

AMERICAN GOVERNMENT AND POLITICS IN THE INFORMATION AGE



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Book: American Government and Politics in
the Information Age

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CHAPTER OVERVIEW

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1.1: Communication, Information, and the Media

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are communication, information, and mass and new media?
2. How do economics, government and politics, and technology shape the media and their contents?
3. What are the main criticisms directed at the media industry?
4. What are the types of mass media?

Communication is a central activity of everyone engaged in politics—people asserting, arguing, deliberating, and contacting public officials; candidates seeking to win votes; lobbyists pressuring policymakers; presidents appealing to the public, cajoling Congress, addressing the leaders and people of other countries. All this communication sparks more communication, actions, and reactions.

What people communicate is information about subjects and events, people and processes.^[1] It can be true or false, fiction or nonfiction, believable or not. We define it broadly to encompass entertainment, news, opinion, and commentary.

The bulk of information that Americans obtain about politics and government comes through the mass and new media. Mass media are well-established communication formats, such as newspapers and magazines, network television and radio stations, designed to reach large audiences. Mass media also encompass entertainment fare, such as studio films, best-selling books, and hit music.

New media are forms of electronic communication made possible by computer and digital technologies. They include the Internet, the World Wide Web, digital video cameras, cellular telephones, and cable and satellite television and radio. They enable quick, interactive, targeted, and potentially democratic communication, such as social media, blogs, podcasts, websites, wikis, instant messaging, and e-mail.

The media, old and new, are central to American politics and government in three ways that we highlight throughout this book. First, they depict the people, institutions, processes, issues, and policies involved in politics and government. Second, the way in which participants in government and politics interact with the media influences the way in which the media depict them. Third, the media's depictions can have effects.

Economics, Government and Politics, and Technology

Three interrelated factors are central to the development of the US media industry and its political contents. They are economics, government and politics, and technology.

We start with economics. Journalist A. J. Liebling wrote, “The function of the press...is to inform, but its role is to make money” (Liebling, 1964). Even when profit is not the motive, the media need financing to survive. The commercial media rely on advertising, sales, and subscriptions, and so the content of their diverse products is aimed at attracting audiences desirable to advertisers. Unlike other countries, the United States has no media primarily financed by government.

Government is involved with the media as a regulator, censor, and enabler. Regulation often involves decisions on technology: the Federal Communications Commission (FCC) has given away approximately \$70 billion worth of digital spectrum, the wireless airwaves that carry television and radio broadcasts, to major media companies. Government censors by restricting content it deems obscene or by punishing media for producing such content. Government enables when, for example, it waives the antitrust laws for media companies or subsidizes and thus lowers the postage costs for mailing newspapers and magazines.

Technological innovation can change media economics, relations with politicians and government, and the media's political contents. Thus the development of television made it easier for candidates to communicate directly with voters and temporarily reduced the importance of political parties in elections.

Economics, government, and technology interact. The degree to which a technology influences politics depends on the way in which the technology is used. This in turn is shaped by the economic realities of the marketplace and by government policies concerning who can use a medium and for what purpose. Although the technology of television, even before cable, could have allowed for multiple and diverse channels, the economic search for a big audience to attract advertising revenue, paired with government regulation that favored private for-profit ownership, created the “three-network system” that endured until the 1980s. This system provided airtime for presidents to present their programs to a huge national audience. When cable television offered

more alternatives for viewers, it became harder for presidents to be heard above the clamor of competing programs—a difficulty furthered by the emergence of new media.

The Media Industry

A few multinational conglomerates dominate the mass media; indeed, they are global media empires. Between them, they own the main television networks and production companies, most of the popular cable channels, the major movie studios, magazines, book publishers, and the top recording companies, and they have significant ownership interests in Internet media. Other large corporations own the vast majority of newspapers, major magazines, television and radio stations, and cable systems. Many people live in places that have one newspaper, one cable-system owner, few radio formats, and one bookstore selling mainly best sellers (Baker, 2007). Furthering consolidation, in January 2011 the Federal Communications Commission (FCC) approved the merger of Comcast, the nation's largest cable and home Internet provider, with NBC Universal, one of the major producers of television shows and movies and the owner of several local stations as well as such lucrative cable channels as MSNBC, CNBC, USA, Bravo, and SyFy.

Some scholars criticize the media industry for pursuing profits and focusing on the bottom line. They accuse it of failing to cover government and public affairs in depth and of not presenting a wide range of views on policy issues (Bagdikian, 2004).

The reliance of most of the mass media on advertising as their main source of revenue and profit can discourage them from giving prominence to challenging social and political issues and critical views. Advertisers usually want cheery contexts for their messages.

Nonetheless, the mass media contain abundant information about politics, government, and public policies. Here is the essential information about the main types of mass media and their political contents.

Newspapers

The core of the mass media of the departed twentieth century was the newspaper. Even now, newspapers originate the overwhelming majority of domestic and foreign news.

During recent years, sales have plummeted as many people have given up or, as with the young, never acquired the newspaper habit. Further cutting into sales are newspapers' free online versions. Revenue from advertising (automotive, employment, and real estate) has also drastically declined, with classified ads moving to Craigslist and specialist job-search sites. As a result, newspapers have slashed staff, closed foreign and domestic bureaus (including in Washington, DC), reduced reporting, and shrunk in size.

Nonetheless, there are still around 1,400 daily newspapers in the United States with estimated combined daily circulations of roughly forty million; many more millions read the news online. Chains of newspapers owned by corporations account for over 80 percent of circulation.

A few newspapers, notably the *Wall Street Journal* (2.1 million), *USA Today* (1.8 million), and the *New York Times* (877,000), are available nationwide.

The *Wall Street Journal*, although it has erected a pay wall around its Internet content, claims an electronic readership of 450,000. Its success suggests that in the future some newspapers may go completely online—thus reducing much of their production and distribution costs.

Most newspapers, including thousands of weeklies, are aimed at local communities. But after losing advertising revenue, their coverage is less comprehensive. They are being challenged by digital versions of local newspapers, such as AOL's Patch.com (Kopytoff, 2011). It has seven hundred sites, each in an affluent community, in nineteen states and the District of Columbia. AOL has hired journalists and equipped each of them with a laptop computer, digital camera, cell phone, and police scanner to publish up to five items of community news daily. Some of their stories have achieved prominence, as, for example, a 2009 report about the hazing of high school freshmen in Millburn, New Jersey. But the most popular posts are about the police, schools, and local sports; and “often the sites are like digital Yellow Pages” (Auletta, 2011).

Magazines

There are roughly five thousand magazines published on every conceivable subject. Five publishers account for around one-third of the total revenue generated. Political and social issues are commonly covered in news weeklies such as *Time* and also appear in popular magazines such as *People* and *Vanity Fair*.

To survive, journals of political opinion usually depend on subsidies from wealthy individuals who support their views. The *Weekly Standard*, the voice of Republican neoconservatives and one of the most influential publications in Washington, with a circulation of approximately 75,000, loses around \$5 million annually. It was initially owned and funded by media mogul Rupert Murdoch's News Corporation, which makes big profits elsewhere through its diverse holdings, such as Fox News and the *Wall Street Journal*. In 2009, it sold the *Weekly Standard* to the conservative Clarity Media Group.

Television

People watch an average of thirty-four hours of television weekly. Over one thousand commercial, for-profit television stations in the United States broadcast over the airwaves; they also are carried, as required by federal law, by local cable providers. Most of them are affiliated with or, in fewer cases, owned by one of the networks (ABC, CBS, NBC, and Fox), which provide the bulk of their programming. These networks produce news, public affairs, and sports programs.

They commission and finance from production companies, many of which they own, the bulk of the entertainment programming shown on their stations and affiliates. The most desired viewers are between eighteen and forty-nine because advertisements are directed at them. So the shows often follow standard formats with recurring characters: situation comedies, dramas about police officers and investigators, and doctors and lawyers, as well as romance, dance, singing, and other competitions. Sometimes they are spin-offs from programs that have done well in the audience ratings or copies of successful shows from the United Kingdom. "Reality" programming, heavily edited and sometimes scripted, of real people put into staged situations or caught unaware, has become common because it draws an audience and usually costs less to make than written shows. The highest-rated telecasts are usually football games, exceeded only by the Academy Awards.

Unusual and risky programs are put on the air by networks and channels that may be doing poorly in the ratings and are willing to try something out of the ordinary to attract viewers. Executives at the relatively new Fox network commissioned *The Simpsons*. Matt Groening, its creator, has identified the show's political message this way: "Figures of authority might not always have your best interests at heart....Entertain and subvert, that's my motto" (Bhattacharya, 2000). The show, satirizing American family life, government, politics, and the media, has become one of television's longest running and most popular series worldwide.

Cable is mainly a niche medium. Of the ninety or so ad-supported cable channels, ten (including USA, TNT, Fox News, A&E, and ESPN) have almost a third of all the viewers. Other channels occasionally attract audiences through programs that are notable (*Mad Men* on American Movie Classics) or notorious (*Jersey Shore* on MTV). Cable channels thrive (or at least survive) financially because they receive subscriber fees from cable companies such as Comcast and Time-Warner.

The networks still have the biggest audiences—the smallest of them (NBC) had more than twice as many viewers as the largest basic cable channel, USA. The networks' evening news programs have an audience of 23 million per night compared with the 2.6 million of cable news.

Politics and government appear not only on television in news and public-affairs programs but also in courtroom dramas and cop shows. In the long-running and top-rated television show (with an audience of 21.93 million viewers on January 11, 2011), *NCIS* (Naval Criminal Investigative Service), a team of attractive special agents conduct criminal investigations. The show features technology, sex, villains, and suspense. The investigators and their institutions are usually portrayed positively.

Public Broadcasting

The Corporation for Public Broadcasting (CPB) was created by the federal government in 1967 as a private, nonprofit corporation to oversee the development of public television and radio (Hoynes, 1994; Lashley, 1992). CPB receives an annual allocation from Congress. Most of the funds are funneled to the more than three hundred public television stations of the Public Broadcasting Service (PBS) and to over six hundred public radio stations, most affiliated with National Public Radio (NPR), to cover operating costs and the production and purchase of programs.

CPB's board members are appointed by the president, making public television and radio vulnerable or at least sensitive to the expectations of the incumbent administration. Congress sometimes charges the CPB to review programs for objectivity, balance, or fairness and to fund additional programs to correct alleged imbalances in views expressed (Twentieth-Century Fund Task Force, 1993). Conservatives charge public broadcasting with a liberal bias. In 2011 the Republican majority in the House of Representatives sought to withdraw its federal government funding.

About half of public broadcasting stations' budgets come from viewers and listeners, usually responding to unremitting on-air appeals. Other funding comes from state and local governments, from state colleges and universities housing many of the stations,

and from foundations.

Corporations and local businesses underwrite programs in return for on-air acknowledgments akin to advertisements for their image and products. Their decisions on whether or not to underwrite a show tend to favor politically innocuous over provocative programs. Public television and radio thus face similar pressure from advertisers as their for-profit counterparts.

Public broadcasting delves into politics, particularly with its evening news programs and documentaries in its *Frontline* series. National Public Radio, with an audience of around twenty-seven million listeners weekly, broadcasts lengthy news programs during the morning and evening with reports from domestic and foreign bureaus. NPR has several call-in current-events programs, such as *The Diane Rehm Show*. Guests from a spectrum of cultural life are interviewed by Terry Gross on her program *Fresh Air*. *On the Media* analyzes the news business in all its aspects; and Ira Glass's *This American Life* features distinctive individuals delving into important issues and quirky subjects. Most of these programs are available via podcast from iTunes. Public Radio Exchange, PRX.org, has an abundance of programs from independent producers and local NPR stations.

Commercial Radio

Around ten thousand commercial FM and AM radio stations in the United States broadcast over the airwaves. During the 1990s, Congress and the Federal Communications Commission (FCC) dropped many restrictions on ownership and essentially abandoned the requirement that stations must serve the “public interest.” This led to the demise of much public affairs programming and to a frenzy of mergers and acquisitions. Clear Channel Communications, then the nation’s largest owner, bought the second largest company, increasing its ownership to roughly 1,150 stations. The company was sold in 2008 to two private equity firms.

Most radio programming is aimed at an audience based on musical preference, racial or ethnic background and language, and interests (e.g., sports). Much of the news programming is supplied by a single company, Westwood One, a subsidiary of media conglomerate Viacom. Even on all-news stations, the reports are usually limited to headlines and brief details. Talk radio, dominated by conservative hosts, reaches large audiences. We discuss it in more detail in Section 1.3 “Opinion and Commentary”.

Music

Four major companies produce, package, publicize, advertise, promote, and merchandise roughly 5,000 singles and 2,500 compact discs (CDs) each year. A key to success is getting a music video on MTV or similar stations. Around twelve million CDs used to be sold nationwide every week. This number has significantly decreased. The companies and performers now make music that is cheaply available online through services such as Apple’s iTunes store. Many people, especially students, download music from the Internet or burn CDs for themselves and others.

Music often contains political content. Contrast Green Day’s scathing 2005 hit song “American Idiot” and its lyric “One nation controlled by the media” with Lee Greenwood’s patriotic “God Bless the USA.” Some rap lyrics celebrate capitalism and consumerism, promote violence against women, and endorse—or even advocate—attacks on the police and other authority figures.

Films

The movie business is dominated by six major studios, which finance and distribute around 130 feature films each year. Mass-market logic usually pushes them to seek stories that “are sufficiently original that the audience will not feel it has already seen the movie, yet similar enough to past hits not to be too far out” (Litwak, 1986). Superheroes, science fiction and fantasy, sophomoric comedies, and animation dominate. Sequels are frequent. Special effects are common. In Robert Altman’s satire *The Player*, the protagonist says that the “certain elements” he needs to market a film successfully are violence, suspense, laughter, hope, heart, nudity, sex, and a happy ending.

It can cost well over \$100 million to produce, advertise, and distribute a film to theaters. These costs are more or less recouped by US and overseas box office sales, DVD sales (declining) and rentals, revenue from selling broadcast rights to television, subscription cable, video on demand, and funds received from promoting products in the films (product placement). Increasingly important are Netflix and its competitors, which for a monthly charge make movies available by mail or streaming.

Many independent films are made, but few of them are distributed to theaters and even fewer seen by audiences. This situation is being changed by companies, such as Snag Films, that specialize in digital distribution and video on demand (including over the iPad) (Cieply, 2011).

It is said in Hollywood that “politics is box office poison.” The financial failure of films concerned with US involvement in Iraq, such as *In the Valley of Elah*, appears to confirm this axiom. Nonetheless, the major studios and independents do sometimes make

politically relevant movies. We refer to many of them in this book and provide a list at the end of each chapter. The five nominees for the 2005 Oscar for best picture all contained political content—*Brokeback Mountain* (homosexuality), *Capote* (a fiction writer’s complex relationship to two murderers he befriends and writes about), *Crash* (racial tension in Los Angeles), *Good Night and Good Luck* (CBS’s response to the Red Scare of the early 1950s), and *Munich* (Israeli–Palestinian relations).

Books

Some 100,000 books are published annually. About “seventy percent of them will not earn back the money that their authors have been advanced” (Auletta, 2010). There are literally hundreds of publishers, but six produce 60 percent of all books sold in the United States. Publishers’ income comes mainly from sales. A few famous authors command multimillion-dollar advances: President Bill Clinton received more than \$10 million and President Bush around \$7 million to write their memoirs.

E-books are beginning to boom. The advantage for readers is obtaining the book cheaper and quicker than by mail or from a bookstore. For publishers, there are no more costs for printing, shipping, warehousing, and returns. But digital books could destroy bookstores if, for example, publishers sold them directly to the iPad. Indeed, publishers themselves could be eliminated if authors sold their rights to (say) Amazon.

Books featuring political revelations often receive widespread coverage in the rest of the media. They are excerpted in magazines and newspapers. Their authors appear on television and radio programs. An example is President George W. Bush’s former press secretary Scott McClellan, who, while praising the president in his memoir as authentic and sincere, also accused him of lacking in candor and competence (McClellan, 2008).

Key Takeaways

The subjects of this section are communication, information, and the media. We have explained how economics, government and politics, and technology shape the media and their contents. Market domination by a few conglomerates limits competition and, arguably, the wide availability and range of media contents. The main types of mass media are newspapers, magazines, television, public broadcasting, commercial radio, music, films, and books. Their contents relevant to politics and government are entertainment, news, and opinion. They are largely aimed at a vast, undifferentiated audience.

Exercises

1. Where do you get most of your information? How do you think the type of media you consume affects the kind of information you get?
2. How does the need to attract a large audience for advertisements influence media content?

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1. This section draws on Bruce Bimber, *Information and American Democracy: Technology in the Evolution of Political Power* (New York: Cambridge University Press, 2003), especially 9–12. ←

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1.2: News

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is news?
2. What is objectivity?
3. How do journalists acquire the news?
4. How is the news presented?
5. How do people in public life try to influence their depictions by and in the media?
6. What are three common ways journalists cover people in public life?

Information about or relevant to politics, government, and public policies commonly appears in the mass media in the form of news. News is a selective account of what happens in the world. Common subjects are violence (wars), crime (school shootings), natural disasters (earthquakes, hurricanes), and scandals (sexual, financial). The statements and actions of powerful or prominent people are news. So are human interest stories, such as the rescue of Private Jessica Lynch.

News is timely, a breaking event, like an assassination attempt on a president. Or newly revealed information, such as a presidential candidate's drunk-driving conviction, even if it happened years ago. Slow-moving processes that may be of vital importance (e.g., the spread of AIDS or global warming) take time to become news, often requiring a “peg”—the release of an alarmist study, a congressional hearing, or presidential speech—on which to hang the story.

Journalists

News is reported by journalists. They work under time pressure with tight deadlines to come up with stories around the clock. This job has become more difficult in recent years as budget cuts have led news organizations to demand more stories for more outlets from fewer reporters.

A majority of journalists are white, middle class, middle-aged, and male. Women now compose about one-third of the press corps and racial minorities around one-tenth. In a survey, 36 percent identified themselves as Democrats, 33 percent as Independents, and 18 percent as Republicans.^[1] Reporters tend to be pro-choice, for gay rights, and in favor of protecting the environment. But they try to refrain from showing their preferences in their stories.

Any influence of reporters' characteristics and opinions on their stories is limited by the norms of objectivity they learn in journalism school or on the job. Specified in the profession's code of ethics, these include reporting accurate information, not deliberately distorting or plagiarizing, and separating reporting from advocacy (Society of Professional Journalists, 1996). Journalists are expected to report different sides of an issue, be impartial and fair, and exclude their personal opinions (Mindich, 1998).

If they are found out, journalists who deliberately and blatantly violate the profession's ethics are punished. *New York Times* reporter Jayson Blair was dismissed after it was discovered that he had fabricated or plagiarized around forty of the six hundred articles he had written for the paper; editors resigned in the wake of the discoveries. Jack Kelly was the star foreign correspondent for *USA Today* and had worked for the paper for over twenty years when he resigned in January 2004, accused of plagiarism and of inventing parts or all of some of his stories.

Comparing Content

Depictions of Journalists

- Many of our impressions of journalists, their behavior, importance, and trustworthiness come from the media.^[2] Media depictions repeat two types best captured in the classic film *His Girl Friday*: reporter Hildy Johnson (Rosalind Russell) and her editor Walter Burns (Cary Grant).
- The first type exemplified by Hildy is the journalist as intrepid seeker after truth and crusader for justice. The most famous real-life equivalents are Bob Woodward and Carl Bernstein, the *Washington Post* reporters who helped uncover the Watergate scandal and wrote a book about it, *All the President's Men*, which was turned into a popular Hollywood movie. Even some caustic satires of the news business contain versions of the journalist as noble loner. In *Network*, Peter Finch

plays a television news anchor who begins to go insane on camera, shouting “I’m mad as hell, and I’m not going to take it anymore.” In the movie, his pain and anguish are exploited by amoral network executives. In real life, his battle cry became the theme of citizens’ tax revolts in the late seventies and could be heard at Tea Party rallies thirty years later.

- The second type of journalist, characterized by Walter Burns, is more common in the entertainment media. At their worst, as in Billy Wilder’s classic *Ace in the Hole*, such reporters cynically and callously exploit the disasters of the human condition. But even less bitter films show reporters as inevitably led astray from their devotion to the truth to the point that they destroy lives and reputations in their reckless search for an exclusive story ahead of other reporters (a **scoop**) that is dramatic and shocking. In *Absence of Malice*, Sally Field plays a reporter who ends up besmirching a good man’s (Paul Newman) reputation. In *Broadcast News*, William Hurt and Albert Brooks compete to become a news anchor. Hurt—good-looking, smooth, unscrupulous, and none too bright—wins out over the dumpier, knowledgeable, and dedicated Brooks.
- A contemporary example of the second type is Rita Skeeter. Introduced by J. K. Rowling in her vastly popular Harry Potter series, Skeeter writes for the *Daily Prophet*, *Witch Weekly*, and other publications. She is untrustworthy, unscrupulous, vindictive, and vile. She justifies her behavior with the motto “Our readers have a right to the truth.” But her news stories are error-strewn and full of lies. They destroy friendships, inflict pain and suffering, and deprive decent people of their jobs. Rita Skeeter gets scoops by turning herself into a bug. The moral is that such journalists are nasty bugs (Rowling, 2000).

Acquiring the News

Journalists follow standard procedures to obtain the news. They go to the scene, especially of wars and disasters. They talk to people who have participated in, witnessed, or claim to know what happened. They dig into records. Easing their job, many events, such as press conferences, trials, and elections, are scheduled ahead of time.

Beats

News organizations guarantee stories by assigning reporters to cover distinct beats such as the White House or specific subjects such as environmental policy. Institutions and subjects not on reporters’ beats (off the beaten track, so to speak) generate few stories unless they do something to become newsworthy. Sometimes events thrust them into prominence, as when the banking crisis of 2008 raised questions about the regulatory effectiveness of the Securities and Exchange Commission.

Sources

Journalists interact with and rely extensively on sources—generally people in government and politics, especially those in high positions of authority—to provide them with scoops and quotations. Other sources are whistle-blowers, who reveal information they have about dubious activities, outrages, or scandals. Depending on their motives, sources either provide information openly and unreservedly or leak it subject to various conditions such as anonymity (Hess, 1984).

Often the reporter-source relationship is symbiotic: they need each other. Reporters need sources for news. Sources need reporters to get their views and information into the news, to obtain favorable coverage.

Sometimes the relationship is adversarial, with reporters pressing a reluctant source for information. Sources must often respond to reporters’ ideas of what is news. Information from one beat may inspire a news story that another beat wants to keep quiet. Refusal to reveal information may result in negative coverage and in sources becoming targets in reporters’ and columnists’ stories.

Government Reports

Legislative committees, regulatory agencies, and governmental departments and commissions conduct investigations, hold hearings, and issue reports and press releases. Journalists sometimes draw on these sources for their stories. Typical is a *New York Times*’s front page story headlined “Terror Suspects Buying Firearms, Report Finds” (in the United States), based on an investigation by the Government Accountability Office (Lichtblau, 2005).

Investigative Reporting

Some journalists specialize in investigative reporting, pursuing information that may involve legal or ethical wrongdoing and that is likely to be concealed (Ettema & Glasser, 1998). This reporting requires detailed and thorough digging into a story. It is often time consuming and expensive. The *New York Times*, *Washington Post*, the *New Yorker*, *Rolling Stone*, and *Mother Jones* are some of the publications that still engage in it, as do the nonprofit [Center for Public Integrity](#), which in November 2010 absorbed the Huffington Post’s “Investigative Fund,” [Pro-Publica](#), and the Center for Investigative Reporting. Examples of award-winning

investigative stories include exposure of secret Central Intelligence Agency prisons in Eastern Europe, the torture of Iraqi prisoners by US forces, appalling care in veterans' hospitals, and job-related deaths of Mexican workers in the United States.

News Services

The mass media rely on the wire services for much of their international and national news. Wire services cover and transmit stories worldwide from their own staff and from reporters who work for the many newspapers and other organizations that belong to the services. Prominent wire services are the Associated Press (AP) and Reuters. The AP sends news to approximately 1,700 newspapers, 5,000 radio and television stations, and 8,500 other media outlets in over 100 countries.

Video feeds supplied by the AP and Reuters are the source of much of the televised international news. Subscribers are sent video accompanied by natural sound without narration and brief printed informational scripts. Four of CBS's eight foreign correspondents are based in London doing voice-overs for these feeds for broadcast on the network's news programs.

Prominence and Presentation

As a result of widely agreed-upon criteria of newsworthiness, the process of gathering the news, and the use of news services, the news media often report many of the same stories. Only a few stories are featured prominently due to limitations in broadcast prime time and front-page print space.

Nonetheless, there are some differences among the media in the range and type of news on which they focus. For example, the *New York Times*, with its stable of reporters in Washington, DC, and foreign correspondents, emphasizes government and politics in the United States and abroad. Cable news channels focus more on crimes and celebrities. Aside from a few stories, such as the war in Iraq and natural disasters, they give short shrift to foreign stories. In fact, the Fox News Channel has a segment titled "Around the World in 80 Seconds."

The media also differ stylistically in how they present the news. The *Times* does it with relative sobriety. Cable channels dramatize their reports by announcing "breaking news," using graphic captions, accompanying stories with pulsating music, engaging in fast-paced editing, and repeatedly admonishing viewers to "stay with us."

Television news is picture driven: stories with appealing, dramatic, or even available camera footage are more likely to be played prominently than those without. Viewers are unaware of what is not shown, what happened before or after the picture was taken, and whether or not the shot was staged. Camera angles, distance from the subject, especially close-ups, length of shot, camera movement, and editing all influence viewers' impressions. A picture may be worth a thousand words, but it can also mislead, as [Note 1.17 "Enduring Image"](#) reveals.

Enduring Image

The Overthrow of Saddam Hussein

- The toppling of a dictator's statue is an enduring image, symbolizing the literal collapse of a regime's authority and the massive uprising and joy of a population freed at last from tyranny. On April 9, 2003, a US mechanized vehicle using a cable pulled down Saddam Hussein's mammoth statue in Baghdad's Firdos Square. The square was sealed off by US marines. The few people in it were US soldiers, Iraqis from the United States, promoted "Free Iraqi Forces Militia" (comprising exiles who had recently been returned to the country by the Pentagon), and journalists.
 - News Reporting propaganda Baghdad Saddam Statue (click to see video)
- The first photograph of the statue being pulled down reflects news values of vividness, drama, and conflict. It spectacularly hearkens back to the removal of statues of Lenin and Stalin after the collapse of communism in the Soviet Union. The alternative photos, showing much more of the relatively empty square, lacked dramatic news values and thus their symbolic effects.
 - Because the news media found the dramatic image to be irresistible, they reinforced a frame, pushed by the Bush administration, of a jubilant Iraqi population welcoming its liberators. But the meaning of an image can change. Now, for many people, the falling statue represents the illusion of a US military success that turned into a quagmire of frustration.

Interactions and Types of Coverage

As we document throughout our book, people involved in public life understand that their election and reelection, their effectiveness in elected and appointed office, and their ability to achieve their policies often depend on how they and their

deliberations and debates, disagreements and conflicts, cooperation and consensus, actions and inactions, and struggles for power, are portrayed by the media. They know that media depictions can influence people's opinions, understandings of policy problems and notions of solutions, and can encourage or discourage participation in politics.

They know that information is power. The more of it they have before others the better. They have aides who gather, synthesize, and summarize the news from newspapers and television, from talk shows, political publications (*Roll Call* and *The Hill*), polls, websites, and blogs (Parker, 2011). So they and their staff interact with media personnel to try to manage and manipulate the news and influence journalists' selection of stories and how they are framed. They present (spin) their behavior, activities, and actions, and policies and decisions, as positively as possible; they conceal, minimize, or put the best gloss on their mistakes and blunders.

They engage in public appearances, make speeches, hold press conferences, and stage newsworthy events. They also deploy an arsenal of savvy techniques such as brief, pithy phrases known as sound bites. Behind the scenes they bestow favors, such as giving access to sympathetic journalists; persuade; apply pressure; and engage in intimidation (Cook, 2005; Paletz, 2012).

Despite these attempts at manipulation, the news media's coverage of people in public life is not necessarily favorable. Three common types of coverage are lap-dog, watch-dog, and attack-dog journalism.

Lap Dogs

Journalists usually rely on policymakers as knowledgeable and convenient sources of information. Much news, therefore, consists of the debates about issues and policies among officials and politicians. Political scientist Lance Bennett and his colleagues call this indexing. The news media serve as lap dogs when the government's perspective dominates. This can take place when leaders of the opposition party and other politicians do not continually criticize and challenge the government's policies or do not articulate an alternative viewpoint to reporters to include in their stories (Bennett, 1996).

A notable example of the news media as lap dogs was their coverage of the Bush administration's claims in 2002–2003 that Iraq must be attacked because it possessed weapons of mass destruction. Leaders of the Democratic Party did not forcefully challenge the White House's official story, plans, and rationale. Most of the news media then transmitted the administration's arguments without subjecting them to sustained analysis and criticism.

