



- Certain elements of democracy apply to U.S.
- 3 types of democracies
  - Participatory Democracy (other names: pure, direct, face-to-face, classical)
    - Citizens more powerful because they decide everything, left up to a vote
    - Athens: males (who are not slaves)
    - If you want to change anything in govt, everyone must vote
    - Citizen must find out about issue and vote
    - Benefit
      - People decide
      - No representative who may not represent well
      - Majority wins
    - Negative
      - The people decide everything
        - May not be a good idea
        - May be short sided
        - May be looking out for themselves, not the people as a whole
      - Time
        - Takes up a lot of time to decide every little thing
        - Showing up to vote
        - Time to learn about the issues
  - Representative Democracy/Elite Democracy
    - Elements of this in US Govt
    - Idea that we are going to choose people to represent our interests and make decisions for us
    - Benefit
      - Not time consuming for people
      - They take care of time issues (becoming educated on issues; showing up and voting)
    - Create a ruling class
      - Elite class of people, career choice
      - Most people don't just say "I'm going to run for governor today"
      - Usually people who have career in politics
      - Members of congress
        - Well educated

- Wealthy
    - White males
  - Negative
    - When you have people making decisions for you, you start surrounding your vote
    - Your power ends in the voting booth
    - Less attached to people
      - Elites try to acquire more power from you
    - If there is no Bill of Rights of some sort, those elite people start thinking about own interests, not yours
  - Pluralist Democracy (see Federalist 10)
    - US has this
    - Idea that individuals are only so powerful in the govt
    - Person acting alone can only have a minimal impact
      - To have power, organize into groups
      - Find people with similar interests/concerns → try to affect change
- Social Contracts
  - Non Authoritarian systems are based on this idea
  - It is an agreement btwn people and govt which is going to try to insure that people remain in power
  - People are willing to transfer some rights to the govt
    - It is in your self interest to do so
    - Without protection of govt, your life will not be happy
    - Need for govt to protect/secure you
    - Realize you are better with govt than without it
  - Social Contract Theorists
    - Modern thinkers, reject premodern thought
    - Reject following ideas:
      - A belief in a natural aristocracy
        - People have power because they are born into the situation
        - Equality among individuals does not exist
        - Offspring get same benefit
        - If god wanted you to be in highest class, you would be
        - God said so, you are under this belief

- As a good person, you must respect what king says because God chose him to be king (premodern thought)
  - A belief in ascribed status
    - If you are born into low social status, that is where you stay no matter what
    - If you are born at upper end, that is where you will stay
    - No hope
  - System of paternalistic authority
    - You see a familial relationship with king (father figure) so....he can tell you what to do
    - He is “there to help you”
    - As a person in the family, you have certain responsibilities
      - Not suppose to think about yourself, but about the family (the elders=the king)
      - What will make the govt happy? What should I do so they will be happy?
      - Not about individualism, making choices that may not be best for you, but best for ruler/govt
  - Thomas Hobbes—The Leviathan
    - Trying to reject divine right of kingship
  - John Lock—Second Treatise on Government
    - Reject natural aristocracy
- Age of Enlightenment
  - Science challenges “pre-modern thought”
    - Things king has said is not true
    - Average people are able to figure this stuff out when king isn’t, citizens have reasoning capacity
  - Belief that people have reasoning capacity to make sound decisions and promote their own interests
  - If people have reasoning capacity, then this help to break down the idea that some are naturally superior
    - This is not to say everyone is equally the same
    - Everyone is different, but it does not go by natural superiority
  - Thus, there is a natural equality among people
- Thomas Hobbes
  - Describes life in the “state of nature” (i.e. what a world without govt would be like)
    - Chaotic
    - Violent
    - Always ends up in death for someone
  - Because we are naturally equal, we do not need a king

- Hobbes understands we need a govt, but not a natural superior one
  - People will steal what you have
    - With govt, they cannot, or will be punished
- We realize that if we do not have govt, our life will be miserable, unsafe, unstable → we are better off with govt than without
- We enter a social contract with government for safety and peace
  - Ultimately, in order to live in a civil society, ALL must be willing to make a social contract and TRANSFER natural rights (at same time) to a sovereign (A Leviathan)
    - We do this because we think through things and realize this is for the better
    - We freely come to this decision, we will respect someone as our ruler
      - Not because god has told us to
  - It's our ability to reason that show us that making the social contract will protect us
- What makes people naturally equal?
  - We all:
    - Are conceited
      - We think we're all smarter than others
      - Think we have great common sense
    - Are Self-Interested and Competitive
      - We think we can acquire what everyone else does
    - Want What Others Have
      - Keeping up with the Jones's
    - Want Respect
      - People don't like when others look down upon them
      - Part of what makes us willing to enter the social contract is they want respect
    - Want Stability, Safety and Peace
      - Do not want chaos
- Hobbes believes he is offering a "scientific" theory (based on reason; not on superstition/myths) for why people must obey an absolute monarch
  - Its not because of divine right; rather, its because of there's a THEORY OF OBLIGATION under the SOCIAL CONTRACT
    - In the past when others put theories on why you have to respect king, it was based on divine right of kingship (God chose him)
- \*\*\*State of nature (most important thing dealing with Hobbes)

- Founding father says people are natural competitive, conceited, etc (what Hobbes said)
      - Motivation is always: what is human nature?
      - When people get power, they want more
- John Locke
  - Describes the “state of nature” as a relatively peaceful society where all citizens are EQUAL and are guided by their reason
    - People are guided by reasoning capacity
  - However, life in the “state of nature” can become chaotic, since everyone is seeking his/her personal advantage
    - Eventually it all goes downhill
    - A lot of situations where people are uncomfortable
    - Violence erupts
    - Death is the ultimate; people are constantly worried about death
    - Everyone is looking out for their own personal advantage
    - Try to acquire things from other people→constantly violent
  - What makes people naturally equal?
    - We all:
      - Are competitive
        - Want what others have; we are just as good
      - Act in our own personal interest
        - What is going to make me happy?
      - Have a natural right to property (provided we do the necessary work to acquire it)
      - Want to acquire other people’s property
        - Natural tendency is for people to be lazy; steal or take away
      - Want to be judged and punished impartially
      - Want our individual interests to be protected (particularly our property rights)
        - We don’t want people taking things from us
  - The “state of nature” is governed by REASON, which teaches us that no one should harm our PROPERTY and that we have the right to protect our PROPERTY
  - We enter into a SOCIAL CONTRACT to protect our PROPERTY RIGHTS as well as have a NEUTRAL UMPIRE to judge and execute the laws
  - Locke- Limited Government
    - Under Locke’s social contract, government has a LIMITED role

- Government's only function is to preserve our LIBERTIES and PROPERTY RIGHTS
      - This is necessary for the common good (peace, stability, etc) .
      - This is all the government is suppose to do
    - Government is based on the CONSENT of the PEOPLE
      - The decision of the majority is law
  - For Locke, people enter into social contracts to preserve life, liberty, and property as well as to ensure justice
    - If we don't have govt, people will kill us for property; so we want to protect our life
    - We want to make sure people do not take from us
    - We want a neutral umpire
  - Also, the social contract is revocable
    - If the government does not hold up to its end of the deal, the contract is revocable
      - Not on an individual basis, but a majority basis
      - Society can get together, revolt, and reject contract
      - The Government is responsible, has responsibilities
- Classical Liberalism
  - Known as the "American ideology"
    - It recognizes equality of opportunity
      - We do not want things handed to people
      - However, we see that some have opportunities that others do not
    - Emphasizes importance individualism & self-reliance
      - Looking out for yourself, not looking for government to help you out
      - To pursue own interest, rely on self-reliance
  - Takes its roots from the philosophies of Hobbes and Locke
  - Major components of classical liberalism:
    - Competitive individualism
      - Straight from Hobbes and Locke
      - Idea is everyone is responsible for their own destiny
      - No one owes you anything, government doesn't owe you anything
      - If you are unhappy, compete more, work harder
      - We have responsibility to compete in society
      - Since you are competing, you have the right to pursue what is good for you
      - Merit based success
        - Smartest, best GPA, hardest worker is the most successful

