challenge of sustaining ordered liberty. He introduced this problem with precepts about human nature and government:

But what is government itself but the greatest of all reflections on human nature? 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. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions (Rossiter and Kesler 2003, 319).

Madison offered a two-fold solution to the problem of sustaining stability, order, and liberty in civil society and government. The people first must constitutionally endow the government with sufficient power to protect them from the danger and destruction of rampant disorder. They must also constitutionally constrain the government to prevent it from acting tyrannically and harming them. Power is necessary to protect liberty; and liberty is essential to protect against power.

Madison recognized the people themselves as the primary controllers of their government to preserve their liberty under law. He also noted “the need for auxiliary precautions” to constitutionally reinforce the people in checking excesses of government. These auxiliary precautions are principles at the core of America’s Constitution:

1. Federalism in a compound republic,
2. Separation of powers with checks and balances, and
3. Popular sovereignty and representation in government.

Federalism, as M. J. C. Vile observes, has always been the central characteristic of government in the United States, “a federal country, in its way of life, and in its constitution” (1961, 10). The first formation of federalism in America was a compact among its thirteen sovereign states, the Articles of Confederation. Article II specifies that each sovereign state retains every power of government, “which is not by this confederation expressly delegated to the United States, in Congress assembled.” The powers granted to Congress were few: most of them about common defense and foreign affairs; and only the states, each one a unitary constitutional republic, had direct law-enforcement power over the people.

In 1787–1788 representatives of the states judged their confederation inadequate and irreparable. So they replaced it with a *new kind of federalism*, a compact of the people, which conjoined the citizens in each of the constituent states with the whole people of the United States. The federal Constitution’s Preamble proclaims: “We the People of the United States, in Order to form a more perfect Union . . . and secure the Blessings of Liberty . . . do ordain and establish this Constitution for the United States of America.”

The principle of federalism in “this Constitution” requires division and sharing of powers between two sets of an extended

constitutional republic. There is a republic of nationwide scope, the United States of America. There are also the constituent constitutional republics, the states, thirteen at the beginning and fifty now. In *The Federalist* (see the 10th, 14th, and 51st papers), Madison called this system of federalism a *compound republic*.

The United States government, within its constitutionally specified sphere of powers, has direct authority over all the people of America, and is accountable to them. It is a large or extended national republic, encompassing all the states and territories within the country. In concert with the United States government, each state, a smaller unitary republic, governs the people within its borders according to the powers and limits of its own constitution. Article IV, Section 4 of the federal Constitution says, “The United States shall guarantee to every State in this Union a Republican Form of Government.” Thus every institution of government in this federal system derives its powers directly or indirectly from the people within its orbit, and is accountable to them. According to Madison, in *Federalist* No. 39, this is the very essence of the republican form of representative government in America (Rossiter and Kesler 2003, 236–39).

The Tenth Amendment of the United States Constitution prescribes the division of powers in this federal system: “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.” However, Article VI, clause 2 of the Constitution specifies the supremacy of powers delegated to the government of the United States relative to corresponding powers of the state governments. So federal laws and treaties, enacted in accord with the Constitution, “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”

Federalism permeates the United States Constitution, which inseparably is connected with constitutions of the states. The Constitution includes numerous references to relationships between the federal and state governments, which pertain to delegations and prohibitions of powers, and to the statuses, privileges, and rights of citizens and other persons within the compound republic of the United States. Lutz writes, “It seems to have been the intention of the Founders that we read the state constitutions along with the national Constitution as a complete text” (1987, 681).

America’s federalism was unique in the world of the late eighteenth century. As Forrest McDonald, one of America’s foremost scholars of the Constitution, observes, “the constitutional reallocation of powers created a new form of government, unprecedented under the sun. Every previous national authority either had been centralized or else had been a confederation of sovereign constituent states. The new American system was neither one nor the other: it was a mixture of both” (1985, 286).

In *Federalist* No. 51 Madison explained how *separation of powers with checks and balances*—in conjunction with federalism in a compound republic—could provide “double security” for liberty of the people against excessive concentrations of power in government. Madison wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by the division of the government into distinct and

separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself (Rossiter and Kesler 2003, 320).

The source of authority and accountability in America’s compound republic is *popular sovereignty and representation in government*. The Declaration of Independence and preambles to the federal and state constitutions point to the people as institutors, perpetuators, and beneficiaries of government. In the beginning and going forward, the people constituted governments by compact to signify their sovereign authority. They also instituted representation in the federal and state governments. The representatives would be accountable to their constituents, who could retain or replace them by voting in periodic public elections.

In America’s federal system, the people have sovereignty and representation in two sets of government. They simultaneously are citizens of the United States and of the state wherein they reside (see the federal Constitution: Article IV, Section 2, and Amendment XIV, Section 1). Thus both the initiation and continuation of limited government, according to the fundamental law of the Constitution, is based on consent of the people in the two sets of America’s compound republic.

In *Federalist* No. 53 Madison stressed the significance of a written Constitution, anchored in popular sovereignty, to the preservation of liberty:

The important distinction so well understood in America between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Where no Constitution paramount to the government, either existed or could be obtained, no constitutional security, similar to that established in the United States, was to be attempted (Rossiter and Kesler 2003, 328–29).

Only in America, at the time of its founding, was there a Constitution *written* and *ratified* by representatives of the sovereign people in conventions convened solely for these two purposes. This two-step process of constitution making produced a founding document from which the federal government was established. The Constitution was intended to be a law above the ordinary laws enacted by the subordinate institutions of government.

This Constitution has remained the supreme law of the United States; so all laws and other acts of the federal and state governments must conform to it. If not, they are lawless actions, considered unconstitutional, and thereby null and void. This Constitution is also *unalterable* by either executive orders or statutes enacted by the majority in Congress. It can be amended only by consent of the sovereign people, expressed through representatives in federal and state governments, according to procedures in Article V of the Constitution. Thus America’s Constitution is designed for liberty and against any kind of

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tyranny: not only the tyranny of one, an autocracy, or of the few, an oligarchy, but also tyranny of the majority, a corruption of democracy, which should not prevail in a democratic republic.

AMERICA'S DURABLE CONSTITUTION

The United States Constitution has endured for more than two and a quarter centuries. It is by far the world's oldest written constitution of national government. Most constitutions have lasted less than twenty years, and very few more than fifty. Since 1791 France has had fifteen constitutions, whereas in America there has been only one (Elkins and others 2009, 1–2).

America's Constitution has been both a functional instrument of governance and a unifying symbol of nationhood for a diverse people in a pluralistic civil society. National unity in America, unlike most other countries, is based primarily on a common civic identity among the people rather than shared ethnicity, race, religion, or other bonds of ancestral kinship. The source of this shared civic identity is strong commitment of the people to ideas in America's founding documents, which greatly has contributed to the durability of the Constitution.

Adaptability is another aspect of the Constitution's durability. This Constitution is interpretable and adaptable within its framework of government. Chief Justice John Marshall emphatically noted this aspect of the Constitution's character in the US Supreme Court's precedent-setting opinion in the case of *McCulloch v. Maryland*, 17 U.S. 316 (1819). Marshall wrote:

This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur (17 U.S. at 415).

In regard to statutes and public policies of the federal or state governments, Chief Justice Marshall held: "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 consist with the letter and spirit of the Constitution, are constitutional" (17 U.S. at 421). Marshall's opinion of the Court in this landmark case set terms of constitutional interpretation to guide decisions in subsequent cases.

The Supreme Court is certainly not the only arbiter of constitutional issues. All the coordinate branches of government (legislative, executive, and judicial) have the authority and responsibility to interpret and adapt the Constitution in response to unforeseen circumstances; but they can legitimately do so only within the established framework of constitutional government. The citizens themselves can also instrumentally be involved in constitutional interpretation and change through interaction with representatives in government, who are accountable to them through political processes provided in the Constitution. Furthermore, the citizens, in concert with their representatives in the federal and state governments, have amended the Constitution seven times to extend the rights of citizenship, equality, and liberty more justly and inclusively

among the people of America (e.g., the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments).

America's interpretable and adaptable Constitution has been conducive to change needed for protection of individual rights and advancement of the common good. Consequently, some phrases or parts of the Constitution are not interpreted or perceived by the people today exactly as the founding generation understood them. Nonetheless, the purposes, principles, and institutions that signify the core and character of the Constitution have remained intact.

An overriding reason for the Constitution's longevity has been its continuous compatibility with the history and culture of the people. It was an organic outgrowth of colonial-era experiences in constitutional government. Going forward, from the founding period until the present, the character and content of the Constitution has tended to fit the political expectations, interests, and values of the majority of Americans. Even during extended periods of constitutional crisis, such as the years before, during, and after the Civil War, most citizens have supported the Constitution against opponents desiring to abolish or radically transform it.

Americans have realistically revered their Constitution and rejected utopianism. Neither the founding generation nor its successors have expected to achieve a perfect polity. Near the end of his life, James Madison expressed this prevailing American viewpoint: "No government of human device and human administration can be perfect; . . . that which is least imperfect is therefore the best government" (Koch 1961, 115).

Successive generations of citizens have eschewed the impossible dream of constitutional perfection and embraced instead an unending project of prudential improvement. They have tried to reduce the inevitable gap between America's highest ideals, expressed in the nation's founding documents, and the ever-present shortcomings in civil society and constitutional government. Framers of America's Constitution called it an experiment in free government, and so it has remained. The future of this constitutional tradition, always in doubt, depends on the commitments and choices of the people.

*John J. Patrick,
Indiana University*

SEE ALSO: *Blackstone, William; British Constitution; Checks and Balances; Coke, Edward; Compact and Covenant; Constitutional Government; Constitutionalism; Declaration of Independence; Federalism, Theory of; Governance; Government; Hume, David; Limited Government; Locke, John; Montesquieu, Charles-Louis de Secondat; Popular Sovereignty; Preamble, United States Constitution; Representation: Idea of Republic; Republicanism; Rule of Law; Separation of Powers.*

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Federalism, Theory of

Federalism, as first created in the United States in 1789, is a mode of governance that establishes unity while preserving diversity by constitutionally uniting separate political communities into a limited but encompassing political community. Public powers are divided and shared between a general government that is granted certain powers of nationwide scope and constituent governments that have reserved local powers and also make up parts of the general government (e.g., equal representation of

the fifty states in the US Senate). Both the general and constituent governments can legislate for individuals within their respective constitutional spheres (e.g., independently levy taxes and enact criminal statutes).

CONFEDERAL PRECEDENTS AND FOUNDATIONS

The word "federal" comes from the Latin *foedus*, meaning agreement, alliance, compact, contract, covenant, and treaty. Preceding the United States were many alliances, leagues, and confederations that might be termed federal but are usually called "confederal." A confederation is an association of independent sovereign states established to manage common concerns, especially defense and internal security. The verb "confederate" has traditionally meant to form an alliance to carry out the will of a coalition of interests, none of which surrender sovereignty to the alliance.

Ordinarily, each member state has one vote in a confederation's legislative council, and decision making requires supermajority and/or unanimous votes by members. The confederal council has limited, expressly delegated powers, relies on revenues contributed by the members, and cannot legislate for individuals. The member states retain supreme power and an explicit or implicit right to secede and are promised territorial integrity. The United Nations is an example. However, there are historical variations on these characteristics.

Examples of modern confederations include the Swiss confederations (1291–1798 and 1814–1848), the Dutch Republic or United Netherlands (1589–1795), the Articles of Confederation of the United States (1781–1789), the Germanic Confederation (1815–1866), and the Confederate States of America (1861–1865). In antiquity the twelve tribes of Israel entered a covenant under Joshua to establish a confederation. In ancient Greece the Delian League, or Confederacy of Delos, was an association of 150 to 173 autonomous city-states founded in 478 BCE under Athens's leadership. However, the Athenians' domineering behavior precipitated the Peloponnesian War and dissolution of the league in 404 BCE. The second Delian confederacy was established in 378 BCE to counter Spartan aggression but was destroyed by Philip II of Macedon in 338 BCE. Philip created the League of Corinth in 337 BCE, but it was dissolved in 322 BCE. The Achaean League, or Achaicum Foedus, was a confederation of twelve Achaean cities in ancient Greece organized in the fourth century BCE to repel pirates, but it collapsed by 288 BCE. Ten cities founded the second league in 280 BCE, which lasted until Roman conquerors disbanded it in 146 BCE.

Influential for the American Federalists were the Achaean and Lycian leagues. The Lycian confederation in Anatolia (now part of Turkey) was formed by twenty-three (later twenty-six) city-states in about 168 BCE under the Roman Empire and was dissolved in 43 CE by Rome's Emperor Claudius. Lycia deviated from the rule of equal votes in the general council by giving three votes to large city-states, two to medium-sized states, and one to small states. When Oliver Ellsworth declared at the 1787 Constitutional Convention that member-state voting equality is a fundamental principle of all confederations, James Madison retorted that "Lycia, so justly applauded by . . . Montesquieu, was different" (Farrand 1966, 497). Alexander Hamilton noted in *Federalist* No. 9 that Lycia's general council appointed all judges and magistrates for the member cities. In *Federalist* No. 16, Hamilton argued that confederal laws in the Lycian and Achaean leagues applied to individuals, not just to the cities. In

Federalism, Theory of

Federalist No. 45, Madison contended that the confederal councils of these leagues possessed powers comparable to those delegated to the general government by the proposed constitution.

FORMATION OF AMERICAN FEDERALISM

At the founding of the United States, “confederal” and “federal” were virtually synonymous. The word “federal” meant what we today call “confederal.” It is the new federalism created by the US Constitution that later differentiated “federal” from “confederal.” A federal system is now understood to include a general government possessing (a) substantial, though still limited powers, (b) implied powers (i.e., the Constitution’s necessary and proper clause in Article I, Section 8), (c) authority to legislate for individuals, and (d) power to raise its own revenue via taxation. States retain sovereign powers but also share powers with the general government and, arguably, have no secession right.

The first constitution of the United States was the Articles of Confederation and Perpetual Union approved by the Continental Congress in 1777 and ratified by the thirteen states in 1781. The confederation had only limited, expressly delegated powers (e.g., to make war and peace, coin money, appoint army officers, run post offices, and negotiate with Indian nations) and no authority to legislate for individuals. Each state had one vote in Congress; important legislation required nine votes; there was no executive or judicial branch; Congress depended on loans and state contributions for revenue; and amendments to the Articles required unanimous consent of the thirteen states.

Events after the Revolutionary War, including Shays’s Rebellion in Massachusetts in 1786 and interstate disputes, triggered calls to amend the Articles to strengthen the general government. Congress authorized a convention of the states that met in Philadelphia in 1787. Essentially, the convention considered two revision plans.

The Virginia Plan, drafted by Madison, proposed three branches of government, with the legislature to select the executive and judicial officers. It called for a bicameral legislature with states represented in proportion to their population. The people would elect one chamber, which would then select the second chamber from nominations submitted by state legislatures. The plan proposed a broad federal tax power and federal authority to regulate interstate and foreign commerce, veto state laws, and use armed force to enforce federal laws. The New Jersey Plan, presented by William Paterson, differed mainly in retaining a unicameral Congress, with each state having one vote, and in proposing a narrower tax power (mainly tariffs). Small states favored a unicameral Congress; big states wanted proportional representation. The dispute was settled by creating the Senate with equal state representation—although each state’s two senators vote as individuals, not as a state—and the House of Representatives where states are represented according to population.

The ratification campaign produced two camps: Federalists who supported the proposed constitution and Anti-Federalists who opposed it. The Anti-Federalists advanced four main objections: the convention exceeded its charter by discarding rather than amending the Articles; republican government can exist only in small republics where citizens can deliberate together; the increased powers delegated to the general government would be used to destroy the states’ sovereignty; and the document contained no declaration of rights.

THE FEDERALIST’S THEORY OF FEDERALISM

The Federalist essays by Hamilton, Madison, and John Jay are the most celebrated commentary on the theory of the US Constitution. In *Federalist* Nos. 9, 15, 18–20, and elsewhere, Hamilton and Madison argued that confederations are inherently weak and unstable because the general council lacks sufficient power, including a tax power, to prevent internal discord and deter aggression. Most important, except for the Lycian and Achaean leagues, confederations, including the American confederation, could not legislate for individuals. “The great and radical vice . . . of the existing Confederation,” wrote Hamilton in *Federalist* No. 15, “is in the principle of LEGISLATION FOR STATES OR GOVERNMENTS, in their CORPORATE OR COLLECTIVE CAPACITIES and as contradistinguished from the INDIVIDUALS of whom they consist” (93). The notion of “a sovereignty over sovereigns” is absurd. The Federalists contended that a confederation is not even a government. A government exercises the coercive power of law over individuals. The Constitution’s solution was to divide sovereignty so that both the general and state governments can legislate for individuals within their respective constitutional spheres. The creation of concurrent sovereignty was the US Constitution’s principal innovation in the theory of federalism.

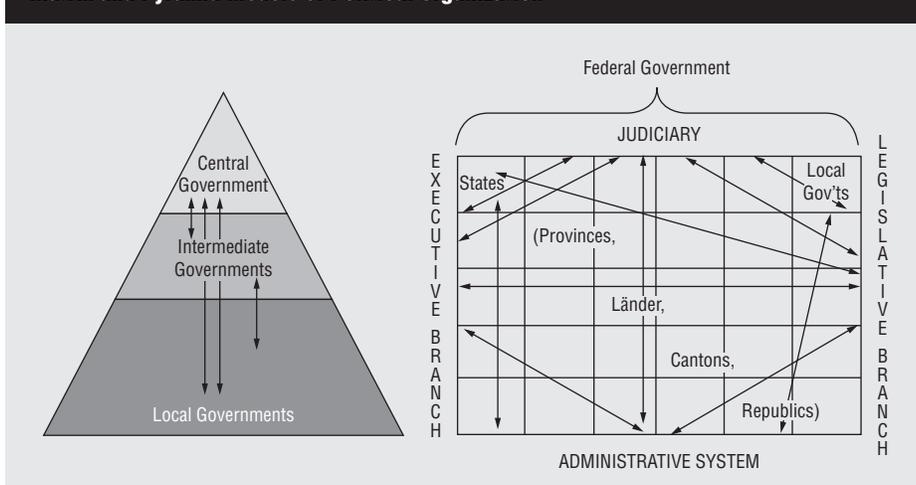
In *Federalist* No. 39, Madison tried to allay fears by demonstrating that the Constitution is reliably republican and that it established a “compound republic,” namely, a composition of federal (i.e., confederal) and national (i.e., unitary) principles. For instance, the Senate, which represents the states equally, embodies the confederal principle; the House of Representatives reflects the national principle. Thus, concluded Madison, the Constitution is neither national nor confederal.

A unitary state has one government that possesses plenary powers and reigns supreme nationwide. Subnational governments, if they exist, exercise only powers given to them by the national government. Subnational governments in unitary systems can be created and abolished and their powers expanded and constricted unilaterally by the national government. In American federalism, the states’ powers derive from the independent sovereignty of their citizens. The federal government does not grant them powers, nor can it abolish any state without its consent.

Consequently, the American federal system is non-centralized rather than decentralized. A decentralization requires a central government able to centralize and decentralize power. The US system has no central government but rather multiple governments having independent constitutional power derived from the people. Hence, the correct imagery for the federal system is a matrix in which governments differ on the basis of wider versus narrower scope of jurisdiction than a pyramid in which differences are based on level of authority, or a circle in which there is a central government.

Contrary to Anti-Federalist fears, the Federalists maintained that the states retained ample sovereignty to legislate for individuals on all matters of domestic importance. “The powers delegated . . . to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite,” wrote Madison in *Federalist* No. 45 (313). He noted, too, that the people are most loyal to their states, the states are constituent parts of the federal government, and the federal government must depend on the states for many of its operations, such as states conducting presidential and congress-

Matrix and Pyramid Models of Political Organization



Two models of political organization.. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

sional elections and appointing US senators (prior to the Seventeenth Amendment, ratified 1913).

The Federalists further argued that a large republic can better repulse aggression. In *Federalist* No. 10, Madison also contended that a large “extended republic” would better sustain republicanism than a small republic because the diversity of interests in a large republic would deter both minority and majority factions from taking over and subverting republican government. Small republics, asserted Madison, are susceptible to factional destruction. It is in this essay that Madison made his famous argument about the need to prevent a tyranny of the majority and highlighted the role of an extended republic in doing just that.

Hamilton argued that it would be dangerous to add a declaration of rights to the Constitution because it would imply that the federal government possesses more powers than is the case. Instead, argued Madison, liberty would be protected by the “double security” of the separation of powers within the federal and state governments and the division of powers between those governments (*Federalist* No. 51). However, many Anti-Federalists objected to the absence of a declaration of rights. To win some of them over, Madison pledged to introduce rights amendments during the first meeting of the new Congress. As a member of the First Federal Congress, Madison fulfilled his promise and led an initiative that proposed twelve amendments, ten of which were ratified by enough states in 1791 and became the US Bill of Rights.

CLASHING THEORIES AND REFORM REDEFINITIONS

The federal system’s newness, the Constitution’s ambiguities, and different ideas of federalism at the founding generated debates about the nature of the new federalism. Hamilton interpreted federal powers broadly and advocated an aggressive economic development role for the federal government. Madison and Thomas Jefferson construed federal powers narrowly and also wrote the Virginia and Kentucky Resolutions (1798–1799), which declared that the Constitution is a compact among the

states. Jefferson’s Kentucky Resolution maintained that states have the right of nullification to void federal laws they deem unconstitutional. Madison’s Virginia Resolution did not mention nullification. It argued instead for the right of interposition to stop the enforcement of a federal law deemed unconstitutional by states.

Later, John C. Calhoun contended that the US Constitution was established by the sovereign states, not the people. Therefore individual states could nullify federal laws, prevent their enforcement on their territory (i.e., interposition), and secede from the union. (In his waning years, Madison adamantly rejected Calhoun’s theory of interposition and nullification.) Calhoun also argued for a two-headed (i.e., North and South) presidency and concurrent majority decision making to require a majority of northern and majority of southern members of Congress or states to enact federal laws. Daniel Webster rejected these ideas in a famous 1830 Senate speech in which he declared the US Constitution to be “the people’s Constitution, the people’s government, made for the people, made by the people, and answerable to the people” (Wright 1929, 481). Webster maintained that state legislatures cannot override the people’s will as expressed through their representatives in Congress by nullifying federal laws. The Civil War settled the question that the federal government is the instrument of the people, not the states.

Abraham Lincoln altered federal theory by arguing that the US Constitution is intended to fulfill the principles of the Declaration of Independence and that the people cannot be permitted to vote away the fundamental rights of others, such as voting slavery up or down in the territories. These ideas were embodied in the Fourteenth Amendment to the Constitution (1868), which prohibits states from violating fundamental rights and authorizes Congress to enforce the amendment. The amendment marked a major nationalizing change, although congressional and judicial neglect of the amendment’s purpose delayed its nationalizing impact until the mid-twentieth century, when the federal courts began using the amendment to apply the US Bill of Rights to state action and thereby strike down numerous

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state laws deemed to violate fundamental rights. States are frequent targets because the states enact the lion's share of laws that affect citizens, whereas until the 1960s the federal government had little direct contact with individuals beyond mail delivery and conscription (except for Native Americans, who were decimated by the federal government).

The rise of an urban-industrial society by the 1880s generated reform movements, such as the Populists and Progressives, who advocated more centralized federalism to rescue democracy from rapacious corporations and plutocrats. Theodore Roosevelt, for example, contended that a much stronger federal government was needed to rein in big corporations that were suppressing democracy and eluding state regulation. Woodrow Wilson influentially argued that every political system needs a center of power. He decried Madison's double security for liberty as a double jeopardy because the separation of powers and federal division of powers promote irresponsibility. Instead, the presidency should be the center of power. Reformers achieved two constitutional changes in 1913 enhancing federal power: the Sixteenth Amendment authorizing federal income taxes and the Seventeenth Amendment mandating direct election of US senators by states' voters.

The New Deal of the 1930s institutionalized many Progressive ideas under the banner of "cooperative federalism." Cooperative federalism emphasizes the idea that the federal, state, and local governments should cooperate and work together in governing the country, although nearly all reformers understood this to mean the willingness of state and local governments to cooperate with the federal government. This produced an intensification of intergovernmental relations. Reformers labeled previous practices dating back to 1789 as "dual federalism," which was said to emphasize separate, rather than intertwined, spheres of sovereign federal and state power.

CONTEMPORARY FEDERAL THEORIES

Contemporary American federalism is a mix of dual, cooperative, and regulatory or coercive federalism. The system is coercive in that the federal government dominates policy making and imposes its will on state and local governments through regulations attached to federal aid, mandates, preemptions, and court orders. However, virtually all fields of public policy are intergovernmental, and state and local administration of federal policies is mostly cooperative. Some observers argue that federalism is now merely intergovernmental relations. Yet dual federalism endures because states retain their status as constitutional governments in their own right as well as considerable realms of autonomous policy making.

There are also new approaches to federalism advanced by various reformers. One is the theory that the federal system was designed to be fundamentally competitive because intergovernmental (i.e., federal-state-local) and interjurisdictional (i.e., interstate and interlocal) competition for citizen allegiance can, like a competitive marketplace, improve government efficiency and effectiveness and also protect liberty. Many public choice advocates and some conservatives endorse this theory, and some of its advocates support a right of secession.

Liberals generally prefer the new judicial federalism and partial preemption. The former allows states to provide higher, but not lower, levels of rights protection under their state constitutions than the federal government provides under the US Constitution. For example, the US Supreme Court has ruled

that First Amendment free speech rights do not apply in private shopping malls. However, several state supreme courts have ruled that their state constitution requires free speech rights in private shopping malls in their state. New Jersey's supreme court also applied these rights to private colleges and universities. Partial preemption is federal law that displaces state authority in a policy field but then establishes a baseline national standard that can be exceeded by states. Many environmental laws are partial preemptions. Any state can enact environmental regulations that are stronger, but not weaker, than the federal baselines.

Both conservatives and liberals like a third approach that sees the main value of federalism today as the ability of states to act as laboratories of democracy by enacting innovative and dissenting policies, such as legalized marijuana, same-sex marriage, and assisted suicide in liberal states and school choice, gun rights, and abortion restrictions in conservative states. This approach, however, translates into coercive federalism when conservatives and liberals nationalize their preferred state policy experiments. In summary, just as contending theories shaped the founding of American federalism, contending theories will shape the future of federalism.

*John Kincaid,
Lafayette College*

SEE ALSO: *Anti-Federalists; Articles of Confederation; Calhoun, John C.; Concurrent and Exclusive Powers; Constitution; Constitutional Convention of 1787; Constitutional Government; Constitutionalism; Democracy; Extended Republic, Theory of; Federalism in American History; Federalism in the Public Policy Process; Federalist, The; Governance; Hamilton, Alexander; Limited Government; Lincoln, Abraham; Madison, James; Nullification; Popular Sovereignty; Progressive Movement, 1890 to 1920; Republic; Republicanism; Separation of Powers.*

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Separation of Powers

To rule, one must command, enforce, and judge. Laws are the most formal commands; to be effective, they must be enforced, translated into actions and not just words. Part of that enforcement requires physical effort—from military and police work to administrative supervision—and part of it requires judicial procedures in which alleged violation of the laws are examined by impartial magistrates. Hence in *The Spirit of the Laws* (1748), the French political philosopher Montesquieu identifies three political powers that define the three functions of government: legislative, executive, and judicial (Part II, Book 11, chap. 6). Separation of these powers means that, rather than combining these functions in one or more of a political society's ruling institutions, each power is embodied by one branch of government.

THE MODERN STATE AND ITS PREDECESSORS

In commending the separation of powers, particularly as embodied by the contemporary constitution of England, Montesquieu (Charles-Louis de Secondat, Baron de La Brède et de Montesquieu; 1689–1755) addressed a serious dilemma caused by the establishment of the modern state. The state was a recent development; prior to that, ancient peoples had two kinds of political societies: the polis, or city-state, and the empire. The polis was small and centralized, often consisting of fewer than 100,000 inhabitants, of whom only 10,000 might be citizens. As a result, the regime of the polis mattered: in a small place, individuals care about who rules because that person or group of persons is close enough to affect everyday life. Conversely, accession to rule is a plausible ambition in a polis, where the only thing needed to gain authority might be a riot in the street or the stab of a knife. For the same reasons, all of which were an effect of its smallness, a polis could be both tightly organized and prey to faction. By contrast the ancient empire was large and decentralized. Rulers had no means with which to exert consistent, direct control over a substantial territory. An empire-building conqueror typically exacted tribute in the form of property, including slaves, as well as soldiers for his army, then left local authorities in place to rule as they had done before the conquest. The regime of the empire mattered enough to a few persons in or near the capital to seize control, but those living in outlying provinces usually cared little whether the empire's regime was a republic or a monarchy.

Medieval Europe (and many other places) often lived under an authority between the polis and the empire: the feudal state. In the feudal system, a set of warrior-aristocrats who had broken free of an empire ruled lands populated by peasants who owed fealty to these lords. This network of aristocrats was loosely coordinated by a monarch, typically only "first among equals," a fellow aristocrat responsible for coordinating sufficient soldiers and revenue to defend the society against attack by foreigners. If chemists were to examine a feudal state, they might identify it as a colloid: globules of authority floating more or less in equilibrium. The feudal state was large and decentralized.

In Renaissance and Reformation Europe, a fourth kind of political society arose: the modern state. The modern state corresponds to feudal societies in size, sometimes rivaling even the ancient empires in territory. But unlike the feudal state, in the modern unitary state, political authority coalesces in a central location, radiating out to the borders like the spokes of a wheel or the threads of a spider web. Each of those spokes or threads consists largely of bureaucratic structures staffed by professional administrators who owe their allegiance not so much to the persons who rule at the center or capital as to the state itself. Around the world the technocratic modern state raised revenues and financed wars that enabled it to crush the most valiant armies of the aristocrats.

Yet such a massive and powerful structure potentially threatens the very people it is designed to protect. Thus the modern state again raised the question of regime with an urgency unfelt since the zenith of the polis. In declaring American independence, the Founders condemned not only the regime of "our British brethren"—the king's tyranny, the Parliament's perfidy—but also the British state. As the Declaration of Independence states, King George III "has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance." That is, Great Britain wanted to make its empire into a centralized, regulating, tax-collecting modern state, whereas Americans sought to design a regime powerful enough to secure the unalienable rights of life, liberty, and the pursuit of happiness while checking the centralizing tendencies of the modern state, so as not to overpower American citizens and compromise those rights.

SAFEGUARDING AMERICAN RIGHTS

Among the institutional solutions to this problem of institutional design, American constitution makers considered republicanism (representative government), constitutionalism and the rule of law, federalism between general and constituent governments, and separation of powers within governments. Although they consulted Montesquieu to identify the three powers or functions to be separated, they nonetheless departed from the philosopher's model state, England. England's branches of government empowered several political families and classes: the royal family in the monarchy, the titled aristocracy in the House of Lords, some classes of commoners in the House of Commons, and both aristocrats and commoners in the judiciary. But no royal family and no titled aristocracy existed in the United States; everyone was a commoner.

The Founders used separation of powers to reinforce not social privilege but other institutions that guarded American rights. Separation of powers reinforces republicanism by slowing down the legislative process—forcing it into deliberation. A republic with all powers centered in one ruling body may incline toward impassioned surges of opinion that may, as Publius says

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in *Federalist* No. 63, vote to poison Socrates one day and to erect a statue in his memory the next. As Thomas Jefferson observed in *Notes on the State of Virginia* (1787), “one hundred seventy-three despots would surely be as oppressive as one” (Query XIII). In other words, the Founders believed legislative deadlock was not such a bad thing; they preferred it to legislative impulsiveness, which is likely to trample on an individual’s unalienable rights in pursuit of a whim of the majority. As Publius writes in *Federalist* No. 47, paraphrasing Jefferson, “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.” In Montesquieu’s words, “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates” (Part II, Book 11, chap. 6).

Similarly, separation of powers reinforces federalism by making the Senate the body in which the states were represented, originally by men selected by the state legislatures. And separation of powers also upholds the rule of law by giving judges a power independent of the lawmakers and the law enforcers, in addition to the power of judicial review, that is, the authority to determine if a given legislative or executive act is lawful under the US Constitution.

Separation of powers secures the rights of citizens not by appealing to the virtuous character of politicians but by investing them with institutional authority sufficient to repel encroachments by politicians occupying the other branches of government. In Publius’s oft-quoted formulation: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place” (*Federalist* No. 51). Given the constitutional means of self-defense, ambitious politicians will defend their prerogatives vigorously, as, for example, when Congress passes a bill that the president regards as an infringement of executive power and exercises his constitutional authority to veto it.

The presidential veto instances another feature of the separation of powers: it is not absolute. Radicalized, separation of powers would entail three separate governments, operating with complete independence from one another, resulting in incoherence. Publius observes that Montesquieu “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other” (*Federalist* No. 47; see also No. 48). What the Founders wanted was powers independent from one another with respect to their capacities to make decisions but interdependent if goals are to be accomplished and action sustained over time. To pass, enact, and retain a law, both houses of Congress must agree to the language, and the president must not veto it (or, if he does, both houses must override the veto with a two-thirds majority); if challenged in the courts, the Supreme Court must not judge it unconstitutional.

As Publius observes: “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit” (*Federalist* No. 51). In the nineteenth century, when the power and prestige of the presidency had been diminished by Congress during and after Reconstruction, President Grover Cleveland restored presidential power by the simple and constitutional remedy of the veto, which he exercised more than 400 times, far more than any earlier president. In the twentieth century, when President Franklin D. Roosevelt attempted directly to bring the Supreme Court into line with his policies by increasing the

number of justices and appointing men congenial to his policies, Congress and the Court successfully resisted the encroachment. And Congress, too, proved capable of resisting presidential power, most notably in the impeachment proceedings against President Richard Nixon, impelling his resignation from office. Separation of powers thus has proven itself not merely a theoretical nicety or a paper construct but a real bulwark against overreaching political ambition.

*Will Morrisey,
Hillsdale College*

SEE ALSO: *Bicameralism; Checks and Balances; Constitution; Constitutional Government; Federalist, The; Limited Government; Montesquieu, Charles-Louis de Secondat.*

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Representation: Idea of

Representation, the act of standing for something or someone not tangibly present, is inseparably linked with the democracies of modern states, wherein the people’s representatives, instead of an assembly of the entire population, govern by consent of the governed. In a democratic republic, such as the United States of America, the people’s elected representatives stand and act authoritatively for the represented, within the institutions of a constitutional government.

An assembly of representatives that reflects the demographic characteristics of constituents is an example of descriptive representation. Constituents are presumed more likely to trust, support, and identify with their representatives when they see those representatives as being just like them ethnically, racially, religiously, experientially, and so forth. According to Hanna Fenichel Pitkin, descriptive representation “is distinguished by an accurate correspondence or resemblance to what it represents, by reflecting without distortion” (1967, 60).

In contrast, substantive representation denotes correspondence of indubitable interests between representatives and the persons represented. Regard for the substantive concerns of individuals within a constituency, and actions on their behalf, distinguishes this kind of political representation. Substantive representation “requires independent action in the interest of the governed, in a manner at least potentially responsive to them, yet not normally in conflict with their wishes” (Pitkin 1967, 222).

The eighteenth-century British statesman Edmund Burke recognized two roles of political representation. Representatives

may behave primarily like trustees and promote their own judgments about the common good. Representatives may also conduct themselves as delegates in response to opinions received or solicited from constituents about what their government should do. The citizens of a genuine democratic republic, however, are not just passive receivers of what representatives do for them. And the representatives are not merely delegates that only follow instructions from their constituents. At best they act thoughtfully, responsibly, and independently to discern and advance substantive interests of constituents. In the final chapter of her comprehensive analysis of political representation, Pitkin concludes: “Only if it seems right to attribute governmental action to the people in the substantive sense do we speak of representative government” (1967, 233).

ROOTS OF REPRESENTATION IN AMERICA

English settlers transplanted long-standing rights of consent and representation from their home country to England’s new colonies in America. These rights were guaranteed in colonial charters issued by authorities in England, which legally set forth rules for the founding and governing of colonies, such as the 1606 Charter of Virginia and the 1629 Charter of Massachusetts Bay. Most colonial legislative assemblies, as early as 1640, represented the settlers’ interests in their transactions with the king’s governors or proprietors (Adams 2001, 228).

In England and its American colonies, consent of the governed was the basis of legitimacy in legislation. Representation in an elected legislature was the primary means by which consent could be expressed or withheld. The rights of consent and representation were concurrent with an obligation of compliance to the laws. Matthew Hale, lord chief justice of England from 1671 to 1676, explained that the undoubted legitimacy of laws enacted by representatives enabled “their binding Force from the Consent of the People governed” (Reid 1989, 18).

The people held their representative assemblies accountable through public elections. Only a minority of the population could be electors, because voting rights in both England and America were granted mostly to male owners of specified amounts of property or wealth. In England during the 1700s, less than 10 percent of the people could be electors of their representatives. In the American colonies, however, where land was abundant and relatively easy to acquire, between 60 and 70 percent of white males owned enough property to be electors (Adams 2001, 229).

In England and the colonies, representation was based mainly on geography, not demography. Places and spaces instead of populations and persons were the units of apportionment. Colonial governments used such corporate entities as counties, towns, and parishes to allocate representation in their legislatures. In Connecticut, for instance, each town, regardless of population differences, elected two representatives to the lower house of the legislative assembly. By contrast, some colonies irregularly and unequally applied the corporate method of representation. In Pennsylvania during the early 1770s, for example, the eight western counties, where more than half the colony’s people lived, had fewer delegates in the colonial legislature than did the three less populous eastern counties (Zagarri 2010, 43).

Despite the collectivist or corporative character of representation in the colonies, substantive interests of individuals were attached to the actions of their representatives. Electors in the four New England colonies, for example, often directed

binding instructions to delegates in their legislative assemblies (Adams 2001, 244). An elector in Connecticut noted that representatives were elected “from among ourselves, well known in our Towns, and not Strangers; . . . and have the same common Interests with us, so interwoven, that they can’t be separated” (Reid 1989, 38). This kind of personal connection between representatives and electors existed throughout the colonies during the eighteenth century, but not in England (after 1707 the Kingdom of Great Britain).

Political representation in Britain was based on property, not people. It persistently was directed mostly to abstract corporate or collective interests, such as those of counties, municipalities, boroughs, and above all the British nation-state. Edmund Burke, a prominent member of Britain’s House of Commons, advocated representation unattached to particular interests of individuals (Pitkin 1967, 168). In his “Speech to the Electors of Bristol” (November 3, 1774), Burke claimed that a good representative “owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.” Burke emphasized the all-encompassing national interest as the major responsibility of a conscientious and competent representative. “Parliament is not a *congress* of ambassadors from different and hostile interests, which each must maintain, as an agent or advocate, against other agents; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole . . . the general good, resulting from the general reasoning of the whole” (Burke, in Kurland and Lerner 1987, 392).

Burke and many others in Britain insisted that every subject of the realm, both electors and nonelectors alike, shared common nationwide interests, burdens, and benefits. So even though the majority of the British people were nonelectors, and not actually represented in the Parliament, they nonetheless had virtual representation. Burke said, “Such a representation I think to be in many cases even better than the actual” (Reid 1989, 58). But he rejected the claim of many colleagues that people of Britain’s American colonies, none of whom had actual representation in the Parliament, were still virtually represented there. Burke pointed out that the colonial people resided in a faraway land very different from Britain in physical, political, and social environments. Thus they could not possibly be represented equitably in the British Parliament.

During the eighteenth century, serious differences developed between Britain and its American colonies regarding representation and consent (Wood 1969, 165). This divergence was prominent among the several causes of resistance, rebellion, and revolution in the colonies against the imperial authority of Britain. Many Americans emphatically opposed laws that imposed taxes and other burdens on them, because they were not, and believed they never could be, justly represented by Parliament. Some colonists pointed to the Petition of Right of 1628 and other acts of Parliament prohibiting taxation without representation and argued that the injustice could be solved if the colonies had adequate representation in the British Parliament. Events outpaced this argument. Thus the slogan, “No taxation without representation,” was among the grievances listed in the Declaration of Independence, which in 1776 heralded the birth of the United States of America.

REPRESENTATION IN AMERICA’S FIRST CONSTITUTIONS

From 1776 to 1791 the people of America’s states participated in an exceptional burst of constitution making, which included

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repeated affirmation of political representation. In his masterful work on the founding of America, Gordon S. Wood concludes: “No political conception was more important to Americans in the entire Revolutionary era than representation” (1969, 164). In response to requests from compatriots, John Adams of Massachusetts wrote “Thoughts on Government” (April 1776) to guide the ongoing construction of constitutions for representative governments in the American states.

