Instructor's Manual

to accompany

Peter Woll's

American Government: Readings and Cases

Eighteenth Edition

Prepared by:

Peter Woll
Brandeis University

New York Boston San Francisco
London Toronto Sydney Tokyo Singapore Madrid
Mexico City Munich Paris Cape Town Hong Kong Montreal

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

This work is protected by United States copyright laws and is provided solely for the use of instructors in teaching their courses and assessing student learning. Dissemination or sale of any part of this work (including on the World Wide Web) will destroy the integrity of the work and is not permitted. The work and materials from it should never be made available to students except by instructors using the accompanying text in their classes. All recipients of this work are expected to abide by these restrictions and to honor the intended pedagogical purposes and the needs of other instructors who rely on these materials.

Instructor's Manual to accompany Woll, *American Government: Readings and Cases, 18th Edition*

Copyright ©2010 Pearson Education, Inc.

All rights reserved. Printed in the United States of America. Instructors may reproduce portions of this book for classroom use only. All other reproductions are strictly prohibited without prior permission of the publisher, except in the case of brief quotations embodied in critical articles and reviews.

ISBN: 0205743943

ISBN-13: 9780205743940

1 2 3 4 5 6 7 8 9 10–OPM–10 09 08 07

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

PREFACE

This instructor's manual for the 18th edition of *American Government: Readings and Cases* contains background material, discussion questions and comments, and multiple-choice questions that are keyed to the selections in the book.

The manual can be useful in many ways. Instructors and teaching assistants can use the manual during class lectures and discussions as a guide to the course and an aid in raising informative and sometimes provocative questions from the readings. Answers are supplied after each question that can help to conduct the discussion and inform the instructor about the progress students are making in absorbing the materials. The questions can also, of course, profitably be used for examinations, with the answers facilitating the grading process. There are also multiple-choice questions at the end of each selection.

The manual should be particularly useful in large courses where teaching assistants are used. Through use of the manual, instructors can direct and keep in close touch with the issues raised in section discussions. Moreover, the instructor can use the answers and comments as a partial indication of what is being taught in section meetings. The manual should help to ensure consistency in instruction where there are many sections taught by different assistants.

Needless to say, the answers and comments are not definitive. The background material and comments in particular are meant to be suggestive and useful in providing ideas that can be expanded upon in lectures and discussions.

Peter Woll

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Table of Contents

Instructor's Manual to accompany
Woll, *American Government: Readings and Cases,*
Eighteenth Edition

PART I: THE SETTING OF THE AMERICAN SYSTEM	1
Chapter 1: Constitutional Government	2
Chapter 2: Federalism	15
Chapter 3: Civil Liberties and Civil Rights	32
PART II: POLITICAL PARTIES, ELECTORAL BEHAVIOR, AND INTEREST GROUPS	52
Chapter 4: Political Parties and the Electorate	53
Chapter 5: Interest Groups	70
PART III: NATIONAL GOVERNMENTAL INSTITUTIONS	82
Chapter 6: The Presidency	83
Chapter 7: The Bureaucracy	98
Chapter 8: Congress	103
Chapter 9: The Judiciary	120

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

PART 1:
THE SETTING OF THE AMERICAN SYSTEM

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 1

Constitutional Government

The selections in this chapter have been chosen to introduce students to differing perspectives on the underlying forces that shaped the Constitution of 1787 and to James Madison's explanation of the theory and practice of the separation of powers in *The Federalist*. An excerpt from John Locke provides one example of the important historical underpinnings of the concept of the rule of law and government by the consent of the people.

Two important themes can be developed from Chapter 1. One is the view of the Constitution as an elitist document, framed by an elite for the purposes of limiting majority rule, and the other is the view that the Constitution was essentially a democratic document, in terms of the forces that operated at the Constitutional Convention of 1787 and in its basic provisions. The congruence between the Declaration of Independence and the Constitution is stressed.

Whether or not one agrees that it was the purpose of the framers of the Constitution to create a democratic government, it seems clear that the Constitution was not intended to make majority rule easy. The fact that only the House of Representatives was to be elected by the people, coupled with the separation of powers and the checks and balances system, suggests a strong apprehension, at the time, of majority rule and of a positive national government. But the flexibility of the Constitution, the ambiguity of many of its provisions, and the possibility of amendments, has led both to forceful government and to a vast expansion of democracy. Amendments to and interpretations of the Constitution have supported an expansion of national power at the same time that they have increased democratic participation. The original system may have been devised by and for an aristocracy, but it soon came to serve the people, the critical turning point perhaps being the Jacksonian era. And, Madison's emphasis upon the importance of checks and balances was soon to be overshadowed by the increasing power of the executive, the rise of an imperial presidency that conformed more to the Hamiltonian than to the Madisonian model of government.

CONSTITUTIONAL DEMOCRACY: THE RULE OF LAW

It is certainly appropriate to begin an introductory text on American government with John Locke. Thomas Jefferson expressed the views of eighteenth-century America when he wrote in May of 1790, “Locke's little book on government is perfect as far as it goes.” Jefferson incorporated Locke's theory of the social contract in the Declaration of Independence. Citing the “laws of nature and of nature's God,” Jefferson wrote: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.” Jefferson's felicitous pen substituted happiness for John Locke's property at the top of the hierarchy of natural rights, but all eighteenth-century Americans, including Jefferson, implicitly recognized that the protection of private property was a principal purpose of government.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Locke's *Second Treatise*, first published in 1690, was an eloquent theoretical justification of the Glorious Revolution of 1688, which established parliamentary rule and Parliament's right to determine succession to the throne and limit the monarch's power.

A belief in reason and scientific progress characterized the eighteenth century, and Locke's treatise was a precursor to the Enlightenment of the eighteenth century. Locke believed that natural law was objectively valid, and therefore once ascertained, governments based on it would have a superior claim to legitimacy. He derived the "best" form of government from natural law and natural rights. Principles of natural law, according to Locke, should control governments created by men.

Reading 1:
John Locke, *Second Treatise, Of Civil Government*

Locke emphasized that the sovereignty of the people resides in the hands of the legislature, which is bounded by the consent of the people and by the standards of the law of God and nature. Natural law dictates that legislative bodies are "to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at Court and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies."

QUESTIONS FOR DISCUSSION

1. How does John Locke describe the state of nature? (It is a state of freedom and equality, governed by natural law, which requires in part that since all persons are equal and independent, "no one ought to harm another in his life, health, liberty or possessions." The execution of the law of nature is put into every person's hands, "whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation.")

2. Why do people leave the state of nature and join a political society by establishing a government? (They form governments because of the uncertainty of the state of nature, and the inability of people to protect their rights due to the lack of a settled, known law, an impartial judge, and sufficient power to force people to conform to the law of nature. People therefore leave the uncertain state of nature and enter into political society and government to protect their property, as well as their lives and liberties.)

3. Under what conditions can government be dissolved? (When it does not act in accordance with the will of the people.)

MULTIPLE CHOICE QUESTIONS

1. One of Locke's fundamental principles is:

   a) a major goal of government is the pursuit of happiness.
   b) governments are established to serve the elite.
   c) all persons should be treated equally by government.
   d) once established, governments cannot be dissolved.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. In the state of nature described by John Locke:

   a) all persons are in a state of war with each other.
   b) life is nasty, brutish, and short.
   c) liberty is denied to all but the strongest.
   d) all persons possess liberty.

3. In the state of nature, the execution of the law of nature is:

   a) in the hands of the executive.
   b) in the hands of the legislature.
   c) in the hands of the judiciary.
   d) in every person's hands.

4. Persons enter into political society and government because:

   a) they seek a higher authority to protect their rights against invasion by others.
   b) the pursuit of happiness can only be guaranteed by government.
   c) they seek equality with each other.
   d) the common defense requires a strong government.

5. According to John Locke, a primary end of government is:

   a) the preservation of equality among all citizens.
   b) to guarantee all citizens happiness.
   c) economic prosperity.
   d) the protection of private property.

6. Private property is, according to Locke, inadequately protected in a state of nature because:

   a) the law of nature is not plain and intelligible to all rational persons.
   b) persons do not agree that the protection of private property is a fundamental right.
   c) persons in a state of nature are constantly at war with each other.
   d) the state of nature lacks an impartial judge and an executive capable of upholding judicial decisions protecting property rights.

7. In a state of nature a person:

   a) has no power.
   b) exerts whatever powers are necessary to preserve himself, and to punish crimes committed against natural law.
   c) is in a state of war.
   d) has no respect for property rights.

8. According to Locke, the supreme power of the Commonwealth is:

   a) the executive.
   b) the judiciary.
   c) the bureaucracy.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

d) the legislature.

9. Locke argues that government can only be dissolved when:

   a) it fails to protect the Commonwealth against foreign attacks.
   b) laws are enacted that fail to protect private property.
   c) the judiciary assumes legislative authority.
   d) government acts without the consent of the people.

10. In John Locke's model of government, the power that each individual gives to society when he or she enters into it:

   a) can never revert to the individuals again.
   b) cannot revert to the individuals as long as the society lasts.
   c) reverts to individuals only with the consent of the government.
   d) can be reclaimed by individuals only if the government fails to protect private property.

FRAMING THE CONSTITUTION: AN ELITIST OR DEMOCRATIC PROCESS?

Reading 2:
John P. Roche, *The Founding Fathers: A Reform Caucus in Action*

John Roche's article on the framing of the Constitution has now been accepted as the classical piece on what actually occurred at the Philadelphia Convention of 1787. When the article first appeared in 1961 in the *American Political Science Review*, its thesis was a startling contrast with the generally accepted notion that the framers were either all-wise Platonic guardians or a conspiratorial economic elite, adhering either to abstract principles of political theory or advancing proposals to protect economic interests, respectively. In either case, no one before Roche had as forcefully presented a view that the Constitutional Convention was essentially a democratic reform caucus. The so-called principles of the Constitution, he writes, were not essentially based upon theoretical considerations or a conspiracy to preserve elite power, but upon practical political trade-offs among the different state interests that had to be reconciled in order to make the idea of a national constitution palatable at home.

QUESTIONS FOR DISCUSSION

1. What does Roche mean when he describes the Constitutional Convention of 1787 as a democratic reform caucus? ("Charles Beard...to the contrary notwithstanding, the Philadelphia Convention was not a College of Cardinals or a Council of Platonic Guardians working within a manipulative, free democratic framework; it was a nationalist reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal—popular approbation.")

2. What were the major political constraints operating during the Constitutional Convention of 1787? (One of the most important constraints was the existence of powerful states with strong views on state sovereignty that had to be accommodated in various ways, which were reflected in the compromises of the Convention.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. Although the delegates to the Constitutional Convention were not elitists in the Beardian sense, most of the framers did share certain political views, which they sought to institutionalize over strong opposition in the country. How does Roche characterize the framers of the Constitution? ("An interesting amalgam of a few dedicated nationalists with the self-interested spokesmen of various parochial bailiwicks." They possessed a "continental" approach to political, economic, and military issues.)

4. What does Roche feel was the role of political theory at the Constitutional Convention? (Essentially that theory was the servant of practical political necessity. ". . . While the shades of Locke and Montesquieu <u>may</u> have been hovering in the background, and the delegates <u>may</u> have been unconscious instruments of a transcendent *telos*, the careful observer of the day-to-day work of the Convention finds no overarching principles. The separation of powers to him seems to be a by-product of suspicion, and federalism he views as a *pis aller*, as the furthest point the delegates felt they could go in the destruction of state power without themselves inviting repudiation.")

5. What evidence is there that the retrospective symmetry given to the Constitution by *The Federalist* has been influential in the American political tradition? (*The Federalist* essentially supplied the theory of the Constitution that has become accepted in our political tradition. Witness the many citations to *The Federalist* in Supreme Court decisions and in political literature generally. Regardless of what different framers may have thought they were doing, the fact is that the Constitutional system they established is consistent with certain theoretical principles, and *The Federalist* helps to explain these.)

MULTIPLE CHOICE QUESTIONS

1. John P. Roche describes the founding fathers as:

   a) an economic elite.
   b) philosopher kings who followed abstract principles of political theory.
   <u>c</u>) practical politicians striving to accommodate state and national interests.
   d) believers in an aristocracy of talent.

2. According to John P. Roche, the delegations to the Constitutional Convention were dominated by:

   <u>a</u>) nationalists.
   b) proponents of states' rights.
   c) Jeffersonian republicans.
   d) conservatives.

3. Roche argues that the Virginia Plan:

   a) capitulated to state interests.
   <u>b</u>) provided for an essentially unitary form of government.
   c) embodied the "Madisonian model."
   d) would have allowed the large states to dominate the national government.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

4. Roche concludes that federalism:

a) represented a victory for states' rights.
b) reflected a necessary compromise to gain state support for a national government.
c) originally incorporated the doctrine of state nullification of national laws.
d) gave the states more power than the national government.

Reading 3:
Charles A. Beard, *Framing the Constitution*

This selection by Charles A. Beard on the framing of the Constitution is taken from his book, *The Supreme Court and the Constitution* (1912), which appeared one year before his famous work, *An Economic Interpretation of the Constitution* (1913). The earlier work contains a concise statement of the famous economic theme of Beard, which was that the Constitution reflected nothing more nor less than the work of an economic elite that was out to protect its own interests against possible incursions from popular majorities. Beard's elite consisted of landholders, creditors, merchants, public bondholders, and wealthy lawyers, all of whom were well represented at the Constitutional Convention.

Just as Roche's thesis of a democratic Constitutional Convention was startling in 1961, Beard's conspiratorial economic elite theme had a profound impact after it appeared in full form in 1913. At that time the prevailing view was that the Constitution had been formulated by wise philosopher kings who impartially followed the dictates of accepted political theory in deciding what was best for the nation. Before Beard, the folklore of American democracy suggested at a minimum that the framers of the Constitution, although an elite, were nevertheless looking out for the best interests of the people. Beard, however, suggested that in effect the Constitutional Convention of 1787 was a conspiracy of an economic elite.

After reading Beard, students may ask who is right about the Constitutional Convention—Roche or Beard? At this point, a few select quotes from Robert E. Brown's work, *Charles A. Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution*" (Princeton, N.J.: Princeton University Press, 1966), should serve to illustrate to students that although Beard was indeed interesting and provocative, his evidence did not support his conclusions. Brown points out that:

> Having reviewed all this evidence on the economic holdings of the Convention delegates, the important question is whether Beard's historical method justified his conclusions that personal property was responsible for the Constitution. The answer must be an emphatic no. . . .
>
> Anyone would concede that the founding fathers had education, property, and influence far greater than the average at that time, but the same would be true of colonial legislatures, the Confederation Congress, and legislatures today. Had Beard cited this evidence to prove that the convention delegates represented property in general and were interested in a government which would protect property, he would have been on firm ground. All the delegates believed in the sanctity of property; some even believed that the chief function of government was the protection of property. This was undoubtedly important, but it was not their only concern. Beard did not contend, however, that the Convention was rigged to protect property *in general*. What he emphasized was *personalty* [personal property], and in fact, a particular kind of personalty which did not include livestock and slaves. We shall see later that he even refined personal property to mean predominantly one kind of personal property—public securities.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

A principal source of Beard in support of his economic argument was *The Federalist*; however, as Brown points out, although the authors of *The Federalist* did appeal to economic interests, they also appealed to many other interests and sentiments, as can be observed in all of the selections from *The Federalist* in this edition. The need for limited government, for example, detailed by Madison in papers 47, 48, and 51 of *The Federalist*, is not premised on the need to protect private property, but on the need to prevent tyranny, the fallibility of man, and the natural division of governmental power into legislative, executive, and judicial categories. By contrast, note that Alexander Hamilton argued in *Federalist 70* that an energetic executive was essential for good government. Hamilton was in favor of protecting private property, as were all of the delegates to the Convention, and a vigorous executive could be interpreted as essential to preserve property, as can most other provisions of the Constitution. A strong and effective national government, which at the same time is constructed in such a way that popular majorities cannot control it, can become the instrument of an economic elite in the preservation of its interests. However, such a government serves other purposes, such as national defense, political stability, and uniformity of laws, which benefit many interests in society apart from significant property holders.

QUESTIONS FOR DISCUSSION

1. Beard observes that the revolutionists—Samuel Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson, among others—"were not, generally speaking, men of large property interests or of much practical business experience. In a time of disorder, they could consistently lay more stress upon personal liberties than upon social control; and they pushed to the extreme limits those doctrines of individual rights which had been evolved in England during the struggles of the small landed proprietors and commercial classes against royal prerogative, and which corresponded to the economic conditions prevailing in America at the close of the eighteenth century. They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals viewed all government, especially if highly centralized, as a species of evil, tolerable only because necessary and always to be kept down to an irreducible minimum by a jealous vigilance."

   The emphasis of the revolutionists upon the need to preserve individual freedom from governmental interference, particularly from the power of the national government, led to a weak Articles of Confederation that failed "to accomplish the accepted objects of government; namely, national defense, the protection of property and the advancement of commerce." Note here that Beard does not as forcefully present the thesis that the Constitution represented the interests of the propertied classes as he did in his *An Economic Interpretation of the Constitution*.

   From this introduction students may be asked to contrast the philosophy and forces behind the Articles of Confederation with those supporting the new Constitution of 1787. Most of the revolutionists who supported the Articles of Confederation in the first place did not wish to see a new and powerful national government, although some, such as Jefferson, clearly supported the new Constitution with certain reservations. To Beard, the Constitution of 1787 reflected the emergence of a new *class* of persons with power, namely the "men of business and property and the holders of public securities." The philosophy behind and conditions leading to the Constitution of 1787 are stated by Beard in the following terms: "The close of the revolutionary struggle removed the prime cause for radical agitation and brought a new group of thinkers into prominence. When independence has been gained, the practical work to be done was the maintenance of social order, the payment of the public debt, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country."

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. What was the effect of the state constitutions and the Articles of Confederation upon the dominant economic classes? ("Under the state constitutions and the Articles of Confederation established during the Revolution, every powerful economic class in the nation suffered either immediate losses or from impediments placed in the way of the development of their enterprises.")

3. How does Beard characterize the delegates to the Constitutional Convention of 1787? (They were an economic, political, and intellectual elite. Although Beard graphically refers to the economic elitist characteristics of the delegates, he also paints them as intellectual, patriotic, and political giants of their time. The economic theme becomes clear as Beard writes that the "makers of the federal Constitution represent the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey, and North Carolina, and stoned their houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defense, prevent fluctuations in the currency created by paper emissions, and control the propensities of legislative majorities to attack private rights. . . . The radicals, however, like Patrick Henry, Jefferson, and Samuel Adams, were conspicuous by their absence from the Convention.")

4. What were the views of the delegates to the Convention on democracy and equality, according to Beard? ("Indeed, every page of the laconic record of the proceedings of the Convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on the one hand against the possibilities of despotism and on the other against the onslaught of majority.")

5. Aside from describing the delegates as representatives of the propertied classes desiring to protect their interests, what other evidence does Beard present to support his thesis that the principal purpose of the Constitution was to protect most forms of private property (slaves and livestock were excluded from the property to be protected, which mostly included public securities)? (Beard writes that the delegates "were anxious above everything else to safeguard the rights of private property against any leveling tendencies on the part of the propertyless masses." James Madison, among others, made strong arguments for property qualifications for voting, but these were not adopted by the Convention because it "could not agree on the nature and amount of the qualifications." Beard argues that the principal purpose of the system of checks and balances was to protect property rights. "Nevertheless, by the system of checks and balances placed in the government the Convention safeguarded the interests of property by attacks by majority." The arguments of *Federalist 10* are introduced by Beard, who suggests that Madison recognized a "natural inequality" due to the unequal distribution of property, and that the constitutional system should take this inevitability into account by guarding against the possibility of a majority faction forming that would dispossess minority property holders. Beard returns to his point regarding the checks and balances system as a major check against majorities and therefore those dispossessed of property, noting that "this very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property.")

6. Beard relies upon *The Federalist* to support his argument that the Constitution was designed to protect the economic interest of property holders. In the selection you have read, what arguments does Beard

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

make based on *The Federalist* to support his conclusions? (Beard cites *The Federalist* a number of times to indicate that the overriding concerns of the framers related to economic matters. Beard cites the tenth paper of *The Federalist* in support of his claim that the leaders of the Convention recognized the maldistribution of wealth and feared its consequences. Beard notes that page after page of *The Federalist* is directed to that portion of the electorate that was disgusted with the mutability of the public's councils. The legislative power was to be feared, said the author of *The Federalist*, and Hamilton argued that a presidential veto was necessary to curb the unreasoned passions of the legislature. Beard notes that Hamilton argued in *The Federalist* that it was important that the process of ratification of the Constitution be removed from the direct control of the people. Parenthetically, some students may be interested in the esoteric argument discussed in selection 2 by John P. Roche that *The Federalist* is not an accurate description of the philosophy of the framers since it was largely campaign propaganda for the ratification of the Constitution. Question 5 above, in reference to Roche's piece, gives my views on the importance of *The Federalist* in constitutional interpretations even though it was after the fact. Beard, who greatly relies upon *The Federalist*, notes also that it was a piece of campaign literature but nevertheless "has remained a permanent part of the contemporary sources on the Constitution and has been regarded by many lawyers as a commentary second in value only to the decisions of the Supreme Court.")

MULTIPLE CHOICE QUESTIONS

1. The thesis of Charles A. Beard is that the framers of the Constitution:

   a) represented the propertied classes.
   b) were a highly talented and elite group.
   c) opposed majority rule.
   <u>d</u>) all of the above

2. Beard states that the revolutionists and radicals:

   a) were well represented at the Constitutional Convention.
   b) owned no property.
   <u>c</u>) were not men of large property interests or practical business experience.
   d) were skeptical of equality and democracy.

3. Beard concludes that under the state constitutions and the Articles of Confederation:

   a) property interests were well protected.
   <u>b</u>) every powerful economic class in the nation suffered losses.
   c) a strong national government was unnecessary.
   d) majority rule was restricted.

4. Beard sees the separation of powers in the Constitution primarily as a device:

   <u>a</u>) to curb popular majorities and thereby protect property interests.
   b) to make the government more democratic by forcing compromise among the three branches.
   c) to increase the power of the president.
   d) to establish conservative domination of Congress.

LIMITATION OF GOVERNMENTAL POWER AND OF

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MAJORITY RULE

These are the first selections from *The Federalist*, and since *The Federalist* is used throughout the text to provide the constitutional background of our political institutions and processes, a few words about *The Federalist* at this point would be very helpful to students. In the folklore of American democracy, *The Federalist* is as firmly embedded as the Constitution itself as a guide to the premises, purposes, and mechanisms of our government. It is almost universally used to explain the Constitution and the way in which the system is supposed to work. John Roche pointed out in selection 2 that for the purposes of historical research on the Constitutional Convention of 1787 and the motives and incentives of the delegates, *The Federalist* must be viewed as campaign propaganda. In fact, James Madison and Alexander Hamilton, the principal authors of *The Federalist*, wished in some cases to see different provisions of the Constitution than they were arguing for in *The Federalist*, but they certainly supported the Constitution. From the standpoint of an introductory course in American government, it is probably not desirable to go beyond John Roche's study of the Constitutional Convention in assessing the historical forces that helped to shape the Constitution. And *The Federalist* should be accepted not only for what it was but for what it has become, namely an accepted version of the views of James Madison and Alexander Hamilton on the Constitution, and indirectly, the views of the nationalists who supported the Constitution at the time.

While the Constitution is usually described as embodying the "Madisonian model" of government, it can also be seen as a reflection of the views of Alexander Hamilton. The contrast between the Madisonian and Hamiltonian models of government reflects the different premises that support fragmentation and dispersion of power on the one hand (the Madisonian model), and concentration of power on the other, particularly an energetic executive and extensive national power (the Hamiltonian model). As students are about to embark upon reading *The Federalist,* the instructor might wish to alert them to the contrasting Madisonian and Hamiltonian views on government that are expressed in the different nuances of the selections written by the two men. *Federalist 47*, *48,* and *51* develop the Madisonian model, but this should not be taken as the last word on what the framers meant the Constitution to be. Contrast, for example, these papers written by James Madison with the 70th paper of *The Federalist* written by Alexander Hamilton, and immediately the different constitutional emphases of the two men can be seen. Hamilton's emphasis in *Federalist 70* upon the need for an energetic executive is in direct contrast to Madison's balances as a mechanism to control power through its dispersion among the three branches of the government.

Reading 4:
James Madison, *Federalist 47, 48, 51*

QUESTIONS FOR DISCUSSION

1. Madison points out in *Federalist 47* that the powers of the three branches of government are distributed and blended together in certain ways. At the same time, he notes that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." How does Madison justify the intermixture of powers with his theory of the separation of powers? (1. Montesquieu, one of the important theorists used as a guide for the separation of powers, did not imply that the separation of powers has to be absolute. One branch of the government can have a "partial agency" in, and some control over, the acts of coordinate branches. Montesquieu meant only that the whole power of one department cannot be exercised by the same hands that possess the *whole power* of another department. 2. Looking at the individual states, "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." 3. Unless the branches of

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

government "be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The maintenance of the separation of powers system requires the existence of checks and balances among the three branches of government.)

2. What is Madison's view of the inherent power potentials of the legislative, executive, and judicial branches of government? (The legislative branch is potentially the most powerful, the executive is carefully limited, and the judiciary also.) To what does Madison attribute the potential power of these branches of government? (Note here, for example, the inference that the direct popular election of the House of Representatives tends to inspire it with "an intrepid confidence in its own strength," and the fact that the legislature's powers are more extensive and less capable of precise limits. These factors in combination with the power of the purse all contribute to a potentially very powerful legislative body. See *Federalist 48*.)

3. What does Madison mean when he says (*Federalist 51*), "The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and *personal motives*, to resist encroachments of the others"? (Here he is referring to the checks and balances system—the constitutional means—and the role of the separate political constituencies for the House, Senate, and the presidency that supply contrasting personal motives, which establish the will to resist encroachments from other branches.)

4. How did Madison's view of human nature affect his theory of government? ("If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." See *Federalist 51*.)

5. The entire thrust of Madison's argument in *Federalist 47*, *48*, and *51* seems to be in the direction of controlling and even weakening the exercise of governmental power. This is a negative view of the role of government. The main question *The Federalist* raises seems to be how to prevent the arbitrary exercise of political power, rather than how to guarantee effective political leadership. Do you accept Madison's goal as the primary one in establishing a governmental system? Is the Constitution really as negative as Madison implies? (Note here that the separation of powers, with its establishment of an independent chief executive, guaranteed effective leadership by enabling the president to take independent action that would overcome the negative implications of the separation of powers. The Constitution can be viewed as a very positive instrument of government; in fact, wasn't the purpose of the constitutionalist, particularly Hamilton, to establish effective national government, not a government that would be crippled?)

MULTIPLE CHOICE QUESTIONS

1. A central premise of James Madison in numbers 47, 48, and 51 of *The Federalist* is that:

   a) weak government is the best government.
   b) the combination of legislative, executive, and judicial power is the very definition of tyranny.
   c) men are not angels and therefore those who exercise political power must be limited.
   <u>d</u>) b and c

2. According to Madison, the branch of government to be most feared because of its inherent power is:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) the executive.
b) the judiciary.
c) the legislature.
d) the bureaucracy.

3. Madison argues that the separation of powers can only be maintained if:

a) each branch of government is kept entirely separate from coordinate branches.
b) the powers of the three branches of the government overlap.
c) a strong presidency exists.
d) an alert citizenry checks government.

INTERPRETING THE CONSTITUTION

How to interpret the Constitution has been a perennial issue in American politics. At the outset of the republic, Thomas Jefferson took the strict constructionist viewpoint while Alexander Hamilton argued for loose construction, which was the Federalist position strongly supported by Chief Justice John Marshall in such historic opinions as *McCulloch* v. *Maryland* (1819) and *Gibbons* v. *Ogden* (1824).

Constitutional interpretation, whether from a "strict" or "loose" approach, always involves a certain amount of conjecture regarding the intentions of the framers. Original intent, the holy grail of strict constructionists, is often far from clear, as the authors of the next selection argue.

Reading 5:
Laurence H. Tribe and Michael C. Dorf, *How Not To Read The Constitution*

Here a leading constitutional theorist, Professor Laurence Tribe of the Harvard Law School, who has been actively involved in the politics of judicial nominations, particularly in opposition to Judge Robert H. Bork in his testimony before the Senate Judiciary Committee in 1987, argues that the Constitution is not written in stone. The Constitution is a framework, not a blueprint. Instructors might wish to contrast Tribe's views with those of Robert H. Bork.

Tribe and his co-author emphasize that the overarching principle was the need to balance and restrain governmental power. The Constitution broadly outlines its plan for the new government, but of necessity leaves out many details. As Chief Justice John Marshall stated in *McCulloch* v. *Maryland* (1819) (set forth in Chapter 2, selection 12), referring to the Article 1 powers granted to Congress, the Constitution enumerates, but does not define, congressional powers. Congress, the Supreme Court, and the president all become involved in constitutional interpretation as they undertake their constitutional responsibilities.

The authors ask: "Is the Constitution simply a mirror in which one sees what one wants to see?" No, but "we must look beyond the specific views of the framers to apply the Constitution to contemporary problems...." That is neither a liberal nor conservative viewpoint, for "not even the most 'conservative' justices today believe in a jurisprudence of original intent that looks only to the framers' unenacted views about particular institutions or practices." Point out to students that the conservative Court in *Lochner* v. *New York* (1907) invented the constitutional right to liberty of contract out of whole cloth, just as the liberal justices found a new constitutional

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

right to privacy in *Griswold* v. *Connecticut* (1965) and in *Roe* v. *Wade* (1973). The authors conclude: "It is therefore not surprising that leaders on both the right and the left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices, and that neither wing has found it difficult to cite chapter and verse in support of its 'reading' of our fundamental law."

QUESTIONS FOR DISCUSSION

1. Pick a constitutional provision, such as the Commerce Clause in Article I, and ask students to interpret it. They will see immediately that the Constitution is, in the words of the authors of this selection, a framework, not a blueprint. The Supreme Court has interpreted congressional authority to regulate commerce among the states in different ways throughout history.

2. Refer students once again to the Roche and Beard selections earlier in the chapter and discuss their views of the framers' intent. Does either author help us to understand the framers' intentions? If so, how would each author interpret, for example, the separation of powers, presidential prerogative powers, and the scope of congressional authority?

MULTIPLE CHOICE QUESTIONS

1. From its creation, the Constitution was perceived as the document that sought to:

   a) reserve extensive powers to the states.
   b) strike a delicate balance between governmental power and individual liberty.
   c) make the president dominant over Congress.
   d) all of the above

2. Which of the following statements is *incorrect*?

   a) There is genuine controversy over how the Constitution should be read.
   b) The framers' intent is clear with regard to most constitutional provisions.
   c) The Constitution has been interpreted in various ways over the years.
   d) The Constitution is a framework, not a blueprint.

3. The text of the Constitution:

   a) leaves much room for the imagination.
   b) clearly reflects the framers' intentions.
   c) has been consistently interpreted by the Supreme Court over the years.
   d) is viewed in the same way by liberals and conservatives.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 2

Federalism

This chapter begins with the views of Hamilton and Madison on the constitutional background of federalism. Anti-Federalist views are also presented briefly. *The Federalist* remains our classic expression of the theory of the Constitution. Here Hamilton and Madison argue that the new Constitution is not a threat to the states, which retain adequate power to balance the federal system. Discussed extensively is the necessary and proper clause that later becomes the basis of Chief Justice John Marshall's opinion in *McCulloch* v. *Maryland*. In the thirty-ninth paper of *The Federalist,* Madison advances the interesting idea that the new Constitution was both federal and national.

The selection from James Bryce's *The American Commonwealth* that discusses and evaluates the characteristics of federalism will give students an interesting historical and theoretical perspective. Federalism is not a hot topic for present-day students, and in fact is rather boring to them. After all, did not FDR's New Deal finally establish a dominant national government that was the real purpose of the Federalists whose views the Constitution embodied? But students should know the historical progression in our federal system and that the balance of national and state power was *the* central political issue for a century and a half after the adoption of the Constitution.

The chapter proceeds to the historic *McCulloch* v. *Maryland* (1819) case, in which Chief Justice John Marshall wrote the Court's opinion reaffirming the Constitution's supremacy clause and at the same time adopting a broad construction of the scope of congressional authority under the Article 1 enumerated powers and the necessary and proper clause. Marshall's position was derived from and supported the views of *both* Alexander Hamilton and James Madison, who advocated broad national and hence congressional power over the states in *The Federalist*. Madison, although later of the same political party as Thomas Jefferson (Democrat-Republican), did not agree with his fellow Virginian's strict constructionist view, which would have limited congressional authority. Although President Madison vetoed the first National Bank bill in 1815, in 1816 he signed into law legislation establishing a national bank that John Marshall was to review in the *McCulloch* case. The discussion of the case in the text and below in this manual illustrates that it was one of the major political controversies of the time. *McCulloch* is followed by *Gibbons* v. *Ogden* (1924), new to this edition. Just when Commerce Clause jurisprudence seemed to have established unqualified national power under Article I, the Court backtracked in *Lopez* v. *United States* (1995) and even more so in *United States* v. *Morrison* (2000), in which the Supreme Court reigned in congressional power under the Commerce Clause. The chapter includes an excerpt from the *Morrison* case.