- Downfalls of Competitive Individualism:
  - Materialism
    - A lot of people cannot afford these materials
  - Right to private property
    - Not just land, but your stuff!
    - Computers, phones, cars, clothes
    - If you're competing in society, you have a right to acquire that property
      - You don't feel bad that you have these things
  - Free Market Economy
    - Do not want government involved in economy
  - Limited Government
    - Insure justice; protect property. That's it.
- U.S. Constitution: NO SOCIAL RIGHTS
  - If you have social programs, they will be paid for thru taxes= less income you have=less right to private property
- This Classical Liberalism worked well in 1787, but now it does not
  - Modern day liberals are critical of going back to that original understanding
  - Want to keep principles, cannot keep original understanding in place
  - When members of Tea Party say Obama is socialist, people who study socialism may reject that

### The Founding of the U.S. Constitution

- Historical timeline
  - 1776: American Revolution- Declaration of Independence
  - 1777: Articles of Confederation (Continental Congress)
  - 1787: Constitutional Convention
  - 1789: Ratification of the U.S. Constitution
  - 1790: Creation of the Bill of Rights (12 Amendments proposed)
  - 1791: Ratification of 10 of the 12 proposed Amendments
- Conflict between England and the Colonies
  - Why England believed it was right:
    - Wanted Colonists to help pay for French and Indian war
      - As colonists, you will benefit→we are offering you safety and protection; since we are holding up our end of the bargain, you have responsibility to pay for these things
    - Colonists reject offers of representation in Parliament
    - England says we give you opportunities for rep, and you say no
      - Colonists: we don't have voting power, so it isn't really representation

- Why the colonists believed they were right:
  - Unfair taxation, such as Sugar and Tea Acts
    - Feel like they don't have fair representation
    - "you shouldn't tax us unless we have representation in Parliament"
  - Tyrannical monarch
  - Belief in popular sovereignty
- The Declaration of Independence
  - Jefferson uses Locke to defend right to revolution
    - Locke says govt. has responsibility under social contract to protect, life, liberty, and happiness
  - Jefferson argues that King George has violated the social contract with the colonists
    - The reason why we are having this revolution is because you, England, are not living up to social contract
  - Jefferson is influenced by Locke's belief in natural rights (life, liberty, and property)
    - Jefferson uses phrase "Life, Liberty, and pursuit of Happiness"
      - Changes it to this because there were very few colonists who owned property on time
      - In hopes of appealing to more colonists
- Influences from Locke in Declaration of Independence
  - —"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."
    - All people are equal
    - We are all competitive
    - Human nature makes us equal
    - Rights that come from God, natural rights → fact that we are humans gives us these rights
  - —"That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."
    - A government by consent
    - Government get its power from the people in the society; people can also take it away
  - —"That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness..."
    - Whenever any form of govt. becomes destructive, it is the right of the people to alter or to abolish it and to institute new govt.
- The DOI explains HOW King George has violated the social contract:

- —“The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over the States. To prove this, let Facts be submitted to a candid world.” (end of 2<sup>nd</sup> paragraph)
- —The DOI then lists numerous examples of the violation of the social contract:
  - (Basically the whole document, goes on and on)
  - —“He has refused his Assent of Laws...”
  - —“He has forbidden his Governors to pass Laws of immediate and pressing importance...” Etc.,
  - Jefferson starts from general statements from Locke, but then shows how King has failed to do things and has done things he shouldn't have
  - —“In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only be repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be a ruler of a free people...”
  - The DOI is so influenced by John Locke\*\*\*
    - Very important for founding of this country
- Life After the Revolution
  - African Americans
    - Remained enslaved in the South
    - Slave trade continued
    - Experienced situation that did not make them feel equal
  - Native Americans
    - Continued to lose land
  - Women
    - Lost the ability to vote and the previous limited opportunities to participate in politics
- The Articles of Confederation
  - We must learn from our mistakes and fix them
    - Clearly we cannot give power to ONE person
    - Classical republicanism: idea that you are suppose to look out for the greater good; act in disinterested fashion→when you make decision you do not think about how this helps me/my family, but how does this help society
      - This is how we will vote from now on
    - No direct democracy
  - Sovereignty rested within the STATES
  - One house legislature
    - Central govt., but states have final authority
    - Small central govt.
  - NO formal executive
  - NO formal judiciary

- Primarily concerned with limiting the powers of the CENTRAL GOVERNMENT
- STATES (Visual)
  - Continental Congress
    - Officers
      - Appointed by Congress to do some of the EXECUTIVE WORK
  - Committee of the States
    - Composed of members of each state who acted in the name of Congress between sessions
- Under the Articles of Confederation, the Continental Congress had the power to:
  - —Declare War and make peace
  - —Enter into treaties
  - —Establish and control armed forces
  - —Requisition men and money from the state
  - —Regulate coinage (but NOT paper money)
  - —Borrow money and issue bills of credit
  - —Fix uniform standards of weights and measures
  - —Create admiralty courts
  - —Create a post office
  - —Regulate Indian affairs
  - —Guarantee that citizens would still retain their rights as citizens when the traveled to another state
  - —Adjudicate states between states upon state petitioners
- Under the AOC, the Continental Congress LACKED the power to:
  - —Compel the states to respect treatise
    - Can enter into a treatise with another nation, but cannot require the states to respect it
      - This makes other nations not want to enter into treatise
  - —Compel the states to meet their military quotas
    - The state can say no, then there are no men!
    - Military becomes ineffective
  - —Regulate foreign and interstate commerce
    - States are taking advantage of each other; general problems
      - No central govt. to say this is how things will be between states
  - —Collect taxes directly from the people
    - States refuse to pay tax money→no money for central government→problems cannot be solved
  - —Compel the states to pay their share of government costs
  - —Issue paper money
    - Value of dollar fluctuates between states
    - Economy is in shambles

- Additional weakness in the Articles of Confederation:
  - Continental Congress lacked coercive power over the states.
  - The exercise of most national authority required the approval of 9 states.
    - More than majority
  - There was one vote in the Continental Congress for each state regardless of size.
  - The passage of amendments required UNANIMITY.
    - Getting every state to agree is impossible
  - Congress could pass laws but had little power to execute or enforce them
  - No executive to administer the government (no real leader)
- Shay's Rebellion (1786)
  - Rebellion by disgruntled farmers
    - Upset with state of the economy
      - Economy is in shambles because govt. can't do anything!
  - They were protesting the poor state of the economy, which was taking its toll on farmers who were jailed for not paying their debts
- The Constitutional Convention
  - Feb. 1787: Congress calls for convention to REVISE the AOC
    - An assembly of the nation's elite
    - Meetings held in secret
    - Virginia delegation had a plan for creating an entirely NEW document.
    - Major debate remained over how much power the NATIONAL government should have
    - Document is never going to work; we need to toss it and start over
- Key Principles of the New Constitution
  1. Popular Sovereignty
  2. Representative Government
  3. Federalism
  4. Enumerated (Delegated) Powers
  5. Implied (Unenumerated or Inherent) Powers
  6. Separation of Powers
  7. Checks and Balances
- Sovereignty
  - Sovereignty is where the ultimate power and authority resides in a government.
  - Typically sovereignty resides in some **institution** (e.g. Congress) or in some **person** (e.g. a King)
  - Remember, under the Articles of Confederation, sovereignty resided in the STATES.