Adams wrote, “In a large society, inhabiting an extensive country, it is impossible that the whole should assemble, to make laws.” Therefore, it is necessary “to distribute power from the many to the few of the most wise and good” that they may represent the entire people. The assembly of representatives, chosen by enfranchised electors, “should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them.” Most important, there “should be an equal representation” of interests in the assembly; that is, the various substantive interests among the electors should be equally represented by the elected (Adams, in Kurland and Lerner 1987, 108–9). Adams also advocated annual elections and term limits to encourage accountability of the people’s representatives and discourage them from accumulating excessive power.

Adams’s thoughts were variously included in America’s first state constitutions, because they reflected dominant political values among the citizens. But other ideas were also advanced in a continuing colloquy on political representation. An ongoing issue was the means of apportioning representatives to the legislature. Five of America’s early state constitutions—Pennsylvania (1776), New York (1777), Massachusetts (1780), New Hampshire (1784), and Georgia (1789)—mandated a system of proportional representation in the lower house of the legislature. There was a numerical relationship between individuals in an electoral district and their allotment of representatives, such as one representative for every ten thousand inhabitants. The individual, not the community, became the unit of representation, which guaranteed majority rule in the popular assembly. Alexander Hamilton referred to the Constitution of New York as providing a “representative democracy, where the right of election is well secured and regulated” (Adams 2001, 232). As of 1790, however, eight of the states had *not* yet implemented a system of representation in proportion to population (Zagarri 1991, 650).

The size of legislative assemblies and the suffrage were other major concerns of the state constitution makers. The 1776 Constitution of Maryland, for example, proclaimed “the right of the people to participate in the Legislature is the best security of liberty and the foundation of free government” (Wood 1969, 164). All of the first state constitutions enlarged both the electorate and the elected to increase participation of the people through representation. The numbers of representatives in state legislatures expanded as much as two to three times what they had been during the last years of the colonial era (Wood 1969, 167).

The numbers of voters, although restricted in most states to property-owning males, also increased as a result of the abundance of available land and the easing of eligibility requirements. Most white males, but few others, were eligible to vote. The Pennsylvania Constitution of 1776 provided the broadest suffrage of the original thirteen states. All free, taxpaying adult males, who had resided in the state for a year, were eligible to vote. The Constitution of Vermont, the fourteenth state in 1791, permitted all male residents to vote, with no

requirement of property ownership or tax payments. Constitutionally committed to freedom, Vermont was the first state in the world to institute universal male suffrage (Keyssar 2000, 24–25 and 340–41).

The first American state constitutions were compacts among the people that signaled popular sovereignty. By contrast, the Articles of Confederation, which constituted the United States of America in 1781, was a compact of thirteen equal and independent states, whose representatives drafted and ratified it. The sovereign state governments also chose their representatives to the Confederation Congress. Each delegation had one vote, regardless of size, to register its state’s corporate or collective interests in the work of the Congress. Substantive interests of individuals, the residents within the Confederation’s constituent states, were not represented in the Congress, which had no authority to directly govern them.

REPRESENTATION IN THE FEDERAL CONSTITUTION OF 1787

Alexander Hamilton incisively documented flaws of the Articles of Confederation in *Federalist* No. 15 (Rossiter 2003). He explained its deficiencies and the need to ratify an alternative form of federal government provided in the newly drafted United States Constitution. During the summer of 1787, representatives of the states had framed this Constitution in an extraordinary convention in Philadelphia. During the next ten months, representatives elected by the voters of each state consented to it, through participation in unique state ratifying conventions, which exemplified popular sovereignty, the people as the source of authority for government.

The 1787 Constitution embodied an unprecedented principle of federalism. It conjoined the whole people of America with the particular people of America’s states in a nexus of representative governments. Citizens of the United States were also citizens of the states in which they resided. There was a binary division of powers between: (1) the federal government of an extended republic, encompassing the entire American nation; and (2) the constitutional governments of the state republics. The federal government was supreme only within its sphere of constitutionally allocated powers. According to the Tenth Amendment of the federal Bill of Rights, all powers *not* delegated to the federal government nor prohibited to the states were reserved to the state governments, within the limits of their constitutions.

Although power was divided, there was a singular popular sovereignty. The citizenry was recognized as the sole source of authority, through direct or indirect representation, in all branches of the interactive federal and state governments. James Madison said in *Federalist* No. 10, “The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the State legislatures” (Rossiter 2003, 77–78). Madison called this system of federated representative governments a compound republic in *Federalist* No. 51 (Rossiter 2003).

In comparison to founding-era state legislatures, the scope of representation in the Congress of the United States was much wider, but the size of the assembly much smaller. The Constitution specified sixty-five members in the House of Representatives, elected by enfranchised individuals for two years, and apportioned among the states according to size of population. By contrast with the proportional (i.e., population-based) represen-

tation of the House, there was a corporate method of apportionment in the Senate, wherein each state had two members, elected by their respective state governments to a term of six years (Article I, Sections 1 and 3). The size of a state's delegation to the House of Representatives would initially be reapportioned based on results of the first census of America's population in 1790, and thereafter according to a decennial census. "The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative" (Article I, Section 2).

The Constitution's Framers agreed that a larger representative legislature guaranteed neither prudential promotion of the public interest nor protection against corruption and disorder. They also knew that very large assemblies, such as those of ancient Greek city-states, were prone to instability and factional strife. In *Federalist* No. 55, James Madison opined, ". . . the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters comprised, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob" (Rossiter 2003, 340).

Unlike most state constitutions of the 1780s, the federal Constitution had minimal eligibility requirements for government officeholders, which merely pertained to age, citizenship, and residence. Only the president was also required to be a "natural born citizen." In the text of the Constitution, there was no mention of restrictions on officeholding in regard to wealth, property, social status, religion, race, ethnicity, or gender. Social traditions, conventional customs, or state constitutional restrictions may have circumscribed an elector's choices, but the words of the federal Constitution did not. In *Federalist* No. 57, Madison asked, "Who are to be the objects of popular choice?" Responding to his own question, he said, "Every citizen whose merit may recommend him to the esteem and confidence of his country" (Rossiter 2003, 349).

The federal Constitution did not specify requirements for voting. Instead it kept this process open-ended by leaving it to the states. In regard to the biennial elections of members to the House of Representatives, Article II, Section 1 says, ". . . the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Thus the electors in each state were directly represented by their elected delegates in the House of Representatives. However, the states of America's federal union, not the people, were directly represented in the United States Senate, because its members were chosen by their respective state legislatures. Residents of each state, who elected the members of their legislative assembly, were indirectly represented in the Senate (Article I, Section 3). The inhabitants of each state were also indirectly represented by an Electoral College, composed of delegations selected by the state, which elected the president and vice president (Article II, Section 1). And the process of selecting Supreme Court justices and federal judges, through nomination by the president and approval by the Senate, was another example of indirect representation of the people (Article II, Section 2).

The Constitution's Framers presumed their procedures of indirect representation would filter the pool of candidates for election to federal offices. They intended to screen out less desirable persons and bring forward those of highest competence and best character. The Framers also expected the large and diverse population of America's extended republic to be a bountiful

source of talented and temperate candidates for election to the US Congress. The Framers anticipated members of Congress, especially the senators, to be mainly involved with debate and deliberation about national interests and the general good of America, leaving most of the local and parochial concerns to the state legislatures.

The Framers' complex combinations of direct and indirect representation, involving both corporate and demographic methods of apportionment, evoked aspects of Edmund Burke's thoughts on representative government. This similarity seems ironic, because Burke's theory of representation, applicable to governance in Britain, had been rejected by many Americans before and during the Revolutionary War. The Framers, however, assumed that their theory of representation, an exceptional synthesis of ideas from various sources (including Burke), was well suited to America's large federal republic.

Framers of the 1787 Constitution firmly believed democratic representation in America's extended republic was a necessary but insufficient means to preservation of liberty and order. They feared the possibility of a permanent majority faction with passionate commitment to selfish interests, which in the name of democracy could impose a tyranny of the majority against unpopular political minorities. This kind of rampant majority rule had been an unresolved problem of republics in antiquity and modernity.

The Framers offered "a republican remedy for the diseases most incident to republican government," said Madison in *Federalist* No. 10 (Rossiter 2003, 79). If majority tyranny would be prevented in a democratic republic, then representative government must be conducted within the authority of a well-constructed federal Constitution, which divides, separates, checks, balances, and in general limits the powers of the people's representatives. Thus political representation could be constitutionally channeled to promote the common good and to protect the public and private rights of individuals.

REPRESENTATION AND THE ADVANCEMENT OF DEMOCRACY IN AMERICA

The conception of representation in the Framers' Constitution has been tested and contested, promoted and protested, challenged and confirmed by every generation of Americans. Critical issues arose during the founding era, which have continuously challenged citizens. During America's early national period and beyond, there were continuing controversies related to the rise and advancement of democracy, such as equitable apportionment of representatives, the right to vote for representatives, and the composition of representative assemblies in regard to personal identity and particular interests.

Demographically apportioned representation advanced steadily between 1789 and 1850. Eighteen of the twenty states admitted to the Union apportioned representation based on population, at least to the lower house of the legislature (Zagarri 1991, 650). However, most of the territorially smaller states, such as Connecticut, Delaware, Maryland, and Rhode Island (and a few larger states too), were reluctant to give up their corporate methods of apportionment, which had sustained a traditional sense of community and continuity. Most of the larger states, however, turned to proportional representation based on population, because it seemed the best way to accommodate quickly increasing populations characterized by diversity, mobility, and fluidity. The division of a state into electoral

Representation: Idea of

districts, with the expectation of approximate equality in numbers of inhabitants, encouraged equitable representation of various interests within the dynamic demography of a relatively open society (Zagarri 2010). By the end of the 1800s, demographic representation in both lower and upper houses of state legislatures prevailed throughout the United States; but the ideal of equality in political representation was often unfulfilled.

In the United States today, however, federal law requires that all electoral districts within a state must have, as nearly as possible, the same number of inhabitants. This standard of political equality was set initially by the federal Apportionment Act of 1911. The federal Reapportionment Act of 1929 capped the size of the House of Representatives at 435 members.

Another indicator of democracy's advancement was the steady growth of suffrage in the nineteenth and twentieth centuries. During the first half of the 1800s, state legislatures removed their wealth or property requirements for voting, practically extending universal suffrage to white male residents. Woman suffrage advanced state by state from the late 1800s until ratification of the Nineteenth Amendment in 1920, which constitutionally prevents the federal and state governments from denying a woman's right to vote. The Fifteenth Amendment of 1870 prohibited denying voting rights on the basis of race but was neither effectively nor justly enforced in every state until enactment of the federal Voting Rights Act of 1965. Furthermore, the Twenty-fourth Amendment prohibited laws requiring payment of "any poll tax or other tax" as a condition for exercising the right to vote. Finally, the Twenty-Sixth Amendment in 1971 guaranteed that the right to vote of citizens "who are eighteen years of age or older" shall not be denied "on account of age."

A remnant of corporate apportionment and indirect representation was diminished by the Constitution's Seventeenth Amendment in 1913. This achievement of the Progressive reform movement provided direct popular election of the two senators constitutionally allocated to each state. Article V of the 1787 Constitution, however, protects indefinitely the requirement of two senators per state by stipulating "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Ironically, James Madison's Virginia Plan, which led to the framing of America's 1787 Constitution, proposed proportional representation based on population in both chambers of the bicameral Congress. The small states objected, and the so-called Connecticut Compromise perpetuated constitutionally the equal representation of the Union's constituent states in the United States Senate.

Despite the general, if uneven, growth of democracy in voting and representation, a perplexing inequality persisted, until a series of Supreme Court decisions constitutionalized the principle of "one person, one vote." This judicial process started with *Baker v. Carr*, 369 U.S. 186 (1962), and concluded in the case of *Reynolds v. Sims*, 377 U.S. 533 (1964). The Court ruled that state legislatures had violated the Fourteenth Amendment's equal protection clause by establishing electoral districts with gross disparities in population. Sparsely populated rural districts were overrepresented to the detriment of densely inhabited urban districts. The Court concluded that representation primarily pertains to people, not places, except for the US Senate. Thus electoral districts must be equal in population to ensure that each person's vote is of equal worth in both federal and state elections of representatives.

Since the 1960s, some reformers have strongly promoted a specialized use of the term "proportional representation" in which ethnic or racial minorities and women would be guaranteed a number of representatives based on their percent of the population, in order to advance the cause of equality in democracy. In response to this advocacy, and the Voting Rights Act of 1965, several states, mostly in the South, have modified electoral districts to increase the possibility of electing minority candidates to state assemblies and the US House of Representatives. However, the established system—single-member district apportionment and election—is not compatible with a theory of representation grounded in sociocultural identity. Many citizens also seem to favor the quality of a person's character and competence, not merely personal identity, as the best qualifications for good representation. As it has been in America's past, refinements and reformations of representation are likely to happen in the future, but not radical transformations that would subvert or overturn the prevailing political culture and institutions.

Representation in America's democratic republic has been impressively continuous and changeable, within the enduring principles of the federal Constitution. But by the democratic standards of America today, political representation in the founding period appears deficient. Nonetheless, nowhere in the late-eighteenth-century world were more people able to participate as voters and elected representatives in governments to which they consented. According to the distinguished constitutional scholars Philip B. Kurland and Ralph Lerner, the idea of representation in the 1787 Constitution "was something quite distinctive, truly a modern refinement of popular government" (1987, 383).

The overall advancement of democratic representation in America's political history stems from its constitutional grounding during the founding era. But there will always be tension between democratic ideals of representation and the less than perfect performances of established institutions. The prudential citizen's response to this dilemma of democracy is, as it was among the founding generation, to realistically, deliberatively, and persistently pursue a less and less imperfect democratic republic, and to reject the specious premises and promises of utopian perfection.

*John J. Patrick,
Indiana University*

SEE ALSO: *Representation: Accountability; Representation: Redistricting; Representation: Representatives; Representation: The Represented; Representation: Transparency.*

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Unit 3

How Has the Constitution Been Changed to Further the Ideals Contained in the Declaration of Independence?

American Constitutional Development from 1789 to 1868

The task of the delegates to the Constitutional Convention in 1787 was to develop a constitutional structure that could create a stronger national government able to conduct foreign affairs, suppress internal rebellions, negotiate international trade agreements, provide a coherent policy for dealing with Indians in the West and the foreign-owned colonies that bordered the United States, and develop sufficient military force to protect the nation and back up its foreign policy. The new government also had to be able to impartially settle disputes between the states and between citizens of different states, institute economic policies that would move the nation out of its current malaise, help develop the nation's interior lands and coastal harbors, and supervise the surveying, sale, and settlement of vast western lands.

Complicating these tasks were jealousies between states, fears of a strong central government, and differing social conditions among the states. The five southernmost states were deeply worried about the safety of slavery under a stronger national government; five states had ended slavery or were in the process of doing so. The commodity-producing slave states feared a national government that might regulate commerce in ways that would favor the more commercial states of the North. The Carolinas and Georgia particularly feared that the new government would prohibit the African slave trade. Many northerners were hostile to the African trade and skeptical about being forced to do the bidding of southerners who had special needs because of slavery.

Most delegates favored population-based congressional representation, but southerners and northerners disagreed on whether to count slaves when allocating representatives. Delegates from the smallest states feared that, without state equality in the national legislature, the large states would oppress them. The eventual compromise counted three-fifths of the slave population for the allocation of representation in the House of Representatives and gave every state two senators. The Constitution also created a cumbersome system for electing the president, through presidential electors allocated according to the state's total representation in the House plus its two senators. Thus the Electoral College gave slave owners extra political power through the three-fifths clause and favored the smaller states because every state had two senators no matter what its population. In the twenty-first century, the Electoral College still remains a fundamentally undemocratic aspect of the Constitution, giving greater power to residents of smaller states and diluting the electoral power of residents of larger states. Under the Electoral College it is possible for the candidate with the most popular votes to lose the election. Because of the bonus in the Electoral College of two senators for each state, the

small states have a decided advantage over the large states in presidential elections. The forty smallest states, representing only 46 percent of the population, have a majority of the electoral college votes, and thus can outvote the 54 percent of the population living in the ten largest states.

The delegates provided for a national court system, but they spent little time discussing how it would work. The Constitution did not include a bill of rights because most of the delegates (and later the Federalists who supported ratification) felt a bill of rights was unnecessary, inappropriate, or even dangerous in a government with limited powers. James Madison argued that a bill of rights was useless—"a parchment barrier" that Congress would ignore when it was convenient.

In the end the new Constitution contained sparse (and sometimes intentionally confusing) language, with complex and subtle provisions. It was open to multiple understandings and interpretations, and the Convention purposely refused to provide any records of its deliberations or debates, therefore making it impossible for future politicians or judges to fully understand their intentions. As a result, scholars, jurists, and other avid readers rely on the published notes of James Madison and other delegates. Some of these notes were first published in the early nineteenth century, but all known records of the Convention were compiled by Max Farrand with a supplement by James Hutson (Farrand 1967; Hutson 1987).

Opponents of ratification (Anti-Federalists) wanted to restructure the government, reduce the powers of the national government, and hold a new convention to rewrite the document. They persistently demanded a bill of rights. Many northerners denounced slavery provisions, especially the prohibition on ending the African slave trade before 1808. Despite strong debates and vociferous opposition, by July 1788 eleven states (two more than the requisite number of nine states) had ratified the document, and in March 1789 George Washington was inaugurated as president and the new government was launched.

CREATING A NEW GOVERNMENT AND AMENDING THE CONSTITUTION

The first task under the Constitution was to actually make the new government operational. Congress created executive departments and officers (initially War, State, Treasury, attorney general, and postmaster general), established a Supreme Court and lower federal courts, created officials to collect revenue, passed import duties, provided for the sale and settlement of western lands, established an army and a navy, provided for the appointment of diplomats and the funding of embassies, and in other ways implemented the new Constitution. In the next few years, acting under specific grants of power in the Constitution, Congress passed a militia act (1793) to ensure a pool of trained

KEY DATES

- 1789:** George Washington is inaugurated as the first president of the United States.
- 1789:** In the First Federal Congress, James Madison introduces a series of amendments, twelve of which are sent on to the states.
- 1791:** Three-fourths of the states ratify ten of the twelve amendments, which become known as the Bill of Rights.
- 1791:** Congress charters the Bank of the United States, the first national bank. The bank would close in 1811 upon expiration of the charter.
- 1792:** Congress establishes a postal system and creates a national mint, providing for the regular minting of United States coins.
- 1792:** Congress passes a pair of militia acts.
- 1793:** In *Chisholm v. Georgia*, the Supreme Court upholds the right of citizens of South Carolina to sue the state of Georgia in federal court for debts owed from selling uniforms to Georgia during the Revolution.
- 1795:** Largely in reaction to the *Chisholm v. Georgia* decision, the Eleventh Amendment is ratified. It declares that federal jurisdiction “shall not be construed to extend to any suit” brought by a citizen of another state or a foreign citizen against a state.
- 1798:** Congress creates a separate Department of the Navy.
- 1798:** President John Adams signs the Sedition Act, making it a crime to criticize the president and Congress but, significantly, not the vice president, his rival Thomas Jefferson.
- 1801:** President John Adams nominates John Marshall of Virginia to be the next chief justice of the United States Supreme Court. Marshall would serve for thirty-four years and shape the meaning of the Constitution, establishing the Supreme Court as a coequal branch of government with Congress and the president.
- 1803:** In *Marbury v. Madison*, Chief Justice John Marshall holds that the Supreme Court has the power to declare an act of Congress unconstitutional. This was the only time Marshall ever struck down a federal law.
- 1804:** The requisite three-fourths of the states ratify the Twelfth Amendment, which requires that electors designate separate presidential and vice presidential choices.
- 1816:** The government having suffered from the lack of a national bank and a national currency during the War of 1812, President James Madison signs a law creating the Second Bank of the United States.

men in the event of war, created a separate Department of the Navy (1798), established a postal system (1792), and created a national mint and provided for the regular minting of United States coins, which was an essential attribute of national sovereignty (1792).

In the First Federal Congress (1789), Madison introduced a series of amendments, twelve of which were sent on to the states. By December 1791 three-fourths of the states had ratified ten of the amendments, which became known as the Bill of Rights. These amendments placed limitations on the national government’s power to infringe on freedom of speech, press, religion, and assembly, while protecting (at the federal level) due process of law, the rights of the accused to fair trials with impartial juries, and private property. These amendments were critical for the development of American political culture, especially by enshrining freedom of religion, speech, press, assembly, and petition. But despite their importance for the political culture and for modern Americans, almost no court decisions were made involving the amendments before 1870, and Congress often ignored them, as Madison had predicted.

One of the few important cases the Supreme Court heard in its first decade concerned the clause that gave the Court jurisdiction “to Controversies . . . between a State and Citizens of another State.” In *Chisholm v. Georgia*, 2 U.S. 419 (1793), the Court upheld the right of citizens of South Carolina to sue the state of Georgia in federal court for debts owed from selling uniforms to Georgia during the Revolution. Most states were shocked by this interpretation, and by 1795 the nation had ratified the Eleventh Amendment, declaring that federal jurisdiction “shall not be construed to extend to any suit” brought by a citizen of another state or a foreign citizen against a state. In 1798 President John Adams signed the Sedition Act, making it a crime to criticize the president and Congress but, significantly, not the vice president (who was Adams’s political rival, Thomas Jefferson). Between 1798 and the end of the presidential campaign of 1800, about a score of Jefferson’s supporters were arrested under the act.

In retrospect this law seems to be an obvious violation of the First Amendment. But the Supreme Court never ruled on its validity at the time, and it expired on the last day of the Ad-

- 1819:** In *McCulloch v. Maryland*, one of his most important Supreme Court opinions, Chief Justice John Marshall emphatically upholds the constitutionality of the Bank of the United States.
- 1819:** Congress passes the Force Bill, which authorizes President Jackson to use federal troops to enforce federal tariff laws in South Carolina.
- 1820:** The Missouri Compromise permits Missouri to enter the Union as a slave state, permits Maine to enter as a free state, and prohibits slavery in all territories north of the southern border of Missouri.
- 1839:** The Removal Act of 1839 authorizes federal agents to begin removing Native Americans from southern states to the Oklahoma territories. Thousands of tribal members died along the Trail of Tears.
- 1857:** In *Dred Scott v. Sandford*, Supreme Court Chief Justice Roger Taney holds that Congress could never constitutionally limit slavery in *any* federal territory, that slavery was a specifically protected property under the Constitution, and that no black could sue in federal courts because no blacks—even those who were free and could vote or hold office in some northern states—could ever be considered citizens of the United States.
- 1860:** Abraham Lincoln becomes the first open opponent of slavery to be elected president. By the time he took office, seven states had formally seceded and formed the Confederate States of America.
- 1861:** The Civil War begins when Confederate troops fire on Union forces stationed at Fort Sumner, in Charleston, South Carolina. Four more states join the Confederacy after Lincoln issues a call to arms.
- 1863:** Lincoln issues the Emancipation Proclamation, freeing all slaves in those parts of the South still under Confederate control.
- 1865:** The Civil War ends. The Thirteenth Amendment is ratified.
- 1868:** The Fourteenth Amendment is ratified.
- 1868:** President Andrew Johnson is the first president impeached by the House of Representatives in American history. After a lengthy trial, the prosecution falls just one vote short of the necessary two-thirds majority of the Senate to remove him from office.

ams administration. In the twentieth century, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court declared that the Sedition Act had been found unconstitutional “in the Court of history.” Jefferson pardoned those convicted under the law, but once in power he initiated his own prosecutions of newspapers and others who opposed his administration. Some of these prosecutions continued into Madison’s administration. Thus several of the leading Founders, including Adams, Jefferson, and Madison himself, violated the parchment barrier. Jefferson also unsuccessfully tried to use the impeachment process to remove Supreme Court justices he did not like, but even some members of his own party opposed this attempt to destroy the independent judiciary.

In 1804 the requisite three-fourths of the states ratified the Twelfth Amendment, which required that electors designate separate presidential and vice presidential choices. This modified the method of electing the president to prevent opposing candidates from ending up in the same administration, as had happened in 1796 with the election of President John Adams and Vice President Thomas Jefferson, or two candidates from the same party being tied for the presidency, as happened in 1800 when Jefferson and Aaron Burr had the same number of electoral votes. The 1800 election resulted in near catastrophe. Between February 11 and February 17, the House voted thirty-five times, each time with the same result. Jefferson carried eight of the seventeen state delegations—one short of the necessary majority—while Burr carried six states and two state delegations were tied. Finally, mostly through the intervention of Alexander Hamilton, a number of Federalists cast blank ballots, allowing

Jefferson to pick up two state delegations and win the presidency. This election was the nation’s first great constitutional crisis. Jefferson feared that if the House had failed to resolve the election, Adams might have stayed in power. Thus Jefferson frantically wrote to governors sympathetic to him, urging them to send their state militias to the new national capital in Washington to seize the government if necessary.

After 1804 no other amendments were ratified until after the Civil War, although two—one banning titles bestowed by foreign governments (1810) and one promising that Congress would never interfere with slavery in the states (1861)—received two-thirds majorities in both houses of Congress, but neither was ratified by the states.

In 1801, while the House was trying to resolve the 1800 presidential election, the outgoing president, John Adams, nominated John Marshall of Virginia to be the next chief justice of the United States. Marshall served for thirty-four years and shaped the meaning of the Constitution, establishing the Supreme Court as a coequal branch of government with Congress and the president.

ECONOMIC DEVELOPMENT AND CONSTITUTIONAL INTERPRETATION, 1801–61

The most important constitutional developments from the 1790s to the 1860s concerned economics, politics, state–federal relations, and slavery. Some involved the Supreme Court, but many involved Congress and other political actors.

The National Bank. The first great post-ratification vlon-

American Constitutional Development from 1789 to 1868

stitutional debate began in December 1790, when Secretary of the Treasury Alexander Hamilton proposed that Congress charter a national bank. In the House of Representatives, James Madison, who had been Hamilton's ally during the ratification struggle, unsuccessfully argued that Congress lacked the constitutional power to create a bank. After Congress passed the bank bill, President Washington asked his cabinet to weigh in on the constitutional issues. Secretary of State Thomas Jefferson and Attorney General Edmund Randolph (1753–1813) both argued that the bank was unconstitutional. Hamilton responded with a long and enormously powerful analysis of the implied powers in the Constitution. Relying on the power of Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution,” in Article I, Section 8 of the Constitution, Hamilton argued that this provision was a basic means-ends relationship that enabled means like the bank to achieve broader ends laid out in the enumerated powers of the Constitution. But Hamilton qualified this argument: only if a bank was necessary for the government to collect taxes and disburse payments, and “[i]f the end be clearly comprehended within any of the specified powers” in the Constitution, and “if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority.” Washington signed the bill, chartering the bank for twenty years.

When the charter expired in 1811, Madison was president, and the bank closed. During the War of 1812, however, the government suffered from the lack of a bank and a national currency, and President Madison now admitted that Hamilton had been correct: a bank was “necessary and proper” to a functioning government. In 1816 Madison signed a law creating the Second Bank of the United States. In *McCulloch v. Maryland*, 17 U.S. 316 (1819), which was one of his most important Supreme Court opinions, Chief Justice Marshall emphatically upheld the constitutionality of the Bank. Looking at the entirety of the Constitution, Marshall found numerous places where a safe, secure, fully functioning national bank was “necessary” for the smooth operation of the government, such as borrowing money, collecting taxes, regulating commerce, supporting the army and navy, and conducting a war. The Bank was necessary because “the sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are intrusted to its Government” (17 U.S. at 407).

Marshall argued that the Constitution had to be read broadly to give the national government flexibility to govern. Reminiscent of Hamilton's means-end argument, Marshall wrote: “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 consist with the letter and spirit of the Constitution, are Constitutional” (17 U.S. at 421). He reminded Americans: “In considering this question, then, we must never forget that it is a *Constitution* we are expounding” (17 U.S. at 407). This Constitution was, he continued:

intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by

immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur (17 U.S. at 415).

In *McCulloch* Marshall established the power of Congress to act in any way that did not contradict the Constitution. He had earlier held, in *Marbury v. Madison*, 5 U.S. 137 (1803), that the Court had the power to declare an act of Congress unconstitutional (as he did in that case). *Marbury* was the only time Marshall ever struck down a federal law, but his court often found state laws unconstitutional. Thus, in *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), he prevented the state of New Hampshire from abolishing Dartmouth College because the college's charter constituted a “contract,” and the Constitution prohibited the states from “impairing the Obligation of Contracts.” In *Gibbons v. Ogden*, 22 U.S. 1 (1824), he used the commerce clause to strike down a New York law that prohibited out-of-state passenger vessels from entering the state's waters. In *Cohens v. Virginia*, 19 U.S. 264 (1821), he emphatically upheld the right of the Supreme Court to review a criminal conviction in Virginia because the case involved a federal law and a claim by the defendant of a federal right. Although Marshall upheld the conviction, Virginia authorities still vigorously argued that the Court had no right to hear the case in the first place.

Equally important in establishing the power of the Supreme Court to be the final arbiter of the meaning of the Constitution was Justice Joseph Story's opinion in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), which involved land Virginia had confiscated during the Revolution. Treaties with Great Britain after the Revolution required that such land be returned to the original owners, but Virginia adamantly refused to do this and denied the Court had any authority in the matter. The issue in the case was about power, and the Court had the last word, holding that the supremacy clause, which declares that “the Constitution . . . and all Treaties made . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby,” trumped Virginia's laws. Justice Story also emphatically affirmed the Supreme Court's power to hear appeals from state cases and to overturn state court decisions. Story declared:

If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states; and might perhaps never have precisely the same construction, obligation, or efficacy, in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution (14 U.S. at 348).

Although Marshall upheld the constitutionality of the Bank in *McCulloch*, as well as the power of Congress to use the necessary and proper clause, the history of the Bank and its relationship to constitutional development did not end there. In 1832 Congress passed a bill to recharter the Second Bank of the United States when its existing charter ran out in 1836. President Andrew Jackson vetoed the bill, arguing that, despite what Marshall said, the Bank was in fact unconstitutional. He felt that the new “charter proposed by this act” was not “consistent with the rights of the States or the liberties of the people.” Jackson of course was perfectly free to veto the bank bill, as he did, and to read the Constitution in a different way from

Marshall. Jackson was not challenging Marshall's power to uphold the 1816 charter, but he was asserting his right as president to independently interpret the Constitution when deciding whether to sign a bill, or veto it, based on his constitutional understanding. Modern presidents often follow Jackson's lead in this way.

Tariff Policies and Nullification. Another great constitutional crisis—almost as important as the 1800 election—arose over tariff policies. In 1828 and 1832 Congress passed a highly protective tariff to protect emerging American industries. South Carolina believed the 1832 tariff was harmful to the state's interests and passed an Ordinance of Nullification, declaring that the law would not be enforced in the Palmetto State. In the Senate, Daniel Webster (1782–1852) of Massachusetts vigorously debated Robert Y. Hayne (1791–1839) of South Carolina. President Jackson threatened to use federal troops to enforce the law, and Congress passed the Force Bill to allow Jackson to do just that. South Carolina backed down, but then petulantly passed a law “nullifying” the federal Force Bill.

Indian Removal. While dealing with the nullification crisis, Jackson also negotiated with Georgia over the removal of the Cherokee Indian nation. Indian removal had been a key national policy since Jefferson's presidency. In *Johnson and Graham v. McIntosh*, 21 U.S. 543 (1823), Marshall had declared that Indian tribes could never own land and that Congress could abrogate treaties at will. When Georgia violated treaties with the Cherokee, Chief Justice Marshall refused to intervene, and in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), he held that Indian nations had no power to sue in federal court because they were “domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases; meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian” (30 U.S. at 2). In *Worcester v. Georgia* (1832), Marshall held that a white missionary had a right under federal law to live among the Cherokee, but this decision did not interfere with the power of the national government to abrogate Indian treaties at will and remove all Indians west of the Mississippi. Jackson then negotiated a compromise with Georgia, in which Worcester was released from jail (and exiled to the Indian Territory, present-day Oklahoma) and the United States guaranteed the removal of all Cherokee from Georgia.

Commercial Regulations. When Marshall died, Jackson appointed Roger B. Taney, his former attorney general, to lead the Court. Taney's court modified some of the commercial regulations of the Marshall Court, giving more power to the states to regulate interstate commerce. In *Mayor of New York v. Miln*, 36 U.S. 102 (1837), the Supreme Court upheld New York State's law regulating foreign immigration under a theory of local “police powers.” Similarly, in *Cooley v. Board of Wardens*, 53 U.S. 299 (1852), the Court upheld a Pennsylvania law requiring that all ships entering the city of Philadelphia's port take on a local pilot. In *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837), the Court held that narrowly construing a bridge charter did not violate the Constitution's contracts clause. This decision helped stimulate new technological innovations and developments. Despite its general deference to states, in *The Passenger Cases*, 48 U.S. 283 (1849), the Court found that a direct tax on immigrants violated the commerce clause, and in

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1852), the Court extended federal admiralty jurisdiction to inland lakes and rivers.

Slavery. From 1819 to 1861 the most important constitutional issues in Congress and before the Court revolved around slavery. In the Missouri Compromise (1820), Congress allowed Missouri to enter the Union as a slave state but banned slavery in the federal territories north and west of Missouri. Many southerners believed this law violated their constitutional rights. In the 1830s and 1840s, the House of Representatives refused to accept antislavery petitions, tabling them without even reading them. Many northerners considered this a grotesque violation of the First Amendment, which guaranteed the right of the people to “petition the government for a redress of grievances.” In 1844 President John Tyler signed a bill to annex the independent Republic of Texas, which became the nation's largest slave state. When he could not muster the two-thirds vote in the Senate necessary to ratify a proposed treaty with Texas, Tyler annexed it with a simple statute. Many northerners believed this process was unconstitutional. Debates in Congress in the 1840s and 1850s swirled around admitting new slave states, opening more territories to slavery, and the passage of a new fugitive slave law, which denied alleged slaves the right to a jury trial or access to habeas corpus. Opponents argued that this provision explicitly violated the procedures specified in the Constitution for suspending the Great Writ.

Meanwhile the Court consistently interpreted the Constitution to support the interests of slave owners. Chief Justice Taney was deeply committed to slavery and throughout his career argued that free blacks could never be citizens of the United States. In *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), Story, writing for the Court, upheld the constitutionality of the Fugitive Slave Law of 1793. More important, he ruled that no state could pass laws to protect their free black citizens from kidnapping and that slave owners had a constitutional right to seize their fugitive slaves and take them to the South without any due process hearing. In *Jones v. Van Zandt*, 46 U.S. 215 (1847), the Court upheld a huge monetary judgment against a white man who had offered a ride to blacks (who were in fact fugitive slaves) walking along a road in the free state of Ohio. The Court reasoned that, even in a free state, Van Zandt should have known the blacks were fugitive slaves. In *Dred Scott v. Sandford*, 60 U.S. 393 (1856), Chief Justice Taney held that Congress could never constitutionally limit slavery in any federal territory, that slavery was a specifically protected property under the Constitution, and that no black could sue in federal courts because no blacks, even those who were free and could vote or hold office in some northern states, could ever be considered citizens of the United States. Taney asserted in *Dred Scott* that since the founding all African Americans were “considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them” (60 U.S. at 404–5). Since 1787 the national government had constantly regulated slavery in the territories, and thus Taney's arguments on the territories shocked most northerners. Similarly, many northerners rejected Taney's claims about citizenship, in part because in 1787 and 1788 free black men could vote in six states and helped ratify the Constitution. Even in northern states where blacks could not vote, they were allowed to own property, attend schools,

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and engage in almost all economic activities, as other citizens could do.

Two years later, in *Ableman v. Booth*, 62 U.S. 506 (1859), Taney abandoned his strong support for states' rights, holding that the Wisconsin courts could not interfere with the arrest of a state citizen accused of rescuing a fugitive slave. In this emphatically proslavery decision, Taney sounded as nationalistic as John Marshall, asserting that "the statesmen who framed the Constitution" believed "that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities" (62 U.S. at 517). A court that had consistently supported states' rights now suddenly rejected the theory to protect slavery. Ironically, in *Cooper v. Aaron*, 358 U.S. 1 (1958), which stemmed from the integration of Central High School in Little Rock, Arkansas, the Supreme Court cited the proslavery decision in *Ableman* for the proposition that state officials could not block integration.

THE CONSTITUTION'S GREATEST CRISIS: 1861–68

In 1860 Abraham Lincoln was elected president. He had stated that the national government had no constitutional power to interfere with slavery in the states where it existed but had indicated that his administration would oppose the admission of any new slave states and would prohibit slavery in the territories. Lincoln argued that Taney's assertions in *Dred Scott* on the status of slavery in the territories were "dicta," individual nonbinding opinions, and hence not constitutionally valid. He also argued that eventually slavery had to be put on a "course of ultimate extinction." This was the first time an open opponent of slavery had ever been elected president. By the time Lincoln took office, seven states had formally seceded and formed the Confederate States of America. Congress had passed a constitutional amendment, known as the Corwin Amendment, which would have forever protected slavery where it existed. But the southern states were not interested in remaining in the nation, and the amendment failed to guarantee their right to expand slavery into the territories. Lincoln argued that secession was illegal and unconstitutional and that the nation could not be dissolved without some legislation or even a constitutional amendment. No state or group of states could unilaterally leave the Union. Most northerners accepted this constitutional theory, and when Confederate forces fired on United States troops stationed in Charleston harbor, the war began. Four more states then joined the Confederacy.

The Civil War raised numerous constitutional questions dealing with the power of national government, the exigencies of war, and slavery and race. When the war began, the United States Army was tiny, had no national police force or secret service, and had few laws to prevent sabotage or even violence against the national government. The Constitution allowed for the suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it." The Constitution did not designate whether Congress, the executive branch, or even the courts might suspend the writ. Congress was not in session when the war began, and Lincoln used the suspension clause to allow the army to arrest saboteurs who were destroying railroad tracks and bridges and organizing pro-Confederate militias in Maryland. In *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), Chief Justice Taney,

ruling from his Supreme Court chambers, declared that the suspension was unconstitutional, asserting that only Congress could suspend the writ. Lincoln ignored the ruling—pointing out that, if Congress was not in session, the government still had to protect itself from violent assaults—and continued to hold Merryman and other traitors in the North who were making war on the United States. When Congress came back into session in July 1861, it authorized far more extensive suspensions of the writ. The Supreme Court never heard any other suspension cases during the war.

The administration also blockaded southern ports, which the Supreme Court narrowly approved in *The Prize Cases*, 67 U.S. 635 (1863), taking "judicial notice" that a civil war was in progress and such wars are never declared. The administration directly issued paper money for the first time in American history, imposed an income tax for the first time, and created a commissioner of internal revenue, which was the forerunner of the modern Internal Revenue Service. The Supreme Court refused to consider the validity of paper currency in *Roosevelt v. Meyer*, 68 U.S. 512 (1863), but in *Knox v. Lee*, 79 U.S. 457 (1871), and *Parker v. Davis* (resolved in the same decision), the Court affirmed the constitutionality of the paper money issued by the United States. During the war the army suppressed some newspapers in the North, although the administration usually countermanded these actions. Throughout the war the northern press was enormously free, and anti-Lincoln papers regularly criticized the president and the war effort, with no legal consequences. Congress created a military draft, and a few legal challenges to it failed. The Confederacy, which had a constitution similar to that of the United States, also suspended habeas corpus, but southern officials arbitrarily arrested significantly more citizens, censored the press, and closed down almost all opposition papers.

The war also raised constitutional questions about slavery, and with eleven slave states no longer participating in Congress, it was possible to deal with slavery at the national level. In his inaugural address Lincoln reiterated that he had "no lawful right" to "directly or indirectly . . . interfere with the institution of slavery." This was the accepted understanding of the Constitution. But, as slaves escaped across US Army lines, the administration authorized their emancipation because they were "contrabands of war" being used by the Confederate army. Congress authorized the emancipation of slaves owned by those in rebellion under the Confiscation Acts of 1861 and 1862, ended slavery in the District of Columbia by "taking" slave property and compensating masters, and ended all slavery in the territories, without compensation, ignoring the *Dred Scott* decision. On January 1, 1863, Lincoln issued the Emancipation Proclamation, freeing all slaves in those parts of the South still under Confederate control. He acted under his constitutional powers as commander in chief of the army. No one ever tested the constitutionality of this act, and by December 1865 the Thirteenth Amendment had ended all slavery in the nation, thus mooted any constitutional issues from the Emancipation Proclamation.

Reconstruction and Civil Rights. As the war wound down, Congress and eventually the Court had to deal with issues of freedom, military trials of civilians, and the Reconstruction of the Union. The Thirteenth (1865), Fourteenth (1868), and Fifteenth (1870) Amendments ended slavery, made blacks citizens of the nation, and prohibited race discrimination in voting. These amendments passed Congress only because the

former Confederate states had no representatives in Congress and the former Confederate states were required to ratify them as a condition of readmission to the Union. The amendments remade American federalism by limiting the power of the states to discriminate among its citizens, and the Civil Rights Act of 1866 gave the former slaves legal equality on a variety of levels.