The final reading by Martha Derthick sets contemporary federalism in the context of Madison's expectations at the time of the framing of the Constitution.

CONSTITUTIONAL BACKGROUND: NATIONAL *versus* STATE POWER

The selections from *The Federalist* will bear out the points made previously by John Roche that federalism, which inevitably was to become an underpinning for states' rights doctrines, was at the time of the framing of the Constitution a major victory for nationalism. It was against this background that Hamilton wrote in *The Federalist* about the advantages of the new federal system that would be created by the Constitution. The debate was not between federalism and a unitary form of government, but rather between federalism and a confederation.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 6:
Alexander Hamilton, *Federalist 16, 17*

In these selections Alexander Hamilton is arguing that under the new federal Constitution the national government will be able to act directly upon the citizens of the states to regulate the common concerns of the nation, which is absolutely essential to the preservation of the Union. The Articles of Confederation are far too weak to serve the nation. While arguing for the necessity of a stronger national government, Hamilton at the same time attempts to assuage the fears of many citizens of the individual states that the proposed new national government would inevitably destroy state sovereignty and subordinate the legitimate interests of the states to the national government.

QUESTIONS FOR DISCUSSION

1. Why, in Hamilton's view, is it illusory to worry about the Constitution establishing a national government so powerful that it could coerce the states collectively? ("Whoever considers the populousness and strength of several of these states singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities.")

2. Why is it necessary for the national government to be able to pass laws that will directly affect the citizens of the states if the Union is to survive? (Only in this way can the common concerns of the nation be regulated, and the national government "must, in short, possess all the means, and have the right to resort to all the methods, of executing the powers with which it is entrusted, that are possessed and exercised by the governments of the particular states." If the state legislatures have the power to act as intermediaries between the national government and state citizens, state evasion of national legislation would be made too easy and even encouraged.)

3. Comment upon Hamilton's statement in *Federalist 17* that "[a]llowing the utmost latitude to the love of power, which any reasonable man can require, I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general [national] government could ever feel to divest the states of [their reserved powers]. . . . The regulation of the mere domestic police of a state, appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war, seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects, ought, in the first instance, to be lodged in the national depository." (Note in this discussion the fact that the national government has increasingly encroached upon what were once the reserved powers of the states. The reasons for this include the increasing nationalization of issues and the inability of states to fulfill the desires of their own citizens in such reserved powers areas as education, police protection, highway construction, urban renewal, and many of the other areas in which federal grant-in-aid programs operate.)

MULTIPLE CHOICE QUESTIONS

1. In *Federalist 16* and *17,* Alexander Hamilton argues that:

   a) the new national government will be a danger to the collective power of the states.
   b) it is illusory to worry that the national government will subvert state power.
   c) the Confederation was an adequate government in its time but now it must be replaced.
   d) the states will retain their sovereignty under the new Constitution.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. Hamilton suggests that the national government must be able to act directly upon citizens of the states in certain spheres because:

   a) it is necessary to keep the states in line.
   b) the national defense requires it.
   c) only in this way can the common concerns of the nation be regulated.
   d) state legislatures are unrepresentative of the people.

Reading 7:
Anti-Federalist Papers No. 17

Theme:

The Constitution will subvert state power. The Constitution gives Congress extensive enumerated powers, among which the most important are the power to tax and to raise and support armies. These and other powers, in combination with the "necessary and proper" and supremacy clauses, assure national domination over the states.

MULTIPLE CHOICE QUESTIONS

1. The Anti-Federalists worried that the new Constitution would:

   a) enhance state power to the detriment of the national government.
   b) undermine state sovereignty.
   c) establish a weak national government.
   d) create strong political parties.

2. The Anti-Federalists felt that excessive national power would be the result of the:

   a) supremacy clause of the Constitution.
   b) Congressional powers to tax and spend.
   c) power of Congress to raise and support armies.
   d) all of the above

Reading 8:
James Madison, *Federalist 44*

The necessary and proper clause of Article I that gives Congress implied powers is a critical component of national power without which the goals of the Constitution could not be achieved. While implied powers would exist by implication, the clause is important to avoid challenges to national power on the pretext that Congress lacks implied powers because of the absence of constitutional text clearly claiming such power.

Discussion

The framers wanted to ensure that national power would not only be supreme (Article VI) but also open-ended within the context of Article I's enumerated powers. Interestingly, the nationalists (Roche definition) viewed the implied powers clause as expanding national power while the dictionary definition at the time suggested that

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

"necessary" and "proper" limited national power as the proponents of states' rights argued. As with so many constitutional provisions, the lack of clear textual definitions allowed both nationalists and states' rights advocates to vote for the new Constitution in the ratification conventions.

Of course students find debates over the necessary and proper clause arcane (if they knew what "arcane" means), but remind them when they get to selection 14, *United States* v. *Morrison* (2000), that the Supreme Court's interpretation of constitutional provisions such as the necessary and proper clause continues to define national power. The Constitution remains our supreme social contract.

MULTIPLE CHOICE QUESTIONS

1. The necessary and proper clause:

   a) expands congressional power.
   b) requires the Supreme Court to adopt a strict constructionist view of Article I powers.
   c) supports presidential prerogative powers.
   d) limits congressional power.

2. In *Federalist 44* Madison argues that:

   a) the Constitution should clearly define all congressional powers.
   b) Congress should exercise only expressly enumerated powers.
   c) the necessary and proper clause is essential to allow implied congressional powers.
   d) the Constitution should enumerate what congressional powers are not necessary and proper for the execution of its enumerated powers.

Reading 9:
James Madison, *Federalist 45*

Theme

The Constitution adds few new national powers beyond those the Articles of Confederation already contain. On balance, the powers the states retain are sufficient to protect them against unwarranted national intrusion into their sovereign domain.

Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

The presidency and the Senate require state legislative action to be elected, making these powerful national institutions dependent on the states as their constituencies. Note for students that even with the direct election of Senators, the states as states continue to dominate the Senate because each state has two Senators regardless of population. Less than 15% of the electorate controls a majority of the Senate. The Electoral College continues to make presidential elections dependent on the geographical distribution of votes. Less than a handful of states determined the outcome of the 2000 presidential election and the same was the case in 2004.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTION

1. James Madison in *Federalist 45* stated that:

    a) state governments cannot act without the support of the national government.
    b) the state governments may be regarded as constituent and essential parts of the federal government.
    c) the federal government will have the advantage over state governments.
    d) state legislatures are not essential to the election of the president.

Reading 10:
James Madison, *Federalist 39*

In *Federalist 39*, James Madison, like Alexander Hamilton in the previous selections, attempts to alleviate the fears of proponents of states' rights that their interests would be submerged by the new Constitution. In this paper Madison separates the national from the federal characteristics of the Constitution, the term *federal* being used to describe those powers of the new government that essentially were shared by the states or reflected state interests. It is important to clarify for students the unusual use of the term *federal* by Madison to describe a system requiring an agreement among the states before certain actions could be taken, or where state interests are taken into account as in the representation of the states in the Senate. Madison's use of the term *federalist* is clarified when in quoting the adversaries of the proposed constitution he notes that they argued for the preservation of the *federal* form, "which regards the Union as a confederacy." *National* refers to the newly acquired power of the government to act directly upon the people, to represent them directly in the House of Representatives, and to legislate for national concerns.

QUESTIONS FOR DISCUSSION

1. In what sense does Madison describe the process of ratification of the Constitution as a federal and not a national act? (It is a federal act because ratification requires the assent of the independent states, acting through their state-ratifying conventions, rather than the assent of the people of the states acting collectively. Madison writes that the assent and ratification of the Constitution "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.")

2. What are the national and federal attributes of the House and the Senate respectively, according to Madison? (Madison states that the "House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*.")

3. What are the attributes of presidential authority in terms of Madison's categories of national and federal characteristics? (The presidency is a compound institution, with both federal and national aspects. The

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

rather intricate argument of Madison is that the immediate election of the president by the Electoral College reflects the states acting in their individual capacities, and therefore this is a federal attribute of the presidency. But note Madison's argument that the "votes allotted to them [the states] are in a compound ratio, which considers them partly as distinct and coequal societies [and therefore reflecting a federal aspect of the system], partly as unequal members of the same society [which reflects national features]."

4. What is the distinction between the federal and national characteristics of the operation of the government? (Where the government has the authority to operate directly upon the individual citizens of the states in their individual capacities the power of the government is national, not federal. But the operation of governmental power directly upon the citizens is limited to its enumerated authority under the Constitution; therefore, the limited extent of its powers is an important federal characteristic of the Constitution.)

Madison concludes that the structures, processes, and powers of the new government created by the Constitution reflect a perfect balance between federal and national interests. The national government is given adequate powers to legislate and carry out public policy in the national interest, and at the same time the interests of the states are preserved both in the structure of the Senate and the mode of election of the president, as well as by the fact that the national powers are only those specifically enumerated as belonging to the national government by the Constitution. Although the Tenth Amendment was not part of the original Constitution, its explicit statement that powers not delegated to the national government are reserved to the states respectively, or to the people, is implied in Madison's argument in *Federalist 39*.

MULTIPLE CHOICE QUESTIONS

1. In *Federalist 39*, James Madison argues that the new Constitution:

   a) eliminates state sovereignty.
   b) is both national and federal.
   c) is primarily national.
   d) retains the major features of the Confederation.

2. In *Federalist 39*, James Madison:

   a) argued that the states should be able to filter national actions.
   b) favored the ability of the national government to act directly upon the states on national concerns.
   c) argued for a weak national government.
   d) pointed out that because the president was directly elected, national power would be exercised in a democratically responsible manner.

3. Which of the following statements did James Madison *not* make in *Federalist 39*?

   a) An important *national* characteristic of the Constitution is the direct election of the House of Representatives by the people.
   b) The electoral constituency of the Senate represents an important *federal* characteristic of the Constitution.
   c) The new Constitution carefully balances federal and national characteristics.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

d) The amendment process is wholly national in character.

Reading 11: James Bryce, *The Merits of the Federal System*

James Bryce analyzes American federalism and lists many of its benefits. Bryce was a Scotsman who traveled the United States in the latter part of the nineteenth century, taking notes and commenting on American government and life in much the same manner as Alexis de Tocqueville had done some decades earlier.

Bryce's observations, from his classic, *The American Commonwealth*, are on par with Tocqueville's, and his discussion of federalism is a concise and thorough outline of federalism's advantages. Interestingly, while both discussed the practical advantages of the federal mechanism—local sovereignty, administrative flexibility, protections against over-centralized power—both also emphasized non-mechanistic factors that are the glue of the American system. Tocqueville praised the "good sense and practical judgment" of the American people; in this selection, Bryce emphasizes "the presence of a mass of moral and material influences stronger than any political devices."

Bryce's work is often overlooked because of Tocqueville's popularity, but his work is as perceptive and in some cases more sophisticated than the observations of his better-known counterpart. One interesting aspect of Bryce is that he wrote in an era when national government was taking on new meaning in America. His emphasis on the enduring beauty and benefits of federalism in the post-Civil War era are particularly insightful.

QUESTIONS FOR DISCUSSION

1. Bryce points out that none of these political mechanisms would be successful without moral and material influences: the love of self-government and a "sense of community in blood, in language, in habits and ideas, a common pride in the national history and the national flag." Is he right? Are these factors more important than the mechanism established under the Constitution, and are they still important? Are they still realistic assessments of the American populace? Critics of open immigration policies have decried the decline in common pride in the United States. Are critics of multicultural education correct when they argue that too much attention to disparate cultures has weakened the very moral and material influences praised so heavily by Bryce? If these factors are more important than the mechanisms Bryce outlines, and if they are weakening, should we heed the critics' warnings?

   (Bryce wrote, "The student of institutions. . . is apt to overrate the effect of mechanical contrivances in politics. I admit that in America they have had one excellent result: they have formed a legal habit in the mind of the nation. . . . [T]he true value of a political contrivance [is] its power of using, fostering, and giving a legal form to those forces of sentiment and interest which it finds in being." Millions of immigrants have entered the United States, legally and illegally, in the last thirty years. They have different languages, habits, and ideas, and their "common pride" is often challenged by allegiances to their homelands. But the key here may be what Bryce identifies as the love of self-government and local independence. These loves are not necessarily inconsistent with immigration or with multiculturalism. The fact that language and national histories may be diverse does not necessarily inhibit the sentiment at the heart of the nation's stability.)

2. Bryce notes that federalism allows local governments to experiment in legislation and administration without risking the fate of the nation as a whole. Is this kind of separation necessarily good? Does Bryce

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

overlook many of the costs of federalism? (Bryce points out that, as watertight holds of a ship protect the greater entity from isolated leaks, federalism protects the nation from localized social discord or economic crisis. One could argue that federalism helped keep slavery out of the northern states, but one might also argue that it protected prejudices and abuses in the South. Likewise, one could argue that federalism aided expansion, but at the cost of a relatively lawless and brutal environment in the Old West.)

3. Bryce's opinion about the states' ability to experiment without danger to the whole foreshadows Louis Brandeis' characterization of the states as "laboratories of democracy." Is this still a significant part of federalism in the late twenty-first century? Given the expansion in federal responsibilities and the growth of regulations and federal agencies, are states and localities still important players in the American governing scheme? (Certainly, efforts at the state level dealing with reform of the health care and welfare systems can be seen as this kind of experimentation. Likewise, radical efforts like those in California to limit services to immigrants and to strike down affirmative action programs, whatever may be their outcomes, are isolated to some extent from affecting the rest of the country.)

4. After noting the basic rationale behind a federal system, that of creating a unified national system while protecting the independence of the member commonwealths, Bryce makes the interesting observation that this system is well-suited to "developing a new and vast country." Is it realistic to view American expansion in terms of its relationship to federalism? Did the American governing system have a significant effect on the western territories?

   (Alexis de Tocqueville had viewed expansion as almost inevitable; Bryce has a much more sophisticated understanding of how governmental forms promoted and protected the United States as it drove westward. The territories developed through loosely controlled structures of law and governmental development, growing from outposts and territories into full-fledged states. The presence of a federal system and a belief in self-government undoubtedly assisted America's expansion westward.

   Bryce noted that federalism allows for many permutations in the speed and style of expansion through diverse areas, and it allows local laws and customs to prevail as necessary without being burdened by dictates from a distant capital. Elsewhere in this chapter, he wrote, "Although many blunders have been committed in the process of development, especially in the reckless contraction of debt and the wasteful disposal of the public lands, greater evils might have resulted had the creation of local institutions and the control of new communities been left to the Central government.")

MULTIPLE CHOICE QUESTIONS

1. Bryce writes that federalism allows states and localities:

   <u>a)</u> to experiment and fail without threatening the nation.
   b) to control the dispensation of all monies involved in governing.
   c) to join together and dominate the national government.
   d) to prosper without worrying about a higher authority.

2. According to Bryce, federalism:

   a) protects local authority.
   b) protects individual freedoms.
   c) unburdens the national government.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

d)	all of the above

3. Bryce argues that expansion:

   a) was hindered by the absence of a strong central power.
   b) benefitted from federalism's flexibility.
   c) was a violent and lawless endeavor.
   d) ended with the closing of the frontier.

THE SUPREMACY OF NATIONAL LAW

The establishment of the doctrine of national supremacy by the early Federalist judiciary, coupled with the implied powers doctrine, was a keystone in constitutional development.

Reading 12:
McCulloch v. *Maryland,* 4 Wheaton 316 (1819)

In *McCulloch* v. *Maryland*, Federalist Chief Justice John Marshall stated the doctrine of implied powers and the doctrine of supremacy of national law over conflicting state legislation. As non-controversial as this may seem today, at the time the praise for the decision by the Federalists was more than balanced by violent denunciation by a wide range of public opinion in southern and western states. In Virginia the opposition was led by Thomas Jefferson and James Madison (who then ardently supported states' rights), and Thomas Ritchie, the editor of the *Richmond Enquirer*. Commenting upon the opinion in the *Enquirer*, Ritchie wrote: "If such a spirit as breathes in this opinion is forever to preside over the judiciary, then indeed it is high time for the state to tremble . . . all their great rights may be swept away by the one…..If Congress can select any means which they consider convenient, useful, conducive to the execution of the specified and granted power; if the word necessary is thus to be frittered away, then we may bid adieu to the sovereignty of the states; they sink into contemptible corporations; the gulf of consolidation yawns to receive them. This doctrine is as alarming, if not more so, than any which ever came from Mr. A. Hamilton on this question of a bank or of any other question under the Constitution…..The people should not pass it over in silence; otherwise this opinion might prove the knell of our most important states' rights." For this quote and a discussion of the case, see Charles A. Warren, *The Supreme Court in United States History* (Boston: Little, Brown and Co., 1922, vol. 1, p. 516).

QUESTIONS FOR DISCUSSION

1. What were the principal arguments used by Chief Justice Marshall to justify the extension of congressional power to include the power to incorporate a bank, even though the words "bank" and "incorporation" are nowhere to be found in the text of the Constitution itself? (The national legislature must have power that will enable it to "perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional….")

2. Once granted that Congress has the power to incorporate a bank, why did Chief Justice Marshall find that the state of Maryland could not, without violating the Constitution, tax a branch of that bank? (Because

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

the power to tax is the power to destroy. Laws made in pursuance of the Constitution are supreme over laws of the respective states, and cannot be controlled by them. The law of the state of Maryland taxing a branch of the National Bank is repugnant to the federal law.)

MULTIPLE CHOICE QUESTIONS

1. *McCulloch* v. *Maryland* (1819) established the principle that:

   a) Congress cannot exceed its enumerated powers.
   b) powers can be implied from the specifically enumerated powers of Article 1.
   c) the national government is supreme over the states in cases of conflict of laws.
   d) b and c

2. Chief Justice John Marshall proclaimed in *McCulloch* v. *Maryland* (1819):

   a) the power of taxation is vital to the states and may be exercised by both state and national governments.
   b) when Congress has acted under the authority of the Constitution, states cannot pass conflicting laws.
   c) the Constitution and the laws made in pursuance thereof are supreme, and they control the laws of the respective states, and cannot be controlled by them.
   d) all of the above

3. Which of the following statements did John Marshall *not* make in *McCulloch* v. *Maryland* (1819)?

   a) The Constitution and the laws made in pursuance thereof are supreme, and they control the Constitution and laws of the respective states.
   b) The Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.
   c) Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.
   d) Article 1 explicitly grants Congress the authority to incorporate a national bank; therefore congressional establishment of the national bank is constitutional.

Reading 13:
Gibbons v. *Ogden*, 9 Wheaton 1 (1824)

Ruling

Congressional authority to regulate commerce among the states is broad and extends to intrastate activities that have a direct or indirect effect on commerce. State laws that conflict with national laws passed in pursuance of the Constitution are unconstitutional.

Discussion

The Gibbons case is the third historic decision the early Marshall Court made, the other two being *Marbury* v. *Madison* (1803) and *McCulloch* v. *Maryland* (1819).

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

In *Gibbons* v. *Ogden* (1824), Chief Justice John Marshall continued to interpret the Constitution in line with his federalist views. Commerce, he held, was any activity that affects commerce among the states. It is an open-ended power that Congress interprets as it sees fit. His definition "loosely" interpreted the clause, but if you think about it there is simply no textual definition of commerce. Therefore, what it means is subject to interpretation, and substantive constitutional interpretation is required to fill in the details of the commerce power.

Commerce Clause interpretation began in *Gibbons* v. *Ogden* with Chief Justice John Marshall's expansive view of congressional commerce authority.

Daniel Webster's Argument for Gibbons

"The power of Congress to regulate commerce [is] complete and entire…. Nothing is more complex than commerce; and in such an age as this, no words [embrace] a wider field than commercial regulation. *Almost all the business and intercourse of life may be connected, incidentally, more or less, with commercial regulations*…. It [is] in vain to look for a precise and exact definition of the powers of Congress, on several subjects. The Constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of enumeration, stating the powers conferred, one after another, in few words." (Italics added.)

Webster concluded that the clearest motive of the framers of the Constitution was to regulate commerce. Congressional authority could not be limited by any substantive definition of commerce. "[W]here the power [as in commerce is] general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited by, its object, and by the nature of the power."

For instructors so inclined this is a great quote that embodied Marshall's opinion in *Gibbons* and what appeared to be the end point of Commerce Clause jurisprudence during the New Deal after *Schechter* v. *United States* (1935). Webster would have supported the Court's exercise of judicial self-restraint after *Schechter* and opposed the Court in *United States* v. *Lopez* (1995), and *United States v. Morrison* (2000), which is selection 14 toward the end of this chapter.

MULTIPLE CHOICE QUESTION

1. In *Gibbons* v. *Ogden,* Chief Justice John Marshall:

a) upheld state over national power.
b) adopted an expansive view of the commerce power.
c) strictly defined the Article I powers of Congress.
d) stated there were no constitutional limits on the commerce power.

NATIONAL POWER OVER THE STATES: A RECURRING CONSTITUTIONAL DEBATE

Reading 14:
***United States v. Morrison,* 529 U.S. 59 (2000)**

This important case examined congressional authority under the Commerce Clause, and demonstrated the Court's modern inclination toward limiting federal encroachments on state and local sovereignty. The case is an excellent

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

vehicle for demonstrating the history and importance of the Commerce Clause, for explaining the importance of federalism and the separation of powers, and for illustrating the Supreme Court's recent leanings. The dissents in *U.S.* v. *Morrison* present an opportunity to discuss the extent of judicial activism involved in the Court's recent series of federalism decisions.

Background

Congress passed the Violence Against Women Act in 1994. The law stated that "[A]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." Persons committing crimes of violence motivated by gender would be held liable for compensatory and punitive damages. The Act defined a crime of violence motivated by gender as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."

Congress passed the act after four years of hearings, involving testimony from physicians, law professors, representatives of state law enforcement agencies, representatives of private business interests, and survivors of rape and domestic violence. The record supporting passage of the act also included 21 state task force reports and eight reports issued by Congress and its committees. Congress grounded the act in its Commerce Clause powers and in its responsibilities under the Fourteenth Amendment.

Congress's hearings and its efforts to gather evidence to support the Violence Against Women Act stood in marked contrast to the absence of such findings to support the Gun-Free School Zones Act of 1990. That law made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Congress had reasoned that guns lead to violent crimes and pose obstacles to education; since crime and education both affect interstate commerce, Congress argued, it had authority to regulate gun possession in school zones. In *U.S.* v. *Lopez* (1995), though, the Supreme Court ruled 5-4 that the Gun-Free School Zones Act exceeded congressional authority to regulate commerce among the states.

In overturning the gun control law, the majority was particularly concerned that Congress did not make findings that tied the possession of guns in school zones to interstate commerce. Chief Justice Rehnquist concluded, "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." The Court also reasoned that Congress' position would leave virtually no areas free from the threat of congressional interference. "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce...among the several States...."

The supporting evidence behind the Violence Against Women Act had many observers thinking that the act would meet the test established by the Supreme Court in *Lopez*. On the other hand, *Lopez* and other decisions by the Rehnquist Court indicated the Court's turn to a more constrained interpretation of Congress's powers under the Commerce Clause. *U.S.* v. *Morrison*, then, provided some suspense as it came before the Court.

The Case

In early 1995, Virginia Tech student Christy Brzonkala filed a complaint against Antonio Morrison and James Crawford, both of whom were students at Virginia Tech and members of Tech's varsity football team. Brzonkala filed the complaint under the school's Sexual Assault Policy; the facts surrounding the incident and subsequent appeals through the Virginia Tech system and later through the courts are reviewed at the beginning of the selection. By the time the case reached the Supreme Court, the Fourth Circuit Court of Appeals had heard the case en banc and ruled 7-4 that Congress lacked constitutional authority to enact the civil remedy section of 42 USC 13981, the Violence Against Women Act (*Brzonkala* v. *Virginia Polytechnic and State Univ*., 169 F. 3d

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

820 (CA4 1999)).

The Decision

In a 5-4 decision, the Court affirmed the Circuit Court's ruling invalidating the relevant section of the Violence Against Women Act. The majority invoked the earlier *Lopez* decision to support its ruling, and found that Congress had exceeded its constitutional authority under the Commerce Clause. (The Court refused to hear a challenge, originally brought as part of this case, to a section of the law that made it a federal crime to cross state lines to engage in domestic violence or to stalk a victim. A footnote in the full decision suggested that the direct link to interstate activity left that clause within Congress' authority).

The majority ruled that “thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature;” the Court found that gender-motivated crimes are not economic activity. The Court dismissed Congress’ extensive effort to demonstrate a connection between gender-motivated violence and commerce: “[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, ‘[S]imply because Congress may conclude that a particular activity affects interstate commerce does not necessarily make it so.’” The dissent disagrees sharply on this aspect of the majority's decision.

The Court also looked at the implications of upholding the Violence Against Women Act and found that if the act were upheld, Congress would be allowed to regulate virtually any criminal activity, usurping areas of law enforcement that have traditionally been left to states and localities. Echoing the finding in *Lopez*, the extension of this principle to areas other than criminal activity would allow Congress to regulate traditional areas of state regulation like family law, marriage, divorce, and childbearing, since the effect of these activities on the national economy is “undoubtedly significant.”

The Court also ruled that the relevant section of the act exceeded Congress's authority under Section 5 of the Fourteenth Amendment, since the section was directed not at any state nor any state actor, but at private individuals. The Court has generally found the Fourteenth Amendment to prohibit state action only; the Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.” The Court suggested that the Commonwealth of Virginia, and not the federal government, is the appropriate venue for a remedy.

The Dissents

Justice Souter's dissent, which was joined by Justices Stevens, Ginsburg, and Breyer, takes issue with the majority's dismissal of Congress' findings that gender-motivated violence affects interstate commerce. The dissent is strongly in favor of deferring to Congress, “whose institutional capacity for gathering evidence and taking testimony far exceeds ours.” The dissent argues that the role of the courts is to review congressional actions not on the basis of their soundness but simply for their rationality. The dissent argues that Congress's support for its action in the Violence Against Women Act differs from the Act at issue in *Lopez* precisely because of the assembled data.

Justice Breyer's dissent, not reproduced here, argues that the interconnectedness of the modern economy means that virtually any activity can affect commerce outside of a state, making it virtually impossible for courts to develop rules about where Congress may and may not regulate. Stevens, Souter, and Ginsburg joined this part of Breyer's dissent.

Significance

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

U.S. v. *Lopez* was the first time since 1936 that the Court found an act of Congress to have exceeded congressional power over interstate commerce. By following *Lopez* with a similar ruling in *Morrison*, even in light of the body of evidence Congress gathered to support the Violence Against Women Act, the Court signaled its commitment to reining in Congress' powers under the Commerce Clause and continuing its redefinition of the practical relationships governing American federalism. The Rehnquist Court's federalism decisions have become one of its most intriguing features. See, in addition, *New York* v. *United States* (1992), citing the Tenth Amendment in striking parts of a federal law regulating liability for nuclear waste; *Seminole Tribe of Florida* v. *Florida* (1996), relying on the Eleventh Amendment to deny the federal government jurisdiction to adjudicate a case between an Indian tribe and a state; *Printz* v. *United States* (1997), striking part of a federal gun-control measure (Brady Act) as exceeding congressional limits imposed by the Tenth Amendment.

QUESTIONS FOR DISCUSSION

1. Violence against women is a serious and compelling issue. Congress attempted to deal with the issue in the Violence Against Women Act. To what extent does this case indicate the difficulties of implementing policy in the American system? (Use the issue to elicit students' opinions about such measures; students will likely agree that combating violence against women is a justifiable government endeavor. Use the case to illustrate for students that addressing important social issues is not merely a matter of outlawing undesirable behavior; lawmaking must respect the Constitution, and that means it must account for and protect the interests of a variety of local, state, tribal, and national actors.)

2. Is the Court right to decide that Congress' reasoning on the relationships between violence against women and interstate commerce would allow Congress to regulate virtually all other aspects of social life on the same grounds? (*Morrison* can be used to illustrate how the Court will look at a particular rationale for a policy or regulation, and search for the deeper implications of the argument. Penalizing violence against women seems, at first glance, like an appropriate topic for Congress's attention. But the Court identifies where Congress's justification for action might lead, beyond the given case. This search for deeper implications, and the use of "worst case" scenarios, is a hallmark of the Court's decision-making process.)

3. Is there a clear line that helps courts determine when Congress has overstepped its authority? Is the text of the Constitution helpful? Are judges well-suited to make the distinction, or is defining such boundaries better left to the other branches and to bargaining between federal and non-federal interests? (The majority opinion suggests, "The Constitution requires a distinction between what is truly national and what is truly local." In a passage not included in this excerpt, Souter's dissent argued that the majority relied on an outdated and overly formalistic understanding of federalism. He wrote that questions regarding the boundaries between federal and state spheres of authority are subjects more appropriate for the political process than for resolution by the courts. Souter wrote, "Whereas today's majority takes a leaf from the book of the old judicial economists in saying that the Court should somehow draw the line to keep the federal relationship in a proper balance, Madison, Wilson, and [John] Marshall understood the Constitution very differently.")

4. Does the history of the Commerce Clause interpretation help illustrate the Court's relationship to economic and political trends and to current events? (*Morrison* can be used to demonstrate the history of the Court's very real presence in policymaking, through interpretations of the Commerce Clause. It can also be used to suggest the limits inherent in a Constitution that serves not as a detailed blueprint, but as a broad framework outlining the interaction of national institutions (here, Congress and the Supreme Court) and semi-sovereign bodies (federal, tribal, state, and local governments).)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTIONS

1. In *U.S.* v. *Morrison*, the Supreme Court ruled that the Violence Against Women Act:

   a) was constitutional under the Commerce Clause.
   b) was constitutional under the Fourteenth Amendment.
   c) was unconstitutional, as it exceeded Congress' authority under the Commerce Clause.
   d) was not an appropriate subject for judicial review.

2. *U.S.* v. *Morrison* is part of the Supreme Court's recent line of decisions that:

   a) uphold the rights of women to seek remedies for violence at the federal level.
   b) refuse federal protections to minorities who have been discriminated against.
   c) limit Congress' authority in defense of principles of federalism.
   d) *Morrison* was not a Supreme Court decision.

3. Passage of the Violence Against Women Act differed from passage of the Gun-Free School Zones Act because:

   a) it was supported by extensive data gathered by Congress.
   b) it was passed by a unanimous Senate.
   c) it was passed by overriding a presidential veto.
   d) it was supported by the Supreme Court.

WHAT STATE ACTIONS ARE BEYOND FEDERAL REGULATION? CALIFORNIA'S MEDICAL MARIJUANA LAW

Reading 15:
***Gonzales v. Raich,* U.S. Supreme Court (2005)**

Ruling

The Constitution's Commerce Clause gives Congress the power to regulate purely local activities that are in a class of economic activities that rationally can be considered to have a substantial effect on interstate commerce. The Court will not, in reviewing Commerce Clause legislation, substitute its judgment for that of Congress, provided Congress has a rational basis for the law.

Background

California voters, through the state's initiative process, passed a proposition in 1996 that legalized the use of marijuana for a limited class of medical conditions. The state legislature followed with the Compassionate Use Act of 1996, a law that authorized the medical use of marijuana.

The California law conflicted with the federal Controlled Substances Act, which was Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The law categorically prohibited the

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

cultivation, sale, and possession of marijuana. Congress cited the Commerce Clause in conjunction with the Necessary and Proper Clause as its authority to pass the law, claiming that the cultivation, distribution, and possession of marijuana were activities that rationally could be considered to have a "substantial effect" on commerce in controlled substances among the states. Since Congress could prohibit the latter, it could prohibit the former.

Significance

This case should make students aware that federalism issues are not hypothetical. Here we have a major California law overturned by the Drug Enforcement Agency's enforcement of the federal Controlled Substances Act that prohibits the manufacture and sale of marijuana, even the intrastate cultivation and sale of marijuana. Congress's Commerce Clause power under Gibbons is plenary, and reaches into states if regulated activities indirectly affect "commerce among the states." But the Morrison and Lopez cases discussed above seemed to restore a more conservative view of federalism by second guessing the rational basis of congressional legislation.

Note for students that here the Supreme Court overturned a state law that the people of California supported fully. The facts of the case are poignant. Students should come away realizing that the seemingly bland and dry Commerce Clause jurisprudence can have a profound political impact, as it has throughout our history.

MULTIPLE CHOICE QUESTIONS

1. In *Gonzales* v. *Raich* (2000) the Supreme Court:
   a) upheld the California Compassionate Use Act of 1996.
   b) deferred to Congress.
   c) narrowly interpreted the Commerce Clause of Article I.
   d) overturned Congress.

2. In reviewing the congressional law in *Gonzales* v. *Raich* (2000) the Supreme Court held:
   a) Congress can regulate local activities that have a "substantial effect" on interstate commerce.
   b) State law regulating intrastate activities trumps federal regulation.
   c) The California law was a legitimate exercise of the state police power to protect the health of its residents.
   d) Congressional Commerce power is not limited.