Watchdogs

The news media are sometimes watchdogs, holding people in government and other powerful institutions accountable by scrutinizing and reporting their statements, activities, claimed accomplishments, and failures. This type of coverage can be provoked by dramatic events, such as Hurricane Katrina, to which the Bush administration responded unconvincingly. Journalists went to the scene, saw the devastation and havoc for themselves, and showed it directly to viewers. Outraged reporters asked so many impassioned questions of administration officials about their inadequate response to Katrina that the Salon website compiled a "Reporters Gone Wild" video clip (Bennett, Lawrence, & Livingston, 2007).

Attack Dogs

The news media can be attack dogs. President Richard M. Nixon observed, based on his many years in public life, that "for the press, progress is not news—trouble is news" (Safire, 1975). The news about government and politics is often negative, about blunders and disasters, scandals and corruption. This "gotcha" journalism can provoke a feeding frenzy in which reporters, like a pack of dogs, search for, uncover, and chew over every morsel of the story (Sabato, 1991). News coverage of President Clinton's relationship with White House intern Monica Lewinsky exemplified such a feeding frenzy.

Key Takeaways

In this section, we have explained how journalists decide what is news, how they acquire news (through beats, sources, investigative reporting, and other ways), and how they present news. We have described the techniques that people in public life use to manage and manipulate the news media to obtain positive and avoid negative depictions. And we have specified three ways that the news media can behave toward people in government and politics: as lap dogs, watchdogs, or attack dogs.

Exercises

1. What makes something news? How do journalists decide what to report as news?
2. Why was the close-up photograph of the statue of Saddam Hussein being pulled down so much more widely used in the media than the wide-angle shot? How does the need to tell an interesting story affect how the news gets reported?

3. What factors determine how journalists cover politics? When is their coverage of politicians more likely to be favorable, and when is it more likely to be critical?

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 3. The differences between the photographs was brought to our attention in the May/June 2003 issue of *Extra!*, p. 8. ↩

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1.3: Opinion and Commentary

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. Where in the media can you find opinion and commentary?
2. What are the leading conservative and liberal cable news channels?
3. What are the leading comedy programs about the media and politics?
4. What are the four leading influences of the media on politics and government?

The media do far more than report the news. They are full of pundits, talking heads, and partisans who are busy expressing opinions and commenting on the news. These reactions and responses can contribute to a marketplace of ideas, informed public discussion, and greater understanding of politics, government, and public policies. Often, however, they result in conflict and cacophony: topics are broached too briefly in too little time, assertions dominate analysis, and shouting and squabbling drown out thought.

Location

In this section, we tell you where to find opinion and commentary in the media about politics, government, and public policies.

Print

Most newspapers contain editorials expressing opinions about the events of the day. The *New York Times's* stance is liberal; the *Wall Street Journal's* is conservative. They supplement their editorials with opinion columns from regular contributors. A few newspapers add op-eds. These are opinions from people unaffiliated with the paper. Some newspapers carry a range of opinions, others are ideologically monolithic. Cartoons, when the newspaper features them, often comment critically on public officials, policies, and current events. Comic strips are sometimes politically provocative, for example Gary Trudeau's sardonic *Doonesbury* and Aaron McGruder's scathing *The Boondocks*. These strip writers first published their work in their campus newspapers at Yale and the University of Maryland, respectively.

The nonpartisan magazines *National Journal* and *Congressional Quarterly Weekly Report* cover government and politics focusing on Washington, DC. Other magazines provide a spectrum of analysis and opinion, ranging from the conservative *National Review* and *Weekly Standard*, through the *New Republic*, to the liberal *Nation* and *Progressive*. All have relatively small readerships.

Television

After much debate among members of Congress, televised coverage of floor proceedings via the Cable Satellite Public Affairs Network (C-SPAN) was established in the US House of Representatives in 1979 and in the Senate in 1986 (C-SPAN2) to transmit gavel-to-gavel coverage of floor action. These channels plus C-SPAN3 also air an array of political events, including election debates, political advertisements, press conferences, discussion forums, and interviews with news makers, journalists, and authors.

The television networks' Sunday morning interview programs usually feature prominent policymakers, including government officials and well-known politicians. There is *Meet the Press*, *Face the Nation*, and *This Week*. In the face of sometimes aggressive questioning by the host and interview panelists, guests strive to set the news agenda and get their messages across to viewers. The programs, which have small audiences, are influential because they are widely watched in Washington, DC, otherwise known as "inside the beltway," and by people interested in government and politics.

There are also shows featuring journalists discussing current events among themselves, whether more combatively (*The McLaughlin Group*) or less (*Washington Week*).

Twenty-four-hour cable-television news channels report the news. For example, CNN has *The Situation Room* with Wolf Blitzer. But they have a lot of time to fill and only a limited number of reporters and news-gathering resources. So they employ opinionated anchors and fill their news programs with commentary and opinion, often from pundits, political consultants, party strategists, and people from interest groups and ideological think tanks. These guests, many of whom appear regularly (no matter how wrong their past observations), disagree forcefully with each other, speak in sound bites, and are adept at memorizing and delivering "spontaneous" quips (Brooks, 2000). Even though these shows have relatively small audiences, the people watching "are the news junkies, the ones who get the buzz going" (Fitzwater, 2007).

For a mainly conservative, pro-Republican, anti-Democrat perspective there is cable's most popular news channel, Fox Cable News.^[1] Despite its claims to separate news from opinion, the two often blend together. The channel features partisan, opinionated talk-show hosts and commentators, notably the combative [Sean Hannity](#), the sophisticated [Glenn Beck](#), and the pugilistic populist Bill O'Reilly. Stating his opinions bluntly and skewering some of his guests, O'Reilly has made his Fox show cable television's most popular public affairs program. All three use multiple media platforms in addition to the Fox News Channel—radio talk shows, books, and websites—to spread their messages. [Media Matters for America](#) attacks the programs and positions of Fox News, especially Glenn Beck, and is attacked in return.

MSNBC is cable's liberal opposition to the conservative Fox News. Its leading programs are *Hardball* with the disputatious [Chris Matthews](#) and *The Rachel Maddow Show*.

Radio

Over two thousand radio stations employ a news-talk format. Hosts have ample time to vent their opinions and cultivate, cajole, and castigate their callers and listeners (Brewer, 1993). The bulk of the talk-radio audience listens to hosts who express conservative opinions, are pro-Republican and hostile to liberals, Democrats, and feminists. The most conspicuous is Rush Limbaugh. This caustic conservative is the most widely heard (on more than six hundred stations with an estimated weekly audience of more than 13.5 million) and influential of all radio commentators. Promoting the conservative side, he castigates liberals with humor, often sliding into insult, sneer, and exaggeration.^[2]

From a countervailing, liberal-radical perspective, there is the Pacifica Network, particularly its evening news program [Democracy Now](#), hosted by Amy Goodman and Juan Gonzalez and heard on approximately nine hundred stations. It reports stories and interviews people rarely hear on mainstream, let alone conservative, media.

There are approximately 1,500 Christian programming stations. In addition to their inspirational religious content and music, they broadcast programs on marriage and family issues and advice for the troubled. Some of their content is relevant to politics and public policy, especially their espousal of and support for traditional views and values.

Comedy

Comedy can venture where other entertainment forms fear to tread. Comedy has a point of view, presents an argument, and often lacerates, usually from a liberal perspective (as, for example, *Saturday Night Live*'s fake news segment).

Comedy Central's [The Daily Show with Jon Stewart](#) satirizes the news media and the politics and government they depict, especially the president. Jon Stewart, the acerbic yet charming host, confronts and analyzes the dissembling pronouncements of people in government. The show's fake correspondents parody the behavior of real reporters to reveal the limitations of news formats and of objectivity. The show's effects are achieved through Stewart's comments and interjections, the incisive writing, and the clever editing of videos (Baymn, 2005; Jones, 2005).

On rare occasions, Stewart has tried to influence public policy. In December 2010, he effectively pushed (embarrassed, shamed) congressional Republicans to pass a bill they had been blocking that would approve funding for medical benefits to firefighters, police officers, and health workers who had become sick from working at Ground Zero on and after 9/11. In one program he interviewed four of the first responders who had become ill.

The most irreverent and cogent critique of newspapers appears in the weekly *The Onion* (Paletz, 2004; Dickens, 1999). January 2011 saw the debut on the IFC cable channel of the television version titled *Onion News Network*.

Link

The Onion

- As headlines from *The Onion* show, this fake newspaper can produce an audacious commentary on the news media and American government and politics.
- Learn more about *The Onion* and the *Onion News Network*:
- <http://www.theonion.com>

Comedy focusing on government and politics also comes from [The Colbert Report](#) on Comedy Central and Bill Maher's *Real Time* on HBO. These two cable channels, although owned by a media conglomerate, are known for their edgy content. Bolstering these shows' impact, as with *The Daily Show*, are their appeal to young adults.

Media Influences on Politics, Government, and Public Policies

The media, old and new, influence politics, government, and public policies in five important ways, all of which we will apply throughout our book. We now introduce them.

Agenda Setting

A series of experiments has demonstrated that when television news places more attention and emphasis on certain issues, such as crime, the public tends to see those issues as more important problems requiring government action. The public then judges politicians according to how well they respond to the issues (Iyenger & Kinder, 1987).

Consider the television show *24*. It told its viewers that terrorists were a constant threat to the United States and likely to strike with horrible destructiveness anywhere at any time. At its peak, the show had a weekly audience of approximately fifteen million viewers and reached millions more through DVD sales.

This agenda-setting power of the media, in effect, tells people what to think about. The flip side of agenda setting is that when the media ignore issues or policy areas, so too does the public. Thus for people involved in government or politics, getting an issue in the media, or keeping it out of the media, is important; the agenda influences the public's understandings of what should be done by policymakers.

Framing

The media are not simply important in getting people to think about an issue; they influence *how* people think about it. Scholars refer to this media power as framing (Schaffner & Sellers, 2010).

Journalists bring a perspective to bear on events, highlight certain aspects at the expense of others, to create a coherent narrative (Reese, Gandy Jr., & Grant, 2001). Such a narrative names protagonists and antagonists, identifies some of the causes of the event described, outlines moral judgments, and may suggest solutions. Framing is inherent in the process of selecting, editing, organizing, and presenting stories. It is often expressed in the television anchorperson's introduction and in newspaper headlines and opening paragraphs.

The meaning of an event can change dramatically based on how it is framed by and in the media. For example, the public understands a demonstration quite differently depending on whether the news frames it as an exercise of freedom of speech or as a threat to law and order.

Of course, some frames are more convincing than others. A frame's impact may depend on who is promoting it, what other frames it is competing against, and how frequently it is repeated.

Often, though, news frames are predictable (Hallin, 1986). They express widely shared assumptions and values. The news media framed the events of 9/11 as terrorist attacks on the United States with a response from Americans of national heroism, horror, and mourning.

Out of habit and to simplify complex subjects, journalists tend to cover government and politics with a relatively small repertoire of familiar frames. Relations within and between the branches of government are typically framed as conflicts. Stories often frame politicians as motivated by partisanship and the desire for reelection. Stories about government agencies are frequently framed around bureaucratic incompetence, waste, and corruption.

Framing influences politics by reinforcing or changing what people think of an issue. Different frames call for different policy solutions. Thus *24* told its viewers that in the grim choice between security and liberty, coercion must prevail, that torture is essential to extract information from terrorists to forestall (usually just in time) their lethal schemes. According to Human Rights First, the number of acts of torture on prime-time television increased from fewer than four before 9/11 to more than a hundred. It used to be the villains who tortured, now it is the heroes (Mayer, 2007).

Priming

Media frames can provide criteria that audience members use to make judgments about government institutions, public officials, and issues. This is called priming. It can occur when news stories identify the person or institution to blame for an event, such as the damage wrought by Hurricane Katrina on New Orleans. The president is often held responsible for the nation's problems. Priming effects are strongest "when the news frames a problem as if it were the president's business, when viewers are prepared to

regard the problem as important, and when they see the problem as entangled in the duties and obligation of the presidency” (Iyengar & Kinder, 1987).

Because of its intrinsic importance, reemphasized by the news and entertainment media, fighting terrorism continues as a prominent issue. The president is seen as primarily responsible. Presidential candidates’ competence to combat terrorism thus becomes an important criterion by which the electorate judges them. Note, in this respect, that some of 24’s presidents could not be trusted to execute that duty and obligation effectively.

Mobilizing

The media affect what people think about in politics and how they think about it. They also influence what, if anything, people do about politics, problems, and policies.

Media contents can mobilize individuals to engage in political behavior, from contacting public officials, to voting, to protesting, to committing violence. In the 1960s, television coverage increased participation in the nonviolent protests of the civil rights movement against segregation in the South (Lee, 2002). Continuous coverage of the 2009 health care legislation contributed to generating a wide range of participation by the public. Partisan media particularly foster citizen engagement in politics, as Fox News did for the Tea Party.

The media can influence people in politics without the public being involved at all. Politicians are far more voracious consumers of the news than is the average American. When issues are heavily covered in the media, officials take such prominence as a sign that they may well be called to account for their actions, even if the public has not yet spoken out. And they speak and behave differently than they did when the issues were obscure. Media attention tends to encourage action and speed up the policy process, if only for politicians to get the issue off the table.

Key Takeaways

In this section, we have identified the incidence of opinion and commentary in the media. They are prevalent in newspapers and magazines, on television and radio, and in comedy. We then described four leading influences of the media on politics, government, and public policies. These are agenda setting, framing, priming, and mobilizing.

Exercises

1. What is the value of having opinion and commentary in the media? Do you think it makes it easier or harder for people to develop their own opinions about politics?
2. How do media set the political agenda by choosing what issues to focus on? What do you think the media treat as the most important political issues right now?
3. How can humor be used to influence public opinion? Why might satire be more effective than straight opinion in making political points?

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1. A documentary film exposing what it sees as the pro–Republican and Bush administration coverage by the Fox News Channel is *Outfoxed: Rupert Murdoch’s War on Journalism*. [↩](#)
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1.4: New Media

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the four ways the new media are changing the relationship between communication on the one hand and government and politics on the other?
2. What is WikiLeaks.org?
3. What limits the ability of the new media to improve citizen education and enhance public life?
4. What is the political potential of the new media?

The early 1980s saw the development of what we call the new media: new technologies and old technologies in new combinations. They are muddying if not eliminating the differences between media. On the iPad, newspapers, television, and radio stations look similar: they all have text, pictures, video, and links.

Increasingly, Americans, particularly students, are obtaining information on tablets and from websites, blogs, discussion boards, video-sharing sites, such as YouTube, and social networking sites, like Facebook, podcasts, and Twitter. And of course, there is the marvel of Wikipedia, the free encyclopedia to which so many people (four hundred million every month) go to for useful, if not always reliable, information.

Changing Relationships

New media are changing the relationship between communication and government and politics in four significant ways.

Making More Information Available and Accessible

Julian Paul Assange founded WikiLeaks.org in 2007 to expose the secrets of governments, corporations, and other institutions. In 2010 he released a classified video showing a US helicopter killing civilians, including two journalists, in Baghdad—an edited version was viewed several million times on YouTube (Khatchadourian, 2010). He has since released thousands of intelligence and military field reports from the war in Afghanistan and from the front lines of the conflict in Iraq.

Assange followed up in November 2010 with a dump of classified cables sent by US diplomats from their embassies during the last three years. The cables detailed the diplomats' dealings with and honest assessments of both the foreign countries where they were stationed and their leaders, revealing the reality beneath the rhetoric: that Saudi Arabia has urged that Iran be bombed, that Shell dominates the government of Nigeria, that China launched a cyber attack on Google, and that the US State Department urged its employees to collect biometrical information on foreign diplomats serving at the United Nations.

WikiLeaks released the material to selected leading newspapers in the United States (*New York Times*), the United Kingdom (*Guardian*), and elsewhere, deferring to the journalists to decide which ones were news, which could be made public, and whether to redact names from them. Nonetheless, their release could damage the careers of some US diplomats and disclose the names of informants, thereby endangering them. The cables could be subject to foreign governments' and private companies' data-mining and pattern-analysis programs. Consequently, the US Justice and Defense Departments and other organizations tried to stop Assange, to avoid further leaks, and to punish the leakers.

News organizations, with their legitimacy and experienced journalists, have gone online. They often add details and links missing from their broadcast or published versions of their stories. Their sophisticated technology keeps their sites fresh with the latest news, photos, and real-time audio and video. In February 2011, Rupert Murdoch's News Corporation announced the arrival of *The Daily*, a general-interest publication for tablet computers. It will cost ninety-nine cents weekly or forty dollars for a year (Peters & Stelter, 2011).

Journalists incorporate the Internet into their reporting. They read the sites of other news organizations, get story ideas, background information, check facts, search for and receive press releases, and download data.

The nonprofit investigative site [Pro-Publica](#)—which has exposed the involvement of doctors in torture, the contamination of drinking water through gas drilling, and other outrages—is generating and sharing content with many print publications that have cut back their investigative reporting.

[Talking Points Memo](#) was primarily responsible for tenacious investigative journalism, pursuing and publicizing the firing of eight US attorneys by the Bush administration's Justice Department. The result was a scandal that sparked interest by the mainstream media and led to the resignation of President Bush's attorney general, Alberto Gonzales, in 2008. The ideologically conservative [Drudge Report](#) came to fame when Matt Drudge used his web portal to spread the latest news and rumors about the relationship between President Bill Clinton and Monica Lewinsky. The site is now looked to by television producers, radio talk-show hosts, and reporters, for scoops, the latest leaks, gossip, and innuendo.

[Andrew Breitbart](#), a former colleague of Matt Drudge, founded his site in 2005. It aggregates news from the wire services and is viewed by an average of 2.4 million people monthly. He is also responsible for the websites Big Hollywood, Big Government, and Big Journalism, which provide some original reporting and commentary from a conservative perspective by unpaid bloggers, as well as references to articles on other sites.

Breitbart made a splash with videos posted on Big Government in September 2009 regarding ACORN (Association of Community Organizations for Reform Now). Since 2006, conservatives had attacked ACORN, accusing it of voter fraud. This became the dominant frame and set the agenda for media coverage of the organization. Now the hidden-camera, heavily edited footage (the complete original video footage has never been fully disclosed) showed ACORN employees offering advice to a man and woman, who were posing as a pimp and a prostitute, proposing to bring underage Salvadoran girls into the United States to be sexually enslaved. The footage became a top story on the *Glenn Beck Show*, the rest of Fox News, and conservative talk radio. In December 2009, the Congressional Research Service issued a report exonerating ACORN of any wrongdoing. A few months later, ACORN went out of business (Dreier & Martin, 2010).

Narrowcasting

The new media can aim at more discrete, specialized audiences, narrowcasting rather than broadcasting. Often controlled by individual communicators, their content is usually aimed at smaller and more socially, economically, and perhaps politically distinct audiences than the mass media. This fragmentation of the mass audience means that the old mass-media pursuit of lowest-common-denominator content may no longer be financially necessary or viable.

There are cable channels devoted to women, African Americans, and Hispanics, as well as for buffs of news, weather, history, and sports. DVDs and CDs enable the cheap reproduction of a wide range of films and recordings that no longer have to find a mass market to break even. Although the recording industry is selling fewer and fewer CDs and is phasing out music formats with small audiences (e.g., classical, jazz), artists can produce their own CDs and find a far-flung audience, particularly through web-based commerce such as Amazon.

Satellite radio is the fastest growing radio market. It uses technology that broadcasts a clear signal from space to receivers anywhere in the world. Providers XM and Sirius offer uninterrupted programming for a subscription fee. Listeners have hundreds of program options. Broadcast radio stations are no longer limited by the range of a signal across terrain but through the web can reach listeners who make up an audience that is less bounded by geography than by shared cultural, social, and political interests.

For people interested in government, politics, and public affairs, there are web magazines such as [Slate](#), [Salon](#), and [Politico](#) with its staff of established political reporters.

Creating Content

As major news organizations have gone online, they have hired technologically skilled young people. At first, these people would primarily reprocess content. Now they create it, as they know how to take advantage of the technology. Thanks to cell-phone cameras, webcams, and social networks, ordinary people can create, store, sort, share, and show digital videos. YouTube is the go-to website for finding obscure and topical streaming video clips. Home videos, remixes, and television excerpts are posted by users (also by the television networks). YouTube has millions of videos and daily viewers.

People can use video clips to hold politicians accountable by revealing their gaffes, showing the contradictions in their statements and behavior, and thereby exposing their dissembling, their exaggerations, and even their falsehoods. Democratic candidate Hillary Clinton had to say that she had misremembered when her claim that she had been under sniper fire at the airport during her 1996 visit to Bosnia as First Lady was refuted by videos shown on YouTube that attained millions of views.

People can become citizen journalists and create contents by reporting on subjects usually ignored by the news media. Examples include OneWorldTV's human rights and development site and short videos on subjects such as land expropriation in Kenya, gang reform in Ecuador, and [LiveLeak](#)'s coverage of executions in Saudi Arabia.

People can become citizen journalists as eyewitnesses to events. Examples of their reporting include the earthquake and tsunami that hit Japan in 2011, Hurricane Katrina that hit the US Gulf Coast in 2005, and the massacre of students at Virginia Tech University in 2006. They showed some of what happened and documented the effectiveness or ineffectiveness of the authorities' responses. Mainstream media have incorporated citizen journalism into their news products. CNN's "iReport," in which "you take control of the news," encourages average people to submit stories with accompanying images. Reports span numerous topics, including candidates on the campaign and pet stories.

The [Free Press](#) now has a site called MediaFail where people can post egregious examples of media derelictions and failures.

Blogging

Blogs are online diaries whose authors post information, including ideas and opinions. Blogs may permit feedback from readers and provide hyperlinks to other online contents that may enrich the discussion. Many people blog; the most popular political blog sites, Instapundit and [DailyKos](#), claim over 75,000 visitors per day, but few are widely read. Nonetheless, there are thousands of political blogs on the web: the [Huffington Post](#), a news aggregator with some original material, claims more than eighteen hundred bloggers—none of them paid.

Blogging can be seen as a new form of journalism without deadlines or broadcast schedules. But it does not replace reporting. Most bloggers rely on material issued elsewhere for their information: domestic and foreign newspapers, government documents, academic papers, and other media.

Nonetheless, the "blogosphere" can hold public officials accountable by amplifying and spreading information, especially when many bloggers cover the same subject, a phenomenon known as "blogswarm." For example, Mississippi Republican senator Trent Lott, at a reception honoring his South Carolina colleague Strom Thurmond's hundredth birthday, spoke approvingly of the latter's prosegregationist 1948 presidential campaign: "When Strom Thurmond ran for president we voted for him. We're proud of it. And if the rest of the country had followed our lead we wouldn't have had all these problems over all of these years either." The journalists in attendance little noted his comment. Bloggers saw the quote in a story on ABC News's daily online comment "The Note." They highlighted and linked it to previous statements on racial issues by Thurmond and Lott. The bloggers' comments were picked up by the news media. As a result, Lott subsequently resigned as Senate Majority Leader.

Bloggers can hold the news media accountable. One important way is by challenging the media's framing of a story. For example, conservative bloggers criticize reporters for framing stories about abortion, gay rights, and religion from a liberal perspective.

Bloggers also challenge the media's stories themselves. On the *60 Minutes Wednesday* segment of September 8, 2005, anchor Dan Rather presented documents purportedly showing that President George W. Bush had received preferential treatment in joining the Texas Air National Guard in the early 1970s and thus avoided military service in Vietnam. The report was a scoop that had been rushed onto the air. Conservative Internet forums and bloggers immediately pointed out that, because of their format and typography, the documents were forged. The accusation quickly gained national attention by the news media and was soon corroborated. Rather's long career at CBS was ended sooner than he and the network had planned.

Limitations

The ability of new media to realize their potential and promise for improving citizen education and enhancing public life is limited in five ways.

First, political websites and bloggers generally lack the resources of the news media and the knowledge and expertise of journalists to cover and investigate government, politics, and public policies in depth. They react to rather than originate the news.

Second, the new media encourage people to expose themselves to contents (people and perspectives) they already agree with. The audience for Fox News is overwhelmingly Republican, while Democrats gravitate to MSNBC and Comedy Central. Liberals find stories that support their views on the Huffington Post, conservatives on the National Review Online. Liberal blogs link to other liberal blogs, conservative blogs to other conservative blogs.

Third, the new media are rife with muddle and nonsense, distortion and error. When the journalist Hunter S. Thompson died, an Internet site reported President Nixon's opinion that Thompson "represented the dark, venal and incurably violent side of the American character." In fact, Thompson said that about Nixon.

Worse, the new media are a fount of rumor, innuendo, invective, and lies. The Indian wire service Press Trust quoted an anonymous Indian provincial official stating that President Obama's official state visit to India would cost \$2 billion (\$200 million a day). The story was picked up by the Drudge Report, other online sites, and conservative talk-radio hosts such as Rush Limbaugh

and Michael Savage. Glenn Beck presented the trip as a vacation accompanied by thirty-four warships and three thousand people. Congresswoman Michele Bachmann (R-MN) repeated the claim to Anderson Cooper on his CNN program. This inspired him to track it down, reveal its falsity, and show how it had been perpetuated (Friedman, 2010).

Even worse, the new media can promote and express anger, hatred, rage, and fanaticism. When American journalist Daniel Pearl was beheaded by his Al Qaeda captors in Pakistan in May 2002, the action was videotaped and distributed over the Internet on a grainy video titled “The Slaughter of the Spy-Journalist, the Jew Daniel Pearl.”^[1]

Fourth is the possibility of the new media falling increasingly under the control of media conglomerates and giant corporations. Google has purchased YouTube. This could eventually subject them to the same demands placed on the mass media: how to finance the production of content and make a profit. Indeed, advertising has become far more prevalent in and on the new media. Of course acquisitions don’t always succeed: Rupert Murdoch’s News Corporation bought and then sold MySpace after failing to make it a financial or social networking success.

Fifth, the new media are a threat to privacy. Google logs all the searches made on it and stores the information indefinitely. Relatedly, the new media tend to defer to government. AOL, Microsoft, and Yahoo, but not Google, have complied with requests from the US Justice Department for website addresses and search terms. Google in China omits links to sites that the Chinese government does not want its citizens to see.

In the United States there are [Gawker](#) and its network, including the gossip sites Jezebel and Deadspin. They have no compunctions about breaching people’s privacy—even if it means violating journalistic norms by paying for information, as they did in the case of the sex diary written in the form of a thesis of a recent Duke University graduate and also a story concerning quarterback Brett Favre’s sexual behavior.

Political Potential

Relatively few Internet users attend to politics or government or public policies (Hindman, 2008). Nonetheless, the new media are rife with political potential. They can convey a wide range of information and views. There are sites for people of every political persuasion interested in any policy issue (e.g., drugs, education, health, environment, immigration). These sites can encourage discussion and debate, stimulate political participation, raise funds, mobilize voters, and inspire civic engagement.

The new media allow politicians, political parties, interest and advocacy groups, as well as individuals to bypass the traditional media and reach the public. They can try to control their image by deciding what information to release and selecting congenial media through which to communicate it—to their benefit but not necessarily our enlightenment. Sarah Palin, for example, uses Twitter, Facebook, appearances on Fox News (the network paid for a television studio in her home), a reality television show, newspaper columns, and two best-selling books to communicate her message. She usually avoids appearing on shows whose hosts may be hostile to or even critical of her. (The belief that public figures, including Palin, personally write everything issued in their names is questionable; President Obama has admitted that he doesn’t write his Twitter feeds).

The new media offer people the potential opportunity to transcend the mass media. As newspaper columnist Thomas L. Friedman wrote rather hyperbolically, “When everyone has a blog, a MySpace page or Facebook entry, everyone is a publisher. When everyone has a cell phone with a camera in it, everyone is a paparazzo. When everyone can upload video on YouTube, everyone is a filmmaker. When everyone is a publisher, paparazzo or filmmaker, everyone else is a public figure” (Friedman, 2007).

Key Takeaways

In this section we have seen how the new media are changing the relationship between communication on the one hand and government and politics on the other. They make more information than ever before accessible and available. They facilitate narrowcasting, the creation of content, and blogging. Despite limitations on their ability to improve citizen education and enhance public life, the new media are rife with political potential, particularly for civic education (Levine, 2007).

Exercises

1. How do new media make it difficult for governments to keep secrets? What effect do you think that will have on politics?
2. How does blogging differ from traditional journalism? What are the advantages of blogging as a form of journalism? What are the disadvantages?
3. In what sense do new media make everyone potentially a journalist? Do you agree that this also makes everyone potentially a public figure?