The government embarked on a massive social welfare program under the Freedmen's Bureau but was stymied in giving former slaves land as a result of various clauses of the Constitution. Military Reconstruction led to a variety of cases involving the jurisdiction of Congress, with the Court acquiescing in Congressional policy in *Mississippi v. Johnson*, 71 U.S. 475 (1867); *Georgia v. Stanton*, 73 U.S. 50 (1867); and *Ex parte McCordle*, 74 U.S. 506 (1869). Throughout this period President Andrew Johnson, a former slave owner who took office after Lincoln was assassinated, did everything in his power to foil attempts by Congress to protect black rights. He vetoed the Civil Rights Act and the Freedmen's Bureau Act, and when the vetoes were overridden, he refused to enforce the acts. This led in 1868 to his impeachment by the House—the first presidential impeachment in history. After a lengthy trial the prosecution fell just one vote short of the necessary two-thirds majority of the Senate to remove him from office. The acquittal was mostly due to presidential politics. A few supporters of the presidential aspirations of General Ulysses S. Grant (1822–85) thought he would fare better if Johnson remained in office, because if Johnson were convicted, the Radical Republican, Benjamin F. Wade (1800–78), as president pro tem of the Senate, was next in line for the presidency.

The Constitution never contemplated secession, a civil war, or the military occupation of large parts of the nation. But the Court, now under the leadership of Salmon P. Chase, who had been an active abolitionist before the war, generally supported an innovative and flexible approach to Reconstruction. At the same time, the Court began to protect civil liberties in ways that had never been done before. Thus, in *Ex parte Milligan*, 71 U.S. 2 (1866), the Court held that, where civilian courts were in place and working, it was unconstitutional to try civilians by military tribunals. Similarly, in *Cummings v. Missouri*, 71 U.S. 277 (1867), and *Ex parte Garland*, 71 U.S. 333 (1867), the Court held that Congress could not constitutionally require civilians to take a “test oath” swearing they had never been part of the Rebellion. In *Texas v. White*, 74 U.S. 700 (1869), an important, but almost impossibly complicated case, Chief Justice Chase ruled that the former Confederate states had never ceased to exist, as states within the Union, because the Constitution “looks to an indestructible Union composed of indestructible states.” Thus secession was constitutionally impossible. Chase concluded, however, that when Texas seceded, its government ceased to exist and that all acts of the Confederate state governments “were absolutely null,” and as such Congress had the power to create new governments and reconstruct the states.

Legacy of the Civil War. In the aftermath of Reconstruction, the Court refused to vigorously enforce the new amendments. Gradually, whites hostile to equality regained political power and used that power to segregate and disenfranchise blacks and economically, legally, and politically oppress them. By and large, the Court acquiesced to these changes from the 1870s until the mid-twentieth century, as did successive Congresses populated by unreconstructed representatives and senators from seventeen segregating states. But the legacy of the

Civil War—the three amendments—remained in the Constitution, to be revived in the modern era.

*Paul Finkelman,
University of Saskatchewan School of Law
University of Pennsylvania*

SEE ALSO: *American Constitutional Development from 1868 to 1937*; *Civil War Amendments*; *Marshall, John*; *National Bank Controversy*; *Slavery*; *US Bill of Rights*.

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Political Party

American politics has almost from its inception been marked by stable two-party competition. Earlier versions of political parties can be seen in the colonial and founding periods, but they did not acquire their modern form, legitimacy, and permanence until the 1830s. They reached the height of their power in the last quarter of the nineteenth century and declined from then through much of the twentieth century until they began to reorganize themselves.

FROM FACTION TO PARTY

In the Anglo-American world, parties developed in the aftermath of the Glorious Revolution of 1688 to 1689, which established the Parliament (the House of Commons in England and the assemblies in the colonies) as the predominant branch of the

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government. Robert Walpole (1676–1745), usually called the first prime minister of Great Britain, developed the Whig Party as a means to organize the unmanageably large body of Parliament. The Whigs represented distinct interests in British society, including merchants and dissenting Protestants, whereas the opposition Tory Party represented the landed magnates and Church of England. Walpole was able to manage Parliament through royal patronage—the granting of titles of nobility, of sinecures (cushy jobs) and pensions, and other favors. Critics of this “Robinocracy” (so-called because Walpole’s nickname was Robin) decried its venality and corruption, and condemned parties as betraying the public or national interest for the sake of private gain. These critics, known as the Opposition Writers (particularly John Trenchard and Thomas Gordon, the authors of *Cato’s Letters* in the 1720s), had a significant influence in the American colonies.

Similar party alignments were discernible in the American colonies, especially in New York and Pennsylvania. Though parties often coalesced around strong personalities or economic interests, the most enduring basis for partisan formation was cultural—ethnicity and religion above all. Pennsylvania was divided among the old English Quakers who founded the colony and lived in the eastern third of the colony, Germans of various denominations in the middle, and Scots-Irish Presbyterians in the western backcountry. In Virginia, Baptists fought to disestablish the Church of England. Upcountry South Carolinian yeomen, predominantly Scots-Irish, demanded more representation from the tidewater Anglican slaveholders who dominated the colony.

Once the colonies became states, partisan activity became the central problem in American political theory, as interest groups gained control of state governments and imperiled the public good and private rights. In Pennsylvania the western Scots-Irish Presbyterians took over the new state government and discriminated against the formerly dominant Quakers. Baptists and other dissenters struggled for the disestablishment of official churches in Massachusetts and Virginia. In almost every state, agrarian debtors called for monetary inflation to relieve their debts, resulting in many issues of paper currency. Tories and Loyalists were also subject to persecution and exile. State acts targeting these groups often violated the Treaty of Paris and caused diplomatic friction with Great Britain. One of the principal reasons for the formation of the United States Constitution of 1789 was the perception that factions were undermining republican government. In *Federalist* No. 10, the most famous paper of *The Federalist*, James Madison defined a faction as “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” He argued that an “extended republic” under the Constitution would help control the effects of factions by making it more difficult to form majority factions across the continent. (Minority-group factions, he assumed, would be defeated by the majority-rule principle of the republic.) The Constitution, he said, provided “a republican remedy for the diseases most incident to republican government.”

The contest over the ratification of the Constitution produced what looked like the first national partisan contest, between the Federalists and Anti-Federalists. But despite many efforts by historians to identify these two groups with particular interests—especially economic ones, as Charles Beard attempted in his 1913 work, *An Economic Interpretation of the Constitu-*

tion—the ratification contest was mainly about political principles rather than specific policies. Although certain issues were directly addressed in the Constitution, such as the prohibition on state paper-money issues, it was difficult to conjecture what the Constitution’s effect on policy would be in the long run. The remarkable degree to which the Anti-Federalist opponents of the Constitution accepted their defeat and became loyal to the new government showed a high degree of consensus behind the ratification contest.

A clear source of American national parties was the program of national economic development initiated by Secretary of the Treasury Alexander Hamilton under President George Washington. These programs, especially the Bank of the United States, were defended by Federalists and provoked an opposition, which came to be called the Republicans, to organize around Thomas Jefferson and James Madison. These differences were exacerbated by the wars of the French Revolution, in which the Federalists favored the English and the Republicans favored the French.

Neither the Federalists nor the Republicans considered themselves factions or parties. They both believed that they were being faithful to the principles of the Revolution and the Constitution, and defined one another as parties undermining those principles. The two groups were also elite-led rather than bottom-up mass organizations, because every state still restricted voting to property owners. The Federalists considered the Republicans’ opposition to be illegitimate and went so far as to criminalize criticism of the government in the Sedition Act of 1798. That act, along with other unpopular Federalist policies (taxes especially), allowed the Republicans to take control of the presidency and Congress in 1800.

Party organization in the presidential election of 1800 produced a tie in the Electoral College. Under the original Constitution, each elector cast two votes, and the person receiving the most votes (if a majority) became president, and the runner-up became vice president. Because all of the Republican electors cast one vote for Thomas Jefferson and one for Aaron Burr, the tie vote was decided by the House of Representatives. After this foul-up, Congress proposed, and the states ratified, the Twelfth Amendment, by which electors cast separate votes for president and vice president. As a result of this recognition of party organization and tickets of presidential and vice-presidential candidates, the national popular vote has always (except in 1824) produced an Electoral College majority. (In 1876, 1888, and 2000, however, a popular vote minority produced an Electoral College majority.)

The Federalists never regained control of any part of the federal government and lost control of an increasing number of state governments. They were nearly extinguished by their opposition to the War of 1812. By the administration of James Monroe (1817–25), it appeared that partisan conflict had ended, in what came to be called “the era of good feelings.”

THE PARTY HEYDAY

Political parties reached their modern form and greatest power in the period from the 1820s to the end of the century. The old Jeffersonian Republican Party, which had absorbed many former Federalists, was transformed into the Democratic Party by the controversy over Missouri statehood (1819–20) and the presidential election of 1824. When the territory of Missouri sought admission to the Union as a slave state, former Federal-

ists attempted to compel it to provide for the abolition of slavery as a condition of admission. It seemed to some that the former Federalists were attempting to revive an opposition party on sectional and ideological grounds that could endanger the Union. Congress reached a compromise on the issue, but it served as what Jefferson called “a fire bell in the night.”

In 1824 the Republican caucus in Congress, which had effectively chosen the president since the Jefferson administration, broke down and a five-man contest for the presidency ensued. Andrew Jackson won a plurality of the popular and electoral votes, but the House of Representatives chose John Quincy Adams instead of Jackson as president. Jackson supporters believed that he had been cheated out of his office and organized to elect him in 1828. This campaign showed the potential danger of factions forming around great, charismatic personalities. However, parties prevented “Bonapartism,” the claim (as exemplified by Napoléon Bonaparte) that a president embodied the people. The president instead would be the product of a party organization, with its state and local components. The party essentially took the place of the Electoral College (which Jackson proposed to abolish).

As a US senator from New York, Martin Van Buren (1782–1862) was the principal architect of the new party structure. Its main goal was organization—to connect the government to the millions of voters who had been enfranchised since most states had adopted universal manhood suffrage and had made more offices elective rather than appointive. The discipline and organization of the party prevented demagogues from appealing to the masses, exploiting personal and sectional issues. The party would operate in all parts of the country and would involve people at the local, state, and national levels. The party would promote itself via newspapers, using the new mass media of the day, along with torchlight parades, slogans, buttons, banners, and other images. Perhaps most important, it would reward its supporters with offices, in a patronage or “spoils system.”

After its electoral function, the party also served the end of organizing governance. It proposed a platform of principles and measures (though members often made them as noncommittal as possible), coordinated action between state and national organizations and between the branches of government, and provided the leaders and “whips” to discipline members in legislatures.

The Whig Party, which arose in opposition to the Jacksonian Democrats, shared many of the demographic bases and policy positions of the Federalists. But by 1840 the Whigs had lost the last vestiges of founding-era suspicions of mass democracy and parties, and became competitive with the Democrats. The Whigs initially had regarded the Jacksonian Democrats as a threat to constitutional government, particularly because of Jackson’s use of executive power—the veto, patronage, and removal of federal officers. They regarded “King Andrew the First” as a dangerous demagogue like Julius Caesar or Napoléon Bonaparte. But they came to accept the new democratic politics. Their 1840 presidential campaign used all of the electoral gimmicks of the new age.

The Democrats were the stronger party, controlling the federal government for most of the period before the Civil War. As the country became increasingly divided over the slavery issue, the Whigs lost their southern supporters to a greater degree than the Democrats lost their northern ones. The Democratic Party was the only national institution left before it, too, split in 1860. With the new Republican Party a strictly northern

concern, Stephen Douglas (1813–61) of Illinois was the only candidate in that year’s presidential election to campaign throughout the country.

The continuation of the political parties during the Civil War played an important role in the Union victory. The Republican Party helped President Abraham Lincoln to organize the North for the war, and the Democratic Party helped him to see who his opposition was. The Confederate States of America, on the other hand, was weakened by the absence of a party system. The leaders of the secession movement believed that the rise of political parties had corrupted the American Constitution and undermined its protection of slavery. Thus the Confederate Constitution was designed to prevent party formation, especially by making pork-barrel politics and patronage more difficult. It required a two-thirds vote for spending not requested by the president, gave the president a line-item veto, limited the president to one term and gave tenure to lower-level officers, gave cabinet officers places in the legislature, and prohibited protective tariffs and internal improvements. Confederate President Jefferson Davis had neither the benefits of loyal party discipline nor the pressure of an opposition party to organize the Confederate war effort.

When the Confederate states were readmitted to the Union, a period of national two-party politics returned for about a decade as the Republicans tried to protect the voting rights of the freedmen. But by 1890 the southern states had effectively disfranchised blacks (and many poor whites), and established a one-party region, the Democratic “Solid South.” The two parties were challenged by a variety of third parties in the late nineteenth century, such as those committed to paper money, labor, prohibition of alcohol, and other causes. The most significant of them was the rise of the Populists in the 1890s, expressing the grievances of southern and western agrarians. The Democratic Party responded by adopting the Populist policy of inflation by coining silver, but the Republicans, in the decisive election of 1896, won on the gold standard against the Populist-Democrat fusion party.

THE DECLINE OF PARTIES

Political parties have declined in importance since the late nineteenth century. The apparent corruption of the spoils system led to the Civil Service Reform (Pendleton) Act of 1883, which removed an ever-greater number of federal officers from partisan selection and dismissal. For many voters and party cadres, this significantly weakened the attraction of working for their party’s success.

Progressive intellectuals regarded the parties as impediments to the development of the modern administrative state. They embarked on a long campaign to replace them with a strong presidency and a politically insulated corps of expert bureaucrats, building on the civil service reform movement. Especially important was the changing legal status of parties. They began as local, voluntary associations. The national organizations they mustered every four years to campaign for their presidential candidate faded away after the election was determined. In the twentieth century, parties became federated nationwide organizations regulated by the states and eventually by federal law.

The movement of power from Congress to the presidency in the twentieth century, and the president’s ability to communicate directly with the electorate via new media (radio,

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television, social media), also weakened the parties as intermediaries between government and citizen. The use of the direct primary to nominate candidates undermined the power of party leaders, who had previously anointed their choices in “smoke-filled rooms” (a common metaphor for places where secret political deals are made). The Seventeenth Amendment’s provision for the direct popular election of senators further reduced party influence.

In the late twentieth century, even incumbent presidents seeking their party’s renomination were not safe from challenges by rivals who believed that they could attract primary voters. Theodore Roosevelt was a Republican challenger in 1912, but the Republican Party machine frustrated him, and he formed a third party, the Progressive party. Even Herbert Hoover, the most vulnerable of incumbents in 1932, faced no serious opposition. But party upstarts challenged incumbent presidents Lyndon Johnson in 1968, Jimmy Carter in 1980, and George H. W. Bush in 1992. Johnson dropped out; Carter and Bush were nominated but defeated in the general election.

As the parties became increasingly national, top-down rather than local, bottom-up organizations, they lost popular appeal and loyalty, as indicated by declining voter-participation rates in the twentieth century. Voter turnout in presidential elections was rarely below 75 percent in the Gilded Age of the late nineteenth century; it never exceeded 65 percent in the twentieth century. The development of “programmatic liberalism” in the national welfare state made party provision of these services less necessary, as depicted in Edwin O’Connor’s classic political novel, *The Last Hurrah* (1955).

The two parties continue to provide the basic structure of American electoral and legislative politics. Third parties generally have only marginal influence on elections and virtually none on governance. The most significant third-party presidential challenges were the Progressive parties of 1912 and 1924, the States’ Rights (Dixiecrat) movement of 1948, the Independent Party of Alabama governor George Wallace between 1964 and 1972, and H. Ross Perot’s Reform Party campaign of 1996.

Since the end of twentieth century, public opinion and voting behavior have migrated toward the ideological extremes of both major parties. This was one of Franklin D. Roosevelt’s goals, to turn the Democratic Party into the liberal party and the Republican Party into the conservative party. Thus he tried to “purge” the southern conservatives from the party in 1938 and reached out to liberal Republicans in the 1940s. In Congress more votes are cast along party lines, and there is less room for moderates, compromises, and switch-over voting. Political observers use the term “partisan polarization” to refer collectively to these developments. There is less agreement, however, over what this means for the strength and cohesiveness of party organizations. In the electoral process, the Democratic and Republican Party organizations are still not the major campaign donors, and it is not entirely clear what role they will play in campaign coordination. In the legislative process, votes may be cast along party lines, but in Congress, for example, the Republican and Democratic Party leaders cannot always be counted on to unite their members and mobilize votes. During the Obama years, congressional Democratic leaders often found it difficult to rally support for the president’s policies, and many conservative Democrats who did support the administration lost their seats in 2010, making the remaining Democratic Party more liberal. Congressional Republican leaders faced a division in their ranks between the very conservative “Tea Party” and less

conservative members. All this puts party leaders in a quandary: how can they capitalize on partisanship without letting the spirit of partisanship continue to divide the country and its representatives?

*Paul D. Moreno,
Hillsdale College*

SEE ALSO: *Democrats; Electoral College; Federalists; Partisanship; Party Platform; Polarization; Political Party Systems; Republicans.*

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Judicial Review

Judicial review is the authority of a court to determine if legislation and executive action are consistent with federal and state constitutions, statutes, and other laws, and to declare laws and actions void if they are inconsistent with a higher form of law. Judicial review is not explicitly found in the Constitution of the United States. The Supreme Court has held that the authority is implicit in the Constitution’s separation of powers and specifically in the delegation of authorities and responsibilities to the judiciary found in Articles III and VI. Judicial review is one form of constitutional review. Other forms of constitutional review can be found in American history and around the world.

ANTECEDENTS OF JUDICIAL REVIEW

In early British history the monarch’s powers were largely unchecked. By the time the British colonies in America were founded, the idea had been established that the power of the monarch should be limited by fundamental rights of the people. The Charter of Liberties of 1100 and Magna Carta of 1215 were two significant, although mostly symbolic, events in the history of Western constitutionalism. Through the former, Henry I (ca. 1069–1135) made concession to nobles and clergymen. Through Magna Carta, King John of England (1167–1216) calmed a rebellion by agreeing, among other things, to provisions limiting his powers and enumerating the rights of others. A little-known provision was a forerunner of judicial review: a council of twenty-five barons was to be appointed to review the actions of the king and his agents to ensure compliance with Magna Carta.

The principle that there is a superior form of law to executive decrees or acts of the legislature, commonly known as natural law, provides the foundation of judicial review. In *Dr. Bonham’s Case* (1610), Lord Edward Coke (1552–1634), a respected English jurist and chief justice of the Court of Com-

mon Pleas, enunciated the natural law underpinnings of judicial review: “[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul [sic] it, and adjudge such Act to be void.” In spite of this famous pronouncement by Lord Coke, which was made during a period when natural law theory was on the rise, parliamentary supremacy remains in England in the early twenty-first century. In fact, Parliament reenacted the law the Coke court challenged, and Coke was removed from the bench and briefly imprisoned, in part because of the *Bonham* decision (Graber and Perhac 2002).

The English colonists in the United States transplanted the British common law and the philosophical underpinnings of judicial review. Indeed constitutional review was practiced in colony and state courts before the adoption of the Constitution of 1789. The Pennsylvania Constitution of 1776 established a Council of Censors, composed of persons chosen from each city and county, charged with reviewing legislation and executive action for constitutionality. This body was delegated the authority to issue public censures, to order impeachments, to recommend that unconstitutional laws be repealed, and to call constitutional conventions. The Vermont Council of Censors was similar to Pennsylvania’s. New York, in contrast, did not elect laymen to sit on its council. Rather, the governor, chancellor, and judges of the state supreme court sat together on a Council of Revision, which reviewed bills for constitutionality before they became law. The council possessed the authority to veto unconstitutional bills, subject to override by a two-thirds majority vote of the state legislature (Haines 1959). Although all three councils were eventually abolished, they illustrate that early Americans did not embrace the English principle of legislative supremacy.

In several cases that predate the Constitution of 1789, judicial review was either exercised or recognized by state courts. For example, *Holmes v. Walton*, a 1780 decision in New Jersey, involved a statute that provided for a six-man jury (Scott 1899). The defendant objected, claiming that a twelve-man jury was required by the state constitution. The court agreed and invalidated the statute.

This history influenced the men who met in Philadelphia in 1787. Indeed, judicial review was referred to on several occasions during the Constitutional Convention (Prakash and Yoo 2003). In some instances the presumption that courts would possess judicial review authority influenced the outcome of the debates, including the delegates’ rejection of a council of revision to check legislation for constitutionality. Subsequently, the authority of the courts to review and to refuse to apply unconstitutional legislation was discussed in seven of the state ratification conventions and in pamphlets and other materials debating the proposed Constitution outside the conventions. Alexander Hamilton, for example, wrote in *Federalist* No. 78 (1788):

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution

void. Without this, all the reservations of particular rights or privileges would amount to nothing.

He further noted that, “where the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws. . . .”

MARBURY V. MADISON

Even though the authority of judicial review was assumed by many of the Framers, or possibly because of it, that authority is not expressly found in the Constitution. The Supreme Court of the United States implicitly recognized it as early as 1796 (see *Hylton v. United States*, 3 Dall. 171 [1796], wherein the Court implicitly exercised the power by reviewing and upholding a federal taxing statute). But the landmark case establishing judicial review was *Marbury v. Madison*, 5 U.S. 137 (1803). The case arose from the federal elections of 1800, in which the Democratic-Republicans won majority control of Congress from the Federalists, and Thomas Jefferson, a Democratic-Republican, defeated the Federalist incumbent John Adams in a contentious presidential election. In an attempt to extend the influence of Federalist philosophy beyond the election, before his term expired President Adams and the Federalist-controlled Congress created new justice of the peace positions and new judgeships. They also made other changes to the federal judiciary before President-elect Jefferson assumed office.

The final days of the Adams administration were frenzied. Adams’s nominations for the newly created justice of the peace positions were confirmed only one day before Jefferson’s inauguration. Adams signed the commissions late into the night of his last day in office (consequently these individuals have become known as the midnight judges) and gave them to Secretary of State John Marshall for delivery. Marshall, however, was unable to deliver four of the justice of the peace commissions before Jefferson was inaugurated.

President Jefferson ordered Acting Secretary of State Levi Lincoln and subsequently Secretary of State James Madison to withhold the commissions. William Marbury, one of the four men who did not receive their commissions, filed suit against James Madison in the Supreme Court seeking an order (a writ of mandamus) to have his commission delivered. Although Marbury filed suit in 1801, no decision was rendered until 1803 because the new Congress and president effectively canceled the 1802 term of the Supreme Court. By the time the Court heard the case, John Marshall, former secretary of state under President Adams, was chief justice. He authored the *Marbury* opinion.

Concerned that the Jefferson administration would ignore a Supreme Court order to deliver the commissions and thereby injure the authority of the Court in the future, Marshall carefully crafted the opinion to assert the authority of judicial review, over both Congress and the president, without actually exercising it. The Court accomplished this by ruling against Marbury on jurisdictional grounds while simultaneously declaring that the judiciary can check the actions of the other branches for constitutionality, and that President Jefferson had acted improperly in not delivering Marbury’s appointment.

The Court’s rationale included several points. First, the Court found that Marbury’s appointment was legitimate and that President Jefferson had wrongly withheld his commission. To avoid the potentially harmful confrontation with the execu-

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tive, the Court did not order Jefferson to deliver the commission. Rather, the Court concluded that it could not issue the writ of mandamus because it lacked jurisdiction over the case. *Marbury* asserted that the Judiciary Act of 1789 gave the Supreme Court original jurisdiction to issue writs of mandamus against public officials. But the Court found the Judiciary Act's grant of original jurisdiction to be inconsistent with the Constitution's original jurisdiction provision and therefore unconstitutional.

The Court then concluded that it had the authority to review legislation for constitutionality and to not apply unconstitutional legislation. Marshall posed this problem in his analysis: What is the judiciary to do when faced with applying a statute that is repugnant to the Constitution? Because the Constitution is the higher form of law, it must be followed, effectively invalidating the statute.

Marshall concluded that it is the responsibility of the judiciary to declare the meaning of the law. In his often-quoted words, "It is emphatically the province and duty of the Judicial Department to say what the law is" (5 U.S. at 177). If two laws conflict, it is a court that must decide which governs a case. "This is of the very essence of judicial duty" (5 U.S. at 178). Because the Constitution is the highest form of law in the land, a court must choose to apply it over any other law.

In support of these conclusions, Marshall pointed to several provisions of the Constitution. First, Article III, Section 2, provides that the "judicial Power shall extend to all Cases . . . arising under this Constitution." Implicit in this assertion is the belief that the judicial power includes being the final arbiter of the meaning of the Constitution. Second, Marshall pointed to several additional provisions in the Constitution to establish that the Framers intended for the courts to independently determine the meaning of the Constitution. For example, the treason provision requires the testimony of two witnesses to the same overt act, or a confession, before a person may be convicted of treason. Marshall reasoned that the Framers would not want a court to enforce a law that allowed conviction for treason on the testimony of one person. Therefore, Marshall concluded that the Framers intended the Constitution to bind the judiciary, as well as the other branches. This being so, courts must independently interpret, comply with, and enforce the Constitution.

In support of its opinion, the Court also cited the supremacy clause of Article VI, which declares that constitutionally valid laws of the national government are the supreme law of the United States. Marshall noted that, in declaring which laws are supreme, the Framers mentioned the Constitution first. From this he concluded that the Constitution is paramount to statutes and other law. Finally, Marshall noted that judges are required by Article VI to take an oath of office. By that oath, judges swear to uphold the laws of the nation, including the Constitution. To uphold the Constitution, he asserted, it must be interpreted and treated as paramount law. For these reasons, Marshall concluded that Congress had improperly conferred original jurisdiction on the Court and that the Court therefore lacked the authority to issue the mandamus. For the first time, judicial review was used to nullify federal action—an act of Congress. In addition to concluding that the judiciary can review congressional actions, Marshall also stated, *obiter dictum*, that executive actions can be reviewed. This decision is commonly regarded as the landmark precedent for judicial review in the United States.

One year after *Marbury* the Supreme Court held for the first time, in *Little v. Barreme*, 6 U.S. 170 (1804), that a

presidential action was unconstitutional. Again there was no confrontation with President Jefferson because the case involved an order issued by Adams during his presidency. Within thirteen years of the *Marbury* decision, the Supreme Court determined that federal courts have the authority to review state legislation in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), and state judicial decisions in *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), for conformity with the Constitution of the United States.

CONTEMPORARY JUDICIAL REVIEW

In the early twenty-first century, judicial review is an established authority possessed by both state and federal courts throughout the nation. Like federal courts, state courts are required to enforce the Constitution of the United States and to invalidate unconstitutional statutory law, executive action, and lower court decisions. The American federal system employs a highly diffused model of judicial review when compared with other nations that have constitutional review. For example, in some nations, such as France, the authority is held only by a special constitutional council, and in others, only by designated courts. (See Hall and Feldmeier 2012, chap. 1.)

In addition to its constitutional source, judicial review is often also provided for by statute. Review of administrative action for compliance with statutory law is an example. Conversely, attempts have been made to limit judicial review through legislation. At the federal level, Congress can "strip" the Supreme Court of appellate jurisdiction under Article III, Section 2.

From 1790 to the early 1990s, the Supreme Court declared approximately 1,500 acts of local, state, and federal government unconstitutional. Although the raw number is large, one researcher found that this represents less than 1 percent of all statutes (Baum 2007). These figures do not include the lower federal courts' or state courts' use of the authority. The application of the doctrine in trial courts, which judges rely on to invalidate police and other government action, is significant.

Judicial review is not without its critics. One concern is that judicial review violates the separation of powers by elevating the Supreme Court above its coequal branches by empowering it to review and invalidate the actions of those branches. Similarly, another criticism of judicial review is that it is counter-majoritarian and undemocratic to have a small group of unelected judges invalidate legislation that was created through a democratic process, whether by the public directly through referendum or by a legislature comprised of elected representatives. In the words of political and legal philosopher Jeremy Waldron, judicial review is "politically illegitimate, as far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights" (Waldron 2006, 1353; Tushnet 1999). Critics also point out that constitutional review is not the sole province of the courts. Congress and the president are also sworn to uphold the Constitution and routinely review their own (and one another's) actions accordingly.

Other scholars have defended judicial review. Erwin Chemerinsky (2004), for example, suggests that judicial review is needed to protect civil liberties so as to guard against the "tyranny of the majority." He also contends that contemporary critics of judicial review ("popular constitutionalists") present an

idealized narrative of the majoritarian nature of legislative decision making. Public choice theorists, he suggests, have demonstrated how special interests sometimes trump the desires of the public in the legislative process. Additionally, Chemerinsky is concerned that the elimination of judicial review would result in disunity of laws and competition between the states that will burden interstate commerce and threaten liberties (Fallon 2008). Regardless of the criticism, judicial review has become a defining feature of United States democratic constitutionalism.

*Daniel E. Hall,
College of Professional Studies and Applied Sciences,
Miami University*

SEE ALSO: *Constitutional Authority; Constitutional Dialogues; Judicial Impact; Judicial Implementation; Judicial Independence; Judicial Review: Administrative Agencies; Judicial Review by State Courts; Judicial Supremacy; Marbury v. Madison; Marshall, John.*

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Fourteenth Amendment

The Fourteenth Amendment is among the most significant and controversial parts of the US Constitution. Added to the Constitution in 1868 in the aftermath of the American Civil War, this amendment defines criteria for national and state citizenship, imposes significant restrictions on the states, constitutionalizes some of the key terms of the Civil War settlement,

and delegates enforcement power to the US Congress. No other part of the Constitution has been at the center of more constitutional litigation.

BACKGROUND

Many people thought the Fourteenth Amendment's precursor, the Thirteenth Amendment, would eliminate slavery and its vestiges. But the Democrats in control of southern state governments continued to deny rights to black persons even after their formal emancipation. For example, southern states enacted Black Codes that limited the freedom of black persons, denied them basic civil rights, and essentially kept them in bondage.

In addition, the Thirteenth Amendment had the unanticipated consequence of enhancing the South's relative political power within national institutions. Under the original Constitution, the number of representatives per state in the House of Representatives was proportional to the total number of free persons plus three-fifths of "other persons" within each state. That meant slaves had counted as three-fifths of a person for purposes of apportioning representatives among the states. Once the Thirteenth Amendment freed those persons, they counted as full persons—even if they were not allowed to vote. Without further constitutional change, the South's power in Congress and in the Electoral College would increase whereas the North's would not.

These issues of power were of great concern to the northern Republicans who had controlled national institutions during the Civil War. With the war over, it was likely that northern and southern Democrats, who had outnumbered Republicans nationally but had split sectionally before the war, would reunite, try to regain control of national institutions, and deny fundamental rights to black persons.

PROPOSAL AND RATIFICATION PROCESSES

As an immediate strategy to avoid that result, the Republicans in control of Congress refused to seat representatives of the southern states at the opening of the first session of the Thirty-Ninth Congress in December of 1865. To fashion a longer-term remedy, the Republican leadership also created a Joint Committee on Reconstruction. The Fourteenth Amendment emerged from that committee and became the centerpiece of Congress's initial plan for reconstruction. Congress also passed the Civil Rights Act of 1866.

The Civil Rights Act and the Fourteenth Amendment were linked to one another in a number of significant ways. As would Section 1 of the amendment, the Civil Rights Act defined citizenship expansively to include native-born persons subject to US jurisdiction. The federal law also declared that every citizen of every race and color had the same right to make and enforce contracts, sue, give evidence, hold and convey property, enjoy the full benefits of laws and proceedings for the security of person and property, and be subject to the same punishments. President Andrew Johnson vetoed this law, arguing that only the states, not Congress, could regulate these civil rights. For the first time in US history, Congress overrode the presidential veto, but even some of those who backed the Civil Rights Act had concerns about the act's validity. One of the primary purposes of the Fourteenth Amendment was to reinforce Congress's power to pass this law and other laws like it. In addition, the amendment itself includes guarantees paralleling those in the Civil Rights Act. Being part of the US Constitution, the amendment's

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guarantees (unlike those in the federal law) would be beyond the reach of congressional repeal through ordinary legislative processes.

President Andrew Johnson's veto of the Civil Rights Act was, moreover, the opening salvo in a political war between the US president and Congress over matters of reconstruction. Johnson argued that the southern states were entitled to immediate readmission to Congress, and he argued that the "rump Congress" had no authority to propose a new constitutional amendment while the DOS southern states were excluded from that body. The Republican leadership in Congress rejected these arguments and insisted that guarantees such as those in the Fourteenth Amendment were essential preconditions to the South's readmission to Congress.

The Joint Committee initially proposed a number of separate amendments and then consolidated them into an omnibus proposal that the committee presented to both Houses of Congress on April 30, 1866. The draft's provisions were similar to those of the eventual Fourteenth Amendment, except that Section 1 did not define citizenship, and Section 3 would have deprived former Confederate leaders of the right to vote in US elections prior to 1870. The latter provision proved especially controversial both within Congress and within the nation at large. The Senate weakened Section 3's precursor to limit office-holding by specified Confederate leaders instead of barring them from voting.

Two-thirds of the seated and voting members of the Senate and House of Representatives approved the text of the Fourteenth Amendment on June 8 and 13, 1866, respectively. Republicans voted along party lines in favor of the proposal, and Democrats voted against it. The Annals of Congress record the vote in the Senate as 33–12 in favor, with 5 absent, and in the House as 120–32 in favor, with 32 not voting.

The proposed amendment was then forwarded to all of the states for ratification, including the southern states excluded from representation in Congress. President Andrew Johnson, northern Democrats, and the South's white leadership strongly opposed the proposed Fourteenth Amendment. As the centerpiece of the Republican-led Congress's plan for reconstruction, the proposed amendment became a major issue in the 1866 midterm elections.

Based on the results of those elections, the Republicans retained control of more than two-thirds of both houses of Congress and claimed a popular mandate in support of the Fourteenth Amendment. Even so, all of the excluded southern states, other than Tennessee, refused to ratify the proposal. For this and other reasons, Congress passed the Reconstruction Acts of 1867 and 1868. They provided for the military occupation and forcible reconstruction of the South and provided that the excluded states would not be readmitted to Congress unless and until they approved the proposed Fourteenth Amendment. These processes eventually ran their course, and the amendment was ratified and declared part of the Constitution in July of 1868, despite efforts by the legislatures of Ohio and New Jersey to withdraw their prior ratifications.

Controversies surrounding the Fourteenth Amendment's original validity have surfaced from time to time since the Reconstruction period, including in the aftermath of the US Supreme Court's controversial decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). For more than thirty years, Bruce Ackerman of Yale Law School has argued that the amend-

ment was invalid based on Article V's amending provisions because the southern states were effectively forced to ratify it. But he has argued that the amendment is nevertheless valid based on its approval by "the People" outside Article V processes. The more conventional view is that the amendment is valid based on Article V.

SECTION 1

The Fourteenth Amendment begins by setting forth qualifications for US and state citizenship. The standard of birthright citizenship effectively overturned the US Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). Writing for a majority of the justices in that case, Chief Justice Roger B. Taney had argued that a black person, even if free, could not be a citizen under the US Constitution and had no rights based on it. With the Thirteenth Amendment's abolition of slavery, it was still possible to regard black persons as noncitizens. In addition to addressing this issue, the citizenship clause has been controversial on account of its conferring citizenship to children born in the United States even if their parents are illegal aliens.

The second sentence of Section 1 includes three of the US Constitution's most important limits on the states. The Republicans in Congress apparently thought the privileges or immunities, due process, and equal protection clauses would be important in at least three ways. First, they constitutionalized the guarantees of the Civil Rights Act of 1866, such that they could not be repealed through ordinary legislative processes. There was concern in particular that Democrats might regain control of Congress and effectively nullify or reverse the fruits of the North's victory in the Civil War. Section 1's guarantees would be an obstacle to their doing so. Second, these clauses, both on their own and in conjunction with Section 5 (see below), were designed to reinforce Congress's authority to pass the Civil Rights Act and other laws like it. Third, the amendment's prohibitions on the states would be directly enforceable by judges. In the short term, this would also be important if Democrats regained control of Congress. In the longer term, judges could continue to enforce Section 1's mutually reinforcing guarantees.

These three provisions—especially the due process and equal protection clauses—have been at the center of more constitutional litigation than any other part of the US Constitution. They have also played important roles in constitutional developments outside courts, such as popular movements seeking greater equality in the protection and enjoyment of civil rights. (Some of the major interpretive controversies surrounding these clauses are covered in their respective entries.)

SECTION 2

Section 2 most directly addressed the issues of political power that motivated the entire amendment. Most immediately, this section was designed to penalize the southern states if they disallowed adult black male persons (who would qualify as "citizens" based on Section 1 of the amendment) from voting in national or state elections. But Section 2 would not bar states from denying black males the right to vote based on their race, ethnicity, or previous condition of servitude, as would the Fifteenth Amendment. It would instead penalize the states, by reducing their apportionment in Congress, for denying black males—or any other adult males—the right to vote except based on their participation in rebellion or other crime. Thus the section would

not penalize the states if they took away the electoral franchise from those who had fought for the Confederacy in the Civil War. Nor would Section 2 penalize the states for not allowing convicted criminals to vote. It also did not prevent states from continuing to deny the franchise to women based on their sex, or even penalize them for doing so. On the contrary, advocates of gender equality were highly critical of Section 2 for introducing into the US Constitution, for the first time, an explicit classification based on sex. They argued that this provision was especially problematic considering the political fundamentality of the right to vote.

Looking beyond the details of Section 2's provisions, it is important to understand how the Republicans envisioned Section 2 operating. They understood that the white males who had been in control of the South before the Civil War would likely continue to side predominantly with the Democratic Party. But they hoped and expected that black males would ally themselves with the Republican Party if they were allowed to vote. Considering that blacks were roughly half the populations in a number of southern states, whether a state elected Republican or Democratic representatives to the US House of Representatives and state legislatures (who would, in turn, select US senators) might well have hinged on whether black males were allowed to vote in that state. If a state allowed black males to vote, its apportionment in Congress would increase compared to the antebellum era, and the Republicans hoped the state would send Republicans to Congress. On the other hand, if the state disallowed black males from voting, Democrats might remain a majority of the state electorate, but the state would have fewer representatives in Congress. Critically at stake, among other things, was whether Republicans or Democrats would control the US Congress, and a similar dynamic would apply to presidential elections. These considerations point toward why Thaddeus Stevens, the Radical Republican Representative of Pennsylvania, described Section 2 as its "most important" section when he introduced into the House the text of what became the Fourteenth Amendment (*Congressional Globe*, 39th Congress, First Session, 2459, May 8, 1866).

Before the Fourteenth Amendment went into effect, however, political events largely overtook the premises underlying Section 2. When Congress had proposed the amendment in 1866, the Republican Party had not been united in support of requiring states to extend the franchise to black males. But this idea had gained broader support by early 1867. In the wake of the 1866 elections, the Reconstruction Acts of 1867 and 1868 required the southern states to extend the franchise to black males and to embed that right in new or amended state constitutions. Accordingly, by the time the Fourteenth Amendment went into effect in 1868, southern states did not have the choice presumed by Section 2. In addition, political developments in 1868 and 1869 underscored the vulnerability of the Republican party in the South and led to the Fifteenth Amendment.

The Fifteenth Amendment's ban on states' denying the right to vote based on race, color, or previous condition of servitude diminished the significance of Section 2 of the Fourteenth Amendment. In addition, Congress never enforced this section even though it might have done so in states that denied the franchise to black persons and others who were not criminals. Even so, this section provides valuable insights into issues of political power surrounding the entire amendment. And it provides continuing support for states that ban convicted criminals from voting.

SECTION 3

Section 3 of the Fourteenth Amendment disqualified specified leaders of the Confederacy from holding various federal and state governmental offices unless the disqualification was removed by two-thirds vote of both houses of Congress. Like Section 2, this disqualification was aimed at limiting the political power of the former Confederate leaders. It also removed the pardoning power from the president. The Reconstruction Acts had parallel limitations, which were both controversial and significant while they remained in effect. In 1872 and 1898, Congress removed Section 3's disability for former Confederate leaders. Section 3 was invoked again in 1919 and 1920 to prevent Victor Berger, who had been convicted of violating the Espionage Act of 1917, from taking his seat in the US House of Representatives.

SECTION 4

Republicans were concerned in the aftermath of the Civil War that the Democrats, if they regained power within national institutions, would refuse to honor the national debt incurred during the war, would honor the Confederate debt, and would compensate former slave owners for the economic losses they incurred in connection with the abolition of slavery. Section 4 of the Fourteenth Amendment explicitly guaranteed the payment of the US debt, disallowed honoring the Confederate debt, and barred claims against the United States based on the abolition of slavery. This provision has continuing relevance to controversies over whether Congress has an obligation to raise the debt ceiling to allow payment of the federal debt, or whether such debts may be paid even if not within a congressionally authorized debt ceiling.