- When the Constitution was written in 1787, the founding fathers created a NEW VERSION of sovereignty. This was an idea known as POPULAR SOVEREIGNTY.
  - Not going to reside in king, majority will
- Popular Sovereignty
  - Ultimate power resided in the PEOPLE not in an institution.
  - The Constitution embodies the PEOPLE'S WILL
  - The DOCUMENT itself is sovereign
  - Examples:
    - Preamble: "We the people..."
    - Article VI, sec. 2: "supremacy clause"
    - Article VII: Ratification of the Constitution
- Basic Ideas about Popular Sovereignty
  - Popular sovereignty is NOT the same idea as majority will!
    - Not founding father's understand of the concept
    - Figuring out people's will as it is embodied through Constitution
  - Popular sovereignty is the people's will as embodied through the U.S. Constitution.
  - These are rights that are NOT subject to the whims of a temporary majority.
  - Rather, these are rights given to the citizens that the government can never take away from the people regardless of what the majority of the people may want. (unless the Constitution is amended)
- Representative Government
  - A government in which decisions are made through representatives of the people
    - Government is to do what the majority of the people desire.
    - However, there is NOT always a DIRECT relationship to the PEOPLE.
    - It is still seen as representative since it is not a hereditary system
- Two Competing Plans
  - The Virginia Plan
    - Bicameral Legislature
    - Representation in both based on population
    - One house elected by the people; one house elected by state legislatures
      - Still rep govt because you will vote for those legislatures
    - Single executive chosen by Congress
    - Favored by large states
  - The New Jersey Plan
    - Unicameral legislature
    - Equal representation
    - Representatives elected by state legislatures
    - Multi-person executive

- Favored by small states
- The Great Compromise
  - Bicameral Legislature
    - House of Representatives based on population and chosen by the people
    - Senate based on equal representation and chosen by state legislatures
  - Single executive chosen by electoral college
    - Concern that if there were a multi-person executive; they would blame one another for when things didn't get done
  - Federal court system
- The Legislative Branch
  - Legislature: the body of government that makes laws
  - The U.S. Constitution establishes legislative power in Article I.
  - Bicameral: legislature with two chambers
    - House of Representatives
      - Represents concerns of neighborhoods
        - Close to people
      - Directly elected by people
    - Senate
      - Represents concerns of states
      - Originally, senators chose by state legislatures (NOT directly elected by the people)
      - The 17<sup>th</sup> Amendment made senators directly elected by the people
- The Executive Branch
  - Executive: the branch of government responsible for putting laws into effect
  - The U.S. Constitution establishes executive power in Article II.
  - Power resides in a single executive (the President)
    - Represents a national perspective
    - Not DIRECTLY elected by the people
    - Rather, chosen by the electoral college
- The Judicial Branch
  - Judicial power: the power to interpret laws and judge whether a law has been broken
  - The U.S. Constitution establishes judicial power in Article III.
    - Represents concerns of "the people"
    - Not directly chosen by the people (least connected to the people of all branches of government)
    - Rather, Supreme Court Justices are nominated by the President and then confirmed by a majority of the Senate
- Federalism
  - Power is divided and shared between central and regional governments

- There is separation and sharing between federal government and state government
- There are 2 levels of government.
  - Central and Regional, National and State
- Each has its appropriate sphere in government.
  - Both has power and responsibilities
  - Sometimes they will share power, sometimes they will not; usually power is separated
- A system of federalism recognizes that there are certain areas where states should not operate. It also recognizes that there are certain areas where the federal government should not operate.
- Each level has its own area of operation. Sometimes these areas are distinct and sometimes they overlap.
- Powers of the National Government
  - Article I, section 8 of U.S. Constitution specifically states what types of laws the federal legislature can pass.
    - To ensure limited government, if its not on the list you cant do it
  - EXAMPLES:
    - Lay and collect taxes
    - Regulate commerce
    - To declare war
    - To raise and support an army
    - Create currency
  - Article VI, section 2 (“Supremacy Clause” of the U.S. Constitution
    - The U.S. Constitution and laws made in accordance with it are the “supreme law of the land”
      - If you have an inconsistency between a law, the national government will step in
- Powers of the State Government
  - The Tenth Amendment of the U.S. Constitution gives the powers of the STATES
    - The federalists: we don’t have things specific b/c if we didn’t write it in the Constitution, then the states decide (b/c the states do everything else)
      - If its not listed, then the states do it
    - “The powers NOT DELEGATED to the United States by the Constitution, NOR PROHIBITED by it are reserved to the States respectively or to the people.”
    - Examples:
      - State police powers (create laws that promote the health, safety, morality and general well being of its citizens)
      - Establish local governments
      - Maintain militias (National Guard)
- Concurrent Powers

- Powers that are SHARED by the national and state governments
  - Taxing powers
  - Borrow and spend money for the general welfare
  - Pass and enforce laws
  - Create highways
- Restrictions on the National Government
  - Found in Article I, section 9 of the U.S. Constitution
    - No bills of attainder
      - Passed by federal govt, targets individuals or groups without a trial; usually a blatant statement (anyone with brown hair should be thrown in prison)
    - No *ex post facto* laws
      - Idea that there may be certain types of behavior and activities that are legal, Congress may make them illegal
      - Cannot be put in jail, or punished, for crimes when they were legal
    - Can't suspend the *writ of habeas corpus* except in cases of rebellion or invasion
      - Idea that if you are going to be detained, you need to know why, there must be evidence of the crime
    - Can't grant titles of nobility
  - Amendments I-IX of the U.S. Constitution are additional restrictions on the national government
- Restrictions on State Governments
  - States will do whatever they want as long as it is not prohibited here
  - 10<sup>th</sup> amendment is trying to put this into words
  - Found in Article I, section 10 of the U.S. Constitution
    - Can't coin money
    - Can't engage in war with a foreign country
    - No bills of attainder
    - No *ex post facto* laws
    - No titles of nobility
- Enumerated (delegated) Powers
  - Don't want national govt. to get too big, powerful, or tyrannical
  - Designed to promote a government of LIMITED powers
    - Vesting clauses of Articles I, II, & III
      - If you're dealing with making legislation, that is solely job of Congress
    - Article I, section 8
- Implied powers
  - Article I, section 8's "Necessary and Proper" clause (aka Elastic clause)
    - There may be other laws that we want Congress to pass, there may be certain issues in the future that the ntl govt should deal with, not the states, but we cannot predict future
    - Concern is that Congress will take more power, become tyrannical, take power from the states