You Can Be a Journalist

- The emerging communications system in the United States, with its heady mix of traditional mass media and new media, offers a startling array of opportunities for citizens to intervene and get something done in politics and government. The opportunities are especially rich for young people who are well versed in new technologies, and they are charting new paths in political discourse.
- Scoop08.com, the “first-ever daily national student newspaper,” was launched on November 4, 2007—a year before the presidential election. The goal of the paper was to bring a youthful focus to campaign news and political issues, as well as to cover topics and political personalities that escaped mainstream media attention. There were almost fifty beats covering aspects of the 2008 election including major and minor political parties, gender and sexuality, the environment, technology, and even sports.
- Reporters and editors came from over four hundred high schools and colleges nationwide. Their backgrounds were ethnically and socially diverse. All volunteers, students who wanted to become involved responded to an open invitation on the website’s homepage: “This is your newsroom—Get involved.” Scoop08’s web-based platform allowed its young reporters to file conventional stories as well as to post videos, blog entries, cartoons, and instant polls.
- The online newspaper was founded by coeditors Alexander Heffner, seventeen, a senior at Phillips Academy in Andover, Massachusetts, and Andrew Mangino, twenty, a junior at Yale University. The two met when they were interns on Senator Hillary Clinton’s Senate reelection campaign. With people aged eighteen to twenty-nine making up 25 percent of the 2008 electorate, Heffner and Magino wanted to provide a mechanism for generating student interest and activity during the election. “We noticed there was a void when it came to national, grassroots, student journalism that really could have an impact on issues of importance. This is an increasingly politically engaged generation that is able to network online and to work professionally, academically, and socially in this venue,” stated Heffner (Smith-Spark, 2007).
- Contributors to Scoop08 found the experience fulfilling. Hadley Nagel, a correspondent from Nightengale-Bamford School, stated, “If our generation is the future, we who write for Scoop08 will be shaping history.” A comment by Zoe Baker from Kennebunk High School reflected the ideals expressed by many of the young reporters: “Scoop08 has the opportunity to reassert journalistic integrity.”

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1. Mariane Pearl’s memoir of her husband, *A Mighty Heart* (New York: Scribner, 2004), was made into a film released in 2007. ←

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1.5: Recommended Reading

Bennett, W. Lance. *News: The Politics of Illusion*, 8th ed. New York: Longman, 2008. A lively, wide-ranging critique and explanation of the failure of the news media to serve democracy.

Bimber, Bruce. *Information and American Democracy: Technology in the Evolution of Political Power*. New York: Cambridge University Press, 2003. A sweeping overview of American politics in different “information ages.”

Chadwick, Andrew. *Internet Politics: States, Citizens, and New Communication Technologies*. New York: Oxford University Press, 2006. A thoughtful overview of the political implications, issues, and influence of the Internet.

Compaine, Benjamin M., and Douglas Gomery. *Who Owns The Media?* 3rd ed. Mahwah, NJ: Lawrence Erlbaum, 2000. A detailed account of the organization and financing of the media.

Edelman, Murray. *From Art to Politics: How Artistic Creations Shape Political Conceptions*. Chicago: University of Chicago Press, 1995. A surprisingly upbeat account of political communication through art and fiction.

Hamilton, James T. *All the News That's Fit to Sell: How the Market Transforms Information into News*. Princeton, NJ: Princeton University Press, 2003. A compelling and detailed application of economic theory to explain the contents of news.

Schudson, Michael. *Advertising, the Uneasy Persuasion: Its Dubious Impact on American Society*. New York: Basic Books, 1984. A distinctive discussion of the role of advertising in American society and economy.

West, Darrell M. *The Rise and Fall of the Media Establishment*. Boston: Bedford/St. Martin's, 2001. A brief history of professional journalism from its inception to what the author claims is its current loss of power.

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1.6: Recommended Viewing

All the President's Men (1976). Through investigative journalism, two *Washington Post* reporters uncover the Watergate affair and bring down President Nixon's men. Based on their book.

Battleship Potemkin (1925). Soviet director Sergei Eisenstein's stirring tale of an incident in the abortive 1905 Russian revolution, a brilliant illustration of how to make a film with collective protagonists (notably, the people of Odessa).

Citizen Kane (1941). Orson Welles's investigation of the life of a media mogul is matchless moviemaking.

Duck Soup (1933). The Marx Brothers' anarchic send-up of the incompetence and hypocrisy of governments and of the folly of war. Groucho becomes leader of the country of Freedonia and leads it into a comedic war.

Good Night and Good Luck (2005). Based on the real-life conflict in the 1950s in which television newsman Edward R. Murrow defied corporate pressure and brought down demagogic senator Joseph McCarthy.

His Girl Friday (1939). In this wise-cracking comedy, cynical editor (Cary Grant) uses his wiles to keep his star reporter and ex-wife (Rosalind Russell) from leaving the newspaper.

The Man Who Shot Liberty Valance (1962). Director John Ford's meditative western in which the news makes the myth that establishes the wrong man as the hero and successful politician.

Network (1976). Television company executives exploit an anchorman's madness on the air to boost ratings.

The Player (1992). Robert Altman's delightful satire of Hollywood, its filmmakers, and its films.

Rashomon (1950). Four versions of an ambush, rape, and murder are shown in Japanese director Akira Kurosawa's famous exploration of the elusive nature of truth.

Shattered Glass (2003). Fictionalized version of the true story of a journalist who is fired from *The New Republic* magazine when it is discovered that he has fabricated many of his stories.

The Social Network (2010). A fascinating account, partly factual and partly fictional, of the founding of Facebook.

Star Wars (1977). The first of the multipart saga applies themes from the American Revolution to planetary political systems.

Sullivan's Travels (1941). Director Preston Sturges's tale of a director of mindless Hollywood studio films who wants to make films of social commentary but discovers the value of comedy.

Triumph of the Will (1935). Hitler's favorite filmmaker, Leni Riefenstahl, made this propaganda documentary of the 1934 Nazi party rally in Nuremberg, a celebration of the fascist state.

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CHAPTER OVERVIEW

2: The Constitution and the Structure of Government Power

- [2.1: The First American Political System](#)
- [2.2: Creating and Ratifying the Constitution](#)
- [2.3: Constitutional Principles and Provisions](#)
- [2.4: The Constitution in the Information Age](#)
- [2.5: Recommended Reading](#)
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2.1: The First American Political System

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What was the Stamp Act Congress?
2. What was the Continental Congress?
3. What are the principles contained in the Declaration of Independence?
4. What were the Articles of Confederation?

We can understand what the Constitution was designed to accomplish by looking at the political system it replaced: the Articles of Confederation, the United States' first written constitution, which embodied political ideals expressed by the Declaration of Independence.

From Thirteen Colonies to United States

By the mid-eighteenth century, Britain's thirteen colonies on North America's east coast stretched from Georgia to New Hampshire. Each colony had a governor appointed by the king and a legislature elected by landholding voters. These colonial assemblies, standing for the colonialists' right of self-government, clashed with the royal governors over issues of power and policies. Each colony, and the newspapers published therein, dealt with the colonial power in London and largely ignored other colonies.

The Stamp Act Congress

British policy eventually pushed politics and news across colonial boundaries. In 1763, the British antagonized the colonialists in two important ways. A royal proclamation closed off the frontier to colonial expansion. Second, the British sought to recoup expenses borne defending the colonies. They instituted the first ever direct internal taxes in North America. The most famous, the Stamp Act, required the use of paper embossed with the royal seal to prove that taxes had been paid.

Such taxes on commerce alienated powerful interests, including well-off traders in the North and prosperous planters in the South, who complained that the tax was enacted in England without the colonists' input. Their slogan, "No taxation without representation," shows a dual concern with political ideals and material self-interest that persisted through the adoption of the Constitution.

Among the opponents of the Stamp Act were printers who produced newspapers and pamphlets.



Figure 2.1: Printing newspapers was a small, labor-intensive business. Printers were often identifiable around town, not only for being ink stained, but also because the physical strain of pulling their presses shut made one shoulder rise considerably higher than the other. Wikimedia Commons – public domain.

The arduous technology of typesetting and hand-printing individual pages did not permit sizable production (Botein, 1975; Clark, 1994).^{[1][2]} Newspapers reached large audiences by being passed around—“circulated”—or by being read aloud at taverns (Leonard, 1995). Printers’ precarious financial condition made them dependent on commissions from wealthy people and official subsidies from government, and thus they were eager to please people in power. Crusading journalism against government authorities was rare (Cook, 1998). The Stamp Act, however, was opposed by powerful interests and placed financial burdens on printers, so it was easy for newspaper printers to oppose it vigorously with hostile stories.

During the Stamp Act crisis, news began to focus on events throughout the thirteen colonies. Benjamin Franklin, postmaster of the British government for the colonies, developed a system of post roads linking the colonies. Printers now could send newspapers to each other free of charge in the mail, providing content for each other to copy. Colonial legislatures proposed a meeting of delegates from across the colonies to address their grievances. This gathering, the Stamp Act Congress, met for two weeks in 1765. Delegates sent a petition to the king that convinced British authorities to annul the taxes.

📌 Link

Declaration of Rights

- See the text of the Stamp Act Congress’s Declaration of Rights at www.constitution.org/bcp/dor_sac.htm.

The Continental Congress

In 1773, the British government awarded the East India Company a monopoly on importing and selling tea to the American colonies. This policy, too, hurt powerful interests: colonial traders and merchants. Rebellious Bostonians ransacked the East India

Company's ships and pushed cartons of tea overboard. The British reacted harshly to this "Boston Tea Party": they closed the port of Boston, deported rebels to England for trial, and restricted settlement in and trade to the west of the country.

Once again, delegates from the various colonies met, this time in a gathering known as the Continental Congress, to address the difficulties with Britain. But this congress's petitions, unlike those of the Stamp Act Congress, were rebuffed. Repressive policies were kept in place. The Continental Congress launched a boycott of British products, initiated the Revolutionary War, and passed the Declaration of Independence (Rakove, 1979).

The Declaration of Independence

The Declaration of Independence, issued on July 4, 1776, announced that the thirteen colonies were independent of Britain. It was designed to be read aloud in public and to be sent to international audiences. Its point-by-point charges against British rule give equal weight to how the king damaged America's economic interests and how he ignored principles of self-government.

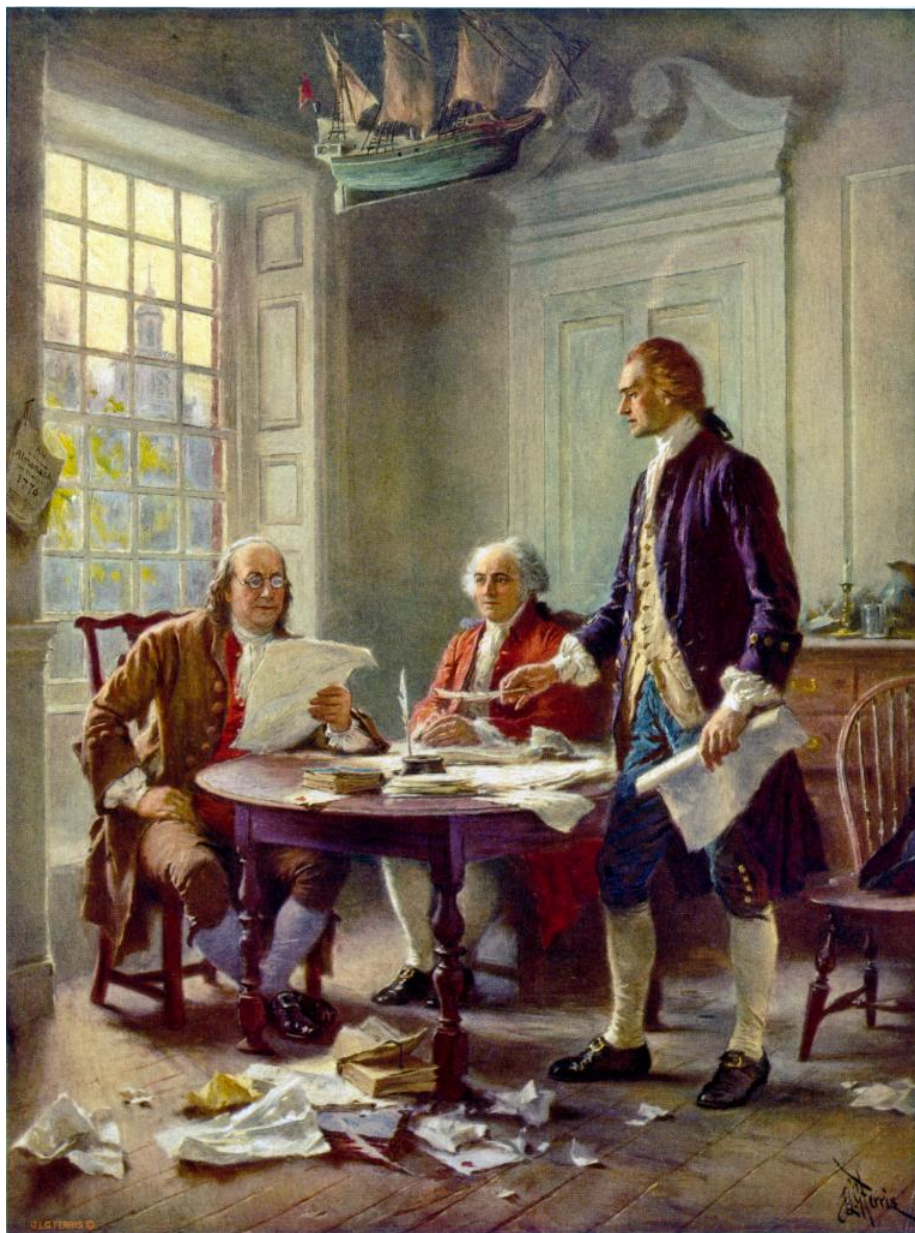


Figure 2.2: The soaring phrases of the Declaration were crafted in part to be declaimed in public. Indeed, one of the copies owned by Jefferson himself—not a confident public speaker—shows where he marked the document to pause, perhaps for laudatory huzzahs and applause. [Wikimedia Commons](#) – public domain.

The Declaration is a deeply democratic document (Lynd, 1969; Wills, 1979; Maier, 1997). It is democratic in what it *did*—asserting the right of the people in American colonies to separate from Britain. And it is democratic in what it *said*: “We hold these truths to be self-evident, that all men are created equal” and have inviolable rights to “life, liberty, and the pursuit of happiness.” The Declaration concludes that the people are free to “alter or abolish” repressive forms of government. Indeed, it assumes that the people are the best judges of the quality of government and can act wisely on their own behalf.

Link

The Declaration of Independence

- For more information on the Declaration of Independence, visit the National Archives online at <https://www.archives.gov/founding-docs/declaration>.

The Articles of Confederation

Drafted in 1777, the Articles of Confederation were the first political constitution for the government of the United States. They codified the Continental Congress’s practices and powers. The United States of America was a confederation of states. Although the confederation was superior to the individual states, it had no powers without their consent.

Link

The Articles of Confederation

- For the text of the Articles of Confederation, see <http://www.loc.gov/rr/program/bib/ourdocs/articles.html>.

Under the Articles, the Continental Congress took over the king’s powers to make war and peace, send and receive ambassadors, enter into treaties and alliances, coin money, regulate Indian affairs, and run a post office. But the confederation could not raise taxes and relied on revenues from each of the states. There was no president to enforce the laws and no judiciary to hear disputes between and among the states.

Each state delegation cast a single vote in the Continental Congress. Nine states were needed to enact legislation, so few laws were passed. States usually refused to fund policies that hampered their own interests (Dougherty, 2001). Changes in the Articles required an all-but-impossible unanimous vote of all thirteen delegations. The weakness of the Articles was no accident. The fights with Britain created widespread distrust of central authority. By restricting the national government, Americans could rule themselves in towns and states. Like many political thinkers dating back to ancient Greece, they assumed that self-government worked best in small, face-to-face communities.

Key Takeaways

The first American political system, as expressed in the Articles of Confederation, reflected a distrust of a national government. Its powers were deliberately limited in order to allow Americans to govern themselves in their cities and states.

Exercises

1. What was it about the Stamp Act and the decision to award a monopoly on the sale of tea to the East India Company that helped bring the American colonies together? What were the motivations for forming the first Congresses?
2. In what way is the Declaration of Independence’s idea that “all men are created equal” a democratic principle? In what sense are people equal if, in practice, they are all different from one another?
3. What were the weaknesses of the Articles of Confederation? Do you think the American government would be able to function if it were still a confederation? Why or why not?

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2.2: Creating and Ratifying the Constitution

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What was Shays's Rebellion?
2. What was the Constitutional Convention?
3. What were the three cross-cutting divides at the Constitutional Convention?
4. What were the main compromises at the Constitutional Convention?
5. Who were the Federalists and the Anti-Federalists?
6. What factors explain ratification of the Constitution?

The Constitution was a reaction against the limitations of the Articles of Confederation and the democratic experiments begun by the Revolution and the Declaration of Independence.

The Case against the Articles of Confederation

The Articles could not address serious foreign threats. In the late 1780s, Britain denied American ships access to British ports in a trade war. Spain threatened to close the Mississippi River to American vessels. Pirates in the Mediterranean captured American ships and sailors and demanded ransom. The national government had few tools to carry out its assigned task of foreign policy (Rakove, 1996; Edling, 2004).

There was domestic ferment as well. Millions of dollars in paper money issued by state governments to fund the Revolutionary War lost their value after the war (Wood, 1987). Financial interests were unable to collect on debts they were owed. They appealed to state governments, where they faced resistance and even brief armed rebellions.

Newspapers played up Shays's Rebellion, an armed insurrection by debt-ridden farmers to prevent county courts from foreclosing mortgages on their farms (Richards, 2002). Led by Captain Daniel Shays, it began in 1786, culminated with a march on the federal arsenal in Springfield, Massachusetts, and wound down in 1787.

The Continental Congress voted unanimously to raise an army to put down Shays's Rebellion but could not coax the states to provide the necessary funds. The army was never assembled (Dougherty, 2001).

Shays's Rebellion

- To learn more about Shays's Rebellion, visit the National Park Service online at <https://www.nps.gov/spar/learn/news/rebellion-at-the-springfield-arsenal.htm>.

Leaders who supported national government portrayed Shays's Rebellion as a vivid symbol of state governments running wild and proof of the inability of the Articles of Confederation to protect financial interests. Ordinary Americans, who were experiencing a relatively prosperous time, were less concerned and did not see a need to eliminate the Articles.

Calling a Constitutional Convention

The Constitutional Convention was convened in 1787 to propose limited reforms to the Articles of Confederation. Instead, however, the Articles would be replaced by a new, far more powerful national government.

Twelve state legislatures sent delegates to Philadelphia (Rhode Island did not attend). Each delegation would cast a single vote.

Who Were the Delegates?

The delegates were not representative of the American people. They were well-educated property owners, many of them wealthy, who came mainly from prosperous seaboard cities, including Boston and New York. Most had served in the Continental Congress and were sensitive to the problems faced by the United States. Few delegates had political careers in the states, and so they were free to break with existing presumptions about how government should be organized in America.

Constitutional Convention

- To learn more about the delegates to the Constitutional Convention, visit <https://www.archives.gov/founding-docs/founding-fathers>.

The Constitutional Convention was a mix of great and minor characters. Exalted figures and brilliant intellects sat among nonentities, drunkards, and nincompoops. The convention's driving force and chief strategist was a young, bookish politician from Virginia named James Madison. He successfully pressured revered figures to attend the convention, such as George Washington, the commanding officer of the victorious American revolutionaries, and Benjamin Franklin, a man at the twilight of a remarkable career as printer, scientist, inventor, postmaster, philosopher, and diplomat.

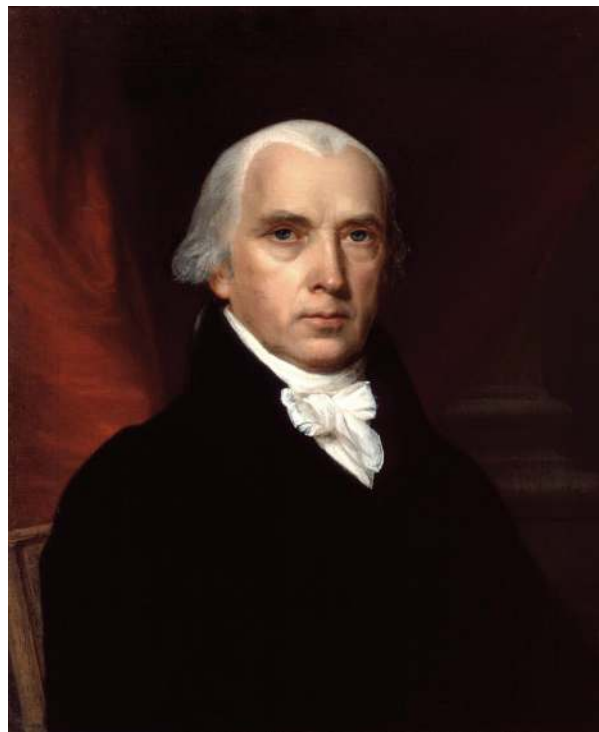


Figure 2.3: The unassuming and slight James Madison made an unusual teammate for the dashing, aristocratic ex-soldier Alexander Hamilton and the august diplomat John Jay. But despite these contrasts and some political divides, they merged their voices in the Federalist papers, published in New York newspapers under the pseudonym “Publius.” Soon after the ratification of the Constitution, *The Federalist* was widely republished in book format. Scholars now regard it as the fullest explication of the logic underlying the Constitution. Source: Photo courtesy of the White House Historical Association, commons.wikimedia.org/wiki/File:James_Madison.jpg.

Madison drafted the first working proposal for a Constitution and took copious notes at the convention. Published after his death in 1836, they are the best historical source of the debates; they reveal the extraordinary political complexity of the deliberations and provide remarkable insight into what the founders had in mind.^[1]

Once the Constitution was drafted, Madison helped write and publish a series of articles in a New York newspaper. These Federalist papers defend the political system the Constitutional Convention had crafted.

Interests and the Constitution

In the early twentieth century, historian Charles Beard asserted that the Constitution was “an economic document for economic ends,” pushed by investors and industrialists who would profit more from a national economic and political system than from one favoring small-scale agricultural interests (Beard, 1913). Research has not upheld Beard’s stark division of reaction to the Constitution into well-off supporters and poor, democratic adversaries. Many local, well-to-do patriachs opposed the Constitution; many small merchants wanted a national government.

But Beard’s focus on economic and social interests is revealing. Paper money, debt relief, and Shays’s Rebellion concerned those committed to existing economic and social orders. Consider Federalist No. 10, the most famous of Madison’s Federalist papers. In it, he decried the dangers of democracy; he started with “a rage for paper money” and “an abolition of debts,” then the specter of

“an equal division of property,” all of which he found an “improper or wicked project.” Madison paid attention to the right to acquire and maintain property, which the Declaration brushed aside. He claimed that political systems were created to maintain liberty—including the liberty to accumulate wealth. Political equality meant only that each person had a right to express himself or herself.

Ideas and the Constitution

The Constitutional Convention responded to ideas, not just interests. Delegates doubted that the people could wisely rule. They sought to replace *democracy* with a *republic*, in which officials would be chosen to act on the people’s behalf. Federalist No. 10 makes the case.

Madison was concerned with threats to order and stability from what he called factions, groups pursuing their self-interest above the public good. For Madison, factions were inevitable. His worst nightmare was of a faction becoming a political majority, trampling on the rights of its helpless opponents, and quickly enacting its program. He favored a large republic, which, he believed, would discourage a faction’s rise to power. Madison expected that in a republic, the number of locally oriented interests would increase and diversify, which would make it harder for any one of them to dominate. Minority factions could pass legislation by forming temporary majorities, Madison reasoned, but these diverse majorities would not be able to agree on a single project long enough to be oppressive.

Drafting the Constitution

Delegates to the Constitutional Convention first gathered on May 25, 1787, in what is now called [Independence Hall in Philadelphia](#). Their goal was to devise a constitution, a system of fundamental laws and principles outlining the nature and functions of the government. George Washington presided. Delegates worked in an intimate setting without committees. The structure of power created by the Constitution in Philadelphia resulted from a deeply political process.^[2]

The Secrecy of the Constitutional Convention

Deliberations took place in secret, as delegates did not want the press and the public to know the details of what they were considering ([Note 2.16 “Comparing Content”](#)). Newspapers hardly mentioned the convention at all, and when they did, it was in vague references praising the high caliber of the delegates (Alexander, 1990).

Comparing Content

The Convention’s Gag Rule

- Press coverage of the Constitutional Convention cannot be compared because one of the first decisions made in the Constitutional Convention was that “nothing spoken in the House be printed, or otherwise published or communicated” (Farrand, 1937). The delegates feared that exposure through newspapers would complicate their work. The delegate who is today regarded as the great defender of civil liberties, George Mason, wrote to his son approvingly: “This I think myself a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in the several crude and indigested parts might in their first shape appear if submitted to the public eye” (Farrand, 1937).
- This gag rule was rigorously enforced. One day the presiding officer, George Washington, noticed that an inattentive delegate had dropped his notes on the floor when leaving the hall. Washington broke his usual silence and rebuked the unknown infractor: “I am sorry to find that some one Member of this Body, has been so neglectful of the secrets of the convention as to drop in the State House a copy of their proceedings, which by accident was picked up and delivered to me this morning. I must entreat Gentlemen to be more careful, least [sic] our transactions get into the News Papers, and disturb the public repose by premature speculations.”
- Throwing the notes on the table, Washington exclaimed, “I know not whose Paper it is, but there it is, let him who owns it take it.” Delegate William Pierce, who recorded this tale, noted that Washington “bowed, picked up his Hat, and quitted the room with a dignity so severe that every Person seemed alarmed” (Farrand, 1937).
- The founders were not unanimous about the threat posed by the press. Thomas Jefferson was in Paris as an ambassador. In August 1787, he wrote to his counterpart in London, John Adams, that there was no news from the convention: “I am sorry they began their deliberations by so abominable a precedent as that of tying up the tongues of their members. Nothing can justify this example but the innocence of their intentions, & ignorance of the value of public discussions. I have no doubt that all their other measures will be good & wise” (Farrand, 1937).

- In 1787, the powers of the press were identified in ways we recognize in the twenty-first century. Washington was concerned that news about the political process might produce rumors, confusion, worry, and public opposition to worthwhile policies. But as Jefferson recognized, the news can also lead to productive public debate, dialogue, and deliberation.



Figure 2.4: The membership of the Constitutional Convention was so small—never more than fifty on a given day—that they could proceed largely in “a committee of the whole.” This size enabled them to continue their discussions in private at their preferred boardinghouses and taverns—and to keep a tight lid on public discussion. Source: Photo taken by Dan Smith, commons.wikimedia.org/wiki/File:Independence_Hall_Assembly_Room.jpg.

The Cross-Cutting Divides

The delegates immediately discarded the Continental Congress’s mandate that they recommend amendments to the Articles of Confederation. They agreed to draft a new Constitution from scratch in order to create a national government superior to and independent of the states.

This crucial decision was followed by disagreement about exactly how to create a national government. The states varied widely in economic bases, population sizes, and numbers of slaves.

Three cross-cutting divides existed among the states:

1. Large states versus small states^[3]
2. Cosmopolitan, centrally located states (Connecticut to Virginia) versus parochial states on the northern and southern borders
3. Southern states, reliant on slavery in their economies, versus Northern states, which were not

The powers and structures of the Constitution resulted from a series of compromises designed to bridge these three divides.

Large and Small States

The most threatening split in the convention emerged initially between large and small states.

Large states fired the first salvo. The Virginia Plan, drafted by Madison, foresaw a strong national government that could veto any state laws it deemed contrary to the national interest. The central institution was a bicameral (two-chamber) legislature. The people would elect the lower house, which would in turn select the members of the upper house; the two chambers together would then elect the executive and judiciary. Breaking with the Articles of Confederation’s equal representation of states, the Virginia Plan allotted seats to both chambers of the legislature by population size alone.^[4]

Cosmopolitan, centrally located states, provided strong initial support for the Virginia Plan against scattered opposition from border states. But Madison could not hold this coalition behind *both* a strong national government *and* a legislature allocated by population. Delegates from the small states of New Jersey, Delaware, and Maryland liked a strong national government, but they feared being overpowered. Delegates from populous Massachusetts and three fast-growing Southern states joined the two largest

states, Virginia and Pennsylvania, to support legislative districts based on population, but they disliked the Virginia Plan's sweeping powers for the national government.

On June 15, the small states proposed an alternative. The New Jersey Plan enhanced the national government's powers to levy taxes and regulate commerce but left remaining powers to the states. The plan had a federal executive, elected by the legislature, to enforce states' compliance with national law, and a federal judiciary to settle disputes among the states and between the states and the national government. Any national law would become "the supreme law of the respective States." The New Jersey Plan preserved the core of the Articles of Confederation—equal representation of states in a unicameral (single-chamber) legislature.