SECTION 5

It has become common to view the US Supreme Court and other courts as having primary authority to enforce constitutional limitations. But Section 5 of the Fourteenth Amendment explicitly gives Congress "power to enforce, by appropriate legislation," the Fourteenth Amendment's remaining provisions. That includes Section 1's important guarantees, which explicitly limit "the states."

One of the primary objectives of the Republican sponsors of the Fourteenth Amendment, as indicated above, was to reinforce Congress's authority to pass the Civil Rights Act of 1866. Accordingly, Congress in 1870 relied on Section 5 to reenact that law. Congress also relied on Section 5 to pass a number of other civil rights statutes during the Reconstruction era. Of particular significance, the Ku Klux Klan Act of 1871 banned conspiracies to deprive individuals of equal protection of the law, and the Civil Rights Act of 1875 banned discrimination based on race in inns, public conveyances, theaters, and other public amusements.

During the later stages of Reconstruction, a majority of the US Supreme Court narrowly interpreted Congress's powers based on the Fourteenth Amendment and invalidated many of the most important provisions in these laws. In the first case involving this amendment, *Slaughter-House Cases*, 83 U.S. 36 (1873), the Court treated Section 1's limits as relatively narrow and suggested that Congress's authority based on Section 5 was correspondingly limited. The Court also invalidated the enforcement of the 1870, 1871, and 1875 civil rights laws in *United States v. Cruikshank*, 92 U.S. 542 (1876), *United States v. Harris*,

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106 U.S. 629 (1883), and *Civil Rights Cases*, 109 U.S. 3 (1883). Of particular significance was the Court's holding that Section 5 did not allow Congress to regulate the purely "private" actions of ordinary citizens as distinct from remedying "state action" by government officials in violation of Section 1 of the amendment.

Not surprisingly in light of these and later restrictive precedents, Congress relied on its Article I commerce power to enact modern civil rights legislation instead of relying solely on Section 5. In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzbach v. McClung*, 379 U.S. 294 (1964), the Court upheld provisions in the Civil Rights Act of 1964 that banned discrimination in hotels, motels, and restaurants. Significantly, the majority based these rulings on Article I's commerce clause rather than Section 5. Then in *Katzbach v. Morgan*, 384 U.S. 641 (1966), a case that did involve "state action," the Court upheld key provisions in the Voting Rights Act of 1965, relying in that case on Section 5 of the Fourteenth Amendment.

More recently, the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000), ruled that Congress did not have the power, based on either the commerce clause or Sections 1 and 5 of the Fourteenth Amendment, to allow one ordinary citizen to sue another for sexual violence. Among the most hotly contested issues in that case, as with earlier ones, was what types or forms of state action or neglect, if any, must be present to establish congressional authority based on Sections 1 and 5 of the Fourteenth Amendment. In a number of other important cases, a majority of the Court has also denied that Congress may use its Section 5 power, along with Section 1, to secure rights beyond those that judges have interpreted as protected by Section 1. For example, the Court invalidated efforts by Congress to protect religious liberties and rights of disabled persons from governmental acts that the Court held were not in violation of Section 1. These rulings remain controversial.

LEGACIES OF THE FOURTEENTH AMENDMENT

The Fourteenth Amendment followed in the wake of the Thirteenth's abolition of slavery. The overarching purpose of the Fourteenth Amendment was to provide greater security in the US Constitution for fundamental rights of citizenship and personhood. No other part of the Constitution has been at the center of more constitutional change or controversy than this amendment.

*Wayne D. Moore,
Virginia Tech*

SEE ALSO: *American Constitutional Development from 1789 to 1868; Federal Powers: Civil Rights; Fifteenth Amendment; Fourteenth Amendment: Citizenship Clause; Fourteenth Amendment: Due Process Clause; Fourteenth Amendment:*

Enforcement Clause; Fourteenth Amendment: Equal Protection Clause; Fourteenth Amendment: Privileges or Immunities Clause; Race Discrimination; Thirteenth Amendment.

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Unit 4

How Have the Values and Principles Embodied in the Constitution Shaped American Institutions and Practices?

Congress as a Governing Institution

Within the American political system, the role of Congress and its members is to represent the people as laws are drafted, debated, enacted, and implemented. Article I of the Constitution directs each chamber of Congress to “determine the rules of its proceedings,” and since 1789 the House of Representatives and the Senate have established unique processes that shape how they take action. In the early twenty-first century, both chambers are complex bodies of structures, offices, and rules. Their institutional features are important because the ways Congress structures and governs itself affect how it governs the country.

STRUCTURES AND RULES

Perhaps the most essential structural feature of Congress is bicameralism. As a consequence of conflict and compromise at the Constitutional Convention, Congress is composed of two chambers: the House of Representatives and the Senate. Whereas the House has always been popularly elected, until 1913 members of the Senate were appointed by state legislatures. In the early twenty-first century the chambers are fundamentally different in their structure, membership, and rules, and these differences meaningfully affect how Congress governs.

The Senate’s 100 members are elected two per state to staggered, six-year terms with roughly one-third of the chamber standing for reelection every two years. The House’s 435 members (and six nonvoting delegates) are elected concurrently to two-year terms. Although every state is represented by the same number of senators, the number of House members per state is based on its population. States are reapportioned House seats every ten years with the goal of creating districts of roughly equal population nationwide. According to population statistics from the 2010 US Census, the average district had over 700,000 residents, but there is significant variation. While several supreme court decisions (including *Wesberry v. Sanders* (376 U.S. 1 [1964])) require each state to draw its districts to be of equal size, state boundaries and the constitutional requirement that all districts be situated within a single state result in disparities. For instance, Wyoming’s population of roughly 580,000 resided within one of the smallest districts, whereas others totaled nearly one million residents.

As a result of these differences, the members of the two chambers hold different policy views and priorities. For instance, the Senate, which is heavily composed of individuals representing rural states, tends to be more supportive of farm subsidies and the agriculture industry than does the House. However, for legislation to become law it must pass both chambers in identical form. Usually, this requires building bipartisan coalitions. Data collected by David Mayhew (2005) show that major legislation passed between 1947 and 2002 was supported, on

average, by 81 percent of House members and 84 percent of senators. But putting together such large voting coalitions is not easy. As Sarah Binder observes, “bicameralism is perhaps the most critical structural factor shaping the politics of gridlock” (2003, 81). Most years, Congress is unable to act on most of the pressing issues requiring its attention. Figure 1 shows the percentage of issues on the agenda on which Congress did not pass new laws from the 80th Congress (1947–1949) through the 106th Congress (1999–2001). Although some Congresses are more prolific than others, the average Congress failed to act on 52 percent of pressing issues. Even the most productive Congress (the 89th) failed to legislate on nearly one-third of its agenda.

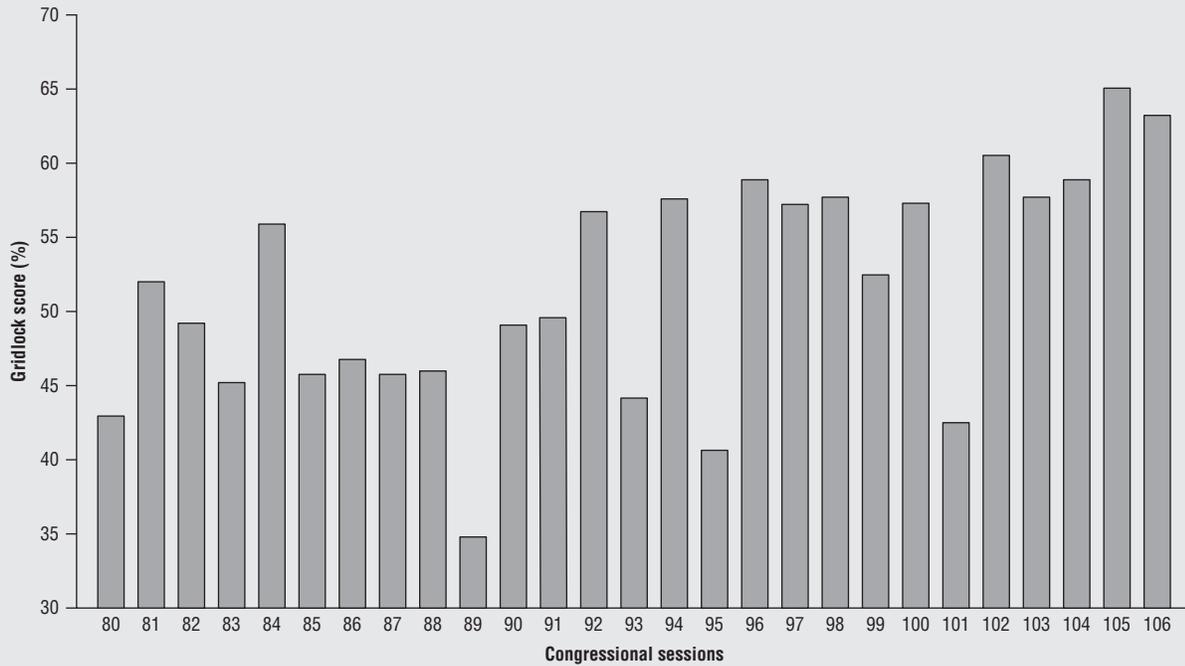
When Congress does act, the differences in seat apportionment affect what becomes law. Frances Lee and Bruce Oppenheimer (1999) show that the equal representation afforded to each state in the Senate benefits smaller states at the expense of larger states in terms of federal spending. Additionally, the staggered nature of Senate elections sometimes softens the effects of election waves. Because only one-third of Senate seats are up for election, even the most decisive landslides can have their effects muted by the sixty-plus senators who did not face the ballot box.

Differences between the rules of the House and Senate are also important. Because the two chambers are allowed to set their own rules, they have developed and evolved separately. In the early twenty-first century they operate very differently from each other: the rules of the House make it a chamber where the majority rules, whereas the rules of the Senate emphasize minority power.

Until the 1890s the minority party in the House enjoyed considerable latitude to obstruct action. However, a series of reforms spearheaded by Speaker Thomas Reed (1889–1891, 1895–1899) empowered the majority to overrule or block obstructionist tactics. With “Reed’s Rules” in place, the House became a majoritarian legislature in which a unified majority has the ability to achieve its unbridled will in every instance. In the contemporary House the majority party can use its control over the Committee on Rules to issue “special rules” that determine what will be considered on the floor, when it will be considered, how debate will unfold, and what amendments, if any, will be considered. Special rules essentially decide the rules by which legislation is considered, and they typically make it nearly impossible for the minority to obstruct or even object to proceedings. As a result, not only does the majority rule in the House, but it does so by its own rules, and it wins nearly every time.

The rules of the Senate emphasize minority power. The Senate is sometimes referred to as a unanimous consent chamber because in practice many actions, including the consideration of

Figure 1: Rates of Gridlock across Congressional Sessions



Note: Gridlock scores measure the percent of issues on the policy agenda successfully addressed with new laws by Congress. For more information, see Binder.

Rates of legislative gridlock per US Congressional session held, 1947–2000. Source: Binder, Sarah A. *Stalemate: Causes and Consequences of Legislative Gridlock*. Washington, DC: Brookings Institution Press, 2003. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

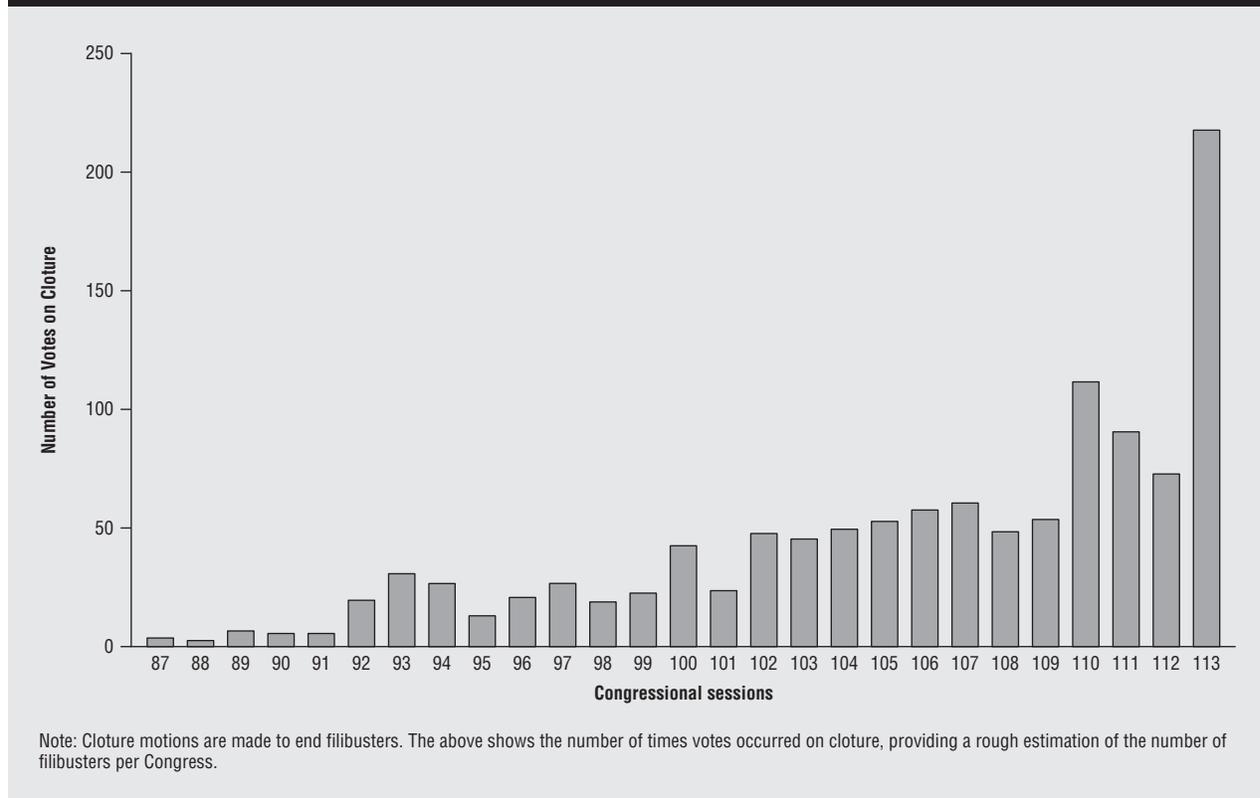
legislation, require the consent of every senator. Early in the Senate’s history the need for unanimous consent was rarely exploited by opponents of legislation to block it. However, that changed as the Senate became more active in the twentieth century. In 1917 rules changes created cloture motions, which allow Senate supermajorities to end the filibustering tactics of a minority of senators. Since then, requirements for achieving cloture have been amended numerous times. In the early twenty-first century, three-fifths of the chamber (sixty votes) is needed to end filibusters on bills and treaties, while a simple majority (fifty-one votes) is needed on most executive and judicial nominations (Supreme Court nominees still require sixty). These requirements, however, still allow a unified minority party to block action, and since the 1960s the use of filibusters has risen sharply (see Figure 2). For instance, during the 113th Congress (2013–2015) there were 218 votes on cloture.

The separate rules of the House and Senate amplify their other differences and thus make legislative action even more challenging. Not only do the members of each chamber hold different policy opinions and priorities, but one chamber is able to pass strictly majoritarian legislation whereas the other must accommodate the interests of at least some members of the minority. The resulting gap in the policies produced by the two chambers adds to the difficulty of congressional action and prevalence of gridlock that is a consequence of the legislature’s design.

COMMITTEES

Committees are another important feature of Congress. In many ways committees help Congress produce policy ideas and legislation and make law. But they may also induce bias into the policy process. Sometimes called the workshops of Congress, standing committees emerged early in Congress’s history to deal with its increasing workload, growing membership, and need for policy expertise. The number of committees has changed over time, but during the 113th Congress there were twenty-one permanent committees in the House and twenty in the Senate. In the House, most members serve on just one or two committees, while senators regularly sit on as many as four.

Each committee has jurisdiction over a set of issues, and legislation introduced on those topics is referred to it for further consideration. Legislation can also originate within committees, where it is drafted by committee staff, marked up, agreed to by committee members, and then sent to the floor for further consideration. The ability to bottle up referred legislation, amend it to their liking, or create their own bills has traditionally given committees significant influence in Congress. In addition, according to research by Kenneth Shepsle and Barry Weingast (1987), the ability of committees to dominate conference committees (a means of reconciling House- and Senate-passed versions of the same bill) gives them a second chance to amend legislation related to their jurisdictions to their liking, or else kill it before it becomes law.

Figure 2: Number of Cloture Votes across Congressional Sessions

Number of cloture votes per US Congressional session, 1961–2014. Source: United States Senate. “Senate Action on Cloture Motions.” https://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

Because of their power, committee assignments are highly valued by lawmakers in both chambers. Committee assignment processes, run by the parties, largely enable members to obtain seats that allow them influence over the issues most important to them and their constituents. As a result, many committees are made up of what are called “high demanders.” For example, members on the agriculture committees tend to represent rural areas with many farms, and members on the armed services committees tend to represent areas with large military installations. The legislation emerging from these committees is often in the interest of these particular groups, and not necessarily that of the country. In addition, these same committees’ members dominate oversight of executive-branch departments and agencies related to their jurisdictions, giving them significant influence over policy in that way as well.

That most committees have historically been successful in getting their legislation adopted on the floor of each chamber points to their power and their ability to sometimes bias public policy. There are various explanations for a committee’s success. One proposes an institution-wide system of logrolling whereby members of each committee accept other committees’ proposals for theirs to be accepted in return. Another suggests committees are successful because they can leverage their expertise on their issues to persuade other lawmakers to go along. Regardless of the reason, committees are pervasive in their impact on

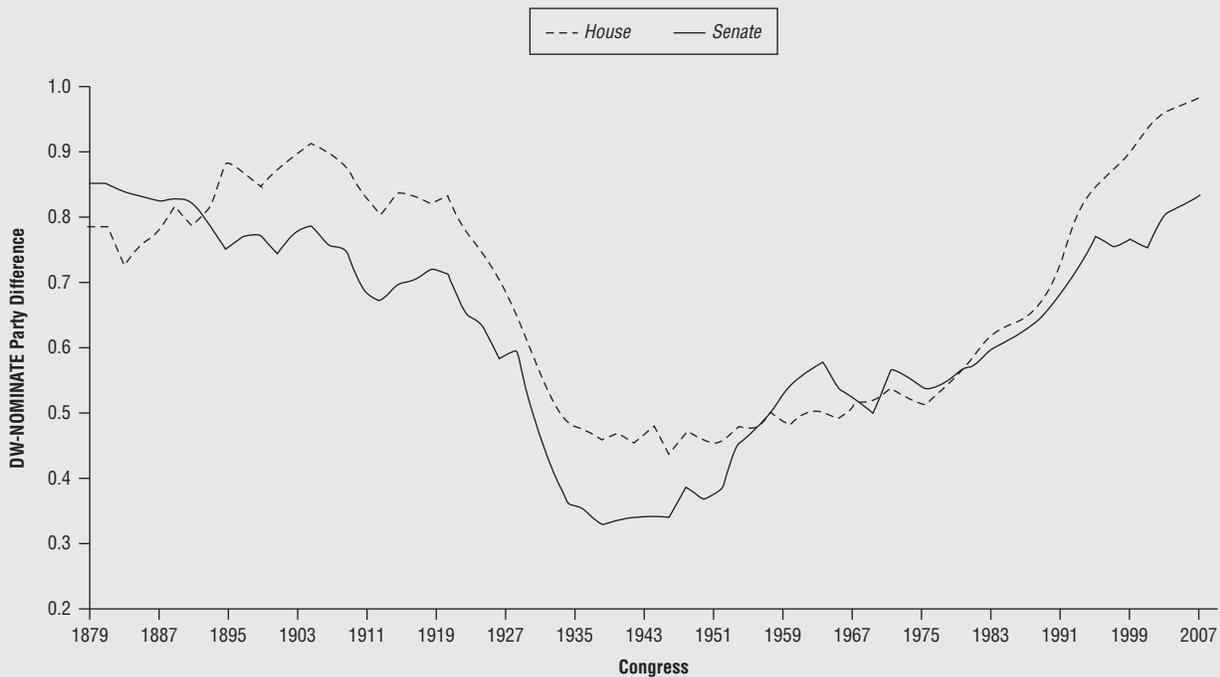
Congress, influencing what legislation is drafted and considered and which policies are passed into law.

PARTIES, LEADERS, AND POLARIZATION

Political parties also affect how Congress governs and its ability to do so effectively. Parties simultaneously add coherence and functionality to Congress’s structures, while adding new complications that sometimes make governance even more difficult.

Parties add coherence by bridging gaps within and across the chambers. Representatives and senators, elected individually from distinct districts and states, have numerous incentives to work apart, but parties provide incentives for them to work together. As argued by Frances Lee (2009), members of a congressional party have collective electoral and power incentives to coordinate their action. Electorally, all members of a party benefit if the party is popular among the voting public, or if the other party is unpopular. They also benefit when their party is in power, controlling one or both chambers of Congress. Thus parties link members across the chambers, spurring coordinated action to boost their party’s image or take and maintain control over Congress. Parties also aid action within each chamber. Prerogatives available to the majority include

Figure 3: Party Polarization in Congress, 1879–2009



Note: Distance between the parties is measured using first-dimension DW-NOMINATE scores. For more on this measure, see Voteview.com.

Degree of party polarization in the US Congress, 1879–2009. DW-NOMINATE data compiled from <http://www.voteview.com>. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

control over every committee and over which bills are considered and debated on the floor. These powers make it easier for action to occur.

But parties can also make action harder. The possibility of Democratic control over one chamber and Republican control over the other raises new impediments to action. When majorities are at odds with each other the space for the bipartisanship necessary for action is reduced. Binder (2003) finds that this situation—divided party control—is the most antithetical to a productive American political system. Additionally, parties increase the frequency of coordinated obstruction, while ensuring some measure of minority party representation in the legislative process. The use of filibusters in the Senate is largely a consequence of party politics. Minority party senators have incentives to work together to block the majority’s actions, force concessions, or both.

Parties also empower leaders. Party leaders are delegated substantial authority to take action and lead their party, and they are deeply involved in nearly every important initiative. Party leaders take the lead in setting each chamber’s agenda, determining their party’s policy positions and priorities, and facilitating communication, the taking of cues, and consensus building among party members. In the House the majority leadership controls the Rules Committee and uses it to ensure their party dominates policy making on the floor. In the Senate the majority leader negotiates with the minority, takes steps to break filibusters, and maintains control over the floor.

Party leaders have impressive abilities to foster party unity and rely on various powers to do so. Leaders control the distribution of important resources, including committee assignments, campaign funds, and other perquisites, and can leverage them to reward loyalty and punish disloyalty. Party leaders can allow loyal members to have their bills considered on the floor while blocking action on the bills of less loyal members. As shown by James Curry (2015), leaders are also empowered by their superior information. Their large staff resources allow leaders to be better informed than their rank and file about important legislation under consideration, and as a result become sources of information and cues for their time-strapped members. Consequently they can influence what their members know and how they understand bills and issues, and keep them in line on important votes.

Since the middle of the twentieth century, party polarization has amplified the importance and influence of parties in Congress. A measure of the distance between the parties in terms of their roll-call voting records indicates that the parties in both chambers have polarized dramatically since the 1950s (see Figure 3). In the early twenty-first century, members of each party are more unified than they have been in over a hundred years, and the partisan conflict over policy proposals has become very contentious. Polarization has dramatically altered how Congress operates. For instance, it has led to the further empowerment of leaders. Needing better coordination to overcome the opposition, parties have delegated substantial

authority to party leaders since the 1970s. Polarization has also influenced congressional processes. To make law, parties in both chambers have turned to previously uncommon procedures such as restrictive rules in the House, complex unanimous consent agreements in the Senate, and budget reconciliation, as covered extensively by Barbara Sinclair (2012). Polarization has also played a role in the increase in filibusters (see Figure 2). With more disagreement between the parties, the minority in the Senate has been more willing to use its prerogative to block action.

Party polarization has made it even harder for Congress to take action by making bipartisan coalitions more difficult to create. According to Thomas Mann and Norman Ornstein (2012) and other observers, this is the result of a general mismatch between the Constitutional system of checks and balances our government is predicated on and highly disciplined political parties. The separation of legislative powers among two chambers and the president typically necessitates compromise and bipartisanship for new laws to be made. But deeply divided parties make compromise difficult and bipartisanship rare as parties have various reasons and incentives to disagree. As the parties have continued to polarize, the result has been an increase in gridlock. There is some debate on this point, but the rise in obstructionism and gridlock that has coincided with a rise of party conflict makes it difficult to dismiss.

Congress, like any complex governmental institution, requires structures, rules, and processes in order to take the action necessary to govern. However, its specific features have consequences. Congress's bicameral structure and the differences between chambers, including their rules, raise barriers to congressional action. Other features, including committees, parties, and leaders, add coherence and functionality to Congress's basic structure but also induce biases and create new impediments to action. Party polarization, a defining feature of the contemporary Congress, has further affected how it performs in various ways. Congress governs the country, but how it does so is strongly shaped by how it governs itself.

James M. Curry,
University of Utah

SEE ALSO: *Article I, United States Constitution; Congress in the Policy Process; Filibuster; Government; Governance; Polarization; Regular Order; Representation: Idea of*

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Presidency, The

The Framers of the Constitution established the presidency to provide national leadership, statesmanship in foreign affairs, command in time of war or insurgency, and enforcement of the laws. The president thus serves as the head of state, the chief executive, and the commander in chief. As compared to the presidency in the twenty-first century, the office as originally defined by the Framers had limited authority, fewer responsibilities, and much less organizational structure. Article II of the Constitution, however, is relatively vague in its provisions of presidential powers, which has allowed presidents over time to enhance the responsibilities and powers attached to the office. According to George Edwards and Stephen Wayne in *Presidential Leadership: Politics and Policy Making*, the Framers did not envision the president serving as chief domestic policy maker, but within the constitutional separation of powers, "the president was given the duty to recommend necessary and expedient legislation and latitude in the execution of the law . . . which provided the constitutional basis upon which [the President's] substantial policy-making responsibility has been built" (2006, 410).

CHANGING VIEWS OF PRESIDENTIAL POWER

The Constitution places the president at the top of the executive branch of government; Article II requires the president to "take care that the laws be faithfully executed." As the country has increasingly looked to the national government to respond to national problems, a large, active government has evolved to implement these solutions. The president's power has grown as

Presidency, The

the head of this large bureaucracy. Although executive agencies and departments developed early in the republic's history, the foundation of the twenty-first century's executive branch was not institutionally created until 1939, in response to the Great Depression of the 1930s, the corresponding New Deal legislation of President Franklin D. Roosevelt (FDR; in office 1933–45), and World War II.

In 1937 FDR requested that Congress provide him with an institutional framework to meet the new demands of the president's expanded domestic policy role, which required more information, more expertise, and more staff. In response Congress passed the Reorganization Act of 1939, thereby establishing the institutionalized Executive Office of the President. From that point on, it became accepted that FDR and future presidents needed that framework to bring the principal managerial units of government firmly under control and to more effectively respond to the growing demands on the national government and thus the presidency.

Since that time, the federal bureaucracy has become enormous. The power of the bureaucracy, however, should not be measured by its size but rather by the level of independence and discretionary authority exercised by its appointed officials. The president appoints and the Senate confirms all heads of bureaucratic agencies, and the president can remove these people from office at any time, except for members of independent boards and commissions, such as the Federal Reserve Board and the Federal Trade Commission, who are appointed for fixed terms to protect their independence. Agency bureaucrats are thus subordinate to the president and dependent on the president's ability to organize and foster procedural legitimacy within the executive branch. Many agencies, however, have gained a great deal of independence, mostly as the result of Congress's delegating some of its legislative authority to them.

As an example, Title IX of the Education Amendments of 1972 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." The regulations for this statute were not established until 1975, after a lengthy process whereby the responsible agencies developed the details for how this policy would be implemented. As part of the process, the agencies held an open comment period in which interested parties and groups, congressional members, and other bureaucrats were able to provide information regarding policy implementation. The agency received more than 900 comments, which it took into consideration, in addition to information flowing from the White House Office. Although Congress passes the legislation and the president has the ability to set the policy agenda, the executive branch also has an independent policy-making role within the regulation-writing process.

Individual presidents have influenced the way the presidential role has grown and changed. The ways in which presidents exercise power has evolved over time. For example, in the nineteenth century, under what is called the Whig theory, the presidency was a limited office whose occupant was confined to the exercise of expressly granted constitutional authority. The president was seen, and behaved, as an administrator. The president was not meant to deal with national problems, because this was part of the congressional realm. Some presidents, includ-

ing Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, did assume greater executive power than was traditional during their time.

Theodore Roosevelt was the first president to expressly reject the Whig tradition in 1901 and to operate under the stewardship theory. Roosevelt believed in an assertive presidential role that served the national interests and was confined only at points specifically prohibited by law or the Constitution. During the Progressive Era, Roosevelt had an aggressive foreign policy, attacked business trusts, and pressed Congress to adopt progressive domestic policy. Most of Roosevelt's successors did not share his view of the presidency, but for the most part, presidents from that point on maintained a stronger view of the role of the president in national and policy affairs.

The Constitution gives the president singular authority. Although the Framers feared the power of an authoritarian ruler, they purposely did not divide the executive function of the government into a multiheaded unit. A plural executive could conceal and evade responsibility, whereas a single-headed unit who is accountable to the public, albeit indirectly through the Electoral College, could not hide behind others and could be removed from office. Singular authority was also important for the institution of the president in the role of chief executive. Although deliberation is important in the democratic legislative process, the president needs the ability to act without dissension to execute the laws faithfully. Writing in *Federalist* No. 70 (1788), Alexander Hamilton underscored four ingredients necessary for the presidency: unity, duration, adequate support, and competent powers (1961, 472).

INCREASING PRESIDENTIAL RESPONSIBILITIES

Over time the singular authority of the president in serving a national constituency contributed to the growth in presidential power, as well as in the size of the executive branch as a whole. As of 2015 the institutional presidency included an executive branch that employed an estimated four million full-time military and civilian personnel. This growth in power and evolution of structure occurred as the result of both historical and institutional factors. The demands of democracy, war, and welfare all played a role, but so, too, did the vision of presidents such as Lincoln, Woodrow Wilson (1913–21), and the Roosevelts.

The changing demands on the national government enabled presidents to claim the position of national leader. Unlike members of Congress, who are elected by their constituencies within their state, the president is the nationally elected leader. As national crises have occurred over time, such as the Great Depression, the world wars, and the terrorist attacks of September 11, 2001, the country looked to its president as the national leader to address these problems.

The United States in the twenty-first century also has broader international responsibilities, which require strong leadership from the president as the head of state. Theodore Roosevelt realized this and persuaded Congress to invest in the nation's naval prowess. In the postmodern era of global interdependence, presidential success in domestic affairs has become interdependent with the president's success in international affairs. The power of the president is no longer determined solely by factors internal to the United States.

In *The Postmodern President* (1991), Richard Rose argues that the president is required to "go public," "go Washington," and "go international." Presidents need to garner public support

in their constant campaign to be reelected, as well as to win legislative battles with Congress. The president must be able to influence other power holders in Washington to effectively direct the government. Presidents also need to cooperate with and influence executives from around the world to protect national security and economic interests in the postmodern global environment. A postmodern president is vulnerable in that “what he can accomplish internationally depends on two very different factors, the influence that a president can exercise on American policy and the influence that other nations have on the United States” (Rose 1991, 306).

*Amanda Ross Edwards,
North Carolina State University*

SEE ALSO: *Executive Agreements; Executive Order; Executive Powers; Executive Privilege; Imperial Presidency; Political Corruption; Presidency in the Policy Process; Presidential Signing Statements; Presidential Succession.*

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Supreme Court of the United States

The United States Supreme Court is the highest appellate court in the federal judicial system. It was the only court created by the federal Constitution. In the British North American colonies, the supreme courts were little more than municipal courts in the imperial scheme, with all decisions appealable to the central courts in England and the king’s Privy Council. The Confederation government of the United States of America, under the Articles of Confederation, had no courts, although they had tribunals to hear admiralty cases.

EARLY YEARS OF THE SUPREME COURT

In the first days of the Constitutional Convention in 1787, Governor Edmund Randolph (1753–1813) of Virginia proposed the creation of a national supreme court. This portion of his Virginia Plan survived opposition and was incorporated in the document the Committee of Detail created at the end of August. As drafted in the final days of the Convention by Gouverneur Morris (1752–1816), the delegate from Pennsylvania serving on the Committee of Style and Arrangement, Article III of the Constitution provided that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as

the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Congress created the system of inferior trial courts in the Judiciary Act of 1789. That system has been changed over the years, most notably in 1891 with the creation of an intermediate level of purely appellate courts.

The Constitution (Article III, Section 2, clause 1) had specified nine types of “cases” and “controversies” over which the federal courts were to have jurisdiction.

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . [and] to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States [“diversity”]; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment formally ended federal jurisdiction over cases between a state and citizens of another state, an adjustment in favor of “state sovereignty,” but in later years this absolute ban was itself whittled away to allow suits when a state waived its immunity, when a state law permitted the suit, and when plaintiffs sued individual officers of the state.

Regarding the Court’s “original jurisdiction” in “all Cases affecting Ambassadors, . . . Ministers and Consuls, and those in which a State shall be Party,” the Court’s appellate jurisdiction in the Judiciary Act of 1789 included hearing appeals from the state courts. Successive Supreme Courts have also read the supremacy clause (Article VI) of the Constitution as conferring jurisdiction on the Court. The clause provided:

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

The Court has read the clause, along with the provisions for appeal to the Supreme Court in the Judiciary Act, to grant the Court authority to strike down state legislation when it conflicted with federal law or the Constitution, as well as to hear and decide appeals from the state courts.

In defending the creation of a national supreme court during the ratification debates in New York, Alexander Hamilton claimed that the Court would be the weakest branch of the new government, lacking the power to raise funds or command an army. Over the years since he made that claim in 1788, the reputation and the reach of the Court into everyday American life has grown immensely, so that in the twenty-first century it

stands fully equal to the other branches of the federal government. In part this is because, from the first major cases to the present day, the Court claimed for itself a power of judicial review of the constitutionality of congressional and state legislation. Judicial review, a prudential (judge-made) doctrine, unlike the supremacy clause, assigned to the Court the final determination of the meaning of the Constitution. Although most closely associated with Chief Justice John Marshall in his opinion for the Court in *Marbury v. Madison* (1803), judicial review was rarely deployed during the first hundred years of the Court's existence. Indeed, although from 1791 to 2000 the Court overturned 156 acts or parts of acts of Congress, before 1866 it found only one—section 13 of the Judiciary Act of 1789—unconstitutional. Notably, a majority of the Court set aside progressive reform acts, such the Child Labor Act of 1918, as well as the National Industrial Recovery Act of 1933 and the Agricultural Adjustment Act of 1933, during the first years of the New Deal. In 2013 the Supreme Court struck down portions of the Voting Rights Act of 1965 and the Defense of Marriage Act of 1996.

Initially the US Supreme Court had little business; on occasion it summoned juries and acted as a trial court. But the political experience and reputation of the members of the first Court suggested that it could have a larger role in American governance. The first chief justice, John Jay of New York, was a veteran Revolutionary diplomat and politician. When he sat in the US Senate, Chief Justice Oliver Ellsworth (1795–1800) of Connecticut was the principal draftsman of the Judiciary Act of 1789, and Chief Justice John Marshall of Virginia (1801–35) was a former secretary of state and member of Congress. Chief Justice Roger Taney (1836–64) had served as US attorney general and secretary of the Treasury, and his successor, Chief Justice Salmon P. Chase (1864–73), was a former Ohio senator and governor as well as secretary of the Treasury. Some, but not all, of the later chief justices held high elective office: William Howard Taft (1921–30) had been president of the United States, and Chief Justice Charles Evans Hughes (1930–41) had served as governor of New York and US secretary of state. Other members of the Supreme Court had political ambitions, or so it was reported at the time. John McLean, Chase, Stephen J. Field, Hughes, and William O. Douglas had aspirations to be president of the United States.

In part because of the political backgrounds of the members of the Court, and in part because the president nominated men of his own political persuasion to serve, the Court has always had the appearance of being a highly politicized body. On some occasions presidents have asked political allies to serve. For example, John Adams selected Marshall because Marshall had proved a loyal ally in the effort to prevent war with France; President Andrew Jackson nominated Taney in part because Taney had assisted in Jackson's campaign to destroy the Second Bank of the United States; and President Harry S. Truman selected three friends from Congress, Chief Justice Fred M. Vinson and Justices Harold H. Burton and Sherman Minton. The Court can hardly avoid the accusation of playing politics when it is part of a political system. At the same time, members of the Court are very much aware that the Court is being watched and assessed—by the lawyers who practice before the Court, by judges of the lower federal and state courts, and by law professors, as well as a myriad of journalists. The canons of judging in a common law system, the authority of precedent, and the desire to rise above partisanship are countervailing forces to purely political ones.

PROCEDURES AND CONVENTIONS

Although for much of its tenure the Court was simply the uppermost tier in the common law system and was required to hear appeals in all manner of suits, in the twenty-first century, Congress has given to the Court almost total control of its docket. Thus the number of cases it hears a year has dropped from the high three figures of the later nineteenth century to about fifty to seventy-five cases. These almost always involve some constitutional question. Under the Court's appellate jurisdiction, a four-person vote of the justices can take up a case from the federal Circuit Courts of Appeal, a three-judge panel of a district federal court, a state supreme court, or in rare cases an expedited interlocutory appeal (appeal in ongoing cases).

The Court sits from the first Monday in October until the end of its term, sometime in late spring. If the Court agrees to hear a case, parties (including state and federal government attorneys) submit briefs and take part in oral argument before the Court. The justices then meet in conference, discuss and vote on the case, and prepare and circulate drafts of their opinions. The senior justice or the chief justice (if in the majority) assigns the writing of the Court's opinion. If a majority of the Court signs on, it becomes part of the body of constitutional law. If only a minority join in it (the majority merely agreeing in the decision), it does not have the weight of precedent. Whereas dissents and concurrences were uncommon in the nineteenth century (almost all of the Marshall Court opinions were unanimous), they became much more common in the twentieth and twenty-first centuries. Early opinions were commonly under ten pages in print, with some noteworthy exceptions. *Dred Scott v. Sandford* (1857) ran more than 100 pages, and every justice wrote an opinion in it. Modern opinions may run well into the hundreds of pages in print and be crisscrossed with concurrences in part and dissents in part.

Although justices make every effort to maintain collegiality, personal and ideological antagonisms have at times created rifts among them. Justice Benjamin Robbins Curtis (1851–57) was so incensed at the treatment he received from Chief Justice Taney that he resigned from the Court. Justice James Clark McReynolds (1914–41) refused to shake Justice Louis Brandeis's hand, customary at the beginning of each session, and rudely turned his back on Brandeis when the latter read opinions in open court. For a time, the feud between Justice Felix Frankfurter (1939–62) and Justice Hugo Black (1937–71) was so fiery that other members of the Court found themselves having to choose sides. In later years, though, the two men became friends.

JUDGES' BACKGROUNDS

Part of the changing function of the Court has been a shift in the educational background of its membership. Whereas many Supreme Court justices well into the nineteenth century had never been to law school, much less gained a law degree (they "read" law in an established lawyer's office and then passed the bar examination), by the end of the twentieth century all were law-school trained, most coming from the elite law schools (Harvard, Yale, Columbia, Chicago, and Stanford). Whereas most of the early justices had been in sole practice, later justices often had experience with large, corporate law firms and in the federal government.

As the demographic shape of the federal judiciary changed, so did the face of the Court. No woman had served until Sandra Day O'Connor of Arizona was appointed in 1981, and she

served until 2006. She was followed by Ruth Bader Ginsburg (1993–), Sonia Sotomayor (2009–), and Elena Kagan (2011–). The first justice of African American ancestry to serve was Thurgood Marshall (1967–91), followed by Clarence Thomas (1991–). Sotomayor is considered the first justice of Hispanic descent, though Justice Benjamin Cardozo (1932–38), was of Sephardic (Portuguese-Spanish) Jewish ancestry. The first Roman Catholic justice was Roger Taney. The next was Joseph McKenna (1898–1925). Roman Catholic justices comprised a majority of the Court in the 2000s, including Chief Justice John Roberts (2005–) and Associate Justices Antonin Scalia (1986–), Thomas, Anthony Kennedy (1988–), Samuel Alito (2006–), and Sotomayor. The first Jewish justice was Louis Brandeis (1916–39); the next was Cardozo, followed by Frankfurter, Arthur Goldberg (1962–65), Abe Fortas (1965–69), Ginsburg, Stephen Breyer (1994–), and Kagan. To date, 112 men and women have served on the Supreme Court.