- Thomas Jefferson very vocal: Congress will get greedy and take more and more power from states/people
  - Ninth Amendment
    - In these first 8 amendments, we tried to list rights that govt cannot take away from people, but we realize we cannot think of everything, so there are additional rights of the people that are not expressed
    - Privacy rights: choose an abortion, use birth control, euthanasia
    - Fundamental right to travel
- Separation of powers
  - Why? Makes it clear whose responsibility is what; specialization (specific group/function)
  - An institutional arrangement that assigns legislative, executive, and judicial to different persons or groups
    - Purpose is to limit the powers of each branch of govt. (an external check on power)
    - Develops specializations
    - Promotes efficiency
    - Makes it clear on who to blame for problems
- Check and Balances
  - Within system of separation of powers
  - No matter how they set it up, whoever is in power, that person will want more power
    - In case you become tyrannical/abusive, another branch will be watching you
    - This slows down results
      - Its better that nothing gets done than something gets done in a tyrannical way (Madison)
  - The principle that allows each branch of government to exercise some form of control over another branch's sphere of power
    - Purpose is to limit the powers of each branch of government (an internal check on power)
    - It is a recognition that the potential for abuse of power exists within each branch of government.
    - It's a gridlock formula
- Amending the Constitution
  - Article VII of the U.S. Constitution sets up process for amendment
  - Articles (you could amend, but needed unanimity, wanted to fix that)
  - Two ways to PROPOSE amendments to the U.S. Constitution
    - 2/3 vote in both houses of Congress
    - Constitutional convention (Needs to be requested by Congress at the request of 2/3 of the state legislatures)
  - Two ways to RATIFY (or approve) proposed amendments to the U.S. Constitution
    - Approval by  $\frac{3}{4}$  of state legislatures

- Ratifying conventions in  $\frac{3}{4}$  of the states
- The Battle over Ratification (after document is written, two camps)
  - Federalists
    - Supported ratification of the Constitution
    - Wanted strong central government
    - Concerned about security and order
    - E.g., Madison, Hamilton, Jay
  - Anti-Federalists
    - Opposed ratification of the Constitution
      - Think changes will take too much power from the states
      - Not everyone who attended convention, signed the document
    - Wanted states to have power over the federal government
    - Corruption best kept in check at the local level
    - E.g., Samuel Adams, Patrick Henry
  - After looking at the document, do you see an improvement or no? → anti or pro
- *The Federalist Papers*
  - Trying to make an argument to convince the states to ratify the Constitution; specifically geared to legislatures of New York and others
  - Most are making argument
    - You shouldn't be fearful
  - Called for ratification of the Constitution
  - Published in New York papers to persuade legislators to ratify the Constitution
  - Written by Madison, Hamilton, and Jay under the pen name Publius
- Ratification of the Constitution
  - Required support of nine of the thirteen state legislatures
  - Small states were quick to support the Constitution because of the inclusion of the Senate
  - Eventually all thirteen states ratified it (Rhode Island was last, in 1790)
- Individual Rights and Liberties
  - Original U.S. Constitution LACKED a Bill of Rights
    - This became source of controversy during ratification process
    - Many Anti-Federalists were concerned that a lack of Bill of Rights could create a tyrannical central govt
- The Federalist #84
  - Alexander Hamilton writes this to explain you don't need BOR
  - Bill of Rights unnecessary, since the Constitution already contained specific protections of rights: (Article I, section 9)
    - Prohibits bills of attainder
    - Prohibits *ex post facto* laws
    - Limits the suspension of the *writs of habeas corpus*
  - Specification of rights could be "dangerous"

- James Madison drafts a Bill of Rights
  - Over 200 amendments submitted for consideration
    - Too much! Dangerous to list this many things
  - Initially drafted a philosophical statement that read:
    - “That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from the people.”
      - People say we want you to enumerate
  - Congress rejected the statement and proposed 12 amendments for consideration of ratification by the states
  - December 15, 1791: 10 of the 12 ratified by  $\frac{3}{4}$  of the states
    - 1<sup>st</sup> and 2<sup>nd</sup> don’t get ratified at first (later one becomes ratified, 27<sup>th</sup> amendment → if you want a pay raise, it will not go into effect until the next election cycle)
      - The other one that didn’t get ratified: there must be one representative for every 30,000; once you reach 100 people in the house, then you can change it to one for every 40,000. Too many!!

Small republic → small number of factions → factional politics

Large republic → large number of factions → deliberative democracy

### Federalist #10

- Federalist #10
  - Most scholars consider Federalist #10 to be the most important Federalist Paper
  - In Federalist #10, Madison defends the creation of large republics
  - This is significant because throughout history, it was always believed that republics needed to be small
- Why do we want a LARGE REPUBLIC?
  - Madison explains that history has shown us that the most destructive and serious problem with both ancient and modern popular government has been the problem of FACTIONALISM.
  - Consequently, Madison recognized that it was necessary to eliminate, or at least NEUTRALIZE factions in the new system of government if it was going to be able to subsist and function properly.
  - Thus, a LARGE REPUBLIC is necessary to control FACTIONS.
- What are FACTIONS?
  - Factions are INTEREST GROUPS.
  - Factions are groups of people who look out for THEIR OWN PERSONAL INTERESTS in government rather than looking out for what’s good for the NATION.
- Pluralist Democracy

- In Federalist #10, Madison makes an argument for a pluralist democracy (rather than a pure democracy).
- A pluralist democracy requires interest groups to compete for attention within the political system.
- Pluralist democracy would help control factions.
- Why does a LARGE REPUBLIC promote pluralist democracy and control factions?
  - Madison pointed out that in a small republic, fewer factions would exist, since fewer people and interests would be represented within a small territory.
  - Hence, the fewer the factions, the more factional the representation.
  - However, the larger the territory, the more diverse the interests of the citizens would be, making it more difficult for a common majority to exist.
  - As a result, representation in a large republic would be **less factional, since one common interest would not exist.**
  - Furthermore, **because there would be more diversity in a large republic, representatives would be more likely set aside local interests and promote the public good.** Thus, the more factional the territory, the less factional the representation.
- In Sum:
  - The LARGER the republic the MORE FACTIONS exist.
  - The more factions that exist, the more competition there is among factions.
  - The more competition there is among factions, the more likely that politicians will have to deliberate more and do what is BEST for the NATION.

### The American System of Federalism

Think about these questions while reading:

- Has the national government taken away too much power from the states?
- Has the expansion of national power been a necessary and appropriate development in American government?

#### American Style Federalism

- **Federalism** is a hybrid arrangement.
  - Mixes elements of a **confederation** (lower level has real power) and a **unitary government** (national level monopolizes constitutional authority).
- Before adopting a federal system in the Constitution the nation had experienced both of these alternatives.
  - Monarchy/parliament – unitary.
  - Articles of Confederation – confederation.
- In a federal system, authority is divided between two or more distinct levels of government.
- In the United States the division is between the national (federal) government and the states.

## Powers of the National Govt

- Article I, section 8
  - Examples:
  - Lay and collect taxes
  - Regulate commerce
  - To declare war
  - To raise and support an army
  - Create currency
- Article VI, section 2 (“Supremacy Clause”)
  - The U.S. Constitution and laws made in accordance with it are the “supreme law of the land”

## Restrictions on the National Govt

- Found in Article I, section 9 of the U.S. Constitution
  - No bills of attainder
  - No *ex post facto* laws
  - Can’t suspend the *writ of habeas corpus* except in cases of rebellion or invasion
  - Can’t grant titles of nobility
- Amendments I-IX of the U.S. Constitution are additional restrictions on the national government

## Powers of the State Governments

- Tenth Amendment
  - “The powers NOT DELEGATED to the United States by the Constitution, NOR PROHIBITED by it are reserved to the States respectively or to the people.”
- Example:
  - State police powers: Police powers give STATES the right to make laws that are designed to protect the health, safety, morality or general well being of its citizens.