Only three states voted for the New Jersey Plan, but the Virginia Plan's vulnerability was exposed. Facing an impasse, delegates from Connecticut suggested a compromise. Borrowing the Virginia Plan's idea of a bicameral legislature, they proposed that one chamber, the House of Representatives, be made up of representatives from districts of equal population, while in the Senate each state would be equally represented with two senators.

This Connecticut Compromise (also known as the Great Compromise) was adopted by the convention with only Virginia and Pennsylvania in opposition. Thus the configuration of today's Congress emerged not so much from principled deliberations between the Constitution's founders as from the necessity for compromise between competing state interests. In essence, the founders decided to split the difference (Robertson, 2005).

North and South

After this vote, North versus South displaced the divide between large and small states. The convention became preoccupied by how the new government would be empowered to deal with slavery. Northerners feared the South's growth and room for expansion. Southerners worried that the North would threaten the practice of slavery, which, although legal in all states, was a central part only of Southern economies.

Northern interests in a strong national government acceded to Southern demands on slavery. Southerners argued that slaves should be counted when allocating legislative seats. Eventually, the convention settled on a three-fifths clause: 60 percent of the enslaved population would be counted for purposes of representation. Northern delegates, convinced that the largest slave-holding states would never have a majority in the Senate, gave in.

The Three-Fifths Clause

- Aaron Magruder's comic strip *The Boondocks* ran this installment during the 2004 presidential campaign. Showing a depressed black man talking about the three-fifths clause, it powerfully illustrates the Constitution's long-lasting affront to African Americans, almost all of whom were enslaved and thus, for the purpose of the census (and of representation in Congress and the Electoral College), would be counted as three-fifths of a person.
- Read the comic at <http://www.gocomics.com/boondocks/2004/10/21>.

As the convention considered the national government's powers, an alliance of delegates from New England and the Deep South emerged to defend local control and their states' economic self-interest. Southerners sought to maintain slavery, while New Englanders wanted national tariffs to protect their commerce. They struck a deal that resulted in New England delegates voting to require the return of fugitive slaves and to prevent Congress from regulating the slave trade until 1808.

The delegates did not confront slavery head on (indeed, the word "slavery" is not directly mentioned in the Constitution). As a result, the issue of slavery would overshadow much of federal politics until its bloody resolution in the Civil War of the 1860s.

The Executive

By now, the Constitutional Convention could not break down, because the document had something for everybody. Small states liked the security of a national government and their equal representation in the Senate. The Deep South and New England valued the protection of their economic bases. Pennsylvania and Virginia—the two most populous, centrally located states—foresaw a national government that would extend the reach of their commerce and influence.

The convention's final sticking point was the nature of the executive. The debate focused on how many people would be president, the power of the office, the term of the office, how presidents would be elected, and whether they could serve multiple terms.

To break the logjam on the presidency, the convention created the Electoral College as the method of electing the president, a political solution that gave something to each of the state-based interests. The president would not be elected directly by the

popular vote of citizens. Instead, electors chosen by state legislatures would vote for president. Small states got more electoral votes than warranted by population, as the number of electors is equal to the total of representatives *and* senators. If the Electoral College did not produce a majority result, the president would be chosen by the popularly elected House, but with one vote per state delegation (Roche, 1961). With all sides mollified, the convention agreed that the office of president would be held by one person who could run for multiple terms.

Bargaining, Compromise, and Deal Making

The Constitutional Convention began with a principled consensus on establishing a stronger national government; it ended with bargaining, compromise, and deal making. State delegations voted for their political and economic self-interests, and often worked out deals enabling everyone to have something to take home to constituents. Some complex matters, such as the structures of the executive and judicial branches, were left up to the new congress. As one scholar writes, the Constitution is “a patch-work sewn together under the pressure of both time and events by a group of extremely talented...politicians” (Roche, 1961; Robertson, 2005).

The Constitution

- To learn more about the Constitution, visit the National Constitution Center at constitutioncenter.org.

Ratifying the Constitution

The signing of the Constitution by the delegates on September 17, 1787, was just the beginning. The Constitution would go into effect only after being approved by specially elected ratifying conventions in nine states.

Ratification was not easy to win. In most states, property qualifications for voting had broadened from landholding to taxpaying, thereby including most white men, many of whom benefited from the public policies of the states. Popular opinion for and against ratification was evenly split. In key states like Massachusetts and Virginia, observers thought the opposition was ahead (Main, 1961; Fink & Riker, 1989).

The Opposition to Ratification

The elections to the ratifying conventions revealed that opponents of the Constitution tended to come from rural inland areas (not from cities and especially not from ports, where merchants held sway). They held to the ideals of the Declaration of Independence, which favored a deliberately weak national government to enhance local and state self-government (Storing, 1988). They thought that the national government’s powers, the complex system of government, lengthy terms of office, and often indirect elections in the new Constitution distanced government from the people unacceptably.

Opponents also feared that the strength of the proposed national government posed a threat to individual freedoms. They criticized the Constitution’s lack of a Bill of Rights—clauses to guarantee specific liberties from infringement by the new government. A few delegates to the Constitutional Convention, notably George Mason of Virginia and Elbridge Gerry of Massachusetts, had refused to sign the document in the absence of a Bill of Rights.

The Campaign for Ratification

Despite such objections and obstacles, the campaign for ratification was successful in all thirteen states (Maier, 2010). The advocates of the national political system, benefiting from the secrecy of the Constitutional Convention, were well prepared to take the initiative. They called themselves not nationalists but Federalists. Opponents to the Constitution were saddled with the name of Anti-Federalists, though they were actually the champions of a federation of independent states.

By asking conventions to ratify the Constitution, the Federalists evaded resistance from state legislatures. Federalists campaigned to elect sympathetic ratifiers and hoped that successive victories, publicized in the press, would build momentum toward winning ratification by all thirteen states.

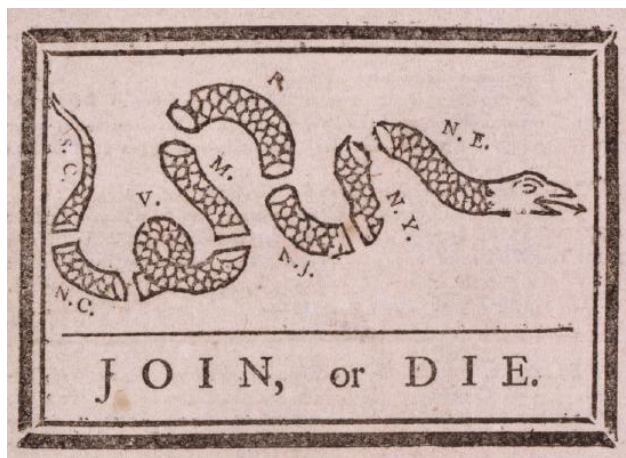


Figure 2.5: The Federalists' media strategies included images, too. A famous woodcut at the start of the Revolution was of a serpent cut into thirteen sections with the admonition "Join or Die." Federalists provided a new twist on this theme. They kept track of the ratification by an edifice of columns, elevated one by one as each state ratified. The next state convention on the list would be represented by a hand lifting the column, often accompanied by the confident motto "Rise It Will.". Source: commons.wikimedia.org/wiki/File:Franklin_join_or_die.jpg.

Anti-Federalists did not decry the process by which the Constitution was drafted and ratified. Instead, they participated in the ratification process, hoping to organize a new convention to remedy the Constitution's flaws.

Newspapers and Ratification

The US newspaper system boosted the Federalist cause. Of the approximately one hundred newspapers being published during the ratification campaign of 1787–88, "not more than a dozen...could be classed as avowedly antifederal" (Rutland, 1966). Anti-Federalist arguments were rarely printed and even less often copied by other newspapers (Riker, 1996). Printers followed the money trail to support the Federalists. Most newspapers, especially those whose stories were reprinted by others, were based in port cities, if only because arriving ships provided good sources of news. Such locales were dominated by merchants who favored a national system to facilitate trade and commerce. Newspapers were less common in rural interior locations where Anti-Federalist support was greatest.

Federalists also pressured the few Anti-Federalist newspapers that existed. They wrote subscribers and advertisers and urged them to cancel. Anti-Federalist printers often moved to other cities, went out of business, or began reprinting Federalist articles. Federalists hailed such results as the voice of the people. When an Anti-Federalist paper in Philadelphia halted publication, Federalists exulted, "There cannot be a greater proof that the body of the people are federal, that the antifederal editors and printers fail of support" (Rutland, 1987; Kaminski & Saladino, 1981).

Today the most famous part of this newspaper campaign is the series of essays (referred to earlier) written by Alexander Hamilton, John Jay, and James Madison, and published in New York newspapers under the collective pseudonym "Publius." The authors used their skills at legal argumentation to make the strongest case they could for the document that emerged from the Constitutional Convention. These Federalist papers, steeped in discussion of political theory and history, offer the fullest logic for the workings of the Constitution. However, they were rarely reprinted outside New York and were a minor part of the ratification campaign.

The Federalist

- Read *The Federalist* at the Library of Congress online at www.constitution.org/fed/federa00.htm.

Newspapers instead played on public sentiment, notably the adulation of George Washington, presiding officer of the convention, and his support of the Constitution (Riker, 1996). The most widely disseminated story concerned his return trip from Philadelphia to Virginia. A bridge collapsed but Washington escaped unharmed. The tale implied that divine intervention had ensured Washington's leadership by "the providential preservation of the valuable life of this great and good man, on his way home from the Convention" (Kaminski & Saladino, 1981).

Not all states were eager to ratify the Constitution, especially since it did not specify what the federal government could not do and did not include a Bill of Rights. Massachusetts narrowly voted in favor of ratification, with the provision that the first Congress take up recommendations for amending the Constitution. New Hampshire, Virginia, and New York followed this same strategy.

Once nine states had ratified it, the Constitution was approved. Madison was elected to the first Congress and proposed a Bill of Rights, the first ten amendments to the Constitution. Only after the Congress had approved the Bill of Rights did North Carolina and Rhode Island ratify the Constitution.

Key Takeaways

We have shown that the Constitution was a political document, drafted for political purposes, by skillful politicians who deployed shrewd media strategies. At the Constitutional Convention, they reconciled different ideas and base self-interests. Through savvy compromises, they resolved cross-cutting divisions and achieved agreement on such difficult issues as slavery and electing the executive. In obtaining ratification of the Constitution, they adroitly outmaneuvered or placated their opponents. The eighteenth-century press was crucial to the Constitution's success by keeping its proceedings secret and supporting ratification.

Exercises

1. From what James Madison says in Federalist No. 10, what economic interests was the Constitution designed to protect? Do you agree that the liberty to accumulate wealth is an essential part of liberty?
2. What did James Madison mean by “factions,” and what danger did they pose? How did he hope to avoid the problems factions could cause?
3. Why were the Constitutional Convention's deliberations kept secret? Do you think it was a good idea to keep them secret? Why or why not?
4. What were the main divisions that cut across the Constitutional Convention? What compromises bridged each of these divisions?

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1. The standard edition of Madison’s notes is in *The Records of the Federal Convention of 1787*, ed. Max Farrand, 3 vols. (New Haven, CT: Yale University Press, 1937). ↩
 2. Political scientists have revealed the degree to which the Constitutional Convention and the ratification conventions can be understood to be the result of manipulation of parliamentary rules, strategic voting, shifting coalitions, and the “agenda-setting” and “framing” use of mass communication. Our analysis draws on these authors, especially John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” *American Political Science Review* 55 (December 1961): 799–816; Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (New York: Agathon Press, 1988); and William H. Riker, *The Strategy of Rhetoric: Campaigning for the American Constitution* (New Haven, CT: Yale University Press, 1996). ↩
 3. The terms “large state” and “small state” are misleading. Some small states had larger populations than large states. The small states all shared economic vulnerability and an inability to grow, usually because they were boxed in by other states on their western edge, which made it impossible to hope for westward expansion. ↩
 4. The text of the Virginia Plan (and its main rival, the New Jersey Plan) can be found in Clinton Rossiter, *1787: The Grand Convention* (New York: Macmillan, 1966), 361–63 and 369–71. ↩
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2.3: Constitutional Principles and Provisions

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is the separation of powers?
2. What are checks and balances?
3. What is bicameralism?
4. What are the Articles of the Constitution?
5. What is the Bill of Rights?

The Principles Underlying the Constitution

While the Constitution established a national government that did not rely on the support of the states, it limited the federal government’s powers by listing (“enumerating”) them. This practice of *federalism* (as we explain in detail in Chapter 3 “Federalism”) means that some policy areas are exclusive to the federal government, some are exclusive to the states, and others are shared between the two levels.

Federalism aside, three key principles are the crux of the Constitution: separation of powers, checks and balances, and bicameralism.

Separation of Powers

Separation of powers is the allocation of three domains of governmental action—law making, law execution, and law adjudication—into three distinct branches of government: the legislature, the executive, and the judiciary. Each branch is assigned specific powers that only it can wield (Table 2.1).

Table 2.1 The Separation of Powers and Bicameralism as Originally Established in the Constitution

| Branch of Government | Term | How Selected | Distinct Powers |
|--------------------------|------------------------------|--|--|
| Legislative | | | |
| House of Representatives | 2 years | Popular vote | Initiate revenue legislation; bring articles of impeachment |
| Senate | 6 years; 3 classes staggered | Election by state legislatures | Confirm executive appointments; confirm treaties; try impeachments |
| Executive | | | |
| President | 4 years | Electoral College | Commander-in-chief; nominate executive officers and Supreme Court justices; veto; convene both houses of Congress; issue reprieves and pardons |
| Judicial | | | |
| Supreme Court | Life (during good behavior) | Presidential appointment and Senate confirmation (stated more or less directly in Federalist No. 78) | Judicial review (implicitly in Constitution but stated more or less directly in Federalist No. 78) |



Figure 2.6: In perhaps the most abiding indicator of the separation of powers, Pierre L'Enfant's plan of Washington, DC, placed the President's House and the Capitol at opposite ends of Pennsylvania Avenue. The plan notes the importance of the two branches being both geographically and politically distinct. Wikimedia Commons – public domain.

This separation is in the Constitution itself, which divides powers and responsibilities of each branch in three distinct articles: Article I for the legislature, Article II for the executive, and Article III for the judiciary.

Checks and Balances

At the same time, each branch lacks full control over all the powers allotted to it. Political scientist Richard Neustadt put it memorably: “The Constitutional Convention of 1787 is supposed to have created a government of ‘separated powers.’ It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers” (Neustadt, 1960). No branch can act effectively without the cooperation—or passive consent—of the other two.

Most governmental powers are shared among the various branches in a system of checks and balances, whereby each branch has ways to respond to, and if necessary, block the actions of the others. For example, only Congress can pass a law. But the president can veto it. Supreme Court justices can declare an act of Congress unconstitutional through judicial review. Figure 2.7 shows the various checks and balances between the three branches.

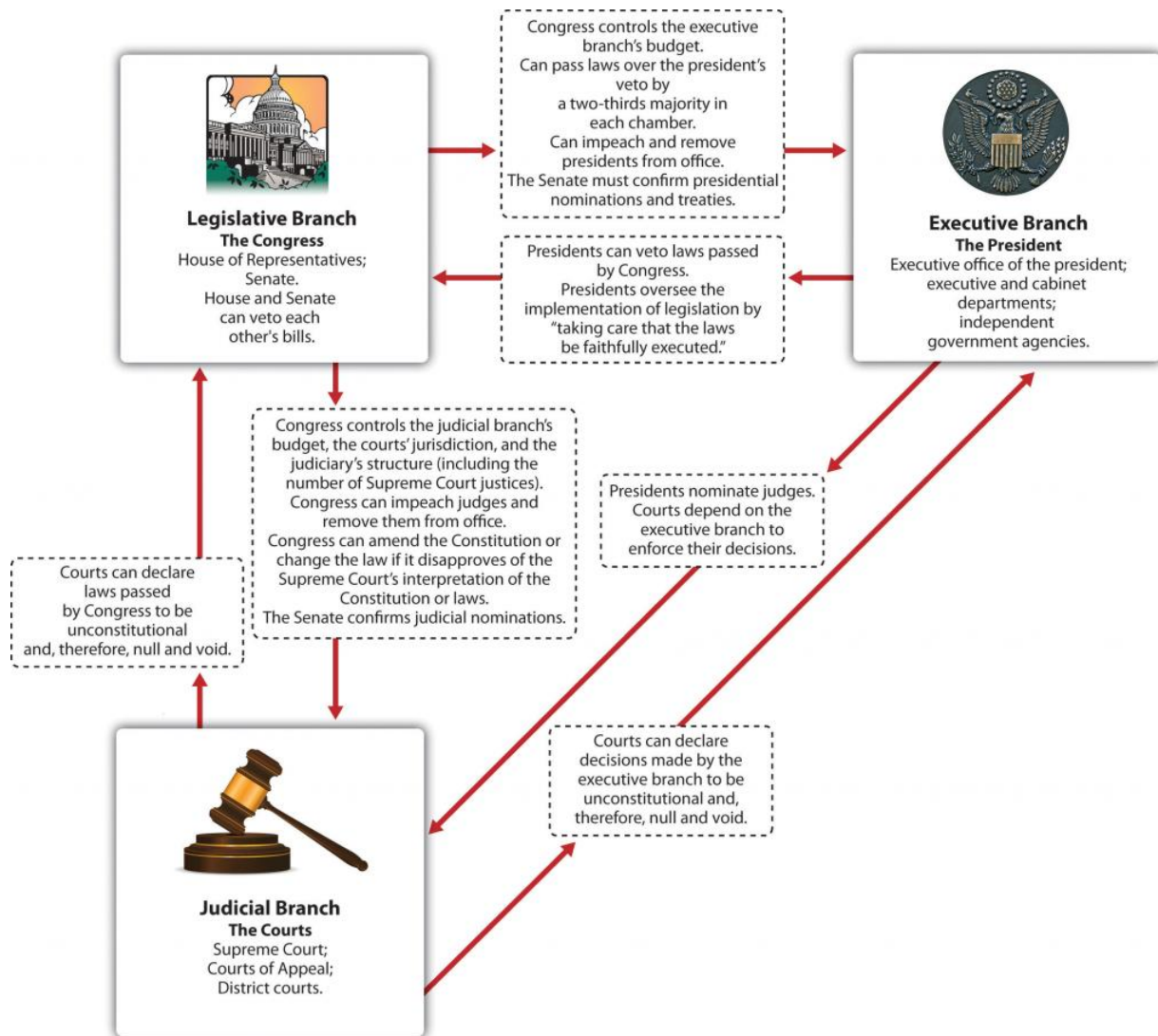


Figure 2.7 Checks and Balances. Adapted from George C. Edwards, Martin P. Wattenberg, and Robert L. Lineberry, *Government in America: People, Politics, and Policy* (White Plains, NY: Pearson Longman, 2011), 46.

The logic of checks and balances echoes Madison's skeptical view of human nature. In *Federalist No. 10* he contends that all individuals, even officials, follow their own selfish interests. Expanding on this point in *Federalist No. 51*, he claimed that officeholders in the three branches would seek influence and defend the powers of their respective branches. Therefore, he wrote, the Constitution provides "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."

Bicameralism

Government is made yet more complex by splitting the legislature into two separate and distinct chambers—the House of Representatives and the Senate. Such bicameralism was common in state legislatures. One chamber was supposed to provide a close link to the people, the other to add wisdom (Wood, 1969). The Constitution makes the two chambers of Congress roughly equal in power, embedding checks and balances inside the legislative branch itself.

Bicameralism recalls the founders' doubts about majority rule. To check the House, directly elected by the people, they created a Senate. Senators, with six-year terms and election by state legislatures, were expected to work slowly with a longer-range understanding of problems and to manage popular passions. A story, possibly fanciful, depicts the logic: Thomas Jefferson, back from France, sits down for coffee with Washington. Jefferson inquires why Congress will have two chambers. Washington asks Jefferson, "Why did you pour that coffee into your saucer?" Jefferson replies, "To cool it," following the custom of the time. Washington concludes, "Even so, we pour legislation into the senatorial saucer to cool it" (Fenno Jr. 1982).

The Bias of the System

The US political system is designed to prevent quick agreement within the legislature and between the branches. Senators, representatives, presidents, and Supreme Court justices have varying terms of offices, distinctive means of selection, and different constituencies. Prospects for disagreement and conflict are high. Accomplishing any goal requires navigating a complex obstacle course. At any point in the process, action can be stopped. Maintaining the status quo is more likely than enacting significant changes. Exceptions occur in response to dire situations such as a financial crisis or external attacks.

What the Constitution Says

The text of the Constitution consists of a preamble and seven sections known as “articles.” The preamble is the opening rhetorical flourish. Its first words—“We the People of the United States”—rebuke the “We the States” mentality of the Articles of Confederation. The preamble lists reasons for establishing a national government.

The first three articles set up the branches of government. We briefly summarize them here, leaving the details of the powers and responsibilities given to these branches to specific chapters.

Article I establishes a legislature that the founders believed would make up the heart of the new government. By specifying many domains in which Congress is allowed to act, Article I also lays out the powers of the national government that we examine in Chapter 3 “Federalism”.

Article II takes up the cumbersome process of assembling an Electoral College and electing a president and a vice president—a process that was later modified by the Twelfth Amendment. The presidential duties listed here focus on war and management of the executive branch. The president’s powers are far fewer than those enumerated for Congress.

The Constitutional Convention punted decisions on the structure of the judiciary below the Supreme Court to the first Congress to decide. Article III states that judges of all federal courts hold office for life “during good Behaviour.” It authorizes the Supreme Court to decide all cases arising under federal law and in disputes involving states. Judicial review, the central power of the Supreme Court, is not mentioned. Asserted in the 1804 case of *Marbury v. Madison* (discussed in Chapter 15 “The Courts”, Section 15.2 “Power of the US Supreme Court”), it is the ability of the Court to invalidate a law passed by Congress or a decision made by the executive on the basis that it violates the Constitution.

Article IV lists rights and obligations among the states and between the states and the national government (discussed in Chapter 3 “Federalism”).

Article V specifies how to amend the Constitution. This shows that the framers intended to have a Constitution that could be adapted to changing conditions. There are two ways to propose amendments. States may call for a convention. (This has never been used due to fears it would reopen the entire Constitution for revision.) The other way to propose amendments is for Congress to pass them by a two-thirds majority in both the House and Senate.

Then there are two ways to approve an amendment. One is through ratification by three-fourths of state legislatures. Alternatively, an amendment can be ratified by three-fourths of specially convoked state conventions. This process has been used once. “Wets,” favoring the end of Prohibition, feared that the Twenty-First Amendment—which would have repealed the Eighteenth Amendment prohibiting the sale and consumption of alcohol—would be blocked by conservative (“dry”) state legislatures. The wets asked for specially called state conventions and rapidly ratified repeal—on December 5, 1933.

Thus a constitutional amendment can be stopped by one-third of either chamber of Congress or one-fourth of state legislatures—which explains why there have been only twenty-seven amendments in over two centuries.

Article VI includes a crucial provision that endorses the move away from a loose confederation to a national government superior to the states. Lifted from the New Jersey Plan, the supremacy clause states that the Constitution and all federal laws are “the supreme Law of the Land.”

Article VII outlines how to ratify the new Constitution.

Constitutional Evolution

The Constitution has remained essentially intact over time. The basic structure of governmental power is much the same in the twenty-first century as in the late eighteenth century. At the same time, the Constitution has been transformed in the centuries since 1787. Amendments have greatly expanded civil liberties and rights. Interpretations of its language by all three branches of government have taken the Constitution into realms not imagined by the founders. New practices have been grafted onto the

Constitution's ancient procedures. Intermediary institutions not mentioned in the Constitution have developed important governmental roles (Ackerman, 2005).

Amendments

Many crucial clauses of the Constitution today are in the amendments. The Bill of Rights, the first ten amendments ratified by the states in 1791, defines civil liberties to which individuals are entitled. After the slavery issue was resolved by a devastating civil war, equality entered the Constitution with the Fourteenth Amendment, which specified that “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” This amendment provides the basis for civil rights, and further democratization of the electorate was guaranteed in subsequent ones. The right to vote became anchored in the Constitution with the addition of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which stated that such a right, granted to all citizens aged eighteen years or more, could not be denied on the basis of race or sex, nor could it be dependent on the payment of a poll tax (Keyssar, 2000).

The Full Text of the Constitution

- Find the full text of the Constitution at the National Archives online at <https://www.archives.gov/founding-docs/constitution-transcript>.

Constitutional Interpretation

The Constitution is sometimes silent or vague, making it flexible and adaptable to new circumstances. Interpretations of constitutional provisions by the three branches of government have resulted in changes in political organization and practice.^[1]

For example, the Constitution is silent about the role, number, and jurisdictions of executive officers, such as cabinet secretaries; the judicial system below the Supreme Court; and the number of House members or Supreme Court justices. The first Congress had to fill in the blanks, often by altering the law (Currie, 1997).

The Supreme Court is today at center stage in interpreting the Constitution. Before becoming chief justice in 1910, Charles Evans Hughes proclaimed, “We are under a Constitution, but the Constitution is what the Court says it is.”^[2] By examining the Constitution's clauses and applying them to specific cases, the justices expand or limit the reach of constitutional rights and requirements. However, the Supreme Court does not always have the last word, since state officials and members of the national government's legislative and executive branches have their own understanding of the Constitution that they apply on a daily basis, responding to, challenging, and sometimes modifying what the Court has held (Devins & Fisher, 2004).

New Practices

Specific sections of the Constitution have evolved greatly through new practices. Article II gives the presidency few formal powers and responsibilities. During the first hundred years of the republic, presidents acted in limited ways, except during war or massive social change, and they rarely campaigned for a legislative agenda (Tulis, 1987). Article II's brevity would be turned to the office's advantage by President Theodore Roosevelt at the dawn of the twentieth century. He argued that the president is “a steward of the people...bound actively and affirmatively to do all he could for the people.” So the president is obliged to do whatever is best for the nation as long as it is not specifically forbidden by the Constitution (Tulis, 2000).

Intermediary Institutions

The Constitution is silent about various intermediary institutions—political parties, interest groups, and the media—that link government with the people and bridge gaps caused by a separation-of-powers system. The political process might stall in their absence. For example, presidential elections and the internal organization of Congress rely on the party system. Interest groups represent different people and are actively involved in the policy process. The media are fundamental for conveying information to the public about government policies as well as for letting government officials know what the public is thinking, a process that is essential in a democratic system.

Key Takeaways

The Constitution established a national government distinguished by federalism, separation of powers, checks and balances, and bicameralism. It divided power and created conflicting institutions—between three branches of government, across two chambers of the legislature, and between national and state levels. While the structure it created remains the same, the Constitution has been

changed by amendments, interpretation, new practices, and intermediary institutions. Thus the Constitution operates in a system that is democratic far beyond the founders' expectations.

Exercises

1. Why was conflict between the different branches of government built into the Constitution? What are the advantages and disadvantages of a system of checks and balances?
2. How is the Constitution different from the Articles of Confederation? How did the authors of the Constitution address the concerns of those who worried that the new federal government would be too strong?
3. What do you think is missing from the Constitution? Are there any constitutional amendments you would propose?

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Wood, G. S., *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), chap. 6.

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1. The power of all three branches to develop the vague language of the Constitution is well documented in Neal Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004). ↩
 2. Hughes was then Governor of New York. Quoted in Edward S. Corwin, *The Constitution and What It Means Today* (Princeton, NJ: Princeton University Press, 1954), xiii. ↩
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2.4: The Constitution in the Information Age

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How do the media portray the Constitution?
2. How do the media depict the politicians charged with fulfilling the Constitution’s vision of public life?
3. What are the effects of the media’s depiction of the Constitution?

We have seen that the Constitution is a political document adopted for political reasons in a highly political process. Yet the text of the Constitution, and the structure of power it created, are almost entirely above political controversy. It is an object of pride for almost all Americans.

The Constitution as a Sacred Document

The official presentation of the Constitution in public buildings show it as a sacred document, demonstrating its exalted status. The original document is ensconced in what is called a “Shrine” at the National Archives.



Figure 2.8: Not far from the “Shrine” in the National Archives, the twentieth-century re-creation by Howard Chandler Christy hangs in the US Capitol. The eye is carried toward the beatific glow around the document itself, George Washington standing proudly as its guardian. The atmosphere is of nobility, grandeur, and calm, not base self-interest and conflict—though the latter characterized the convention at least as much. [Wikimedia Commons](#) – public domain.

The media rarely show the Constitution or the structure of the political system as a cause of political problems. However, media depictions of the politicians charged with fulfilling the Constitution’s vision in public life are far less positive.

Let us return to our discussion at the beginning of this chapter. The news declared a “constitutional crisis” during the aftermath of the 2000 presidential election. The covers of *Time*, *Newsweek*, and *US News & World Report* all displayed the manuscript of the Constitution and its boldly emblazoned preamble, “We the People.” The stories reported the 4–3 vote by the Florida Supreme Court, which ordered a statewide recount of that state’s vote (the vote that would decide the national outcome), and the US Supreme Court’s 5–4 order to halt the recount and hear the Bush campaign’s appeal. Both *Newsweek* and *US News & World Report* superimposed the word “CHAOS” on the Constitution; *Newsweek* showed the word looming menacingly beneath the torn, seemingly fragile document.