MODERN FEDERALISM IN THE MADISONIAN SYSTEM

Reading 16:
Martha Derthick, *Up-to-Date in Kansas City: Reflections on American Federalism*

Theme

James Madison saw federalism as an important part of balanced government. Shared responsibilities between the national government and the states would prevent excessive delegation of powers to the executive by an overburdened Congress

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Overview

- By American federalism I mean an arrangement whereby the functions of government are divided between one national government and numerous sub-national ones, all resting on popular consent and written constitutions.

- American states are not creatures of the national government. State governments derive authority from their respective constituent communities

- Madison felt that Congress would be unable to deal with the vast universe of local problems and pressures. Consolidation would increase the power of the president by compelling a legislative delegation on practical grounds

- Madison expected the institutions of federalism to help control the national legislature. But parties and elections early proved more efficacious than address by the state legislatures to deter Congress from pursuing "a self-directed course."

- In the end federalism failed to bring about the social harmony and national community Madison wanted.

MULTIPLE CHOICE QUESTIONS

1. Madison saw federalism as a governmental arrangement that would:
   a) encourage states to address Congress directly and sustain popular control of the national government.
   b) encourage Congress to delegate power to the executive.
   c) reduce judicial power.
   d) increase political conflict.

2. In the end federalism:
   a) brought about political harmony in the broad national community.
   b) enhanced the role of courts as they were called upon to define the limits of national and state powers.
   c) helped to transmit popular will to Congress.
   d) was not constitutionally protected.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 3

Civil Liberties and Civil Rights

It is ironic that the Bill of Rights was not part of the original Constitution because it has become such an important part of our constitutional law beginning with the twentieth century. In introducing students to the subject, point out that no civil liberty or right is absolute. However, it is difficult to determine under what circumstances constitutional and inalienable or higher-law rights may be abridged. The Supreme Court has typically used a balancing test, weighing governmental interests against private rights and interests, to decide at what point the government may curtail civil liberties and rights.

The constitutional premise of the Bill of Rights, and even of those founding fathers who did not believe it should be spelled out in the Constitution, is that natural law and natural rights give individuals' inalienable rights that the government can not take away except under the most compelling circumstances. Defining civil liberties and rights is a matter of constitutional and higher law interpretation to be done by the courts, rather than a determination that is to be made through the political process in which the majority can, at whim, trample upon and stamp out individual freedoms.

Unique in the American system is the dominant and expansive role of the courts in interpreting both the constitutional and higher law of civil liberties and rights. The latter is incorporated into the former in such controversial cases as *Roe* v. *Wade* (1973), upholding a woman's right to have an abortion based on the individual's fundamental right to privacy, a right that is not explicitly part of the Bill of Rights but one that can be interpreted as part of the "liberty" of the due process clause of the Fourteenth Amendment. As Justice Douglas stated in the precedent to Roe, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), a right to privacy is created from a "penumbra" of various Bill of Rights provisions, such as the First Amendment freedoms of association, speech, and press; the Fourth Amendment protection against unreasonable searches and seizures; and the Fifth Amendment protection against self-incrimination.

CONSTITUTIONAL BACKGROUND

Reading 17:
Anti-Federalist Paper No. 84, On the Lack of a Bill of Rights

Theme

A major defect of the proposed Constitution is the lack of a separate bill of rights. Our mother country England has the Magna Charta and a bill of rights, and all of the states have constitutional protections of civil rights. A bill of rights is fundamental to free governments.

Arguments

"Brutus" argues in this Anti-Federalist paper that all of the states have extensive bills of rights, either separately or included within their constitutions. The same protections afforded against state action should be explicitly included in the federal Constitution to prevent the national government from intruding upon fundamental civil liberties and rights.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTION

1. The Anti-Federalists argued that:

a) a bill of rights was unnecessary in the federal Constitution because all of the states had extensive bills of rights.
b) natural law and its common law derivatives protecting due process made a federal bill of rights unnecessary.
c) a major failure of the federal Constitution was its lack of a separate bill of rights.
d) a bill of rights in the federal Constitution would set a dangerous precedent by implying that the national government could violate rights not enumerated.

THE NATIONALIZATION OF THE BILL OF RIGHTS

In leading into the next discussion on the nationalization of the Bill of Rights, ask students to evaluate the arguments of the opponents of the Bill of Rights. Did the listing of rights, essentially in the first eight amendments to the Constitution, actually create an important bulwark against intrusion by the national government upon the civil liberties and civil rights of the people? Historical evidence certainly suggests that the major invasion of rights has been by the states and not the national government. The irony is that the Supreme Court, under the due process clause of the Fourteenth Amendment, ultimately used the Bill of Rights far more to curb *state* than national power.

The note introducing *Gideon* v. *Wainwright* (1963) is a capsule summary of the history of the nationalization process under the due process clause of the Fourteenth Amendment. The relevant part of the text of that amendment is given, followed by a brief overview of the *Slaughterhouse Cases*, 16 Wallace 36 (1873); *Gitlow* v. *New York*, 268 U.S. 652 (1925); and *Near* v. *Minnesota*, 283 U.S. 697 (1931).

But before proceeding to the nationalization of the Bill of Rights, students should clearly understand Chief Justice John Marshall's decision in *Barron* v. *Baltimore (1833)*, in which he examined both the intent and the text of the Constitution to conclude that the Bill of Rights limited only the national government.

In response to a plea that the Fifth Amendment should be applied to the City of Baltimore, as an agent of the state, to prevent property confiscation without just compensation, Chief Justice John Marshall's opinion in *Barron v. Baltimore* stated:

> Serious fears were extensively entertained, that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those unvaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general [national] government-not against those of the local [state] governments. In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 18:
Gideon v. *Wainwright,* 372 U.S. 335 (1963)

As direct background to the *Gideon* case, *Powell* v. *Alabama*, 287 U.S. 45 (1932), and *Betts* v. *Brady*, 316 U.S. 455 (1942), are covered in the text. The general debate over the proper extent of nationalization of the Bill of Rights, as well as the controversy over going beyond the explicit provisions of the Bill of Rights in incorporating such rights as privacy is discussed, and reference is made to *Adamson* v. *California*, 332 U.S. 350 (1947), *Griswold* v. *Connecticut* (1965), and *Roe* v. *Wade* (1973).

The story of the *Gideon* case is brilliantly told in Anthony Lewis' classic book, *Gideon's Trumpet* (New York: Random House, 1964), which is often assigned in introductory American Government courses.

QUESTIONS FOR DISCUSSION

1. What were the essential facts of the *Gideon* case, and what constitutional issue was involved? (Gideon, having been charged with a misdemeanor in a Florida court, requested counsel to defend him. The request was denied by the court over the insistence of Gideon that "the United States Supreme Court says I am entitled to be represented by counsel." Gideon then conducted his own defense, the jury returned a verdict of guilty, and he was sentenced to five years in a state prison. An appeal to the Florida Supreme Court was turned down, and the United States Supreme Court granted certiorari, Gideon having filed an *in forma pauperis* petition with the Supreme Court for review of his case.

   Although the text of the case does not so state, the Supreme Court appointed Abe Fortas to be Gideon's counsel. The Supreme Court had already made up its mind to nationalize the right to counsel under the Fourteenth Amendment due process clause, and selected the *Gideon* case from a number of possible cases it could have chosen as the vehicle for this purpose. Since the fact situation of *Gideon* v. *Wainwright* was, in the words of the Court, almost identical to that in *Betts* v. *Brady* (1942), in which the Court had denied the right to counsel, *Gideon* v. *Wainwright* overruled *Betts*.)

2. What arguments did the Court use to justify inclusion of the right to counsel under the due process clause of the Fourteenth Amendment? (The Court advanced the classic premise that rights which are fundamental and essential to a fair trial are obligatory upon the states under the due process clause of the Fourteenth Amendment, and that the Sixth Amendment guarantee of counsel is one of these fundamental rights. The Court selectively referred to prior cases dealing with the right to counsel, such as *Powell* v. *Alabama* (1932), in which it was held that the particular facts of that case required that counsel be given to the Scottsboro defendants, to support its conclusion that the right to counsel was often considered essential by the Supreme Court in the past. *Betts* v. *Brady*, Justice Black argued for the Court, was a departure "from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested.")

MULTIPLE CHOICE QUESTIONS

1. *Gideon* v. *Wainwright* (1963):

   a) overruled *Betts* v. *Brady*.
   b) incorporated the right to counsel under the due process clause of the Fourteenth Amendment.
   c) held that the right to counsel was not fundamental.
   <u>d</u>) a and b

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. In *Gideon* v. *Wainwright* (1963), the plaintiff (Gideon):

   a) conducted his own defense on a criminal charge before a Florida jury.
   b) had a court-appointed counsel for his defense.
   c) hired a high-priced counsel.
   d) was given a suspended sentence by the Florida court.

3. In *Gideon* v. *Wainwright* (1963), the Supreme Court:

   a) held that the right to counsel was one of the privileges and immunities granted to criminal defendants under the Fourteenth Amendment due process clause.
   b) incorporated the Bill of Rights under the due process clause of the Fourteenth Amendment.
   c) held that the right to counsel in criminal cases was fundamental to due process of law and therefore applicable to the states under the due process clause of the Fourteenth Amendment.
   d) cited *Betts* v. *Brady* approvingly, limiting the right to counsel to capital cases.

FREEDOM OF SPEECH AND PRESS: THE EVOLUTION OF CLEAR AND PRESENT DANGER

Reading 19:
Oliver Wendell Holmes, *The Need to Maintain a Free Marketplace of Ideas*
Abrams v. *United States,* 250 U.S. 616 (1919)

Theme

The clear and present danger test of *Schenck* v. *United States* (1919) should require facts supporting an immediate or imminent danger to a legitimate government interest to justify suppression of First Amendment freedoms of speech and press.

Discussion

Emphasize for students that the clear and present danger test as applied in *Schenck* and all subsequent cases by the Court's majority until *Brandenburg* v. *Ohio* (1969) upheld most instances of government regulation of expression. Essentially the Court used a balancing test that gave governmental interests in national security greater weight than individual liberty of expression in specific cases.

Now stress the important point that Holmes' dissent in the Abrams case given here ironically changed his original clear and present danger test to require a demonstration of substantial imminent danger to justify suppressing the free marketplace of ideas.

Holmes used the same argument John Stuart Mill gave for freedom of expression in the selection in previous editions, now omitted for space reasons. Mill wrote:

> But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Holmes wrote in his Abrams dissent:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

MULTIPLE CHOICE QUESTION

1. In *Abrams* v. *United States,* Justice Holmes:

   a) stressed the need for government to have wide latitude to regulate speech and press during both wartime and peacetime.
   b) modified his original clear and present danger standard in *Schenck* v. *United States*.
   c) stated that government should not regulate speech under any circumstances.
   d) directly overturned *Schenck* v. *United States*.

EXPANDING THE BOUNDARIES OF PERMISSIBLE CRITICISM OF GOVERNMENT AND PUBLIC OFFICIALS

Reading 20: *New York Times* v. *Sullivan,* 376 U.S. 254 (1964)

Theme

The First Amendment freedoms of speech and press overrule the common law of libel that is embedded in statutory law throughout the country, which casts a chilling effect on criticism of public officials. Public officials must prove actual malice and reckless disregard of the truth to collect damages in libel suits against their critics.

In *New York Times* v. *Sullivan* (1964), the Court overturned the historic common law of criminal and civil libel that was embedded in state statutory law. The opinion of Justice William J. Brennan for the Court had enormous implications for freedom of the press. The common law of libel that statutory law repeated was the principal shield preventing unrestrained press and speech criticism of government and public officials in particular. The Sullivan case was indeed a watershed event in constitutional law and First Amendment jurisprudence.

MULTIPLE CHOICE QUESTIONS

1. To win a libel case, a public official must prove that the libel:
   a) undermines national security.
   b) is false.
   c) was made with reckless disregard of the truth or malicious intent.
   d) caused monetary damages.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. The Court's ruling in *New York Times* v. *Sullivan*:
   a) made it impossible for public officials to win libel suits.
   b) supported reckless criticism of public officials.
   c) changed the common law of libel.
   d) undermined freedom of the press.

EQUAL PROTECTION OF THE LAWS: SCHOOL DESEGREGATION

This section includes *Plessy v. Ferguson* and the two historic *Brown* decisions of 1954 and 1955, and a discussion in the notes of the important busing cases of *Swann* v. *Charlotte - Mecklenburg*, 402 U.S. 1 (1971) and *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

Reading 21:
***Plessy* v. *Ferguson,* 163 U.S. 537 (1896)**

The Court's Ruling

The Fourteenth Amendment's equal protection clause incorporates a separate but equal doctrine, which permits state segregation of the races, provided segregated facilities are equal. A state law that segregates the races on railway carriages does not violate the Thirteenth Amendment's prohibition on slavery nor the Fourteenth Amendment's requirement for equal protection of the laws. The Fourteenth Amendment intended only equality of the races before the law.

Mr. Justice HARLAN dissenting:

> …[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Discussion

Explain the separate but equal doctrine and its effect as precedent even in *Brown* v. *Board of Education* that overruled it. The *Brown* overrule was based on evidence that racially separate public education is intrinsically unequal, a tacit acceptance of the separate but equal doctrine. What if one could use a Brandeis brief argument; that is, the use of empirical evidence, to prove, for example, that education in black colleges is not necessarily unequal? Would that then lead to a modification of *Brown*?

MULTIPLE CHOICE QUESTION

1. *Plessy v. Ferguson* (1896) announced:
   a) segregated schools are unequal.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

b) segregated schools can be equal.
c) racial segregation in railroad cars does not violate the Fourteenth Amendment's equal protection clause if the facilities are separate but equal.
d) racial segregation violates the spirit but not the letter of the Thirteenth Amendment's prohibition on slavery.

Reading 22: *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954)

The introductory note to this case optimistically states that students are undoubtedly familiar with the "separate but equal" doctrine; however, it would be a good idea for instructors to go over *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) in some detail. Relevant sections from that case are quoted in the introductory note to *Brown*.

QUESTIONS FOR DISCUSSION

1. What arguments did Chief Justice Warren use to overrule the "separate but equal" doctrine? (Separate educational facilities, no matter how physically equal they may be, are inherently unequal because they separate blacks from whites in such a way as to imply inferiority of the former. Such a physical separation of the races, by preventing blacks from exchanging views with white students, and getting to know white students on an equal basis, "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." See also the citation from the Kansas case in the *Brown* decision.)

2. What precedents did Chief Justice Warren rely upon in the *Brown* case to overrule *Plessy* v. *Ferguson*? (Note here the cases involving higher educations, such as *Sweatt* v. *Painter*, 339 U.S. 629 (1950).) Point out to students the slightly different implications of segregation at the higher educational and professional school levels, from that at elementary and secondary levels, namely the fact that segregation in professional schools has a positively detrimental effect upon later career possibilities. At the secondary and elementary levels it tends more to affect the minds and hearts of children, and this was one of the key reasons for the *Brown* decision.)

3. What did the Court decide about implementing its decision in the first *Brown* case? (The case merely announced that segregation is a denial of equal protection of the laws. Arguments were then solicited from the Attorneys General of the states where the decision would have effect, as well as from the Attorney General of the United States, to determine how the decision was to be implemented. "Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity.")

MULTIPLE CHOICE QUESTIONS

1. In the 1954 *Brown* v. *Board of Education* decision, the Court held:

a) segregated public schools are constitutional provided they are equal.
b) segregated education violates the due process clause of the Fourteenth Amendment.
c) segregated education violates the equal protection clause of the Fourteenth Amendment.
d) segregated education can, from a social and educational standpoint, be equal but it is nevertheless unconstitutional.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. Which of the following statements is *incorrect* with regard to *Brown* v. *Board of Education* (1954)?

   a) The plaintiffs contended that segregated public schools are not equal and cannot be made equal under any circumstances.
   b) The Supreme Court rejected the "separate but equal" doctrine of *Plessy* v. *Ferguson* (1896).
   c) The Supreme Court concluded that in the field of public education separate educational facilities are inherently unequal.
   d) The Supreme Court held that in some cases separate educational facilities for the races were justified.

Reading 23:
***Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483 (1955)**

This was the implementing decision of the *Brown* case, in which the Supreme Court recognized the potential political consequences of its decision.

QUESTIONS FOR DISCUSSION

1. Do you agree or disagree with the Supreme Court's final method of implementation of the *Brown* decision? What effects did this process ultimately have upon desegregation in the South? (Note here that the Court delegated to district courts the responsibility to issue desegregation decrees as cases and controversies arose before them on the issue of desegregation. The Court remanded the cases that were involved in the *Brown* decision to the district courts to fashion decrees after balancing the general public interest with the interests and needs of the communities involved—such as problems relating to administration, arising out of the physical condition of the school plants, school transportation, personnel, revision of school districts, and the revision of local laws and regulations. Ultimately the implementation of the *Brown* decision was based upon a case-by-case process at the district court level. The result of this was extraordinarily slow progress in integration in the South until approximately 1970. A decade after the *Brown* decision, less than 10 percent of the black pupils in the lower educational levels in the South were enrolled in integrated schools. While the Supreme Court had ordered integration to proceed "with all deliberate speed," in fact it proceeded at a snail's pace.)

MULTIPLE CHOICE QUESTIONS

1. The 1955 implementing decision in *Brown* v. *Board of Education* held that:

   a) implementation of desegregation in education may be delayed until local communities support the idea.
   b) desegregation is to proceed immediately without regard to local problems.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

c) the district courts are to implement desegregation with consideration of local problems but are to require “a prompt and reasonable start” toward compliance and are to act with “all deliberate speed.”
d) full implementation of the decision may be delayed for no longer than 20 years.

2. In the 1955 implementing decision for *Brown* v. *Board of Education*, the Supreme Court:

a) recognized that the implementation of desegregation required the solution of varied local school problems.
b) ordered the immediate implementation of desegregation orders throughout the southern and border states.
c) turned over the administration of local schools to the courts in those states that had by law segregated their public schools.
d) gave the Federal District Courts no guidelines and full discretion to order desegregation in a manner and at a time of their choice.

THE CONSTITUTIONAL RIGHT TO VOTE

Reading 24:
***Gomillion v. Lightfoot,* 364 U.S. 339 (1960)**

Background

Fifteenth Amendment - Right of Citizens to Vote

Section. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

The Court’s Ruling

The Fifteenth Amendment forbids states as well as the national government from creating electoral districts that discriminate on the basis of race. In this case the Supreme Court unanimously held that the federal courts have jurisdiction to decide, on the basis of the facts of the case, whether or not an Alabama state law that redrew the boundary lines of the city of Tuskegee to exclude all African-Americans from voting in city elections violated the Fifteenth Amendment.

Further Background

The lower federal courts had followed the precedent of Justice Frankfurter’s plurality opinion in Colegrove v. Green (1946) that legislatures, not courts, had the final authority to draw electoral districts.

In the *Gomillion* case, however, the same Justice Frankfurter held that an electoral district based on *racial discrimination* raised a constitutional issue, giving courts jurisdiction to decide whether or not the legislative

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

action violated the Constitution. In *Gomillion* the Supreme Court accepted the facts of the original complaint as true, and remanded the case to the lower federal courts for further judicial action consistent with the ruling. On remand the federal district court in Alabama held the Alabama law to be a violation of the Fifteenth Amendment.

Discussion

Emphasize how the Alabama law implied a clear *intent* to discriminate on the basis of race; therefore there was by implication a racial classification. Since the law in effect denied the right to vote to African-Americans in Tuskegee the violation of the Fifteenth Amendment was clear.

Frankfurter discussed his plurality opinion in *Colegrove v. Green* (1946). That opinion was commonly accepted as precedent requiring federal courts to decline to hear electoral reapportionment cases because they were "political questions."

The confusion came from Justice Rutledge's decision that joined Frankfurter's plurality *decision*, not *opinion* for the Colegrove case only due to what Rutledge viewed as special circumstances because the Illinois congressional elections were due in the Fall. He did not want to disrupt those elections through judicial intervention. But his concurring opinion agreed with the dissenters that the question of unequal electoral apportionment was justiciable.

MULTIPLE CHOICE QUESTIONS

1. *Gomillion v. Lightfoot* (1960) unanimously held that:

   a) state school segregation was unconstitutional.
   b) the federal courts should not intervene in electoral apportionment cases.
   c) state action denying the right to vote in municipal elections on the basis of race violated the Fifteenth Amendment.
   d) the federal courts should exercise judicial self-restraint in reviewing a state apportionment scheme unless an explicit intent to discriminate on the basis of race was part of the apportionment law.

2. Justice Frankfurter in *Gomillion v. Lightfoot* (1960) found:

   a) the complaint amply alleged racial discrimination.
   b) the state gave important but not compelling reasons to support the discrimination.
   c) racial gerrymandering was beyond the jurisdiction of the federal courts.
   d) the Alabama law violated the Fourteenth Amendment's due process clause.

Reading 25:
***Crawford et al. v. Marion County Election Board,* United States Supreme Court (2008)**

The Court's Ruling

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

A state law requiring voter photo identification does not arbitrarily and excessively burden a particular class of voters. The state has a rational basis for the law, which is to prevent voter fraud. The petitioners' claim that the law violates the equal protection clause of the Fourteenth Amendment is dismissed.

Background

As Justice Steven's wrote at the outset of his opinion for the Court, "At issue in these cases is the constitutionality of an Indiana statute requiring citizens voting in person on Election Day, or casting a ballot in person at the office of the circuit court clerk prior to election day, to present photo identification issued by the government."

Constitutional Issues

In cases reviewing state or federal laws the Supreme Court analyzes the governmental rationale for the law to determine if it is sufficient to support the law. To pass constitutional muster laws can not be *arbitrary*, as when based upon racial prejudice.

The Court subjects laws that contain racial classifications to strict scrutiny which requires the government to prove a compelling interest for the law. The law also must be narrowly tailored to achieve the legitimate government end that is sought.

Racial discrimination was not directly implied in the Indiana voter identification law. The state argued that the primary purpose of the law was to prevent voter fraud. Nevertheless minority groups joined in the challenge. They argued that the photo identification requirement discriminated against minority groups, the members of which were less likely to have such identification than mainstream voters.

The Court's Conclusion

"In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters…"

Finally we note that petitioners have not demonstrated that the proper remedy—even assuming an unjustified burden on some voters—would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, "[w]e must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"

MULTIPLE CHOICE QUESTIONS

1. In *Crawford et al. v. Marion County Election Board (2008)* the issue was:

    a) racial classifications in voting.
    b) the poll tax.
    c) literacy tests.
    d) state photo identification requirements for voting.

2. In *Crawford et al. v. Marion County Election Board (2008)* the Court:

    a) overturned the Indiana voter identification law.
    b) held that the state had failed to prove the need for the law.
    c) found the prevention of voter fraud could be used as part of a legitimate state rationale for the law.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

d) held that the law did not unduly burden any class of voters.

THE JUDICIAL SOURCES OF MAJOR CONTROVERSIES OVER CIVIL LIBERTIES AND RIGHTS

Stress once again for students the unique role the Supreme Court performs in our political system. In no other democratic government does the high court have such wide authority to make decisions that have the effect of public policy and that may overturn democratic outcomes in Congress and, more significantly in Supreme Court practice, state legislatures. All of the decisions in this section reviewed state action on school prayer, the free exercise of religion, abortion, affirmative action, and racial gerrymandering, respectively. All of the cases spawned political debates over the issues.

Perhaps before beginning a discussion of the cases, it would be a good idea to refer students ahead to some of the Chapter 9 selections on the judiciary, particularly selection 67 by John P. Roche dealing with judicial self-restraint, and selections 72-74, which discuss how different Justices interpret the *Roe* decision. Roche stresses that the Supreme Court has been politically astute in maintaining its power through the exercise of judicial self-restraint, especially when it has confronted cohesive political majorities opposing it. Roche's thesis continues to hold up fairly well, although surveys of national public opinion reveal that, while a majority supports abortion rights and limiting affirmative action, 86 percent of the public believes that prayer should be permitted in public schools. One might agree that the Supreme Court followed the election returns on the former two cases, but in the cases involving school prayer even a conservative Supreme Court is highly unlikely to allow prayers where there is a legislative intent to put religion back into the schools. (See *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), which will be discussed below.)

THE ESTABLISHMENT CLAUSE AND THE ISSUE OF SCHOOL PRAYER

Reading 26:
***Engel* v. *Vitale,* 370 U.S. 421 (1962)**

Here is the seminal school prayer decision that many readers requested be put back into the book to acquaint students with the origin of the school prayer controversy. During the 1970s, when the school prayer issue seemed at least to be on the political back burner, the case was dropped from the text. However, the controversy continues and *Engel* v. *Vitale* is again highly relevant.

The Decision

The Court held that the First Amendment's Establishment Clause prohibits, as part of its ban on government-sponsored religions, state-sponsored prayers in public schools. A New York State law requiring public school pupils to recite a short nondenominational prayer each day in front of their teachers violates the constitutional separation of church and state.

Reaction to the Decision

The *Engel* decision stirred all sorts of political controversy, with its opponents charging that the Court was practically equivalent to the anti-Christ. After all, “In God We Trust” is stamped on our coins, and Congress itself opens sessions with prayer. How could the Court ban God in public education? In the 1960s, conservative congressional leaders introduced school prayer amendments to overturn the Supreme Court's decision. But even

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

though a popular majority, when asked, supported school prayer, the national political process did not translate this apparent view of an overwhelming majority into action that would have overruled the Court.

The states, however, lived up to their reputation as ingenious legislative innovators by coming up with various methods to get around the *Engel* decision. "Moment of silence" legislation, requiring public school classes to open their days with brief silent periods during which students could meditate or pray, was the most commonly chosen method to circumvent the Supreme Court's school prayer ruling. The rationale was that a moment of silence *per se* did not require prayer and therefore did not put religion back into the schools.

In *Wallace* v. *Jaffree* (1985), cited above, the Court, by a vote of 6-3, held that an Alabama statute authorizing a moment of silence in public schools for "meditation or voluntary prayer" violated the First Amendment's Establishment Clause, because the clear intent of its legislative sponsors was to return prayer to public schools. Conservative and moderate Justices O'Connor and Powell, respectively, joined moderate and liberal Justices Stevens, Blackmun, Brennan, and Marshall to comprise the Court's majority. Chief Justice Burger, joined by Justices White and Rehnquist, dissented. Probably much to the chagrin of President Reagan, who appointed her, conservative Justice O'Connor wrote in her concurring opinion that while "nothing in the United States Constitution as interpreted by this Court or in the laws of the state of Alabama prohibit public school students from voluntarily praying at any time, before, during, or after the school day," and "moment of silence laws in many states should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to meditate or reflect," the purpose of the Alabama statute was to promote and sponsor prayer which *is* a violation of the Establishment Clause.

QUESTIONS FOR DISCUSSION

1. Describe the Establishment Clause, and the Supreme Court's rationale for declaring unconstitutional New York's program of daily classroom prayers. (The Establishment Clause states that "Congress shall make no law respecting an establishment of religion. . . ."

   Applicable to the states under the Due Process Clause of the Fourteenth Amendment, the Establishment Clause strictly separates church and state. The *Engel* court prohibited even the slightest connection between church and state, and thus according to the Supreme Court, the New York State prayer program violated the clause because it "officially establishes the religious beliefs embodied in the Regents' prayer." Note from the text the prayer's content, and ask students if they agree that it clearly embodies religious beliefs.)

2. From the material in the case discuss the origins of the Establishment Clause, its purposes, and its effects. Is the Establishment Clause as relevant today for the protection of our liberties as it was in 1789? (The Establishment Clause "rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church in England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind...." Note the tension between the Establishment and Free Exercise Clauses, for a strict interpretation of the former can be interpreted to dampen the latter by preventing the free exercise of religion by those who want to say their prayers in public schools. Note also that one of the original purposes of the Establishment Clause was to prevent the *national* government from establishing a religion which would have interfered with *state established* religions which existed in several states at the time of the Constitution's adoption.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTIONS

1. The Court held school prayer to be unconstitutional in the case of *Engel* v. *Vitale* (1962) on the grounds that it violated:

   a) the First Amendment's Establishment Clause.
   b) the Free Exercise Clause of the First Amendment.
   c) equal protection of the laws.
   d) First Amendment protections of freedom of speech and of the press.

2. The required New York State prayer involved in *Engel* v. *Vitale* was clearly:

   a) denominational.
   b) nondenominational.
   c) inoffensive to all required to recite it.
   d) neutral with respect to acknowledging the existence of God.

3. Which of the following statements did the Supreme Court *not* make in its majority opinion in *Engel* v. *Vitale* (1962)?

   a) There could be no doubt that New York's State Prayer Program officially establishes the religious beliefs embodied in the Regents' prayer.
   b) It is a matter of history that the practice of establishing governmentally composed prayers for religious services was one of the reasons that caused many of our early colonists to leave England and seek religious freedom in America.
   c) Applying the Constitution to prohibit state laws respecting an establishment of religious services in public schools indicates hostility toward religion and toward prayer.
   d) The Establishment Clause stands as an expression of principle on the part of the founders of our Constitution that religion is too personal, too sacred, too holy, to permit its provision by a civil magistrate.

THE RIGHT TO PRIVACY

Reading 27:
Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*

Theme

The common law has protected individual rights to life, liberty, and property over the centuries. But common law has renewed its definitions of these rights to accommodate societal changes, and from this process a right to privacy emerged.

> [As common law developed legal concepts of life, liberty, and property expanded and] there came recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, —the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Student Understanding

My goal in including this rather esoteric *Harvard Law Review* article, which I've thoroughly edited for introductory students, is first to acquaint them with the name Brandeis as it connects to the right to privacy. After all, this is arguably the most famous article ever written on privacy.

My second goal is simply to make students aware that the right to privacy is as ancient as the common law, and in other contexts goes back to Greek and Roman times. But it is our England heritage students should know; they should be aware that an English common law protects a right to privacy, and the protection of the law of the land (due process of law) the barons demanded in Magna Charta in 1215, and later in the English Petition of Right (1628) and Bill of Rights (1689), implies aspects of privacy. Moreover, students should learn from the reading that historically common law and equity law are flexible and adaptable, and change to meet new concepts of justice and individual rights.

The theme I want students to absorb from the Warren and Brandeis article is that common law privacy has evolved and continues to evolve in response to changing technologies (witness today the many privacy issues the internet puts on our constitutional agenda). Privacy is not fixed in time, it is the right to be "left alone," it is a right older than the Constitution, and one the Anglo-American legal tradition recognizes.

MULTIPLE CHOICE QUESTIONS

1. Warren and Brandeis observed in "The Right to Privacy" that:

   a) privacy is directly derived from the Constitution.
   b) privacy is not a constitutional right.
   c) the right to privacy is as ancient as the common law.
   d) the right to privacy is static over time.

2. The right to privacy, stated Warren and Brandeis, is above all:

   a) the right to abortion.
   b) protection against unreasonable search and seizure.
   c) the right to be let alone.
   d) protection against slander.

Reading 28: *Griswold v. Connecticut,* 381 U.S. 479 (1965)

Ruling

The Bill of Rights has specific guarantees, such as protection against unreasonable searches and seizures, self-incrimination, and freedom of association, that imply a right to privacy. But the right to privacy is older than the Bill of Rights, and is embedded in the customs and traditions of people over time. The Connecticut law banning the sale of contraceptives to married couples violates their right to privacy, which the due process clause of the Fourteenth Amendment incorporates under "liberty." Under the Fourteenth Amendment no state can deny life, liberty, or property without due process of law. The Connecticut law takes liberty without due process as there is no sufficient counterbalancing state interest in the law to override the right to privacy.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Student Understanding

Students should note that Justice Douglas for the Court does not pluck the right to privacy out of thin air, but derives it from the penumbras of the Bill of Rights and from custom and traditions. Arguably Brandeis would agree with Douglas's reasoning and apply his understanding of the right to privacy to void the state law.

Black's Dissent

I have not included Black's dissent, which is an example of strict construction. Instructors might want to cite it as a contrast to the flexible approach of Douglas. Black simply asserts there is no textual right to privacy in the Bill of Rights. Black's "reading" of the original intent of the Fourteenth Amendment concluded that it was intended to apply the Bill of Rights to the states. Later both Justices Rehnquist (Roe, 1973; Planned Parenthood, 1992) and Scalia (Planned Parenthood, 1992) echoed Black's strict constitutional interpretation with regard to a privacy right to abortion, but unlike Black both did find a right to privacy in our traditions and culture.

MULTIPLE CHOICE QUESTIONS

1. Justice Douglas in *Griswold* v. *Connecticut* (1965):

   a) held there is no right to privacy in the Constitution.
   b) upheld the state law banning the sale of contraceptives.
   c) found a right to privacy in the penumbras of provisions of the Bill of Rights.
   d) held that the right to privacy included a right to abortion.