## Restrictions on State Governments

- Found in Article I, section 10 of the U.S. Constitution
  - Can’t coin money
  - Can’t engage in war with a foreign country
  - No bills of attainder
  - No *ex post facto* laws
  - No titles of nobility

## Concurrent Powers

- Powers that are SHARED by the national and state governments
  - Taxing powers
  - Borrow and spend money for the general welfare
  - Pass and enforce laws
  - Create highways

## Federalism

- Under our original version of federalism, most of the governing is going to be done by the STATES and not the national government.
  - Federalist #39 emphasizes this point.

- However, the powers of the national government have EXPANDED significantly since the founding.

#### Types of Federalism

- Two distinct forms of American federalism have been identified.
  - Dual federalism.
  - Shared federalism/Cooperative federalism

#### Two Views of Federalism

- Dual federalism
  - National and state governments responsible for separate policy areas
  - “Layer cake” model of federalism
  - Model prior to the New Deal era (1930s)
- Shared federalism OR Cooperative federalism
  - National and state governments share responsibilities for most domestic policy areas
  - “Marble cake” model of federalism
  - Model after 1930s

#### Critics

- The powers of the national government have expanded throughout American history.
- Critics of nationalization argue that the federal government has so intruded into the traditional responsibilities of states and local communities that even “shared” federalism is a misnomer.

### The Changing Balance of American Federalism

(3 Branches of federal govt. played role in causing/allowing expansion of federal power)

#### Federalism & the Marshall Court

#### Founding Fathers & The “Necessary and Proper” Clause

- Many of the founding fathers were concerned that the “necessary and proper” clause would cause Congress and the federal government to become too large and over-powerful.
  - They always talk about this in relation to the necessary and proper clause
  - The reason why it doesn’t happen b/c of the M v M case
- However, the ruling in *McCulloch v. Maryland* kept the powers under the “necessary and proper” clause LIMITED, so this clause did NOT cause the expansion of federal power.

#### Commerce Clause:

Founding fathers understood this simply as the buying and selling of goods

*Gibbons v. Ogden* (1824)

- This case is the first time that Congress EXPANDS the original meaning of the COMMERCE CLAUSE.
- As a result, the federal government begins to acquire new powers.
- Now, “commerce” includes the **transportation** and **navigation** of goods.

### Taney Court & Dual Federalism

#### Cooley v. Board of Wardens (1852)

- This case establishes a theory of “selective exclusivity.” (a.k.a. the “Cooley rule”)
- This means that if an issue is better served with a UNIFORM rule, then the issue should be decided by the NATIONAL government under the commerce clause.
- On the other hand, if an issue is better served by LOCAL DIVERSITY, then the issue should be decided on a case-by case basis by the STATE governments under their authority of the 10th Amendment.

#### Cont.

- In this point in history, the Taney Court generally tended to think that most issues were **better served by the STATES (allowing for local diversity) rather than having the national government** establish a uniform rule.

#### Dred Scott v. Sanford (1857)

- Taney Court believed the slavery issue should be left to the states.
- The Supreme Court did not support a national legislative solution to the slavery issue.

#### Civil War

- National government increases in size and power.
  - National government begins paying out pensions and disability payments

#### Reconstruction Amendments

- 13<sup>th</sup> Amendment (1865): Prohibited slavery
- 14<sup>th</sup> Amendment (1868): Prohibited states from denying civil and political rights
- 15<sup>th</sup> Amendment (1865): Voting rights for African-American men
- Expands Congress’ authority, expands national govt.’s power

#### U.S. v. E.C. Knight Co. (1895)

- Challenges the constitutionality of the Sherman Anti-Trust Act.
- This case questions whether or not Congress has the right to regulate the manufacturing and production of good under the commerce clause.
- The Supreme Court ruled that the definition of “commerce” does NOT include the manufacturing and production of goods.
- Therefore, Congress (i.e. the national government) does not have the authority under the commerce clause to regulate issues dealing with the manufacturing and production of goods.

\*\*\*\*Although there were some expansions of national power during the 19<sup>th</sup> century, the government still operates under a system of **dual federalism** during this time period.

Setting the Stage for a Stronger National Govt.  
And the Demise of Dual Federalism  
(Early 20<sup>th</sup> C – 1930s with FDR's New Deal)

Champion v. Ames (1903)

- This case establishes FEDERAL police powers.
- Police powers give STATES the right to make laws that are designed to protect the health, safety, morality or general well being of its citizens.
- ◦Prior to the case of *Champion v. Ames*, police powers ONLY were given to STATES.
- Congress can regulate commerce (i.e. buying and selling of goods as well the navigation and transportation of goods) in an effort to promote NATIONAL police powers (i.e. to protect the safety, health, morality and general well being of citizens).

Amendments to the Constitution

- 16<sup>th</sup> Amendment (1913): Federal income tax
- 17<sup>th</sup> Amendment (1913): Senate elected by the people (rather than appointed by state legislators)

Progressives

The Great Depression

- Period of severe economic crisis, high unemployment
  - Presidents in the 1920's and early 1930's felt that economic crisis should be handled by state and local governments (not the national government)
- However, when President Franklin Delano Roosevelt (FDR) was elected in 1933, he proposed a **national** solution to the problem, which he called the "New Deal"

Cooperative Federalism & The New Deal

The New Deal

- FDR's New Deal was a comprehensive set of economic regulations and relief programs (massive in size and scope) intended to fight the Great Depression.
  - Created new federal agencies, which **expanded** the role of the national government, and also required that all levels of government work together **cooperatively**.
    - EXAMPLES: Federal Housing Administration (FHA), Agricultural Adjustment Administration (AAA), National Recovery Administration (NRA).
- To justify its unprecedented intervention in the economy, FDR invoked the commerce clause.

E.C. Knight

- The ruling in *E.C. Knight* limited the government's ability to regulate business and the workplace. (e.g., it prohibited the government's ability to regulate maximum work hours, minimum wage, child labor)

- The ruling did not allow for Congress to use the commerce clause to regulate “manufacturing and production”
- Based on this understanding of federal power, the Supreme Court struck down many of FDR’s New Deal policies.
- The Supreme Court repeatedly ruled that the NATIONAL solutions proposed by the New Deal overstepped the constitutional authority of the national government and that solutions to these problems should be left to the STATES.

### FDR’s “Court-packing” Plan

#### 1937 Constitutional Revolution: “The Switch in Time that Saved Nine” (West Coast Hotel v. Parrish- 1937)

#### U.S. v. Darby (1941)

- This case expands the meaning of “commerce” once again. Specifically, it expands the powers of Congress and the federal government over the states.
- This case expanded Congress’s power tremendously because Congress (i.e. national government) could now regulate MANUFACTURING AND PRODUCTION of goods.
- It says that CONGRESS (and not the Court) should determine if something has an impact on interstate commerce.

#### Heart of Atlanta Motel v. United States (1964)

- Supreme Court grants Congress the authority to pass Title II the Civil Rights Act of 1964
- The ruling gives Congress (i.e. the national government) the authority to pass legislation that has an impact on the national economy.
- Congress can pass legislation that has a “direct and substantial relation” to the flow of interstate commerce.