All three news magazines lamented that the Constitution was threatened by unscrupulous, self-interested politicians intruding into the realm of dispassionate principle. To quote *Newsweek*, “The endless election has not been a grand contest of famous legal gladiators contesting broad constitutional principles...[but] a local fight, a highly personal shoving match driven by old grudges

and vendettas” (Thomas & Isikoff, 2000). Yet it was the complex electoral and federal system devised in the Constitution itself that caused much of the crisis.

Entertainment media occasionally present stories about the Constitution and the structure of power it created. Consider the familiar tale of a lone individual bravely fighting to restore a wayward political system to its virtuous roots. In the 1930s, Director Frank Capra perfected the genre in a series of Hollywood movies that reached its height in the classic 1939 film *Mr. Smith Goes to Washington* (Note 2.43 “Enduring Image”).

📌 Enduring Image

Mr. Smith Goes to Washington

- James Madison’s portrayal in the Federalist papers of sacrosanct institutions and fallible politicians finds its movie version in Frank Capra’s *Mr. Smith Goes to Washington* (Rose, 1980; Maland, 1980). Upon its 1939 release, it was hugely popular and a critical success, second only to *Gone with the Wind* in box-office receipts and Oscar nominations. The title alone has recurred repeatedly in political talk across the decades ever since.
- *Mr. Smith* begins when a senator dies. The governor, pushed to appoint either a party hack or a reformer, picks instead his sons’ “Boy Ranger” leader, resonantly named Jefferson Smith (James Stewart). The naive Smith heads to the capital under the wing of the state’s senior senator, Joseph Paine (Claude Rains), who entrusts Smith to the dead senator’s cynical secretary, Clarissa Saunders (Jean Arthur). Paine is a onetime associate of Smith’s father, a crusading editor, and has sold out to the state’s political boss. At Paine’s urging, Smith submits a bill proposing a national boys’ camp but later learns that the site has been bought by the boss to sell at a huge profit to the government for a dam Paine is proposing. Smith refuses to back down, and a fake corruption charge is launched against him with devastating results. About to resign in disgrace, Smith visits the Lincoln Memorial. Sustained by the love and political know-how of Saunders, Smith fights back by a filibuster on the Senate floor. The Washington reporters who had earlier scorned his innocence are transformed into his supporters by his idealism. But his home state hears little of this: the boss controls all radio stations and newspapers and brutally quashes any support. Smith faints in exhaustion when confronted with baskets full of trumped-up hate mail, but is saved when the guilt-ridden Paine tries to shoot himself and confesses to the corrupt scheme. The movie ends in a blaze of jubilation as the Senate president, apparently satisfied with Smith’s vindication, gives up gaveling for order.
- Many observers see the message of *Mr. Smith* as reassuring: the system works, preserved by the idealist individual American hero. The founders and their handiwork are viewed as above criticism. During the climactic filibuster, Smith reads the Declaration of Independence and the Constitution, lecturing the senators, “Great principles don’t get lost once they come to light—they’re right here.”
- The film endures because it is richly challenging: *Mr. Smith* is both a celebration in theory and an indictment in practice of the American political system.



Figure 2.9 Mr. Smith (James Stewart) Speaking in the Senate Chamber. Wikimedia Commons – public domain.

Mr. Smith has been a template for media depictions of the American political system. The Reese Witherspoon vehicle *Legally Blonde 2: Red, White and Blonde* (2003) follows the same formula of an idealistic individual going to Capitol Hill and redeeming the promise of the political system against crooked politicians.

Media Interactions: Why the Media Love the Constitution

Why do the media today present a rosy picture of the Constitution and the political system it created? One historic reason is that opposition to the Constitution collapsed after the Bill of Rights was added to it in 1791. Within a few years, the Constitution was no

longer an object of political controversy. Even during the Civil War, the ultimate “constitutional crisis,” both sides were faithful to the cherished principles of the Constitution—at least as each side read them.

The Constitution is the essential framework for the work of reporters as well as politicians. Reporters rely on order and regularity to perform their job day in, day out. The procedures established by the Constitution—such as how presidents are elected; how a bill becomes a law; how the president, Congress, and the Supreme Court vie for power—are the basis for continuing sagas that reporters narrate across days, months, even years (Fishman, 1980).

The Constitution also gives the media an easy symbol with which they can display their idealism, a perhaps unattainable (and un-Madisonian) political system in which officials work efficiently, cooperatively, and selflessly in the public interest.

Media Consequences

This positive media portrayal of the Constitution encourages reverence for the political system even when there is much criticism of the officials in that system (Huntington, 1981). Typical are the results of a public opinion poll conducted during 1992, a year marked by high public unhappiness with government. Not surprisingly, the survey showed that the public was highly critical of how the president and members of Congress were handling their jobs. But the public did not criticize the *institutions* of Congress and the presidency themselves. Ninety-one percent said they approved of “the constitutional structure of government” (Hibbing & Theiss-Morse, 1995). Political scientists John Hibbing and Elizabeth Theiss-Morse who conducted the research concluded, “People actually see two quite different political systems...Anything associated with the constitutional system elicits a positive response... To the extent there are problems with the political system it is because we have deviated from what was outlined in the Constitution, not because that outline was flawed” (Hibbing & Theiss-Morse, 1995).

Yet many of the media’s indictments against politicians are for behaviors encouraged by the Constitution. Reporters and the mass media often criticize American politicians for “squabbling” and “bickering.” But the separation of powers, as the founders designed it, is supposed to *encourage* conflict within the legislature and between the three branches.

The Constitution is a remarkably terse document. Generations have worked to evolve its meanings in over two centuries of politics and policies. Americans may rarely question the Constitution itself, but they surely disagree and debate over how its principles should be applied. In the chapters to follow, we will see many contemporary examples of politics around the Constitution in the information age—from constitutional amendments, to disputes between the branches over the powers of each, to the meanings of the Constitution’s clauses when applied in public policy.

Key Takeaways

The media usually portray the Constitution and most of the institutions it established favorably and above politics. Yet, the Constitution was—and remains—a political document created and developed in political ways for political purposes. In part because of the media’s presentation, the public finds little to criticize in the Constitution, even as it is quick to disparage public officials. Nonetheless, the Constitution continues to be the object of political engagement in the twenty-first century.

Exercises

1. Think about the movies you’ve seen. Do any of them present the Constitution in a negative light? What do they see as the source of problems with the American political system, if not the Constitution?
2. Why do you think Americans tend to idealize the Constitution? Do you think there are disadvantages to having an idealized view of the Constitution?

Civic Education

Gregory Watson and the Twenty-Seventh Amendment

- The message of civic education is the relevance and importance of politics. If the workings of the American political system are not what we like, there are ways to change structures, policies, and political practices.
- An unusual example is provided by Gregory Watson.^[1] In 1982, as a sophomore at the University of Texas at Austin, Watson found a stimulating topic for a government class essay: The Bill of Rights, as drafted by Madison and passed by Congress, originally included *twelve* amendments. Only ten were ratified by the states and included in the Constitution.
- In 1982, congressional pay raises were controversial, and Watson concluded that this issue made one of the two unratified amendments pertinent: “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” Only six of the thirteen states had ratified this

amendment by 1791. But Watson noticed that the amendment had no time limit. In his essay, he laid out the history of the amendment and urged that it be ratified by thirty-two more states. His instructor, dubious that a constitutional amendment could be revived after almost two hundred years, gave Watson's paper a C.

- Undeterred, Watson launched a campaign to get state legislatures to pass this congressional compensation amendment. His first successes were with Maine in 1983 and Colorado in 1984. The news media began paying attention. The story of legislators voting themselves pay raises and news of scandals over congressional perks of office resonated with the public; the momentum shifted in Watson's favor. In 1992, Michigan became the thirty-eighth state to ratify the amendment. Congress recognized Watson's efforts in what became the Twenty-Seventh Amendment to the Constitution—203 years after their congressional forebears had passed it.

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2.5: Recommended Reading

Belkin, Carol. *A Brilliant Solution: Inventing the American Constitution*. New York: Harcourt, 2002. An astute, readable account of the creation of the Constitution.

Davis, Sue, and J. W. Peltason. *Corwin and Peltason's Understanding the Constitution*, 16th ed. Belmont, CA: Wadsworth, 2003. An indispensable clause-by-clause guide to the Constitution.

Devins, Neal, and Louis Fisher. *The Democratic Constitution*. New York: Oxford University Press, 2004. A sweeping, persuasive account of how everyone in American politics helps define the meaning of the Constitution.

Riker, William H. *The Strategy of Rhetoric: Campaigning for the American Constitution*. New Haven, CT: Yale University Press, 1996. A distinguished political scientist's posthumously published work recounting the many tactics of the ratification campaign.

Storing, Herbert. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press, 1988. A valuable appreciation of the Anti-Federalist approach to governance.

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2.6: Recommended Viewing

Founding Brothers (2002). This History Channel documentary based on Joseph Ellis's best-selling account explores the policies and personalities of post-Revolutionary America.

The Great McGinty (1940). Preston Sturges's first effort as director is a comedy about a hobo rising through the ranks of a party machine to become governor and spoiling it all by going honest.

Mr. Smith Goes to Washington (1939). Frank Capra's classic drama of a lone, idealistic individual single-handedly (but with a woman's love and help) fighting corrupt individuals within a sacrosanct political system.

The Patriot (2000). A South Carolina farmer and veteran of the wars with France (Mel Gibson) reluctantly takes up arms as a guerrilla fighter in the Revolution and struggles with his political identity and the meaning of self-government.

Rebels and Redcoats (2003). A lively four-hour documentary featuring a British military historian's perspective of the Revolution as a bloody civil war.

1776 (1972). The movie adaptation of the Broadway musical comedy hit vividly portrays the high-minded and self-interested political struggles leading to the Declaration of Independence.

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CHAPTER OVERVIEW

3: Federalism

- [3.1: Federalism as a Structure for Power](#)
- [3.2: The Meanings of Federalism](#)
- [3.3: Why Federalism Works \(More or Less\)](#)
- [3.4: Federalism in the Information Age](#)
- [3.5: Recommended Reading](#)
- [3.6: Recommended Viewing](#)

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3.1: Federalism as a Structure for Power

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is federalism?
2. What powers does the Constitution grant to the national government?
3. What powers does the Constitution grant to state governments?

The Constitution and its amendments outline distinct powers and tasks for national and state governments. Some of these constitutional provisions enhance the power of the national government; others boost the power of the states. Checks and balances protect each level of government against encroachment by the others.

National Powers

The Constitution gives the national government three types of power. In particular, Article I authorizes Congress to act in certain enumerated domains.

Exclusive Powers

The Constitution gives exclusive powers to the national government that states may not exercise. These are foreign relations, the military, war and peace, trade across national and state borders, and the monetary system. States may not make treaties with other countries or with other states, issue money, levy duties on imports or exports, maintain a standing army or navy, or make war.

Concurrent Powers

The Constitution accords some powers to the national government without barring them from the states. These concurrent powers include regulating elections, taxing and borrowing money, and establishing courts.

National and state governments both regulate commercial activity. In its commerce clause, the Constitution gives the national government broad power to “regulate Commerce with foreign Nations, and among the several States and with the Indian tribes.” This clause allowed the federal government to establish a national highway system that traverses the states. A state may regulate any and all commerce that is entirely within its borders.

National and state governments alike make and enforce laws and choose their own leaders. They have their own constitutions and court systems. A state’s Supreme Court decision may be appealed to the US Supreme Court provided that it raises a “federal question,” such as an interpretation of the US Constitution or of national law.

Implied Powers

The Constitution authorizes Congress to enact all laws “necessary and proper” to execute its enumerated powers. This necessary and proper clause allows the national government to claim implied powers, logical extensions of the powers explicitly granted to it. For example, national laws can and do outlaw discrimination in employment under Congress’s power to regulate interstate commerce.

States’ Powers

The states existed before the Constitution, so the founders said little about their powers until the Tenth Amendment was added in 1791. It holds that “powers not delegated to the United States...nor prohibited by it [the Constitution] to the States, are reserved to the States...or to the people.” States maintain inherent powers that do not conflict with the Constitution. Notably, in the mid-nineteenth century, the Supreme Court recognized that states could exercise police powers to protect the public’s health, safety, order, and morals (License Cases, 1847).

Reserved Powers

Some powers are reserved to the states, such as ratifying proposed amendments to the Constitution and deciding how to elect Congress and the president. National officials are chosen by state elections.

Congressional districts are drawn within states. Their boundaries are reset by state officials after the decennial census. So the party that controls a state's legislature and governorship is able to manipulate districts in its favor. Republicans, having taken over many state governments in the 2010 elections, benefited from this opportunity.

National Government's Responsibilities to the States

The Constitution lists responsibilities the national government has to the states. The Constitution cannot be amended to deny the equal representation of each state in the Senate. A state's borders cannot be altered without its consent. The national government must guarantee each state "a republican form of government" and defend any state, upon its request, from invasion or domestic upheaval.

States' Responsibilities to Each Other

Article IV lists responsibilities states have to each other: each state must give "full faith and credit" to acts of other states. For instance, a driver's license issued by one state must be recognized as legal and binding by another.

No state may deny "privileges and immunities" to citizens of other states by refusing their fundamental rights. States can, however, deny benefits to out-of-staters if they do not involve fundamental rights. Courts have held that a state may require newly arrived residents to live in the state for a year before being eligible for in-state (thus lower) tuition for public universities, but may not force them to wait as long before being able to vote or receive medical care.

Officials of one state must extradite persons upon request to another state where they are suspected of a crime.

States dispute whether and how to meet these responsibilities. Conflicts sometimes are resolved by national authority. In 2003, several states wanted to try John Muhammad, accused of being the sniper who killed people in and around Washington, DC. The US attorney general, John Ashcroft, had to decide which jurisdiction would be first to put him on trial. Ashcroft, a proponent of capital punishment, chose the state with the toughest death-penalty law, Virginia.

"The Supreme Law of the Land" and Its Limits

Article VI's supremacy clause holds that the Constitution and all national laws are "the supreme law of the land." State judges and officials pledge to abide by the US Constitution. In any clash between national laws and state laws, the latter must give way. However, as we shall see, boundaries are fuzzy between the powers national and state governments may and may not wield. Implied powers of the national government, and those reserved to the states by the Tenth Amendment, are unclear and contested. The Constitution leaves much about the relative powers of national and state governments to be shaped by day-to-day politics in which both levels have a strong voice.

A Land of Many Governments

"Disliking government, Americans nonetheless seem to like governments, for they have so many of them" (Derthick, 2001). [Table 3.1 "Governments in the United States"](#) catalogs the 87,576 distinct governments in the fifty states. They employ over eighteen million full-time workers. These numbers would be higher if we included territories, Native American reservations, and private substitutes for local governments such as gated developments' community associations.

Table 3.1 Governments in the United States

| | |
|---|--------|
| National government | 1 |
| States | 50 |
| Counties | 3,034 |
| Townships | 16,504 |
| Municipalities | 19,429 |
| Special districts | 35,052 |
| Independent school districts | 13,506 |
| Total governmental units in the United States | 87,576 |

Source: US Bureau of the Census, categorizing those entities that are organized, usually chosen by election, with a governmental character and substantial autonomy.

States

In one sense, all fifty states are equal: each has two votes in the US Senate. The states also have similar governmental structures to the national government: three branches—executive, legislative, and judicial (only Nebraska has a one chamber—unicameral—legislature). Otherwise, the states differ from each other in numerous ways. These include size, diversity of inhabitants, economic development, and levels of education. Differences in population are politically important as they are the basis of each state’s number of seats in the House of Representatives, over and above the minimum of one seat per state.

States get less attention in the news than national and local governments. Many state events interest national news organizations only if they reflect national trends, such as a story about states passing laws regulating or restricting abortions (Leland, 2010).

A study of Philadelphia local television news in the early 1990s found that only 10 percent of the news time concerned state occurrences, well behind the 18 percent accorded to suburbs, 21 percent to the region, and 37 percent to the central city (Kaniss, 1991). Since then, the commitment of local news outlets to state news has waned further. A survey of state capitol news coverage in 2002 revealed that thirty-one state capitols had fewer newspaper reporters than in 2000 (Layton & Dorroh, 2002).

Native American Reservations

In principle, Native American tribes enjoy more independence than states but less than foreign countries. Yet the Supreme Court, in 1831, rejected the Cherokee tribe’s claim that it had the right as a foreign country to sue the state of Georgia. The justices said that the tribe was a “domestic dependent nation” (*Cherokee Nation v. Georgia*, 1831). As wards of the national government, the Cherokee were forcibly removed from land east of the Mississippi in ensuing years.

Native Americans have slowly gained self-government. Starting in the 1850s, presidents’ executive orders set aside public lands for reservations directly administered by the national [Bureau of Indian Affairs](#) (BIA). During World War II, Native Americans working for the BIA organized to gain legal autonomy for tribes. Buttressed by Supreme Court decisions recognizing tribal rights, national policy now encourages Native American nations on reservations to draft constitutions and elect governments (Wilkinson, 1987; Castile, 1998; Philip, 1999).



Figure 3.1 Foxwoods Advertisement: The image of glamour and prosperity at casinos operated at American Indian reservations, such as Foxwoods (the largest such casino) in Connecticut, is a stark contrast with the hard life and poverty of most reservations. Ted Murphy – [Hard Rock Casino](#) – CC BY 2.0.

Since the Constitution gives Congress and the national government exclusive “power to regulate commerce...with the Indian tribes,” states have no automatic authority over tribe members on reservations within state borders (*Worcester v. Georgia*, 1832). As a result, many Native American tribes have built profitable casinos on reservations within states that otherwise restrict most gambling (*Montana v. Blackfeet Tribe of Indians*, 1985; *California v. Cabazon Band of Indians*, 1987; *Seminole Tribe of Florida v. Florida*, 1996).

Local Governments

All but two states are divided into administrative units known as counties.^[1] States also contain municipalities, whether huge cities or tiny hamlets. They differ from counties by being established by local residents, but their powers are determined by the state. Cutting across these borders are thousands of school districts as well as special districts for drainage and flood control, soil and water conservation, libraries, parks and recreation, housing and community development, sewerage, water supply, cemeteries, and fire protection.^[2]

Key Takeaways

Federalism is the American political system's arrangement of powers and responsibilities among—and ensuing relations between—national, state, and local governments. The US Constitution specifies exclusive and concurrent powers for the national and state governments. Other powers are implied and determined by day-to-day politics.

Exercises

1. Consider the different powers that the Constitution grants exclusively to the national government. Explain why it might make sense to reserve each of those powers for the national government.
2. Consider the different powers that the Constitution grants exclusively to the states. Explain why it might make sense to reserve each of those powers to the states.
3. In your opinion, what is the value of the “necessary and proper” clause? Why might it be difficult to enumerate all the powers of the national government in advance?

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Worcester v. Georgia, 31 US 515 (1832).

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1. The two exceptions are Alaska, which has boroughs that do not cover the entire area of the state, and Louisiana, where the equivalents of counties are parishes. ←
 2. The US Bureau of the Census categorizes those entities that are organized (usually chosen by election) with a governmental character and substantial autonomy. US Census Bureau, *Government Organization: 2002 Census of Governments* 1, no. 1: 6, www.census.gov/prod/2003pubs/gc021x1.pdf. ←
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3.2: The Meanings of Federalism

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How has the meaning of federalism changed over time?
2. Why has the meaning of federalism changed over time?
3. What are states' rights and dual, cooperative, and competitive federalism?

The meaning of federalism has changed over time. During the first decades of the republic, many politicians held that states' rights allowed states to disobey any national government that in their view exceeded its powers. Such a doctrine was largely discredited after the Civil War. Then dual federalism, a clear division of labor between national and state government, became the dominant doctrine. During the New Deal of the 1930s, cooperative federalism, whereby federal and state governments work together to solve problems, emerged and held sway until the 1960s. Since then, the situation is summarized by the term competitive federalism, whereby responsibilities are assigned based on whether the national government or the state is thought to be best able to handle the task.

States' Rights

The ink had barely dried on the Constitution when disputes arose over federalism. Treasury Secretary Alexander Hamilton hoped to build a strong national economic system; Secretary of State Thomas Jefferson favored a limited national government. Hamiltonian and Jeffersonian factions in President George Washington's cabinet led to the first political parties: respectively, the Federalists, who favored national supremacy, and the Republicans, who supported states' rights.

Compact Theory

In 1798, Federalists passed the Alien and Sedition Acts, outlawing malicious criticism of the government and authorizing the president to deport enemy aliens. In response, the Republican Jefferson drafted a resolution passed by Kentucky's legislature, the first states' rights manifesto. It set forth a compact theory, claiming that states had voluntarily entered into a "compact" to ratify the Constitution. Consequently, each state could engage in "nullification" and "judge for itself" if an act was constitutional and refuse to enforce it (McDonald, 2000). However, Jefferson shelved states' rights when, as president, he directed the national government to purchase the enormous Louisiana Territory from France in 1803.

Alien and Sedition Acts

- Read more about the Alien and Sedition Acts online at <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html>.
- Jefferson's Role: Read more about Jefferson's role online at <http://www.loc.gov/exhibits/jefferson/jefffed.html>.

Slavery and the Crisis of Federalism

After the Revolutionary War, slavery waned in the North, where slaves were domestic servants or lone farmhands. In the South, labor-intensive crops on plantations were the basis of Southern prosperity, which relied heavily on slaves (McPherson, 1988).

In 1850, Congress faced the prospect of new states carved from land captured in the Mexican War and debated whether they would be slave or free states. In a compromise, Congress admitted California as a free state but directed the national government to capture and return escaped slaves, even in free states. Officials in Northern states decried such an exertion of national power favoring the South. They passed state laws outlining rights for accused fugitive slaves and forbidding state officials from capturing fugitives (Morris, 1974). The Underground Railroad transporting escaped slaves northward grew. The saga of hunted fugitives was at the heart of Harriet Beecher Stowe's 1852 novel *Uncle Tom's Cabin*, which sold more copies proportional to the American population than any book before or since.

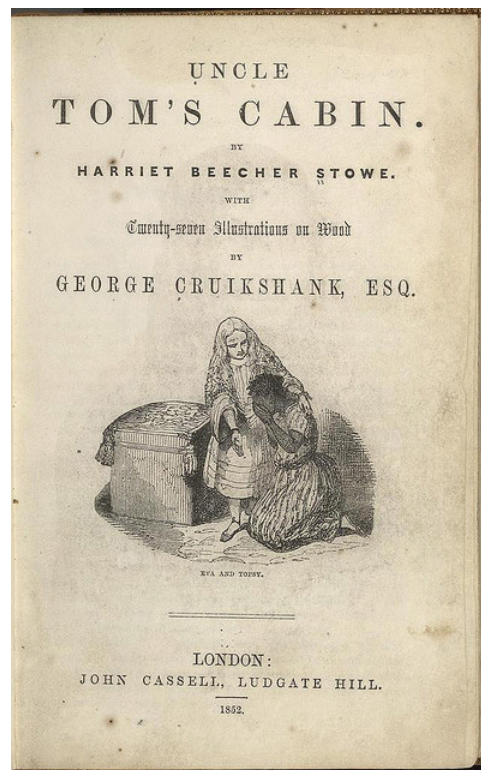


Figure 3.2 Lithograph from *Uncle Tom's Cabin*. The plight of fugitive slaves, vividly portrayed in the mega best seller of the 1850s, *Uncle Tom's Cabin*, created a crisis in federalism that led directly to the Civil War. Moosevl - [Uncle Tom's Cabin](#) - CC BY 2.0.

In 1857, the Supreme Court stepped into the fray. Dred Scott, the slave of a deceased Missouri army surgeon, sued for freedom, noting he had accompanied his master for extended stays in a free state and a free territory.^[1] The justices dismissed Scott's claim. They stated that blacks, excluded from the Constitution, could never be US citizens and could not sue in federal court. They added that any national restriction on slavery in territories violated the Fifth Amendment, which bars the government from taking property without due process of law. To many Northerners, the Dred Scott decision raised doubts about whether *any* state could effectively ban slavery. In December 1860, a convention in South Carolina repealed the state's ratification of the Constitution and dissolved its union with the other states. Ten other states followed suit. The eleven formed the Confederate States of America (see [Note 3.19 "Enduring Image"](#)).

The Underground Railroad and The Dred Scott Case

- Learn more about the Underground Railroad online at <http://www.pbs.org/wgbh/aia/part4/4p2944.html>.
- Learn more about the Dred Scott case from the Library of Congress at <http://www.loc.gov/rp/program/bib/ourdocs/DredScott.html>.

Enduring Image

The Confederate Battle Flag

- The American flag is an enduring image of the United States' national unity. The Civil War battle flag of the Confederate States of America is also an enduring image, but of states' rights, of opposition to a national government, and of support for slavery. The blue cross studded with eleven stars for the states of the Confederacy was not its official flag. Soldiers hastily pressed it into battle to avoid confusion between the Union's Stars and Stripes and the Confederacy's Stars and Bars. After the South's defeat, the battle flag, often lowered for mourning, was mainly a memento of gallant human loss (Bonner, 2002).
- The flag's meaning was transformed in the 1940s as the civil rights movement made gains against segregation in the South. One after another Southern state flew the flag above its capitol or defiantly redesigned the state flag to incorporate it. Over the last sixty years, a myriad of meanings arousing deep emotions have become attached to the flag: states' rights; Southern

regional pride; a general defiance of big government; nostalgia for a bygone era; racist support of segregation; or “equal rights for whites” (Horwitz, 1998; Martinez et al., 1998).



Confederate Flag Sally Tudor – CONFEDERATE FLAG2 – CC BY-NC 2.0.

- The battle flag appeals to politicians seeking resonant images. But its multiple meanings can backfire. In 2003, former Vermont governor Howard Dean, a candidate for the Democratic presidential nomination, addressed the Democratic National Committee and said, “White folks in the South who drive pickup trucks with Confederate flag decals on the back ought to be voting with us, and not them [Republicans], because their kids don’t have health insurance either, and their kids need better schools too.” Dean received a rousing ovation, so he probably thought little of it when he told the *Des Moines Register*, “I still want to be the candidate for guys with Confederate flags in their pickup trucks.”^[2] Dean, the Democratic front runner, was condemned by his rivals who questioned his patriotism, judgment, and racial sensitivity. Dean apologized for his remark.^[3]

The South’s defeat in the Civil War discredited compact theory and nullification. Since then, state officials’ efforts to defy national orders have been futile. In 1963, Governor George Wallace stood in the doorway of the University of Alabama to resist a court order to desegregate the all-white school. Eventually, he had no choice but to accede to federal marshals. In 1994, Pennsylvania governor Robert Casey, a pro-life Democrat, decreed he would not allow state officials to enforce a national order that state-run Medicaid programs pay for abortions in cases of rape and incest. He lost in court (Shapiro, 1995).

Dual Federalism

After the Civil War, the justices of the Supreme Court wrote, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States” (*Texas v. White*, 1869). They endorsed dual federalism, a doctrine whereby national and state governments have clearly demarcated domains of power. The national government is supreme, but only in the areas where the Constitution authorizes it to act.

The basis for dual federalism was a series of Supreme Court decisions early in the nineteenth century. The key decision was *McCulloch v. Maryland* (1819). The Court struck down a Maryland state tax on the Bank of the United States chartered by Congress. Chief Justice Marshall conceded that the Constitution gave Congress no explicit power to charter a national bank (*McCulloch v. Maryland*, 1819), but concluded that the Constitution’s necessary-and-proper clause enabled Congress and the national government to do whatever it deemed “convenient or useful” to exercise its powers. As for Maryland’s tax, he wrote, “the power to tax involves the power to destroy.” Therefore, when a state’s laws interfere with the national government’s operation, the latter takes precedence. From the 1780s to the Great Depression of the 1930s, the size and reach of the national government were relatively limited. As late as 1932, local government raised and spent more than the national government or the states.

McCulloch v. Maryland

- Read more about *McCulloch v. Maryland* (1819) online at http://www.pbs.org/wnet/supremecourt/antebellum/landmark_mcculloch.html.

On two subjects, however, the national government increased its power in relationship to the states and local governments: sin and economic regulation.

The Politics of Sin

National powers were expanded when Congress targeted obscenity, prostitution, and alcohol (Morone, 2003). In 1872, reformers led by Anthony Comstock persuaded Congress to pass laws blocking obscene material from being carried in the US mail. Comstock had a broad notion of sinful media: all writings about sex, birth control, abortion, and childbearing, plus tabloid newspapers that allegedly corrupted innocent youth.



Figure 3.3: The first book by Anthony Comstock, who headed the New York Society for the Suppression of Vice, aimed at the supposedly corrupting influence of the tabloid media of the day on children and proposed increasing the power of the national government to combat them. [Wikimedia Commons](#) – public domain.