2. In Griswold v. Connecticut (1965) found that the right to privacy:

   a) began with the Bill of Rights.
   b) was a privilege and immunity under the Fourteenth Amendment.
   c) was older than the Bill of Rights.
   d) could not nullify a state law.

Reading 29:
***Roe* v. *Wade,* 410 U.S. 113 (1973)**

Here is the case that seems to have caused more political controversy than any other in recent decades. At least, far more than in other cases, the controversy appears to be more vociferous as right-to-life groups fight freedom-of-choice proponents.

The right-to-life groups each year march on Washington on January 22, the date the Supreme Court handed down the *Roe* v. *Wade* decision. On a far more violent side, some abortion clinics have been bombed by extremists who oppose abortion, calling it "child-murder." Picketing clinics became the tactic of choice in the right-to-life movement. Those espousing freedom of choice argue that a woman has a natural right to control what she does with her own body, including the right to abort a fetus. They also argue that women who want to have an abortion will seek it whether it is legal or not, and they should have the right to have the procedure done in a medical clinic rather than in the dark rooms and back alleys where illegal abortionists practice.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

The central issue is whether or not the state should be allowed to impose a majority's views concerning abortion on the individual or whether a woman should have the freedom to decide the issue on moral and religious grounds, at least during the first trimester of her pregnancy when, in the opinion of a Supreme Court majority, the state has no compelling interest that justifies regulating abortions.

QUESTIONS FOR DISCUSSION

1. What interests does Justice Blackmun, who wrote the Supreme Court's opinion in *Roe* v. *Wade*, find the state has in the regulation of abortion? (The state "has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient." He points out that the "prevalence of high mortality rates at illegal abortion mills strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the state retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a *late* stage of pregnancy." [Emphasis supplied.]

   Blackmun also points out that the state has an interest "in protecting prenatal life... in assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.")

2. On what grounds does Blackmun find that under certain circumstances a woman has a constitutional right to have an abortion? (He cites the right to *privacy*. Because the right to privacy is fundamental, it is incorporated as part of the "liberty protected by the Fourteenth Amendment due process clause, which provides that no state may "deprive any person of life, liberty, or property without due process of law." Blackmun continues, "This right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice *altogether* is apparent." [Emphasis supplied.])

3. How does Justice Blackmun balance private rights with governmental interests in *Roe* v. *Wade*? (He weighs the right of personal privacy against governmental interests in regulating abortion. Because the right to privacy is "fundamental," regulation of it "may be justified only by a compelling state interest . . . and . . . legislative enactments [regulating abortion] must be narrowly drawn to express only the legitimate state interests at stake." Blackmun then finds that the state's interest in regulating abortion increases as a woman's pregnancy progresses. During the first trimester of her pregnancy a woman has an absolute right to abortion, but after that point a compelling state interest may justify regulating abortion to protect maternal life and health. The state's regulatory interest in abortions becomes "compelling" after the first trimester not because the fetus is then viable but because aborting it would constitute more than an average risk to the mother, because "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." Nowhere in Blackmun's opinion is the fetus considered to be in any way a living human being with constitutional rights of its own.)

4. What is Justice Rehnquist's rationale in his dissenting opinion in *Roe* v. *Wade*? (The young associate Justice Rehnquist, who President Ronald Reagan nominated to be Chief Justice over a decade later in 1986, took a strict constructionist approach to the case and adopted a strong tone of judicial self-restraint with respect to the Court's authority to declare state laws to be unconstitutional. First, Rehnquist declared that the history of Supreme Court interpretation of the Fourteenth Amendment did not require the adoption of the "compelling state interest" test to judge the state abortion law. Second, he declared that it was a stretch of the imagination and of proper legal interpretation to incorporate as part of the

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Fourteenth Amendment due process "liberty," a right to privacy that supported abortion, even if only during the first trimester of pregnancy. "To reach its result," concluded Rehnquist, "the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the amendment." Abortion statutes existed throughout the nineteenth century, dating to an 1821 Connecticut anti-abortion law, and because the right to abortion is in no way a fundamental one, state regulatory statutes should be upheld provided they are reasonably related to a valid state objective. Note that Rehnquist in no way comments upon the moral side of the abortion issue, but focuses entirely upon constitutional interpretation.)

MULTIPLE CHOICE QUESTIONS

1. In *Roe* v. *Wade* (1973), the Supreme Court upheld abortion as a part of:

    a) First Amendment freedoms of expression.
    b) equal protection of the laws.
    c) the right to privacy.
    d) Fifth Amendment protections against self-incrimination.

2. In *Roe* v. *Wade* (1973), the Supreme Court held that the right to abortion was:

    a) absolute.
    b) subject to governmental regulation after the first trimester of pregnancy.
    c) subject to governmental regulation to protect the life and health of the fetus.
    d) subject to governmental regulation at any time to protect maternal life and health.

3. The Supreme Court's *Roe* v. *Wade* decision has fairly been described as an example of:

    a) procedural due process.
    b) substantive due process.
    c) judicial self-restraint.
    d) strict constitutional construction.

4. Critics of the Supreme Court's *Roe* v. *Wade* decision argue that it is an example of:

    a) improper judicial activism.
    b) the Supreme Court acting as a super-legislature.
    c) overly loose constitutional construction.
    d) all of the above

AFFIRMATIVE ACTION

Reading 30:
***University of California Board of Regents v. Bakke,* 438 U.S. 265 (1978)**

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Justice Powell's Opinion

Under the Fourteenth Amendment's Equal Protection Clause, state racial classifications of any kind are inherently suspect and call for the most exacting judicial scrutiny. State university admissions policies may take race into account, but cannot use racial quotas.

Theme and Background

Bakke is the seminal affirmative action case. I have focused on this case for introductory students not only because it is the first major case but also because in later cases the Justices repeatedly cite Justice Powell's centrist opinion as precedent. Essentially Powell held that the Fourteenth Amendment equal protection clause prohibits states from using racial quotas in school admissions programs, but allows race to be taken into account in admissions. The conservative four Justices simply held that the Civil Rights Act of 1964 prohibits race to be taken into account in any way, while the four liberal Justices would have upheld racial quotas as a legitimate remedy for past societal discrimination.

Instructor Reference

Under the strict judicial scrutiny test, a racial classification can only be upheld if there is a clear demonstration of a *compelling* governmental interest to justify it. The origin of the strict judicial scrutiny test may be found in the famous footnote of Chief Justice Stone in *United States* v. *Caroline Products Co.*, 304 U.S. 144, p. 152-153 n. 4 (1938). Stone stated there that more exacting standards of judicial scrutiny *may* be required of legislation burdening fundamental constitutional rights or "directed at particular religious…or national…or racial minorities…."

The Warren Court developed new equal protection standards that strictly scrutinized legislative classifications burdening fundamental rights or that were intrinsically suspect, for example, racial classifications. The origin of the term "suspect class" is found in Justice Black's majority opinion in *Korematsu* v. *United States*, 323 U.S. 214 (1944), that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Black went on to state that suspect classifications are not unconstitutional *per se*, but that "courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." (Justice Black found a pressing public necessity in the exigencies of war to justify the suspect classification that had been made in the *Korematsu* case, which in effect treated Japanese Americans differently from other citizens.)

The *Bakke* Case

The different views of Justices Powell and Brennan in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), hinged upon their respective definitions of what constitutes a suspect classification. Powell implied that all racial classifications are suspect, even if they worked to the advantage of minority groups and disadvantaged only a majority racial group—white males in the case of *Bakke*. Brennan, on the other hand, suggested that a racial classification designed to remedy past discrimination should not be treated as fully suspect, but as a classification demanding an intermediate standard of judicial review that did not require the demonstration of a compelling governmental interest to sustain the classification.

Affirmative Action Debate

The United States in the 1990s witnessed charged debates over the role of race in policymaking. Efforts by lawmakers to include race as a factor in rules and legislation, while preventing it from becoming a predominant concern, have complicated government's tasks and drawn the Court into a hornets' nest of volatile issues.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Consider the progression from *Brown I* to *Brown II*, from *Bakke* to *Adarand* (1995), and from *Shaw* v. *Reno* , 509 U.S. 630 (1993), to *Abrams* v. *Johnson*, 521 U.S. 74 (1997). These sets of cases deal with race issues in education, affirmative action, and congressional redistricting. All illustrate some of the difficulties of implementing Court rulings, and they illustrate the fact that issues of law and interpretation are not solved by a single case. Subtle changes are made, different nuances are given, and implementation problems arise and create new issues for the Court to examine. The judicial process, like the governing process generally, is an evolutionary one.

Affirmative Action Debate Continues

The Supreme Court again confronted controversial affirmative action cases in 2003, this time at the University of Michigan law school and undergraduate school. In *Grutter* v. *Bollinger* (2003) Justice Sandra Day O'Connor for the Court upheld the law school's program that took race into account but was narrowly tailored to achieve diversity. She cited the Powell opinion in *Bakke* as precedent. Then in *Gratz* v. *Bollinger* (2003) Chief Justice Rehnquist for the Court held that the undergraduate affirmative action admissions program violated the Fourteenth Amendment's equal protection clause because it was not "narrowly tailored" to achieve diversity.

MULTIPLE CHOICE QUESTIONS

1. The Supreme Court held in *University of California Board of Regents v. Bakke* that:

   a) racial quotas in admissions are permissible under the Fourteenth Amendment equal protection clause.
   b) admission programs cannot take race into account.
   c) admission programs cannot use racial quotas but can take race into account.
   d) racial classifications do not require strict judicial scrutiny.

2. Justice Powell in *Bakke* held:

   a) racial and ethnic distinctions in law are always suspect.
   b) state programs can use racial quotas to remedy the effects of past societal discrimination.
   c) The Civil Rights Act of 1964 bans admission programs from taking race into account.
   d) affirmative action programs do not have to be narrowly tailored to achieve diversity.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

PART 2: POLITICAL PARTIES, ELECTORAL BEHAVIOR, AND INTEREST GROUPS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 4

Political Parties And The Electorate

Political parties, the "factions" the founding fathers so carefully tried to control, are an essential bridge between people and government. From James Madison's treatment of them as "evil" factions in *Federalist 10*, which begins this chapter, to the present, political writers have both criticized and praised them. The expansion of the voting franchise that accompanied the nineteenth century growth of democracy supported the rise of parties. Parties are the key to a successful democracy, although our system of *constitutional* democracy restrains them.

After beginning with *Federalist 10*, the most famous and widely read of James Madison's and Alexander Hamilton's acclaimed constitutional treatise, the chapter proceeds to E. E. Schattschneider's overview of parties in the constitutional system in a selection from his classic work, *Party Government*. The Schattschneider selection has long been out of print but has been kept alive through every edition of the reader. He emphasizes that while the Constitution makes it difficult for parties to function effectively, constitutional freedoms of expression, protected in the Bill of Rights, permit parties to organize and allow them to flourish.

After students have become acquainted with the constitutional context of parties, they are exposed to a variety of readings, both contemporary and classic, that discuss various aspects of parties and the role they play in the political process.

Parties were not part of the eighteenth century Madisonian (separation of powers and checks and balances) or Hamiltonian (strong, unitary president) constitutional models. What political scientists refer to as the "party model" of government really did not come into its own until the end of the nineteenth century. Woodrow Wilson called for a party model in his famous 1885 book, *Congressional Government*.

Political scientists of all stripes began to address the need for party government as the APSA formed in the first decade of the twentieth century. Although it's difficult of course to generalize, American political scientists did not emphasize the centrality of the Madisonian model (some describing it as a "deadlock of democracy"). They addressed the role of parties and interest groups, some calling for more disciplined parties, others stressing the importance of pluralism in the democratic process.

Sir Ernest Barker's classic argument for a "government by discussion" introduces students to the party model. After Barker comes an excerpt from the report issued by the American Political Science Association Committee on Political Parties in 1950 calling for more disciplined parties to strengthen Congress and reduce the power of the imperial presidency. Democratic demands should be channeled to parties, not entirely to the president. David Mayhew offers a revisionist theory of the party model in his reading on divided government.

Other classics in the chapter include V. O. Key, Jr.'s theory of critical elections, and his sanguine view of voters in *The Responsible Electorate* (Cambridge, MA: Harvard University Press, 1966). Key argues that voters are essentially rational but that politicians, largely on the advice of their consultants, continue to appeal more to emotion than to reason.

CONSTITUTIONAL BACKGROUND

James Madison's famous *Federalist 10* provides the constitutional setting not only of political parties, but also of interest groups. "Faction" is inherently opposed to the national interest, argues Madison, the clear implication

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

being that political parties and interest groups, which by definition represent faction, should not be allowed to govern without impediment. There is no way in which a free government can prevent faction without destroying the very liberty upon which it is based. However, faction can be controlled through constitutional devices, and Madison suggests that the instrument of federalism, enabling a large geographical area with diverse interests be brought together to form one nation, will tend to isolate particular factions within the states and make any one faction less capable of dominating the entire nation.

Reading 31: James Madison, *Federalist 10*

The discussion of *Federalist 10* should highlight Madison's definition of faction as being opposed to the national interest, and his statement that the major cause of faction is the unequal distribution of property, a secondary cause being the inevitable diversity of group opinions. Government must be designed to control and channel faction rather than prevent it.

QUESTIONS FOR DISCUSSION

1. What, according to Madison, is the principal cause of faction in society, and do you feel that his view accurately reflected his own times? What about the present? ("But the most common and durable source of factions has been the various and unequal distribution of property." Note also that Madison stated other reasons for faction, such as "a zeal for different opinions concerning religion, concerning government, and many other points…an attachment to different leaders . . . ")

2. How does Madison propose to deal with the problem of faction? Can faction be eliminated? How is it to be controlled? ("Liberty is to faction what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." To control faction, Madison rejects the idea of a pure democracy, which he feels would be most subject to the evil effects of faction. He proposes a republic, "by which I mean a government in which the scheme of representation takes place…." Moreover, a republic can cover a greater expanse of territory than a pure democracy, which requires a relatively small community in which to function. The larger the republic, the more faction will be diluted, according to Madison. Factious leaders will be more or less isolated in the various compartments of government—the states. It will be very difficult for faction to spread from state to nation. Faction will tend to have a parochial cast rather than a national orientation.)

3. What other constitutional devices, besides those mentioned by Madison, tend to prevent the control of government by a faction? (Here mention the separation of powers, the various provisions for extraordinary majorities, and the Bill of Rights. The entire thrust of the Constitution is to prevent the easy rule of the majority.)

4. What are the implications of Madison's theory for political parties and interest groups within our political system? (Note that Madison's view is definitely anti-party and anti-interest group, and the constitutional provisions which he mentions and also those which he does not mention tend to frustrate the development of party government; but, paradoxically, they increase the potential power of interest groups by fragmenting the political process and expanding the number of access points for interest groups to control policymaking.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTIONS

1. In *Federalist 10*, James Madison suggests that the most enduring cause of faction is:

   a) differing political opinion.
   b) unequal distribution of property.
   c) the separation of powers.
   d) the large geographical area of the country.

2. James Madison argues, in *Federalist 10*, that faction:

   a) should be stamped out.
   b) helps to advance the national interest.
   c) is always opposed to the national interest.
   d) provides an important underpinning for democratic government.

3. In *Federalist 10*, Madison suggests that faction may be controlled by:

   a) a republican form of government.
   b) a powerful Supreme Court.
   c) a strong presidency.
   d) a national legislature.

4. *Federalist 10* suggests that the framers of the Constitution were:

   a) in favor of strong political parties.
   b) suspicious of parties.
   c) in support of parties as a necessary condition of democratic government.
   d) oblivious to parties.

Reading 32:
E. E. Schattschneider, *Party Government*

Although James Madison in the preceding selection states the premise that faction, i.e., parties and interest groups, is inherently evil, E. E. Schattschneider points out in the following section that in fact the Constitution contained provisions that supported and nourished the development of parties as well as interest groups. This is in no way a contradiction of Madison's views, for in *Federalist 10* he also declared that the Constitution must necessarily support the liberties that made faction possible.

QUESTIONS FOR DISCUSSION

1. In what ways does Schattschneider describe the Constitution as pro-party and anti-party? (The pro-party aspects of the system are those that guarantee civil rights and civil liberties, particularly freedom of speech and press, which allow parties to develop. The anti-party aspects are the separation of powers, checks and balances, and federalism. As Schattschneider says, "It was hoped that the parties would lose and exhaust themselves in the futile attempts to fight their way through the labyrinthine framework of the

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

government, much as an attacking army is expected to spend itself against the defensive works of a fortress.")

2. Describe Schattschneider's "law of the imperfect political mobilization of interests." (This is the theory of overlapping group memberships. It is impossible for any one individual to be mobilized totally in a political sense by any one group, because of the individual's overlapping group memberships.)

3. To what extent do you feel the operation of the law of the imperfect mobilization of political interests protects the system against domination by interest groups? Are what Schattschneider calls "the raw materials of politics" (overlapping group membership, etc.) a more effective check upon "faction" than formal constitutional devices?

MULTIPLE CHOICE QUESTIONS

1. E.E. Schattschneider argues that the major pro-party aspect of the Constitution was:

   a) the separation of powers.
   b) its guarantee of the right to agitate and to organize.
   c) federalism.
   d) a strong presidency.

2. Which of the following statements does E. E. Schattschneider *not* make?

   a) The Constitutional Convention produced a constitution that was pro-party in one sense and anti-party in another.
   b) In the American republic, parties are tolerated but are invited to strangle themselves in the machinery of government.
   c) James Madison was unequivocal in stating that parties should not control the government.
   d) Because the Constitution made the rise of parties inevitable, it was compatible with party government.

3. E.E. Schattschneider argues that interest groups:

   a) are bound to control the government.
   b) do not have the unanimity and concentration of power to control all of their members or the government.
   c) reflect the unanimity of the political interests of their members.
   d) represent the perfect political mobilization of interests.

4. The law of the imperfect political mobilization of interests:

   a) is derived from the unanimity of group interests.
   b) was an important part of the theory of *The Federalist*.
   c) reflects the fact that every individual is torn by a diversity of his or her own interests, making an individual a member of many groups.
   d) reflects the undemocratic character of special interests.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

5. Which of the following statements is *incorrect*?

a) There are many interests in the American polity, including a great body of common interests.
b) The government pursues a multiplicity of policies and creates and destroys interests in the process.
c) Each individual is capable of having many interests.
d) Most citizens are represented by a single interest group.

THE PARTY MODEL OF GOVERNMENT

Reading 33:
Sir Ernest Barker, *Government by Discussion*

Theme

Democratic government supports discussion that begins with political parties, proceeds to the electorate, and moves to the legislature and executive. Political parties facilitate rational electoral choice and bridge the gap between people and government.

Argument

Democracy is based on a belief in the principles of the Enlightenment. Reason and progress are the foundations of democracy. Parties make rational electoral choice possible.

A system of government by discussion proceeds through four main stages:

- first of party,
- next of the electorate,
- then of parliament,
- and finally of cabinet.

This is the British model that Barker used. Here the last two stages are Congress and the Presidency.

Discussion

Can our Madisonian system accommodate government by discussion? The Madisonian system was one of government by deliberation, discussion among the branches and components of government to achieve the national interest.

The separation of powers arguably puts roadblocks in the way of discussion. The separate constituencies of the President and Congress, the House and the Senate, give the different branches conflicting incentives. Some have argued this deadlocks democracy.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Barker put parties and rational choice at the center of his paradigm. Madison emphasizes balanced, deliberative, government. Barker suggests factions can give the electorate programmatic choice. Madison sees factions are undermining a national interest.

Barker's model seems a bit idealistic. Madison knows what might be called the existence of original political sin. Men are not angels, politics can be demagogic, requiring balanced institutions. Madison's system is realistically based on the laws of natural political behavior. Barker, in making government by discussion the democratic ideal, perhaps ignores political realities. His democracy is the Oxford Union, Madison's model is rooted in political reality.

Students undoubtedly haven't thought much if at all about the complex theories of democracy. I try to stress to students that our government is based in the eighteenth century Enlightenment in France, England, and here as well. Madison is the political Newton. Government is about balance, the necessary quality to give us a statesman-like government rather than one of partisan bickering.

I also stress that our government has been Hamiltonian in times of crisis, when the President, now with popular support, rises above the separation of powers to save the nation. Lincoln and F.D.R. come to mind.

All of the preceding raises many lively discussion topics about "government by discussion."

MULTIPLE CHOICE QUESTIONS

1. Sir Ernest Barker's Government by Discussion model:

    a) attacks factions as evil.
    b) requires a plurality of parties.
    b) stresses the importance of coalition government.
    c) puts the Cabinet ahead of Parliament.

2. The electorate in Barker's government by discussion is:

    a) irrational.
    b) rigidly partisan.
    c) rational and enlightened.
    c) apathetic.

THE AMERICAN PARTY SYSTEM

Reading 34:
Report of the Committee on Political Parties, American Political Science Association
Toward a More Responsible Two-Party System

Theme

In 1950, the Committee on Political Parties of the American Political Science Association produced a highly influential report defending the two-party system and citing the benefits of a party-government style system. The Committee's Report remains relevant as an excellent defense of strong parties, a line of reasoning that runs from

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Woodrow Wilson in the late nineteenth century through modern calls for strengthened parties and warnings about the fragmenting of American politics.

Support of party government arose in the United States in the nineteenth century as a reversal from the eighteenth century affinity for mixed government. The latter had informed the founding fathers and the Constitutional system, but by the nineteenth century it had begun to look outmoded and inefficient. As government's responsibilities broadened and the electorate grew, and as fear of factions was replaced by the ideal of democratic majority rule, the party government model grew in popularity. Wilson was hardly the only supporter of a system reliant on parties to design broad programmatic directions in order to organize and aggregate the electorate around clear-cut policy alternatives.

Party government is attractive for its order, efficiency, and accountability. Factions can be disordered and evanescent, and government under a mixed system with weak parties can be fluid and volatile. Supporters of party government envision clear policy choices and an informed electorate unconfused by changing initiatives, policy directions, and temporary coalitions. Under the party government theory, a modern government with far-flung responsibilities is ordered and therefore able to provide leadership and coordination.

The Committee's Report

The APSA Committee's Report endorses the idea of strong parties, writing that popular government in a large country "requires political parties which provide the electorate with a proper range of choice between alternatives of action."

The Committee acknowledges that parties function both in the electorate, as devices for coordinating partisanship and debating principles, as well as in government as mechanisms for debating and coordinating the implementation of public policy. This last function requires parties because of "the extraordinary growth of the responsibilities of government."

The Committee reasons that modern public policies require a broad base of public support, in large part because so many people are involved in the execution of policy decisions. Only parties can provide this base.

The Committee's Warnings About the Decline of Parties

The Report warns of four dangers associated with the decline of parties. The first of these is that the inability to sustain programs and support "may lead to grave consequences in an explosive era." The Report was written in 1950, in the throes of the Cold War, and the Committee is clearly worried about the United States' ability to function in the face of powerful enemies. The concern for the ability of the nation to function effectively and coherently in a period of extended crisis has not ended with the collapse of the Soviet Union, however, and similar concerns about the United States' lack of policy planning and coordination continue to be heard from economic, trade, labor, and education sources.

The second danger is that the executive may step into the void left by an unguided Congress, extending not only the power of the presidency but also pushing its responsibilities beyond its capacities. This fear demonstrates concern for the delicate balance of shared powers, and echoes earlier fears about executive power and responsibility. A key factor here is the Committee's understanding of the parties' role in building popular support for programs and policy directions. Recognizing that there is a natural tendency to look to the president for initiatives and guidance, the report warns that "when the political parties fail to [build popular support], it is tempting once more to turn to the president [to do this as well]." Making the president himself garner support for programs undercuts parties at their base: "either his party becomes a flock of sheep or the party falls apart. . . .

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

[This] favors a president who exploits skillfully the arts of demagoguery, who uses the whole country as his political backyard, and who does not mind turning into the embodiment of personal government."

These are serious concerns, and they remain current: Sidney Milkis' selection on the presidency (selection 51) describes exactly this danger. The president exists at great risk when his support is direct and based on personality, without the mediation and reliability of support based on political parties.

Third, the Committee warns that a decline in party strength and importance may create a cycle of increasing cynicism about the parties' roles, leading eventually to the complete disintegration of parties. This "is an ominous tendency. It has a splintering effect and may lead to a system of smaller parties"—dangerous because of the American system's grounding in a two-party system.

Finally, the Committee argues that a decline in the importance of the major parties may create support for extremist parties of fanatics determined to impose their own "particular panacea[s]" on the country's problems.

Conclusion

The Committee's report remains an excellent defense of strong parties, and it offers a concise summary of several reasons why a decline in the two-party system may be very dangerous for the future of the United States. Continued calls by contemporary scholars for stronger parties, continued worry over the gradual disintegration of parties, and the increasing reliance on candidate-centered politics are all testaments to the Committee's prescience.

QUESTIONS FOR DISCUSSION

1. Discuss with students the merits of the eighteenth-century mixed government system and the nineteenth-century party government model. How does each account for the presence and importance of factions? Which is more likely to chart a path in the "national interest"? Are the promises of a party government model realistic in an American system of federalism and shared powers, one which encourages and even actively multiplies factions and one which has, in the last several decades, witnessed an explosion of new and diverse viewpoints? Can a party government model work in a heterogeneous environment like America, or is it better suited to a relatively homogeneous, smaller nation like England? Can parties be strengthened without moving to a full-blown party government system?

   (Woodrow Wilson, by the time he became president, had decided that a party government model was inappropriate for America. Strong parties are not necessarily the same as party government, however, and asking parties to provide organization and policy alternatives does not seem unrealistic. As the Democrats and Republicans grow closer to each other, though, it becomes increasingly difficult to make choices based on party affiliations. Republicans can no longer be assumed to be pro-life, and Democrats can no longer be expected to support large government entitlement programs. The parties have failed recently to provide clear-cut alternatives, exacerbating worries about coordination and accountability in government.)

2. Strengthening parties is usually accepted as a laudable endeavor, but how to do it is often a much more difficult proposition. Discuss with students some of the forces that elevate personalities above parties: the media, the committee system, the desire for reelection. Even the need to be seen as a free agent can lead candidates and officeholders to make a public point about going against their own party: See, for example, New York City Mayor Rudolph Giuliani's endorsement of Democrat Mario Cuomo in New York State's 1994 gubernatorial campaign. What mechanisms can students suggest to strengthen parties in a candidate-centered polity?

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. The Committee's two most important warnings regard the extension of executive power and the rise of smaller, possibly extremist parties to replace the two dominant parties. Has this occurred since the Committee published its report? (See Sidney Milkis' entry in this volume, where he discusses the separation of the presidency from party support. At the same time, recent years have seen the rise of Ross Perot and the United We Stand America campaign, exemplifying the increasing presence of powerful political forces outside of the two traditionally dominant parties.)

MULTIPLE CHOICE QUESTIONS

1. In 1950, the APSA's Committee on Political Parties argued that:

   a) the decline of parties in America could have dangerous consequences.
   b) American political parties were healthier than they had ever been.
   c) the strength of American political parties threatened individual freedoms.
   d) Republicans were undercutting the proposals of the Truman administration.

2. The party government model envisions:

   a) two weak parties.
   b) many weak parties.
   c) two strong parties.
   d) no parties.

3. According to the APSA's Committee on Political Parties, weakened parties might result in:

   a) a new constitutional convention.
   b) an overextension of presidential responsibilities.
   c) better coordination of policy initiatives.
   d) greater interest in politics among the electorate.

POLITICAL PARTIES IN DIVIDED GOVERNMENT

Reading 35:
David R. Mayhew, *Divided We Govern*

David Mayhew argues, against conventional wisdom, that divided government produced by the separation of powers works as well as the unified government many critics favor.

Observers of the American political scene argue that divided government produces a deadlock of democracy. Many of these analysts have argued that strengthened political parties unifying the executive and legislative branches might overcome the institutional stalemate encouraged by the separation of powers.

Regarding the amount of legislation approved in Washington and the oversight role of Congress, Mayhew writes that "[u]nified versus divided control has probably *not* made a notable difference during the postwar era."

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Mayhew makes his points by analyzing the history of the postwar United States, comparing, for example, disputes over foreign policy in times of unified control and in times of divided government.

Attacking the usual arguments for the effects of divided government, Mayhew makes five central claims to support his thesis:

1. The argument that divided government produces *worse* laws than unified control is dubious.

2. Ideological and budgetary coherence in policymaking is not necessarily affected by divided government.

3. Increased congressional micro-management of executive affairs bears no correlation to periods of divided government.

4. The conduct and "coordination" of foreign policy is not damaged by divided government.

5. The argument that the country's lower-income strata are not well-served under divided party control is not necessarily true.

QUESTIONS FOR DISCUSSION

1. If Mayhew is correct to argue that divided government seems to have little effect on the outcome of policymaking, why do so many critics of the system hold to the idea as the root of governmental gridlock? If Mayhew is correct, is the separation of powers overrated? Could Mayhew's findings be the *result* of the decline in party strength in the twentieth century, rather than evidence that party control is unimportant? In other words, if policy outcomes are the same under unified and divided control, is this evidence that party control is unimportant or might it be the result of party decline? If the latter, is Mayhew's argument against strengthening the party system convincing?

2. Mayhew states that the critics of divided government often look to European party-government models as a kind of grail. Why is this? Is the party government model incompatible with American political culture and institutions, as Mayhew suggests?

3. In 1994, voters elected a Republican Congress for the first time in 40 years, ending a brief period in which the Democrats controlled the White House and Congress. Does this suggest that voters have an allegiance to divided government? Do voters support divided government, even as many political scientists criticize it? Why? If Mayhew is correct in arguing that there is little difference in outcomes between unified and divided regimes, why do voters seem to prefer divided government?

MULTIPLE CHOICE QUESTIONS

1. David Mayhew, in *Divided We Govern*, suggests that:

   <u>a</u>) unified versus divided control of government makes little difference in the outcome of policymaking.
   b) a divided government writes as many laws as a unified one, but the laws are not as good.
   c) a unified government is more able to attach an ideological coherence to its programs.
   d) divided government is the preference of irrational voters.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. Mayhew argues that congressional micro-management of executive affairs:

   a) increases with divided government.
   b) decreases with divided government.
   c) is independent of divided or unified control.
   d) helps end divided government by attacking presidents from other parties.

3. David Mayhew argues that:

   a) the promotion of a European-style party government system will solve many of the United States' problems.
   b) "party government" schemes are a mistake.
   c) the United States needs to maintain separation of powers but increase the power of the two major political parties.
   d) American foreign policy is not as coherent as foreign policy made under a parliamentary system.

FUNCTIONS AND TYPES OF ELECTIONS

The existence of free elections is a major difference between democracies and totalitarian or authoritarian forms of government. It is through elections that most people attempt to transmit their views to government, and although group theorists suggest that all relevant political views are subsumed within organized or potential interest groups, nevertheless even they would not deny that elections are, at least symbolically, vitally important in the process of democratic participation.

Reading 36:
V. O. Key, Jr, *A Theory of Critical Elections*

In this selection, V.O. Key, Jr. develops his classic theory of critical elections, elections which demonstrate a *long-term* realignment of party loyalties. The significance of critical elections is that they reflect major changes in political sentiment that are nevertheless accommodated through the democratic electoral process. A close reading of V.O. Key reveals that the critical election process is incremental, and long before party realignments appear at the national level, as they did in 1932, permanent shifts have taken place among parties at the state and local levels of government.

QUESTIONS FOR DISCUSSION

1. How does Key define a critical election? (A critical election is one in which a permanent realignment of voters occurs along party lines.)

2. What do you think Key means when he refers to "the consequences for public administration, for the legislative process, for the operation of the economy of frequent serious upheavals within the electorate"? Discuss the role of critical elections in the political system. How frequent have they been? (They occur only very rarely.) Is this good or bad for the political system? How much stability does a political system require, and to what extent must this stability be reflected in the electoral system? (Point out that

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

the decline of party attachments on the part of voters may make it more difficult to apply the critical election theory in the future.)

3. Was the election of 1968 critical in Key's terms? (No permanent party realignment occurred.) The election of 1972? (Even though Richard Nixon in 1972 was elected by a landslide, this hardly constituted a critical election because of the election of a Democratic Congress at the same time. Moreover, Nixon ran ahead of Republican candidates in most parts of the country. Critical elections are built from the bottom up, not from the top down. Elections based upon the pull of a political leader for whatever reasons, such as the charismatic pull of an Eisenhower, do not produce critical elections but rather "deviating" elections.) The election of 1976? (Again it is difficult to classify the 1976 election. It was not a "reinstating" election because party alignments remained indefinite, less than a majority clearly identifying as Democrats.) The election of 1980? (The scope of Reagan's victory and the election of a Republican Senate for the first time since 1952 led some observers to conclude that the 1980 election was "critical." For contrasting views see the *New York Times*, Nov. 11, 1980, p. A15; and the *Wall Street Journal*, Nov. 12, 1980, p. 34.)