PUBLIC LAW AND PUBLIC LIFE

As the changing composition of the Court suggests, the institution played an integral part in the nation's history. Its case law, and the impact of that case law on American economic, political, and social life, reflected changing public opinion, sometimes running ahead of that opinion, sometimes lagging behind it. This complex and vital relationship can be tracked by examining some of the Court's landmark cases.

Marbury v. Madison. *Marbury v. Madison*, 5 U.S. 137 (1803), came to the Court in the middle of its first great crisis. In the election of 1800, the ruling Federalist Party had lost the presidency and control of both houses of Congress to Thomas Jefferson and his Republican Party. The federal courts were the last bulwark of Federalist Party strength. In *Marbury* the issue before the Court, as Marshall framed it, was whether the Court had jurisdiction over the case. He intentionally ignored the political context of the suit, the battle between the Federalists and the Republicans. Nothing better demonstrated Marshall's command of his Court and his ability to rise above party than this deliberate shift from the political to the constitutional.

In a very long opinion for that day (twenty-six pages), Marshall wrote for a unanimous Court. He ruled that the justices could not help Marbury (who sought, from Secretary of State James Madison, a commission for a promised government post) because the relief he sought was not one of the kinds of original jurisdiction given the Court in Article III of the Constitution. The Constitution controlled or limited what Congress could do, and in particular prohibited Congress from expanding the original jurisdiction of the Court. Congress had violated the Constitution by doing so in the Judiciary Act of 1789. In short, he struck down that part of the act as unconstitutional.

The power that Marshall assumed in the Court to find acts of Congress unconstitutional, and thus null and void, was immensely important. It protected the independence of the Court from Congress. It implied that the Court was the final arbiter of the meaning of the Constitution. Here it applied rather narrowly to a matter of the Court's own powers. That is, in this particular case Marshall was simply saying that the Court had the final say on its own jurisdiction. Finally, Marshall reminded everyone that the Constitution was the supreme law, and that every act of Congress had to be measured against it.

Dred Scott v. Sandford. By denying that the Court had the power to order Madison to deliver Marbury's commission, Marshall had kept the Court out of partisan politics and protected its reputation. In the second of the landmark cases, *Dred Scott v. Sandford*, 60 U.S. 393 (1856), the Court did what Marshall had avoided: it stepped directly into the political arena, and its reputation suffered. In 1846 Dred Scott, the slave of US Army doctor John Emerson, had sued for freedom for himself and his family. After two trials and four years had passed, the Missouri trial court ruled in his favor. The Missouri Supreme Court reversed that decision in 1852. Northern personal liberty laws, the response to the Fugitive Slave Act of 1850, angered Missouri slaveholding interests, and the new policy the majority of the state's supreme court adopted in *Scott* reflected that anger.

But Scott's cause had also gained new friends among Free Soilers and abolitionists, who saw his case as raising crucial issues. The federal circuit court agreed to hear the case under its diversity jurisdiction (in effect finding that Scott had the capacity to bring the suit), but the jury in the federal circuit court found Scott a slave in Missouri, and therefore diversity did not exist.

Scott's counsel appealed to the Supreme Court. Although the Court might still have saved its store of public confidence, or at least not exposed itself to the virulent politics of the day, by issuing a narrow ruling finding that Scott had no standing to bring the suit, instead Chief Justice Taney issued a long opinion that went far beyond the diversity question. As Chief Justice Hughes later wrote, Taney's opinion in the case was a "self-inflicted wound." By not deferring to the elective branches and seeking to settle the slavery issue once and for all, Taney put the Court into the center of the most divisive issue in national politics.

Joined by six other justices, he ruled that the Missouri Supreme Court was correct and the lower federal court was correct: under Missouri law, Scott had no case. Nor should the case have come to the federal courts, for Scott was not a citizen. But Taney was not done. He added two dicta not necessary to resolve the case but that would, if followed, have settled the political questions of black citizenship and Free Soil.

Taney wrote that no person of African descent brought to America to labor could ever be a citizen of the United States. Adding insult to injury, Taney said that blacks "had for more than a century before [the drafting of the federal Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect. . . ." (60 U.S. at 407).

In a second dictum he opined that the Fifth Amendment to the Constitution, guaranteeing that no man's property might be taken without due process of law, barred Congress from denying slavery expansion into the territories. Although Article IV, Section 3 of the Constitution had explicitly given to Congress full and untrammelled authority to set laws and regulations for the territories, it could not rule out slavery because the Fifth Amendment was added to the Constitution after ratification, and it must be read to modify Congress's powers over the territories. Taney retroactively declared the Missouri Compromise of 1820, barring slavery in territories north of 36 degrees 30 minutes north latitude, unconstitutional.

Taney's opinion and the Court's ruling were celebrated in the South and excoriated in the North. Abraham Lincoln bashed it in his 1858 debates with Illinois senator Stephen Douglas.

Supreme Court of the United States

Douglas had a hard time defending it, as it seemed to imply slavery would be legal throughout the country. The decision would become a major blow to the prestige of the Court, and perhaps that was part of the thinking of the proponents of secession in the winter of 1860 to 1861.

Plessy v. Ferguson. Slavery ended with the Thirteenth Amendment, a direct repudiation of Taney's opinion in *Dred Scott*. But a new regime of Jim Crow legislation, largely in, but not limited to, the former Confederate states, imposed racial segregation, making African Americans second-class citizens. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the plaintiff, Homer Plessy, and counselor Albion Tourg e challenged Louisiana's railroad-car segregation law. Plessy, who could have passed for white, was selected by a committee of Afro-Creoles to take part in a test case: they had him buy a first-class train ticket and then arranged for the conductor and a detective to detain and arrest him after he refused to move from the whites-only car to the black car. The committee lost the case in the Louisiana courts, where John Ferguson (1838–1915) was a trial court judge, but appealed to the Supreme Court on Thirteenth Amendment and Fourteenth Amendment grounds.

Justice Henry Billings Brown (1891–1906), writing for the majority of the Court, dismissed both constitutional and common law grounds for the suit, and went on to explain the need for segregation. “[I]n the nature of things, [the Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either” (163 U.S. at 544). Justice John Marshall Harlan's dissent in *Plessy* was powerful and sweeping. “In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights” (163 U.S. at 554). Harlan concluded: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law” (163 U.S. at 559).

Lochner v. New York. Although most state regulation of industrial activity in the Populist and Progressive eras passed review in the federal courts, the courts refused to adopt the doctrine of routine deference to legislatures' findings—findings based on the kind of factual evidence that Progressive reformers admired. The case of *Lochner v. New York*, 198 U.S. 45 (1905), became a focus of Progressive complaints about the federal courts. *Lochner* involved a challenge to the New York Bakeshop Act of 1895. On health grounds it limited the hours a baker could be made to work to ten per day or sixty per week. The counsel for Joseph Lochner, a baker, argued that the act violated his and his workers' freedom to enter into contracts, a freedom protected from a state's interference by the due process clause of the Fourteenth Amendment. Although the state legislature twice passed the act unanimously and the state courts declined to honor Lochner's claims, the Supreme Court agreed to hear the case.

Justice Rufus Peckham wrote for the majority, including Melville Fuller, David Brewer, Henry Brown, and Joseph McKenna. “The statute necessarily interferes with the right of contract between the employer and employees. . . . The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amend-

ment of the Federal Constitution” (198 U.S. at 53). State regulations of economic activities or individual rights were not unconstitutional per se, but “there is a limit to the valid exercise of the police power by the State. . . . Otherwise the Fourteenth Amendment would have no efficacy, and the legislatures of the States would have unbounded power” (198 U.S. at 56).

Justice Harlan again dissented. He insisted that “the right to contract in relation to persons and property or to do business, within a State, may be ‘regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes’” (198 U.S. at 66). Justices Edward White and William Day agreed.

Oliver Wendell Holmes Jr., a 1901 addition to the bench, also dissented. He did not see why Peckham's economic ideology should be constitutionalized, any more than any judge's personal views of liberty should trump a legislature's. He wrote: “This case is decided upon an economic theory which a large part of the country does not entertain. . . . I strongly believe that my agreement or disagreement has nothing to do with the right of a majority [in a legislature] to embody their opinions in law. . . . The Fourteenth Amendment does not enact [the English sociologist] Mr. Herbert Spencer's Social Statics” (198 U.S. at 75).

Abrams v. United States. Although Holmes was the author of First Amendment opinions that upheld the convictions of radicals during World War I, in *Abrams v. United States*, 250 U.S. 616 (1919), he dissented from his brethren. After the war A. Mitchell Palmer (1872–1936), attorney general under President Woodrow Wilson, initiated a “Red Scare,” an antiradical sweep, which troubled Holmes. The five defendants in *Abrams*, all young anarchists born in Russia, had dropped leaflets in English and Yiddish from the window of a building on Manhattan's Lower East Side criticizing Wilson's decision to send troops to Russia to suppress the Bolshevik Revolution. The majority, with Justice John Clarke citing three earlier Holmes opinions, found that the leaflets violated the Espionage Act of 1917.

In dissent, Holmes found that “[t]he principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion. . . . Congress certainly cannot forbid all effort to change the mind of the country” (250 U.S. at 628). History—the history of a great democracy—offered a different lesson. “[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas. . . .” (250 U.S. at 630).

Brown v. Board of Education. Perhaps the most oft-cited of all the Supreme Court's decisions is *Brown v. Board of Education*, 347 U.S. 483 (1954). Throughout the 1930s the National Association for the Advancement of Colored People (NAACP) had focused its energies on ensuring that separate but equal was actually equal. In *Brown* it shifted its aim to the destruction of Jim Crow laws in education.

In *Brown* and the other elementary school segregation cases, the opinion of the Court was unanimous. Chief Justice Earl Warren read the Fourteenth Amendment simply: the *Plessy* doctrine had no place in the education of children. Warren opined that education was the key to success in American society.

No one could doubt that. “It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms” (347 U.S. at 493).

Warren did not explicitly overrule *Plessy*, a fact that had great significance. He said that the rule in *Plessy* did not apply to public education. *Plessy* was not concerned with education, though it would become the precedent on which segregation of schools was based. Instead, it concerned transportation. To overrule *Plessy* would have been tantamount to saying that all state segregation was unconstitutional. The Court would follow this path in the years to come, but for the present, it was more cautious.

Roe v. Wade. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court was not so cautious, with tumultuous results. Chief Justice Warren Burger (1969–86) knew the importance of this case and its companion, *Doe v. Bolton*, from the moment they arrived in 1971 as two class action suits challenging the abortion laws of Texas and Georgia, respectively. Texas had a very old law that made performing an abortion a felony, with no exceptions for pregnancies resulting from rape or incest, or pregnancies that threatened the health of the woman. The woman undergoing the procedure was not a party to the offense. Georgia had recently “reformed” its law, following guidelines from the American Bar Association, the American Medical Association, and the Model Penal Code, to permit abortions if a panel of doctors agreed that the health of the patient was at stake in the continued pregnancy. In both *Roe* and *Doe*, federal district court panels of three judges (petitioners had sought injunctive relief against the states, and Congress provided that such cases be heard before a panel of judges) struck down the state laws as violating the federal Constitution’s protection of a woman’s privacy rights under *Griswold v. Connecticut*, 381 U.S. 479 (1965).

After two rounds of oral argument in 1971 and 1972, with newly appointed justices Lewis F. Powell (1972–87) and William Rehnquist (1972–86; chief justice 1986–2005) taking part in the latter, Chief Justice Burger assigned the opinion to Justice Harry Blackmun (1970–94). Writing for a 7–2 majority, he rested the right to an abortion on the due process clause of the Fourteenth Amendment and on the doctor–patient relationship. From his research into the latter, Blackmun proposed the division of a pregnancy into trimesters. For an abortion in the first trimester, a woman needed only the consent of her doctor. In the second and third trimesters, after the twentieth week, the state’s interest in the potential life allowed it to impose increasingly stiff regulations on abortions. The choice of ending a pregnancy in its early stages was now a fundamental right, protected by the Fourteenth Amendment. At the same time, states had a right to protect incipient human life that grew as the pregnancy continued, so that “at some point in time [in the pregnancy]” the state could assert a compelling interest in protecting the potential life of the fetus.

The 7–2 decision invalidated most of the abortion laws in the country and nationalized what had been a very local, very personal issue. *Roe* would become the most controverted and controversial of the Court’s opinions since *Dred Scott*, to which some of its critics, including Justice Scalia, would later compare it. Women’s rights advocates welcomed a decision that recognized a right to an abortion—but only barely, with qualifications, on a

constitutional theory ripe for attack. Opponents of abortion jeered a decision that recognized a state interest in the fetus but denied that life began at conception. Some veteran Court watchers thought that the position a judicial nominee took on *Roe* became a “litmus test” for the choice of justices. Congressional and presidential elections would turn on the abortion rights question—proof, if more was needed, of the central place of the Supreme Court in American public life.

Peter Charles Hoffer,
University of Georgia

SEE ALSO: *Article III, United States Constitution; Constitutional Authority; Constitutional Dialogues; Federal Court Jurisdiction; Judicial Review; Judicial Selection; Judicial Supremacy.*

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Federalism in American History

Federalism has deep roots in North America, Canada, Mexico, and the United States; each has a federal form of government whereby powers are constitutionally divided and shared between a national government and state or provincial governments. The United States is the world’s oldest federal country, and the

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institutions of federalism established by the US Constitution have been durable despite substantial centralization since 1789.

PRECURSORS OF THE FEDERAL UNION

Some observers argue that the roots of American federalism lie in indigenous polities, such as the Iroquois Confederation (a league of six nations after 1722) and the Dakota League of the Seven Council Fires. Some also maintain that these indigenous federations guided the Founders of American federalism, but evidence of such influence is scant. Colonial settlers saw federalism through a European lens when they sought to interpret these powerful Indian polities. Although those government systems were sophisticated, they differed from European federal arrangements.

A stronger case can be made for the influence of the Puritans' covenant or federal theology. The word "federal" comes from the Latin *foedus*, meaning covenant, compact, or agreement. Federal theology is complex but, essentially, when applied to political life by Reformed Protestants, it held that families, congregations, and towns, as well as unions of communities, can be created legitimately only by voluntary covenants. Among many forms of political covenanting were the Mayflower Compact (1620); the Fundamental Orders of Connecticut (1639), which established a "confederation" of three towns; and the Massachusetts Constitution (1780), the preamble to which states that a body politic "is a social compact by which the whole people covenants with each citizen and each citizen with the whole people." Thus, covenanting was a common political experience known to most of the US Constitution's Framers in 1787.

The first notable unification proposal was the Albany Plan of Union advanced by Benjamin Franklin at a congress of seven colonies in 1754. The first united political action, involving nine colonies, was the Stamp Act Congress of 1765. The first informal colonial union was the First Continental Congress of 1774, which produced a compact among the colonies to boycott British goods and called for a Second Continental Congress. That Second Congress issued the Declaration of Independence in 1776 and proposed the Articles of Confederation and Perpetual Union in 1777, which all thirteen states ratified by 1781.

The Articles established a weak, one-branch government—Congress—in which each state had one vote. The confederation could coin and borrow money, appoint army officers, make peace, and run post offices, among other things, but could not legislate for individuals. Hence, it could not levy taxes, conscript for military service, regulate commerce, or enforce treaties. Despite its weaknesses, the confederation did win the war and conclude a treaty with Great Britain, enact the Land Ordinance of 1785 and Northwest Ordinance of 1787, maintain a postal system and common currency, establish the idea of a perpetual union, and name the country the United States of America.

THE FEDERAL UNION

The confederation's weaknesses generated agitation for a tighter union with a more powerful national government, which was embodied in the Constitution of the United States that went into effect in 1788. The Constitution established a three-branch national government having a separation of powers and checks and balances among the branches. Most important, the Constitution authorized Congress to legislate for individuals.

This power transformed the ancient idea of federalism that underlay the Articles of Confederation into the modern idea of federalism that underlies the Constitution of 1787—namely, concurrent governments, national and state, each authorized to legislate for individuals within its sphere of constitutional power.

The system's originality sparked debate at the Constitutional Convention, in the ratification of the proposed constitution, and ever since. Should it work more like a confederation with a weak national government or a unitary system with a strong national government? As the debate endured, successive generations adapted the federal system to their preferences.

There is no scholarly consensus identifying eras of American federalism; however, many scholars speak of dual, cooperative, and regulatory or coercive federalism. This classification will be used for analytic convenience with caveats noted as appropriate.

PRE-CIVIL WAR DUAL FEDERALISM ESTABLISHED (1789–1861)

The idea of dual federalism, prominent during this period, holds that the federal and state governments are constitutionally coequal, occupy separate spheres of sovereign power, and should not interfere with each other. In this view the federal government has only enumerated powers of limited scope, and state-federal relations exhibit more tension than collaboration.

This era witnessed contentious debates over the nature of the union, the balance of power between free states and slave states (e.g., the Missouri Compromise of 1820), and whether the federal government had authority to fund internal improvements (e.g., canals and roads). The Virginia and Kentucky Resolutions (1798–1799) crafted by James Madison and Thomas Jefferson asserted an authority of state legislatures to oppose federal laws they deemed unconstitutional. Jefferson asserted a state authority to nullify federal laws; Madison held that states have a right of interposition to prevent the federal government from enforcing a law deemed unconstitutional by a state. Later, John C. Calhoun and other southerners defined the Constitution as a compact from which states can secede.

The US Supreme Court under Chief Justice John Marshall, a Federalist, sought to protect the federal government's powers against state encroachments. For example, in *McCulloch v. Maryland*, 7 U.S. 316 (1819), the court ruled that the Constitution's necessary and proper clause allowed Congress to establish the Bank of the United States and that the Bank, as an instrument of the United States, possessed sovereign immunity from state taxation, as do many state instrumentalities from federal taxation. In *Dartmouth College v. Woodward*, 17 U.S. 518 (1819), the Court invoked the Constitution's contracts clause to strike down New Hampshire's seizure of a college in violation of the school's 1769 royal charter. An important case for US commercial development was *Gibbons v. Ogden*, 22 U.S. 1 (1824). The Court relied on the commerce clause to prohibit states from granting private companies monopoly rights over navigable interstate waterways. The Court also ruled in *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), that the federal government can enforce federal law against state and local officials. In this case, Ohio's auditor had violated a federal court order when, in defiance of the Court's *McCulloch* decision, he seized \$100,000 from the Second Bank of the United States for non-payment of Ohio's unconstitutional tax on the Bank. In ordering the state auditor to repay all the money, the Court ruled

that a state agent acting under color of an unconstitutional state law can be held personally responsible for harms arising from his or her actions.

Despite the dualist view, various types of federal-state cooperation emerged, beginning with federal assumption of the states' Revolutionary War debts in 1790. Later, the US Army Corps of Engineers provided technical assistance to states, and Congress helped fund state infrastructure and schools through loans, investments in joint stock companies, revenues from public land sales, land grants, and loans of surplus federal revenue to the states in 1837, with no repayment expected. However, growing agitation over slavery, the Supreme Court's 1857 *Dred Scott* decision (*Dred Scott v. Sandford*, 60 U.S. 393), and Abraham Lincoln's election to the presidency in 1860 precipitated a civil war.

CIVIL WAR-ERA DUAL FEDERALISM (1861–1886)

During the war, the federal government legitimized direct support for internal improvements by, for example, giving states land grants to establish colleges, authorizing frontier homesteading, and supporting construction of the transcontinental railroad. The federal government created a national currency and a network of national banks alongside state-chartered banks, and taxed state and local currencies out of existence.

After the war the federal government, spurred by congressional Republicans, undertook aggressive "reconstruction" of the former Confederate states, mainly to secure equal rights for freed slaves. When Reconstruction ended in 1877, whites reasserted control throughout the South, disenfranchised blacks, and enacted laws requiring racial segregation of public facilities, which the US Supreme Court upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Implementing the principal plank of the Republican Party to rid the country of "the twin relics of barbarism—slavery and polygamy," the federal government also mounted legal and military campaigns to extinguish polygamy in the Mormon territories, culminating in the Latter Day Saints' disavowal of polygamy in 1890. These campaigns had gained important legitimacy from *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Supreme Court ruled against polygamy by upholding the federal Morrill Anti-Bigamy Act of 1862. The campaign was part of a set of postwar movements, often endorsed by federal officials, that sought to unite the country culturally by healing the wounds of the Civil War, Americanizing immigrants, suppressing pornography (e.g., the US Comstock Act of 1873) and alcoholic beverages, and establishing Protestant-based national mores.

The federal government also sold and gave away millions of acres of public land in the West to railroads, homesteaders, and new states entering the union. Land grants were a major form of federal aid to states.

The US Supreme Court reaffirmed dual federalism when it declared the United States an "indestructible Union, composed of indestructible States" (*Texas v. White*, 74 U.S. 700 [1869]). Yet constitutional changes had occurred, especially ratification of the Fourteenth Amendment (1868). Because the amendment authorizes the federal government to intervene in state affairs to protect individual rights, its supporters viewed the amendment as a major nationalizing improvement of the Constitution. The Supreme Court, however, interpreted the amendment narrowly in the *Slaughter-House Cases*, 83 U.S. 36 (1873), and for eighty-

six years, declined to use it to protect black Americans deprived of their rights by states. The amendment did not transform federalism until the Court reinterpreted it during the 1950s and 1960s.

TRANSITION TOWARD COOPERATIVE FEDERALISM (1887–1932)

By the 1880s, industrialization, urbanization, and immigration spurred calls for more economic and social regulation, especially by the federal government. This era saw the rise of the Progressives and Populists, the emergence of cash grants-in-aid to states, major expansions of federal regulation, and three amendments to the US Constitution pertinent to federalism.

Land grants declined as the supply of public land diminished and lands were preserved as national heritages (e.g., Yellowstone and Yosemite). The federal government, therefore, offered cash grants to states, such as the Hatch Act (1887) for land-grant colleges, the Weeks Act (1911) for forest fire prevention, and the Federal-Aid Road Act (1916). Such grants were a hallmark of what later became known as cooperative federalism, which emphasizes federal-state cooperation rather than dualism to solve national problems, federal-state sharing of responsibilities for public functions, and intergovernmental bargaining to produce collaboration.

Progressives, including Presidents Theodore Roosevelt and Woodrow Wilson, campaigned to strengthen federal power to regulate large corporations, redistribute wealth, and advance social welfare. Progressive scholars such as Charles Beard (1874–1948) denigrated the Founders, federalism, the separation of powers, and the states, calling for more centralized national governance. Populists agitated for federal economic regulation, a graduated income tax, and direct election of US senators.

The first significant federal economic regulatory system was the Interstate Commerce Commission created in 1887 to regulate railroads and, later, trucks, buses, and telephone companies. Railroad expansion had provoked state regulation, but because railroads cross state lines, most rail companies preferred one federal regulator. The rise of cartels and monopolies, such as the Standard Oil Co., induced enactment of the Sherman Antitrust Act (1890) and Clayton Antitrust Act (1914), while consumer protection concerns triggered such laws as the Pure Food and Drug Act (1906) and Meat Inspection Act (1906). The Federal Reserve was established in 1913 to exercise monetary policymaking through a national board and twelve regional banks. Even though bankruptcy is an explicit federal constitutional power, Congress proved unable to enact a permanent bankruptcy law until 1898.

In 1913 reformers achieved ratification of the Sixteenth Amendment, which authorizes federal taxation of income, and the Seventeenth Amendment, which authorizes direct election of US senators by the voters of each state, thereby ending the original method of state legislative selection of senators. Both amendments laid foundations for substantial expansions of federal power in the twentieth century. The era's national cultural reform was Prohibition, established by the Eighteenth Amendment in 1919.

MID-TWENTIETH-CENTURY COOPERATIVE FEDERALISM (1933–1968)

This era saw vast expansions of federal fiscal and regulatory interventions into both the economy and two historically state

KEY DATES

- 1754:** The first notable unification proposal, the Albany Plan of Union, is advanced by Benjamin Franklin at a congress of seven colonies.
- 1765:** The first united political action, the Stamp Act Congress, takes place, involving nine colonies.
- 1774:** The first informal colonial union, the First Continental Congress, produces a compact among the colonies to boycott British goods and calls for a Second Continental Congress.
- 1777:** The Second Continental Congress proposes the Articles of Confederation, which establishes a Congress in which each state has one vote. The Confederation can not legislate for individuals.
- 1788:** The Constitution of the United States goes into effect, establishing a three-branch national government having a separation of powers and checks and balances among the branches. The Constitution authorizes Congress to legislate for individuals.
- 1798-** The Virginia and Kentucky Resolutions, crafted by James Madison and Thomas Jefferson, respectively, assert the authority of state legislatures to oppose federal laws they deem unconstitutional.
- 1819:** *McCulloch v. Maryland* rules that the Constitution's necessary and proper clause allows Congress to establish the Bank of the United States and that the Bank, as an instrument of the United States, possesses sovereign immunity from state taxation.
- 1868:** The Fourteenth Amendment is ratified, authorizing the federal government to intervene in state affairs to protect individual rights.
- 1869:** The US Supreme Court in *Texas v. White* declares the United States an "indestructible Union, composed of indestructible States."
- 1887:** With the Hatch Act, the federal government offers cash grants to states, a hallmark of what later became known as cooperative federalism, which emphasizes federal-state cooperation rather than dualism to solve national problems.
- 1913:** Ratification is achieved for the Sixteenth Amendment, which authorizes federal taxation of income, and the Seventeenth Amendment, which authorizes direct election of US senators by the voters of each state. Both amendments lay foundations for substantial expansions of federal power in the twentieth century.
- 1937:** Vast expansions of federal economic regulation, initially driven by the Great Depression, are endorsed by the US Supreme Court in a historic switch in doctrine, *West Coast Hotel Co. v. Parrish*, that defers to Congress's interpretations of interstate commerce.
- 1964-** The Civil Rights Act of 1964 and the Voting Rights Act of 1965 both extend federal power over states.
- 1973:** In *Roe v. Wade*, the US Supreme Court holds that the Fourteenth Amendment voids antiabortion laws then present in forty-six states.
- 1977:** Supreme Court Justice William J. Brennan advocates the new judicial federalism when urging state courts and legislatures to establish broader rights protections than those provided by the US Supreme Court, so long as such protections rest solely on "adequate and independent" state constitutional grounds.
- 1995:** For the first time since 1936, the Court strikes down a federal law as exceeding Congress's commerce power in *United States v. Lopez*.

and local functions: social welfare and civil rights. Mostly, federal legislative initiatives did not undermine traditional state powers. They were usually undertaken with federal-state consultation and support from many state and local officials. Further, the Eighteenth Amendment's repeal in 1933 restored state regulation of alcoholic beverages.

Three factors facilitated cooperation. First, the Great Depression led voters to elect a Democratic majority in the federal government, enabling President Franklin D. Roosevelt to launch his New Deal, which promoted federal-state (and local) cooperation to address the economic calamity. World War II reinforced intergovernmental cooperation because it was neces-

sary to mobilize all sectors of the country and to enlist state and local governments in various aspects of the war effort such as civil defense and operation of the Selective Service System. Second, in most states, county-based party organizations, sometimes called political machines, largely controlled the electoral fortunes of presidents and members of Congress. The Democratic and Republican parties were confederations of county and state organizations, not nationalized parties. State and local elected officials, especially governors and mayors, wielded significant weight in federal elections and could, thus, demand the cooperation of federal policymakers. Third, this era experienced the lowest party polarization in Congress since 1879 (the earliest data point), which facilitated bipartisan cooperation. (Polarization is a measure of the extent to which members of each party vote only with their own party; bipartisanship is the extent to which members of each party vote with members of the other party.)

Vast expansions of federal economic regulation, initially driven by the Great Depression, were endorsed by the US Supreme Court in a historic 1937 switch in doctrine (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 [1937]) that deferred to Congress's interpretations of interstate commerce. The Court further opined in 1941 (*United States v. Darby Lumber Company*, 312 U.S. 100 [1941]) that the Tenth Amendment is "but a truism" and thus not a barrier to federal economic regulation. Despite this expansion, federal laws usually allowed states to retain many regulatory powers over most major economic sectors such as banking, securities, telecommunications, gas, and electricity. Congress even overrode the US Supreme Court to restore state regulation of insurance.

Cooperation also characterizes the Social Security Act of 1935, the first major federal social welfare law. The act's old-age assistance program is almost entirely federal, but the act's unemployment insurance, Aid to Dependent Children, and other welfare programs were created as jointly funded federal-state programs with significant state administration. The act was amended in 1965 to establish Medicare, a federal program, and Medicaid, a federal-state program.

President Dwight D. Eisenhower campaigned against what he called New Deal centralization but supported two large nationalizing federal aid programs: the National Interstate and Defense Highways Act (1956), initiating interstate highways, and the National Defense Education Act (1958), the first major federal intervention into public education, historically a local responsibility.

By 1960 federal aid to state and local governments (in constant dollars) had increased 243 percent from 1940. Most federal grants are categorical; that is, the money must be spent for specific, congressionally designated activities (e.g., highway construction). Most also require state and local governments to match federal aid dollars in various ratios with their own dollars.

Federal aid increased another 143 percent to \$110.2 billion by 1969 as President Lyndon B. Johnson promoted Creative Federalism. This entailed the creation of 210 new grants, federal aid awards not only to states but also to local governments (especially large cities), community organizations, and nonprofit entities, and greater federal involvement in more areas of state and local governance, such as the War on Poverty and the Omnibus Crime Control and Safe Streets Act (1968).

Federal power expanded less cooperatively to remedy states' deprivations of individual rights. From 1954 to 1955, the US

Supreme Court, in *Brown v. Board of Education*, 347 U.S. 483 (1954), declared that racial segregation in public schools violates the Fourteenth Amendment's equal protection clause. Numerous federal court orders thereafter mandated desegregation. Resistance, especially in the South, required President Eisenhower to send US troops to Little Rock, Arkansas, in 1957. President John F. Kennedy dispatched US marshals several times to enforce desegregation and protect civil rights advocates. Congress responded with the Civil Rights Act of 1964 and Voting Rights Act of 1965, both of which extended federal power over states.

The US Supreme Court also increased supervision of the states by selectively incorporating most of the US Bill of Rights into the Fourteenth Amendment. Incorporation applies provisions of the US Bill of Rights to the actions of state and local governments. For example, the Court declared in 1962 and 1963 that public school-sponsored prayer and Bible reading violate the establishment clause of the US Constitution's First Amendment.

RISE OF REGULATORY OR COERCIVE FEDERALISM (1969–1989)

This era entailed unprecedented increases in federal regulation of states and localities through conditions attached to federal aid, preemptions, mandates, and court orders. Presidents Richard M. Nixon and Ronald Reagan each launched a New Federalism to restore some state powers, and the US Supreme Court under Chief Justices Warren E. Burger and William H. Rehnquist attempted to maintain state powers, but none arrested centralization.

Various factors accelerated federal power expansion. The rise of television, proliferation of national interest groups, the spread of primary elections, and US Supreme Court "one person, one vote" rulings on redistricting in the mid-1960s all undermined the confederated party system and disconnected the electoral fortunes of presidents and members of Congress from state and local parties and elected officials. Additionally, rights advocates demanded federal coercive pressure on states to promote national rights protections. In 1973, for instance, the US Supreme Court held that the Fourteenth Amendment voided antiabortion laws then present in forty-six states (*Roe v. Wade*, 410 U.S. 113 [1973]). New social movements also demanded federal intervention into state and local affairs to overcome collective-action problems, whereby states are unable to join together to solve a problem, and to mitigate negative externalities, such as polluted water flowing from one state into another, arising from state and local policies. Environmental protection is a prime example. The US Environmental Protection Agency was created in 1970; its initial regulatory approach to states and localities was "command and control." Further, the Civil Rights Movement's discrediting of the traditional South, as well as social changes in the South, ended the South's historic role as defender of states' rights. Most Americans supported these changes, sooner or later, and apparently no longer saw national centralization and diminished state authority as unacceptable prices for change.

Conditions of federal aid are rules that state and local governments must obey to receive and expend federal funds. Conditions increased significantly in number and policy scope. A prominent example is the 1984 condition of aid requiring states to raise their alcoholic beverage purchase age to twenty-one or lose up to 10 percent of their federal highway aid. All states increased their drinking age.

Federalism in American History

Congress also exerts control by funneling aid through categorical grants. By 1989, 478 grants were categorical grants for specific purposes. Only fourteen were block grants, which combine related categorical grants and give state and local governments more discretion over how to spend federal dollars. For example, the Community Development Block Grant, enacted in 1974, brings together various housing and community development programs, and remains a favorite of mayors.

Preemption is the displacement of state law by federal law under authority of the supremacy clause of the US Constitution (Art. VI). From 1789 through 1969, Congress enacted 206 explicit preemptions. From 1970 through 1989, Congress enacted 205 such preemptions. For example, the Motor Carrier Act of 1980 deregulated the trucking industry and prohibited states from re-regulating it. A much larger field of implicit preemption exists whereby federal agencies and courts conclude that operational conflicts between state and federal laws require displacement of state law, even if Congress did not explicitly preempt state law. Congress also enacts partial preemptions, which establish minimum national standards and allow states to set higher standards. Many federal environmental laws contain partial preemptions.

Mandates are direct orders. Failure to comply can result in federal civil or criminal penalties against state and local governments or officials. The first federal mandate was enacted in 1931, followed by one in 1940 and nine during 1964 to 1969. Congress enacted fifty-six mandates from 1970 to 1989. Unfunded and underfunded mandates most disturb state and local officials because little or no federal aid is offered for compliance. For example, the Education for All Handicapped Children Act (1975) requires public schools to provide a free appropriate education and one free meal a day to all children with disabilities. States contend that Congress provides too little aid to help pay the compliance costs.

Federal court orders and consent decrees also proliferated during this era, especially as US Supreme Court rulings and new federal laws exposed state and local governments to more litigation. President Nixon proposed a New Federalism to restore some state powers. He increased block grants from two to five and secured enactment of General Revenue Sharing (GRS) in 1972. GRS provided nearly unconditional federal funds to states and more than thirty-eight thousand local and tribal governments, but GRS ended for states in 1980 and for local and tribal governments in 1986. President Reagan championed a New Federalism and increased the number of block grants to fourteen by 1989. In 1982 he proposed a “swap/turnback” and a federal trust fund. The federal government would fund all medical assistance programs (mainly Medicaid); the states would assume responsibility for AFDC, food stamps, and some other categorical grants. The trust fund, to be funded by federal excise taxes, would be distributed to the states over four years. The governors rejected the swap. Reagan was the last president to make federalism a specific campaign issue.

In 1976 the US Supreme Court, under Nixon appointee, Chief Justice Rehnquist, briefly revived the Tenth Amendment as a brake on the federal commerce power (*National League of Cities v. Usery*, 426 U.S. 833 [1976]), but the ruling was eroded by later cases and then overturned in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

A partial enhancement of state powers has been the “new judicial federalism” first advocated by US Supreme Court Justice William J. Brennan in 1977. This doctrine allows state courts

and legislatures to establish broader rights protections than those provided by the US Supreme Court, so long as such protections rest solely on “adequate and independent” state constitutional grounds. For example, although the US Supreme Court holds that the US Bill of Rights does not protect free speech rights in privately owned shopping malls, the high courts of California, Colorado, Massachusetts, and New Jersey hold that citizens have such rights under their state constitution’s declaration of rights.

NORMALIZED REGULATORY OR COERCIVE FEDERALISM (1990–2000S)

The contemporary period has normalized the trends established during 1969 to 1989, as symbolized by the 1996 closing of the thirty-seven-year-old US Advisory Commission on Intergovernmental Relations, the last institutional manifestation of cooperative federalism. The US Supreme Court has issued some rulings limiting federal power, but with little practical effect. The federal government is the prevailing policymaker. State and local officials have little voice in federal policymaking, although they influence the intergovernmental implementation of federal policies. Rising party polarization, however, has made some federal-state relations contentious and partially revived dual federalism, especially in states dominated by liberal Democratic or conservative Republican governors and legislatures.

Conditions of federal aid have increased; categorical grants rose from 478 in 1989 to 1,019 in 2013; and block grants increased from 14 to 22. In 2012 the US Supreme Court, for the first time, struck down a condition of aid as unconstitutionally coercive (*National Federation of Independent Business v. Sebelius*, 567 U.S. ____ [2012]), but the ruling will likely be *sui generis*. The condition of aid was a requirement that states significantly increase Medicaid (i.e., subsidized health insurance for low-income people) enrollments or else lose all of the federal government’s share of their Medicaid funds.

In constant dollars, federal aid to states and localities increased by 147 percent from \$186.5 billion in 1989 to \$459.9 billion in 2013. In 2013 federal aid accounted for 30.9 percent of state spending. The composition of aid, however, has changed dramatically. In 1989, 56 percent of federal aid was dedicated to social welfare; in 2013 it was 68 percent. Most of this money is for Medicaid, which accounts for 45 percent of all federal aid. Consequently, states have become mainly conduits for federal funds transferred to individuals in the forms of income support and social services such as healthcare. This trend is squeezing out federal aid for such public investments as education, infrastructure, economic development, criminal justice, and social services. As a result, direct federal aid to local governments dropped steeply, whereas Medicaid has become the single largest category of state spending.

Congress has enacted about 310 explicit preemptions since 1989 (43 percent of all preemptions enacted since 1789). More than 450 federal mandates have been enacted during this era, although the Unfunded Mandates Reform Act (UMRA) of 1995 has reduced the number of unfunded mandates. State and local officials complain, however, that UMRA exempts many federal actions that induce unfunded costs for them. Likewise, federal court orders and consent decrees continue to be important in state and local governance, and to impose costs on those governments.

The US Supreme Court has placed some limits on federal power. In 1995, for the first time since 1936, the Court struck down a federal law as exceeding Congress’s commerce power

John Kincaid,
Lafayette College

(*United States v. Lopez*, 514 U.S. 549 [1995]). The Court also has limited some federal power through its anti-commandeering doctrine, which holds that the federal government cannot require state officials to execute federal law; sovereign immunity doctrine, which shields states from some federal court litigation under the US Constitution's Eleventh Amendment; and "plain statement" rule, which limits implied preemption by requiring Congress to express clearly in statutes any intent to preempt state law. However, virtually all rulings limiting federal power have entailed 5–4 splits on the Court, and none have significantly decreased federal power.

Party polarization, which increased during this era and the previous era, has reached record high levels. Both parties use the federal system for political combat. Predominantly Republican states have enacted abortion, immigration, and voter ID policies, among others, that are opposed by most Democrats. Democratic states have enacted their policy preferences. Both parties view the states as laboratories of democracy for experimentation with policies that can be nationalized once either party controls Congress and the White House or the US Supreme Court. For example, advocates of same-sex marriage and marijuana legalization see the states as stepping-stones to nationalization of these policies. Some state policy making, such as marijuana legalization, has even resurrected the specters of nullification and interposition, although states that have legalized marijuana, which is illegal under federal law, contend that they are not nullifying federal law but only declining to enforce federal law on their territory.

These trends will continue in the twenty-first century, and the federal system will remain complex. Essentially, in terms of public policy making, the federal government remains the dominant player. Yet cooperative federalism endures insofar as all policy implementation is intergovernmental. Elements of dual federalism also survive insofar as states retain a reservoir of reserved powers not yet preempted or coopted by the federal government.

SEE ALSO: *Anti-Federalists; Articles of Confederation; Block Grants; Compact and Covenant; Concurrent and Exclusive Powers; Constitution; Constitutional Government; Constitutionalism; Democracy; Devolution; Extended Republic, Theory of; Federalism, Theory of; Federalists; Governance; Intergovernmental Relations; Polarization; Preemption; Progressive Movements in American History; Public Policy from 1789 to 1868; Public Policy from 1868 to 1937; Public Policy from 1937 to 1980; Public Policy since 1980; Ratification of the US Constitution; Regulation; Separation of Powers.*

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Unit 5

What Does the Bill of Rights Protect?

US Bill of Rights

Much of the United States Constitution of 1787 prescribes what the government *can do* and *how* it may do it. There are limits, to be sure; in fact, the Framers saw every power granted as a limited one. The Bill of Rights, however, sprang from the demand for a clear, wider enumeration of what government *must not do*. Citizens enforce the Bill of Rights through appeals to the courts. The Bill of Rights, therefore, is a fundamental statement of principles backed up by specific rights provisions governing the relations between citizens and the state, founded in ideas derived from the concept of natural rights as elaborated in the Declaration of Independence.