#### What is “Commerce”?

- The meaning of “commerce” has expanded since the founding
  - Buying and selling of goods
  - Transportation and navigation of goods
  - Manufacturing and production of goods
  - Any action that will have an impact on the national economy (i.e. a “direct and substantial relation” to the flow of interstate commerce)
- Congress (i.e. the NATIONAL government) can impose restrictions on state and local governments for any of these reasons.
- Consequently, the NATIONAL government is regulating areas that they traditionally did not regulate in the past. (Rather, than the states regulating these areas)
- How does the federal government induce cooperation from the constitutionally independent states?
  - Carrots and sticks.

### The Carrot: Federal Grants to the States

- Categorical grants: Congress gives detailed instructions, regulation and compliance requirements to the state (or local) governments on a specific policy.
  - If the states comply, they will receive money from the federal government. If they do not comply, they won't.

### Categorical Grants

- The New Deal unleashed floods of federal grant monies for public works projects such as building and road construction. (Most of these grants were categorical grants.)
  - Categorical grants made it easier for the national government to impose its agenda on the states.
  - If the states wanted the money, they had to do what the federal government wanted them to do
- Categorical grants continued during and after WWII.
- The federal government continued to use categorical grants as a way to coerce states to comply with non-discriminatory programs during the civil rights era.

### The Great Society

- Lyndon Johnson and his Democratic Congress launched a "War on Poverty" -- part of a Great Society agenda.
- Passed more than 100 new categorical grant programs with the intent to reduce poverty rates in the United States and to help eliminate racial injustices.
- EXAMPLES: Medicaid, Medicare, funding for federal education, "Head Start," urban renewal programs
- Grants supplemented state programs/national goals.
- Often grant money was given directly to local government and citizen action groups, undermining the authority of state governments even more.
- Traditional state and local responsibilities became federal ones.

### Preemption Statutes:

- Allows the national government to OVERRIDE state or local actions.
- A tool that has allowed the national government to start governing in areas that typically were considered state or local functions.
  - Federal preemption is defended based on the Supremacy Clause

### New Federalism & The Devolution Revolution Efforts to return more power to the states

#### New Federalism

- Proposed by President Ronald Regan in the 1980's
- An effort to return power back to the STATES

- Favored programs administered by STATE GOVERNMENTS and favored shrinking the size of the federal government
- Efforts were made to merge many of the categorical grants into **block grants**

#### The Carrot: Federal Grants to the States

- Another alternative to categorical grants are block grants.
  - Like categorical grants, funds are appropriated to achieve a particular policy goal.
  - However, policy targets are only **generally** stated.
  - There are broad (rather than detailed) program requirements and regulations required for funding
  - Fewer strings are attached.

#### Devolution

- A continued effort to return power back to the STATES and to constrain the power of the national government
- Associated with the 1994 “Contract with America” put forth by Republicans in the House of Representatives
- One goal that the Republicans hoped to achieve was to eliminate **unfunded mandates**.

#### The Stick: Unfunded Mandates

- Unfunded mandates impose specific policy requirements on the states, but they do NOT provide a way to pay for them.
  - Examples: Environmental issues such as clean air and water
- Rather, Congress threatens criminal or civil penalties OR threatens to cut off other funding if the states refuse to comply.
  - Examples:
    - 1984: Withholding of federal highway funds from states that did not have a minimum drinking age of 21.
    - No Child Left Behind Act.

#### The New Judicial Federalism

- Presidents Reagan and Bush promised to appoint Supreme Court Justices that would return powers back to the states.
- In the late 1980’s through the early 2000’s, rulings seemed to favor state decision-making over the federal government.
  - Examples:
    - *Webster v. Reproductive Health Services* (1989)
    - *U.S. v. Lopez* (1995)
    - *U.S. v. Morrison* (2000)
- The Supreme Court has tried to restrain Congressional power under the “commerce clause” in recent years. The Court has ruled in an effort to curb federal power and retain greater levels of states’ rights.
- Nevertheless, the federal government’s power still is significant.

## Federalism Since September 11<sup>th</sup>

- Republicans believe there is a need for a large and strong federal government to combat the “war on terror” to provide homeland security.
- The Supreme Court’s rulings have been more favorable to the federal government and less favorable for states’ rights.
- Republicans also have become more supportive of federal preemptions.

## Summary

- National power expanded
  - Through the evolving meaning of the “commerce clause.” (Supreme Court decisions)
  - Through constitutional amendments which granted additional powers to the national government
  - Through significant events in American history (e.g., Civil War, the Great Depression), which inspired Presidents and Congresses to expand federal power to tackle national issues.
- Although efforts have been made over the past 50 years to return more powers to the states, the federal government still possess significant power – more power than the founding fathers ever envisioned.

## Congress

### Constitutional Authority for Congress

- Article I of the US Constitution
- Bicameral Legislature (Great Compromise)
  - House (population)
  - Senate (equal)

### Founders sought to achieve the proper balance of authority

- In addition to minimum age, citizenship, and residency requirements, the founding fathers had other requirements not explicitly listed in the Constitution that needed to be met to serve in Congress.
  - Gender
  - Race
  - Wealth (Property ownership)
- The founders wanted to ensure that representatives in Congress possessed “civic virtue” and could put the best interests of the country ahead of their personal needs and benefits.

### Who Serves in Congress?

- Congressional members are not “representative” of the public at large.
  - Most are college graduates (41 percent have law degrees).

- Many have business backgrounds, but most come from professional fields in general.
- Only a few have blue-collar backgrounds.
- Most held prior elected office.
- Women and racial minorities continue to be underrepresented.

Who serves in the 111<sup>th</sup> Congress?

- Currently, the Senate includes:
  - Seventeen women, one African-American, one Hispanic, two Asian-Americans, and no Native-Americans.
- Currently, the House includes:
  - Seventy-six women (3 of which are delegates), forty-one African-Americans (2 of which are delegates), twenty-nine Hispanics (1 of which is a Resident Commissioner), ten Asian-Americans (2 of which are delegates), and one Native-Americans.
- Congress remains overwhelmingly white and male.
  - Why? Because white males still predominate in the lower-level public offices and private careers that are the most common stepping-stones to Congress.

### Congressional Elections: Choosing Members

Congressional Districts

- Federal law may apportion House seats among states after each census.
- But each STATE draws the lines that divide its territory into the requisite number of districts.
- After the first census in 1790, each state was allotted one House seat for every 33,000 inhabitants for a total of 105 seats.
- Total membership was finally fixed at its current ceiling of 435 in 1911 when House leaders concluded that further growth would impede the House's work.
- However, the size of each state's delegation may change after each decennial census as state/region populations shift.

Politics of Defining Congressional Districts

- Reapportionment: a reallocation of congressional seats among the states every ten years, following the census
- Redistricting: process of redrawing district lines in states with more than one representative (carried out by state legislators or commission)
- Gerrymandering: redistricting to benefit a particular group

Redistricting and the Law

- In 1964 the Supreme Court ruled in *Wesberry v. Sanders* that districts must have equal populations.
- If one party controls the legislature and the governorship, it may attempt to draw lines to favor its own candidates.
  - This is called gerrymandering.

Types of Gerrymandering

- Pro-incumbent gerrymandering: Redistricting to enhance the chances that the incumbent will win re-election

- Partisan gerrymandering: Redistricting to enhance or reduce the chances that a political party will win upcoming elections
- Racial gerrymandering: redistricting to enhance or reduce the chances that a racial or ethnic group will elect members to the legislature

#### Partisan Gerrymandering

- In *Davis v. Bandemer* (1986), the Court held that a gerrymander would be unconstitutional if it were too unfair to one of the parties.
  - As yet, no districting scheme has run afoul of this vague standard.