   What of more recent elections? 1988? (George Bush's election following Reagan's two terms might be considered a maintaining election, depending on how one sees the Reagan elections. The elections of Democratic Congresses through much of Reagan's terms, though, clouds the situation.) 1992? (Bill Clinton's first election might have first appeared as critical or reinstating, but party allegiances fail to suggest a solid Democratic majority. In fact, given the low turnout in recent years and the Republicans' gains in Congress, the issue of divided government is as prevalent as ever.) 1996? (Clinton's reelection, together with the victories by congressional Republicans and the Democrats' inability to retake the House, have continued divided government.) Does the persistence of divided government suggest that Key's assessment of elections and parties is less valid now than it was in the past? (The rise of "candidate parties," fostered by the presidential primary system and the rise of independent voters, makes Key's analysis perhaps less useful in the 1990s. Use the Key selection to help students understand the various party systems in American history, and to help them understand what changes have occurred in recent years.)

4. The elections of 2000, 2004, and 2008.

   Red states clearly dominated blue states in 2000 and 2004, but the anomaly of Florida in the 2000 election and Gore's popular vote victory throws critical election analysis out of kilter.

   The 2008 Election: Critical?

   Stuart Rothenberg writes in Roll Call after the 2008 election: "The big question that everyone is asking is whether this month's general election marked the beginning of a political realignment that will create a new dominant party. Have Americans shifted their loyalties and fundamental assumptions about the parties and about the government, or did we just witness a short-term reaction to years of bad news?" (http://www.rollcall.com/issues/54_55/rothenberg/29988-1.html)

   Put your students to work on this question. How do we define a fundamental critical election realignment? Did the 2006 congressional and gubernatorial elections presage what happened in 2008? Is it too early to say a long-term realignment is in the works?

   Ask students to look into voter turnout and the composition of the turnout in 2008. How did elections for the president, congress, and in the states compare in terms of parties? What issues did the electoral

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

choice reflect? Compare 2008 with 1932. Key discusses the 1928 elections as a precursor to 1932, can we do the same for 2006 and 2008?

Student Understanding

What are students to make of esoteric critical election theory and political scientists' pursuit of certainty in classifying elections? We care about the character of elections because of what that tells us about trends and political continuity and stability. Critical elections represent electoral upheavals that put a strain on the system. Politics must be aggregated to generalize about electoral effects. Critical election theory depends upon at least minimal party government to draw conclusions.

MULTIPLE CHOICE QUESTIONS

1. V.O. Key, Jr. defines critical elections as:

   a) elections that take place during economic depression.
   b) elections occurring during crises.
   c) elections reflecting the realignment of party allegiances.
   d) a frequently recurring phenomenon of the political system.

2. Critical elections reflect:

   a) short-term shifts in voter attitudes.
   b) long-term changes in voter allegiances.
   c) the decline of political parties.
   d) the rise of the imperial presidency.

3. Critical elections occur:

   a) every two years.
   b) relatively frequently.
   c) relatively infrequently.
   d) every eight years.

VOTING BEHAVIOR: RATIONAL OR IRRATIONAL?

The concept of critical elections and their importance within the political system is predicated upon a belief in the rationality of the electorate. V. O. Key, of course, believed in this throughout his life. Even Key's comprehensive analysis of voting studies and data emerging from the University of Michigan Center for Political Studies Research did not dissuade him, nor was he put off by the evidence of numerous studies suggesting elite control of the political process. V. O. Key's views on voting, public opinion, and the democratic process are perhaps best expressed in two of his books, *Public Opinion and American Democracy* (New York: Alfred A. Knopf, 1961), and *The Responsible Electorate* (Cambridge, MA: Harvard University Press, 1966), which was published posthumously. Having just read Key, and now turning to a classic voting study that would seem to contradict the efficacy of the electoral process as an expression of mass democratic views, students would undoubtedly be interested in V. O. Key's values and in a general discussion of the value context within which voting studies actually occur, even though many political scientists who conduct these studies would consider themselves empirical and not in any way normative.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 37:
Bernard R. Berelson, et al., *Democratic Practice and Democratic Theory*

While this selection points out that the classical requirements of democracy cannot be met in light of empirical evidence regarding voting behavior, it nevertheless concludes, in a way characteristic of so many voting studies, that in fact the proper working of modern democracy requires less popular participation and more political apathy that could ever be supported by classical democratic theory.

QUESTIONS FOR DISCUSSION

1. What are the classical requirements for the democratic citizen, as outlined by Berelson? (Interest, participation in political affairs, knowledge, and rationality, all of which should show up in the electoral process.)

2. How do the requirements for the system differ from the requirements for the individual in the democratic process? (The system requires a distribution of the classical qualities of the democratic voter among the population, rather than electorate, in which each individual possesses these qualities. A mass democracy cannot work if all the people become involved in politics. Too great participation in politics may render the system unstable, because it is an indication of desire for change within the electorate. Probably the most important point to mention here to students is the Berelson thesis that apathy plays a very important role in a political system. The system simply cannot stand everyone being politically active at the same time. In general, our complex system requires a division of political labor just as it requires a division of labor in other areas.)

MULTIPLE CHOICE QUESTIONS

1. In the selection by Berelson, et al., titled "Democratic Practice and Democratic Theory," the authors argue that:

   a) political apathy does not exist.
   b) some political apathy is desirable in the democratic process.
   c) voters are rational.
   d) attempts should be made to increase the rationality of political campaigns.

2. Berelson, et al., conclude that an effective democratic system requires that:

   a) all voters be members of political parties.
   b) all voters be rational.
   c) some voters be rational while others are apathetic.
   d) political parties be disciplined.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. Which of the following statements is *incorrect*?

a) The democratic citizen is expected to be interested and to participate in political affairs.
b) The democratic citizen is expected to be well informed about political affairs.
c) The democratic citizen is supposed to cast his or her vote on the basis of principle, not fortuitously or frivolously or impulsively or habitually, but with reference to standards not only of his or her own interest but of the common good as well.
<u>d</u>) In democratic theory, rationality is not a requirement for the democratic citizen.

POLITICAL CAMPAIGNS AND THE ELECTORATE

Facile public relations more than a serious discussion of issues seems to characterize many political campaigns. Marshall McLuhan observed after the Kennedy-Nixon debates in 1960 that the medium is the message. McLuhan simply reinforced the widely held views of political consultants and media experts that candidates are consumer products like any other and can be sold in the same way. What a far cry from democratic theory! But V. O. Key, Jr.'s classic analysis of the electorate in the next selection belies the public relations cynics and fortifies the belief that democracy is working after all.

Reading 38:
V. O. Key, Jr., *The Responsible Electorate*

V. O. Key's categorically states that voters are not the fools that many politicians and their advisors often take them to be. The electorate "behaves about as rationally and responsibly as we should expect, given the clarity of the alternatives presented to it and the character of the information available to it."

<u>Student Understanding</u>

Key's argument in this selection is made against the backdrop of the extensive voting studies of the University of Michigan's Survey Research Center and political scientists in voting studies that often followed along the lines of the Berelson reading suggesting voter irrationality can trump rational electoral choice. Key deeply believe in the rationality of democracy and spent his life studying electoral behavior, parties, and interest groups.

QUESTIONS FOR DISCUSSION

1. Why does V. O. Key, Jr., argue that the "voice of the people is but an echo"? ("For a glaringly obvious reason, electoral victory cannot be regarded as necessarily a popular ratification of a candidate's outlook….The output of an echo chamber bears an inevitable and invariable relation to the input. As candidates and parties clamor for attention and vie for popular support, the people's verdict can be no more than a selective reflection from among the alternatives and outlooks presented to them. Even the most discriminating popular judgment can reflect only ambiguity, uncertainty, or even foolishness if those are the qualities of the input into the echo chamber. A candidate may win despite his tactics and appeals rather than because of them. If the people can choose only from among rascals, they are certain to choose a rascal.")

2. According to V. O. Key, Jr., what were the conclusions from the voting study literature about why people vote as they do? (The literature explains many variables in voting behavior, including income, family

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

background, and group identification. "Yet, by and large, the picture of the voter that emerges from a combination of the folklore of practical politics and the findings of the new electoral studies is not a pretty one. It is not a portrait of citizens moving to considered decision as they play their solemn role of making and unmaking governments. The older tradition from practical politics may regard the voter as an erratic and irrational fellow susceptible to manipulation by skilled humbugs. One need not live through many campaigns to observe politicians, even successful politicians, who act as though they regarded the people as manageable fools. Nor does a heroic conception of the voter emerge from the new analyses of electoral behavior. They can be added up to a conception of voting not as a civic decision but as an almost purely deterministic act. Given knowledge of certain characteristics of the voter—his occupation, his residence, his religion, his national origin, and perhaps certain of his attributes—one can predict with a high probability the direction of his vote. The actions of persons are made to appear to be only predictable and automatic responses to campaign stimuli.")

3. What is the importance of theories about how voters behave? (While the voters themselves are largely unaware of the theories, and indeed may be far more rational than is commonly thought, the candidates and political leaders often do believe in theories about the irrationality of voting behavior. Political consultants often encourage such views on the part of politicians. "If leaders believe the route to victory is by projection of images and cultivation of styles rather than by advocacy of policies to cope with the problems of the country, they will project images and cultivate styles to the neglect of the substance of politics. They will abdicate their prime function in a democratic system, which amounts, in essence, to the assumption of the risk of trying to persuade us to lift ourselves by our bootstraps.")

4. What is V. O. Key, Jr.'s "perverse and unorthodox argument"? (It is that "voters are not fools. To be sure, many individual voters act in odd ways indeed; yet in the large the electorate behaves about as rationally and responsibly as we should expect, given the clarity of the alternatives presented to it and the character of the information available to it. In American presidential campaigns of recent decades the portrait of the American electorate that develops from the data is not one of an electorate straitjacketed by social determinants or moved by subconscious urges triggered by devilishly skillful propagandists. It is rather one of an electorate moved by concern about central and relevant questions of public policy, of governmental performance, and of executive personality.)

MULTIPLE CHOICE QUESTIONS

1. V. O. Key, Jr., concludes that studies of electoral behavior:

   a) present a picture of voter rationality.
   b) give a vivid impression of the variety and subtlety of factors that enter into individual voting decisions.
   c) reveal that voters do not take their economic interests into account in making their choices.
   d) conclude that group identification determines electoral choice.

2. V. O. Key, Jr., argues, in discussing the responsible electorate, that theories about how voters behave become important because:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) voters are aware of them and vote accordingly.
b) candidates and their advisers are aware of them, and act as if voters' behavior conforms to the theories.
c) they demonstrate that economic interests are always paramount in political campaigns.
d) they reveal that most electoral outcomes depend upon a single issue.

3. In discussing the responsible electorate, which of the following statements does V. O. Key, Jr. *not* make?

a) It can be a mischievous error to assume, because a candidate wins, that a majority of the electorate shares his views on public questions.
b) Election returns tell us precious little about why a candidate wins.
c) The voice of the people echoes candidate inputs, and even the most discriminating popular judgment can reflect only ambiguity, uncertainty, or even foolishness if those are the qualities of the input candidates make into the echo chamber.
d) The electorate is rarely moved by concerns about central and relevant questions of public policy and governmental performance, but rather are always persuaded by the facile public relations techniques of political candidates.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 5

Interest Groups

This chapter covers interest group theory and practice. Discussed at the outset is John C. Calhoun's mid-nineteenth century concurrent majority theory, which he devised to support the doctrine of nullification and a stronger position for the southern states than they had under the Constitution. He argued that *numerical* majorities, which the Constitution supported, were tyrannical when they took action that ignored or oppressed minority interests. His treatise, *A Disquisition on Government*, which was published posthumously in the 1850s, contains many elements of modern group theory. To Calhoun, group rather than individual political interests were important, and the relevant group actors were the states whose interests incorporated individual political concerns. Calhoun concluded that the national government should not take action without having achieved a "concurrent majority" of the states, which presumably required each state somehow to take a vote on national legislation. Calhoun conveniently did not elaborate his plan's details.

As the chapter begins Robert Dahl analyzes the constitutional framers views of faction. Jeffrey M. Berry discusses interest groups in the Madisonian system and examines the continuing relevance of "Madison's dilemma," how to balance liberty with the "evils" of the faction it creates.

The Supreme Court addressed Madison's dilemma in the next selection, *Buckley* v. *Valeo* (1976), the seminal case introductory students should understand in broad outline. Later cases have all been a variation on the *Buckley* v. *Valeo* dilemma, how to balance liberty with the "evils" of faction. That is, when do the evils of faction (I like to use Madison's language that always originates the question in the eighteenth century) justify limiting liberty contained in the freedoms of expression of the First and Fourteenth Amendments.

David Ortiz gives students a provocative analysis of how campaign finance reform contradicts normative democratic theory. He argues that proponents of reform assume, unlike V.O. Key in Chapter 4, that voters are fools, incapable of making rational electoral choices on their own.

The chapter next turns to the sanguine view of interest groups in David B. Truman's classic statement of group theory from his landmark work *The Governmental Process* (1951). Truman's restatement and emphasis on group theory was popular in political science circles in the 1950s, when his book was first published, and well into the 1960s. Truman's group theory had its origins in the works of earlier political scientists, one of whom was Pendleton Herring who discusses the role of interest groups in government in the selection following Truman.

Whatever may be the state of interest group *theory*, special interests are alive and well in the political process. The chapter selections discuss the contemporary role of political action committees and lobbyists. Students will tend to accept James Madison's anti-faction views and our political culture's pejorative definition of special interests as always opposed to the national interest. Madison recognized that liberty will always support political pluralism, which must be accepted. A properly constituted republican government along with the Madisonian system of separation of powers and checks and balances was designed to prevent the tyranny of any one person, group, or special interest.

Larry J. Sabato, in the chapter's final reading, analyzes what he describes as the Misplaced Obsession with PACs. He argues that PAC-bashing is overdone. PACs have made visible forces that have always been present in politics, and the political landscape has not in reality changed all that much because of the addition of PACs. In a political culture where the word PAC is pejorative, beginning with Madison's definition of factions as "evil" in *Federalist 10*, students will find Sabato's selection highly informative and his argument provocative.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CONSTITUTIONAL BACKGROUND

Reading 39:
Robert Dahl, *The Dangers of Faction*

A widely shared concern of the founding fathers was the danger of factions. James Madison took it for granted that factions would represent conflicting economic, geographical, and political interests. Majority and minority factions would threaten the Republic. Factions would forever threaten the national interest and government by the consent of all of the people.

Theme

The constitutional framers were preoccupied with the dangers of faction. But they did not have an agreement as to which factions were most dangerous to society. The author notes, "When the delegates descended from vague generalities to concrete cases [of dangerous factions], the examples they chose generally involved attempts to change the distribution of property."

The framers felt that the most dangerous factions were those whose interests opposed their own. This theme seems to have carried over to contemporary politics.

In the final analysis, "the problem of faction is simply the mirror image of the problem of gaining consent—of governing with the consent of the governed." Successful government must manage political conflict and give citizens security.

MULTIPLE CHOICE QUESTIONS

1. One of the major concerns of the founding fathers was:

   a) changing the unequal distribution of wealth.
   b) maintaining their property.
   c) an overextended judiciary.
   d) managing the demands of farmers.

2. The founding fathers wanted to:

   a) eliminate faction.
   b) prevent factions from influencing the national government.
   c) manage political conflict.
   d) forbid political parties from forming.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 40:
Jeffrey M. Berry, *Madison's Dilemma*

Theme

Interest group expert Jeffrey Berry examines the contemporary relevance of Madison's famous discussion of factions and freedom in *Federalist 10*. This piece is an excellent opportunity to revisit Selection 31, p.173, *Federalist 10*, indicating to students the continuing importance of the theories and writings of the Constitution's framers. Berry illustrates the ways in which Madison's dilemma continues to complicate current affairs.

Conclusions

Berry defines the dilemma facing Madison as: "If the government does not allow people to pursue their self interest, it takes away their political freedom." As Madison noted, trying to control selfish interests by limiting freedom is a solution that conflicts with American values and ideals. Authoritarian controls are anathema in America, yet in the American system "interest groups constantly push government to enact policies that benefit small constituencies at the expense of the general public." Berry reviews Madison's argument from *Federalist 10* and asks, "Can an acceptable balance be struck between the right of people to pursue their own interests and the need to protect society from being dominated by one or more interests?"

Berry offers a brief review of the last half-century's scholarship on interest groups, suggesting that how we evaluate interest groups as forces in public affairs has changed over the years. He traces the classic work of David Truman (see Selection 43 for an excerpt from Truman's *The Governmental Process*), and then charts the rise of academic studies of pluralism. Berry introduces students to the work of Robert Dahl, and highlights the critical significance of Dahl's landmark book, *Who Governs?* The discussion therefore serves two purposes: It introduces students to important figures in the study of interest groups and interest group politics, and it outlines for them the ideas behind Truman's and Dahl's arguments in defense of interest group activity. Berry concludes by reviewing the backlash against pluralism, driven by fears of a lack of group representation for certain segments of the population, and the move toward promoting increased participation.

QUESTIONS FOR DISCUSSIONS

1. Is the thinking of the framers relevant to contemporary politics? Does Madison have anything to say that resonates with the dynamics of American politics in the twenty-first century?

   (Berry's underlying point is that Madison's dilemma remains our dilemma. Tension still exists between fundamental freedoms to pursue self-interests and selfish ends, on the one hand, and the need to protect and promote the good of the larger community, on the other. People organize into groups to pursue their ends, a process protected by the Constitution's right of association and one which continues to expand its influence and enhance its political strength and savvy as single-issue groups become more common. This activity can threaten the good of the community and encourage government activity that harms larger groups to benefit smaller ones. Because the American people scorn authoritarian controls and limits on group activity and the free pursuit of interests, the system still needs a way of promoting the greater good without trampling on citizens' freedom.)

2. What is significant about the evolution in academic thought regarding interest group activity that took place between Truman's *The Governmental Process* and Dahl's *Who Governs?*, and then between the rise of pluralism and the events of the 1960s?

   (Truman and Dahl both concentrated on the importance of interest group activity in producing

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

governmental results. Dahl's pluralism, though, marked an advance from Truman's group theory by casting a strongly approving light on the activities of groups. Dahl found that certain groups dominate certain areas of policymaking and not others, countering fears that a "power elite" could dominate government more generally to the exclusion of other interests.

Berry writes that events of the 1960s pierced the faith in pluralism by suggesting that the system was still biased toward groups that failed to represent the American people adequately. The decline in approval for pluralism led to efforts to increase public participation to balance unequal representation, a theme that emerges in later readings in this chapter and in the previous chapter on political parties and participation.)

3. With the increasing prevalence, political acumen, and practical effectiveness of narrowly focused single-issue interest groups, has the time come for greater control on the behavior of citizens and the activities of interest groups? Should groups, for example, be required to look at more than one issue, or should they be required to explain how their positions and interests would benefit the nation?

   (Students may disagree here. Discuss with students various efforts to control or manage the activity of groups, such as campaign finance laws, disclosure laws, and lobbying laws (see Selection 67, for example). Are these efforts to regulate groups' behavior, and do they infringe on individual or group freedoms? There are always opponents of such regulations who argue that they infringe on protected freedoms and activities. Such examples are, then, part of the continuing effort to resolve Madison's dilemma—how to regulate or influence groups and their members without intruding on freedom.)

MULTIPLE CHOICE QUESTIONS

1. According to Jeffrey Berry, what was Madison's dilemma?

   a) "Groups pursue the good of society until governments are formed."
   b) "The invisible hand fails to provide representation for the masses."
   c) "If people pursue their self-interest, government will be too weak."
   d) "If the government does not allow people to pursue their self interest, it takes away their political freedom."

2. Robert Dahl's book, *Who Governs?*, is associated with which school of thought?

   a) laissez-faire.
   b) pluralism.
   c) incrementalism.
   d) the New Deal.

3. According to Jeffrey Berry, worries about pluralism led to efforts to:

   a) increase participation in the political process.
   b) eliminate single-issue citizen groups.
   c) sacrifice individual freedom on behalf of the common good.
   d) none of the above

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

FIRST AMENDMENT BARRIERS TO THE REGULATION OF INTEREST GROUPS AND POLITICAL PARTIES

Reading 41: *Buckley* v. *Valeo*, 424 U.S. 1 (1976)

Ruling

Campaign spending is a form of political expression the First Amendment protects. The Constitution forbids Congress from limiting political campaign expenditures. However, Congress can regulate contributions to political candidates and parties. Important governmental and societal interests in limiting contributions outweigh First Amendment protections.

Background

Although campaign finance regulation dates to the Theodore Roosevelt administration in 1905, congress did not begin to regulate this area in earnest until the 1970s. The campaign finance laws of the 1970s severely restricted campaign expenditures in federal elections, and limited the amount individuals and groups could contribute to candidates. The Nixon campaign practices in 1972, which came to light after Watergate, practices that violated the Corrupt Practices Act of 1925 among other laws, caused an outcry among congressional Democrats, for stricter regulation. Congress created the Federal Election Commission in 1975 to enforce various campaign finance laws passed in the 1970s, beginning in 1971.

Plaintiffs in *Buckley* v. *Valeo* challenged the 1971 law as amended in 1974 as a violation of the First Amendment's freedoms of speech and association.

The Court's Reasoning

In a Per Curiam opinion the Supreme Court stated: "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression…."

Political association

The Court also stated, "The First Amendment protects political association as well as political expression."

Holdings

Contribution Limitations
". . . We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling. . . ."

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Expenditure Limitations

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms. . ."

MULTIPLE CHOICE QUESTIONS

1. The Court held in *Buckley* v. *Valeo* (1976) held:

    a) Congress did not have the authority to regulate campaign finances.
    b) Congress could limit campaign contributions but not expenditures.
    c) congressional campaign regulation posed no constitutional issues.
    d) Congress could limit campaign expenditures but not contributions.

2. In *Buckley* v. *Valeo* (1976) the core constitutional issues raised were from the:

    a) Fourth Amendment
    b) Fifth Amendment
    c) First Amendment
    d) Fourteenth Amendment

Reading 42: Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*

Theme

Democratic theory supports electoral choice and competition in an environment free of government control. Campaign finance reform violates the premises of democratic theory by dictating the terms of electoral participation by voters, parties, and interest groups.

Argument

1."Seldom have so many worked so hard and so long to accomplish so little. Despite enduring popular support, campaign finance reform has had, at best, mixed success. Congress has moved slowly, when at all, and has often enacted changes that are either cosmetic, easy to circumvent, or practically unenforceable."

2. "If a reform should actually threaten to matter, the courts, particularly the United States Supreme Court, have been quick to strike, leaving in their wake a patchwork framework that Congress never would have enacted and that makes little sense."

3. Reformers attach *Buckley v. Valeo* as a major obstacle in the way of campaign finance reform. But "[t]he major obstacle to campaign finance reform is not that the Supreme Court misunderstands the role of money in politics nor, more fundamentally, misinterprets the First Amendment."

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

4. The real problem is that "the arguments advanced by the reformers themselves are internally incoherent. In a deep sense, those who argue for campaign finance reform appear to violate democratic theory in the name of defending it."

5. The essential flaw in campaign finance reform theories is that "in the name of protecting democracy, these theories all violate one of democracy's central normative assumptions: the idea that voters are civically competent. To the extent Americans are the kind of people that democratic theory demands—i.e., engaged, informed voters who carefully reason through political arguments—we hardly need the kind of protection that campaign finance regulation affords us."

MULTIPLE CHOICE QUESTIONS

1. Democracy requires:

    a) regulation of both campaign expenditures and contributions.
    b) greater judicial activism by the Supreme Court to level the playing field.
    c) state but not national regulation of campaign finance.
    <u>d</u>) voter freedom to choose the means of persuasion of others.

2. Theories supporting campaign finance reform

    a) follow directly from democratic theory.
    <u>b</u>) undermine democratic theory.
    c) are supported more by Democrats than Republicans.
    d) emerged from the early days of the Republic.

GROUP THEORY: THE NATURE AND FUNCTIONS OF INTEREST GROUPS

The introductory note to this section begins with a discussion of John C. Calhoun's *Disquisition on Government*, which in previous editions of this book was given as a selection. His theory of concurrent majority is a precursor to modern group theory, and Calhoun's proposition that the constitutional system did not effectively protect group interests is an important premise that in a different form has been transferred to modern group theory, which accepts the view that public policy is properly a reflection of the concerns of the major interest groups in different policy spheres.

Reading 43:
David B. Truman, *The Governmental Process*

The selection from Truman's major book is necessarily brief, and instructors might well wish to expand upon Truman's views at this point. Essentially, Truman argues that the political process is a reflection of group politics; moreover, group politics is a perfect representation of democracy in action. This is the view so strongly criticized by Lowi in Selection 33.

Truman's judgment is both empirical and normative and can be questioned on both counts. Truman's circle of reasoning is completed by his introduction and definition of potential interest groups. The political activation of potential or unorganized groups when their members feel their interests to be threatened presumably

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

automatically solves all of the problems created by the imbalance of power that often exists in group politics between well-organized and financed groups and their less powerful adversaries, which includes unorganized groups. Empirical evidence does not suggest, however, that potential groups always are activated to challenge dominant groups that are backing policies for their own benefit and not for a broader public interest, however vague and difficult to define the public interest may be.

In introducing Truman's selection, refer to James Madison's discussion in *Federalist 10*, and contrast the premises of the original constitutional system with the approach to interest group theory from Calhoun to Truman.

QUESTIONS FOR DISCUSSION

1. How does Truman define an interest group? ("Any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes.")

2. What is the political role of the individual in Truman's analysis? (The political interests of the individual are essentially accommodated by groups. The individual as such does not affect politics.)

3. What does Truman feel about the assertion that there is an inclusive national or public interest? (He feels the assertion cannot be proved. Even during wartime, when it seems likely that everyone would agree that the war, if it is a defensive war such as World War II, is in the national interest, one finds interest groups opposed to the fighting.)

4. What are the major factors that determine the success of an interest group in gaining access to government? (Access is determined by the group's strategic position in society, the internal characteristics of the group, and factors peculiar to the governmental institutions themselves. The prestige of the group in society is an example of the first factor. An example of a factor in the second category is "the degree and appropriateness of the group's organization…cohesion…the skills of leadership; and the group's resources in numbers and money." In the third category is the fact that the American political system contains a number of points of access due to the separation of powers, federalism, and the lack of cohesive national parties.)

MULTIPLE CHOICE QUESTIONS

1. David B. Truman, in *The Governmental Process*, argues that interest groups:

   a) reflect the views of individuals.
   b) are unrepresentative of individual viewpoints.
   c) are controlled by undemocratic elites.
   d) are equal in power.

2. David Truman concludes, in *The Governmental Process*, that:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) interest group power is less in the United States than in other countries because of the separation of powers.
b) interest group power is increased because of the multiplicity of points of access to government.
c) interest groups are subordinate to political parties.
d) the Constitution was designed to increase group power.

3. Which of the following statements is *incorrect*?

a) It is often argued that any attempt at the interpretation of politics in terms of group patterns inevitably "leaves something out."
b) Group theory suggests that there is no conflict between "the individual" and "the group."
c) Group theorists suggest that we do not find individuals otherwise than in groups.
d) Group theorists recognize that there is an interest of the nation as a whole that stands apart and is superior to the interests of various groups within the nation.

Reading 44:
Pendleton Herring, The Role of Interest Groups in Government

Theme

Interest group diversity characterizes the political process. Interest group pressures on Congress, the presidency, and the bureaucracy have shaped governmental institutions and policies over the years.

Major Points

1. When we review the role of interest groups we see how effective such organized efforts have been in winning a response, and, over the decades, have brought about changes of great moment.

2. Over time, Congress has proved itself capable of mediating and sustaining diverse pressures.

3. The increased importance of organized interests has been accompanied by a decline of party control and the ensuing fragmentation of leadership in Congress.

4. Congress has increased its staff to help members deal with interest groups.

5. The executive branch is not a monolithic entity but "an uneven array of agencies, each with its own constituency of supporters and often facing its specialized critics. Officials serve their particular publics, congressional committees and interest groups. The problem is not tyranny but often too much responsiveness. In short, it is difficult to discern policy direction in this multitude of particular purposes."

Discussion

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Herring's thesis reflects a twentieth century political scientist's analysis of the consequences of political pluralism. Special interest constituencies fragment both the executive and legislative branches.

The first decade of the twenty-first century looks as if strong parties have emerged on Capitol Hill, and in state legislatures are well. Bitter partisanship, not bipartisanship, is the order of the day. Partisanship, however, does not necessarily diminish the powerful force of pluralism. That partisanship characterizes the politics of what Lowi long ago called redistributive policies, i.e. those policies that have a recognized effect on broad segments of the public.

But pluralism lurks always in the interstices of Washington politics. One of many examples is the labyrinth of earmarks in President Obama's stimulus bill. Bailout legislation too exhibits in many particulars interest group power. Arguably president Obama's Treasury Secretary's proposals to save the banks had the stamp of approval of the most powerful banks, even while the President, members of Congress, and the media castigated the bankers as modern day devils.

MULTIPLE CHOICE QUESTIONS

1. Herring places interest groups:

   a) outside of the political mainstream.
   b) as the most important components of legislative and executive constituencies.
   c) as less important than parties.
   d) within the political parties that aggregate them.

2. The pluralistic universe of interest groups:

   a) undermines the power of congressional party leaders
   b) solidifies the executive branch
   c) undermines judicial power
   d) strengthens political parties

MONEY, PACS, AND ELECTIONS

Political campaigning has become increasingly expensive at all levels of government. House candidates who once spent under $100,000 to run for office now spend between $250,000 and $1 million, and sometimes more. Low-visibility challengers have particular difficulty and often find it impossible to match incumbents' fundraising organizations and sources. On the Senate side, both incumbents and challengers commonly spend millions of dollars to run for office. It is no accident that the Senate is a millionaire's club.

For an in-depth review of the history of campaign finance, current issues, and reform proposals, see *Campaign Finance Reform: A Sourcebook*, ed. Anthony Corrado, et. al. (Washington, D.C.: Brookings Institution Press, 1997).

Reading 45:
Larry J. Sabato, *The Misplaced Obsession with PACs*

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Theme

Money and politics go together in the political environment, and Political Action Committees are a major source of campaign funds. While PACs are legal and even encouraged by campaign finance laws, they are often portrayed as the bad guys of American politics. Larry Sabato argues that this obsession with PACs is misplaced because PACs fulfill the role Madison created for diverse and active factions.

Conclusion

Sabato addresses several of the major charges leveled at PACs, concluding that most are unfounded. First, while critics have charged that PACs have multiplied in number and influence since the 1970s, Sabato traces the change to laws favoring PACs. Since PACs represent mechanisms for tracing the amount and direction of political campaign funds, comparing the PAC era with a past in which funds and contributors were not disclosed is unsatisfactory. Sabato writes, "[I]t is not clear that there is proportionately more interest-group money in the system than before."

Second, Sabato argues that the facts of increased PACs and increased costs in running for office may represent the effect of newer, more expensive technologies. Television and polling costs have added tremendously to campaign costs. PACs may, in fact, supply candidates with the requisite funds to address the public and increase the flow of information.

Third, Sabato highlights the lack of clear evidence that PAC money can "buy" votes on legislation. He suggests that in certain circumstances PACs can be influential, such as narrow and specialized issue-areas with low visibility; they can also be effective in agenda setting and subcommittee votes. But Sabato argues that most congressmen are not overly influenced by PAC money, because legislators need to be responsive to their party, ideology, and constituents. Sabato also notes the difficulty in distinguishing between these motives for congressional votes and PAC influence: Does a dairy state senator vote for dairy price supports because of PAC money from agriculture interests or because his constituents are dairy farmers?

Finally, Sabato argues that PACs are Madisonian factions, multiplying (rather than attempting to stifle) associations and political participation. PACs are, and will always be, checked by free elections with universal suffrage and by the needs of a two-party system.

QUESTIONS FOR DISCUSSION

1. As a legislator, would you be more tied to your party and your constituents than to a PAC? How would you react to pressure put on you by a PAC soliciting your vote? Is Sabato right in suggesting that certain issues and stages in the political process are more susceptible to PAC influence? What are the problems Sabato identifies with gauging the amount of PAC influence on congressional votes? Is there any sure way to know the extent of PAC influence? Is the answer to this question an argument for or against PACs?

2. Should PACs be limited, or are they manifestations of group activity that should be multiplied and encouraged in our system? How would you limit PAC activity? How would important interests respond to such limitations? If campaign money was spent much more secretively in the past, as Sabato argues, do PACs fulfill a purpose in charting and publicizing interests' campaign spending?

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. What obstacles exist to PAC reform? Are legislators liable to cast votes that limit the influence of groups that support their election campaigns? How would a reformer build support for PAC reform? Alternatively, how would legislators or PACs go about convincing the public that they fulfill a useful role in American government?

MULTIPLE CHOICE QUESTIONS

1. According to Larry Sabato, PACs:

    a) increase the cost of modern-day elections.
    b) should be outlawed because they corrupt the system.
    c) are not really a factor in American politics.
    d) are modern Madisonian factions.