DESIGN OF THE BILL OF RIGHTS

The United States Bill of Rights consists of the first ten amendments to the Constitution (ratified December 15, 1791) and arguably the Twenty-Seventh Amendment (ratified May 7, 1992), which had been one of the proposed Bill of Rights amendments approved by Congress in 1789. In fact, Congress approved twelve, not ten, amendments in 1789, and all but the first won eventual ratification. The first proposed amendment provided minimum and maximum ratios of representation in the US House of Representatives. It was neither approved nor specifically defeated, so it lies in constitutional limbo. The second proposal (now the Twenty-Seventh Amendment) provides a limitation on Congress's ability to set its own pay, making it necessary to undergo an intervening election before a pay increase can go into effect. Importantly, the list of amendments began with a focus on the structure of the government, Congress in particular. By one insightful analysis, the proposed establishment clause (in what became the First Amendment) also concerned the structure of government, restraining Congress from interfering with religious establishments in the states (Amar 1998). The bulk of the Bill of Rights, as originally ratified, came to be read not as a limit on government structure but as a guarantee of civil rights and liberties against infringement by the federal government and eventually by state governments as well.

Among the rights therein assured are freedom of speech, press, religion, assembly, and petition (First Amendment); the right to bear arms (Second Amendment); security against quartering of troops in citizens' homes (Third Amendment); guarantees against unreasonable searches and seizures (Fourth Amendment); grand jury indictment and guarantee of due process (Fifth Amendment); the right to a speedy trial and a trial by jury (Sixth Amendment); the guarantee of jury trials in civil cases (Seventh Amendment); prohibition of cruel and unusual punishment and excessive bail (Eighth Amendment); and a structural guarantee that citizens and states retain rights and privileges not expressly limited in the Constitution (Ninth and Tenth Amendments).

ORIGINS OF THE US BILL OF RIGHTS

Bills of rights began in Britain. Various charters and petitions were transacted between barons and kings, and between Parliament and kings, throughout the history of England, perhaps none more important than the Petition of Rights of 1628 sent to King Charles I (r. 1625–49) by parliamentarians who ultimately became his mortal enemies in the struggles of English politics. Privileges were carved out for the people, and one thing was foremost in the attention of most people: namely, that unless special account was made of the privileges of citizens, the power of the government, the power of the monarch, would override every human will. Citizens had no way to restrain the power of government, save through some express commitment of contractual force, tying restraint of the monarch to the happiness of the people.

English politics also influenced America, especially when events reached the point in interactions between the British monarch and the colonists that royal writs were promulgated. The colony of Rhode Island particularly enjoyed special privileges from the Stuart kings, who gave them a charter of religious toleration extending from monarch to people. The people of Rhode Island received this charter from the king in 1663, not so much as a promise but as a legal relationship binding colonial rulers in their dealings with colonial citizens.

The prominent case of Robert Child arose very early in Massachusetts history. This citizen of England emigrated to Massachusetts, faithful in the king's church—the Church of England. He eventually filed suit protesting that he was not given liberty to worship as he wished in that exclusively Puritan colony because it only gave proper status to those who were inscribed in some dissenting tradition rather than in the Church of England. When Child raised his case in 1646, the members of the General Court of Massachusetts listened to him with enormous patience, and they responded at extraordinary length. They refuted all the particular charges but did not think that sufficient. They next wrote out what had not been collected in one place by anyone before; namely, the British Constitution.

Then, in a parallel column, they laid their constitution alongside it and claimed that theirs was better, because their constitution had already begun the process of qualifying the unlimited power of the government. They did not acknowledge the kind of power that rested in the monarch of Britain. They argued that the Massachusetts Constitution was a limited government, limited in its conception. It was brought into being by the people and had no other source to which to trace its authority.

This was only one of many events throughout the colonial period that led most of the American states, once independence had been accomplished, to append bills of rights to their state constitutions. These remarkable documents did not simply enumerate rights. They provided elaborate moral and philosophical statements about the source of those rights. They traced

US Bill of Rights

these rights to nature and to God, and they provided that governments are bound to acknowledge these rights. They derived, from these relationships between God and nature, the existence of the people as a primary source of authority.

This informed American representatives to the First Continental or Suffolk Resolve Congress who wrote to the citizens of Quebec in 1774, inviting them to take part in the Revolution. They spoke to them in terms of these rights, which included the one that is perhaps most famous in the twenty-first century, the freedom of the press, which they felt provided for a better administration of government. They saw an immediate connection between the guarantee of the freedom of the press and the practices of civil liberty and civil restraint. The Americans believed that government without express concern for rights was, by definition, despotic.

ADOPTION OF THE BILL OF RIGHTS

The Constitution was ratified June 21, 1788, and put into place the following year, but it did not contain the Bill of Rights. The original Constitution had been adopted based on the idea that the Constitution itself is a bill of rights. For the Framers, the Constitution aimed to defend the rights of citizens by restricting the powers of government. That meant, then, that the provisions, particularly in the first three articles of the Constitution establishing the legislative, executive, and judicial branches, were thought by the draftsmen of the Constitution to be crucial in defending the people's rights.

Founding Father Benjamin Rush (1746–1813) welcomed the Constitution in 1788, celebrating it as a radical departure from all prior regimes, principally because it placed the responsibility for limiting the government and determining the fate of the people in the hands of the people. This pronouncement was echoed by James Wilson (1742–98) and other constitutional Framers.

The Framers had to contend with the arguments of those who opposed the proposed Constitution, those who said a constitution without a bill of rights is a contract without a commitment to deliver. Indicating that a constitution without a bill of rights leaves the people unprotected, George Mason (1725–92) declared in the Virginia Ratifying Convention, June 16, 1788, that “Unless there were a bill of rights, implication might swallow up all our rights.” Mason was the chief author and architect of the Virginia Declaration of Rights. Others, including Thomas Jefferson (1743–1826), agreed and maintained that the Constitution without a bill of rights was flawed. Defenders of the Constitution increasingly realized that they could never quite eliminate the force of that objection.

Although some of the defenders remained openly opposed to a bill of rights, others led by James Madison (1751–1836) agreed to conciliate public opinion by amending the Constitution. The process began in the inaugural address (1789) of George Washington (1732–99). Washington himself called for amendments. Yet Washington said, as he pondered his inaugural address and considered the government they were about to institute, that “better still could not be devised.”

Then in May 1789, Madison announced to Congress that he would introduce amendments. These draft amendments would add rights but not alter the powers or structures of the new government, as many opponents of the Constitution had proposed. This produced the wonderful paradox that Americans have a federal Bill of Rights not from the hands of those who

defended the need for a bill of rights in the ratification process, but from the hands of those who drafted the original Constitution.

The integrity of republican government was at stake. The people accepted the Constitution's authority but insisted that their representatives needed, in good faith, to develop amendments to the Constitution. Madison brought those amendments forth in the same spirit with which President Washington recommended them. Indeed, in the debates in the House of Representatives, Madison went so far as to say he did not think the proposed Bill of Rights could place more meaningful limitations on the branches of government than already existed. He observed that they had done all they could to limit the government. But the Bill of Rights might serve to tutor majority opinion and to teach the people to temper their expectations of their representatives.

Madison proposed amendments as insertions to be interwoven into the text of the Constitution, not as a list to be added at the end. He fought hard for such insertions, but other members of Congress opposed his design no less vigorously. Roger Sherman (1721–93) of Connecticut expressed it best when he argued that the work of the Constitutional Convention deserved to be remembered unstained by subsequent emendations. Sherman won. The Bill of Rights became, out of respect for the original document, a tail to the Constitution, added at the end to preserve the priority of the main body.

DEVELOPMENT OF THE BILL OF RIGHTS

The amendments originally guarded only against infringement by the federal government. The Supreme Court reinforced that limit in *Barron v. Baltimore*, 32 U.S. 243 (1833). Especially since the early twentieth century, however, the Court has applied one right after another as a limit on state action as well. This was accomplished by reading those rights into the due process clause or equal protection clause of the Fourteenth Amendment. As a result, until the Fourteenth Amendment was ratified on July 9, 1868, there was virtually no call on the Bill of Rights by American citizens. The first significant Supreme Court case to cite the Bill of Rights as a potential protection of individual rights was *Twining v. New Jersey*, 211 U. S. 78 (1908). An 1886 case, *Yick v. Hopkins*, 118 U.S. 356, protected individual rights, but cites the equal protection clause of the Fourteenth Amendment and not the Bill of Rights. In the twentieth century, successful appeals to the Bill of Rights mushroomed, becoming a major source of litigation, with First Amendment cases outstripping all others.

From the late twentieth century on, Americans spoke more about what the Bill of Rights has become than about where it originated. Some imply that the Bill of Rights is the most important part of the Constitution, for that is where citizens have their most meaningful contact with the promises of the Constitution. Amendments have been made to the US Constitution since that time, many of which figure very largely in Americans' evolving interpretation of the Bill of Rights.

All the state constitutions also have bills of rights. In fact, many rights provisions in the US Bill of Rights were borrowed from early state constitutions. Thus the two sets of bills overlap considerably. However, state bills also contain some novel provisions. For example, the twenty-fifth paragraph of the Georgia State Constitution reads: “The social status of a citizen shall never be the subject of legislation.” One may wonder what

that means; does it evoke the kind of questions raised in Minnesota by the former Minority Heritage Preservation Act? That legislation and its subsequently amended forms prescribes adoptive placements for children on the basis of racial and ethnic heritage. Is that a question of social status? For Georgia, this is an application of principles inherent in the Bill of Rights, and one finds provisions no less perplexing in other state constitutions.

The Constitution of the State of Illinois says this about “Individual Dignity”: “To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national, or regional affiliation are condemned” (Sec. 20). Do citizens have no right to the expression of such condemnation in the state of Illinois but do have that right in Georgia, Hawaii, or Louisiana? The state of Illinois also, interestingly, provides in the preamble to its constitution and bill of rights the guarantee that the government (or “We, the people of the State of Illinois,” to state it correctly) will “eliminate poverty and inequality.”

These are not promises made lightly. Such promises, which are not uncommon in state constitutions, concern what government should provide the people and what the people should provide one another. However, the spare provisions of the first ten amendments to the US Constitution speak far more loudly about what government may not do than of what government and the people promise one another in their continuous efforts to perfect the civil relationship.

Bills of rights in the twentieth century became the most important constitutional provisions. That creates a difficulty: in proportion, as Americans enlarge their expectations of the Bill of Rights, they diminish confidence in the effectiveness of those political arrangements contained in the main body of the Constitution.

To recap, the Bill of Rights was added to the Constitution after it had been ratified and the government established. Anti-Federalist opponents to the Constitution thought the document inadequate without a Bill of Rights, whereas proponents insisted that the Constitution itself was the main limitation on government. The Anti-Federalist position may have been mainly a ploy designed to defeat the Constitution, but advocates for the Constitution took advantage of the opposition to leverage support for a Bill of Rights into support for the Constitution in general (Levy 1987, 289). President George Washington, in his first inaugural address, asked the new Congress in 1789 to adopt a Bill of Rights so that all citizens would feel a part of the new nation. The debates in Congress, particularly the House of Representatives, stressed the need to “quiet the mind of the people” (Madison 1991, 63). Two states, North Carolina and Rhode Island, had not joined the original government because they desired a Bill of Rights. As soon as the amendments were sent out, these states proceeded to ratify and join the union.

*William B. Allen,
Michigan State University*

SEE ALSO: *Anti-Federalists; Constitutional Convention of 1787; Federalists; Freedom of Religion: Establishment; Freedom of Religion: Free Exercise; Freedom of Speech; Freedom of the Press; Incorporation of the Bill of Rights; Madison, James; Ratification of the US Constitution; Right to Assemble; Right*

to Petition; Rights, Negative; Rights, Positive; State Constitutions.

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Constitutional Criminal Procedure

Most constitutional constraints on police and prosecutors derive from the Fourth, Fifth, and Sixth Amendments. These amendments regulate the conduct of the federal government and its agents directly. With the exception of the Fifth Amendment grand jury requirement, provisions of these amendments governing criminal procedure are “incorporated” to the states via the due process clause of the Fourteenth Amendment, and therefore regulate state governments and their agents as well.

FOURTH AMENDMENT

The Fourth Amendment provides that: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The amendment was adopted in response to colonial experiences with writs of assistance—general warrants providing broad discretion for

agents of the Crown to enter homes and businesses in search of contraband goods. English courts outlawed general warrants in the mid-eighteenth century (*Wilkes v. Wood*, 98 Eng. Rp. 489 [1763]), but those protections were overridden by statutes in the colonies. The Fourth Amendment addresses that legislative threat by limiting the powers of the federal government (Davies 1999).

For most of its history, the Fourth Amendment was understood to regulate physical intrusions. Thus, in *Olmstead v. United States*, 277 U.S. 438 (1928), the Supreme Court held that wiretapping a suspect's phone was not a "search" under the Fourth Amendment because "[t]here was no entry of the houses or offices of the defendants." That changed in 1967 with the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967), which held that eavesdropping on telephone conversations using an electronic device attached to a public phone booth violates reasonable expectations of privacy and therefore constitutes a Fourth Amendment "search."

Katz gave rise to several very important doctrines. According to the public observation doctrine, officers may observe anything that can be seen from a lawful vantage point without implicating the Fourth Amendment. Thus police may track the public movements of a suspect using a beeper tracking device (*United States v. Knotts*, 460 U.S. 276 [1983]), look into the backyard of a home from a low-flying aircraft (*Florida v. Riley*, 488 U.S. 445 [1989]), or use a telephoto lens to make observations from a distance (*Dow Chemical Co. v. United States*, 476 U.S. 227 [1986]). The third-party doctrine allows government agents to access through lawful means information shared with third parties without implicating the Fourth Amendment. This doctrine covers cases of misplaced trust, such as when officers use confidential informants (*Hoffa v. United States*, 385 U.S. 293 [1966]); business records, including bank transaction logs (*California Bankers Assn. v. Shultz*, 416 U.S. 21 [1974]); and telephone call registries (*Smith v. Maryland*, 442 U.S. 735 [1979]). In *United States v. Jones*, 565 U.S. ____ (2012), several justices indicated that these doctrines may need to be revised in light of advanced surveillance and data aggregation technologies.

According to its text, and read for its original public meaning, the Fourth Amendment does not impose a general warrant requirement (Amar 1997). Nevertheless, the Court has held consistently that searches of homes, persons, and similar highly protected areas require warrants (*Agnello v. United States*, 269 U.S. 20 [1925]). Arrests (seizures of persons) made in an arrestee's home also require a warrant (*Payton v. New York*, 445 U.S. 573 [1980]). Pursuant to the warrant clause, only detached and neutral magistrates may issue warrants, and only where investigators demonstrate probable cause to believe that specific evidence of a crime will be found in a particular place at the time of the search. Searches of highly protected places conducted without a warrant, pursuant to a defective warrant, or outside the scope of a lawful warrant, are presumed to be unreasonable (*Johnson v. United States*, 333 U.S. 10 [1948]). This presumption does not apply if police have lawful consent to conduct a search (*United States v. Matlock*, 415 U.S. 164 [1974]), a search is conducted under exigent circumstances (*Warden v. Hayden*, 387 U.S. 294 [1967]), or the purpose of a search is to advance compelling "special needs" unrelated to a criminal investigation (*New York v. Burger*, 482 U.S. 691 [1987]). As a general matter, searches of cars require probable cause, but do not require a warrant (*California v. Carney*, 471 U.S. 386 [1985]); the same is true of arrests in public (*Gerstein v. Pugh*, 420 U.S. 103 [1975]). In

GIDEON V. WAINWRIGHT, 372 U.S. 335 (1963)

In the early morning hours of June 3, 1961, Clarence Gideon broke into a Panama City, Florida, pool hall to steal money from a cigarette machine, jukebox, and cash register. Arrested and charged with felony breaking and entering, Gideon claimed indigency and asked the court to appoint an attorney to represent him, citing his Sixth Amendment right to counsel. The trial court denied Gideon's request, relying on the fact that Florida law provided for the appointment of counsel only in capital cases. Gideon represented himself at trial where he was convicted and sentenced to five years' imprisonment. After being denied relief by Florida's highest court, Gideon filed an *in forma pauperis* petition with the United States Supreme Court, which granted certiorari. The Court assigned Abe Fortas, who later joined the Court as an Associate Justice, to represent Gideon.

The Court voted unanimously to overturn Gideon's conviction. Writing for the majority, Justice Hugo Black held that the right of defendants in criminal trials to have the assistance of counsel is fundamental, that it is essential to a fair trial, and that Gideon's conviction without the assistance of counsel therefore violated his Sixth Amendment right to counsel as it applies to the states through the Fourteenth Amendment. Among the Court's major concerns was that lay defendants would not be able to navigate the legal system's complex rules and procedures. The Court also worried about the inherent unfairness of pitting lay defendants against trained and seasoned prosecutors. Justice Black therefore concluded that, absent "the guiding hand of counsel," the innocent might easily be convicted, or the guilty convicted by deficient procedures or the use of inadmissible evidence. Justices William O. Douglas, Tom C. Clark, and John Marshall Harlan II concurred.

Gideon has had far-reaching implications for the criminal justice system. At the federal level, in most states, and in most major municipalities, it has given rise to a network of public defenders' offices, which operate in parallel with prosecutors' offices, employing full-time attorneys to represent indigent defendants. Other jurisdictions meet their obligations under *Gideon* by appointing and compensating private counsel to represent indigent clients.

both circumstances, however, a search or seizure will be subjected to prompt, post hoc judicial review at a probable cause hearing.

Officers engaged in a search must conduct themselves reasonably (*Hummel-Jones v. Strobe*, 25 F.3d 647 [8th Cir. 1994]). Search warrants must be served when the probable cause upon which they are based is "ripe" (*United States v. Grubbs*, 547 U.S. 90 [2006]). Before entering a premises, officers must knock, announce themselves, and provide occupants a reasonable opportunity to cooperate, unless this procedure would unreasonably compromise officer safety or the security of evidence (*Wilson v. Arkansas*, 514 U.S. 927 [1995]). Once on a

premises, officers may only search in locations described in the warrant and in places where evidence named in the warrant is likely to be found (*United States v. Evans*, 92 F.3d 540 [7th Cir. 1996]). During a lawful search, officers may seize any evidence that is in “plain view,” even if not named in the warrant (*Horton v. California*, 496 U.S. 128 [1990]).

Searches and seizures not subject to the warrant requirement must be “reasonable.” This requires striking a balance between governmental needs, including preserving evidence and detecting, investigating, and prosecuting crime, and citizen interests in privacy, property, and physical security (*United States v. Place*, 462 U.S. 696 [1983]). Reasonableness is a fact-intensive, case-specific analysis, seldom amenable to bright line rules (*Scott v. Harris*, 550 U.S. 372 [2007]). Applying this standard, courts generally allow officers conducting a lawful arrest to search an arrestee and the areas within his immediate reach and control without a warrant or separate showing of probable cause (*Chimel v. California*, 395 U.S. 752 [1969]). This search incident to arrest rule does not encompass the contents of smartphones; officers must secure a warrant before searching these devices (*Riley v. California*, 573 U.S. ____ [2014]).

A common circumstance where courts review searches and seizures for reasonableness is in the context of street encounters. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that, where police officers have reason to suspect that a target is engaged in criminal activity, they may conduct a brief stop to confirm or dispel their suspicions, and where officers have reason to suspect that a target is carrying a weapon, they may conduct a brief pat-down or “frisk” of his outer clothing in search of weapons.

The primary means of enforcing the Fourth Amendment in criminal trials is the exclusionary rule, which provides that illegally seized evidence will be excluded from the prosecution’s case in chief, which is where the prosecutor presents her evidence, along with any investigative proceeds of that evidence, which are referred to as “fruits of the poisonous tree” (*Wong Sun v. United States*, 371 U.S. 471 [1963]). This was not always true. Until the late eighteenth century, the only remedy available for Fourth Amendment violations was a private tort action (Amar 1997). In fact, courts roundly refused to apply anything like the exclusionary rule (*United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843–44 [C.C.D. Mass. 1822]); *Commonwealth v. Dana*, 43 Mass. [2 Met.] 329, 337 [1841]). That began to change with the Supreme Court’s decision in *Boyd v. United States*, 116 U.S. 616 (1886), which relied on the Fifth Amendment privilege against compelled self-incrimination to forbid government exploitation of illegally seized papers and their contents. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court held that the Fourth Amendment itself required exclusion of illegally seized evidence. The Supreme Court incorporated the exclusionary rule to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The exclusionary rule is subject to several important exceptions. Only defendants whose Fourth Amendment rights are violated may seek exclusion. Illegally seized evidence may therefore be admissible against others, including codefendants (*United States v. Payner*, 447 U.S. 727 [1980]). Evidence will be excluded only if its discovery is caused by a Fourth Amendment violation. Prosecutors may therefore avoid exclusion if they show that challenged evidence inevitably would have been discovered by legal means (*Segura v. United States*, 468 U.S. 796 [1984]).

MAPP V. OHIO, 367 U.S. 643 (1961)

Three hours after Dollree Mapp refused to allow police to search her home for a suspected bomber, they returned with what they claimed was a warrant. Mapp confronted the officers, snatched the document, and stashed it in her shirt. After retrieving the paper, officers detained Mapp and conducted an extensive search, leading to the discovery of “obscene materials” in a trunk. Mapp subsequently was convicted of violating Ohio obscenity laws.

On appeal to the Supreme Court, Mapp relied on the First Amendment to challenge the constitutionality of Ohio’s obscenity statute. At conference, the Court voted to side with Mapp on this ground. After conference, however, Justice Tom C. Clark persuaded a majority to instead overrule *Wolf v. Colorado*, 338 U.S. 25 (1949) by incorporating the Fourth Amendment exclusionary rule to the states. The Court held that the exclusionary rule is required as a matter of constitutional principle and determined that it provides the most effective means of deterring law enforcement from violating the Fourth Amendment. The Court also expressed concerns about the integrity of federal officers, who might be tempted to circumnavigate the federal exclusionary rule by passing illegally seized evidence to state prosecutors, and judges, who might be required to admit illegally seized evidence at trial.

Justice Hugo Black concurred, arguing that the Fifth, Fourth, and Fourteenth Amendments together mandate exclusion of illegally seized evidence. In dissent, Justice John Marshall Harlan II would have left the question of Fourth Amendment remedies in state courts to the respective states.

The exclusionary rule does not apply if investigating officers act in “good faith” by, for example, searching under the authority of a warrant later determined to be infirm (*United States v. Leon*, 468 U.S. 897 [1984]). The exclusionary rule also does not apply in collateral forums such as grand jury investigations (*United States v. Calandra*, 414 U.S. 338 [1974]), civil tax suits (*United States v. Janis*, 428 U.S. 433 [1976]), immigration proceedings (*Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 [1984]), and parole revocation hearings (*Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 [1998]).

FIFTH AMENDMENT

The pertinent portions of the Fifth Amendment provide that:

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

**MIRANDA V. ARIZONA, 384
U.S. 436 (1966)**

Prior to 1966, the primary constitutional constraints on officers conducting investigative interrogations came from the due process clauses of the Fifth and Fourteenth Amendments. The courts' principal targets were interrogation techniques likely to produce "involuntary" confessions, including physical violence and threats of violence. In response, interrogators devised nonviolent ways to secure confessions through the exploitation of power disparities, suspects' naiveté, suspects' psychological vulnerabilities, and the inherently compulsive atmosphere of police custody. Faced with mounting evidence of these practices, the Supreme Court in *Miranda v. Arizona* held that the Fifth Amendment privilege against compelled self-incrimination reaches beyond the courtroom, protecting suspects subjected to custodial interrogations.

In light of the general nature of threats to Fifth Amendment rights posed by custodial interrogations, the *Miranda* Court devised a general remedy. Now a familiar part of law enforcement vernacular, these *Miranda* warnings require officers to apprise suspects taken into custody that they have the right to remain silent, that anything they say can be used against them in future legal proceedings, that they have the right to consult an attorney before and during questioning, and that the state will provide an attorney if the suspect cannot afford to hire one. In each of the cases consolidated before the Court in *Miranda*, a defendant made incriminating statements during a custodial interrogation without first being apprised of his right to remain silent or his right to have counsel present during questioning. The convictions in each case were therefore reversed.

The grand jury clause of the Fifth Amendment is among the few constitutional rights not incorporated to the states (*Hurtado v. California*, 110 U.S. 516 [1884]). Many states follow the federal model, requiring a grand jury indictment for serious crimes, but they are not under any Fifth Amendment mandate.

The double jeopardy clause protects defendants from being tried and punished more than once for the same conduct by the same sovereign. This has two principal applications. First, the Fifth Amendment prevents prosecutors from retrying defendants who have been acquitted or otherwise put in prior jeopardy of punishment (*United States v. DiFrancesco*, 449 U.S. 117 [1980]). "Jeopardy" attaches at the commencement of trial, usually with the swearing in of a jury (*Crist v. Bretz*, 437 U.S. 28 [1978]). Second, the Fifth Amendment prevents defendants convicted of both a principal offense and a lesser, but included, offense from being sentenced separately for each crime (*Brown v. Ohio*, 432 U.S. 161 [1977]). Double jeopardy generally does not cross jurisdictions. Therefore, defendants whose crimes may be subject to both state and federal prosecution can be tried, convicted, and punished in both jurisdictions for the same conduct (*United States v. Lanza*, 260 U.S. 377 [1922]).

The Fifth Amendment privilege against compelled self-incrimination is principally a trial right (*United States v. Patane*,

542 U.S. 630 [2004]). Adopted in the historical shadow of religious and political inquisitions, it protects defendants from the "cruel trilemma" of self-incrimination, perjury, and contempt (*Pennsylvania v. Muniz*, 496 U.S. 582 [1990]). However, a defendant who chooses to take the stand in his own defense generally may not "plead the Fifth" when subjected to cross-examination. The Fifth Amendment also bars the admission of "testimonial" statements made by defendants outside the courtroom and in response to police questioning (*Schmerber v. California*, 384 U.S. 757 [1966]). This includes statements secured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

The due process clauses of the Fifth and Fourteenth Amendments secure many procedural and substantive rights for criminal defendants. Among the most important of these are prohibitions on the state's use of perjured testimony (*Mooney v. Holohan*, 294 U.S. 103 [1935]), the right to receive exculpatory evidence in the possession of law enforcement (*Brady v. Maryland*, 373 U.S. 83 [1963])—including evidence that might be used to impeach government witnesses (*United States v. Bagley*, 473 U.S. 667 [1985])—and the right not to be subjected to torture, threats of violence, or other efforts to compel involuntary confessions (*Brown v. Mississippi*, 297 U.S. 278 [1936]).

SIXTH AMENDMENT

The Sixth Amendment provides that:

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

By its language, the Sixth Amendment applies only to "criminal prosecutions." The line between criminal cases and civil cases is not always obvious. For example, many states have civil commitment provisions for convicted sex offenders. Courts generally trust legislative designations of sanctions as "civil" rather than "criminal" unless faced with the "clearest proof that the statutory scheme is so punitive either in purpose of effect as to negate the State's intention to deem it civil" (*Kansas v. Hendricks*, 521 U.S. 346, 361 [1997]; internal citation, quotation marks, and alterations omitted).

The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment" (*Klopfer v. North Carolina*, 386 U.S. 213, 223 [1967]). The Supreme Court has identified three primary interests at stake in the right to speedy trial: (1) deprivation of liberty; (2) the opportunity to challenge public allegations of criminal wrongdoing; and (3) the impact of delay on the defense (*Smith v. Hoey*, 393 U.S. 374 [1969]). The right to speedy trial attaches at arrest or the public filing of formal charges, whichever comes first (*United States v. Marion*, 404 U.S. 307 [1971]). When determining whether the right to a speedy trial has been violated, courts apply a balancing test weighing length of delay, reason for delay, whether and when the defendant demanded a prompt trial, and prejudice caused by the delay (*Barker v. Wingo*, 407 U.S. 514 [1972]). Violations

of the right to a speedy trial result in the dismissal of charges or vacation of sentence (*Strunk v. United States*, 412 U.S. 434 [1973]).

In response to abuses perpetrated by secret tribunals, including the Star Chamber, late-eighteenth-century English common law guaranteed the right to a public trial. The Sixth Amendment encompasses that common law right, relying on publicity to help curb abuses by courts and prosecutors, to provide notice to potential witnesses so they might come forward, and to inhibit perjury (*In re Oliver*, 333 U.S. 257 [1948]). The right is not absolute—limited closure is allowed if necessary to protect victims, witnesses, or state secrets (*Waller v. Georgia*, 467 U.S. 39 [1984]).

The right to trial by jury traces back at least as far as Magna Carta and is meant to prevent government oppression by “corrupt or overzealous prosecutor[s] and . . . compliant, biased, or eccentric judge[s]” (*Duncan v. Louisiana*, 391 U.S. 145, 156 [1968]). The Sixth Amendment right to a jury trial applies to all cases involving more than mere “petty” offenses (*Baldwin v. New York*, 399 U.S. 66 [1970]). Although common law juries generally consisted of twelve members, the Supreme Court in *Williams v. Florida*, 399 U.S. 78 (1970), upheld the use of six-member juries. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court also loosened common law requirements that guilty verdicts be unanimous, allowing convictions based on supermajorities of twelve-person juries. The Court in *Burch v. Louisiana*, 441 U.S. 130 (1979), however, preserved the unanimity requirement for smaller juries.

The Sixth Amendment does not guarantee defendants the right to any particular composition of petit juries (*Fay v. New York*, 332 U.S. 261 [1947]; *Holland v. Illinois*, 493 U.S. 474 [1990]). It does, however, guarantee that the jury venire, from which a petit jury is chosen, will represent a “fair cross-section” of the population within a jurisdiction (*Taylor v. Louisiana*, 419 U.S. 522 [1975]). During the jury selection process, parties may strike potential jurors peremptorily or for cause. The use of these challenges is governed by the equal protection clause of the Fourteenth Amendment (*Batson v. Kentucky*, 476 U.S. 79 [1986]).

For many years, the Sixth Amendment right to confront witnesses at trial was determined in part by reference to established evidentiary rules governing the admissibility of hearsay. That changed with the Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004). After *Crawford*, the admissibility of “nontestimonial” hearsay is still governed by rules of evidence, but the use of “testimonial” hearsay is controlled by the Sixth Amendment. Testimonial hearsay is admissible under *Crawford* only if the witness is unavailable and the defendant has had a prior opportunity to cross-examine that witness.

By its text and history, the Sixth Amendment guaranteed a right to privately retained counsel in all criminal proceedings but probably was not understood as providing a right to appointed counsel. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court began to shift that understanding, holding that due process requires states to provide appointed counsel for indigent defendants in capital cases. *Johnson v. Zerbst*, 304 U.S. 458 (1938), went further, holding that the Sixth Amendment guarantees access to appointed counsel in all federal prosecutions. *Gideon v. Wainwright*, 372 U.S. 335 (1963), incorporated that rule to the states, requiring that states and localities provide appointed counsel for indigent defendants in all cases where the potential punishment is greater than six months in jail or a fine

of \$500. The right to counsel attaches at the commencement of adversarial proceedings, which usually is marked by the filing of formal charges (*Massiah v. United States*, 377 U.S. 201 [1964]).

CONCLUSION

The Fourth, Fifth, and Sixth Amendments establish important rules governing searches and seizures and the prosecution of criminal cases. In so doing, these provisions set important constraints on governmental power and the exercise of that power. These constraints were regarded as critical to the Founders and continue to play a central role in engagements between citizens, police, and prosecutors.

*Michael Jacko,
Francis King Carey School of Law,
University of Maryland*

SEE ALSO: *Capital Punishment; Criminal Law; Exclusionary Rule; Fourteenth Amendment; Fourteenth Amendment: Due Process Clause; Fourth Amendment; Incorporation of the Bill of Rights; Police Powers; US Bill of Rights.*

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Freedom of Religion: Free Exercise

The free exercise clause is one of two separate clauses in the First Amendment of the United States Constitution intended to protect freedom of religion: the establishment clause (“Congress shall make no law respecting an establishment of religion”) and the free exercise clause (“or prohibiting the free exercise thereof”). The free exercise clause was ratified principally to protect one’s right to conscience—the right to believe as one might wish without interference or coercion by government. Additionally, it was intended to safeguard conduct motivated by religion, though, as indicated below, that protection is far from absolute.

THE FREE EXERCISE CLAUSE: ITS FOUNDATIONAL PURPOSE

At its inception the purpose of the free exercise clause was to protect freedom of conscience, and, arguably, to a more limited extent, the right to take action predicated upon belief. Of parallel importance is the First Amendment's establishment clause, which prevents government from "the establishment of religion." As Kenneth Wald and Allison Calhoun-Brown note, "the Founders appear to have been as eager to keep the state from limiting religious expression as they were to keep the government from promoting it" (2014, 80).

Consequently, the Framers of the First Amendment maintained that the government had no interest in judging religious beliefs unless, as George Mason explained, said beliefs caused one to "disturb the peace, the happiness, or safety of Society" (Dreisbach [1997] 2000). Thomas Jefferson, in his "Notes on the State of Virginia" (1784), agreed. He articulated two basic principles regarding the free exercise of religion: first, that "the legitimate powers of government extend to such acts only as are injurious to others," but also that "it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor breaks my leg."

What happens, however, when government asserts that certain actions, motivated by religious beliefs, do harm to others (e.g., plural marriage, refusal to vaccinate children, homeschooling children, engaging children in "religious service" by putting them to work for the religious organization, creating religious schools)? Or, what if believers argue that laws, which seem to make no direct attack on their faith or ability to worship, undermine their free exercise of religion (e.g., laws limiting those who might receive unemployment compensation, land use ordinances, drug laws)? Questions of this sort have required the courts to flesh out the particular meaning of the free exercise clause.

REYNOLDS TO SMITH: MUCH ADO ABOUT NOTHING?

Development of free exercise jurisprudence proceeded slowly. Since the late nineteenth century, the Supreme Court has addressed cases respecting the free exercise of religion. Although attempts to categorize the Court's jurisprudence often lead to overgeneralization, the free exercise case law can be broken down into four distinct periods: The *Reynolds* caveat (1879–1943), the *Barnette* requirement (1943–1963), the *Sherbert-Yoder* directive (1963–1990), and the return to *Reynolds* (1990–).

The *Reynolds* Caveat. In the decision *Reynolds v. United States*, 98 U.S. 145 (1879), the Court addressed the case of a man convicted of bigamy in the district court of Utah Territory. He admitted to having entered a second concurrent marriage, thereby violating United States law, but argued that, as a member of the Mormon church, it was his religious duty to practice polygamy. Hence he claimed that the free exercise clause protected his right to do so.

In his majority opinion, Chief Justice Morrison R. Waite carefully distinguished religious *belief* and opinions from religious *practices*. To disallow regulation of religious practice, noted Waite, would introduce a new element into the criminal law. Civil government could no longer interfere, even to prevent a human sacrifice should the sacrifices be found a necessary part of religious worship. "To permit this," argued Waite, "would be

to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself" (98 U.S. at 167).

Reynolds introduced a belief–action dichotomy indicating the Court's reluctance to protect an absolute right to engage in a course of action because one is compelled by religious duty. More than sixty years later, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court further distinguished between the free exercise of religion as *belief* and the free exercise of religion as *action*. The Court held that "the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" (310 U.S. at 303–304).

The Court warned in *Reynolds*, and reaffirmed in *Cantwell*, that while religious belief is beyond government intrusion, activity undertaken in the name of religion must occasionally countenance some restriction for the good of the larger community. If the state has a valid objective, like preventing suicide, stopping drug use, or ending polygamy, then it can enforce its criminal law even over free exercise claims.

The *Barnette* Requirement. Nearly fifty years after *Reynolds*, the Court determined that the free exercise clause meant more than simply the right to believe. The Court bolstered free exercise dramatically, even if indirectly, in the landmark decision *West Virginia v. Barnette*, 319 U.S. 624 (1943). *Barnette* is primarily thought to be a free speech case, but in the decision the majority held that one cannot be compelled into expression that violates one's beliefs. In *Barnette* Jehovah's Witnesses were reacting to state regulations requiring them to pledge allegiance to the flag in violation of their religious beliefs. Similarly, *Barnette* protected the Jehovah's Witnesses from compulsory expression that would cut against one's beliefs (e.g., government-mandated prayer, or the requirement by government that one sing hymns or carols).

The *Sherbert-Yoder* Directive. In the 1960s the Court went substantially farther to protect free exercise of religion. It held that at some level, albeit one difficult to discover definitively, the clause requires government to act positively to remove barriers that might hinder one's religious practice. In the pivotal decision *Sherbert v. Verner*, 374 U.S. 398 (1963), the justices decided whether a state agency could deny unemployment compensation to those who refused, for religious reasons, any job requiring Saturday work. The Court held that denial of unemployment benefits to a Sabbatarian because of his or her refusal to work on Saturday constituted an abridgment of religious freedom.

In *Sherbert* the Court for the first time protected religious activity beyond that associated with speech, press, and assembly—freedoms simultaneously protected by other components of the First Amendment. Second, it recognized a new dimension to the free exercise clause. The Court held that there were limits on the degree to which government can, through pervasive involvement in our lives, *indirectly* affect religious freedom. Although withholding unemployment insurance did not *directly* force Sherbert to compromise her religious beliefs, the Court noted that to "condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties" (374 U.S. at 406). Third, the free

exercise clause afforded “relatively absolute” protection—only extremely strong interests justify government restrictions on religious conduct. Fourth, the burden of proof is on government to demonstrate that strong interests exist, and how religious conduct harms them.

Nine years later, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court ruled that a law compelling children to attend school until sixteen years of age severely threatened the survival of the Amish faith. In *Yoder* the Court reaffirmed the elements of its holding in *Sherbert*. Moreover, it reinforced the free exercise clause by adding a fifth significant test to *Sherbert*’s directives: The state must show a compelling reason to limit state conduct and demonstrate that there is no less drastic means to reach its goal. Thus *Yoder* gave rise to a “least drastic means” test applied to the free exercise clause.

In *Sherbert* and *Yoder*, the Court decided that the free exercise clause not only forbids legislation that would force one to violate one’s religious beliefs but, remarkably, at some level it actually requires government to accommodate religion—to act affirmatively to remove barriers that might hinder religious practice. *Sherbert* softened the consequences one might face for acting on religious principles. Government cannot use public benefits to hold a religious practitioner hostage and exact conformity.

Sherbert served much like the Court’s equal protection jurisprudence to heighten scrutiny and to establish a two-tiered approach to examining legislation. Just as with racially based legislation, where the government cannot simply provide a rational basis for a law (but must show a compelling reason if the legislation is to pass constitutional muster), the Court held that there must be an overriding reason to restrict religious liberties. In *Yoder*, despite the state’s claim to what is clearly a compelling governmental objective—educating fifteen- and sixteen-year-old children—the Court found that exempting the Amish community proved no substantial threat to that objective.

After *Sherbert* and *Yoder*, however, the Court retreated from this substantial level of protection. The Court decided, in *United States v. Lee*, 455 U.S. 252 (1982), that the Old Order Amish were not exempt from paying Social Security taxes, though the Court accepted their contention that “both payment and receipt of Social Security benefits is forbidden by the Amish faith.” In the *Lee* decision, along with *Bob Jones University v. United States*, 461 U.S. 574 (1983), and *Goldman v. Weinberger*, 475 U.S. 503 (1986), the Court failed to apply each of the significant elements of the *Sherbert–Yoder* doctrine. Similarly, the Court departed from *Sherbert–Yoder* when it upheld the right of the government to build a road through burial and ceremonial grounds of a Native American tribe—although the road could have been built elsewhere—and held that there is no constitutional right to religious tax exemptions.

Back to *Reynolds*: Reinstating the Belief–Action Dichotomy in *Smith*. Despite the guidelines articulated in *Sherbert–Yoder*, the Court has dramatically reaffirmed its commitment to its analysis way back in *Reynolds*. The Court held in 1990 that *Yoder*’s compelling interest test would not apply to free exercise claims requesting exemption from neutral laws of general applicability. In the landmark decision *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court by a 5–4 vote

reversed a verdict by the Oregon Supreme Court allowing two men, Alfred Smith and Galen Black, who had been fired for ingesting peyote, an act that violated the state’s controlled substance law, to receive unemployment compensation. Black and Smith were members of the Native American Church and ingested the peyote for sacramental purposes only. The Oregon Court reasoned that, following *Sherbert*, the men were entitled to unemployment compensation benefits.

Writing for the Supreme Court majority, Justice Antonin Scalia argued that *Sherbert* is not the standard from which to interpret the free exercise clause: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition” (494 U.S. at 878–879). Scalia went on to note: “Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)’” (494 U.S. at 879). Moreover, noted Scalia, there is no disharmony in the Court’s free exercise jurisprudence. *Reynolds* has always been good law. The only time the Court held that an individual’s religious beliefs exempt him or her from a neutral, generally applicable law is when the free exercise claim is in conjunction with other constitutional protections.

Why did the Court not protect the holding in *Sherbert* by simply using the compelling interest test to overturn the Oregon Supreme Court and vitiate the unemployment benefit? Scalia maintained that, with regard to race or free speech, exemptions are permitted to protect societal norms and aspirations. Accommodation, however, is not offered to protect aberrant behavior. “[W]hat it would produce here—a private right to ignore generally applicable laws,” says Scalia, “is a constitutional anomaly” (494 U.S. at 886).