As a result of these laws, the national government gained the power to exclude material from the mail even if it was legal in individual states.

The power of the national government also increased when prostitution became a focus of national policy. A 1910 exposé in *McClure's* magazine roused President William Howard Taft to warn Congress about prostitution rings operating across state lines. The ensuing media frenzy depicted young white girls torn from rural homes and degraded by an urban “white slave trade.” Using the commerce clause, Congress passed the Mann Act to prohibit the transportation “in interstate commerce...of any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose” (Morone, 2003). The bill turned enforcement over to a tiny agency concerned with antitrust and postal violations, the Bureau of Investigations. The Bureau aggressively investigated thousands of allegations of “immoral purpose,” including unmarried couples crossing state lines to wed and interracial married couples.

The crusade to outlaw alcohol provided the most lasting expansion of national power. Reformers persuaded Congress in 1917 to bar importation of alcohol into dry states, and, in 1919, to amend the Constitution to allow for the nationwide prohibition of alcohol. Pervasive attempts to evade the law boosted organized crime, a rationale for the Bureau of Investigations to bloom into the Federal Bureau of Investigation (FBI), the equivalent of a national police force, in the 1920s.

Prohibition was repealed in 1933. But the FBI under J. Edgar Hoover, its director from the 1920s to the 1970s, continued to call attention through news and entertainment media to the scourge of organized crime that justified its growth, political independence, and Hoover’s power. The FBI supervised film depictions of the lives of criminals like John Dillinger and long-running radio and television shows like *The FBI*. The heroic image of federal law enforcement would not be challenged until the 1960s when the

classic film *Bonnie and Clyde* romanticized the tale of two small-time criminals into a saga of rebellious outsiders crushed by the ominous rise of authority across state lines.

Economic Regulation

Other national reforms in the late nineteenth century that increased the power of the national government were generated by reactions to industrialization, immigration, and urban growth. Crusading journalists decried the power of big business. Upton Sinclair's 1906 novel *The Jungle* exposed miserable, unsafe working conditions in America's factories. These reformers feared that states lacked the power or were reluctant to regulate railroads, inspect meat, or guarantee food and drug safety. They prompted Congress to use its powers under the commerce clause for economic regulation, starting with the Interstate Commerce Act in 1887 to regulate railroads and the Sherman Antitrust Act in 1890 to outlaw monopolies.

The Supreme Court, defending dual federalism, limited such regulation. It held in 1895 that the national government could only regulate matters *directly* affecting interstate commerce (*United States v. E. C. Knight*, 1895). In 1918, it ruled that Congress could not use the commerce clause to deal with local matters like conditions of work. The national government could regulate interstate commerce of harmful products such as lottery tickets or impure food (*Hammer v. Dagenhart*, 1918).

Cooperative Federalism

The massive economic crises of the Great Depression tolled the death knell for dual federalism. In its place, cooperative federalism emerged. Instead of a relatively clear separation of policy domains, national, state, and local governments would work together to try to respond to a wide range of problems.

The New Deal and the End of Dual Federalism

Elected in 1932, Democratic president Franklin Delano Roosevelt (FDR) sought to implement a "New Deal" for Americans amid staggering unemployment. He argued that the national government could restore the economy more effectively than states or localities. He persuaded Congress to enact sweeping legislation. New Deal programs included boards enforcing wage and price guarantees; programs to construct buildings and bridges, develop national parks, and create artworks; and payments to farmers to reduce acreage of crops and stabilize prices.

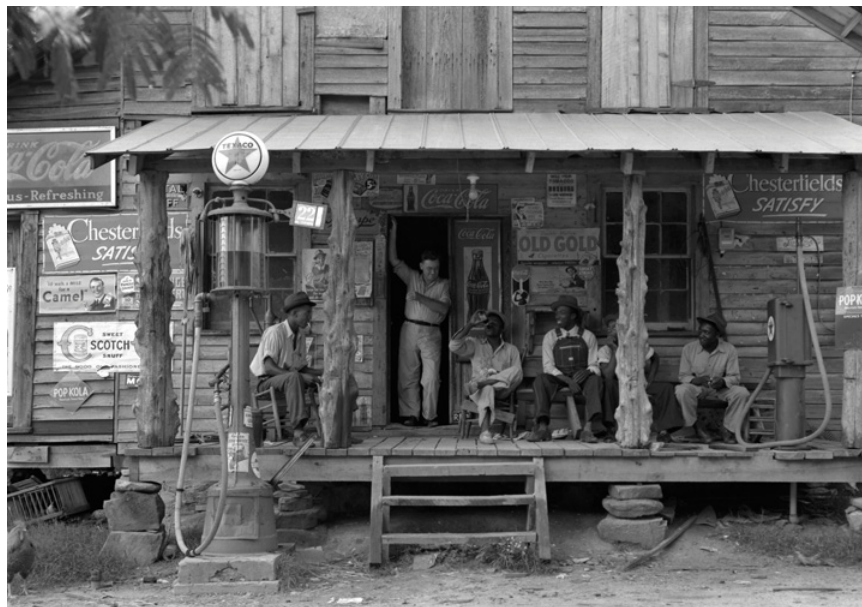


Figure 3.4 Dorothea Lange Photograph: The 1930s New Deal programs included commissioning photographers to document social conditions during the Great Depression. The resultant photographs are both invaluable historical documents and lasting works of art. Wikimedia Commons – public domain.

By 1939, national government expenditures equaled state and local expenditures combined (Anton, 1988). FDR explained his programs to nationwide audiences in "fireside chats" on the relatively young medium of radio. His policies were highly popular, and he was reelected by a landslide in 1936. As we describe in Chapter 15 "The Courts", the Supreme Court, after rejecting several New Deal measures, eventually upheld national authority over such once-forbidden terrain as labor-management relations,

minimum wages, and subsidies to farmers (National Labor Relations Board v. Jones & Laughlin Steel, 1937; United States v. Darby, 1941; Wickard v. Filburn, 1942). The Court thereby sealed the fate of dual federalism.

The New Deal and Fireside Chats

- Learn more about the New Deal online at <http://www.archives.gov/research/alic/reference/new-deal.html>.
- Read the Fireside Chats online at <http://docs.fdrlibrary.marist.edu/firesi90.html>.

Grants-in-Aid

Cooperative federalism's central mechanisms were grants-in-aid: the national government passes funds to the states to administer programs. Starting in the 1940s and 1950s, national grants were awarded for infrastructure (airport construction, interstate highways), health (mental health, cancer control, hospital construction), and economic enhancement (agricultural marketing services, fish restoration) (Walker, 1999).

Grants-in-aid were cooperative in three ways. First, they funded policies that states already oversaw. Second, categorical grants required states to spend the funds for purposes specified by Congress but gave them leeway on how to do so. Third, states' and localities' core functions of education and law enforcement had little national government supervision (Derthick, 2001).

Competitive Federalism

During the 1960s, the national government moved increasingly into areas once reserved to the states. As a result, the essence of federalism today is competition rather than cooperation (Peterson, Rabe, & Wong, 1986; Derthick, 2001).

Judicial Nationalizing

Cooperative federalism was weakened when a series of Supreme Court decisions, starting in the 1950s, caused states to face much closer supervision by national authorities. As we discuss in Chapter 4 "Civil Liberties" and Chapter 5 "Civil Rights", the Court extended requirements of the Bill of Rights and of "equal protection of the law" to the states.

The Great Society

In 1963, President Lyndon Johnson proposed extending the New Deal policies of his hero, FDR. Seeking a "Great Society" and declaring a "War on Poverty," Johnson inspired Congress to enact massive new programs funded by the national government. Over two hundred new grants programs were enacted during Johnson's five years in office. They included a Jobs Corps and Head Start, which provided preschool education for poor children.

The Great Society undermined cooperative federalism. The new national policies to help the needy dealt with problems that states and localities had been unable or reluctant to address. Many of them bypassed states to go straight to local governments and nonprofit organizations (Walker, 1999).

The Great Society

- Read more about the Great Society online at <http://www.pbs.org/johngardner/chapters/4.html>.

Obstacles and Opportunities

In competitive federalism, national, state, and local levels clash, even battle with each other.^[4] Overlapping powers and responsibilities create friction, which is compounded by politicians' desires to get in the news and claim credit for programs responding to public problems.

Competition between levels of federalism is a recurring feature of films and television programs. For instance, in the eternal television drama *Law and Order* and its offshoots, conflicts between local, state, and national law enforcement generate narrative tension and drama. This media frame does not consistently favor one side or the other. Sometimes, as in the film *The Fugitive* or stories about civil rights like *Mississippi Burning*, national law enforcement agencies take over from corrupt local authorities. Elsewhere, as in the action film *Die Hard*, national law enforcement is less competent than local or state police.

Mandates

Under competitive federalism, funds go from national to state and local governments with many conditions—most notably, directives known as mandates.^[5] State and local governments want national funds but resent conditions. They especially dislike “unfunded mandates,” according to which the national government directs them what to do but gives them no funds to do it.

After the Republicans gained control of Congress in the 1994 elections, they passed a rule to bar unfunded mandates. If a member objects to an unfunded mandate, a majority must vote to waive the rule in order to pass it. This reform has had little impact: negative news attention to unfunded mandates is easily displaced by dramatic, personalized issues that cry out for action. For example, in 1996, the story of Megan Kanka, a young New Jersey girl killed by a released sex offender living in her neighborhood, gained huge news attention. The same Congress that outlawed unfunded mandates passed “Megan’s Law”—including an unfunded mandate ordering state and local law enforcement officers to compile lists of sex offenders and send them to a registry run by the national government.

Key Takeaways

Federalism in the United States has changed over time from clear divisions of powers between national, state, and local governments in the early years of the republic to greater intermingling and cooperation as well as conflict and competition today. Causes of these changes include political actions, court decisions, responses to economic problems (e.g., depression), and social concerns (e.g., sin).

Exercises

1. What view of federalism allowed the Confederate states to justify seceding from the United States? How might this view make it difficult for the federal government to function in the long run?
2. What are the differences between dual federalism and cooperative federalism? What social forces led to the federal state governments working together in a new way?
3. How is federalism portrayed in the movies and television shows you’ve seen? Why do you think it is portrayed that way?

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3.3: Why Federalism Works (More or Less)

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. How do national, state, and local governments interact to make federalism work more or less?
2. How are interest groups involved in federalism?
3. What are the ideological and political attitudes toward federalism of the Democratic and Republican parties?

When Hurricane Katrina hit New Orleans and the surrounding areas on August 29, 2005, it exposed federalism's frailties. The state and local government were overwhelmed, yet there was uncertainty over which level of government should be in charge of rescue attempts. Louisiana governor Kathleen Blanco refused to sign an order turning over the disaster response to federal authorities. She did not want to cede control of the National Guard and did not believe signing the order would hasten the arrival of the troops she had requested. President Bush failed to realize the magnitude of the disaster, then believed that the federal response was effective. In fact, as was obvious to anyone watching television, it was slow and ineffective. New Orleans mayor C. Ray Nagin and state officials accused the Federal Emergency Management Agency (FEMA) of failing to deliver urgently needed help and of thwarting other efforts through red tape.

Hurricane Katrina was an exceptional challenge to federalism. Normally, competition between levels of government does not careen out of control, and federalism works, more or less. We have already discussed one reason: a legal hierarchy—in which national law is superior to state law, which in turn dominates local law—dictates who wins in clashes in domains where each may constitutionally act.

There are three other reasons (Nugent, 2009). First, state and local governments provide crucial assistance to the national government. Second, national, state, and local levels have complementary capacities, providing distinct services and resources. Third, the fragmentation of the system is bridged by interest groups, notably the intergovernmental lobby that provides voices for state and local governments. We discuss each reason.

Applying Policies Close to Home

State and local governments are essential parts of federalism because the federal government routinely needs them to execute national policy. State and local governments adjust the policies as best they can to meet their political preferences and their residents' needs. Policies and the funds expended on them thus vary dramatically from one state to the next, even in national programs such as unemployment benefits (Dye, 1990; Peterson, 1995).

This division of labor, through which the national government sets goals and states and localities administer policies, makes for incomplete coverage in the news. National news watches the national government, covering more the political games and high-minded intentions of policies than the nitty-gritty of implementation. Local news, stressing the local angle on national news, focuses on the local impact of decisions in distant Washington (see [Note 3.29 "Comparing Content"](#)).

Comparing Content

Passage of No Child Left Behind Act

- The No Child Left Behind (NCLB) Act vastly expanded the national government's supervision of public education with requirements for testing and accountability. Amid the final push toward enacting the law, Washington reporters for national newspapers were caught up in a remarkable story: the bipartisan coalition uniting staunch opponents President George W. Bush and liberal senator Edward Kennedy (D-MA) civilly working together on a bold, historic piece of legislation. Dana Milbank's *Washington Post* story was typical. Milbank termed the bill "the broadest rewriting of federal education policy in decades," and he admired "Washington's top bipartisan achievement of 2001" (Milbank, 2002). The looming problems of funding and implementing the act were obscured in the national media's celebration of the lovefest.
- By contrast, local newspapers across the country calculated the benefits and costs of the new legislation on education in their states and localities—in particular, how much money the state would receive under NCLB and whether or not the law's requirements and deadlines were reasonable. On January 9, 2002, the *Boston Globe's* headline was "Mass. Welcomes Fed \$; Will Reap \$117M for Schools, Testing," and the *Denver Post* noted, "Colorado to Get \$500 million for Schools" (Hayward, 2002; Whaley, 2002)

- Local newspapers sought out comments of state and local education officials and leaders of local teachers' unions, who were less smitten by the new law. The *Sacramento Bee* published a lengthy front-page story by reporter Erika Chavez on January 3, shortly before Bush signed the law. Chavez contrasted the bill's supporters who saw it as "the most meaningful education reform in decades" with opponents who found that "one crucial aspect of the legislation is nothing more than a pipe dream." Discussing the bill's provision that all teachers must be fully credentialed in four years, a staffer at the State Department of Education was quoted as saying "The numbers don't add up, no matter how you look at them." The California Teachers' Association's president called it "fantasy legislation," adding, "It's irresponsible to pass this kind of law and not provide the assistance needed to make the goals attainable. I can't understand the reason or logic that went into this legislation. It's almost a joke" (Chavez, 2002).

Complementary Capacities

The second reason federalism often works is because national, state, and local governments specialize in different policy domains (Peterson, 1995). The main focus of local and state government policy is economic development, broadly defined to include all policies that attract or keep businesses and enhance property values. States have traditionally taken the lead in highways, welfare, health, natural resources, and prisons (Anton, 1988). Local governments dominate in education, fire protection, sewerage, sanitation, airports, and parking.

The national government is central in policies to serve low-income and other needy persons. In these redistributive policies, those paying for a service in taxes are not usually those receiving the service (Peterson, Rave, & Wong, 1986). These programs rarely get positive coverage in the local news, which often shows them as "something-for-nothing" benefits that undeserving individuals receive, not as ways to address national problems (Peterson, Rabe, & Wong, 1986).

States cannot effectively provide redistributive benefits. It is impossible to stop people from moving away because they think they are paying too much in taxes for services. Nor can states with generous benefits stop outsiders from moving there—a key reason why very few states enacted broad health care coverage (Rom & Peterson, 1990)—and why President Obama pressed for and obtained a national program. Note, however, that, acknowledging federalism, it is the states' insurance commissioners who are supposed to interpret and enforce many of the provisions of the new federal health law

The three levels of government also rely on different sources of taxation to fund their activities and policies. The national government depends most heavily on the national income tax, based on people's ability to pay. This enables it to shift funds away from the wealthier states (e.g., Connecticut, New Jersey, New Hampshire) to poorer states (e.g., New Mexico, North Dakota, West Virginia).

Taxes of local and state governments are more closely connected to services provided. Local governments depend mainly on property taxes, the more valuable the property the more people pay. State governments collect state income taxes but rely most on sales taxes gathered during presumably necessary or pleasurable consumer activity.

Link

Tax and Budget Information for Federal, State, and Local Governments

- Find more information about government budgets and taxes.

Federal

- State
- www.census.gov/govs/state/

Local

- www.census.gov/govs/local/

The language of "no new taxes" or "cutting taxes" is an easy slogan for politicians to feature in campaign ads and the news. As a result, governments often increase revenues on the sly, by lotteries, cigarette and alcohol taxes, toll roads, and sales taxes falling mostly on nonresidents (like hotel taxes or surcharges on car rentals) (Beamer, 1999).

The Intergovernmental Lobby

A third reason federalism often works is because interest groups and professional associations focus simultaneously on a variety of governments at the national, state, and local levels. With multiple points of entry, policy changes can occur in many ways (Anton, 1988).

In bottom-up change, a problem is first identified and addressed, but not resolved at a local level. People, and often the media, then pressure state and national governments to become involved. Bottom-up change can also take place through an interest group calling on Congress for help (Berman, 2003). In 1996, pesticide manufacturers, fed up with different regulations from state to state, successfully pushed Congress to set national standards to make for more uniform, and less rigorous, regulation.

In top-down change, breaking news events inspire simultaneous policy responses at various levels. Huge publicity for the 1991 beating that motorist Rodney King received from Los Angeles police officers propelled police brutality onto the agenda nationwide and inspired many state and local reforms (Lawrence, 2000).

Policy diffusion is a horizontal form of change (Walker, 1969). State and local officials watch what other state and local governments are doing. States can be “laboratories of democracy,” experimenting with innovative programs that spread to other states. They can also make problems worse with ineffective or misdirected policies.

These processes—bottom-up, top-down, and policy diffusion—are reinforced by the intergovernmental lobby. State and local governments lobby the president and Congress. Their officials band together in organizations, such as the National Governors Association, National Association of Counties, the US Conference of Mayors, and the National Conference of State Legislatures. These associations trade information and pass resolutions to express common concerns to the national government. Such meetings are one-stop-shopping occasions for the news media to gauge nationwide trends in state and local government.

Democrats, Republicans, and Federalism

The parties stand for different principles with regard to federalism. Democrats prefer policies to be set by the national government. They opt for national standards for consistency across states and localities, often through attaching stringent conditions to the use of national funds. Republicans decry such centralization and endorse devolution, giving (or, they say, “returning”) powers to the states—and seeking to shrink funds for the national government.

Principled distinctions often evaporate in practice. Both parties have been known to give priority to other principles over federalism and to pursue policy goals regardless of the impact on boundaries between national, state, and local governments (Posner, 1998).

So Republicans sometimes champion a national policy while Democrats look to the states. In 2004, the Massachusetts Supreme Court ruled that the state could not deny marriage licenses to same-sex couples, and officials in cities like San Francisco defied state laws and began marrying same-sex couples. Led by President George W. Bush, Republicans drafted an amendment to the US Constitution to define marriage as between a man and a woman. Bush charged that “activist judges and local officials in some parts of the country are not letting up in their efforts to redefine marriage for the rest of America” (Hulse, 2004). Democrats, seeking to defuse the amendment’s appeal, argued that the matter should be left to each of the states. Democrats’ appeal to federalism swayed several Republican senators to vote to kill the amendment.

“The American Recovery and Reinvestment Act,” enacted in February 2009, is another example. This was a dramatic response by Congress and the newly installed Obama administration to the country’s dire economic condition. It included many billions of dollars in a fiscal stabilization fund: aid to the states and localities struggling with record budget deficits and layoffs. Most Democratic members of Congress voted for the legislation even though it gave the funds unconditionally. Republicans opposed the legislation, preferring tax cuts over funding the states.

Economic Woes

The stimulus package was a stopgap measure. After spending or allocating most of the federal funds, many states and localities still faced a dire financial situation. The federal government, running a huge budget deficit, was unlikely to give the states significant additional funding. As unemployment went up and people’s incomes went down, states’ tax collections decreased and their expenditures for unemployment benefits and health care increased. Many states had huge funding obligations, particularly for pensions they owed and would owe to state workers.

State governors and legislators, particularly Republicans, had promised in their election campaigns not to raise taxes. They relied on cutting costs. They reduced aid to local governments and cities. They fired some state employees, reduced pay and benefits for

others, slashed services and programs (including welfare, recreation, and corrections), borrowed funds, and engaged in accounting maneuvers to mask debt.

At the University of California, for example, staff were put on furlough, which cut their pay by roughly 8 percent, teaching assistants were laid off, courses cut, library hours reduced, and recruitment of new faculty curtailed. Undergraduate fees (tuition) were increased by over 30 percent, provoking student protests and demonstrations.

At the local level, school districts' budgets declined as they received less money from property taxes and from the states (about one quarter of all state spending goes to public schools). They fired teachers, hired few new ones (resulting in a horrendous job market for recent college graduates wanting to teach), enlarged classes, cut programs, shortened school hours, and closed schools.

Key Takeaways

The federal system functions, more or less, because of the authority of national over state laws, which trump local laws; crucial assistance provided by states and local governments to execute national policy; the complementary capacities of the three levels of government; and the intergovernmental lobby. The functioning of the system is being challenged by the economic woes faced by government at all levels. The Democratic and Republican parties differ ideologically about federalism, although these differences can be changed to achieve political objectives.

Exercises

1. How do the perspectives of national, state, and local governments complement one another? What are the strengths of each perspective?
2. Why do you think Democrats are more likely to prefer to make policy at the national level? Why are Republicans more likely to prefer to leave policymaking to state and local governments?
3. How did conflicts between the national government and state and local governments contribute to damage caused by Hurricane Katrina? Why do you think federalism broke down in that case?

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3.4: Federalism in the Information Age

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What are the strengths and weaknesses of the media in covering federalism?
2. How are some public officials in the federal system able to use the media to advance their political agendas?
3. What effects could the new media have on people's knowledge of and commitment to federalism?

Federalism gives the American political system additional complexity and dynamism. The number of governments involved in a wide sweep of issues creates many ways for people in politics to be heard. These processes are facilitated by a media system that resembles federalism by its own merging and mingling of national, state, and local content and audiences.

Media Interactions

National, state, and local news and entertainment outlets all depict federalism. Now they are joined by new technologies that communicate across geographical boundaries.

National News Outlets

News on network television, cable news channels, and public broadcasting is aimed at a national audience. A few newspapers are also national. Reporters for these national outlets are largely based in New York and Washington, DC, and in a smattering of bureaus here and there across the country.

Local News Outlets

Local television stations transmit the news programs of the national networks to which they are affiliated. They broadcast local news on their own news shows. These shows are not devoid of substance, although it is easy to make fun of them as vapid and delivered by airheads, like Will Ferrell's character Ron Burgundy in the 2004 comic film *Anchorman*. But they have only scattered national and international coverage, and attention to local and state government policies and politics is overshadowed by stories about isolated incidents such as crimes, car chases, and fires.

Almost all newspapers are local. Stories from the wire services enable them to include national and international highlights and some state items in their news, but most of their news is local. As their staff shrinks, they increasingly defer to powerful official sources in city hall or the police station for the substance of news. The news media serving smaller communities are even more vulnerable to pressure from local officials for favorable coverage and from advertisers who want a "feel-good" context for their paid messages.

From National to Local

Local newspapers and television stations sometimes have their own correspondents in Washington, DC. They can add a local angle by soliciting information and quotes from home-state members of Congress. Or, pooling of resources lets local television broadcasts make it look as though they have sent a reporter to Washington; a single reporter can send a feed to many stations by ending with an anonymous, "Now back to you."

From Local to National

Some local stories become prominent and gain saturation coverage in the national news. Examples are the shootings at Columbine High School in Littleton, Colorado, in 1999; the murder of pregnant Laci Peterson in California on Christmas Eve 2002; the kidnapping in Utah of Elizabeth Smart in 2003; and the 2005 battle over the fate of the comatose Terri Schiavo in Florida. The cozy relationships of local officials and local reporters are dislodged when national reporters from the networks [parachute in](#) to cover the event.

In 2011, federalism took center stage with the efforts of Republican governor Scott Walker of Wisconsin, and related steps by the Republican governors of Indiana and Ohio, to save funds by stripping most of the collective bargaining power of the state's public employee unions. Stories reported on the proposed policies, Democratic legislators' efforts to thwart them, and the workers' and supporters' sit-ins and demonstrations.

Such stories expand amid attention from local and national news outlets and discussion about their meaning and import. National, state, and local officials alike find they have to respond to the problems evoked by the dramatic event (Page, 1996).

State News and State Politics

Except for certain governors and attorneys general, the local media give little space in their news to state governments and their policies. One reason is that there are only a few truly statewide news outlets like New Hampshire's *Manchester Union Leader* or Iowa's *Des Moines Register*. Another reason is that most state capitals are far from the state's main metropolitan area. Examples such as Boston and Atlanta, where the state capital is the largest city, are unusual. The four largest states are more typical: their capitals (Sacramento, Austin, Tallahassee, and Albany) are far (and in separate media markets) from Los Angeles, Houston, Miami, and New York City.

Capital cities' local news outlets do give emphasis to state government. But those cities are relatively small, so that news about state government usually goes to people involved with state government more than to the public in the state as a whole.

State officials do not always mind the lack of scrutiny of state government. It allows some of them to get their views into the media. Governors, for example, have full-time press officers as key advisors and routinely give interviews and hold news conferences. According to governors' press secretaries, their press releases are often printed word-for-word across the state; and the governors also gain positive coverage when they travel to other cities for press events such as signing legislation (Layton & Dorroh, 2002).

Media Consequences

The variety and range of national and local media offer opportunities for people in politics to gain leverage and influence. National policymakers, notably the president, use national news and entertainment media to reach a national public. But because local news media serve as a more unfiltered and thus less critical conduit to the public, they also seek and obtain positive publicity from them.

State governors and big-city mayors, especially when they have few formal powers or when they face a state legislature or city council filled with opponents, can parlay favorable media attention into political power (Beyle & Muchmore, 1983; Rosenthal, 1990; Kaniss, 1991). At best, a governor (as one wrote in the 1960s) "sets the agenda for public debate; frames the issues; decides the timing; and can blanket the state with good ideas by using access to the mass media" (Sanford, 1967).

Some state attorneys general are particularly adept and adroit at attracting positive media coverage through the causes they pursue, the (sometimes) outrageous accusations they announce, and the people they prosecute. One result is to put intolerable pressure on their targets to settle before trial. Another is reams of favorable publicity that they can parlay into a successful campaign for higher office, as Eliot Spitzer did in becoming governor of New York in 2006, and Andrew Cuomo in 2010.

But to live by the media sword is sometimes to die by it, as Governor Spitzer discovered when the media indulged in a [feeding frenzy](#) of stories about his engaging the services of prostitutes. He resigned from office in disgrace in March 2008. (See the documentary *Client 9*, listed in our "Recommended Viewing.") Indeed, news attention can be unwanted and destructive. After he was arrested in December 2008 for corruption, the widespread negative coverage Illinois governor Rod Blagojevich received in the national, state, and local media contributed to his speedy impeachment and removal from office by the state legislature the next month.

The media are also important because officials are news consumers in their own right. State legislators value news exposure to communicate to other legislators, the governor, and interest groups and to set the policy agenda (Cooper, 2002). Thus legislative staffers in Illinois conclude that news coverage is a better indicator of public opinion than polls (Herbst, 1998). The news may more heavily and quickly influence officials' views of problems and policy issues than the public's.

New Media and Federalism

New technologies that enable far-flung individuals quickly to obtain news from many locales can help people understand the many dimensions of federalism. People in politics in one state can, with a few keystrokes, find out how an issue is being dealt with in all fifty states, thus providing a boost for ideas and issues to travel more quickly than ever across state lines. The National Conference of State Legislatures, as part of its mission to "offer a variety of services to help lawmakers tailor policies that will work for their state and their constituents," maintains a website, <http://www.ncsl.org>, with a motto "Where Policy Clicks!" allowing web surfers to search the latest information from a whole range of states about "state and federal issues A to Z."

But new media create a challenge for federalism. They erode the once-close connection of media to geographically defined communities. Consumers can tune in to distant satellite and cable outlets as easily as local television stations. Cell phones make it as convenient (and cheap) to call across the country as across the street. The Internet and the web, with their listservs, websites, weblogs, chat rooms, and podcasts, permit ready and ongoing connections to groups and communities that can displace individuals' commitment to and involvement in their physical surroundings.

In one sense, new technologies simply speed up a development launched in the 1960s, when, as one scholar writes, “one type of group—the place-based group that federalism had honored—yielded to groups otherwise defined, as by race, age, disability, or orientation to an issue or cause” (Derthick, 2001).

Yet the vitality of state and local governments, presenting so many opportunities for people in politics to intervene, reminds us that federalism is not about to wither and die. In the end, the new technologies may enable individuals and groups more efficiently to manage the potentially overwhelming amount of information about what is going on in policymaking—and to navigate quickly and adroitly the dazzling and bemusing complexity of American federalism.