2. According to Sabato, why have PACs and their contributions to political campaigns increased in the last 20 years?

    a) The decline in labor unions' influence allowed businesses to form PACs.
    b) Richard Nixon demonstrated PACs' effectiveness in the 1972 campaign.
    c) PACs were encouraged by campaign finance laws following Watergate.
    d) Americans have become more politically active.

3. Why is Sabato not concerned that PACs support incumbents?

    a) PACS often support strong challengers late in the campaign.
    b) Incumbents are good for government.
    c) Voters offset PAC influence by voting for challengers.
    d) Incumbents are not eligible for public campaign funds.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

PART 3: NATIONAL GOVERNMENTAL INSTITUTIONS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 6

The Presidency

Alexander Hamilton's *Federalist 70* introduces this chapter. His theme is the basis of the Hamiltonian constitutional model: "Energy in the executive is a leading character in the definition of good government." Next the great presidential scholar Edward S. Corwin puts the Hamiltonian presidency in perspective in a new reading for this edition.

Clinton Rossiter and Richard Neustadt give contrasting views on the nature of the presidency in the next section. Rossiter takes a more formal approach than Neustadt in outlining the president's responsibilities in a way that tends to aggrandize presidential power. Neustadt focuses upon the politics of the presidency and treats the president more as an ordinary politician who, to exercise power, must be able to skillfully persuade others that their interests are the same as his. You might want to mention to students that President John F. Kennedy had a copy of Neustadt's book on his Oval Office desk.

In addition to Alexander Hamilton, Clinton Rossiter, and Richard Neustadt, this chapter is a virtual gold mine of classic readings and presidential scholarship. James David Barber presents his provocative thesis on the importance of presidential character. Sidney M. Milkis analyzes the presidency and political parties. He describes the tenuous relationship between the presidency and his political party, which has resulted in the rise of the administrative presidency.

Presidential power in the post 9/11 era raised the specter of "constitutional dictatorship." The classic case of Ex Parte Milligan (1866) gives students a historical reference to presidential powers in times of crisis. The chapter ends with the new case of *Boumediene et al. v. Bush, President of the United States* (2008), giving the contemporary Supreme Court view of presidential power to suspend the writ of habeas corpus in times of crisis.

CONSTITUTIONAL BACKGROUND: SINGLE *versus* PLURAL EXECUTIVE

At this point it will be useful to recall for students James Madison's discussion of the separation of powers and checks and balances system in Numbers 47, 48, and 51 of *The Federalist* given in Chapter 1. The Madisonian model of government outlined in those papers can be read as supporting weak and divided government, the emphasis being on how to prevent the exercise of arbitrary political power rather than how to ensure effective leadership.

Reading 46: Alexander Hamilton, *Federalist 70*

Alexander Hamilton's views in *Federalist 70* can be read as presenting a sharp contrast to the Madisonian model, for Hamilton supports energetic government and a unified executive. To Hamilton, a strong executive is the very definition of good government. The Hamiltonian model casts government in positive terms, whereas the Madisonian model views governmental power negatively.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

QUESTIONS FOR DISCUSSION

1. Why does Hamilton say that "all men of sense will agree in the necessity of an energetic executive," and that "the ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers"? (Discuss here the difference between a collective and unitary executive. Emphasize the importance of providing the president with powers independent of Congress, and a separate term of office. *Federalist 70* is largely devoted to explaining the importance of unity in the executive.)

2. Hamilton states that "the ingredients which constitute safety [in the executive] in the republican sense are: a due dependence on the people; a due responsibility." How did the constitutional system bring this about in reference to the presidency? (Discuss the electoral college system and how it almost immediately was used to provide for the popular rather than indirect election of the president. "A due responsibility" is produced, according to Hamilton, by a single executive more readily than by a plural executive. "But one of the weightiest objections to a plurality in the executive…is that it tends to conceal faults, and destroy responsibility….It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure…ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author….")

MULTIPLE CHOICE QUESTIONS

1. In *Federalist 70*, Alexander Hamilton argued that the office of the president should:

   a) be elected by the people.
   b) have extensive prerogatives.
   c) be unified.
   d) a and b

2. In *Federalist 70*, Alexander Hamilton stated that:

   a) energy in the executive is the definition of good government.
   b) the presidency should be weak.
   c) the separation of powers was an important device to limit government.
   d) the president should always act in consultation with his cabinet.

3. *Federalist 70* suggests a Hamiltonian view of government that:

   a) supports weak national government.
   b) emphasizes federalism.
   c) backs strong executive power.
   d) emphasizes the importance of limiting government more than strengthening it.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 47:
Edward S. Corwin, *The Presidency in Perspective*

Theme

> [The] Constitution reflects the struggle between two conceptions of executive power: the conception that it ought always to be subordinate to the supreme legislative power, and the conception that it ought to be, within generous limits, autonomous and self-directing; or, in other terms, the idea that the people are represented in the legislature versus the idea that they are embodied in the executive.

Argument

In the twentieth century the New Deal brought about a watershed in popular conceptions of the presidency. In short, the nation recognized once again the need for predominant presidential leadership in times of crisis. This was the Lincoln model, which with the New Deal became our permanent constitutional model. The Hamiltonian imperial presidency triumphed over the Madisonian separation of powers paradigm.

The doctrine of dual federalism, the sharing of national and state power, receded as the economic crisis grew, and caused "the replacement of the *laissez-faire* theory of government with the idea that government should make itself an *active, reforming* force in the field of economic enterprise."

Discussion

Now is the time to discuss how the Obama presidency perfectly follows the Hamiltonian, Lincoln, and FDR imperial presidency model. I'm using the term "imperial" here in the good, Hamiltonian meaning, not in the pejorative way Arthur Schlesinger used it in his book attacking the Nixon presidency as "The Imperial Presidency."

In this time of grave national economic crisis all eyes and expectations are on the presidency. Can the Madisonian model of separation of powers and checks and balances work to limit presidential initiatives in times of crisis? Engage students in this discussion to make them aware that our constitutional models (Hamilton v. Madison) have real meaning. They are not just theoretical constructs.

MULTIPLE CHOICE QUESTIONS

1. Edward S. Corwin's powerful presidential model is the result of:

   a) the breakdown of the separation of powers.
   b) the end of dual federalism.
   c) the replacement of the laissez faire economic model with a model that stresses the importance of active national governmental intervention in the economy.
   d) all of the above

2. Congress has:

   a) attacked the growth of presidential power at every turn.
   b) supported the presidency regardless of which party has a congressional majority.
   c) delegated significant powers to both the president and administrative departments and agencies.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

d) always checks the president.

THE NATURE OF THE PRESIDENCY: POWER AND PERSUASION

Reading 48:
Clinton Rossiter, *The Presidency: Focus of Leadership*

This selection by Clinton Rossiter has been retained throughout the life of this text, because its sanguine view of the presidency, accepted at the time it was written in 1956, continues to pose a provocative thesis. Rossiter's view of the presidency was the traditional approach, an approach that supported the imperial presidency. During the administrations of Lyndon B. Johnson and Richard M. Nixon, students were always surprised to read the Rossiter selection, because its optimistic view of the presidency conflicted with their pervasive pessimism about the White House. The Rossiter viewpoint is once again the prevailing one as the Obama presidency mobilizes to deal with the economic crisis and the continuing terrorist threat from abroad.

QUESTIONS FOR DISCUSSION

1. On what ground does Rossiter claim that the president is to be "leader of the Executive Branch"? (On the basis of constitutional provisions that provide that he is to see that the laws are faithfully executed, and that he is to have powers of appointment and removal of executive officials.)

2. How has the authority of the president as Commander-in-Chief of the armed forces been expanded since the framing of the Constitution? (Note here the rise of the imperial presidency, using Rossiter as a basing point, from which the unilateral power to engage American forces has accrued to the presidency.

3. Is it accurate to describe the president as leader of his party? Does this give him significant power in government? (The president is actually the leader only of the presidential wing of his party. Given the lack of disciplined parties in the United States, and now the disintegration of parties, the role of the president as leader of his party does not necessarily give him much power. Congress is often of the opposite party.)

4. Remind students of the historical twentieth century role of the president as "a leader of the free nations." This is a cold war phenomenon, but the president as the national leader and symbol of the nation continues to be the point person for democratic aspirations around the world.

5. Do you agree with Rossiter that the presidency has been a clear beacon of national purpose at great moments in our history? Lincoln, FDR, and now Obama arguably fulfill that role.

MULTIPLE CHOICE QUESTIONS

1. Clinton Rossiter argues that the presidency:

   a) has become too powerful.
   b) has assumed a wide range of responsibilities.
   c) is controlled by the bureaucracy.
   d) is overshadowed by Congress.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. Clinton Rossiter views the presidency as:

    a) an unpopular institution.
    b) a matrix for dictatorship.
    c) the focal point of national government.
    d) dangerously imperial in character.

3. Rossiter views the president's duties as:

    a) purely executive in nature.
    b) extending beyond executive functions.
    c) primarily legislative.
    d) solely administrative.

4. Rossiter writes that the president's constitutional responsibilities are to be:

    a) leader of his party.
    b) manager of prosperity.
    c) the voice of the people.
    d) Commander-in-Chief.

5. Rossiter states that it should be taken for granted that all people of sense will:

    a) agree in the necessity of an energetic executive.
    b) support a limited presidency.
    c) be constantly vigilant against the extension of executive power.
    d) advocate congressional domination of the executive.

Reading 49:
Richard E. Neustadt, *Presidential Power*

Richard Neustadt's selection was written in the same era as Clinton Rossiter's piece. The major difference between Rossiter and Neustadt is not to be found in their different values of what a president should be, but in their differing approaches to the nature of the institution. The implication of Rossiter's article is that the presidency is in fact imperial, whereas the thrust of Neustadt's piece is that a powerful presidency can only be produced by a highly skilled politician in the White House. The essential power of the presidency is the power to persuade, not to rule by prerogative.

QUESTIONS FOR DISCUSSION

1. Contrast Neustadt with Rossiter. How do their views on the presidency differ? (In short, to Rossiter the president is a king; to Neustadt, a clerk.)

2. Expand upon Neustadt's five categories of presidential constituents: executive officialdom, Congress, his political partisans, citizens at large, and foreign nations. (At a minimum here students should discuss the contrasting demands that these constituents place upon him. Also, note that such a constituent group as

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

"citizens at large" is very nebulous and rather difficult to define in terms of any concrete input upon the president.)

3. Since Neustadt claims that the Constitution makes the president a mere clerk, why do other parts of the government accept his authority? (Of course they do not always accept his authority. But when they do it means that they "have found it practically impossible to do *their* jobs without assurance of initiative from him. Service for themselves, not power for the president, has brought them to accept his leadership in form. They find his actions useful in their business. The transformation of his routine obligations testifies to their dependence on an active White House. A president, these days, is an invaluable clerk. His services are in demand all over Washington. His influence, however, is a very different matter. Laws and customs tell as little about leadership in fact.")

4. What are some of the major difficulties that the president finds in attempting to exert influence over other parts of the government? (An important limitation on the president arises from the different constituencies of other parts of the government. "His Cabinet officers have departmental duties and constituents. His legislative leaders head congressional parties, one in either house." And discuss in particular the contrasting constituencies of administrative agencies.)

MULTIPLE CHOICE QUESTIONS

1. Richard Neustadt states that the Constitution made the president:

   a) a king.
   b) the leader of his political party.
   c) a clerk.
   d) controlled by the bureaucracy.

2. Richard Neustadt argues that presidential power is:

   a) assured by the Constitution.
   b) subject to congressional control.
   c) the ability to persuade.
   d) controlled by the bureaucracy.

3. A modern president, states Neustadt, is bound to face demands from:

   a) the bureaucracy.
   b) Congress.
   c) the public.
   d) all of the above

4. Neustadt states that symbolically, presidents are:

   a) clerks.
   b) bureaucrats.
   c) legislators.
   d) leaders.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

PRESIDENTIAL CHARACTER AND STYLE

Reading 50:
James David Barber, *The Presidential Character*

The preceding selections by Rossiter and Neustadt focus upon the institutional aspects of the presidency, but the personality of the president is perhaps as important if not more significant than the presidential establishment. It is not just that the president's finger can be on the nuclear button, but also that his character shapes the approach taken by the White House—including the presidential bureaucracy—to the performance of presidential responsibilities.

It may have been the character of Lyndon Johnson, for example, that caused his reliance upon "The Best and the Brightest," those advisers inherited from the Kennedy administration but kept on by Johnson out of admiration, some awe, and perhaps an occasional feeling of intellectual inferiority in confrontation with this brain trust. At the same time, argues James David Barber in the book from which the text selection is taken—*The Presidential Character*—Johnson created an atmosphere of fear and paranoia in the White House, fear at defying the president, and paranoia about attacks upon Vietnam policy from the outside.

Aside from Barber's work, the main studies of Lyndon Johnson's character and his relationship to his advisers are David Halberstam, *The Best and the Brightest* (New York: Random House, 1972), and Doris Kearns, *Lyndon Johnson and the American Dream* (New York: Harper and Row, 1976).

Argument

James Barber states his premises regarding the importance of presidential character upon performance:

> First, a president's personality is an important shaper of his presidential behavior on nontrivial matters.
>
> Second, presidential personality is patterned. His character, world view, and style fit together in a dynamic package, understandable in psychological terms.
>
> Third, a president's personality interacts with the power situation he faces in the national "climate of expectations" dominant at the time he serves. The tuning, the resonance—or lack of it—between these external factors and his personality sets in motion the dynamics of his presidency.
>
> Fourth, the best way to predict a president's character, world view, and style is to see how they were put together in the first place. That happened in his early life, culminating in his first independent political success.

Barber outlines in the text his now-famous typology of presidential character: active-positive; active-negative; passive-positive; passive-negative. And it is of course the "active-positive" character that fulfills the requirements for good performance in the White House. This is because the active-positive president is oriented towards achievement, is productive, has well-defined goals, and is both rational and flexible in approach. He has a strong sense of self-confidence, making it possible for him to accept criticism and change his mind when he finds that a course of action upon which he has embarked should be changed.

Before the 1980 presidential election, Barber conducted an interview with *U.S. News and World Report*, in which he assessed the characters of Ronald Reagan and Jimmy Carter. In reply to a question regarding what kind of president Ronald Reagan would make, Barber stated: "His would be a rhetorical presidency. Reagan's style is

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

centered on speech-making. He has been a speech-maker ever since, as a young college freshman, he made a dramatic speech that won great support on the campus. He can move and act to capture an audience." Reagan would be a "passive-positive" president, continued Barber, who stressed the fact that Reagan likes to please people. Reagan's "political life centers on collecting affection from his environment. He wants to be at the center of a friendly crew of colleagues who are appreciative of him and like him. The man, after all, is an actor who wants to please his audiences. He spent his lifetime trying to do that. Even as a young man, he tried to please his family and his friends. He always was reputed to be a nice, friendly, cheerful, optimistic sort of guy."

Commenting upon Reagan's "passive-positive" personality, Barber declared that Reagan "has always been a kind of booster, an optimist, a conveyor of hopefulness. He is passive in the sense that he has a long record of saving his energy, of not working too hard. He was a nine-to-five governor, and as a campaigner he takes it pretty easy. The danger is that people with this kind of personality give in to pressure too quickly. Historically, Warren Harding and William Howard Taft were 'passive-positive' presidents, and they proved too compliant." However, concluded Barber, the time might be ripe for a Reagan presidency because the country "is in need of a rest….In that environment, Reagan might prove somewhat of a unifying figure, conveying a folksiness that's less electric and dramatic than what we've been through. His presidency might be a kind of Eisenhower second term, where the danger is drift and inaction but the plus is a kind of healing and recovery."

Before Jimmy Carter came to the White House, Barber had characterized him as "active-positive." By the end of Carter's first term, Barber had not changed his assessment. The Carter character, Barber told his interviewers, "is going to be one that continues to muddle through, adapting to changing crises, without a great deal of long-range vision. At the same time, Carter is unlikely to dig his own grave by his actions." Carter, stated Barber, "puts out a lot of energy and does not get depressed or complain the way Lyndon Johnson or Richard Nixon did [both of whom were active-negative presidents]. He [Carter] remains rather serene and even cheerful. That indicates he can roll with the punches, recover from troubles, learn and grow. He is in the same category as Harry Truman, John Kennedy, Gerald Ford and Franklin." It might be suggested that Gerald Ford was more "passive-positive" than "active-positive," but that is of course a matter of debate. Barber himself raised the possibility that Ford would be a passive-positive president before Ford took office.

Barber was not too optimistic about the possibility of a Carter presidency for four more years, because although Carter would continue to learn in office, he lacks "a broad political vision that would enable him to see clearly the major alternatives that might be available. He thinks much more tacitly and narrowly."

In judging character, concluded Barber, the point is "not what office." The nominating process, suggested Barber, ought to cast its net beyond the realm of professional politicians to seek persons who would have the vision to make good presidents. (The Barber interview is in *U.S. News and World Report*, October 27, 1980, pp. 30, 33.)

QUESTIONS FOR DISCUSSION

1. In what sense does Barber feel that the presidency is "much more than an institution"? (Barber writes that the presidency, in addition to being an institution, "is focus of feelings. In general, popular feelings about politics are low-key, shallow, casual. For example, the vast majority of Americans know virtually nothing of what Congress is doing and care less. The presidency is different. The presidency is the focus for the most intense and persistent emotions in the American polity. The President is a symbolic leader, the one figure who draws together the people's hopes and fears for the political future. On top of all his routine duties, he has to carry that off—or fail." The president is a kind of father figure, an emotional focal point in the polity for most citizens. Compare Barber's statement with the views of Rossiter and Neustadt. Rossiter focuses more upon the symbolic roles of the president than Neustadt does.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

2. What is the president's style? (“Style is the President's habitual way of performing his three political roles: rhetoric, personal relations, and homework.”)

3. How does Barber define the “world view” of the president? (“A President's world view consists of his primary, politically relevant beliefs, particularly his conceptions of social causality, human nature, and the central moral conflicts of the time.”)

4. Define and discuss the four character types that Barber develops. (Active-positive presidents bring energy and enjoyment of the job. Active-negative presidents also are energetic, but out of a sense of duty. Active-negative presidents do not gain emotional rewards from the job as do active-positive occupants of the Oval Office. Passive-positive presidents have low energy but a positive attitude. Passive-negative presidents have little energy and no enjoyment in their job. They serve out of a sense of duty. In *The Presidential Character*, James Barber's examples of active-positive presidents include Franklin D. Roosevelt, Harry S. Truman, and John F. Kennedy. Active-negative presidents are Richard M. Nixon and Lyndon B. Johnson, as well as Herbert Hoover and Woodrow Wilson. Passive-positive presidents are Warren G. Harding and William Howard Taft. The passive-negative presidents include Dwight D. Eisenhower and Calvin Coolidge.)

MULTIPLE CHOICE QUESTIONS

1. James David Barber concludes that the most desirable type of presidential character is:

   a) active-negative.
   <u>b</u>) active-positive.
   c) passive-positive.
   d) passive-negative.

2. Active-negative presidents:

   a) want most to achieve results.
   b) are after love.
   c) emphasize their civic virtue.
   <u>d</u>) aim to get and keep power.

3. James David Barber concludes that the presidency is primarily shaped by:

   a) its organization.
   b) the party of the incumbent.
   c) the separation of powers.
   <u>d</u>) the character of the occupant of the Oval Office.

4. James David Barber asserts that the Constitution:

   a) weakened the presidency.
   b) made the presidency the most important branch of the national government.
   c) stressed the equality of the president and Congress.
   <u>d</u> only loosely defined the presidency.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

5. Barber asserts that the presidency is much more than an institution because:

   a) it must deal with foreign nations.
   b) it exercises nongovernmental functions.
   c) it is the focus of popular feelings.
   d) it is imperial in character.

6. Barber states that the White House:

   a) is controlled by the staff.
   b) is dominated by Congress.
   c) has been weakened by the Supreme Court.
   d) is first and foremost a place of public leadership.

PRESIDENTIAL LEADERSHIP AND POLITICAL PARTIES

Reading 51:
Sidney M. Milkis, *The Presidency and Political Parties*

Theme

Modern presidents have become isolated from party politics and support. Milkis traces this development to Franklin Roosevelt, whose reliance on extraordinary presidential leadership "was more conducive to corroding the American party system than to reforming it." Roosevelt's administration confronted a dilemma in politics: the decentralized nature of American government can only be reformed through strong presidential leadership, but any such centralized effort undercuts party unity.

The reforms brought by Roosevelt sought to create an administrative apparatus insulated from electoral change. The bureaucracy thus created would cement New Deal values in the governmental mechanism, making elections, and therefore parties, less important. The presidency came to preempt traditional party functions such as linking government and interest groups, staffing the executive department, contributing to policy development, and organizing election campaigns.

This trend continued through the Johnson and Nixon administrations, the latter being significant because of his attempt to create a *conservative* "administrative presidency."

Conclusion

The unlikelihood that strong national party organizations will emerge in this country provides a constant incentive for presidents to short-circuit the traditional legislative process, emphasizing instead popular appeals and administrative action. Milkis identifies the Iran-Contra program and regulatory politics under President Reagan as an example of this.

Efforts by Reagan and George Bush to tie their presidencies to the Republican party only highlighted the executive's isolation." Since FDR, the president has been freed from the constraints of party, only to be enslaved by a volatile political environment that often would rapidly undercut political support."

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Milkis' essay in this edition adds a new section on the George W. Bush presidency. Parties are becoming stronger to be sure, but presidential control of party to govern remains an elusive goal. Milkis concludes: "The major question for the next several years is whether the profound revival of the modern presidency's governing authority in the wake of 9/11 has brought a national party system to fruition or continued the long-term development of a modern presidency that renders collective partisanship impractical."

QUESTIONS FOR DISCUSSION

1. What does Milkis mean by an isolated president, given that the president has a stronghold in the executive branch and a direct relationship with the public? Does the fact that presidents have been divorced from party support mean that parties have declined in importance? Are there aspects of government in which party politics are still important? Has politics become centered in the executive, or are important aspects of governance still taking place at the state and local levels? Does this add to the isolation of the president?

2. If modern presidents are increasingly isolated from the support of traditional political parties, what might replace that support? Can we trace the rapid decline in support for George Bush to the absence of traditional support, making the president vulnerable to shifts in public opinion, or were other factors involved? Is the direct link between the president and the public through rhetorical appeals necessarily a weaker support than that given by parties? What consequences follow this new connection?

3. Ginsberg and Shefter argued, in selection 35, that as elections have become less important, politics takes place "by other means." How does Milkis' argument fit into this conception? Are reliance on administrative action and rhetorical appeals examples of "politics by other means"? If Milkis is right that the modern administrative system has ensconced a New Deal vision in the bureaucracy, will an influx of new voters have any effect on government (as Ginsberg and Shefter argue)? Will a Republican Congress be able to circumvent the administrative bureaucracy?

MULTIPLE CHOICE QUESTIONS

1. Sidney Milkis argues that the modern presidency:

    a) is increasingly tied to party politics.
    b) is increasingly isolated from the public.
    c) has forged a new and direct relationship with the public.
    d) has usurped the traditional role of Congress.

2. According to Sidney Milkis, modern presidents must increasingly rely on which type of action to further their goals?

    a) administrative
    b) legislative
    c) local
    d) judicial

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. According to Milkis, the Nixon presidency was an important landmark in the development of the modern presidency because:

   a) Nixon reversed many New Deal programs.
   b) Nixon followed New Deal and Great Society trends by centralizing administrative power in the executive branch.
   c) Nixon's resignation showed the strength of the New Deal coalition.
   d) Nixon added foreign affairs to the growing responsibilities of the president.

THE CONSTITUTIONAL PRESIDENCY AND EMERGENCY POWERS

In the aftermath of the terrorist acts of September 11, 2001 that brought down New York's World Trade Towers, destroyed part of the Pentagon, and threatened the White House and the U.S. Capitol, President Bush sought wide prerogative and new statutory powers to deal with the war on terrorism. The terrorist acts were unprecedented but the presidential quest for the power to cope with a national emergency was not new.

Constitutional Precedents

The presidential quest for emergency powers is always greatest in time of war, and the war that presented the greatest threat to the country was the Civil War. President Lincoln exercised both prerogative, or unilateral, power as well as statutory power, derived from congressional laws, to act to preserve and protect the Union. As President Bush and the executive branch, and Congress, respond to terrorist threats, the Constitution and constitutional precedents speak to how far they can go in suspending civil liberties and civil rights in order to detain and arrest suspected terrorists.

The first precedent is *Ex Parte Merryman*, in which Chief Justice Taney presiding over a circuit court in Maryland, held that a military order cannot suspend the ancient writ of habeas corpus. Taney wrote in part:

> I can only say that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus upon any pretext or under any circumstances be usurped by the military power at its discretion, the people of the United States are no longer living under a Government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.
>
> The full Supreme Court again address the constitutional issue of when can the President suspend the writ of habeas corpus in Ex Parte Milligan (1866), which established an important precedent limiting presidential prerogative powers even in times of national crisis.

Student understanding

Students tend to think, or at least feel, that history began when they were born. All issues seem contemporary and without precedent. The point of including the seminal *Ex Parte Milligan* (1866) precedent is again to make students aware of their constitutional heritage. National crises did not begin with 9/11 and they will not end there. Probably the greatest crisis in our history was the Revolutionary War, followed by the Civil War, then World War II. Students should not simply think of military tribunals as a new constitutional problem, but as one that dates to the Civil War. And, of course, due process of law dates to the Magna Charta in 1215.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 52:
***Ex Parte Milligan,* 71 U.S. 2 (1866)**

Ruling

The Constitution does not give the president unlimited authority to order trials by military commissions for persons accused of crime in jurisdictions where Article III courts are open and available. The president cannot deny fundamental constitutional rights.

Facts, Pleas, and Reasoning

1. On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th day of May, 1865.

2. Milligan insists that said military commission had no jurisdiction to try him upon the charges preferred, or upon any charges whatever; because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

3. The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him?

4. No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law.

5. Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress.

MULTIPLE CHOICE QUESTIONS

1. In *Ex Parte Milligan* the Supreme Court:

   a) upheld suspension of the Bill of Rights during wartime.
   b) upheld presidential discretion to curb constitutional rights during wartime.
   c) suspended judicial review of presidential action during wartime when the president based his decision on the national interest.
   d) held that the president did not have discretion to suspend due process during wartime by substituting military tribunals when civil courts are open and available.

2. In *Ex Parte Milligan* the Supreme Court held that:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) judicial power must reside in Article III courts.
b) military tribunals can exercise judicial power.
c) the president can create courts during wartime and structure them as military tribunals.
d) the suspension of the writ of habeas corpus due times of rebellion or invasion can be done by either the president acting alone, or congress.

PRESIDENTIAL POWER, DUE PROCESS, AND THE SEPARATION OF POWERS IN THE TIME OF THE WAR ON TERROR

Reading 53:
***Boumediene et al. v. Bush, President of the United States,* United States Supreme Court, 2008**

Court Ruling

Judicial power extends to the president of the United States even in times of national emergency. Courts protect the fundamental rights of alien-enemies as well as citizens. Aliens have a constitutional right to appeal to federal district courts for writs of habeas corpus to hear their appeals that they have been detained unlawfully. But before granting habeas corpus, courts must take governmental interests into account.

Reasoning

Petitioners are enemy aliens held at Guantanamo. The question is "whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege."

> Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that [*in effect* although not formally suspends the writ of habeas corpus and] provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ.
>
> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. Thathistory counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.

The courts of England gradually assumed the judicial power to issue writs of habeas corpus after Magna Carta [1215] to fulfill its requirement that "[n]o free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land."

The writ is a vital part of our Constitution and our Anglo-American legal traditions. Neither the President nor Congress can suspend the writ except by strict adherence to the constitutional exceptions of invasion or rebellion.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

The government has not met the requirements of the suspension clause. This effective suspension of the writ is not the result of an invasion or rebellion. The government must extend the privilege of the writ of habeas corpus to detainees at Guantanamo because the base is under United States sovereignty.

Dissent

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting.

> Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants. The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate. The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation. And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date.

Discussion

Note that courts do not have to grant petitions for a writ of habeas corpus. Habeas corpus is a prerogative writ within judicial discretion to issue. The Court in *Boumediene et al. v. Bush* guided the federal district courts to take national security considerations into account before granting the petitioners the writ.

MULTIPLE CHOICE QUESTIONS

1. *Boumediene et al. v. Bush* held that the Constitution

   a) gives Congress and the President discretionary power to suspend the writ of habeas corpus.
   b) requires an invasion or rebellion for government suspension the writ of habeas corpus.
   c) provides that upon a petition for the issuance of a writ of habeas corpus the courts must comply. They have no discretion to deny the writ.
   d) stated that Magna Carta demanded that all Englishmen have the privilege of the writ of habeas corpus.

2. The dissenters in *Boumediene et al. v. Bush*

   a) held that the President and Congress have the absolute authority to suspend the writ of habeas corpus at any time in any place.
   b) found the procedures Congress established for detainees fair and generous.
   c) accepted the view that enemy combatants should have all the rights of non-enemy combatants.
   d) argued that enemy combatants should have no rights.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 7

The Bureaucracy

This chapter begins with a discussion of the ambiguity of the constitutional background of the bureaucracy, which in its present form was not specifically mentioned nor dealt within the framers' elaborately constructed system of separation of powers and checks and balances. The bureaucracy has become an important and largely independent fourth branch of the government, suspended between the president and Congress and often playing each against the other. The president considers the bureaucracy to be within his domain, while Congress emphatically insists that the departments and agencies of government are its agents.

James Q. Wilson's classic article on the rise of the bureaucratic state concludes the chapter. Wilson focuses upon how private-sector political demands for government services, regulation, and protection have created a client-serving bureaucracy that has become a powerful political force in its own right. Administrative departments and agencies often respond more to special than to broad national interests, a condition that political pluralism accentuates.

Political demands for government action led to the creation of the bureaucracy, which is one of the most representative branches of the government. Clientele departments and agencies give a variety of interest groups special representation in the counsels of government.

The bureaucracy—its power and red tape—has long been the subject of political rhetoric. Politicians run against the bureaucracy in their electoral campaigns, much as congressmen attack the institution of Congress when they go before constituents and seek their support. Jimmy Carter, for example, promised to reduce the vast federal bureaucracy to a few manageable cabinet departments and agencies. Carter's attacks upon the bureaucracy reflected the relatively new political phenomenon, as both Democrats and Republicans seemed in the 1970s for the first time to agree that something should be done about the burdensome bureaucracy and its oppressive ways. Senator Edward Kennedy, among others, led the congressional fight for the Freedom of Information Act and for regulatory reform, which eventually saw the elimination of government regulation in many important areas, including transportation and communication. But before the 1970s, the bureaucracy was pictured largely as a Democratic party creation, which received impetus from the New Deal and gradually expanded to its pinnacle of power during the Lyndon B. Johnson administration in the 1960s.

The Reagan and first Bush administrations continued the anti-bureaucratic tone of the 1970s with a vengeance. They failed to cut the federal bureaucracy significantly, but they managed to undermine many regulatory programs by appointing cabinet secretaries and administrators who were more in favor of laissez faire than strong government regulation. Bush appointed his vice president, Dan Quayle, to head a special presidential task force charged with cutting bureaucratic red tape and eliminating oppressive government regulation. And the Clinton administration continued the process. He appointed Vice President Al Gore to head a special presidential task force (sound familiar?) to reinvent government. The task force's goal, as it had been in all prior administrations, was to streamline government and humanize the bureaucracy. Although shaken up, an entrenched federal bureaucracy remains largely in place. The perennial problem of how to make the bureaucracy responsible and accountable is as acute as ever. President George W. Bush, preoccupied with the Iraq war, did not make the bureaucracy a political issue.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CONSTITUTIONAL BACKGROUND

While the Constitution did not specifically mention the bureaucracy, its provisions nevertheless have helped to shape the formal context within which the administrative branch developed.

Reading 54:
Peter Woll, *Constitutional Democracy and Bureaucratic Power*

The theme of this selection is: "In the final analysis, we are left with a bureaucratic system that has been fragmented by the Constitution, and in which administrative discretion is inevitable. The bureaucracy reflects the general fragmentation of our political system. It is often the battleground for the three branches of government, and for outside pressure groups which seek to control it for their own purposes."

QUESTIONS FOR DISCUSSION

1. What was the original conception of "administration" at the time of the framing of the Constitution? (As stated in *Federalist 72*, administration consisted of the mere execution of executive details. Those who were charged with performing administrative functions were to be under the control of the president. Administration in 1789 was not thought of as involving the exercise of quasi-legislative and quasi-judicial functions, a major role of the bureaucracy today.)