The *Smith* decision prompted mixed reactions among scholars. Some were pleased with the majority’s new reading of *Sherbert* and *Yoder*. Others regarded the “return to *Reynolds*” with great alarm. In perhaps its last purely free exercise decision, the Court did apply the *Smith* test consistently to protect the religious liberties of a group that practiced animal sacrifice as an essential part of its religion. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down the Florida city’s restrictions on animal sacrifice for religious purposes. The Court held that the ordinance was not neutral on its face. It did not prevent butchers from plying their craft. Nor did the ordinance make it illegal for hunters to shoot animals. Instead, the community had passed the ordinance to target the church, which placed the ordinance squarely outside of the holding in *Smith*.

Since the holding in *Lukumi* the only case to address prominently a free exercise claim was *Locke v. Davey*, 540 U.S. 712 (2004). In the decision, the Court held that a state does not violate the free exercise clause if it provides college scholarship money to students with secular college majors while excluding students who major in pastoral studies. Rene Reyes argues that “*Davey* is a significant case in that it permits government to discriminate against religion in funding cases without necessarily violating the Free Exercise Clause” (2010–11, 733).

ALTERNATIVE APPROACHES TO PROTECT RELIGIOUS FREEDOM

Reacting to the *Smith* decision, Congress passed, and President Bill Clinton signed, the Religious Freedom Restoration Act (RFRA). Specifically, RFRA dictated that government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates that application of the burden to the person (1) furthers a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.

Whether RFRA might restore the *Sherbert-Yoder* directive or will largely be ineffective is still unclear. On one hand, in its 1997 decision *Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA—at least inasmuch as it applies to state and local law. The case involved a Catholic church, in Boerne, Texas, that wanted to expand its building to accommodate the needs of a growing congregation. The Boerne City Council passed an ordinance authorizing its Historic Landmark Commission to prepare a preservation plan. Based on the plan, the church was denied a building permit to expand. The church challenged the city's decision in light of RFRA—government cannot interfere with religion unless there is a compelling interest.

Instead of limiting its analysis to whether the civic leaders in Boerne could show a compelling interest in preserving the existing church building, the Court took on Congress directly. Justice Anthony Kennedy argued that Congress passed RFRA in direct response to the *Smith* decision under the guise of protecting the Fourteenth Amendment. However, he noted that any such legislation must be remedial or preventative in nature. Section 5 of the Fourteenth Amendment (providing Congress with the “power to enforce” that amendment) was never designed to permit Congress to *amplify* or *redefine* constitutional rights.

On the other hand, since the *Boerne* decision, Congress responded by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. The statute, in direct response to the holdings in *Smith* and *Boerne*, defines religious exercise as any exercise of religion whether compelled by or central to a religious belief. Congress said that the purpose of the legislation was to provide the maximum protection to religious belief.

Subsequently, in *Gonzales v. O Centro Espirita* (2006), 546 U.S. 418 (2006), the Court upheld the application of RFRA to federal statutes. Accordingly, the Court applied strict scrutiny to the actions of federal drug law enforcement officers and required the government to show a compelling interest.

In the landmark decision *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014), a 5–4 majority held that, pursuant to RFRA, a “closely held” for-profit corporation can be exempt from a general law based on its owner's religious objections if there is a less restrictive means of furthering the law's objectives.

THE “FREE SPEECH STRATEGY” FOR SECURING RELIGIOUS LIBERTIES

If one looks at a series of cases involving Jehovah's Witnesses in the 1940s, one finds that the Witnesses often prospered before the Court when they blurred the line differentiating the freedom of religion from the freedom of speech. Their persistent efforts to defend free exercise, or at least a combination of free exercise and free speech, dramatically expanded their religious liberty—

even if it came at the expense of a robust interpretation of the free exercise clause. The right to believe includes the right to speak, and the right to speak can, generally, be limited only if there is a clear and present danger.

Five decades after the Jehovah's Witnesses, others used a similar strategy effectively to protect religious liberty. Furthermore, they were victorious at the highest appellate level. In *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court upheld the Equal Access Act permitting religious clubs to meet in public schools on the grounds of protecting students' freedom of expression—not their right to free exercise. Similarly, in *Lamb's Chapel v. Center Moriches Free Union School District*, 58 U.S. 384 (1993), the Court held that a community cannot deny access to public school facilities to a church group that wanted to use them after hours—assuming the community makes the facilities available to other, nonreligious groups as well.

It appears that one “strategy” that has contributed to these successes is to litigate on the basis of freedom of expression rather than more traditional religious liberty claims. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and several other cases including *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 573 (1995), litigators successfully used the free speech strategy to bolster freedom of religion. In fact, in the case *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), the free exercise clause took a backseat to claims made by the petitioner regarding impact of the University of California Hastings College of Law's policies on the freedom of speech and association.

In a 2001 article, Mark Tushnet refers to the free exercise clause as “redundant.” In other words, if it were removed from the Constitution, what would change in contemporary constitutional law? Tushnet holds that the freedoms that the clause protects are already largely protected by the free speech clause. Reyes notes that it is “fading.” It is easy for some to dismiss the free exercise clause as a second-class citizen in the community of constitutional liberties. Throughout its history, when the Court has heard a free exercise case it has typically first balanced the religious liberty claim against the restrictions required by the criminal or civil law. More likely than not, the judgment of the elected lawmakers will prevail. Additionally, the Court will test the liberty claim against the establishment clause. Would the state effectuate an establishment of religion by satisfying a particular religious liberty claim? If so, then the free exercise claim must take a backseat. Although one might be concerned with a clause in the Bill of Rights that appears to have little to no independent meaning or significance, such seems to be the current interpretation of the free exercise clause—much ado about nothing.

Alternatively, Tushnet notes that “practices previously protected by the Free Exercise Clause can still be protected under other constitutional doctrines” (2002, 94). Accordingly, one might argue that the success some groups have had when they couple what might otherwise be a free exercise claim with a freedom of expression argument has served to protect religious liberties. And, of course, the victory by the company Hobby Lobby, where the Court reinvigorated the Religious Freedom Restoration Act, might similarly, for better or worse, allow a pushback against the holdings in *Smith* and *Boerne*.

Frank Gulizza,
Patrick Henry College

SEE ALSO: *City of Boerne v. Flores*; *Freedom of Religion: Establishment; Incorporation of the Bill of Rights; Religion and Politics; School Prayer; US Bill of Rights*.

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Freedom of Speech

The First Amendment of the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of

Freedom of Speech

grievances.” With regard to freedom of expression, the key provisions are the speech and press clauses.

THE ORIGINAL DOCUMENT

The delegates to the Constitutional Convention in Philadelphia did not extensively discuss free expression. The overwhelming majority of delegates believed a bill of rights, including an express protection of either free speech or a free press, was unnecessary. In fact, not a single delegate even mentioned a free speech clause, other than a speech and debate clause for Congress. Once the Convention delegates had completed their work, though, the national debate over ratification began. The Anti-Federalist opponents of the Constitution voiced numerous objections to the proposed document, but their overriding concern was the continuing viability of state sovereignty vis-à-vis the enhanced sovereign power of the national government (Maier 2010). Even so, the Anti-Federalists quickly realized that their concerns might garner the most popular traction if they stressed the lack of a bill of rights (which, for many, was also a genuine concern). If the Constitution would vest enormous power in the national government, as the Anti-Federalists feared, then the government would be empowered to trample many essential individual liberties. A bill of rights, the Anti-Federalists therefore argued, was essential to protect those liberties and to prevent governmental tyranny (Storing 1981). The Anti-Federalists repeatedly hammered on this supposed defect in the proposed Constitution and, in doing so, stressed that freedom of the press, in particular, was unprotected. Ultimately, of course, the states ratified the constitution, but only after James Madison and other Federalist leaders promised to add a bill of rights.

THE BILL OF RIGHTS

Madison fulfilled his promise. As a member of the first House of Representatives, he introduced a draft of a bill of rights on June 8, 1789. In referring to the proposed protections of free expression, Madison offered faint praise: such guarantees, he stated, were “neither improper nor altogether useless” (Kurland and Lerner 1987, vol. 5, 128). Nevertheless, Madison’s first draft became important because Congress devoted little time to the substance of the provisions. Many congressional members believed that a bill of rights was inconsequential, an unnecessary redundancy: it would reiterate what already was understood, that the national government lacked the power to infringe on individual rights, such as freedom of the press. For many Federalists, the proposed bill of rights remained a mere political bone tossed to the Anti-Federalists, who would then, it was hoped, quietly lie down. When Madison initially presented his first draft, numerous representatives, Federalists and Anti-Federalists alike, insisted that Congress needed to remain focused on more important matters.

When Congress finally turned to Madison’s proposed bill of rights, six weeks after he had introduced them, the House sent the matter to a Select Committee. Even then, few representatives wanted to discuss the substance of the proposals. Congressional deliberations mostly revolved around the form or felicity of phrasing in the amendments. For instance, when the full House first took up the proposed amendment on free expression, Theodore Sedgwick of Massachusetts decried the redundant language while simultaneously complaining that “it is derogatory to the dignity of the House to descend to such minutiae” (Kurland and Lerner 1987, vol. 5, 128–129).

Madison had initially proposed two constitutional amendments related to free expression. One (the national provision)

referred to both freedom of speech and the press, and would eventually become, in modified form, the First Amendment; the other (the state provision) focused explicitly on state governmental power and a free press. The House reported out both the national and state provisions, with modifications. The Senate rejected the state amendment, however, and the Conference Committee did not try to resuscitate it. The Senate did not explain its action, but in the House, Thomas Tucker of South Carolina had worried that the state provision would “interfere” with state government (Kurland and Lerner 1987, vol. 5, 129). As for the national provision, the House, Senate, and Conference Committees all modified Madison’s initial proposal by juxtaposing different phrases, combining it with other proposed provisions, and smoothing out the language. Most important, the Senate changed the proposal from the passive to the active voice, thus clarifying that the guarantees would apply against only the national government. On September 24 and 25, 1789, both congressional houses concurred in an Agreed Resolution on the final language of a bill of rights. As resolved by Congress, the resulting bill of rights still required ratification by at least three-fourths of the states. When Virginia ratified on December 15, 1791, the Bill of Rights officially became part of the Constitution.

ORIGINAL MEANING OF FIRST AMENDMENT

The lack of extensive debate about the meanings of free speech or a free press or even the propriety of adding constitutional protections of speech and press underscores that the First Amendment did not clarify the law related to free expression. Yet three important political consequences flowed from the framing and ratification. First, as Madison and other Federalists had hoped, the Anti-Federalists’ popularity shriveled, so opposition to the Constitution almost completely disappeared. Second, as some Anti-Federalists had hoped, the debate over the Constitution and the Bill of Rights enhanced American sensibilities regarding individual rights and liberties. Finally, and perhaps most important, the mere existence of the First Amendment, with its protections of speech and press, gave Americans another basis for protesting against governmental efforts at suppression. When free expression issues came to the forefront in the late 1790s, opponents of governmental suppression were quick to invoke the First Amendment.

Beyond these ramifications, the First Amendment free expression protections did not have determinative meanings. At the time of ratification, most Americans believed that they had a right to speak their mind, but they would not have articulated this right in precise legal terms (Feldman 2008). Other Americans, including lawyers, assumed that legal rights to free expression still, for the most part, tracked the common law. Madison suggested as much when he stated during the congressional debates over the Bill of Rights that he sought to enumerate “simple, acknowledged principles.” From this perspective, the national government could not impose prior restraints on expression—such as requiring a government license before publishing—but the national government’s power to punish seditious libel—that is, criticisms of government officials and policies—was less clear. This ambiguity would provoke controversy when Congress enacted the Sedition Act of 1798.

Meanwhile, state governments, not subject to the First Amendment (*Barron v. Baltimore*, 32 U.S. [7 Pet.] 243 [1833]), could punish seditious libel in certain circumstances. State courts thus developed a “bad tendency” test to delineate the scope of

free expression within a republican democracy: A writer who furthered the common good by publishing truthful statements for good motives and justifiable ends was protected from criminal punishment, but a writer whose expression instead was malicious or had bad tendencies acted contrary to the common good and was therefore subject to punishment. When the Supreme Court began addressing free expression issues, it followed this bad tendency doctrine and largely continued to do so through the early twentieth century. This doctrine provided only narrow protections for speech and writing, and thus the government permissibly imposed numerous restrictions on expression. For example, the Court upheld a prohibition of flag desecration in *Halter v. Nebraska*, 205 U.S. 34 (1907), a licensing requirement for movies in *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), and the punishment of protests against the World War I draft in *Schenck v. United States*, 249 U.S. 47 (1919).

Nowadays we often think of free expression as a constitutional lodestar (White 1996). We believe that democracy cannot exist without a robust First Amendment. But for much of the nation's history, courts did not interpret free expression in this manner. Only after the Court began to change its conceptualization of democracy, in the late 1930s, did free expression gain its current luster.

THE PURPOSES OF FREE EXPRESSION

To justify the status of free expression as a constitutional lodestar, the Court typically relies on three theoretical rationales: the search-for-truth (or marketplace of ideas) theory; the self-governance theory; and the self-fulfillment theory. Under the search-for-truth rationale, a robust free expression is necessary to allow society to uncover truth. The government, in other words, should allow speech and writing to flow into a marketplace of ideas. From this free exchange of ideas the truth will emerge. Harmful ideas must be met with better ideas—counterspeech—rather than with force or suppression. As the Court stated in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the only expression that is constitutionally unprotected is that which does not contribute to “any exposition of ideas” and thus cannot further the societal quest for “truth.”

The self-governance rationale emerged in the late 1930s when the Court began to conceive of American government as a pluralist rather than a republican democracy. Pluralist democracy depends on adherence to certain governmental processes, and no liberty seems more central to those processes than free expression. Free speech and writing allow diverse groups and individuals to contribute their views in the pluralist political arena. If governmental officials interfere with the pluralist process, if they control public debates, then they skew the democratic outcomes and undermine the consent of the governed. No less so than voting, free expression is a prerequisite for democracy. As the Court explained in *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940), government cannot be allowed to “diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.”

The self-fulfillment rationale begins with “the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being” (Emerson 1963, 879). Consistent with this premise, “every man—in the development of his own personality—[must have] the right to form his own beliefs and opinions,” as well as “the right to express these beliefs and opinions” (Emerson 1963,

879). When understood in this manner, free expression allows the individual “to realize his potentiality as a human being” (Emerson 1963, 879). As the Court stated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), “a speaker has the autonomy to choose the content of his own message.”

In sum, the framing of the Constitution and the addition of the Bill of Rights reveal an ambivalent commitment to the protection of free expression. During the twentieth century, though, the Court transformed free speech into a constitutional lodestar. The three theoretical rationales help justify that lodestar status. Regardless, even during the late twentieth century the Court upheld numerous restrictions on speech and writing (Feldman 2008).

Stephen M. Feldman,
University of Wyoming

SEE ALSO: *Freedom of the Press*; Holmes, Oliver Wendell, Jr.; *Incorporation of the Bill of Rights*; *Preferred Freedoms*; *US Bill of Rights*; *Whitney v. California*.

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Unit 6

What Challenges Might Face American Constitutional Democracy in the Twenty-first Century?

Citizenship

Citizenship is formal membership in a polity. Every political system governs the meaning, processes, and requirements of citizenship, and every citizen decides the values that will most influence his or her civic identity and judgments. A key and controversial theme of American governance, citizenship has legal, philosophical, and moral dimensions. In democratic, self-governing societies such as the United States, citizens are collectively sovereign and individually enjoy certain rights, assume certain duties, and are free to define their roles as citizens according to their interests, means, and values.

LEGAL DIMENSIONS OF CITIZENSHIP

Citizenship is a legal status and carries certain exclusive rights and responsibilities. In the United States, citizens and noncitizens equally enjoy all human rights in the federal Constitution, such as freedom of speech and freedom of religion, and share most duties (e.g., resident aliens are required to register for the military draft). Nonetheless certain rights and privileges are reserved exclusively to citizens, such as the right to vote, hold office, serve on a jury, and carry a US passport.

Democracies also must decide the ways in which people become citizens. General guidance about the legal dimension of citizenship comes from the United States Constitution. Article I, Section 8 gives Congress the power “to establish a uniform rule of naturalization.” Laws about naturalization are delegated to the national government and not reserved to the states.

The Fourteenth Amendment states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The Fourteenth Amendment establishes citizenship through birth, citizenship through naturalization, and the primacy of national over state citizenship. The United States also recognizes citizenship through blood if they are born to at least one American parent anywhere in the world.

The laws, traditions, and issues surrounding citizenship have been controversial from the founding to the present. Although the Founders radically transformed thinking about the relationship of individuals to their government (i.e., from subjects to citizens), women, African Americans, Native Americans, and other marginalized groups did not share equally or fully in the new system. Slavery was not abolished until the Thirteenth Amendment was ratified in 1865.

The vast majority of American citizens are also citizens of a state. As state citizens, people enjoy the rights, duties, and privileges associated with a particular state. Citizens of a state have the right to vote in state and local elections, and enjoy other state benefits such as education, fire and police protection, and road maintenance.

Every year millions of people apply for legal residency in the United States, and thousands of others cross the border illegally (Zong and Batalova 2015). Addressing issues of legal and illegal immigration is a prominent political and legal issue at both the state and federal levels. Immigration reform is a significant political issue in national, state, and local politics, particular in the border states of the southwestern United States.

In the absence of federal reform, some states and cities have enacted laws to address problems associated with undocumented aliens. Certain state and local policies are aimed at providing authorities with tools to identify and investigate undocumented aliens, whereas others attempt to provide a safe haven for the undocumented. Arizona passed an immigration law, SB 1070, most of which was struck down in *Arizona v. United States*, 567 U.S. ____ (2012). The Supreme Court ruled that (1) requiring resident aliens to carry official papers; (2) allowing police to arrest a person for suspicion of being illegal; and (3) making it a crime for undocumented people to search for or hold a job were unconstitutional. The Court reasoned that federal law preempted those parts of SB 1070 and that Congress possessed broad authority to regulate immigration. San Francisco and other cities adopted “sanctuary city” policies designed to facilitate undocumented aliens living and working in a particular city.

Resident aliens are eligible to apply for citizenship. As specified by the US Office of Personnel Management, to become citizens resident aliens must:

- be eighteen years of age or older
- reside in the United States for at least five years as a lawful permanent resident (three years if married to a US citizen)
- speak, read, and write English
- be of good moral character
- be familiar with the history and culture of the United States
- be attached to the principles of the US Constitution
- renounce allegiance to any foreign prince, potentate, state, or sovereignty

Naturalized citizens enjoy all of the rights and assume all of the duties of natural-born citizens except one—they cannot become president. The Constitution requires that the president be a natural-born citizen.

Although federal law does not mention dual nationality or citizenship, a small percentage of American citizens are simultaneously nationals or citizens of another country (US Department of State, Bureau of Consular Affairs). Individuals

Citizenship

may simultaneously become citizens of the United States and their country of birth by being born American citizens in that country. Alternatively naturalized American citizens may retain the citizenship of their home country. The United States government does not “encourage [dual citizenship] as a matter of policy because of the problems it may cause” (US Department of State, Bureau of Consular Affairs). Dual citizens are subject to the laws of both countries, and some people question the ultimate loyalty of dual citizens.

The tradition and legal protection of birthright citizenship has become a matter of debate within the United States and throughout the world (Aleinikoff and Klusmeyer 2002). A movement to stop or limit “birth tourism” (pregnant mothers traveling to the United States for the sole purpose of giving birth on American soil to establish citizenship for a newborn child) has become a recurrent issue in the United States, particularly since the 2000s (Graglia 2009). Several developed Western democracies, such as France, the United Kingdom, and Australia, have abandoned or restricted birthright citizenship.

A variety of other legal principles influence the ways in which Americans understand the idea of citizenship. For example, government is expected to treat its citizens equally and fairly, protect their individual rights, and promote their general welfare. Citizens may use constitutional principle, law, or access to the political system to address these basic and legal expectations of citizenship.

PHILOSOPHICAL DIMENSIONS OF CITIZENSHIP

In self-governing societies such as the United States, citizens are both the rulers and the ruled. If government is empowered of, by, and for the people, then the people must be active members of community and public life. Yet, in free societies, citizens should be free to choose when, where, how, and why to participate, if at all. One of the enduring questions of governing in the United States is how a large, diverse democracy can get its citizens to participate at a level that enables effective governance while also respecting their individual freedom. Two theories have dominated thinking about democratic citizenship in the United States: civic republicanism and Enlightenment liberalism.

Civic republican theory, rooted in ancient Greece and Rome, holds that the interests of the community outweigh the interests of the individual. Citizen participation in political life on behalf of the common good is superior to the individual and private pursuits of family and profession (Kymlicka and Norman 1994). Civic republicans rest their theory on the shared autonomy of the community (Lakoff 1996). Acting alone, individuals have little or no power to effectively address social problems. Such problems require that citizens act together for the common good (Norman 1992).

Civic republicans also believe in the “intrinsic value of political participation for the participants themselves” (Kymlicka and Norman 1994, 362). Engaging in deliberation and political participation not only betters the community, it also betters the individuals who participate on behalf of the community. Active participation in the public arena is the only means available for people to achieve the practical judgment necessary for effective democratic governance.

According to the civic republican tradition, liberty depends on sharing in self-governance, which requires knowledge of public affairs and a sense of belonging to the community (San-

del 1996). Citizen identities, in the civic republican tradition, are “thick” and occupy a central place in one’s life (Conover, Crewe, and Searing 1991). Citizens not only have the right to participate, they are expected to do so, for their own good and that of the community.

Liberal political philosophers, in contrast, place the rights of the autonomous individual before the demands or needs of society. The main purpose of liberal government is security for personal liberty. According to Lance Banning, liberalism is “a label most would use for a political philosophy that regards man as possessed of inherent individual rights and the state as existing to protect these rights, deriving its authority from consent” (1986, 12).

Liberals claim that people are rational beings capable of using reason to overcome impediments in pursuit of their happiness. Citizens make a social contract that creates civil society and government by consent of the governed to guarantee their rights. Participation in public life is for protection of personal liberty and pursuit of one’s self-interest (Conover, Crewe, and Searing 1991).

Liberals tend to emphasize the rights of citizenship against the power of government, which citizens create and maintain to serve them (Lakoff 1996). Individuals are free to choose, within reasonable limits, their own particular conception of the good life (Sandel 1996). From a liberal perspective, a good society is one in which individuals are free to choose their own values and ends.

The duties or responsibilities of citizenship, which are of primary importance in the civic republican tradition, are relegated to secondary status in the liberal tradition. If individuals have the right to participate, they also enjoy the right, in a free society, not to participate. Citizen identities are “thin” because private interests and concerns primarily occupy individuals (Conover, Crewe, and Searing 1991).

At the core of modern liberal conceptions of democracy and citizenship is the idea of constitutionalism and rule of law to protect individual rights. Of course, the existence of a constitution is a necessary, but insufficient, condition for constitutionalism. A country that practices constitutionalism legally limits the power of government to prevent it from arbitrarily and capriciously restricting or denying rights. It also legally and sufficiently empowers government to achieve the common good by maintaining public order and safety, and thereby preventing predators from violating the rights of individuals (Patrick 1999).

A variety of forces help Americans to overcome the inevitable tensions between civic republicanism and liberalism. Participation in civil society—a space between private life and the government—brings together aspects of both. According to the sociologist Adam Seligman, civil society has a harmonizing effect on the often-conflicting ideas of individual interest (liberalism) and the common good (republicanism): “What . . . makes the idea of civil society so attractive . . . is its assumed synthesis of the private and public ‘good’ and of individual and social desiderata. The idea of civil society thus embodies for many an ethical idea of social order, one that, if not overcomes, at least harmonizes the conflicting demands of individual interest and social good” (Seligman 1992, x). The vitality of civil society is an indicator of a healthy blend of civic republicanism and liberalism in a democracy. If civil society is healthy, then citizens are assuming their responsibilities to act for the good of the

Twelve Tables of Civism for the Modern American Republic

[with apologies to the “Laws of the Twelve Tables” of the Early Roman Republic and to Aristotle’s paradigm of the Later Greek Republics]

UNUM The Obligations of Citizenship		PLURIBUS The Rights of Citizenship	
Corrupted Forms of Unum	True Forms of Unum	True Forms of Pluribus	Corrupted Forms of Pluribus
“Law and Order”	Justice	Freedom	Anarchy
Enforced sameness; conformity	Equality	Diversity	“Unstable pluralism”
Authoritarianism; totalitarianism	Authority	Privacy	Privatism; privatization
“Majoritarianism”	Participation	Due Process	“Soft on criminals”
“Beguiling half-truth; plausible falsehood”	Truth	Property	“Property rights superior to human rights”
Chauvinism; xenophobia	Patriotism	Human Rights	“Cultural Imperialism”
Democratic Civism			

Butts’s twelve tables of civism for the modern American republic. Adapted from the “Decalogue of Democratic Civic Values” in R. Freeman Butts, The Revival of Civic Learning (Bloomington, IN: Phi Delta Kappa Educational Foundation, 1980), p. 128. GRAPHIC BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

community; they are exercising their commitments to the rights of citizenship and constitutionalism, the rule of law that regulates tensions between the state and civil society, and enables both to protect liberty and promote the common good (Patrick 1999).

Education, both formal and informal, also helps Americans to maintain a healthy balance between principles of civic republicanism and liberalism. Citizens need to learn about their rights as well as their responsibilities, the powers as well as the limits of government, and the multiple roles citizens may assume in public and private life. A well-conceived civic education fosters the knowledge, skills, and dispositions that motivate informed, reasonable, and humane participation. Citizens may learn, for example, that participation in civic and political life is in their best self-interest.

In both traditions, citizens not only have rights, duties, and responsibilities, they also have power. When people exercise their rights to inform their fellow citizens of an issue, influence a governmental official, or publicize governmental abuse, they are exercising the powers of their citizenship. Much of the power of citizens, however, is latent. Public officials know that citizens can hold them accountable and shed light on their actions in the court of public opinion.

MORAL DIMENSIONS OF CITIZENSHIP

Citizenship and governance in the United States blend civic republican and liberal ideas. The moral dimensions of citizenship include respect for the autonomy of the individual, the sovereignty of the citizenry, and the authority of government to protect individual rights and promote the common good. Within this theoretical framework, citizens must make practical choices, most of which involve values. From choosing a political party to taking a stance on a particular issue to deciding to run

for office, citizens are required to make value judgments. Civic principles and values inform and motivate citizen participation and help to form civic identity.

The United States is a pluralistic and federal polity that respects multiple civic identities. Civic identity can be supplied in various ways—by being part of a group, a community, a state, and a nation. Participation requires that people make practical judgments about their values as they think through specific issues and make decisions about candidates—or decide not to participate at all.

From the founding of the republic until the early twenty-first century, Americans have assumed multiple civic identities. Debate, disagreement, and diversity have characterized American political culture from ratifying the Constitution to current efforts at immigration reform. Although most Americans would agree on a host of foundational values (e.g., liberalism, constitutionalism, and republicanism) that bind them together, they disagree about which of those values should be emphasized as they are applied to specific issues. Most Americans agree that the economy needs to be regulated, for example, but disagree about how much and in what ways.

Citizens’ values, choices, and identity may change over time. The general framework of values and principles within which those are formed, however, has remained remarkably consistent. Since the founding, Americans have had to wrestle with several recurring issues involving diversity and unity, privacy and security, liberty and order, and minority rights and majority rule. In making these choices Americans have employed a host of other values such as those described by the prominent educational historian R. Freeman Butts (1988).

Of course, not all Americans would agree with the values outlined in Butts’s Twelve Tables of Civism. Some would add

Foreign Policy

other values or principles, or recast the table in other ways. Still, the framework Butts proposed highlights key aspects of citizen choice in American governance.

First, any important civic value or principle can become “corrupt.” Too much focus on the individual and liberty or on the community and the common good can be detrimental to a good society and/or the rights of the individual. Nearly all Americans are committed to individual liberty, for example, but most also realize that liberty has limits. Protection against unreasonable searches and seizures is limited to search incident to arrest, in a school setting, and in a variety of other circumstances. Important constitutional principles should apply equally to everyone, but circumstances may dictate various applications.

Second, effective governance requires citizens and their government to find the appropriate balance between the sometimes competing, sometimes complementary values and principles of the American political order. Such a balance cannot be found using a preset formula. Rather, citizens and statesmen are required to make judgments using reason, weighing evidence and arguments, and ultimately, making value choices.

Third, most of the important choices and preferences of citizens are made within a framework of general agreement. Several scholars have noted increases in polarization among politicians and citizens (Fiorina and Abrams 2008). Yet most citizens and politicians, though they sometimes or often disagree about the means the government or the citizenry should employ to resolve particular issues, generally agree on important principles and general purposes of government.

THE FUTURE OF AMERICAN CITIZENSHIP

Democratic citizens occupy the “highest office” in the land. Citizens are free to choose their own and collective identities, influence the direction of their government, and define their roles in civic and political life. Individually, through their government and with one another in civil society, citizens govern themselves. The future of good governance, in the United States and elsewhere, depends on each citizen’s ability to make wise choices in ever-changing circumstances.

*Thomas S. Vontz,
Kansas State University*

SEE ALSO: *Citizenship, History of; Citizenship, Pathways to; Civic Agency; Civic Duty; Civic Participation; Fourteenth Amendment; Governance; Self-Governance.*

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Foreign Policy

The United States was born in an age of globalization, and its Declaration of Independence was a purposeful recognition of

that fact of national life. As a result the Declaration is not only a statement of first principles but also the first official instrument of foreign policy in that world (Armitage 2007). The Founders' warnings against "permanent alliances" and "entangling alliances" were not a repudiation of all alliances, nor were they a call for isolationism. Rather, they were the counsel of seasoned pragmatists who called for a foreign policy that would be free of the kind of commitments that might drag the United States into a European war. American leaders and public opinion have remained reluctant to engage in war but, from the earliest days of the republic, continued to be deeply invested in diplomacy and trade around the world.

FOREIGN POLICY HISTORY

Walter Russell Mead (2001), George Herring (2008), and other scholars have long made the case that foreign policy is an essential component of American governance in a global age from the country's founding into the twenty-first century. The success of the American Revolution depended in no small part on building alliances with continental European powers, and later the Union's victory in the Civil War relied on Abraham Lincoln's diplomatic efforts to keep Britain and France from giving diplomatic recognition to the Confederacy (Doyle 2015). Prosperity and the expansion of the American economy have relied on foreign trade and the infusion of foreign investments from the earliest days of the republic. That reliance has been nationwide—in northeastern cities, on southern plantations, and on western farms that needed foreign markets for their goods, foreign equipment for production, foreign labor, the acquisition of foreign land (most notably, the Louisiana Purchase), and foreign capital for internal improvements in transportation and communications. Until the Civil War, foreign policy experience was a requirement of successful presidential candidates, and all but three—John Tyler (1790–1862), James Polk (1795–1849), and Millard Fillmore (1800–74)—served in diplomatic posts or as war generals (Mead 2001).

In short, American isolationism is the exception, not the rule. The United States was founded on an international footing, and early foreign policy successes were essential to the growth of the American republic. American isolationism is a myth. American foreign policy is the reality.

American foreign policy is defined as a broad set of instruments and actions adopted by Congress and the president to advance and protect American interests and ideals in the international system. Neutrality in European affairs is an early example of American foreign policy. One of its instruments was the Neutrality Act of 1794. Another early example was the Monroe Doctrine, the instrument that proclaimed American policy against European interference in the internal affairs of Latin American and Caribbean countries. In the early years of the Cold War, America adopted a policy of containment to prevent the Soviet Union from expanding its sphere of influence. In the early twenty-first century, America has something of a containment policy in its war against terrorism. Both containment policies have been carried out by a toolkit of diplomatic, economic, cultural, and military instruments.

FOREIGN POLICY MAKING

A second myth is that the making of American foreign policy is a bipartisan activity in which there is no room for party politics. American foreign policy and domestic politics are intertwined.

At the dawn of the Cold War, Republican senator Arthur H. Vandenberg (1884–1951), who was the chairman of the US Senate Foreign Relations Committee, called on fellow senators from both parties to work with Democratic president Harry S. Truman (1884–1972) in shaping America's policy. In 1947 he famously said, "partisan politics [should stop] at the water's edge," suggesting that partisan politics may be acceptable in domestic policy but not when it comes to making foreign policy beyond American shores. That statement was not a reflection of a history of bipartisan foreign policy making; quite the contrary, it was a call on both sides to cooperate. Partisanship has been a factor, at times more or less influential, in the politics of foreign policy making since the early days of the republic. In the 1790s Republicans and Federalists bitterly disagreed over the dangers of the French Revolution. Convinced of the new French threat, Federalists in Congress passed, and Federalist president John Adams signed, the Alien and Sedition Acts of 1798. Bipartisan consensus has been hard won and often unachievable.

Party politics is by no means the only political influence on foreign policy making. Sectional interests divided the nation over the protective tariff that fledgling New England industries sought and southern planters opposed. Conservatives and pragmatists fought over détente with the Soviet Union and Communist China. Hawks and doves disagreed over the war in Vietnam. Business advocates of free trade clashed with labor and environmentalist proponents of fair trade. Various lobbyists try to influence American foreign policy, from business and labor groups to ethnic lobbies, such as the American Israel Public Affairs Committee (AIPAC) and the Cuban American National Foundation (CANF).

All of these factors figure into congressional–presidential relations, but the overarching and most enduring struggle between these two branches over foreign policy has been institutional. On occasion, one or both houses of Congress and the president have been of different parties and policies. But Congress and the president always represent different institutional interests and perspectives. Congress represents states and local constituencies, whereas the president represents the nation. The Framers of the United States Constitution determined that foreign policy needed both sets of interests and perspectives.

Article I of the Constitution grants Congress the power to regulate foreign commerce, declare war, "raise and support armies," "provide and maintain a navy," and "provide for calling forth the militia to . . . repel invasion." Added to these specific powers are Congress's powers of the purse, legislation, and oversight. Article II provides the president with the power to make treaties and appoint US ambassadors and other representatives with the advice and consent of the Senate; serve as commander in chief of the army, navy, and, when called into service, the militia; and receive foreign ambassadors and other foreign representatives. Added to these are the broad executive powers of administration and enforcement to implement public policy.

Clearly the president holds the constitutional initiative in matters of war and peace, and since the adoption of the executive budget system in 1921, increasingly in budget making and law making. In response to national threats, Congress has significantly increased the president's powers. In 1947, faced with gaping holes in American postwar policies, Congress passed the National Security Act, creating a National Security Council close to the president "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security." Fifty-four years later, in the aftermath of

Figure 1: Congressional Foreign Policy Orientations

Level of Activity	Level of Assertiveness	
	Less Assertive	More Assertive
More Active	Supportive Congress	Competitive Congress
Less Active	Disengaged Congress	Strategic Congress

Adapted from Carter and Scott, 2012, 40. TABLE BY LUMINA DATAMATICS LTD. © 2015 CENGAGE LEARNING®.

the terrorist attacks of September 11, 2001, Congress once again strengthened the president’s powers by passing the USA PATRIOT Act and creating the Department of Homeland Security.

The Constitution makes no reference to neutrality, abrogating treaties, international agreements of less standing than treaties, or congressional limits on presidential deployment of troops without a declaration of war. And the courts have been loath to resolve these uncertainties. In 1979, for example, President Jimmy Carter rescinded a defense treaty with Taiwan without seeking Senate approval. Senator Barry Goldwater sued Carter, but the Supreme Court determined that this issue was not a legal, but a political, matter to be resolved by the political branches.

Although the Constitution requires the two branches to share the power to govern, the political cooperation needed to share constitutional power has not always occurred. As Edward Corwin famously put it in *The Constitution of the United States of America*, the Constitution provided the two branches with an “invitation to struggle” over foreign policy. Writing as the Korean War was being fought without a congressional declaration but with congressional appropriations, Corwin observed: “The relations of President and Congress in the diplomatic field have, first and last, presented a varied picture of alternate cooperation and tension, from which emerge two outstanding facts: first, the overwhelming importance of Presidential initiative in this area of power; second, the ever increasing dependence of foreign policy on Congressional cooperation and support” (Corwin 1953, 470).

The political scientists Ralph Carter and James Scott (2012) have developed a typology to distinguish four types of congressional orientations to foreign policy based on the levels of congressional assertiveness and activity. (See Figure 1.) Carter and Scott found a general pattern since World War II in which congressional assertiveness has increased, whereas congressional activity has declined. Between 1945 and 1958, during the age of consensus, Congress generally supported the Cold War policies of Presidents Harry S. Truman and Dwight D. Eisenhower (1890–1969). From 1958 to 1967, Congress occupied more of a “strategic” stance as its members’ comfort level with the Vietnam War declined and its assertiveness increased.

During the period from 1968 through the mid-1980s, a more “competitive” Congress emerged as its leaders and members became more active and assertive in their efforts to reestablish congressional authority in the face of what they perceived to be presidential overreach. Symptomatic of this period, Congress passed the War Powers Resolution of 1973. In part a response to President Richard Nixon’s bombing of Cambodia and Laos, the resolution put time restrictions on the president’s unauthorized

deployment of troops. No president has accepted the constitutional authority of Congress to impose those restrictions. According to Carter and Scott, the period since the mid-1980s has witnessed the return to a more strategic posture in which Congress is less active but selectively assertive in foreign policy. That assertiveness, the authors note, has increased at times when one or both houses of Congress and the president are controlled by different political parties, but Congress picks its battles.

On rare occasions Congress has used substantive legislation to check the president, as when in 1986 it overrode President Ronald Reagan’s veto and prohibited new US investment in South Africa. At other times Congress has passively asserted its authority by refusing to accept the president’s proposals or by finding a way to authorize presidential action without taking the blame if that action fails. On still other occasions Congress has made increasing use of procedural legislation that sets forth principles of presidential action but then provides the president with discretion, allowances, or waivers in implementing those principles. The War Powers Resolution is one example. Another is fast-track trade authorization, which enables the president to proceed with trade negotiations subject only to a yes-or-no vote by Congress without the opportunity to amend. Congress has also authorized the International Trade Commission to investigate complaints of unfair trade practices by foreigners and the Committee on Foreign Investment to investigate potential national security risks posed by planned foreign investments in US companies or technologies (Stevenson 2013).

Periodization aside, Congress has always been more active and assertive in certain kinds of foreign policy than others. As a general rule, members of Congress tend to be more interested in foreign policies that have the most direct implications for the domestic policies of interest to their constituents. Leading the way are policies involving foreign trade, immigration, and, in some districts, the location and funding of military facilities (Hook 2014). These issues are reminders that domestic policy and foreign policy are entwined. Although the extent of the connection between foreign and domestic policy varies from one policy area to another, policy makers often consider the ramifications of foreign policies for domestic policies and vice versa.

FOREIGN POLICY TOOLKITS

Foreign policy makers rely on four basic toolkits in crafting and carrying out foreign policy—diplomacy, economic relations, national security, and public diplomacy or soft powers. Each toolkit contains a variety of instruments; many but not all instruments require congressional and presidential action. Federal legislation defines these toolkits and specifies which federal departments and presidential offices are authorized to use specified instruments in the conduct of American foreign policy (Stevenson 2013). For example the Logan Act of 1799 prohibits unauthorized US citizens from interacting with any foreign government or foreign official for the purpose of influencing that government or official in disputes with the United States or seeking to defeat measures of the United States. Violations can carry fines and imprisonment (no more than three years). The Logan Act has been used to discourage members of Congress and state and local officials from trying their hand at foreign diplomacy. But there is no law against fact-finding congressional delegations, known as codels. Nor is there a law against states entering into foreign affairs for the purposes of trade, aid, investment, or even managing migration of herds of caribou across the US–Canadian border.

Diplomacy. Diplomacy between governments (known as Track I Diplomacy) uses formal and, where necessary, back channels to (1) establish and maintain normal relations with individual foreign nations; (2) represent the United States and the president in international settings, including international organizations; and (3) conduct negotiations on a variety of subjects from trade to disarmament. Executive agreements have largely replaced the more cumbersome treaty-making process in formalizing these activities. The Department of State (often referred to simply as State) organizes and conducts American diplomacy, drawing on civil servants, foreign-service officers (FSOs), and political appointees. In addition to conducting diplomatic activities, the State Department also analyzes trends, makes policy recommendations, supervises educational and economic relations, and helps American citizens and organizations overseas. Occasionally, the daily working relations of diplomacy are punctuated by policy initiatives by the president and secretary of state. Examples include, during the Barack Obama administration (2009–), Secretary of State Hillary Clinton’s 2012 Pacific Rim initiative to strengthen American trade and security relations with East Asian countries. Less publicized was her initiative to empower women and protect women’s rights.