#### Racial Gerrymandering

- In *Thornburg v. Gingles* (1986) the Court ruled that district lines may not dilute minority representation, but neither may they be drawn with race as the predominant consideration.
- North Carolina legislators carved out two majority-black districts, which elected 2 African-American members of Congress in 1992 (did not occur since 1889)
- NC gerrymandering challenged in Supreme Court.
  - 1993: Court ruled the irregular districts went too far; race cannot be only factor, must also take into account preservation of neighborhoods and communities.
  - In 1995: Race can be a factor in redistricting as long it is not the “dominant and controlling” factor.

\*\*\*Does this ruling help or hinder democracy?

#### Unequal Representation in the Senate

- The fifty Senate constituencies -- entire states -- may not change boundaries with each census, though they vary greatly in size of population.
  - Senator Feinstein of California -- 35 million people.
  - Senator Enzi of Wyoming -- 494,000 people.
- Average U.S. House member represents 669,000 people.
- Nine largest states are home to 51 percent of total U.S. population.

### Congressional Elections

#### Incumbency Advantage: The Decline of Party Loyalty

#### Incumbency Advantage

- Success of efforts:
  - Only about 1% of incumbents lose a primary election.
  - Over 94% of incumbents win their general elections.
  - The best chance for a non-incumbent to win an election is if there is an “open-seat.”
- Members of Congress insist (and others agree) that incumbents win because they work so hard at getting re-elected.

#### Constituent Services

Is incumbency advantage good for democracy?

Vulnerable Senators: 3 times as likely to lose their seats than House incumbents

Why are senators more vulnerable?

- States are more populous and diverse than congressional districts -- most senators are unable to develop the personal ties to constituents that House members can.
  - States more than districts have balanced party competition.
  - Senate races attract more experienced, politically talented, well-financed challengers.
  - States have media markets that make it easier for challengers to get out their messages.
  - Senators more readily associated with controversial and divisive issues.
- What impact does national politics have on congressional elections?

## The Presidency

### Article II

- Implied Powers in Article II
  - Most of the executive's powers come from vague phrases in the Constitution
    - FOR EXAMPLE:
    - **Article II, Section 1** explains that all executive power "shall be vested in a President" (this is known as the "**vesting clause**" of the Constitution)
    - **Article II, Section 2** explains that the President "shall be Commander in Chief..." (this is known as the "**Commander in Chief**" clause of the Constitution)
    - **Article II, Section 3** explains that President "shall take Care that the Laws be faithfully executed..." (this is as the "**Take Care**" clause of the Constitution)
- Pacificus-Helvidius Debate
  - Pacificus-Helvidius debate is a debate over the nature of implied powers of the presidency.
  - Pacificus position: Argued by Alexander Hamilton
  - Helvidius position: Argued by Thomas Jefferson and James Madison (Madison officially writes)

### 19<sup>th</sup> v. 20<sup>th</sup> & 21<sup>st</sup> Centuries

- The Evolution of the American Presidency (The Founders' Conception to the "Modern" Presidency)
  - The 19<sup>th</sup> Century Presidency
    - During the republic's first century, presidents typically assumed a small role, thus in step with the Framers' expectations.
    - Congress had the majority of power.
    - They did not play a leadership role in domestic policy formulation.
    - Thus their accomplishments were limited to their responses to wars, rebellions, or other national crises.
  - Traditional Roles of the President in the Executive Process

- Commander in chief: top officer of the country's military establishment and civilian head of American military forces
  - Chief foreign policy maker: Negotiates treaties
  - Chief administrator: Responsible for the implementation of national policy; appoints cabinet members
- Traditional Roles of the President in the Legislative Process
  - The Constitution gives presidents only a modest role in the legislative arena.
    - May call Congress into special session.
    - Veto laws
    - Must report "from time to time" to Congress with State of the Union address.
- Traditional Understanding of the Presidential Veto
  - Under its original conception, the veto allows the president to block congressional action if it violates the Constitution, but does NOT allow the president to substitute his own policy preferences.
- State of the Union
  - Article II, section 3 states: "He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient."
    - Presidents Washington & Adams (1790-1800)
    - Presidents Jefferson - Taft (1801-1912)
- Traditional Roles of the President in the Judicial Process
  - Judicial appointments: nominate judges to the federal courts and justices to Supreme Court
  - Pardoning power: release or excuse person from legal penalties of a crime
    - Often controversial and done at end of term
- The Modern Presidency comes about primarily through the expansion of implied powers
- Presidential power in the domestic sphere
  - In re Neagle (1890)
    - This case is the first time that the Supreme Court recognized INHERENT presidential power within the Constitution.
  - 20<sup>th</sup> Century Presidents that were instrumental in expansion of Presidential power
    - Theodore "Teddy" Roosevelt
      - Stewardship Theory
    - Woodrow Wilson
      - Introduces legislative proposals
    - Franklin Delano Roosevelt
      - New Deal - Introduces the Administrative State
  - The Rise of the Delegation Doctrine

- Congress no longer passes all legislation itself and then asks the executive to enforce these laws.
- Now, Congress creates an executive agency, DELEGATES its lawmaking power to it, giving these agencies the authority to make rules to govern contemporary issues in society.
- The rules and regulations created by executive agencies have the characteristics of legislative acts and have the force of law.
- In short, policy is being made by the executive branch
- Pros and Cons to Delegation
  - Contemporary Example of Delegation
    - Congress delegated to the U.S. Fish and Wildlife Service discretion to establish rules for classifying species as “endangered” and “threatened.”
  - Modern Presidents As Policy Makers/Legislators
    - It is now commonplace for Americans to believe that our President should have a role in POLICY making.
    - The American people don’t look exclusively to Congress to create policies that will help their daily lives and future. Now, they look to their President.
      - Ninety percent of presidents’ initiatives are considered by some congressional committee or subcommittee
    - Presidents feel pressure to deliver on their policy promises.
  - Going Public
    - Today, presidents spend a great deal of their time, energy, and staff taking their message to the American people
      - Going on prime-time television
      - Public speeches, travel
      - Use of “minor” addresses
  - Additional Forms of Presidential Policy Making
    - Executive orders
    - Signing statements
  - Youngstown Sheet and Tube v. Sawyer
    - President Truman seized the steel mill. He based his authority to do so under an executive order
    - This case discusses the nature of implied presidential power in the domestic arena
  - 3 Levels of Implied Presidential Power
    - Justice Jackson explains that presidential power **fluctuates**.

- He explains that the president's power is **STRONGEST** when he has been given authorization by Congress to do something.
- He explains that the president's power is **WEAKEST** when Congress prohibits him to do something.
- He explains that a president's power is **UNCLEAR** when Congress is silent on the issue. Justice Jackson explains that this is known as the **zone of twilight**.
- International vs. Domestic Spheres
  - The Supreme Court, Congress and the American public are willing to give the President **more leeway** in asserting implied powers **in the international arena than in the domestic sphere**.
- United States v. Curtis-Wright Export Corp. (1936)
  - This case was instrumental in expanding IMPLIED presidential power in the INTERNATIONAL SPHERE.
- "Sole Organ Theory"
  - This theory states that the President is the "SOLE ORGAN" in looking out for the nation in international affairs.
  - The "Sole Organ Theory" also states that when it comes to international relations the President's authority is PLENARY in this area.
  - Consequently, Congress may provide the President with a special degree of discretion in external matters which would not be afforded domestically
- Treaties, Executive Agreements, & War Powers
  - The Case Act (1972): Congressional Oversight
    - Additional Checks on Executive Agreements
      - Congress & Federal Courts
    - War powers
      - It is a SHARED power under the Constitution.
        - Article I, Section 8: States that CONGRESS shall declare war.
        - Article II, Section 2: States "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, **when called into the actual Service of the United States**."
  - Congress To Initiate War
    - Under the original intentions of the founders, CONGRESS would initiate hostilities and not the President.