2. Hamilton, as might be expected, stated in *Federalist 72* that the executive branch was to be under the control of the president. However, the constitutional system actually has fostered a bureaucracy that is in many important respects independent of the president. What constitutional powers does Congress have over the bureaucracy? (It often shares the appointive power, because the president must appoint "public ministers," ambassadors, and other officers Congress designates with the advice and consent of the Senate. Congress possesses the "organic" power, that is, the power to create administrative agencies. These agencies are created on the basis of the Article 1 powers of Congress, such as the Commerce Clause, and the power to tax and provide for the general welfare. Virtually no administrative agencies have been created by executive order, and where they have, the Executive Order has been based upon prior statutory authority. The Department of Health and Human Services and the Environmental Protection Agency are the only two current examples of agencies that have been established by executive order. In addition to creating agencies, Congress also determines their organization, although the president has generally in the past been given reorganization authority, which was reinstated in 1977. Congress also determines the extent of judicial review over administrative decisions.)

3. What is the basis for the claim that the president is "Chief Administrator"? (This is a derivative from the Constitution, from the clause providing that the president is to see that the laws are faithfully executed. Virtually all of the powers that the president possesses over the bureaucracy are those that have been given to him by Congress. His only constitutional authority derives from the Commander-in-Chief clause, his general power as "Chief Executive," and his authority to appoint ambassadors and other public ministers. But even Congress has come to recognize in the twentieth century the importance of establishing the president as Chief Administrator in many areas.)

4. In what ways does the existence of the administrative branch pose problems to the maintenance of our constitutional democracy? (This is a very broad question, and from the text the major point to be raised

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

is that the bureaucracy combines within itself, although not necessarily in the same hands, executive, legislative, and judicial functions. Raise with students the extent to which these functions are performed in accordance with constitutional criteria. An extensive discussion of this is contained in Peter Woll, *American Bureaucracy*, New York: W.W. Norton, 2nd edition, 1977.)

MULTIPLE CHOICE QUESTIONS

1. Under the terms of the Constitution, the bureaucracy is:

   a) to check Congress.
   b) subordinate to the president.
   c) not mentioned.
   d) given the responsibility to implement public policy.

2. Alexander Hamilton stated in *Federalist 72* that:

   a) administrators ought to be directly under the control of the president.
   b) administrative agencies should be dominated by Congress.
   c) the president alone should be in charge of all administrative details.
   d) the president should appoint administrators but not have authority to supervise them.

3. It was clear that Hamilton felt the president:

   a) should have the authority to create administrative agencies.
   b) should have the removal power.
   c) would be responsible for administrative action as long as he was in office.
   d) should not be involved in administration.

4. Under the Constitution:

   a) the president has more authority over the bureaucracy than Congress.
   b) Congress has more authority over the bureaucracy than the president.
   c) administrative agencies are to be independent.
   d) both Congress and the president have important powers over the bureaucracy.

5. The separation of powers gives Congress the incentive to:

   a) grant the president control over the bureaucracy.
   b) limit the powers of the bureaucracy.
   c) place the bureaucracy outside of the control of the president.
   d) closely oversee the activities of the bureaucracy.

6. Administrative responsibility refers to making administrative agencies:

   a) accountable to the president.
   b) responsible to Congress.
   c) accountable to the courts.
   d) act in accordance with constitutional and democratic principles.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

7. Which of the following statements is *incorrect*?

   a) The founding fathers had little to say about the nature or function of the executive branch of the new government.
   b) The founding fathers carefully placed the administrative branch under presidential control.
   c) The Constitution provided for presidential appointment of executive officers but was silent on the issue of how far the president's removal power would extend over executive branch officials.
   d) Under the Constitution it is conceivable that the administrative departments might have become legal dependencies of the legislature.

THE POLITICAL ROOTS AND CONSEQUENCES OF BUREAUCRACY

Reading 55:
James Q. Wilson, *The Rise of the Bureaucratic State*

The introductory note to this section points out that with the exception of those executive departments that all governments need, such as State, Treasury, and Defense, private sector political demands have led to the creation of American bureaucracy. In response to those demands, Congress has, over the years, created more and more executive departments and problems. It is important to realize that the bureaucracy is not, as many of its critics have suggested, a conspiracy by government officials to increase their power. Wilson's article traces the rise of the administrative state and particularly notes how political pluralism has affected the bureaucracy's character by dividing it into clientele sectors.

QUESTIONS FOR DISCUSSION

1. What is the "bureaucracy problem?" (Red tape, delay, inefficiency, and "administrative despotism" have all been defined as part of the bureaucracy problem. Wilson observes that "Max Weber, after all, warned us that in capitalist and socialist societies alike, bureaucracy was likely to acquire an overpowering power position. Conservatives have always feared bureaucracy, save perhaps the police. Humane socialists have frequently been embarrassed by their inability to reconcile a desire for public control of the economy with the suspicion that a public bureaucracy may be as immune to democratic control as a private one. Liberals have equivocated . . . .")

2. What are ways in which political power "may be gathered undesirably into bureaucratic hands"? (First, by the growth of an administrative apparatus so large as to be immune from popular control; second, by placing power over a governmental bureaucracy of any size in private rather than public hands; and third, by vesting discretionary authority in the hands of a public agency so that the exercise of that power is not responsive to the public good.)

3. One of the most frequently mentioned attributes of bureaucracy is size. A large and unwieldy administrative branch makes problems of democratic responsiveness and efficient government operation more difficult to solve. Is a large bureaucracy, *per se*, a threat to the constitutional foundations of our government? (Wilson is careful to point out that the sizable bureaucracy that had been created by the end of the nineteenth century did not constitute a serious threat to the constitutional separation of powers system. The Post Office, for example, which accounted for most of the increase in the size of government bureaucracy in the nineteenth century, performed routine tasks and posed no threat to

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

constitutional government. The large military bureaucracy that became a permanent government fixture after World War II was a temporary phenomenon in the nineteenth century. And the dominant nineteenth century Congress closely supervised the relatively few discretionary agencies it had created. However, the twentieth century administrative state was a different matter, as client-serving agencies expanded in number and powers. The bureaucracy became in many respects, as selection 56 on constitutional democracy and bureaucratic power emphasized, a semi-autonomous fourth branch of the government in the twentieth century.) Wilson concludes: "All democratic regimes tend to shift resources from the private to the public sector and to enlarge the size of the administrative component of government. The particularistic and localistic nature of American democracy has created a particularistic and client-serving administration. If our bureaucracy often serves special interests and is subject to no central direction, it is because our legislature often services special interests and is subject to no central leadership. For Congress to complain of what it has created and it maintains is, to be charitable, misleading. Congress could change what it has devised, but there is little reason to suppose it will."

MULTIPLE CHOICE QUESTIONS

1. During the nineteenth century the largest executive department was:

   a) Treasury.
   b) War.
   c) Post Office.
   d) Human Resources.

2. Which of the following statements is *incorrect*?

   a) Conservatives have always feared government bureaucracy.
   b) Many socialists have suspected a public bureaucracy may be as immune to democratic control as a private one.
   c) Liberals have always unequivocally supported government bureaucracies.
   d) Max Weber warned that bureaucracy was likely to acquire an "overpowering" power position in both capitalist and socialist societies.

3. An examination of American bureaucracy makes it clear that many administrative departments and agencies are:

   a) client-oriented.
   b) controlled by special interests.
   c) closely allied with Congress.
   d) all of the above

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 8

Congress

Congress remains a fragmented yet powerful institution as it moves through the 1990s. Congress has changed in the twentieth century; perhaps the most important development being what Nelson Polsby has called the institutionalization of the House of Representatives (see *The American Political Science Review*, vol. 63, September 1979, pp. 787-807).

Congress continues to be shaped by its members' reelection incentives and their quest for personal power on Capitol Hill. Congressional parties as an internal force on Capitol Hill have strengthened considerably since the Gingrich eras that began in 1994, and intense partisanship began a new congressional stage with parties dominating the agenda. But committee chairmen are still the "feudal barons" of Capitol Hill, and party leaders still have only limited control of them.

A distinction should be made between the institution of Congress and its membership, between the goals for the institution insofar as they can be defined—
goals often shaped by the leadership of the House for that side of Capitol Hill—and the goals of individual legislators on Capitol Hill. More often than not, over congressional history members seeking personal power have reduced the power of the leadership and the collective power of the institution.

This chapter covers first the constitutional background of Congress, drawn from Madison's and Hamilton's discussions in *The Federalist*. The readings that follow analyze the place Congress occupies in the Washington political establishment; the power of committee chairmen; congressional incentives, particularly the quest for personal power and its counterpart, the desire to strengthen Congress as an institution; Congress and the electoral connection, particularly the irony that while Congress as an institution is often held in disrepute by voters, they almost automatically reelect its members, particularly to the House; the contrast between Home Style and Washington careers. A selection from Woodrow Wilson's classic, *Congressional Government*, shows students an emerging professional Congress in the 1880s. Wilson wrote at the threshold of the emergence of career politics on Capitol Hill, which many of the selections in this chapter describe.

CONSTITUTIONAL BACKGROUND: REPRESENTATION OF POPULAR, GROUP, AND NATIONAL INTERESTS

To a considerable extent the complex constitutional structure of Congress, particularly its bicameralism, reflected the need to balance conflicting state interests in 1787. The Senate provided small states with equal representation while the House was to be apportioned according to population. Each body of Congress was to have powers and terms of office to serve its different constituency.

Reading 56:
James Madison, *Federalist 53, 56, 57, 58, 62, 63*

In these selections from *The Federalist*, James Madison describes the theory behind the structure of Congress, in particular its bicameralism and the different powers, constituencies, and terms of office given to the House and Senate.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

QUESTIONS FOR DISCUSSION

1. How do the authors of *The Federalist* explain the different terms of office for the House and the Senate? (The House of Representatives is so constituted as to support in the members a habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it [*Federalist 57*]. In other words, the two-year term of office is to keep the members of the House strictly accountable to their constituents. Why then the six-year term for Senators? Because the Senate is to act as a check upon the House, and one way in which it is to do this is to have a more conservative constituency and a longer term of office, to make it more detached from popular passions. It is not possible that an assembly of men [the House of Representatives], called, for the most part, from pursuits of a private nature, continued in appointments for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of the country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust….The Senate, with its greater wisdom, its longer period of time to study the affairs of legislation, can check the errors of the House [*Federalist 62*]).

2. According to the theory of *The Federalist*, how does the Constitution bring about a system of checks and balances between the House and the Senate? (The House and Senate have not only different terms of office, which provide their members with different perspectives, but also contrasting constituencies. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the states [*Federalist 62*]. Moreover, the mere existence of two separate bodies causes legislative power to be divided and acts as a check on the legislature. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient….[*Federalist 62*]).

3. Why does *The Federalist* proclaim that it is necessary to have an internal check within the legislature itself? (This is answered in part in the answer to question 2, but also by the quote from *Federalist 62*: "The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.")

4. Do you agree with the theory of *Federalist 58* that: "In all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities." What factors lend support to or detract from the validity of this statement? (Is the Congress of the United States today, a body composed of far more members than in 1790, more subject to being ruled by an elite than at that time? Leadership is dispersed by the committee system, the seniority rule, the lack of party organization in the House and Senate, and the ineffectiveness of congressional party leaders.)

5. What are the primary functions of the legislature to be according to *The Federalist*? (Clearly the legislature was to be the primary policy body: It was to be the dominant legislative force in government subject only to the presidential veto or judicial review [*Federalist 78*].)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

6. Assume, for the purposes of argument, that legislative functions have now been largely transferred from Congress to the bureaucracy. Administrative legislation both in quantity and quality certainly equals congressional legislation. Now take the theory of *The Federalist* and apply it to the exercise of the legislative function by the bureaucracy. Does the bureaucracy as an institution conform to the requirements of *The Federalist* in the exercise of its legislative responsibilities? (This question may be raised in discussing Chapter 7 on the bureaucracy. For an analysis of the question, see Peter Woll, *American Bureaucracy*, New York: W.W. Norton and Company, 2nd edition, 1977, chapter 1.)

MULTIPLE CHOICE QUESTIONS

1. Under the original constitutional plan it was absolutely clear that Congress was to:

   a) be subordinate to the president.
   b) be subject to judicial review by the courts.
   c) exercise primary legislative functions.
   d) be able to delegate legislative authority to the other branches of the government.

2. A major difference between the House and the Senate in the Constitution is:

   a) the popular election of members of the House.
   b) House control over the power of the purse.
   c) Senate control over impeachment.
   d) House domination over foreign affairs.

3. According to Madison in *Federalist 62*, equality of representation for the states in the Senate was:

   a) an important check upon improper legislative acts.
   b) a check upon majority rule.
   c) the result of compromise between the large and small states.
   d) all of the above

4. Madison argued in *Federalist 63* that the Senate is an important complement to the House because:

   a) the Senate will be composed of wiser men.
   b) the Senate will not be swayed by passion.
   c) Senators must be older than members of the House.
   d) the short term of the House reduces its capacity to give continuity to legislation.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CONGRESS AND THE WASHINGTON POLITICAL ESTABLISHMENT

Reading 57:
Woodrow Wilson, *Congressional Government (1885)*

Theme

Woodrow Wilson as a graduate student in the 1880s studied and wrote his Ph D thesis on Congress, which became a classic in congressional literature. He concluded that committee denomination of Congress reflected a decentralization and fragmentation of the legislative process that advanced special interests and defeated the collective will of popular majorities that parties should represent.

Background

During the 1880s Congress was beginning to emerge from an institution "citizen legislators" dominated to a venue in which professional politicians advanced their political careers. Member reelection and internal power incentives began to shape Congress and led directly to the rise of multiple committees to serve these incentives. Committees were the "little legislatures" that collectively defined Congress.

The British Empire dominated the nineteenth century, and its parliamentary government became a model for democracy throughout the world. Party government was the keystone of British democracy, but the Madisonian model considered parties to be "evil" factions that opposed the national interest. The deliberative process that the separation of powers and checks and balances encouraged should define the national interest, not party partisanship. Somewhat ironically for a future American president, Wilson was an anglophile who greatly admired the parliamentary and party model of government.

The more the young Wilson studied Congress, the more dismayed he became. Committee denomination of Congress reflected a decentralization and fragmentation of the legislative process that advanced special interests and defeated the collective will of popular majorities that parties should represent. The conclusion of Congressional Government calls for more party control of Congress to connect it to public opinion. But, as Wilson describes Congress in the following selection, committees define its politics, not disciplined parties. Capitol Hill politics reflects an ebb and flow and committee and party control, but the cycles of committee power are longer than those of party dominance.

MULTIPLE CHOICE QUESTIONS

1. Woodrow Wilson's *Congressional Government* described a Congress controlled by:

    a) disciplined political parties.
    b) congressional party leaders.
    c) powerful committees.
    d) the executive branch.

2. Wilson stated the most powerful member of Congress was:

    a) the Speaker of the House.
    b) the majority leader of the Senate.
    c) the chairman of the House Rules Committee.
    d) the vice president.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. Which of the following statements did Wilson, in *Congressional Government*, not make?

a) The leaders of the House are the chairmen of the principal Standing Committees.
b) The House has as many leaders as there are subjects of legislation; for there are as many Standing Committees.
c) Both the House of Representatives and the Senate conduct their business by what may figuratively, but not inaccurately, be called an odd device of *disintegration.*
d) Disciplined political parties characterize both the House and the Senate.

Reading 58:
Morris P. Fiorina, *The Rise of the Washington Establishment*

Presented here is Fiorina's thesis from his award-winning book, *Congress: Keystone of the Washington Establishment* (New Haven, CT: Yale University Press, 1977). In a nutshell, that thesis is that Congress has created a bureaucracy not only in response to political demands but to enable its members to enhance their reelection prospects by acting as buffers between citizens and the bureaucracy. Congress, which gained credit for establishing the vast number of programs the executive branch administers, steps in after the creation of departments and agencies to receive credit for handling constituent complaints against them.

All sorts of discussion points can be drawn from Fiorina's selection. The theory of iron triangles might well be mentioned here, a reality that belies the commonly held assumption of congressional/executive branch antagonism. Congressional rhetoric, especially during reelection campaigns, certainly attacks the bureaucracy on all fronts, just as it attacks the institution of Congress itself. However, beneath the rhetoric, committee chairmen, staffers, and administrative agencies often act collusively to advance their mutual political interests.

QUESTIONS FOR DISCUSSION

1. What major assumptions does Fiorina make about the Washington political establishment and those within it? ("I assume that most people most of the time act in their own self interest….I assume that the primary goal of the typical congressman is reelection….What about the bureaucrats? A specification of their goals in somewhat more controversial….The literature provides ample justification for asserting that most bureaucrats wish to protect and nurture their agencies. The typical bureaucrat can be expected to seek to expand his agency in terms of personnel, budget, and mission.") The third element of Fiorina's equation is the voters. What do we, the voters who support the Washington system, strive for? Each of us wishes to receive a maximum of benefits from government for the minimum cost. This goal suggests mutual exploitation of the other. Each of us favors an arrangement in which our fellow citizens pay for our benefits.

2. What conclusions about the Washington establishment does Fiorina draw from his assumptions? (Fiorina agrees with Mayhew that reelection is the primary goal of Congressmen. They engage in lawmaking, pork-barreling, and casework to achieve reelection. After describing these activities, Fiorina states the core of his thesis: The key to the rise of the Washington establishment (and the vanishing marginals) is the following observation: *The growth of an activist federal government has stimulated a change in the mix of congressional activities*. Specifically, a lesser proportion of congressional effort is now going into programmatic activities and a greater proportion into pork-barrel and casework activities.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

As a result, today's congressmen make relatively fewer enemies and relatively more friends among the people of their districts.)

Fiorina concludes: "The nature of the Washington system is…quite clear. Congressmen (typically the majority Democrats) earn electoral credits by establishing various federal programs (the minority Republicans typically earn by fighting the good fight)." In short, without an overbearing bureaucracy, members would have significantly less casework activities they could engage in to gain electoral credits and reelection.

MULTIPLE CHOICE QUESTIONS

1. Morris P. Fiorina argues that a typical bureaucrat:

   a) protects the national interest.
   b) expands his or her agency in terms of personnel, budget, and mission.
   c) has little interest in the aggrandizement of his or her agency.
   d) is not part of the political process.

2. Which of the following statements is *incorrect*?

   a) Whether narrowly self-serving or more publicly oriented, the individual congressman finds reelection to be at least a necessary condition for the achievement of his or her goals.
   b) On average, those congressmen who are not primarily interested in reelection will not achieve reelection as often as those who are interested.
   c) Voters admire politicians who courageously adopt the aloof role of the disinterested statesman and vote for those politicians who protect national over more parochial state and local interests.
   d) For most of the twentieth century, congressmen have engaged in a mix of three kinds of activities: lawmaking, pork-barreling, and casework.

3. Morris P. Fiorina sees the bureaucracy as:

   a) antagonistic to Congress.
   b) helpful to congressmen seeking reelection.
   c) disconnected with Congress.
   d) subservient to the president.

4. The growth of an activist federal government has:

   a) increased programmatic activities on Capitol Hill.
   b) strengthened congressional oversight.
   c) caused a congressional shift from programmatic to pork-barrel and casework activities.
   d) made it more difficult for members of Congress to be reelected.

COMMITTEE CHAIRMEN AS POLITICAL ENTREPRENEURS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

A major incentive of many members of Congress is *personal* power on Capitol Hill. Harold Lasswell once stated that politics is about who gets what, when, where, and how. The quest for power is always central to the political game, and power can become an end in itself.

Reading 59:
Lawrence C. Dodd, *Congress and the Quest for Power*

The pursuit of personal power within Congress supports decentralization and the dispersion of power on Capitol Hill. The power incentive spawns committees and is an important reason for the almost 300 committees and subcommittees that dot the Capitol Hill political landscape.

Theme

Congressional scholar Lawrence Dodd argues in this selection that while the personal power incentive usually dominates legislative politics, producing a decentralized Congress dominated by committees and their chairmen, occasionally presidential assaults on Congress cause members to subordinate their desire for personal aggrandizement in order to strengthen Congress as an institution. Emphasize here, as throughout the congressional chapter, Richard Fenno's congressional incentive typology. Members strive, states Fenno, for: (1) reelection; (2) power and influence within the institution of Congress itself; and (3) good public policy. To Fenno, Mayhew, and other congressional scholars represented in this chapter's selections, these incentives explain congressional politics and organization. How one views Congress often depends upon which of these incentives is given priority. Mayhew, for example, gives priority to the reelection incentive in selection 65. Lawrence Dodd, on the other hand, gives priority to the personal power incentive, which leads him to view Congress more from an internal than external perspective.

Conclusion

The author emphasizes that the pursuit of personal power, by supporting committee government, decentralizes power in a way that undermines the ability of Congress to fulfill its constitutional responsibilities to make legislative policy and oversee the implementation of that policy. Gary Jacobson has noted that Congress is too responsive to be responsible, a conclusion that Dodd would support, adding that it is not only responsiveness to constituent interests that diversifies power on Capitol Hill but, more importantly, the personal quest for power. Periodically Congress does, in response to an imperial presidency, make attempts to get its House in order by strengthening its leadership and curbing committee dominance. While such attempts may in the short term push the quest for personal power to the background, inevitably the incentive returns to put Congress once again on the path towards decentralization and dispersion of power through committees.

QUESTIONS FOR DISCUSSION

1. What is the personal power incentive on Capitol Hill, and how does it affect Congress as an institution? (Power is symbolized by position, by the reputation for power. More opportunities exist for personal power in an institution that is decentralized and which has many power positions, such as committee and subcommittee chairmanships. As with politicians generally, writes Dodd, members of Congress enter politics in a quest for personal power. This quest may derive from any number of deeper motives: a desire for ego and gratification or for prestige, a search for personal salvation through good works, a hope to construct a better world or to dominate the present one, or a preoccupation with status and self-love. If played out in an institution with limited power positions, the personal power incentive becomes a

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

zero-sum game in which some members win and others lose. In such an institution the power incentive places members into combat with each other. The greater the dispersion of power, the less conflict there is among members competing for a limited number of positions which are power symbols. One logical solution [to conflict caused by the personal power incentive]. . . is to place basic policymaking responsibility in a series of discrete and relatively autonomous committees and subcommittees, each having control over the decisions in a specified jurisdictional area. Each member can belong to a small number of committees and, within them, have a significant and perhaps dominant influence on policy.)

2. Contrast the reelection and personal power incentives. Which is dominant and why on Capitol Hill? (This is a good question to begin an important discussion of the two incentives that should continue throughout the Congress chapter. David Mayhew in particular addresses the reelection incentive in selection 62, taken from his seminal book *Congress: The Electoral Connection*. Dodd points out that reelection obviously has to occur before members can play the power game in Congress. Moreover, reelection by large margins helps members in their quest for *internal* power by creating an aura of personal legitimacy. It indicates that one has a special mandate from the people that one's position is fairly secure, and that one will have to be 'reckoned with. And, long-term electoral success bestows on a member of Congress the opportunity to gain the experience and expertise, and to demonstrate the legislative skill and political prescience, that can serve to justify the exercise of power.

   After the time-consuming job of building an effective constituency organization, and after a junior member's advertising and credit claiming (to use Mayhew's terminology) have helped to create the incumbency effect and the decline of marginality, members can turn their serious attention to building personal power on Capitol Hill.)

3. What are the normal stages of a congressional career? (First, members devote their time to shoring up their electoral base. Note, of course, that members always have to devote a great deal of time to their reelection, returning to their districts several days a week while Congress is in session and full-time as elections approach. Nevertheless, once the incumbency effect is in place, the second stage involves members pursuing personal power in many ways--moving up the committee or congressional party ladder, garnering a large and expert staff to increase their policy expertise and credibility, and so on. Simply holding a power position does not suffice to give a member sufficient credibility to wield power in the House or the Senate. A member must maintain the respect, or trust, and confidence of committee and House colleagues; he or she must sustain the aura of personal authority that is necessary to legitimize the exercise of power.)

MULTIPLE CHOICE QUESTIONS

1. The personal power incentive tends to produce a Congress that is:

   a) highly centralized.
   b) decentralized.
   c) collectively responsible.
   d) accountable to the will of the majority.

2. A junior member of Congress in the first stage of his or her congressional career is:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) primarily interested in developing good legislation.
b) concerned mostly with reelection.
c) equally concerned with gaining personal power within Congress and reelection.
d) uninterested in the committee hierarchy on Capitol Hill.

3. The quest for personal power in Congress:

a) buttresses the power of congressional party leaders.
b) strengthens congressional parties.
c) supports a diversified and powerful committee system.
d) all of the above

4. Which of the following statements is *incorrect*?

a) As with politicians generally, members of Congress enter politics in a quest for personal power.
b) Reelection, especially by large margins, can boost the internal power of members of Congress.
c) On Capitol Hill, personal power incentives always take precedence over the desire to strengthen Congress as an institution.
d) Personal power in Congress is often achieved through committee chairmanships.

5. A dominant, imperial presidency which ignores Congress:

a) intensifies the quest for personal power in Congress.
b) decreases the power of already weak congressional parties.
c) causes members of Congress to temporarily subordinate their quest for personal power to strengthen Congress as an institution.
d) undermines congressional reform.

CONGRESS AND THE ELECTORAL CONNECTION

Reading 60:
Edmund Burke, *Speech to the Electors of Bristol*

Theme

In this classic piece from 1774, Edmund Burke argues that the duty of elected representatives is to act on their best judgment, and not on the instructions of their constituents.

Background and Reasoning

Burke was a member of the House of Commons in the 1760s. He was elected as the representative to Parliament from the city of Bristol in 1774, after which he made this speech.

Burke argues that the representative's judgment and enlightened conscience are a trust from Providence, and not derived from any set of constituents. These faculties must not be sacrificed to the opinions of electors: Your

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

representative owes to you [the constituents], not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. If government were a matter of will, Burke reasons, then a representative might be subservient to popular opinion. But since government is deliberative and based on reason and judgment, the opinion of the elected representatives must rule; they will both deliberate and decide. It is important to note that Burke acknowledged the seriousness with which the official must consider constituents' views, but he rejects authoritative instructions and mandates.

A major theme of Burke's speech is his characterization of Parliament as a national body serving one national interest; it is specifically *not* a grouping of representatives of distinct, local, and hostile interests.

Significance

Burke's speech raises two significant issues. The first is the obligation of an elected representative. Instructions have periodically been debated as part of the American system, and some members of the Constitutional Convention in 1787 were under orders from their state governments that bound their decisions. More recently, recall elections have tried to bring elected officials closer to the will of their constituents by creating the probability that decisions counter to the majority's will result in the loss of office. Burke's speech is the archetype for the argument that elected officials must be bound by their judgment more than by the public's will.

The second significant issue is the method of government and the interest it serves. Burke argues that government is meant to be deliberative, a theory that informs the American republican system. The American Congress is designed to be a deliberative body, especially the Senate, and it is thus put at some remove from the direct will of the people, which was believed to be susceptible to passions and immediate concerns.

Further, Burke argues that the purpose of government is to serve the national interest through these deliberations, more so than it is to serve the particular concerns of localities. This is more problematic in the American system, which intentionally multiplies factions so that the clashing of many interests will result in what is called the national interest.

QUESTIONS FOR DISCUSSION

1. Ask students if they agree that the public will, or opinions of constituents, should be subordinate to the judgment of the elected representative. If 80% of a congressional district's voters desire one policy outcome, and the representative desires another, is the representative justified in voting his conscience and not the will of his constituents? Should officials be subject to mandates and instructions from the populace?

   (The American system's general rejection of binding instructions reflects not only on the founders' affinity for a deliberative body insulated from the passions of the general public, but also the founders' commitment to a practical and stable governing system. Subjecting officials to binding instructions would not only be difficult to enforce, but it might lead to frequent disruptions in government—not to mention the valuable time that would be spent awaiting instructions during a crisis. How would an official resolve conflicts, for example, if opposite instructions were issued by two different sets of voters? Would there be certain limits for what becomes a mandate; for example, a petition signed by 60% of voters? 75%? Under such a system, how would officials be forced to follow the people's will? Is this a practical system?)

2. What is the national interest? Can it be defined? Burke argues that a deliberative body serves one national interest, and not the diverse and hostile interests of different localities and districts. Critics of

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Congress often argue that it fails to serve the nation, fragmenting instead into warring factions serving narrow, local interests. Is Burke's reasoning still valid if there is no national interest?

(The question of a national interest is still debated. David Truman, in selection 43, argues that the American system really has no concept of an abstract national interest that exists without being defined by these clashing forces. Others, like those who support a party government model, tend to lean more heavily on the prospect of a national interest on which a rational and deliberative government can agree. Madison and the founders designed an American system that multiplies interests and expects those interests to clash, but they also refer frequently to a national interest in *The Federalist Papers* and other writings. The government is set up to reflect different interests, or factions, and is built on the theory that all interests will fight for themselves to some extent; the result of such clashes will serve the national interest.)

3. Have recent developments in American politics taken us away from the Burkean theory of representation? Recall elections, candidate-centered elections, pandering to public opinion through photo opportunities, and constant polling--do these mechanisms of modern politics threaten the freedom of elected officials to decide based on their own judgment, their trust from Providence?

   (Candidates today are very close to the public. Officials have always been wary about going against their constituents, and have always needed to balance their own judgments and opinions against those of voters. In recent years, however, officials have been drawn ever closer to the public, and their individual decisions are in bright evidence. Sidney Milkis' selection on the presidency, for example, illustrates how the decline of parties and other factors have made officials increasingly reliant on support based on personal character and actions. In this system, the decisions of individuals are highlighted for the observant public.

   Further, modern polling techniques have made constant attention to the public will possible, tempting officials to respond to shifts in public opinion rather than to lead the public. Richard Morris, formerly President Bill Clinton's adviser, has argued that polls can also be used to *lead* public opinion by finding out why the public may oppose a certain proposal. In that case, the proposal can be recast, or rhetoric adjusted, in order to maintain the proposal's intent while increasing public support. So polling is not necessarily pandering, but it remains to be seen if the modern official can resist the urge to sacrifice his repose, his pleasure, his satisfaction to the opinions of the voting public.)

MULTIPLE CHOICE QUESTIONS

1. According to Edmund Burke, which of these is the most important source for an elected official's decision-making?

   a) his own judgment and opinions
   b) instructions from constituents
   c) results of public opinion polls
   d) classical liberal theory

2. Edmund Burke believed:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) that no national interest can be agreed upon.
b) that the clash of many factions will lead to the national interest.
c) that there is one national interest.
d) that the people are the best judges of the national interest.

3. According to Edmund Burke, Parliament should be what kind of body?

a) unobtrusive
b) ad hoc
c) popular
d) deliberative

Reading 61:
Richard E. Fenno, Jr., *If, as Ralph Nader Says, Congress Is "The Broken Branch," How Come We Love Our Congressmen So Much?*

In this selection, Richard Fenno suggests that the electoral connection may connect *congressmen* with constituents but does not necessarily bring *Congress* closer to the people. Fenno's theme is that while people tend to fault the institution of Congress, they respect and even love their individual representatives on Capitol Hill. A common phenomenon during congressional election campaigns is incumbents as well as challengers running against Congress, which would seem to make very little sense but which works in practice because of the ability of people to separate in their minds the congressmen whom they see and hear and whose personalities they may like, from the nebulous institution called Congress in the far-off capital called Washington. The 1970s witnessed the widespread phenomenon of running against Washington, a phenomenon that occurred not only in congressional campaigns but also markedly in the presidential campaigns of Jimmy Carter and Ronald Reagan.

QUESTIONS FOR DISCUSSION

1. Explain Fenno's thesis that individual congressmen may be loved while the institution of Congress lacks respect. (Fenno discusses his experience as well as polls indicating the public's volatile attitude towards Congress. In explaining this phenomenon, he writes: The first answer is that we apply different standards of judgment, those that we apply to the individual being less demanding than those we apply to the institution. For the individual, our standard is one of representativeness--of personal style and policy views. Stylistically, we ask that our legislator display a sense of identity with us so that we, in turn, can identify with him or her--via personal visits to the district, concern for local projects and individual cases, and media contact of all sorts, for example. On the other hand, to solve national problems [is] a far less tractable task than the one we (and he) set for the individual. Given the inevitable existence of unsolvable problems, we are destined to be unhappy with congressional performance.)

2. How does the behavior of members of Congress tend to fortify their popularity at the expense of the institution of Congress? (Fenno discusses the priorities of members of Congress to polish their style, to bolster their popularity with constituents, and in general to strengthen their individual-constituent link at the expense of strengthening Congress so it will be capable of dealing with national problems. Another point that should be made, which Fenno supports, is that the internal drive for personal power on Capitol Hill tends to fragment Congress and make it less effective and certainly less visible as a collective institution in coping with most problems of public policy. After reelection and the development of a

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

solid constituent base, members of Congress are able to deal with their constituencies on a more routine basis, which allows them to concentrate upon their internal quest for power and status. In other words, the representative system does not really cause congressmen to ignore the institution—in fact, the prevailing apathy of most constituents about what goes on in Congress and indeed even about their representatives—allows members to concentrate upon their individual role within the broader institution of Congress.)

3. The drive for personal power in Congress above all leads to the expansion and dispersion of the committee system. Congressional government is truly subcommittee government. Fenno comments that the dispersion of committee power is due not only to incentives for power within the institution, but also to reelection and good public policy incentives. Discuss with students Fenno's statement that: When members of Congress think institutionally--as, of course they must-- they think in terms of a structure that will be most congenial to the pursuit of their individual concerns--for reelection, for influence, or for policy. In other words, the institutional perspective of members of Congress is individually, rather than collectively, oriented.