Key Takeaways

The US media system blends national, state, and local outlets. Issues and stories move from one level to another. This enables people in politics to gain influence but can undermine them. New media technologies, fostering quick communication across vast expanses, allows people to learn and understand more about federalism but challenge federalism's geographical foundation. Federalism seems like a daunting obstacle course, but it also opens up many opportunities for political action.

Exercises

1. How do the perspectives of the national and local media differ? Why is there relatively little coverage of state politics in the national and local media?
2. Do you get any of your news from new media? How does such news differ from the news you get from the traditional media?

Civic Education

Michael Barker versus the School Board

- As Hamilton predicted in Federalist No. 28, if the people are frustrated at one level of government, they can make their voice heard and win policy battles at another. Federalism looks like a daunting obstacle course, yet it opens up a vast array of opportunities for political action.
- Michael Barker did not set out to push the Louisiana state legislature for a new law. In 2003, Barker, a seventeen-year-old high school junior from the town of Jena, had wondered if his school district might save money on computer equipment by making smarter purchases. He sent four letters to the LaSalle Parish School Board requesting information about computer expenditures. He was rebuffed by the superintendent of schools, who notified him that a state law allowed public officials to deny requests for public records from anyone under the age of eighteen.
- Barker did not understand why minors—including student journalists—had no right to access public information. Stymied locally, he aimed at the state government. He conducted an Internet search and discovered a statewide nonprofit organization, the Public Affairs Research Council (PAR), that promotes public access. Barker contacted PAR, which helped him develop a strategy to research the issue thoroughly and contact Jena's state representative, Democrat Thomas Wright. Wright agreed to introduce House Bill 492 to strike the “age of majority” provision from the books. Barker testified in the state capital of Baton Rouge at legislative hearings on behalf of the bill, saying, “Our education system strives daily to improve upon people's involvement in the democratic process. This bill would allow young people all over the state of Louisiana to be involved with the day-to-day operations of our state government.”
- But Barker's crusade had just begun. A state senator who had a personal beef with Representative Wright tried to block passage of the bill. Barker contacted a newspaper reporter who wrote a story about the controversy. The ensuing media spotlight caused the opposition to back down. After the bill was passed and signed into law by Governor Kathleen Blanco, Barker set up a website to share his experiences and to provide advice to young people who want to influence government. This information comes from Jan Moller, “Teen's Curiosity Spurs Open-Records Bill,” *New Orleans Times-Picayune*, April 14, 2004; and Wendy Scahetzl Lesko, “Teen Changes Open-Records Law,” *Youth Activism Project, E-News*, July 2004, www.youthactivism.com/newsletter-archives/YA-July04.html.

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3.5: Recommended Reading

Berman, David R. *Local Government and the States: Autonomy, Politics, and Policy*. Armonk, NY: M. E. Sharpe, 2003. An overview of the relationship between state and local governments.

Derthick, Martha. *Keeping the Compound Republic: Essays on American Federalism*. Washington, DC: Brookings, 2001. A set of discerning essays on intergovernmental relations.

Kaniss, Phyllis. *Making Local News*. Chicago: University of Chicago Press, 1991. A pathbreaking account of how politicians and journalists interact to produce local news.

Lawrence, Regina G. *The Politics of Force: Media and the Construction of Police Brutality*. Berkeley: University of California Press, 2000. An eye-opening example of how local issues do and do not spread to national news and politics.

Peterson, Paul E. *The Price of Federalism*. Washington, DC: Brookings, 1995. An astute assessment of the contributions that national, state, and local levels can and do make to government.

Posner, Paul L. *The Politics of Unfunded Mandates: Whither Federalism?* Washington, DC: Georgetown University Press, 1998. A concise account of the ups and downs of unfunded mandates.

Shapiro, David L. *Federalism: A Dialogue*. Evanston, IL: Northwestern University Press, 1995. A distinguished legal scholar debates with himself on the pros and cons of federalism.

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3.6: Recommended Viewing

Amistad (1997). This Steven Spielberg dramatization of the legal aftermath of a revolt on a slave ship examines interactions between local, state, national, and international law.

Anchorman (2004). This vehicle for comedian Will Ferrell, set in the 1970s, spoofs the vapidness of local television news.

Bonnie and Clyde (1967). Small-time criminals become romanticized rebels in this famous revisionist take on the expansion of national authority against crime in the 1930s.

Cadillac Desert (1997). A four-part documentary about the politics of water across state lines in the American West.

Client 9: The Rise and Fall of Eliot Spitzer (2010). Alex Gibney's interviews-based documentary about the interweaving of hubris, politics, enemies, prostitution, the FBI, and the media.

The FBI Story (1959). James Stewart stars in a dramatized version of the Bureau's authorized history, closely overseen by FBI director J. Edgar Hoover.

First Blood (1982). When Vietnam vet John Rambo clashes with a monomaniacal local sheriff in this first "Rambo" movie, it takes everyone from the state troopers, the National Guard, and his old special forces colonel to rein him in.

George Wallace: Settin' the Woods on Fire (2000). A compelling documentary on the political transformations of the Alabama governor who championed states' rights in the 1960s.

Mystic River (2003). A state police officer investigating the murder of the daughter of a childhood friend faces "the law of the street" in a working-class Boston neighborhood.

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CHAPTER OVERVIEW

4: Civil Liberties

[4.1: The Bill of Rights](#)

[4.2: Religion, Speech, the Press, Assembly, and Petition](#)

[4.3: Arms, Search and Seizure, Accusation, Punishment, Property, and Privacy](#)

[4.4: Civil Liberties in the Information Age](#)

[4.5: Recommended Reading](#)

[4.6: Recommended Viewing](#)

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4.1: The Bill of Rights

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is the Bill of Rights?
2. What historical periods were central to the evolution of civil liberties protections?
3. What is the relationship of the Fourteenth Amendment to civil liberties?

The foundation of civil liberties is the Bill of Rights, the ten amendments added to the Constitution in 1791 to restrict what the national government may do.

The state conventions that ratified the Constitution obtained promises that the new Congress would consider adding a Bill of Rights. James Madison—the key figure in the Constitutional Convention and an exponent of the Constitution’s logic in the Federalist papers—was elected to the first House of Representatives. Keeping a campaign promise, he surveyed suggestions from state-ratifying conventions and zeroed in on those most often recommended. He wrote the amendments not just as goals to pursue but as commands telling the national government what it must do or what it cannot do. Congress passed twelve amendments, but the Bill of Rights shrank to ten when the first two (concerning congressional apportionment and pay) were not ratified by the necessary nine states.

Link

The Bill of Rights

- View the Bill of Rights online at <https://www.archives.gov/founding-docs/bill-of-rights>.

The first eight amendments that were adopted address particular rights. The Ninth Amendment addressed the concern that listing some rights might undercut unspoken natural rights that preceded government. It states that the Bill of Rights does not “deny or disparage others retained by the people.” This allows for unnamed rights, such as the right to travel between states, to be recognized. We discussed the Tenth Amendment in Chapter 3 “Federalism”, as it has more to do with states’ rights than individual rights.

The Rights

Even before the addition of the Bill of Rights, the Constitution did not ignore civil liberties entirely. It states that Congress cannot restrict one’s right to request a writ of habeas corpus giving the reasons for one’s arrest. It bars Congress and the states from enacting bills of attainder (laws punishing a named person without trial) or ex post facto laws (laws retrospectively making actions illegal). It specifies that persons accused by the national government of a crime have a right to trial by jury in the state where the offense is alleged to have occurred and that national and state officials cannot be subjected to a “religious test,” such as swearing allegiance to a particular denomination.

The Bill of Rights contains the bulk of civil liberties. Unlike the Constitution, with its emphasis on powers and structures, the Bill of Rights speaks of “the people,” and it outlines the rights that are central to individual freedom (Goldwin, 1997).

The main amendments fall into several broad categories of protection:

1. Freedom of expression (I)
2. The right to “keep and bear arms” (II)
3. The protection of person and property (III, IV, V)
4. The right not to be “deprived of life, liberty, or property, without due process of law” (V)
5. The rights of the accused (V, VI, VII)
6. Assurances that the punishment fits the crime (VIII)
7. The right to privacy implicit in the Bill of Rights

The Bill of Rights and the National Government

Congress and the executive have relied on the Bill of Rights to craft public policies, often after public debate in newspapers (Curtis, 2000). Civil liberties expanded as federal activities grew.

The First Century of Civil Liberties

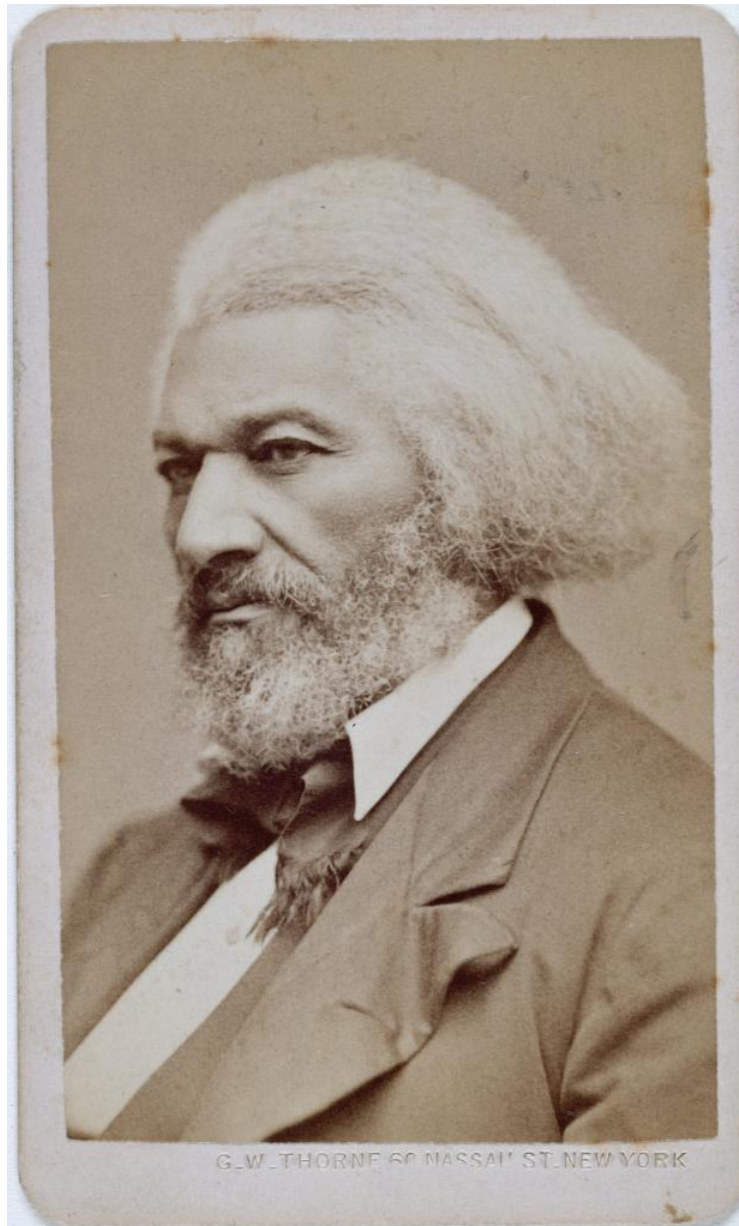


Figure 4.1 Frederick Douglass and the *North Star*: The ex-slave Frederick Douglass, like many prominent abolitionists, published a newspaper. Much of the early debate over civil liberties in the United States revolved around the ability to suppress such radical statements. [Wikimedia Commons](#) – public domain.

The first big dispute over civil liberties erupted when Congress passed the [Sedition Act](#) in 1798, amid tension with revolutionary France. The act made false and malicious criticisms of the government—including Federalist president John Adams and Congress—a crime. While printers could not be stopped from publishing, because of freedom of the press, they could be punished after publication. The Adams administration and Federalist judges used the act to threaten with arrest and imprisonment many Republican editors who opposed them. Republicans argued that freedom of the press, before or after publication, was crucial to giving the people the information they required in a republic. The Sedition Act was a key issue in the 1800 presidential election, which was won by the Republican Thomas Jefferson over Adams; the act expired at the end of Adams's term (Smith, 1956).

Debates over slavery also expanded civil liberties. By the mid-1830s, Northerners were publishing newspapers favoring slavery's abolition. President Andrew Jackson proposed stopping the US Post Office from mailing such "incendiary publications" to the South. Congress, saying it had no power to restrain the press, rejected his idea. Southerners asked Northern state officials to suppress abolitionist newspapers, but they did not comply (Curtis, 2000).

World War I

As the federal government's power grew, so too did concerns about civil liberties. When the United States entered the First World War in 1917, the government jailed many radicals and opponents of the war. Persecution of dissent caused Progressive reformers to found the [American Civil Liberties Union \(ACLU\)](#) in 1920. Today, the ACLU pursues civil liberties for both powerless and powerful litigants across the political spectrum. While it is often deemed a liberal group, it has defended reactionary organizations, such as the American Nazi Party and the Ku Klux Klan, and has joined powerful lobbies in opposing campaign finance reform as a restriction of speech.

The Bill of Rights and the States

In Chapter 5 "Civil Rights", we discuss the Fourteenth Amendment, added to the Constitution in 1868, and how its due process clause, which bars *states* from depriving persons of "life, liberty, or property, without due process of law," is the basis of civil rights. The Fourteenth Amendment is crucial to civil liberties, too. The Bill of Rights restricts only the *national* government; the Fourteenth Amendment allows the Supreme Court to extend the Bill of Rights to the states.

The Supreme Court exercised its new power gradually. The Court followed selective incorporation: for the Bill of Rights to extend to the states, the justices had to find that the state law violated a principle of liberty and justice that is fundamental to the inalienable rights of a citizen. [Table 4.1 "The Supreme Court's Extension of the Bill of Rights to the States"](#) shows the years when many protections of the Bill of Rights were applied by the Supreme Court to the states; some have never been extended at all.

Table 4.1 The Supreme Court's Extension of the Bill of Rights to the States

| Date | Amendment | Right | Case |
|------|-----------|---|---|
| 1897 | Fifth | Just compensation for eminent domain | <i>Chicago, Burlington & Quincy Railroad v. City of Chicago</i> |
| 1925 | First | Freedom of speech | <i>Gitlow v. New York</i> |
| 1931 | First | Freedom of the press | <i>Near v. Minnesota</i> |
| 1932 | Fifth | Right to counsel | <i>Powell v. Alabama (capital cases)</i> |
| 1937 | First | Freedom of assembly | <i>De Jonge v. Oregon</i> |
| 1940 | First | Free exercise of religion | <i>Cantwell v. Connecticut</i> |
| 1947 | First | Nonestablishment of religion | <i>Everson v. Board of Education</i> |
| 1948 | Sixth | Right to public trial | <i>In Re Oliver</i> |
| 1949 | Fourth | No unreasonable searches and seizures | <i>Wolf v. Colorado</i> |
| 1958 | First | Freedom of association | <i>NAACP v. Alabama</i> |
| 1961 | Fourth | Exclusionary rule excluding evidence obtained in violation of the amendment | <i>Mapp v. Ohio</i> |
| 1962 | Eighth | No cruel and unusual punishment | <i>Robinson v. California</i> |
| 1963 | First | Right to petition government | <i>NAACP v. Button</i> |
| 1963 | Fifth | Right to counsel (felony cases) | <i>Gideon v. Wainwright</i> |

| | | | |
|--|---|--|--------------------------------|
| 1964 | Fifth | Immunity from self-incrimination | <i>Mallory v. Hogan</i> |
| 1965 | Sixth | Right to confront witnesses | <i>Pointer v. Texas</i> |
| 1965 | Fifth, Ninth, and others | Right to privacy | <i>Griswold v. Connecticut</i> |
| 1966 | Sixth | Right to an impartial jury | <i>Parker v. Gladden</i> |
| 1967 | Sixth | Right to a speedy trial | <i>Klopfer v. N. Carolina</i> |
| 1969 | Fifth | Immunity from double jeopardy | <i>Benton v. Maryland</i> |
| 1972 | Sixth | Right to counsel (all crimes involving jail terms) | <i>Argersinger v. Hamlin</i> |
| 2010 | Second | Right to keep and bear arms | <i>McDonald v. Chicago</i> |
| Rights not extended to the states | | | |
| Third | No quartering of soldiers in private dwellings | | |
| Fifth | Right to grand jury indictment | | |
| Seventh | Right to jury trial in civil cases under common law | | |
| Eighth | No excessive bail | | |
| Eighth | No excessive fines | | |

Interests, Institutions, and Civil Liberties

Many landmark Supreme Court civil-liberties cases were brought by unpopular litigants: members of radical organizations, publishers of anti-Semitic periodicals or of erotica, religious adherents to small sects, atheists and agnostics, or indigent criminal defendants. This pattern promotes a media frame suggesting that civil liberties grow through the Supreme Court's staunch protection of the lowliest citizen's rights.

The finest example is the saga of Clarence Gideon in the book *Gideon's Trumpet* by Anthony Lewis, then the Supreme Court reporter for the *New York Times*. The indigent Gideon, sentenced to prison, protested the state's failure to provide him with a lawyer. Gideon made a series of handwritten appeals. The Court heard his case under a special procedure designed for paupers. Championed by altruistic civil-liberties experts, Gideon's case established a constitutional right to have a lawyer provided, at the state's expense, to all defendants accused of a felony (Lewis, 1964). Similar storylines often appear in news accounts of Supreme Court cases. For example, television journalists personalize these stories by interviewing the person who brought the suit and telling the touching individual tale behind the case (Davis, 1994).

This mass-media frame of the lone individual appealing to the Supreme Court is only part of the story. Powerful interests also benefit from civil-liberties protections. Consider, for example, freedom of expression: Fat-cat campaign contributors rely on freedom of speech to protect their right to spend as much money as they want to in elections. Advertisers say that commercial speech should be granted the same protection as political speech. Huge media conglomerates rely on freedom of the press to become unregulated and more profitable (Schauer, 1993).

Many officials have to interpret the guarantees of civil liberties when making decisions and formulating policy. They sometimes have a broader awareness of civil liberties than do the courts. For example, the Supreme Court found in 1969 that two Arizona newspapers violated antitrust laws by sharing a physical plant while maintaining separate editorial operations. Congress and the president responded by enacting the Newspaper Preservation Act, saying that freedom of the press justified exempting such newspapers from antitrust laws.

Key Takeaways

In this section we defined civil liberties as individual rights and freedoms that government may not infringe on. They are listed primarily in the Bill of Rights, the ten amendments added in 1791 by the founders to address fears about the new federal

government's potential to abuse power. Initially limited to the federal government, they now apply, though unevenly, to the states. What those liberties are and how far they extend are the focus of political conflict. They are shaped by the full range of people, processes, and institutions in American politics. Both unpopular minorities and powerful interests claim civil liberties protections to gain favorable outcomes.

Exercises

1. How does the original text of the Constitution protect civil liberties? What kinds of rights does the Bill of Rights protect that the original body of the Constitution does not?
2. Why might landmark civil-liberties cases tend to be brought by unpopular or disadvantaged groups? What are some of the ways in which powerful interests benefit from civil-liberties protections?
3. Do you think the Bill of Rights does enough to protect civil liberties? In your opinion, are there any ways in which the Bill of Rights goes too far?

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4.2: Religion, Speech, the Press, Assembly, and Petition

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What two clauses protect freedom of religion?
2. What exceptions apply to freedom of speech?
3. What protections do the media enjoy under freedom of the press?
4. What are the benefits of and limitations on the right to assemble and petition?

Civil liberties touch upon many issues. In the next two sections, we describe the current interpretation of each right and outline the policies it affects.

Freedom of Religion

The First Amendment addresses freedom of religion in two distinct clauses: the establishment clause and the free expression clause.

Establishment Clause

Rejecting the British legacy of “established” churches, the establishment clause bars Congress from giving any religion an official status. In Jefferson’s much-quoted line, the establishment clause erects a “wall of separation between church and state.” A public policy may advance religious objectives only if its aim and main effect have nothing to do with religion. Thus a law forcing stores to close on Sundays can be justified to require employers to give staff a day off but not to enforce a Sabbath (*Lemon v. Kurtzman*, 1971).

The separation of church and state has generated high-profile controversies. The drama surrounding such confrontations is often captured by the press. In the 1920s, John Thomas Scopes was found guilty of teaching evolution in violation of a Tennessee law requiring that the Bible’s version of creation be taught in public schools. Scopes’s trial, portrayed in the stage play and film *Inherit the Wind*, was a precursor of later battles.

Link

The Scopes Trial

- Learn more about the Scopes trial online at http://www.pbs.org/wgbh/evolution/library/08/2/1_082_01.html.

Starting in the 1960s, the Supreme Court, in a series of rulings, prohibited nondenominational state-issued prayers in school, Bible readings, moments of silence intended for prayer, and student-led prayers at graduation ceremonies and football games. (The Court did refrain from invalidating the Pledge of Allegiance for containing the words “under God.”) (*Engel v. Vitale*, 1962; *Abington School District v. Schempp*, 1963; *Wallace v. Jaffree*, 1985; *Lee v. Weisman*, 1992; *Santa Fe Independent School District v. Doe*, 2000). Court attempts to stop prayers are hard to enforce across the country—especially since they often receive saturation media coverage that gives most of the attention to those decrying what they see as judicial activism.

Free Exercise Clause

The First Amendment also says that Congress shall not prohibit the “free exercise” of religion. Individuals have the right to believe and practice their religions as they see fit. Government policies cannot target individuals’ religious practices or force actions that violate their religions.

This free exercise clause gained potency in 1943 when the Supreme Court ruled that Jehovah’s Witnesses could not be expelled from public schools for refusing to salute the American flag, an act contrary to their religion. More recently, the Supreme Court limited the clause’s reach when it ruled, in 1990, that American Indians had no right to disobey an Oregon law barring controlled substances in order to ingest peyote as part of a religious service. The Court held that laws hindering religious practices do not violate the First Amendment if they apply to all persons and do not openly refer to religion.

The establishment clause tries to keep religion out of government; the free exercise clause tries to keep government out of religion. The two objectives are not always compatible. For example, President George W. Bush proposed to allow government to contract with “faith-based” organizations to administer social programs. Opponents argued that this would violate the establishment clause by endorsing religion; Bush responded that existing policy violated the free exercise clause by discriminating against religious organizations.

Freedom of Speech

The Supreme Court has held that “debate on public issues should be uninhibited, robust, and wide-open” (*New York Time v. Sullivan*, 1964). Offensive speech is less detrimental than the “chilling effect” of individuals being silenced for fear of retribution. Nevertheless, freedom of speech is not absolute. Governments can regulate or restrict it under certain conditions.

Thoughts, Words, and Actions

Thoughts are deemed beyond the scope of government regulation; actions are heavily regulated by government; words are somewhere in between. The distinctions between thoughts, words, and actions are not always clear. Two cases of protest against the Vietnam War show how lines are drawn (*United States v. O’Brien*, 1968; *Tinker v. Des Moines Independent Community School District*, 1969). In one, a protester burned his draft card and was charged with violating a federal law that makes it a crime to knowingly destroy draft cards. The Court upheld the law, saying that the law aimed to maintain draft records, not to stifle free expression. When two students wore black armbands to their high school to protest the war and were suspended for violating the dress code, the Court found the policy sought to suppress free expression and sided with the students.

When Speech Can Be Regulated

The First Amendment does not protect speech that fails to contribute to the exchange of ideas that is crucial in a democracy—for instance, libel, obscenity, and “fighting words”—but such forms of speech are narrowly defined.

The publication of defamatory information, or libel, can be challenged in court. But officials and other public figures must demonstrate “actual malice” displayed by a “reckless disregard for the truth” (*New York Times v. Sullivan*, 1964). Thus libel cases are hard to win. Nonetheless, some litigants sue to shame a media organization publicly or to force it to spend money defending itself in court.

There is now a right to possess most obscene material in one’s home, but not to produce, sell, or ship it. Early in the twentieth century, obscenity laws had halted the circulation of works of art such as James Joyce’s now classic novel *Ulysses*. In 1957, the Supreme Court shrank the definition of obscenity from anything to do with sex to “material that deals with sex in a manner appealing to prurient interest” and “utterly without redeeming social importance.” This decision forced the justices to hear dozens of cases in order to distinguish obscenity from protected speech. The results were almost comical. The often elderly justices viewed numerous pornographic films, the earthy Thurgood Marshall recounting the goings-on to his patrician, sight-impaired colleague John Harlan. At one point, Justice Potter Stewart exasperatedly wrote in one opinion, “I know it when I see it.” Finally, in 1973, the Court established three rules that must be met for material to be obscene: it appeals to a prurient interest by the standards of the local community; it depicts specified sexual conduct in a patently offensive way; and it lacks serious literary, artistic, political, or scientific value (*Roth v. United States*, 1957; *Stanley v. Georgia*, 1969; *Miller v. California*, 1983).

In the 1920s, the Supreme Court allowed government to bar fighting words as long as there was a “clear and present danger” of provoking an immediate attack or acts of violence. In Justice Oliver Wendell Holmes’s terms, freedom of speech does not extend to the right to falsely yell “Fire!” in a crowded theater. Such a rule allowed for suppression of radical voices. As late as 1951, the Court upheld a federal law banning advocacy of the violent overthrow of the government. But the Court, in 1969, held that speech favoring illegal action is protected unless violence is both intended and likely (*Schenck v. United States*, 1919; *Dennis v. United States*, 1951; *Brandenburg v. Ohio*, 1969).

Even when the government cannot bar speech, it can direct its time, place, and manner. But policies may not target particular content and must provide alternative ways to express oneself. If public universities and colleges cannot ban political speeches, they may restrict them to certain parts of campus such as “Free Speech Alleys.”

Speech Codes

Like fighting words, intimidation and harassment are not protected forms of free speech. By this logic, colleges and universities in the 1980s proposed campus speech codes to forbid the demeaning or stigmatizing of persons on the basis of race, ethnicity, gender,

or sexual orientation. Proponents argued that speech codes would actually boost free speech, since “hate speech” deterred individuals who felt under attack from speaking out. But courts struck down the codes as too broad (Jacobs & Potter, 1998).

Freedom of the Press

The media claim special privileges under the First Amendment’s guarantee of “freedom of the press.”

Prior Restraint

The government is rarely able to stop material from being published. Even the Sedition Act of 1798, discussed previously in this chapter ([Section 4.1 “The Bill of Rights”](#)), did not include this prior restraint. The Supreme Court extended the ban to the states in 1931 when it struck down a Minnesota law allowing the state to suppress a “malicious, scandalous and defamatory” publication as a “public nuisance”—in this case, an abusively anti-Semitic periodical. Prior restraint is rarely justified: in 1971, the Court refused to issue an injunction sought by the executive branch against the *New York Times* and *Washington Post* on grounds of violations of national security. In the absence of the government’s *proof* that the national interest would be harmed, the Court allowed the publication of the Pentagon Papers, a leaked classified set of documents revealing decisions leading to the Vietnam War (Near v. Minnesota, 1931; *New York Times v. United States*).

News Media Privileges

Reporters have privileges that the public lacks: greater access to the workings of government, the ability to question officeholders, legal protection from revealing confidential sources, and access to government public information offices that feed them quotations and stories. But such privileges stem from policy and practice, not from constitutional rights.

Laws aimed at public disclosure, such as sunshine laws preventing government from working behind closed doors, benefit reporters. The Freedom of Information Act (FOIA), enacted in 1966, allows for access to executive agencies and commissions’ records and files closed to public inspection (Foerstel, 1999). Information obtained under the FOIA provides documentation for stories like *USA Today*’s discovery of a huge increase in the use and dealing of crack cocaine by individuals under age fifteen. Such information can also reveal scandals. In 1990, *Washington Post* reporter Ann Devroy was frustrated with White House Chief of Staff John Sununu’s refusal to answer her dogged questions about his rumored use of perquisites of office for private gain. Devroy filed for documents under the FOIA and found Sununu had used government planes to get to a dentist’s appointment and to attend postage-stamp auctions. Sununu resigned in disgrace.

Broadcast Regulation

Public policy treats different media differently. Broadcast and cable slots, being inherently limited, can be regulated by government in ways that are not allowed for print media or the Internet (*Red Lion Broadcasting Company v. Federal Communication Commission*, 1969; *Turner Broadcasting System, Inc. et al. v. Federal Communication Commission*, 1997).

The [Federal Communications Commission](#) (FCC), established in 1934, has the power to issue licenses for a given frequency on the basis of “the public interest, convenience, or necessity.” From the start, the FCC favored big commercial broadcasters aiming at large audiences. Such limits on competition enabled the establishment of hugely profitable radio (and later television) stations and networks, whose licenses—sometimes jokingly termed licenses to print money—the FCC almost automatically renewed.

The FCC has regulatory authority to penalize the broadcast media, but not cable television, for indecent content. During the halftime show at the 2004 Super Bowl, televised by CBS, singer Justin Timberlake tore the costume and briefly exposed the right breast of singer Janet Jackson. The FCC fined CBS \$550,000 for the Super Bowl “wardrobe malfunction.” The fine was overturned by a federal court of appeals in July 2008. In May 2009, the Supreme Court returned the case to the court for reconsideration.