- ALSO, Presidents could only claim their power to be acting as Commander in Chief after a war had been declared by Congress.
- **\*\*Therefore, Presidents could not commit troops unilaterally.**
- Defensive v. Offensive Actions
  - War Powers Act (1973) (War Powers Resolution): Congressional Oversight; p. 266-268 & 283-287 textbook
    - Impact of the War Powers Act
      - The impact of this law has been limited.
      - Presidents have continued to take military action without informing Congress.
        - Reagan's invasion of Grenada in 1983.
        - George H. W. Bush's invasion of Panama
        - Clinton's deployment of U.S. troops in Somalia in 1993.
        - Clinton's participation of U.S. military forces in the NATO action against Yugoslavia in 1999.
      - George W. Bush DID comply with WPA in 2001 & 2002 in use of force against Iraq.
    - Additional Check on WPA: Withhold funding
    - Executive Privilege
      - Presidents argue that they have an **implied** power under the Constitution to withhold information from other branches of government.
      - Early presidents interpreted the term narrowly, asserting it only when they thought secrecy would serve the national interest.
      - In the modern era, presidents facing opposition-controlled Congresses (or special prosecutors) have defined executive privilege broadly and involved it often.
        - *United States v. Nixon* (1974)
          - Court ruled that "executive privilege" was NOT an absolute and unqualified right of presidents. A limited right may exist in certain military and diplomatic affairs.
          - Court held the president could not use this privilege to impede criminal investigations.

### The Electoral College

- Electoral College: Why did the founding fathers create it?

- The Electoral College was a compromise during the Constitutional convention.
  - Some founders favored direct election of a President.
  - Some founders favored the President to be selected by Congress.
- The main concern was that whoever selected the President, that those individuals would simply vote for someone from their individual state.
- There were no real mass media outlets, so there was concern that people would not be familiar with a candidate if he was not from their individual state.
- Also, there was concern that people would vote for the person from their individual state out of self-interest.
  - In short, there was concern that no one individual would get a majority if people simply voted for the person from their state.
  - Also, there was concern that self-interest would be the motivating factor behind the vote rather than the good of the nation.
- Hence, the Electoral College was a compromise that was intended to make sure that:
  - one person would be able to receive a majority
  - the vote for President would not be motivated by self-interest and would be motivated by what was best for the country
- History of Electoral College: How does it work?
  - Each state designated electors to represent them in the Electoral College.
    - It was left up to the states to determine how they would select their electors.
    - Some state selected them by a popular vote. Other states appointed electors.
    - The number of electors each state has is equal to the number of seats it has in the House and the Senate.
  - Electors vote for 2 people for President.
  - There is a rule that at least one person you vote for must be from another state.
  - Whoever received the most votes (provided it was a majority of the electors) would become President.
  - In order to give them incentive to take both votes seriously, they decided to tell them that whoever comes in second will be the Vice-President.
  - Don't want the V-P to do anything important, because you want the President to be responsible and accountable.
  - Therefore, decided that the V-P would preside over the Senate and would break ties.
  - It's not until 1967 with the 25th Amendment that V-P becomes president upon removal of the President.

- If two candidates received the same number of votes and both candidates received the majority of the votes, then the election would be decided by the House of Representatives.
  - Each state's delegation would act as a unit and cast one vote.
  - If no candidate still received a majority, the House would vote again and narrow the race down to the 5 candidates that received the most electoral votes.
- Electoral College: History
  - The 12<sup>th</sup> Amendment changes the original process of the electoral college.
  - Beginning in 1804, when you run for president, you must state who you want to be V-P and you run as a ticket (establishes political parties)
  - Comes about because of the election of 1800 between Thomas Jefferson and Aaron Burr. There was a tie between them.
- Electoral College
  - There are 538 electoral votes.
    - Each state's number of electoral votes is based on the number of Congressional seats they have plus the 2 Senate seats each state has.
    - Therefore, every state has at least 3 electoral votes. EX: Wyoming, South Dakota, North Dakota, Alaska
    - The District of Columbia also has 3 electoral votes --23<sup>rd</sup> Amendment (1961)
  - In December, electors meet in their state capitals to cast their votes for President.
  - It is possible have "faithless electors," who vote their own preferences rather than what the majority of the electorate decided.
  - Each state sends their electoral votes to the U.S. Senate, who counts the ballots of the Electoral College.
  - 270 electoral votes are needed to win the Presidency.
  - All but 2 state use a "winner-take-all" system for giving candidates electoral votes
    - Maine and Nebraska use a "Congressional District Plan"
      - Each candidate receives an electoral vote for each Congressional District he or she wins, plus 2 bonus votes to represent the popular vote.
        - Maine has 4 electoral votes; Nebraska 5 electoral votes.
  - Due to the "winner-take-all" system, large states with bigger number of electoral votes are at a premium.
  - However, since some of these large states are firmly Republican or Democratic, candidates don't give these states much attention during their campaigns.

- Therefore, most of a candidate's attention will be focused on a handful of "toss-up" states. These states will receive a disproportionate share of the candidate's attention.
  - Consequently, depending on where you live, you will experience the campaign differently.
  - Also, depending on where you live, the main "message" you may hear repeated may be different from the main "message" you would hear if you lived in another part of the country.
- It is possible that a candidate who won the popular vote may not win the necessary votes from the Electoral College to secure the Presidential election.
  - 1824: John Quincy Adam vs. Andrew Jackson
  - 1876: Rutherford B. Hayes vs. Samuel Tilden
  - 1888: Grover Cleveland vs. Benjamin Harrison
  - 2000: George W. Bush vs. Al Gore
- 1824: John Quincy Adam vs. Andrew Jackson
  - Jackson had more popular vote and electoral votes.
  - Neither, however, had a majority of the electoral votes.
  - House of Representatives decided in favor of Adams.
- 1876: Rutherford B. Hayes vs. Samuel Tilden
  - Tilden had 250,000 more popular votes.
  - Tilden had one more electoral vote than Hayes.
  - However, no candidate received the majority of electoral votes.
  - House of Representatives decided in favor of Hayes.
- 1888: Grover Cleveland vs. Benjamin Harrison
  - President Cleveland received approximately 100,000 more votes in the popular vote
  - However, Harrison won more of the electoral votes, and therefore, won the presidency.
- 2000: George W. Bush vs. Al Gore
  - Al Gore won approximately 544,000 more votes in the popular vote.
  - Margin of electoral votes in question in the state of Florida. A recount of votes began in Florida.
  - The U.S. Supreme Court stopped the recount in *Bush v. Gore* (2000), granting Bush all of Florida's electoral votes
  - Bush received 271 electoral votes, while Gore received 267.
- Should the Constitution be amended to abolish or revise the Electoral College?
  - Proposals for Reform
    - Popular Votes Wins
    - Congressional District Plan
    - Keep the College but Abolish the Electors