Economic Relations. Economic relations are wide ranging. Trade has been first in significance since the earliest days of the republic. American representatives negotiate trade agreements, monitor compliance with those agreements and with international law, regulate and surveil exports and imports, and assist American businesses overseas. The most prolific economic transactions, however, are currency exchange transactions, amounting in 2015 to roughly \$5.5 trillion a day. The Treasury Department and Federal Reserve System (the Fed) are involved in economic stabilization during currency crises. The United States Agency for International Development (USAID) and other federal agencies provide economic and technical assistance to foreign countries amounting to 1 percent of the federal budget. Economic instruments are used not only as enticement but also as punishment. The economic embargo on Cuba and trade sanctions on Iran are examples of the latter. Antiterrorism now includes a variety of economic weapons for freezing foreign bank accounts, seizing assets, and halting money laundering. The Committee on Foreign Investment, which includes representatives from sixteen executive branch agencies, carefully monitors foreign attempts to acquire US technologies and companies, which may adversely affect national security. The United States is also very active in the work of the World Trade Organization, the International Monetary Fund, and the World Bank. The Departments of State and Commerce are primarily responsible for foreign economic relations, but the Treasury Department, the Fed, and specialized agencies and independent commissions also play a role.

National Security Policy. National security policy seeks to protect American citizens and territory from foreign threats. The president fashions national security policy with the advice of the National Security Council, Joint Chiefs of Staff, White House staff, and appropriate cabinet members and congressional leaders. The Department of Defense (DoD) carries out national security policy in conjunction with the intelligence community (headed by the Office of the Director of National Intelligence) and the Department of Homeland Security (DHS). The relations among these departments can be competitive, even adversarial. However,

good working relations among these departments is essential. Embassies and consulates rely on the military for protection and support, military attachés are assigned to embassies to advise ambassadors, and FSOs collect and analyze information as do DoD intelligence and civilian intelligence officers. DoD and the Department of State (DOS) have shared responsibilities in a wide range of operations from humanitarian relief to counterinsurgency. In addition DoD and DOS provide the president with two essential perspectives in crises and situations in which foreign policy and national security blend and blur. Diplomats rely on military expertise in negotiating disarmament deals. Federal law even requires the presence of an FSO in all military weapons sales.

Public Diplomacy. Public diplomacy uses soft power to strengthen international understanding of and support for American culture and public policy. It includes two instruments, both housed in the State Department’s Office of Public Diplomacy and Public Affairs. Public information programs (also known as propaganda) consist of government-to-people programs that use broadcast, print, and social media to communicate American culture and values to foreign audiences. During the Cold War, Radio Free Europe broadcasts reached audiences in Soviet-dominated Eastern Europe. In the early twenty-first century, these programs are part of the American counterterrorism strategy aimed at countering terrorist propaganda and recruitment campaigns.

The second public diplomacy instrument is people-to-people programs consisting of international cultural and educational exchange programs in the belief that the American people are their own best ambassadors. One aspect of this instrument is educational exchange programs that provide opportunities for professionals to interact and learn from one another. These programs are not just for teachers and professors, but also for journalists, jurists, interest group advocates, legislators, and scientists. Another aspect is international visitor programs that allow visitors to interact with the American way of life and meet a broad spectrum of Americans. A third aspect is cultural programs that arrange international tours and exhibits for American visual and performing artists from ballet to rock music. And a final aspect is the public lectures, special exhibits, and libraries housed in American embassies, consulates, and reading rooms around the world.

FOREIGN POLICY APPROACHES

Presidents fashion foreign policy with the toolkits available to them. Most presidents enter the White House with a vision of the world; they explain that vision in their inaugural addresses and then spend the rest of their presidencies engaged in the often frustrating challenge of accommodating that vision to the complex realities of a world with multiple visions and changing circumstances. Sometimes, those changes are dramatic and seem to affect everything. Missing from this familiar picture, however, is history. Many presidents rush to press the reset button on foreign policy before appreciating how much of that policy is already preset.

On the preset side, Mead (2001) has identified four important traditional approaches to American foreign policy. The Hamiltonian approach, named for Treasury Secretary Alexander Hamilton, is predicated on the idea that economics drives prosperity and prosperity drives peace and stability. The goal is to foster economic growth by widening production and

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markets through trade and investment. George Washington was an early proponent of this approach, as was Senator Henry Clay (1777–1852) and his promotion of the American System. Diplomacy and national security are based on the adage “let the flag follow the dollar” to protect free trade, free navigation, freedom of the airways, and free markets. Subsequent examples include John Hay’s Open Door Policy, Theodore Roosevelt’s trade policies, and George H. W. Bush’s vision of a post–Cold War new world order (see Mead 2001, chapter 4).

The Jeffersonian approach, named for Secretary of State and President Thomas Jefferson, is predicated on the idea that America’s strength lies in its democracy and therefore American foreign policy should be within the people’s reach and rely on the same democratic processes as domestic policy. The goal is to preserve democracy at home in a dangerous world by relying on diplomacy for treaties and allies. National security is translated into an emphasis on domestic security, and far-flung military commitments are discouraged. Foreign policy is a minimalist enterprise. Jefferson purchased Louisiana to create an “empire of liberty” that would serve as a protective borderland against foreign threats. John Quincy Adams, though a Whig and a major proponent of the American Plan, had something similar in mind when he instructed his Secretary of State James Monroe to design a protective hemispheric policy that would become known as the Monroe Doctrine. The Soviet specialist George Kennan’s containment policy reversed the direction, but not the logic, by encircling the enemy in the Cold War (see Mead 2001, chapter 6).

The Jacksonian approach, named for General and President Andrew Jackson, captures a set of American values that include honor, self-reliance, individualism, and equality wrapped in a deep sense of national pride and a populist belief in the common folk. Add a cowboy mentality, a healthy suspicion of strangers, and a healthy respect for firepower, and one finds an approach that emphasizes national security and negotiating from strength. Theodore Roosevelt’s “big stick” policy, Ronald Reagan’s Strategic Defense Initiative (dubbed “Star Wars”), and George W. Bush’s doctrine of preemption (“get the bad guys before they get you”) are classic examples of this approach (see Mead 2001, chapter 7).

The Wilsonian approach, named for President Woodrow Wilson, represents the idealistic and moralistic strain of American foreign policy. Whereas the Jeffersonian approach seeks to protect democracy at home, the Wilsonian approach is committed to exporting democracy and human rights around the world. Its instruments include international law, international organizations, humanitarian conditions attached to aid, and democracy promotion programs that rely on their own moralistic commitments to multilateralism and the rule of law. The classic example is Wilson’s advocacy for the League of Nations, resting on the principles of self-determination and collective security. So, too, is Franklin Roosevelt’s charter for the United Nations, reinforced by First Lady Eleanor Roosevelt’s shepherding of the International Declaration of Human Rights (see Mead 2001, chapter 5).

FOREIGN POLICY OVERVIEW AND EFFECTS

These four traditions supply the complexities and contradictions, the tensions and balance, the consistencies and inconsistencies of American foreign policy. Hamiltonian realism and Wilsonian idealism share a commitment to world order and America’s role in it. Jeffersonians retreat from internationalism,

and Jacksonians fear weakness. “Moderate Republicans tend to be Hamiltonians. Move right toward the Sarah Palin range of the party and the Jacksonian influence grows. Centrist Democrats tend to be interventionist-minded Wilsonians, while on the left and the dovish side they are increasingly Jeffersonian, more interested in improving democracy at home than exporting it abroad” (Mead 2010, 1).

Some presidents work toward a coalition-building mix of approaches; others seem to favor one approach, whereas still others seek to balance two approaches or simply avoid their least favorite. Mead sees George H. W. Bush’s policies as strongly Hamiltonian pursued with Wilsonian zeal for a new world order, Clinton’s policies as a balance of Hamiltonian and Wilsonian approaches, George W. Bush’s policies as a mix of Jacksonian and Wilsonian, and Barack Obama’s policies (like Jimmy Carter’s) as a blend of Jeffersonian and Wilsonian approaches (Mead 2010).

In the period since the late 1980s, idealism has remained the unifying thread, wrapped variously around the values of capitalism and democracy. Critics abound. Journalists report the contradictions and infighting in each administration between rival schools of thought. European realists are convinced that values of any kind dangerously confuse what foreign policy is—the naked pursuit of national self-interest. Marxists and Islamic jihadists decry materialism. Jeffersonian doves believe American intervention has created a dangerous world, whereas Jacksonian hawks are equally convinced that America’s retreat from full intervention has made the world an even more dangerous place.

The late-nineteenth-century British observer James Bryce (1838–1922) likened American foreign policy to snakes in Ireland—which has none. In the same era, the Prussian statesman Otto von Bismarck (1815–98) is said to have remarked, “God has a special providence for fools, drunks, and the United States of America.” Defenders of American foreign policy, though sometimes hard to find, generally agree on a simpler proposition: America must be doing something right considering that it has won most of the great wars it has fought and emerged as the richest, most powerful, and one of the freest countries in the world.

*Stephen Schechter,
Russell Sage College*

SEE ALSO: *Alien and Sedition Acts; American Revolution; Declaration of Independence; Executive Agreements; Fair Trade; Federal Powers: Commerce; Federal Powers: Immigration and Naturalization; Federal Powers: War; Free Trade and Tariffs; Globalization; International Law; International Organizations; Manifest Destiny; National Security Policy; Treaty Power; War on Terrorism; War Powers Act of 1973.*

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Civic Engagement

Civic engagement is the commitment of individuals, organizations, and communities to address social and political issues facing society. It is related to civic participation, but that term refers to a range of activities; as such, civic participation may be considered the manifestation of civic engagement. Civic engagement, a hallmark of democratic governance, ranges from involvement in political activities such as voting, to community involvement in neighborhood activities and the nonprofit sector, to membership in civic associations or clubs. Peter Levine finds the common thread in this range as actions that affect “legitimately public matters (even if selfishly motivated) as long as the actor pays appropriate attention to the consequences of his behavior for the underlying political system. In turn, ‘public matters’ include the commons, the distribution of goods in a society, and all the laws and social norms that prohibit or discourage particular behaviors” (2007, 13).

In the American system, civic engagement is considered a core value that is open to all persons. Freedom of association—the ability of individuals to freely join or leave groups—is protected by the First Amendment of the US Constitution. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the US Supreme Court considered group association to enhance the effective advocacy of public and private points of view. Other political forms of civic engagement are rights specifically designated to citizens: namely, voting for candidates for elected government office, holding such office, and serving on a jury.

Although scholarship relating to civic engagement reached a high-water mark in the 1990s and early 2000s, with convergence around a general definition of civic engagement, disagreement remains among scholars and practitioners about how to operationalize the concept. Most agree, however, that civic engagement has both a political component and a civil society component.

FORMS OF CIVIC ENGAGEMENT

On the political side, actions include voting, registering to vote, volunteering for a campaign, displaying political stickers and signs, giving money to parties or candidates, and contacting an elected official or public administrator. Alternatively, political engagement may be achieved by exercising a “political voice” through policy advocacy, lobbying, signing petitions, contacting the media, and boycotting or “buycotting” products (i.e., purchasing specific products from corporations with similarly aligned values) (Zukin et al. 2006; Levine 2007).

Relating to civil society, civic engagement is typically organized around membership in civic associations. These associations are of several types: affinity groups (e.g., sports clubs, ethnic heritage groups, or choral groups); service organizations, such as a local Rotary Club; work-related associations (e.g., professional and labor); the associative side of interest groups such as environmental organizations; and cooperatives and neighborhood associations. Robert Putnam (1993) presents these civic associations as “networks of civic engagement” that seek to discourage free-riding and defection, foster norms of reciprocity (Ostrom 1990), facilitate communication, improve the flow of information (Coleman 1990), and provide templates for future engagement (North 1990). In a nation of joiners, one has only to identify a shared interest to find civic associations formed to pursue that interest.

In addition to activities related to membership in civic groups, volunteering and philanthropic activity are also considered important indicators of civic engagement. Others suggest that pursuing knowledge and “cognitive engagement” (e.g., attending public lectures) may also be important dimensions of civic engagement (Levine 2007).

RELEVANT INSTITUTIONAL ARRANGEMENTS AND CONSTITUTIONAL PROVISIONS

American governance processes are predicated on a model of democratic participation, whereby citizens are expected to educate themselves about the issues facing their communities and actively seek to identify and implement solutions. Formal and informal institutions have been established to promote the virtues and benefits of civic engagement behavior. Formal federal institutions include the Federal Elections Commission (FEC), which monitors and enforces campaign financing. In the states, secretaries of state are often the chief election officers responsible for maintaining the integrity of elections. At the local level, counties and municipalities often have election boards, commissions, or clerks to administer or oversee elections.

In 1953 Congress chartered the National Conference on Citizenship “to strengthen civic life in America.” Its activities include a civic health initiative, a national community-service project, and a series of annual conferences. The Civic Health Index (CHI), jointly tracked by the National Conference on Citizenship and the Corporation for National and Community Service (CNCS), is considered to be a useful metric. The CHI tracks indicators measuring the levels of trust, involvement, and interactions with government within communities. The CHI has been primarily tracked at the national level, although it is also measured at the state and local levels. Indicators of civic health include social connection, political action, belonging to a group, volunteering, and working with neighbors. Longitudinal analysis reveals that the CHI has been declining since 1975 (NCOC 2006).

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Relating to community civic engagement, the CNCS is a quasi-governmental federal agency that promotes and tracks voluntarism throughout the nation through such programs as AmeriCorps, Senior Corps, and the Social Innovation Fund. AmeriCorps is a national service program that provides roughly 80,000 opportunities each year for individuals to serve their country and communities. Full-time positions require members to perform 1,700 hours of service over the course of a year in exchange for a modest living stipend and an education award. AmeriCorps members are paired with nonprofit organizations, schools, public agencies, community groups, and faith-based groups throughout the United States. Senior Corps programs aim to keep American citizens fifty-five and older engaged through volunteer service, contributing their knowledge and skills to community organizations. The Social Innovation Fund, started in 2010, is an effort by CNCS to leverage private funds to generate meaningful impacts in communities. The Fund emphasizes cross-sector partnerships, innovation, and rigorous impact evaluation.

Additionally, every state and most US territories have established offices and commissions to promote service and voluntarism at the state and local levels. Locally, many nonprofit organizations, such as the United Way, serve to connect citizens to service opportunities.

Civic education also plays an important role in developing a civically engaged citizenry. Most school districts and states require some form of civic education that is designed to instill a lifelong sense of civic engagement in students. The type, frequency, and intensity of K–12 civic education varies by state but is generally in decline nationwide. Additionally, many K–12 schools and universities now require students to complete service-learning projects, where students work with local public and nonprofit agencies to engage in active learning while producing public value. Informally, politicians, public administrators, and community leaders extol the virtues of community service. Family and religious socialization are also important agents of civic development. In this century the White House has developed an office aimed at expanding the role of community and religious groups in the provision of social service. In 2001 President George W. Bush established the office of faith-based initiatives and community initiatives, which expanded religious groups' access to federal grant money and government contracts through competitive processes. Under President Barack Obama, the scope of this office extended to include neighborhood partnerships.

EVOLUTION OF AMERICAN CIVIC ENGAGEMENT

Since the founding of the Republic, civic engagement has been seen as critical to the health and development of democratic institutions in the United States. Early colonists who did not have access to centralized and organized government services relied on civic institutions for survival, economic opportunity, and socialization. Although these traditions of civic engagement have largely endured, Americans today appear to be less civically engaged than in the past.

Civic engagement has roots in political science and public administration scholarship, where citizens are considered to be integral to policy making and administrative processes. Specific civic engagement-related policy making concepts include discursive policy making (Habermas 1996; deLeon 1997; Macedo 2005) and deliberative democracy (Dryzek 2000), which emphasize discussion and deliberation in the decision-making

processes. Similarly, participatory management (Barber 1984) is the process of incorporating community members into the administration of public goods and services. These democratic policy and management concepts were popularized during the 1990s and have become subjects of renewed interest within the field of public administration.

While civic engagement undergirds many American democratic traditions and institutions, the definition and conception of civic engagement has evolved over time. Civic engagement in early America was often local, with most individuals participating at the community level either through deliberative discourse or participation in civic associations. At the same time, there were national federated organizations, such as the Freemasons, Odd Fellows, and American Temperance Society, with members organized in local, state, and national chapters. Similarly organized was the first American political movement, the independence movement.

One of the earliest observers of American civic participation in action was French social scientist Alexis de Tocqueville (1805–1859). Tocqueville's *Democracy in America* (1835, 1840) celebrated civic engagement in America and attributed the strength of the social fabric to high rates of citizen participation in voluntary associations, the presence of strong religious institutions, norms of reciprocity, and decentralized governance structures. Tocqueville was interested in explaining America's successful democratic experience and found that individual participation in civil society strengthened democratic institutions. Subsequent studies of American civic life have focused on the United States as a "nation of joiners" (Schlesinger 1944; Almond and Verba 1963) and an "unusually participatory democracy" (Skocpol and Fiorina 1999).

Trust in democratic institutions eroded in the 1970s as the fallout from the Watergate scandal undermined American's confidence in government. Coupled with the civil rights movement, the anti-Vietnam War movement, and the environmental movement, post-Watergate sentiments witnessed a phase of civic engagement as civic protest and policy advocacy.

In the years leading up to the twenty-first century, Theda Skocpol and others saw a danger of civic disengagement in this period as membership organizations declined and specialized advocacy groups emerged with small professional staffs and no members. In 1997 the National Commission on Civic Renewal issued a final report titled, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do about It*. Robert Putnam (2000) argued that civic disengagement was eroding social capital, a term he used to describe the value of social networks and the norms of reciprocity they produce. He found that Americans were participating in traditional civic associations like bowling leagues at much lower rates than before and were now "bowling alone." Putnam concluded that the proliferation of technology was likely a major driver of this rapid decline (Putnam 2000).

The Millennial Generation (born between 1980 and 2000) has been participating in political activity at lower rates than the national average, as has been common with younger generations (including Generation X). Millennials, however, have been highly active in other forms of civic engagement, such as volunteering, being active in their communities, and participating in economic protests using consumerism as a vehicle (Zukin et al. 2006; Dalton 2008). As institution builders in their youth, they founded technology, communications, and nonprofit service

organizations. Generational historians regard them as the next “civic generation,” akin to the GI generation (born between 1900 and 1925).

CONTEMPORARY ISSUES, CONTROVERSIES, AND DECISIONS

One set of contemporary civic engagement issues includes the effects of technology, in particular the Internet and social media, on civic engagement, as well as the digital divide and the inability of some citizens to access online content or participate in online discussions. Another set of issues has to do with the role of national, state, and local service programs, such as AmeriCorps, in providing opportunities for Americans to serve their communities in meaningful ways and reengage in a nation of joiners. A third set of issues occurs within a polarizing political climate and includes the effect on campaign-finance transparency of the Supreme Court ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), which protects the freedom of speech of corporations, associations, and labor unions and eliminates campaign donation limitations.

Additionally, as technology makes communication faster and easier, public participation in administrative decision-making processes, largely circumventing elected representatives, will likely be an important issue. For agencies or organizations to engage in public participation, they should inform the public, listen to the public, engage in problem solving, and develop agreements (Creighton 2005).

Finally, political forces contend over the barriers to voting. Some seek to ease participation through early voting, mail-in ballots, and online voting. Others look to protect elections from fraud by implementing voter-identification laws.

IMPLICATIONS FOR GOVERNANCE

Civic engagement is of paramount importance to American governance. A basic tenet of effective governance is an informed and participatory decision-making body. Civic engagement is the way by which citizens learn about their communities, build social capital, and participate in political processes. As individuals volunteer and join civic groups, they gain a better, more complete understanding of the issues affecting their communities and are more likely to participate in finding solutions. Similarly, as individuals participate in political processes such as voting and advocating policy makers, they are likely to become more informed about public policies and programs and will be better able to provide citizen oversight through democratic means. Finally, communities with strong social ties and high levels of trust are likely to have stronger and more stable decision-making processes where participants respect the outcomes and more readily buy into the implementation of decisions. Without a civically engaged citizenry, these strong democratic institutions and American governance processes will be undermined.

*Kevin D. Ward,
Institute of Public Service,
Seattle University*

SEE ALSO: *Bowling Alone*; *Civic Health Index*; *Civic Participation*; *Civil Disobedience*.

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Political Judgment

Political judgment is the ability to make reasonable political decisions. Good governance requires sound political judgment—by citizens as well as their institutions and government. Political judgment cannot be reduced to an immutable set of principles, strict adherence to democratic processes, or idealized outcomes; rather, political judgment requires people to discern what is best, right, or good in a particular situation. Political judgment is particularly important in democratic polities like the United States. As noted by political scientist, Leslie Paul Theile,

The welfare of democratic societies, it follows, depends upon the cultivation of judicious citizens. Freedom cannot be gained, or long maintained in the absence of such a public. Indeed, it has recently been argued that judgment—more so than any other human faculty—manifests our individual freedoms, safeguards our civil liberties, and preserves us from tyranny (2006, 2).

Judgment is an important human faculty beyond politics and has been the subject of inquiry and controversy across several disciplines (Beiner and Nedelsky 2001). Theorists and scholars have attempted to define, discuss, and contextualize judgment in general and political judgment in particular. All agree that judgment is a crucial component of a good life and good governance, but scholars disagree about the specific aspects of judgment that are most worthy of analysis and investigation. How do individuals, their institutions, and their government perceive, analyze, and evaluate political ideas and issues?

POLITICAL JUDGMENT AS PRACTICAL WISDOM

Self-government in free and open societies requires the application of reasoning, practical experience, political ideas, and ethical values to make informed and morally defensible judgments. Many political judgments involve issues that require citizens to consider competing values, or “goods.” The Greek philosopher Aristotle (384–322 BCE) developed the doctrine of the Golden Mean, which seeks the best possible middle path between two extremes. In American governance that often requires people to weigh the values, principles, and practices of republicanism (i.e., an emphasis on the community) with those of liberalism (i.e., an emphasis on the individual). The search for the Golden Mean is not an abstract or academic pursuit; it is exercised in the context of resolving real issues.

Political judgment is also based on the Aristotelian idea of *phronesis*, or prudence. Aristotle believed that *phronesis* was the most important virtue of citizens and leaders in making political judgments. Practical wisdom was distinct from other kinds of knowledge, such as science (i.e., *episteme*) or art (i.e., *techne*).

In *Nicomachean Ethics*, Aristotle writes:

We may grasp the nature of prudence [*phronesis*] if we consider what sort of people we call prudent. Well,

it is thought to be the mark of a prudent man to be able to deliberate rightly about what is good and advantageous. . . . But nobody deliberates about things that are invariable. . . . So . . . prudence cannot be science or art; not science [*episteme*] because what can be done is a variable (it may be done in different ways, or not done at all), and not an art [*techne*] because action and production are generically different. For production aims at an end other than itself; but this is impossible in the case of action, because the end is merely doing well. What remains, then, is that it is a true state, reasoned, and capable of action with regard to things that are good or bad for man. We consider that this quality belongs to those who understand the management of households or states (1140a24–1140b12).

Practical wisdom is concerned with both the context and reasons for decisions. It is not the kind of knowledge to selectively apply; it is a knowledge that people carry with them at all times. It is based on past experiences, values, moral sensibilities, instincts, and knowledge of ideas that might be brought to bear on a particular problem. In short, practical wisdom is doing the right things, for good reasons, in the best ways (Schwartz and Sharpe 2010).

Modern theorists and practitioners have further refined Aristotle’s idea as it is applied to governance and politics. Political judgment, according to Isaiah Berlin (1996), is “practical wisdom, practical reason, perhaps, a sense of what will ‘work,’ and what will not” (1996, 40). As Berlin’s essay “Political Judgment” illustrates, practical wisdom or judgment is the kind of knowledge that conductors have of their orchestras, not the knowledge that chemists have of the “contents of their test tubes” (Berlin 1996, 47). In other words, it is the knowledge of what is best, right, or good in a particular circumstance.

Berlin likened the practical wisdom of statesmen and citizens to the practical wisdom of good doctors (1996, 41): “To know only the theory,” Berlin admitted, “might not be enough to enable one to heal the sick”; however, Berlin continued, “to be ignorant of [theory] is fatal” (1996, 41). In other words, exercising sound political judgment, according to Berlin, blends practical experience with theoretical understanding and technical skill.

Contemporary statesman Fernando Henrique Cardoso, president of Brazil from 1995 to 2003, interprets Berlin’s essay:

Updated knowledge, republican values, and a good deliberative process, important though they are, may not be enough to produce a successful statesman. The missing quality is what Isaiah Berlin identified as the capacity for good “political judgment.” This entails not only the discernment to avoid the opposite risks of impractical idealism and uninspiring realism, but also the practical wisdom to grasp the character of a particular situation or moment in history and to seize the opportunities or confront the challenges that it presents (2005, 11).

TYPES OF POLITICAL JUDGMENT

In free societies the universe of public issues about which citizens and their government officials make decisions is vast and complicated. People make decisions about general issues such as the appropriate scope of government, the best division of power between the national and state governments, or how to best

express their citizenship, as well as judgments about more specific issues such as their particular stance on same-sex marriage, who to vote for in the next election, or how to best express their political ideas in a letter to the editor. Absent the freedom of the people and their government to make decisions, democracy is a sham (Ober 2013).

Political judgment is exercised individually or collectively. Individuals are called on to exercise good political judgment in their daily lives—discussing issues and ideas with others, deciding their position on a particular issue, interpreting political commentary on television, or evaluating the actions of their government, to cite only a few examples. As individuals gain more experience, political and social realities shift; or through deliberation with others, individual political judgments often change over time.

The people exercise collective political judgments in two ways. First, people assemble, deliberate, and make collective decisions in their civic and political organizations. The deliberative process is key: group discussion based on mutual respect, trust, and rational argumentation builds a collective judgment stronger than its individual parts. Second, collective judgment is expressed in public opinion—the cumulative expression of thousands of individuals who separately arrive at common patterns of opinions.

COMPONENTS OF POLITICAL JUDGMENT

Wise political judgment demands a particular kind of knowledge, set of skills, and practical experience. Wise political judgment requires a knowledge of the values and principles that define American governance, an ability to discern the best ideas as they apply to particular problems, and the ability to use past experience to resolve current problems.

Americans exercise political judgment within a framework of remarkably stable principles and values. Most Americans would agree on the foundational principles (e.g., liberalism, constitutionalism, and republicanism) that bind them together. They disagree, however, about which of those principles should be emphasized as they are applied to specific issues. Since the founding, Americans have been using these principles to both make and evaluate their political judgments.

It follows that those who have developed a deep understanding of foundational ideas of American governance are best able to practice wise political judgment. Most, if not all, of America's most iconic leaders and citizens have had a deep understanding of core political ideas and were able to apply them to social problems of the day, often helping to redefine the ideas in the process. Foundational ideas about liberty, justice, and equality have been used and further refined by great Americans. From George Washington and Abraham Lincoln to Susan B. Anthony and Dr. Martin Luther King Jr., wise political judgment is informed by a firm grasp of the fundamental ideas on which the American polity rests.

The values and principles employed by a wise decision maker are dependent on the context and issue at hand. A politically wise person may well emphasize the value of liberty in some circumstances and the value of order in others, for example. And, changing circumstances may alter someone's judgment on a particular issue. Does the threat of continued terrorist attacks justify increased governmental power of surveillance? For many Americans, their value choices would depend

on the specifics of the situation (e.g., the type of surveillance, how it would be conducted, and the threat it would pose to individual rights).

Judgment, however, is more than just a matter of taste or value preference, and some political judgments are better than others (Theile 2006). The best judgments are consistent with the best ideas and the most reasonable arguments. Although there is no precise formula for evaluating political judgments, the members of the polity are empowered—within limits—to decide which judgments are best, right, or good. In this sense, judgment is similar to aesthetics. Beauty may well be in the eye of the beholder, but artists can identify works of art that best exemplify beauty. Similarly, citizens, their institutions, and their governments can decide the best ways to do good things for the right reasons.

A variety of intellectual abilities are associated with judgment—from perception, analysis, and discernment to creativity, imagination, and resourcefulness. A politically wise person, for example, can fully “see” an issue and all its nuances, carefully consider alternative perspectives and possibilities, and ultimately, craft a workable solution consistent with the context in which the problem exists. No magic formula exists for addressing political problems; they all require judgment.

The exercise of good political judgment requires discretion—similar to legal judgment. Judges apply general laws to specific situations and are given discretion to appropriately dispense justice. Criminals often receive different sentences for violating the same law; the sentence often depends on the particulars of the situation. In a similar way Americans' political judgments are informed by general principles and values, but the ways in which they apply them is determined by the specific circumstances.

Finally, perhaps the most important component of political judgment is experience. Experience informs all aspects of human judgment. Through experience—both success and failure—people further develop the knowledge, skills, and values required of wise judgment. This is especially true of people who carefully reflect on their experience. Teachers, doctors, and architects as well as citizens, civil servants, and statesmen are able to make better judgments in the light of additional experience.

JUDGMENT AND AMERICAN GOVERNANCE

Judgment is an inherent part of the American system of government and governance. Although there are many examples of poor political judgment (e.g., Indian removal, slavery, racial segregation, denying women the right to vote, Japanese American internment), there are also thousands of examples of excellent judgments by average citizens as well as by leaders and institutions of every branch of government. Political judgment is as critical to the American system in the twenty-first century as it was during the founding. The future of America's system of governance is dependent on the political wisdom of its people.

*Thomas S. Vontz,
Kansas State University*

SEE ALSO: *Decision Making; Governance; Morality and Politics.*

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Following the terrorist attacks of September 11, 2001, President George W. Bush asked Congress for statutory authority to respond militarily. Seven days later, Congress passed the Authorization for Use of Military Force (AUMF), directing the president to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." The statute also covered those who harbored terrorists "in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons" (115 Stat. 224). Having turned initially to Congress for express authority, the administration then began acting unilaterally—and often in secret—leading to numerous challenges in court and the need for subsequent legislation.

MILITARY TRIBUNALS AND GUANTANAMO

On November 13, 2001, President Bush surprised the nation by issuing a military order to create military tribunals to try individuals suspected of assisting in the 9/11 terrorist attacks. These tribunals, to serve as a substitute for federal courts, had not been used since World War II. For legal authority, the administration depended heavily on the existence of "inherent" presidential power. Under that doctrine, the executive branch could establish tribunals as it liked, without interference from Congress or the courts. The administration captured several thousand suspected terrorists and brought nearly 900 to the military detention facility at Guantanamo Bay Naval Base, Cuba, to be detained and tried before the tribunals.

In court, the US Justice Department argued that military tribunals "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit" (Brief for Appellants, 53), implying that the president had full inherent authority to create these tribunals and did not need statutory authority. In fact, the record demonstrates that tribunals were regularly created under such procedures as Congress saw fit to establish by statute. Military tribunals generally followed the procedures for courts-martial and were never used to

single out a broad class of noncitizens, as attempted by the Bush military order (Fisher 2008, 172–76). On June 29, 2006, the US Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, rejected the administration's claim that military tribunals could be created pursuant to presidential inherent powers. The Court held that the tribunals violated both the Uniform Code of Military Justice (created by statute) and the Geneva Conventions. The Court's decision forced the administration to seek statutory authority from Congress in the Military Commissions Act (Fisher 2008, 239–45).

Another decision by the Supreme Court involved Yaser Esam Hamdi, born in Louisiana and therefore a US citizen. He was captured in Afghanistan, held at Guantanamo Bay, moved to a naval brig at the Norfolk Naval Station and from there to a brig in Charleston, SC. Designated an enemy combatant, he was not charged but instead held incommunicado without access to an attorney. After several years of litigation, the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), rejected the administration's central proposition that Hamdi's detention was quintessentially a presidential decision and could not be reevaluated or overturned by the courts.

With the exception of Justice Clarence Thomas, all members of the Court agreed that they had the institutional authority and competence to review and override presidential judgments in the field of national security. A plurality of four (Sandra Day O'Connor, William Rehnquist, Anthony Kennedy, and Stephen Breyer) agreed on this core principle:

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake (542 U.S. at 535–36).

On that central value the plurality was joined by Justices David Souter, Ruth Bader Ginsburg, Antonin Scalia, and John Paul Stevens.

In Justice Department memos, the administration argued that the US naval base in Guantanamo was outside the United States and therefore beyond the jurisdiction of federal judges to hear cases brought by detainees. On June 28, 2004, the Supreme Court in *Rasul v. Bush*, 542 U.S. 466, held that federal courts have jurisdiction to consider challenges to the legality of detaining foreign nationals captured abroad in connection with hostilities and held at Guantanamo. In a concurrence, Justice Anthony Kennedy agreed that the naval base was "in every practical respect a United States territory" and expressed concern that the detainees held there were "being held indefinitely, and without benefit of any legal proceeding to determine their status" (542 U.S. at 487–88).

In *Boumediene v. Bush*, 553 U.S. 723 (2008), following efforts to deny detainees at Guantanamo access to habeas relief, the Supreme Court held that both the Military Commissions Act and the Detainee Treatment Act of 2005 operated as an unconstitutional suspension of the writ. In response to *Boumediene*, detainees filed hundreds of habeas petitions and they were regularly granted by federal district courts. Yet, at the appellate level, the DC Circuit reversed and the Supreme Court would

deny review. The legal principle announced in *Boumediene* did not result in procedural safeguards for the detainees.

Of the nearly 900 individuals brought to Guantanamo, US officials over time acknowledged that the population represented a mix of terrorist fighters and innocent people erroneously swept up. Eventually, hundreds would be released without explanation, apology, or any type of reparation (Margulies 2006; Begg 2006). On January 22, 2009, on his second day in office, President Barack Obama signed Executive Order 13492 to close the detention facility at Guantanamo “as soon as practicable, and no later than 1 year from the date of this order” (74 Fed. Reg. 4897). Transferring terrorist suspects to the United States was immensely controversial and could not be achieved by unilateral presidential action. For example, the administration needed appropriations from Congress to build a facility in the United States to house the detainees.

Obama needed to build political support and understanding for closing Guantanamo. He did that in part by giving a major speech at the National Archives on May 21, 2009. He explained that over the preceding seven years, hundreds of people were detained at the naval base, but the system of military tribunals “succeeded in convicting a grand total of three suspected terrorists.” Part of the rationale for establishing Guantanamo, Obama stated, “was the misplaced notion that a prison there would be beyond the law—a proposition that the Supreme Court soundly rejected. Meanwhile, instead of serving as a tool to counter terrorism, Guantánamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantánamo likely created more terrorists around the world than it ever detained.”

Obama’s decision to act by executive order provoked strong bipartisan opposition, as revealed on May 14, 2009, when the House debated a supplemental appropriations bill. It deleted \$80 million the administration requested to transfer the detainees to a US facility. The Senate vote to prohibit those funds was 90–6. Subsequent legislation prohibited the use of any funds to transfer or release detainees to the United States. As to transfers to other countries, the administration would have to certify in writing that the government willing to receive detainees was not a designated state sponsor of terrorism and would maintain effective control over the facility to house detainees (Fisher 2013).

As a further statutory restriction, the administration was required to give Congress thirty days notice before transferring detainees from Guantanamo to another country. On May 31, 2014, the administration decided to violate that provision by releasing five Taliban detainees from the naval base, sending them to Qatar, without giving Congress prior notice. In exchange, the administration gained the release of an American soldier, Sergeant Bowe Bergdahl, who had been held by the Taliban for five years (Hamburger and Sieff 2014). The effort over several years to build bipartisan support between the two branches to eventually close Guantanamo, by establishing statutory procedures, was now set aside. The administration insisted that President Obama possessed independent authority under Article II of the Constitution and could ignore the thirty-day notice requirement (Fisher 2014). In arranging for the release of Sergeant Bergdahl, the administration alienated lawmakers from both parties and jeopardized future efforts to reach executive-legislative accommodations.

TORTURE AND EXTRAORDINARY RENDITION

The facilities at Guantanamo were used to interrogate and abuse detainees (Ratner and Ray 2004; Jaffer and Singh 2007). Many of the harsh methods developed at the naval base were transported to other countries and applied there, including the prison at Abu Ghraib in Iraq. In April 2004, during oral argument before the Supreme Court in the cases of *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*, several justices repeatedly asked whether detainees at Guantanamo and other US facilities were being mistreated and tortured. Deputy Solicitor General Paul Clement assured the justices that safeguards existed, that the United States had signed treaties banning torture, that torture did not yield reliable information, and that US military persons who violated treaty principles of interrogation would be tried before a court martial (Fisher 2008, 226–27). Later that evening, after Clement had concluded his oral argument, photos of abuse of detainees held at Abu Ghraib began to be broadcast around the world by the CBS News program *60 Minutes*.

The US military had already begun an inquiry into these abuses. An investigation initiated on January 19, 2004, led to the appointment of Major General Antonio M. Taguba to investigate the conduct of operations at Abu Ghraib. His report began circulating on websites in early May. He described “numerous incidents of sadistic, blatant, and wanton criminal abuses” inflicted on detainees, referring to the abuses as “systemic and illegal” (Danner 2004, 292). His report detailed such actions as keeping detainees naked for several days at a time, a male military police guard having sex with a female detainee, the use of unmuzzled dogs to intimidate and terrify detainees, and the sodomizing of a detainee with a chemical light and perhaps a broomstick (Danner 2004, 292–93).

In secret memos prepared by the Office of Legal Counsel (OLC) in the Justice Department, the administration received advice that international treaties and federal laws did not apply to al-Qaeda and Taliban detainees. Moreover, a president’s determination about a treaty’s meaning would prevent courts from hearing charges that American military and civilian officials had violated Geneva Convention rules relating to the conduct and interrogation of detainees (Fisher 2006, 220–21). In a memo dated August 1, 2002, OLC head Jay Bybee interpreted the meaning of a US statute that implements the Convention Against Torture (CAT). According to Bybee, an act that constitutes torture must “inflict pain that is difficult to endure,” and physical pain “amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death” (Fisher 2006, 222). By this analysis, anything short of those results would not amount to torture.

World condemnation of US conduct at Abu Ghraib and other prisons forced the White House to revisit the Bybee memo. At the end of 2004, OLC issued a new memo to replace what Bybee had written. Signed by Daniel Levin, it states that torture “is abhorrent both to American law and values and to international norms,” and the universal repudiation of torture is reflected in US criminal law and international agreements. (For background on the rewriting of these OLC memos, see Goldsmith 2007.)

Under the doctrine of “extraordinary rendition,” the administration of George W. Bush claimed that the president possessed inherent authority to seize individuals and transfer them to other countries for interrogation and torture. In the

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past, attorneys general and other legal commentators understood that presidents needed congressional authority for these transfers and the purpose was to bring the person *to trial*, with full procedural safeguards. That view of the law changed radically after 9/11. The Bush administration sent persons to other countries not to try them in open court but to interrogate and abuse them in secret.

Beginning in December 2004, Dana Priest of the *Washington Post* wrote a series of articles describing how the Central Intelligence Agency (CIA) transported suspected terrorists to undisclosed locations for abusive interrogations, beyond the reach of federal courts (Priest 2004). Other studies provided additional details on these CIA flights, pointing out that the interrogation methods were outlawed in the United States and violated the Convention Against Torture (Paglen and Thompson 2006; Grey 2006; Mayer 2005). The Bush administration, declining to confirm or deny the CIA program, insisted that it did not hand over people to other countries for torture. However, former government officials estimated that the agency had flown from 100 to 150 suspected terrorists to interrogation sites (Jehl and Johnston 2005, 1).

In lawsuits challenging this practice, the Bush administration regularly invoked what is called the *state secrets privilege*, arguing in court that private plaintiffs who objected to extraordinary rendition should not have access to confidential and sensitive documents. In one case after another, federal courts deferred to executive claims (Fisher 2008, 346–56). Notwithstanding the failure of US courts to hold the executive branch accountable, the European Court of Human Rights in recent years has found CIA violations. In December 2012, the court concluded that the rights of Khaled el-Masri had been violated when he was seized by the CIA in Macedonia and taken to Afghanistan to be brutalized (Kulish 2012, A13). The court also censured particular countries in Europe for providing assistance to CIA renditions (Bilefsky 2014, A9). It was reported in 2014 that the CIA paid Poland's intelligence officials \$15 million in the winter of 2002 to host a facility for interrogations (Goldman 2014, A22).

CONCLUSIONS

Efforts by US federal and state officials have been effective in apprehending a number of individuals who planned terrorist actions against America. They were prosecuted in federal court, found guilty, and placed in secure prisons. Some terrorist activities were carried out, as at the Boston marathon in 2013. Averting other tragedies depends in large part on government policies that gain broad public support and understanding.

*Louis Fisher,
The Constitution Project*

SEE ALSO: Boumediene v. Bush; *Executive Powers; Federal Powers: War*; Hamdi v. Rumsfeld; *Torture Memos*.

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