Rights to Assemble and Petition

Rights to assemble and petition government allow individuals to come together as groups and voice concerns. These rights permitted groups that were denied the vote—such as women before 1920—to state views and pressure government (Zaeske, 2003; Lumsden, 1997). Social movements claim that the rights protect protesting; interest groups argue that the right to petition government includes all lobbying.

Like speech, freedom of assembly can be regulated in its time, place, and manner. Thus demonstrations outside political party conventions may be limited to given areas, sometimes far from the event. Moreover, the right is “to *peaceably* assemble.” Governments have the power and responsibility to ensure that protests do not turn violent. But the failure to distinguish between an

assembly and a mob has resulted in tragic consequences when unarmed protesters have lost their lives (see [Note 4.20 “Enduring Images”](#)).

Enduring Images

Kent State

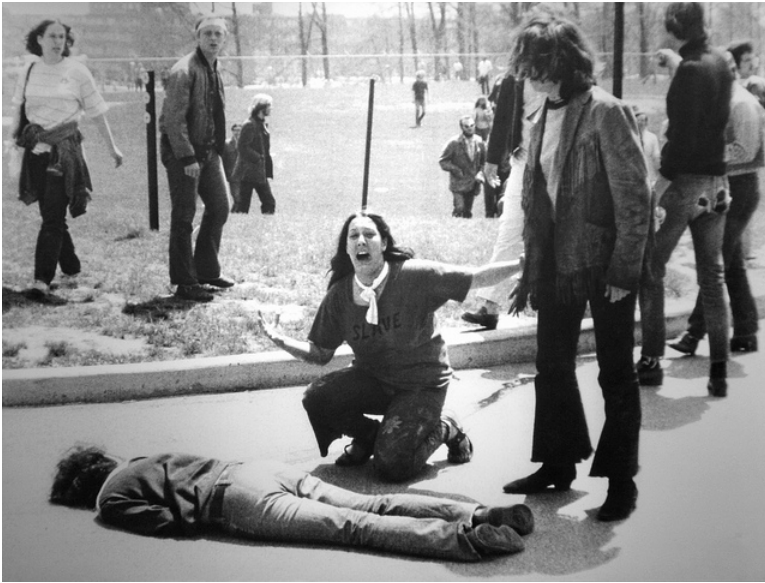
- On May 4, 1970, at Ohio’s Kent State University, National Guardsmen fired on unarmed student protesters who had planned a noontime antiwar rally. Four students, including two passersby, died. A photographer snapped fifteen-year-old runaway Mary Ann Vecchio kneeling and screaming over Jeffrey Miller’s dead body. Another showed National Guardsmen, impersonal under gas masks, aiming rifles at defenseless students. Such images conjure up brutal, deliberate repression of rights of protest. They reappear on anniversaries of the Kent State killings, with captions like, “Americans were stunned to see photographs showing the government shooting on its own citizens, here in the world’s oldest democracy where the right of political dissent is supposedly fundamental” (Schuurman, 1998).



National Guardsmen at Kent State

Tommy japan – [BE021212](#) – CC BY 2.0.

- The enduring image, however, is of Mary Ann Vecchio. One reason is its emotional resonance: it resembles a Pietà sculpture of Mary grieving over the body of Jesus. Also, American politics after the invasion of Cambodia turned from engaging in to ending the Vietnam War—in part as a response to unrest that racked the country. And President Nixon’s law-and-order rhetoric lost support as revelations of illegal misdeeds surfaced in the Watergate scandal. By the fall of 1973, a majority in a Harris poll saw the shootings as “unjustified and repressive” (New York Post, 1973). As images of Kent State were winnowed down to the one picture of Mary Ann Vecchio over the body of Jeffrey Miller, the meaning of what happened at Kent State shifted from a tragic consequence of disorder to a vivid symbol of civil liberties denied.



Mary Ann Vecchio Kneeling over the Body of Jeffrey Miller

Cliff – [Kent State University Massacre](#) – CC BY 2.0.

Key Takeaways

In this section we discussed the constitutional protections guaranteeing freedoms of religion, speech, the press, assembly, and petition. These important protections are far reaching but nonetheless subject to important exceptions.

Exercises

1. What is the difference between the establishment and the free exercise clauses of the First Amendment? How do these clauses complement one another? How might they come into conflict?
2. What kinds of speech are protected by the First Amendment? What factors determine whether speech is protected?
3. Why might it be important for citizens of a democracy to have the right to assemble and to petition their government? In your opinion, what should the limits of these rights be?

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-
1. Writings on Kent State, particularly in the immediate aftermath of the shooting, are highly politicized, with government commissions' reports being dismissed as cover-ups of conspiracies. A balanced assessment of the literature is Thomas R. Hensley and Jerry M. Lewis, eds., *Kent State and May 4th: A Social Science Perspective* (Dubuque, IA: Kendall/Hunt, 1978). [↩](#)
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4.3: Arms, Search and Seizure, Accusation, Punishment, Property, and Privacy

Learning Objectives

After reading this section, you should be able to answer the following questions:

1. What is the Second Amendment?
2. What constitutes an illegal search and seizure?
3. What amendments protect the rights of the accused?
4. What is eminent domain?
5. What is the current state of abortion as a civil liberty?

The Right to Keep and Bear Arms

The Second Amendment reads, “A well-regulated militia being necessary to the security of a free state, the right to keep and bear arms shall not be infringed.” Is this a right of self-defense that is akin to the protection of one’s dwelling guaranteed by other amendments? (Malcom, 1994) Or is it simply a basis for states to build militias, balancing off the standing army of the national government—in which case the gradual replacement of volunteer state militias by the National Guard rendered the Second Amendment obsolete? (Uviller & Merkel, 2002)

Most crime rates in the United States are similar to those of countries such as Canada or Australia. But the United States has a far higher rate of violent crime, in part because of the greater availability of firearms. A large majority of the public supports restrictions on the sale of firearms, but few policies have been enacted to do so. Although opponents of gun control are outnumbered, they are more likely than supporters to vote on this issue.

Policy debate on gun control usually occurs only after a dramatic, heavily covered news event like an assassination or a massacre at a school. One political scientist described the result as “furious politics, marginal policy” (Spitzer, 1995). For example, after the killings of Martin Luther King Jr. and Robert Kennedy in 1968, Congress debated President Lyndon Johnson’s proposal for a federal system of firearm registration and licensing of gun owners but passed only limited, ineffective legislation. In 1994, dramatic fights over banning assault weapons and mandating a waiting period for gun purchases produced a law with huge loopholes when it failed to cover gun shows.

The “right to keep and bear arms” has been debated by the public and politicians more than by courts. But in June 2008, the Supreme Court, by a vote of 5–4, ruled that individuals have the right to bear arms. This decision, an interpretation of the Second Amendment, struck down the District of Columbia’s thirty-two-year-old law banning the possession of handguns (*District of Columbia v. Heller*, 2008). In June 2010, the Court, again by a vote of 5–4, applied the ruling to cities and states by overturning Chicago’s ban on handguns (*McDonald v. Chicago*, 2010). The Court has not prohibited all legislation and limitation of guns, but such governmental actions would likely conflict with the Court’s interpretation of the Second Amendment.

Searches and Seizures

The Fourth Amendment prevents the government from conducting “unreasonable searches and seizures.” A reasonable search is conducted with a warrant issued by a judge and based on probable cause. What is “unreasonable” varies with how much privacy people can expect when they are being searched. Cars are less private than houses, so rules for searches of cars are less stringent. And government agencies can state reasons to compel persons not suspected of a crime to submit to searches and seizures. The goal of preventing airplanes from being hijacked authorizes mandatory searches of persons and their property before boarding aircraft and allows the confiscation of objects deemed dangerous.

Electronic Searches

New technologies complicate searches and seizures. In 1967, the Supreme Court ruled that the Fourth Amendment did not simply restrict physical entry: it “protects people, not places” (*Olmstead v. United States*, 1928). The pivotal test is whether a person has “a legitimate expectation of privacy” regardless of the technological means used to search. Thus the Court has held that the use of heat-sensing devices able to find intensive marijuana farms inside closets requires a search warrant as much as would a physical entry to one’s house (*Kyllo v. US*, 2001).

New technologies can also intrude into formerly private domains hitherto free from the potentially prying eye of government. For example, e-mail passes through many portals en route to delivery, each of which may be available for search without the sender's or receiver's knowledge. E-mail and web searches are still available in shadowy form even after the hard drive has seemingly been erased, and they can be searched for key words or other patterns efficiently. Police and prosecutors now have new weapons at their disposal in tracking down possible criminal activity.

The massive computerization of information tempts the government even more. In May 2004, the Government Accountability Office (GAO) released a report on data mining. It documented 52 federal agencies conducting 122 projects to collect, analyze, and use identifiable information on US persons for national security and law enforcement purposes. These numbers, which omit classified projects, are probably low-ball estimates.

Electronic Eavesdropping

In 2006, newspapers leaked word of a secret executive order signed by President George W. Bush authorizing electronic eavesdropping on computerized and cell phone conversation without a warrant (Lichtblau, 2008). Bush claimed that the inherent powers of the president and Congress's authorization of force to respond to the 9/11 attacks allowed him to initiate this policy. Members of Congress, unhappy that the program had been put into place without their knowledge, supported legislation obliging the president to seek warrants from a secret court.

The Exclusionary Rule

The Fourth Amendment's exclusionary rule prevents evidence from an illegal search or seizure being introduced against a defendant in court. The Supreme Court adopted this rule for federal cases in 1914 and extended it to states in 1961.

Law enforcement officers have long bridled at the exclusionary rule and claim that "technicalities" allow guilty suspects to be set free. The Supreme Court has permitted the use in trial of seized evidence that would have been "inevitably discovered" even without an unconstitutional search—such as that "in plain view"—or which police officers acquired under a search warrant that they did not know was improperly issued (*Weeks v. United States*, 1914; *Mapp v. Ohio*, 1961; *Nix v. Williams*, 1984; *United States v. Leon*, 1984; *Massachusetts v. Sheppard*, 1984).

The Rights of the Accused

Collectively, the Fifth, Sixth and Seventh Amendments set forth procedural guarantees known as "rights of the accused," which exist through the criminal process from accusation to trial to conviction.

Innocent until Proven Guilty

The central right of the accused is the presumption that anyone charged with a crime is innocent until proven guilty in court. This rule can be hard to preserve when an accused individual has been subjected to massive unfavorable media attention prior to or during a trial. For example, the police have perfected a technique known as the "perp walk" (for "perpetrator"), allowing television cameras to film the accused—often handcuffed and in prison garb—escorted by police. Such images, repeated over and over again in news broadcasts, can lead viewers to presume guilt rather than innocence.

"Taking the Fifth"

The Constitution's Fifth Amendment gives people the right to refuse to answer questions from any entity of government if they claim such responses might lead to criminal prosecution. Claiming this right not to incriminate oneself is popularly called "taking the fifth." Witnesses may be compelled to testify only if given immunity from prosecution (*Quinn v. United States*, 1955; *Emspak v. United States*, 1955; *Ullman v. United States*, 1956).

Such restrictions frustrate law enforcement officers, who find confessions among the best means to obtain a guilty verdict.

The right against self-incrimination originally meant only that individuals could not be forced to testify against themselves during their trials. In the 1920s, the Supreme Court threw out convictions for which evidence had been gained by torture or coercion and slowly expanded the right to cover all discussions with all law enforcement officials.

By 1966, the Court was weary of issuing case-by-case decisions about whether the police had gone too far in questioning suspects. In *Miranda v. Arizona* (384 US 436), the justices, having reviewed numerous police manuals, concluded that police often tried to create an atmosphere designed to intimidate or manipulate the accused into confessing. The justices ruled that law enforcement officials must "demonstrate the use of procedural safeguards" by ensuring that the accused is "adequately and effectively apprised

of his rights.” The Miranda decision required a warning to be read to suspects prior to interrogation—this warning is known as Miranda rights—without which their statements could not be admitted as evidence in court. Suspects must be notified of the following: that they have the right to remain silent, that whatever they say can be used against them in court, that they have the right to be represented by a lawyer before and during questioning, that they have the right to have a lawyer provided by the court if they cannot afford one, and that they have the right to terminate questioning at any time.

Figure 4.2 Oliver North



- Congressional investigations that provide grants of immunity can complicate judicial proceedings. The conviction of Oliver North, a central figure in the arms-for-money Iran-Contra scandal of the 1980s, was overturned for that reason.

Wikimedia Commons – public domain.

These rights are familiar to anyone who has seen criminal detective movies or television shows.

[Video Clip](#)

Infamous *Dragnet* “Blue Boy” LSD scene

(click to see video)

- Miranda rights were effectively introduced to the American public when the tough-guy detectives of the sixties television show *Dragnet* read them to suspects they were arresting.

But are they effective? Police officers view the reading of these rights as a mere technicality. They can get information by appealing to a suspect's desire to tell his or her story and by acting as if they are on the suspect's side. Even after suspects invoke Miranda rights, officers can try to change their minds or elicit what they term off-the-record information. Eighty percent of suspects voluntarily waive their rights; many confess (White, 2001).

Trial Procedures

Over time, Supreme Court decisions have outlined processes for a suspect to be tried in court. The most important are the following:

- Individuals cannot be subject to double jeopardy; in other words, they cannot be tried again for a crime after being acquitted of it in an earlier trial. This restriction does not prevent someone acquitted in a criminal case from being sued in a civil case: actor-athlete O. J. Simpson, found not guilty of the murder of his ex-wife and her friend, was found in civil court to be responsible and financially liable for their deaths.
- Suspects must know and understand the charges and evidence against them; therefore, cases against those “incompetent to stand trial” for reasons of illness or insanity must be dismissed, and juvenile suspects cannot be tried as adults.
- The trial must be speedy, so that someone not yet proven guilty is not punished by lengthy incarceration before trial.
- Defendants for serious crimes (punishable by more than six months in prison or a \$500 fine) and those in federal civil cases have a right to a trial by an “impartial jury” of their peers.
- Defendants have a right to face and confront witnesses against them.
- The accused has a right to a defense attorney. At first, this meant only that accused persons could pay for lawyers to represent them. But the 1932 case of seven young African American men sentenced in Scottsboro, Alabama, to die on a charge of raping two white women (a charge later found to be trumped-up) persuaded the Supreme Court otherwise. The justices ruled that these defendants—poor, illiterate, and charged with a capital offense—had to be represented by a public defender, a defense attorney employed and paid by the state.

This ruling gradually extended to all defendants in federal courts, then to felony defendants in state courts, and eventually to anyone facing any jail time (Johnson v. Zerbst, 1938; Gideon v. Wainwright, 1963; Argersinger v. Hamlin, 1972). But public defenders are underpaid and overworked. And their convicted clients can win on appeal only if they can show that public defenders made serious errors, depriving them of a fair trial (United States v. Cronin, 1984).

Moreover, most charges are resolved prior to trial when a defendant agrees to plead guilty to a lesser charge. They thereby avoid being charged with—and found guilty of—a more serious crime and receiving a more severe sentence, but they lose out on the many protections of trial procedures.

The War on Terror

Civil liberties are often impaired during international crises. Witness the “war on terrorism,” which is no exception. While the revelations in April 2004 of abuse and torture of Iraqi prisoners in the Abu Ghraib prison may be a matter more for international law than civil liberties, other rights of the accused were also in question after the terrorist attacks of 9/11.

In October 2001, Congress enacted the [USA Patriot Act](#). Among other things, it authorized the attorney general to detain indefinitely a noncitizen when there are “reasonable grounds to believe” that the person is a threat to national security. Attorney General John Ashcroft praised these policies, correctly observing, “It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism” (Purdy, 2001).

The Bush administration used these powers vigorously. Hundreds of resident aliens were detained without explanation in the fall of 2001, many in solitary confinement. When the Taliban government was overthrown in Afghanistan in late 2001, American forces captured some ten thousand soldiers and other Afghans. Many of them were named “enemy combatants” (not “prisoners of war,” who would have greater protection under international law). Shackled and hooded, they were shipped to a military prison at the base at Guantánamo Bay. Some were subjected to abusive interrogation. The base was located on land the United States had leased from Cuba in perpetuity, and thus, according to the Bush administration, it was outside the jurisdiction of the federal judiciary (Mayer, 2008; Cole & Lobel, 2007).

Many rights of the accused were directly challenged by these policies: the right to know charges against oneself, the right to counsel, the right to a speedy and public trial, the right to a jury of one's peers, the right to confront adverse witnesses, and the ability to appeal decisions to a higher court.

In 2004, the Supreme Court upheld the president's power as commander in chief to name persons as enemy combatants, to hold them indefinitely under Congress's authorization of military force, and to fashion trial proceedings with less stringent standards of evidence. But that due process required that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the detention's basis before a neutral decision maker. The Court also ruled that because the United States controlled Guantánamo, all detainees there had the habeas corpus right to go to federal court to challenge their detention (Hamdi v. Rumsfeld, 2004; Rasul et al. v. Bush, 2004).

In response, the Bush administration began keeping detainees in a camp in Bagram, Afghanistan, in the theater of war, where judges could not go. And Congress passed the Military Commissions Act of 2006, removing the federal courts' jurisdiction to hear habeas corpus applications from detainees designated as enemy combatants. Then, in 2008, the Supreme Court, by a vote of 5–4, declared the Military Commissions Act unconstitutional, thereby giving back to enemy combatants their habeas corpus rights (Boumediene et al. v. Bush, 2008).

Punishment of Convicted Criminals

The Eighth Amendment also gives rights to people convicted of a crime. It aims to make the punishment fit the crime and to prohibit “cruel and unusual punishment.” Policies affected by the Eighth Amendment include the length of prison sentences, prison conditions, and the death penalty.

Prisons

Through the 1970s, prisoners were rarely expected to serve out their full sentences. Parole or “time off for good behavior” gave incentives to cooperate and acquire skills needed to reenter society. But media stories about crimes committed by paroled ex-cons impelled “truth-in-sentencing” laws—mandatory minimums or fixed sentences for given crimes.

States began adopting “three-strikes-and-you're-out” laws. These typically increase the sentence for a second felony conviction and require life in prison without parole for a third. These lengthy sentences often bear little connection to the gravity of the crimes committed.

Lengthy sentences and the fact that over three-fourths of those put in state or federal prison each year commit nonviolent crimes raise an Eighth Amendment question: does the punishment fit the crime? (Donziger ed., 1996) In 2003 the Supreme Court decided that “three strikes” was not so “grossly disproportionate” as to violate restrictions on “cruel and unusual punishment” (Ewing v. California, 2003; Lockyer v. Andrade, 2003; Solem v. Helm, 1983).

The United States is the world leader in the proportion of its population that is incarcerated. When you include those on probation or parole, about 3.2 percent of adults live under the criminal justice system's direct supervision (Donziger, ed., 1996; Butterfield, 2004).

When prison policies are reexamined, it is less for civil liberties than for their costs. States badly needed to cut expenses when the economic depression that started in 2007 slashed their tax receipts. They instituted sentencing alternatives to prison for first-time offenders, those seeking early parole, and prisoner-release programs.

Prisoners may organize to pursue common interests, such as seeking decent conditions in prison (Berkman, 1979). Inspired by 1960s civil rights movements, they claimed a denial of basic rights. Their perspectives were bolstered by Hollywood films of the 1960s and 1970s, such as *Birdman of Alcatraz*, *Cool Hand Luke*, and *One Flew Over the Cuckoo's Nest*, that vividly depicted inhumane conditions of involuntary confinement. Some inmates taught themselves to become lawyers and sued the prisons. Starting in the 1960s, the Supreme Court recognized prisoners' rights to bring suit and said the ban on “cruel and unusual punishment” included prison conditions. While harsh conditions may be part of a convict's penalty, prisoners cannot be subjected to “unnecessary and wanton” pain by the “deliberate indifference” of authorities (Cooper v. Pate, 1964; Estelle v. Gamble, 1976; Wilson v. Seiter, 1991; Lewis v. Casey, 1996).

The Death Penalty

The death penalty is now reserved for the most serious of crimes: murder and treason. In 1972, the Supreme Court threw out all state laws imposing the death penalty as a violation of due process being arbitrarily applied from one case to the next. In 1976, the

Court allowed states to impose capital punishment as long as it is decided on by a jury following a strict process, weighing mitigating and aggravating circumstances to decide if death is the most appropriate punishment (*Furman v. Georgia*, 1972; *Gregg v. Georgia*, 1976; *Woodson v. North Carolina*, 1976). After 1976, thirty-eight states reinstated the death penalty, which by then was endorsed by a strong majority of the public.

The main objection to the death penalty today is that it cannot be applied dependably enough to meet the Bill of Rights' standards for due process. Death sentences vary greatly based on the race of the convicted murderer and of the murder victim; blacks convicted of murdering a white person are far more likely to receive a death sentence than blacks convicted of murdering a black person (see [Note 4.28 "Comparing Content"](#)).

📌 Comparing Content

Victims and Capital Punishment

- Victims are everywhere in the media. But who gets to play the part? For some investigative journalists, the answer is innocent death row inmates. Building on evidence dug up by journalism professor David Protess and his students at Northwestern University, reporters for the *Chicago Tribune* compiled two devastating series about prisoners sentenced to die on faulty evidence—"Trial and Error" and "The Failure of the Death Penalty in Illinois." The first story in the series began by listing accusations against prosecutors: "They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide.... They do it to win. They do it because they won't get punished" (Armstrong & Possley, 1999).
- Evidence of mistaken convictions led Illinois governor George Ryan to declare a moratorium on capital punishment and, just before leaving office in 2003, to commute all death penalties to life in prison without parole. Days later, Ryan went on *Oprah*. The show's host, Oprah Winfrey, aired two episodes she termed "our show with the governor who emptied death row." Before the broadcast, Winfrey videotaped interviews with surviving relatives of those whose murderers had been spared the death penalty. She confronted Ryan with this video testimony of survivors describing the gruesome crimes and their sense of betrayal.



Vic – [oprah](#) – CC BY 2.0; Wikimedia Commons – CC BY 2.0.

- For investigative journalism, the victims are wrongfully convicted death row inmates, whose wrongful convictions justify a halt to the death penalty, so that the state does not put innocent people to death. This focus on the exoneration of the wrongfully convicted, sometimes by dramatic revelations of exculpatory DNA evidence, shifts the media's frame away from the victims of crime to the victims of prosecution, and may thereby shift public opinion. But for the daytime talk show, the victims are survivors of violent crime who rely on the justice system to give them what Winfrey called "closure." The future of capital punishment may depend on which frame wins.

Property Rights and Eminent Domain

The Fifth Amendment includes a takings clause: government must provide “just compensation” (usually market value) when it uses its power of eminent domain to take property for public use, or if government action removes “all the purposes for which it was acquired” (*Duquesne Light Company v. Barasch*, 1989).

Some civil liberty advocates propose expanding this right to limit government regulation. They echo Chief Justice Rehnquist, who wrote, “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation” (*Dolan v. City of Tigard*, 1994). Corporations and business associations have funded probusiness legal centers that argue that *any* regulation restricting a property’s value or use is a “taking” requiring compensation. This approach would throw out such land-use policies as zoning, rent control, wetland conservation laws, and regulations like the Endangered Species Act (Epstein, 1985).

The Supreme Court has resisted putting property rights front and center. The justices ruled in 2005 against a homeowner who contested the city’s plan to replace her economically depressed neighborhood with an office park, hotel, and conference center. They said that governments have broad discretion to take property for “public use” as long as it is put to a “public purpose,” including economic development, even when the land is transferred to other private owners (*Kelo v. New London*, 2005). In reaction, several states began to limit the uses of eminent domain.

Right to Privacy

A right to privacy is nowhere explicitly named in the Bill of Rights. However, some members of the Supreme Court recognized the right in a 1965 case. They overturned the conviction of executives of Connecticut’s Planned Parenthood for violating a state law that banned advising married couples about the use of birth control and prescribing contraceptives. One justice found privacy implicit in the First, Third, Fourth, and Fifth Amendments. Other justices found it in the Ninth Amendment’s reminder that the Bill of Rights does not exhaust the sum total of liberties (*Griswold v. Connecticut*, 1965). Justice applied the right to the states through the due process clause of the Fourteenth Amendment.

Roe v. Wade and Abortion Rights

In this 1973 decision, the Supreme Court, invoking privacy, recognized a woman’s constitutional right to an abortion in the first three months of a pregnancy (*Roe v. Wade*, 1973). Whether to have an abortion was seen as a private decision between a woman and her doctor. Before and since then, a debate has raged between two sides calling themselves “pro-choice” and “pro-life”—a debate and a divide exaggerated by the news media’s preference for vivid conflicts.

Link

Oral Arguments in *Roe v. Wade*

- Listen to oral arguments in *Roe v. Wade* at http://www.oyez.org/cases/1970-1979/1971/1971_70_18/argument.

The *Roe* decision mobilized a pro-life movement. Members of Congress sought but failed to obtain the two-thirds majorities necessary for a constitutional amendment declaring that life begins with conception, thereby recognizing the fetus as a “person” able to receive the protection of the Bill of Rights. President Reagan, elected in 1980, also pushed to reverse *Roe*. States tried to test *Roe*’s boundaries. The Court initially rejected such efforts as requiring the written consent of the woman’s spouse or her parents, demanding that abortions be performed in a hospital, or enforcing twenty-four-hour waiting periods.

By the end of the 1980s—President Reagan having named new justices to the Supreme Court—the original majority for *Roe* had eroded. In 1989, the Court limited abortion rights by ruling that the state’s interest in the fetus begins at conception, not viability; states could now regulate abortions in the first trimester (*Webster v. Reproductive Health Services*, 1989).

Roe Reaffirmed

Figure 4.3 *Roe v. Wade* Anniversary



- The justices of the Supreme Court presumably did not realize when they issued the *Roe v. Wade* decision on January 22, 1973, that its anniversary would be marked by demonstrations by opponents and counterdemonstrations of proponents in front of their building.

Wikimedia Commons – public domain.

When pro-life president George H. W. Bush named David Souter and Clarence Thomas to replace retiring pro-choice justices William Brennan and Thurgood Marshall, *Roe* seemed doomed. In 1992, the justices considered a Pennsylvania law that required a married woman’s husband to be notified before she could have an abortion and a twenty-four-hour waiting period for a woman to be provided with information about risks and consequences of abortion. But Justice Anthony Kennedy, allying with Souter and Sandra Day O’Connor (a Reagan appointee), jointly wrote an opinion. They declined to overturn *Roe*’s central tenet that a woman had a right to an abortion prior to the ability of the fetus to live outside the womb. But they scrapped the trimester scheme of *Roe* and put in a new (if less clear) test of whether a law imposes an “undue burden” on a woman’s right to an abortion. The decision supported most of the restrictions Pennsylvania had placed on abortion. It fit public opinion that was against reversing *Roe v. Wade* but in support of conditions and exceptions (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 1992).

D&X or Partial-Birth Abortion?

With the Court’s reaffirmation of *Roe*, the pro-life movement was on the defensive—until it began focusing on an unusual abortion procedure known technically as “dilate and extract” (D&X). Giving it the unsettling term “partial-birth abortion” and recounting dramatic examples of its use late in a pregnancy, the pro-life side refocused the attention of the media on the fetus and away from the pro-choice emphasis on a woman’s right to decide (with her physician) on abortion without government interference.

In 2003, Congress passed—and President George W. Bush signed—a law banning partial-birth abortion. The law allowed an exception to save the lives of women but no exception for their health. It was the first time since *Roe* that federal law criminalized an abortion procedure. With President George W. Bush’s two appointees voting in the majority, the Supreme Court upheld the law by a vote of 5–4 in April 2007 (*Gonzales v. Carhart*, 2007).

Key Takeaways

This section covered rights dealing with arms, search and seizure, the accused, punishment, property, and privacy. The Supreme Court has interpreted the Second Amendment as allowing people to bear arms. Freedom from unreasonable searches and seizures is complicated by the development of new technologies. Rights of the accused include the right to be considered innocent until proven guilty, protection against self-incrimination, the Miranda rights, and trial processes. Some policies initiated by the government’s war on terror have challenged these rights. The rights of convicted criminals apply to punishment, prison terms, and the death penalty. Property rights can conflict with the government’s power of eminent domain. Abortion is subject to Supreme Court decisions and political conflict.

Exercises

1. What rationale does the Second Amendment give for protecting the right to bear arms? What are some different ways this rationale could be interpreted?
2. How have new technologies made it difficult to determine what constitutes an unreasonable search and seizure? What information about you do you think the government should have access to?
3. What are the arguments for and against the death penalty? On what grounds do some people argue that the death penalty infringes on the rights of the accused?
4. Do you think people should have a basic right to privacy? In your opinion, does any part of the Bill of Rights seem to guarantee a right to privacy?