   Fenno comments that the more we attempt to understand Congress, as in reference to the committee system, the more we are forced to peel back the institutional layers until we reach the individual member. At that point, it becomes hard to separate, as we normally do, our judgments about congressmen and Congress. The more we come to see institutional performance as influenced by the desires of the individual member, the more the original puzzle ought to resolve itself. It is, above all, the members who run Congress, and the irony is that it is their individual strength which may weaken the overall capacity of the institution to legislate responsively, expertly, and innovatively.

MULTIPLE CHOICE QUESTIONS

1. According to Richard Fenno, the reason people can love their congressmen and at the same time hold Congress in low esteem is that:

   a) congressmen do not really shape the nature of Congress.
   b) the expectations of people for Congress and for congressmen are different.
   c) Congress continually frustrates the legislative efforts of congressmen.
   d) Congress is controlled by the White House, whereas congressmen are not.

2. Congressmen and Senators tend to be popular with their constituents because:

   a) they clearly favor reform on Capitol Hill.
   b) they are effective legislators.
   c) they place priority upon their representative functions and constituent relations.
   d) they oppose increases in the federal budget.

3. Richard Fenno concludes that the committee system of Congress is organized:

   a) to increase the collective power of the House and the Senate.
   b) to serve the personal incentives of individual members.
   c) primarily to serve the policy interests of legislators.
   d) to integrate and coordinate a legislative function.

4. Generally, congressmen seriously embark upon their Washington careers:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

a) immediately upon assuming office.
b) only after several terms.
c) after they have achieved a committee chairmanship.
d) only with the support of the congressional leadership.

Reading 62: David Mayhew, *Congress: The Electoral Connection*

While political scientists have been busy demonstrating the weak linkages between constituencies and members of Congress, David Mayhew suggests that the activities of congressmen and the organization and procedures of Capitol Hill are primarily oriented toward the goal of reelection of incumbents. He writes, "Whether they are safe or marginal, cautious or audacious, congressmen must constantly engage in activities related to reelection."

In his selection, Mayhew describes the activities of congressmen to optimize their chances for reelection. Congressmen engage in advertising, credit claiming, and position-taking to maintain and increase their appeal to the voters of their districts.

QUESTIONS FOR DISCUSSION

1. Define and give an example of advertising. (Advertising is any effort to disseminate one's name among constituents in such a fashion as to create a favorable image, but in messages having little or no issue content. A successful congressman builds what amounts to a brand name, which may have a generalized electoral value for other politicians in the same family. Advertising is carried out by members of the House through newsletters sent to constituents, opinion columns for newspapers, radio and television reports to constituents, and mail questionnaires. The appearance by congressmen at social events in their constituencies is also a form of advertising.)

2. Define and give examples of credit claiming. (Credit claiming is acting so as to generate a belief in a relevant political actor (or actors) [voters] that one is personally responsible for causing the government, or some unit thereof, to do something that the actor (or actors) considers desirable. Congressmen seek to claim credit for particularized benefits for constituents. Pork-barrel projects and casework are examples of activities for which congressmen claim credit. The underlying assumption of credit claiming is that constituents will attribute the benefits they receive to the hard work of their congressmen, which will make them more inclined to vote for incumbents. The opportunities members of Congress have to engage in credit claiming is one reason they have an advantage over challengers at election time.)

3. Define and give examples of position-taking. (Position-taking is the public enunciation of a judgmental statement on anything likely to be of interest to political actors [voters]. Position-taking may be done through roll call voting, committee hearings, and speeches before home groups, television appearances, letters, newsletters, press releases, ghostwritten books, *Playboy* articles, even interviews with political scientists. On occasion, congressmen generate what amount to petitions; whether or not to sign the 1956 Southern Manifesto defying school desegregation rulings was an important decision for southern members. Outside the roll call process, the congressman is usually able to tailor his positions to suit his audiences. A solid consensus in the constituency calls for ringing declarations. However, the best position-taking strategy for most congressmen at most times is to be conservative--to cling to their own positions of the past where possible and to reach for new ones with great caution where necessary.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Mayhew concludes that while members of Congress constantly engage in advertising, credit claiming, and position-taking, it is difficult to measure the effects of these activities upon voters. Perhaps the most important consideration is that congressmen believe such activities are necessary and profitable in gaining votes. Nothing is more important in Capitol Hill politics, writes Mayhew, than the shared conviction that election returns have proven a point.

MULTIPLE CHOICE QUESTIONS

1. According to David Mayhew, members of Congress must:

   a) constantly strive for power and status on Capitol Hill.
   b) engage in reelection activities whether or not they are from safe districts.
   c) engage in reelection activities only if they are from marginal districts.
   d) engage in reelection activities only where there are sharp party differences along ideological lines in their districts.

2. Activities members of Congress engage in to secure reelection include:

   a) advertising.
   b) position-taking.
   c) credit-claiming.
   d) all of the above

3. Congressional advertising activities are essentially focused upon:

   a) casework.
   b) oversight of administrative agencies.
   c) taking stands on issues.
   d) congressmen disseminating their names among constituents.

4. Credit-claiming by congressmen is essentially focused upon:

   a) claiming credit for channeling specific benefits to districts.
   b) raising credibility on Capitol Hill.
   c) wooing voters by claiming credit for power on Capitol Hill.
   d) attacks upon the political opposition.

5. Generally the best strategy for position-taking is to:

   a) take ideological stands.
   b) take strong positions on important issues of public policy.
   c) cling to positions taken in the past where possible and reach for new positions only with great caution.
   d) follow the leadership of Capitol Hill.

Reading 63:
Richard F. Fenno, Jr., *Home Style and Washington Career*

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

While David Mayhew suggests that the activities of members of Congress are primarily aimed at reelection, Richard Fenno declares that there are variables other than the goal of reelection that shape congressional behavior and organization. The introductory note to this selection points out that in his book *Congressmen in Committees* (Boston: Little, Brown & Co., 1973), Fenno described the incentives of members of Congress to be: (1) reelection, (2) internal power and influence on Capitol Hill, and (3) good public policy.

Fenno concluded that it is mostly the freshmen members who stress reelection, although this may continue to be a primary incentive among representatives of marginal districts with intense two-party competition that results in strong challenges to the incumbents. Generally, however, the decrease of marginality and the development of strong *constituency* organizations by incumbents leave them relatively free to pursue internal power and status on Capitol Hill as well as public policy. Congressmen must pay close attention to their constituencies, but this is done through the development of an effective home style more than by activities on Capitol Hill. The Washington careers of many members become separated from their constituency activities. In selection 63 Fenno stresses the separateness rather than the linkage between constituency and Washington careers.

QUESTIONS FOR DISCUSSION

1. What does Fenno mean when he refers to constituency careers and Washington careers? (When we speak of constituency careers, writes Fenno, we speak primarily of the pursuit of the goal of reelection. When we speak of Washington careers, we speak primarily of the pursuit of the goals of influence in the House and the making of good public policy. Thus the intertwining of careers is, at bottom, an intertwining of member goals.)

2. What strains may develop between constituency and Washington careers? (At first the strains are minimized, because the freshmen members of the House have little if any opportunity to gain inside power or influence policy. Freshmen can devote their time to developing their constituency base without a feeling that they are missing important opportunities on Capitol Hill. As members begin to seek power and influence in Congress they may begin to experience some allocated strain [between constituency and Washington demands]. It requires time and energy to develop a successful career in Washington just as it does to develop a successful career in the district. Because it may not be possible to allocate these resources to House and home, each to an optimal degree, members may have to make allocative and goal choices.)

3. How do members of Congress seek to reconcile their constituency and Washington careers? (Much of Fenno's selection is devoted to answering this question. Members seek to reconcile the conflict between the demands of reelection with those of attaining power on Capitol Hill in a variety of ways. They build powerful constituency organizations and develop effective constituency styles to free them while they are in Washington to pursue internal influence in the House. They may seek to merge their Washington and constituency careers by portraying themselves in their constituencies as powerful legislators. However, this strategy does not work well because the powerful Washington legislator can actually get pretty far out of touch with his supportive constituents back home. In Mayhew's terms, one might state that in the pursuit of power on the Hill members of Congress may forget the importance of advertising, credit claiming, and position-taking, all of which are required for reelection.)

   Fenno concludes that congressmen’s home activities are more difficult and taxing than we have previously recognized. Under the best of circumstances, the tension involved in maintaining constituency contact and achieving legislative competence is considerable. Members cannot be in two places at once, and the growth of a Washington career exacerbates the problem. But, more than that, the demands in both places have grown recently. The legislative workload and the demand for legislative expertise are

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

steadily increasing. So is the problem of maintaining meaningful contact with their several constituencies.

MULTIPLE CHOICE QUESTIONS

1. A congressman's home style and Washington career:

   a) are never in conflict.
   b) are always in conflict.
   c) are generally mutually supportive of each other.
   d) are often in conflict.

2. Generally members of Congress seriously embark upon their Washington careers:

   a) immediately upon assuming office.
   b) only after several hours.
   c) after they have achieved a committee chairmanship.
   d) and are closely followed by constituents.

3. Members of Congress generally find that their power on Capitol Hill:

   a) helps them to get reelected.
   b) is not very important to reelection.
   c) is essential to position-taking.
   d) is closely followed by constituents.

4. The congressman's home activities are:

   a) generally easy to handle.
   b) delegated entirely to the member's staff.
   c) difficult and taxing for the members and his staff.
   d) handled by local party bosses.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

CHAPTER 9

The Judiciary

If the chapters of the text are taken in sequence, by now students have already become acquainted with the important role of the judiciary in policymaking from the cases in Chapter 2 on federalism and in Chapter 3 on civil liberties and civil rights. The cases and the comments in those chapters also introduce students to some of the sharp disagreements that so frequently surround Supreme Court decisions.

Controversy over the role of the judiciary has existed from the very beginning of the Republic. In fact, the Constitutional Convention itself did not fully agree on the structure and role of the judiciary. For example, Federalists who saw in national courts a potentially powerful repository of Federalist beliefs pushed through the provision for the congressional authority to create inferior courts. Federalist President John Adams and his party in Congress expanded the federal judiciary and almost created a constitutional crisis before incoming President Jefferson and the Republicans in Congress repealed the Judiciary Act of 1801. Jefferson clearly saw the federal courts as a repository of Federalist judges and power that threatened democratic government.

The early Court of Chief Justice John Marshall was one of the most controversial in our history. Decisions such as *McCulloch* v. *Maryland* (1819) and *Gibbons* v. *Ogden* (1824), which supported constitutional principles upholding broad national power and supremacy, caused heated debates and even violent reactions. The early Supreme Court was controversial because it interpreted the Constitution to support expansive national power *over the states*. Students should be made aware at the outset of their consideration of the judiciary that it is as political a branch as any other, both in its original design and in its evolution and contemporary practices.

ENGLISH COMMON LAW PRECEDENTS

Reading 64:
William Blackstone, *Commentaries on the Laws of England 1765*

Theme

The right of every Englishman "is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein."

Student Understanding

Here I simply want students to understand our great Anglo-American heritage and in particular how English law and legal practices have shaped our system of law and courts. Yes we're Americans. But also, "We're all Englishmen," I tell my students, to make them think about the origins of our courts as independent of the political branches of the government (even though the King originally created both common law and equity courts). We're Englishmen as we follow Magna Charta (1215), the English Petition of Right (1628), and Bill of Rights (1689). Yes we revolted, but as proud Englishmen we would not accept our lack of representation in Parliament, nor,

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

following the precedents of English barons over centuries, would we accept the arbitrary power of the King over us. We had the rights of Englishmen which the neither King nor Parliament could deny.

I want students to know the name of William Blackstone, and his Commentaries on the Laws of England, as part of their English heritage and liberal arts education. We are governed by law, a government of law and not of men as the old saying goes (put "persons" in if you want, but it just doesn't sound right). And the courts stand front and center to render justice in all its forms. Those who govern and the governed abide by, to use Magna Charta's language, the law of the land, which includes due process of law.

MULTIPLE CHOICE QUESTIONS

1. Blackstone stressed in his Commentaries on the Laws of England (1765):

   a. the powers of the King.
   b. parliamentary power to suspend individual rights.
   c. checks and balances.
   <u>d.</u> the right of all Englishmen to apply to the courts for justice.

2. Which of the following statements does Blackstone *not* make?

   <u>a.</u> The king can overrule parliament in times of invasion.
   b. Every subject knows the law of the land.
   c. Laws cannot be suspended without the consent of parliament.
   d. The king can create new courts of justice.

CONSTITUTIONAL BACKGROUND: JUDICIAL INDEPENDENCE AND JUDICIAL REVIEW

The selections in this section complement each other in that John Marshall's doctrine of judicial review announced in *Marbury* v. *Madison* was, according to Alexander Hamilton in *Federalist 78*, an inherent judicial power. The power of judicial review possessed by the courts in combination with their independence from control by Congress or the president, although they are checked by each in various ways (e.g., presidential appointments to the Supreme Court requiring the approval of the Senate), implies judicial supremacy in the interpretation of constitutional and statutory law, and now as well in the field of administrative law. Moreover, judicial review combined with the supremacy of the Constitution and of the national government gives the Supreme Court extraordinary power over the states. Early Federalist control of the government guaranteed a Federalist judiciary, and the early conflict between the Federalist judiciary and the Jeffersonian Republicans was a precursor of many later struggles between politicians elected by the people, whether in the presidency or in Congress, and judges who are not directly subject to political controls.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Reading 65:
Alexander Hamilton, *Federalist 78*

While the Constitution itself does not explicitly declare the power of judicial review, Alexander Hamilton in this selection from *The Federalist* unequivocally fills in the apparent gap by announcing that the judiciary has the power to declare legislative acts contrary to the Constitution void. Note for students that judicial review also extends to executive actions, over which Hamilton did not care to extend judicial power. The principle of judicial review of executive action has deep roots in English history, and before the Glorious Revolution of 1688 and the Settlement Act of 1700, British jurisprudence also contained seeds of the principle of judicial review over parliamentary actions. But within the Anglo-American legal tradition, the continuance of judicial power to overturn laws passed by the supreme legislative body remains uniquely American.

Student Understanding

Hamilton's analysis of the role of the judiciary relevant to the contemporary political debate over strict versus loose construction. Hamilton stresses how judicial independence and tenure supports judicial expertise. Judges will not exercise their WILL but rather their JUDGMENT:

> It can be no weight to say, that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.

QUESTIONS FOR DISCUSSION

1. Hamilton points out that the judicial department of government is the least to be feared in terms of its capability to exercise significant political power. He argues that the executive and legislature are far more powerful policymaking bodies. Why do you feel Hamilton was so careful to point out the relative impotence of the judiciary? (This is difficult to answer, but it might be suggested that Hamilton knew very well the judiciary would have significant power. In *Federalist 78* he clearly stated that the judiciary would have the power of judicial review, to declare acts of Congress unconstitutional. His argument that the judiciary would be relatively weak probably was to persuade state ratifying conventions to accept the constitutional provisions establishing an independent national judiciary.)

2. What was Hamilton's position regarding the power of the judiciary to declare legislative acts contrary to the Constitution void? (The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.)

3. Why does Hamilton consider the independence of the judiciary to be a vital component of constitutional government? (If then the courts of justice are to be considered as the bulwarks of a limited Constitution, against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial officers, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. Moreover, an independent judiciary helps to guarantee fair and impartial judgments, freed from the political passions of the community. In other words, it is important to maintain judicial independence not only from the legislature but also from immediate popular demands.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

4. What arguments does Hamilton advance for establishing permanency of judicial offices? (This is tied in with the last question. Permanency establishes independence. Judges are to hold their offices during good behavior. Hamilton argues against periodic appointments, because if the power of making them was committed either to the executive or legislature, there would be danger of an improper compliance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the constitution and laws. Moreover, Hamilton argues that there will inevitably be a very small pool of persons who possess the requisite knowledge and integrity to be judges. Periodic appointment would drain this pool rapidly, forcing the appointment of unqualified persons.)

MULTIPLE CHOICE QUESTIONS

1. In *Federalist 78*, Alexander Hamilton stated that:

    a) the complete independence of the courts of justice is essential in a limited constitution.
    b) the independence of the courts is unnecessary in a limited constitution.
    c) the president and Congress should exercise partial control over the courts.
    d) judges should not have life tenure.

2. In *Federalist 78*, Alexander Hamilton:

    a) said nothing about judicial review.
    b) declared that the courts should have the power to overturn unconstitutional acts of Congress.
    c) said that judicial review is unnecessary in a limited constitution.
    d) held that Congress and the courts were equal in their authority to interpret the Constitution.

3. In *Federalist 78*, Alexander Hamilton stated that:

    a) Congress should be the judge of its constitutional powers.
    b) the interpretation of laws is the proper and peculiar province of the courts.
    c) Congressional laws should have the same authority as the Constitution.
    d) Congressional statutes, not the Constitution, represent the will of the people.

Reading 66:
Marbury v. *Madison,* 5 U.S. 137 (1803)

While Chief Justice John Marshall's dictum in *Marbury* v. *Madison* unequivocally proclaimed the authority of the Supreme Court to declare acts of Congress unconstitutional, it was not the first time the issue had been raised or the principle of judicial review announced. In *Hayburn's Case* (1792), five of the six justices of the Supreme Court, acting as federal circuit court judges, refused to execute an act of Congress because they felt that it was unconstitutional in its delegation of nonjudicial functions to the circuit courts. The applicable statute had delegated to the courts the authority to pass upon pension claims arising out of the Revolutionary War, and made their decisions subject to review by the Secretary of War and ultimately by Congress. Also acting as circuit court judges as early as 1791, several Supreme Court justices overturned a Connecticut statute because it was in conflict with the provisions of a treaty. In 1792, Chief Justice Jay and Judge Cushing, both of the Supreme Court, sitting on the circuit court for the District of Rhode Island, overturned a Rhode Island statute that they found to be

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

in violation of the contract clause of the Constitution (Article 1, Section 10). In *Hylton* v. *United States* (1796), a complicated set of opinions by the three Supreme Court justices that participated in the case again implied judicial power to overturn acts of Congress, even though this was not made absolutely explicit. Therefore, by the time of *Marbury* v. *Madison* in 1803 the Supreme Court had participated in decisions that clearly implied the power of judicial review, and at the state level invoked it.

While there was little if any ambiguity at the time of *Marbury* v. *Madison* over the power of the Supreme Court to exercise judicial review over congressional acts, Marshall's assertion of the principle as *obiter dictum* was the clearest declaration of this power up to that time. The decision of the case did not hinge upon the power of judicial review, and, as in the 1792 *Hayburn's Case*, the Supreme Court dealt with what it considered to be an unconstitutional delegation of power to it by simply refusing to exercise that power—in this case, the power to issue a writ of mandamus to public officers in original jurisdiction.

Neither Marshall's *obiter dictum* announcing the power of judicial review in *Marbury* v. *Madison*, nor, more practically, his overturning in effect a section of 1789 Judiciary Act that gave the Supreme Court the authority to issue writs of mandamus to public officers in original jurisdiction, caused any reaction at the time. Judicial review was a well-accepted principle, and the Court's refusal to issue the writ of mandamus, if anything, removed it from a difficult political situation. However, Marshall's lengthy, and in Jefferson's opinion gratuitous, discussion of the rights of the defendants to their commissions, and more particularly his discourse on the responsibility of the executive to deliver them, caused a storm of criticism from Jefferson and the Republicans on the one hand, and praise from the Federalists on the other. Jefferson felt that he did not need to be told his duty by the Chief Justice of the Supreme Court, and Jefferson's indignation over Marshall's audacity apparently lasted for the remainder of his life.

QUESTIONS FOR DISCUSSION

1. Chief Justice Marshall recognized that all three branches of the government take oaths to uphold the Constitution. Why, then, did he feel that it is the responsibility of the courts to determine ultimately whether or not a law is unconstitutional when it is challenged in a case and controversy? (He merely pointed out that judges take oaths to support the Constitution, and in supporting the Constitution they are bound to hold unconstitutional acts void. But he did not get into the question of the subjective nature of the determination of whether or not an act is unconstitutional. His classic statement is: It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. Marshall's arguments in favor of judicial review are similar to those of Hamilton in *Federalist 78*, but he did not go as far as Hamilton in giving political arguments for having an independent judicial system checking both the legislature and popular opinion. Raise with students the role of the Court at this point, and note the subjective nature of determining what is in fact unconstitutional. Ask students whether or not they support the view that the Supreme Court should have the power of judicial review. Cite as a case study the New Deal, when a conservative Supreme Court was striking down key legislation of the president that was designed to cope with the Great Depression.)

2. Why, according to Marshall, is the Constitution superior to any ordinary act of the legislature? (Because the Constitution is the fundamental and paramount law of the nation. It is the highest expression of the sovereignty of the people. It is not an ordinary act. Constitutional government means government limited according to the terms of the Constitution, and this requires that any legislative act be subject to constitutional limits. Otherwise the Constitution means nothing.)

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

MULTIPLE CHOICE QUESTIONS

1. In *Marbury* v. *Madison* (1803), Chief Justice John Marshall proclaimed:

   a) the authority of the Supreme Court to review the constitutionality of state laws.
   b) the Supreme Court's power to exercise judicial review over congressional laws.
   c) a and b
   d) none of the above

2. Which of the following statements did Chief Justice John Marshall *not* make in *Marbury* v. *Madison* (1803)?

   a) A legislative act contrary to the Constitution is not law.
   b) Those who have framed written constitutions contemplate them as forming the fundamental law of the nation.
   c) An act of the legislature, repugnant to the Constitution, is void.
   d) It is not the province and duty of the courts to say what the law is.

3. Chief Justice John Marshall stated in *Marbury* v. *Madison* (1803) that:

   a) the Constitution is the superior and paramount law of the land.
   b) constitutional interpretation resides as much in Congress as in the Supreme Court.
   c) congressional laws have the same authority as does the Constitution.
   d) it is up to the courts to decide whether or not the Constitution is superior to a legislative act.

POWERS AND LIMITATIONS OF THE SUPREME COURT

The power of the Supreme Court to exercise judicial review over congressional and state laws has given it a unique policy-making role in the political system. Quantitatively, the Supreme Court has actually overturned relatively few provisions of congressional laws and, depending upon how one counts, the Court has overturned fewer than 150 federal statutory provisions since the beginning of the Republic. It is probably safe to say that the greatest stir caused by the Supreme Court in overturning federal statutes was during the New Deal era, the political reaction being so intense on the part of Franklin D. Roosevelt that he boldly, and one might say injudiciously, proposed a court-packing scheme that would have enabled him to appoint one new justice for each justice over 70 years of age, which accounted for six justices of the nine on the Supreme Court at that time. The battle over the Supreme Court during the New Deal is briefly recounted in the note.

An overview of American history certainly suggests that the Supreme Court has exercised judicial self-restraint in order to avoid unnecessary political conflicts at the national level; however, its most significant role has come in exercising judicial review over state laws, and it has overturned over 950 such laws during the course of its history. More importantly, the qualitative significance of Supreme Court decisions reviewing state laws has been politically greater than in the Court's review of congressional enactments. Just as the early Marshall Court decisions embroiled it in controversy over the proper delineation between national and state authority, the issue of national versus state power was to be the basis of most of the later controversies surrounding the Supreme Court.

Reading 67:
John P. Roche, *Judicial Self-Restraint*

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

In this selection, John P. Roche presents the provocative thesis that it is the fragmentation of political power within our system that has enabled the Supreme Court to step in and fill the power vacuum, making key decisions shaping public policy. Roche argues that where the Court senses national majorities backing particular public policies, it will not embroil itself in the political thicket by rendering decisions contradicting these majorities. During the New Deal, for example, the Supreme Court did go against the fairly clear mandate of Franklin D. Roosevelt in overruling much of his New Deal legislation, but it was too soon to retreat, and after 1937 it did not embroil itself in affecting substantive law in the area of economic regulation.

Remind students that the Roche article was published in 1955, which although it dates the piece, actually makes it an excellent basis for discussion as one can raise the issue of how the article might have been written differently in 1990. Did the Supreme Court, in the activist era of Chief Justice Earl Warren, act in a way to support Roche's hypothesis? Although political majorities were not clearly mobilized against the many controversial decisions the Supreme Court made during the Warren era, there was vociferous and widespread opposition to virtually all of its key decisions to desegregate public education, require equal apportionment of electoral districts, and complete the nationalization of the Bill of Rights. The opposition was never able to become concrete enough to bring about congressional action to overturn the major decisions of the Supreme Court, either by initiating constitutional amendments or by attempting to overrule the Court through the passage of statutory law. However, the Court's intrusion into what the states considered to be their proper authority over the administration of criminal justice did produce in the Omnibus Crime Control Act of 1968—specific provisions which had the effect of overruling or significantly changing such Supreme Court decisions as *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *United States* v. *Wade*, 388 U.S. 218 (1967). Curiously enough, the Burger Court, instead of retreating in the face of strong state and congressional opposition to the imposition of federal standards governing criminal justice, in the early 1970s actually extended in some cases the rights of the accused. In discussing the Roche selection, remind students of the widespread belief that the busing decisions of the Supreme Court and lower courts have improperly intruded upon the political arena.

QUESTIONS FOR DISCUSSION

1. Why does Roche state that it is naive to assert that the Supreme Court is limited by the Constitution? (In theory, they [judges] are limited by the Constitution and the jurisdiction it confers, but, in practice, it would be a clumsy judge indeed who could not, by a little skillful exegesis, adapt the Constitution to a necessary end. Judges have enormous policymaking power. Interpretation of the Constitution is essentially subjective, therefore judges in fact do say what the law is.)

2. To what extent has the judiciary been limited as the result of political demands to curb judicial discretion? (Although the judiciary has been attacked at numerous times in our history, rarely have these attacks resulted in a significant curb on judicial authority. Congress can control the appellate jurisdiction of the Supreme Court, and of course it controls the entire jurisdiction and organization of the lower federal judiciary. However, Congress has rarely used its political power as a weapon against the judiciary. One of the major reasons for this is that the judges themselves have exercised judicial self-restraint, refusing to involve the courts in unequal combat with the legislature or the executive. Without the exercise of this self-restraint throughout our history, more political action against the judiciary would undoubtedly have occurred.)

3. What are the two major techniques of judicial self-restraint? (1. Procedural self-restraint: refusing to accept jurisdiction, limiting the scope of a writ of certiorari [*Dennis* v. *United States*, 1951], delay, are

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

all examples of procedural self-restraint. The purpose of procedural self-restraint is to prevent the case from reaching the Court on the merits. That is, preventing the justices from having to consider the substantive issues of the case. 2. Substantive self-restraint: Once a case has come before the Court on its merits, the justices are forced to give some explanation for whatever action they may take. Here self-restraint can take many forms, notably, the doctrine of political questions, the operation of judicial parsimony, and—particularly with respect to the actions of administrative officers of agencies—the theory of judicial inexpertise. The doctrine of political questions and judicial inexpertise is fairly clear. Judicial parsimony involves the Court refusing to apply any more principles to the settlement of a case than are absolutely necessary, thereby avoiding the necessity of facing the need to interpret constitutional or statutory clauses. For example, if a case can be settled by statutory construction, the Supreme Court will generally refuse to raise constitutional issues. Note that the Court has great leeway to exercise self-restraint under the Judiciary Act of 1925, which grants it in most cases the right to turn down applications for writs of certiorari. No reason has to be given for the denial of an application for a writ of certiorari.)

4. Why has the Supreme Court been able to exercise such broad-ranging policymaking powers in the American political system? (The power of the Supreme Court to invade the decision-making arena... is a consequence of that fragmentation of political power which is normal in the United States. No cohesive majority, such as normally exists in Britain, would permit a politically irresponsible judiciary to usurp decision-making functions, but, for complex social and institutional reasons, there are few issues in the United States on which cohesive majorities exist.)

MULTIPLE CHOICE QUESTIONS

1. John P. Roche argues that judicial self-restraint:

   a) is based upon constitutional provisions.
   b) has been used by the judiciary to avoid unequal political combat.
   c) is unconstitutional.
   d) has always been used by the Supreme Court to avoid political questions.

2. Roche states that the power of the Supreme Court to invade the political decision-making arena is the result of:

   a) the separation of powers.
   b) the lack of cohesive political majorities on many issues of public policy.
   c) the result of a powerless Congress and president.
   d) the result of pressure from the people.

3. The Supreme Court exercises judicial self-restraint by:

   a) applying the doctrine of political questions.
   b) proclaiming its inexpertise in certain matters concerning administrative action.
   c) limiting its jurisdiction.
   d) all of the above

THE POLITICAL QUESTION DOCTRINE

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

The introductory text note to the political question doctrine cites Chief Justice John Marshall in *Marbury v. Madison*: “By the Constitution . . . the President is invested with certain important *political* powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. …The subjects are *political*. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive…”

Where the Constitution in Articles I and II delegate discretion legislative and executive powers respectively to Congress and the President the exercise of those powers is political and not subject to judicial review. Courts have no law to apply to political questions by definition as they are within the discretion of coordinate branches.

As Roche points out in the preceding selection exactly what is a political question is within the discretionary power of the courts to decide. *Baker v. Carr* (1962) illustrates sharply contrasting views on what is a political question. Frankfurter an impassioned dissent holds that electoral apportionment is a political, guaranty clause, question. The *Baker v. Carr* majority held that a claim of malapportionment in Tennessee was justiciable under the Fourteenth Amendment’s equal protection clause.

In the jurisprudence of political questions the seminal case is *Luther v. Borden* (1849). I have included it and Daniel Webster’s brilliant argument before the Supreme Court for the defendant in this edition because as a minimum students should know of the case and the reasoning behind it.

Reading 68:
Daniel Webster, Counsel for Defendant Borden in Luther v. Borden (1849)
Why Courts Cannot Fairly Decide Political Questions

Theme

Courts apply law to the facts of individual cases to make fair judgments. The judicial process requires evidence and proof to function properly. Courts cannot make political judgments because evidence and proof are lacking. Political decisions are within the discretion of the legislature or executive branches.

Discussion

The facts of the case are given in the text. Luther, a member of the Dorr rebellion, sued Borden, an agent of the Charter government of Rhode Island, for trespass after Borden broke into Luther’s house on orders of his superior.

To find a trespass the federal Circuit of Appeals, acting as a trial court, would have to determine if Borden’s act was under legitimate governmental authority. In effect the court would have to determine which government of the state was the legitimate one, the Charter government or the government of the Dorr faction. Elections had been held that supported the Dorr faction, but as Webster argued, how could a court, through testimony and evidence, judge if the elections represented the choice of the people?

The President, acting under a 1795 law, had determined that the Charter government was a “republican” government and was the legitimate government of the state.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

Deciding what is a republican government is a political, not judicial, decision. The Constitution does not define a republican government. In effect there is no clear law for the courts to apply.

MULTIPLE CHOICE QUESTIONS

1. Daniel Webster argues in *Luther v. Borden* (1849) that:
   a) ultimately courts must determine Guaranty Clause questions
   <u>b)</u> the judicial process can not decide which of two competing governments in a state is "republican" and therefore to be guaranteed by the federal government.
   c) the Constitution clearly defines what a republican government is
   d) courts can determine the legitimacy of electoral results

2. Webster argued in *Luther v. Borden* (1849)

   <u>a)</u> The Dorr government never really existed in fact
   b) The people of Rhode Island supported the Dorr faction
   c) The issue of governmental legitimacy in Rhode Island was a state and not a federal matter
   d) The Charter government was undemocratic

Reading 69:
***Luther v. Borden,* 48 U.S. 1 (1849)**

<u>Ruling</u>

Courts cannot decide guaranty clause cases, which require a determination of what a Republican form of government is. The Constitution delegates this power to the political branches, Congress, and the president.

<u>Discussion</u>

The text gives the full facts of the case. One point to add is that the Charter government of Rhode Island did after the Dorr rebellion adopt a new constitution in 1843 that expanded suffrage. This took the air out of the rebellion's argument that the former restricted suffrage was undemocratic, making the Charter government illegitimate because of the restricted suffrage.

Taney notes in his opinion that under the 1843 state constitution the courts of Rhode Island determined at the trial of Dorr that the established Charter government was the legitimate one. Then he states that the federal courts are bound to accept the judgment of state courts on state law. This argument is in addition to Taney's acceptance of Webster's position that courts can not decide political question of this sort.

Under Art. 4, sec. 4, the Guaranty Clause, Taney writes: "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. . . .It rested with Congress, . . . to determine upon the means proper to be adopted to fulfill this [constitutional guarantee of a republican form of government to the states]." Congress chose to delegate this power to the President in the 1795 legislation enforcing the Guaranty Clause.

MULTIPLE CHOICE QUESTIONS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

1. *Luther v. Borden* (1849) held:

a) federal courts should not decide Guaranty Clause cases as they are "political questions."
b) the Charter government of Rhode Island is the legitimate one.
c) which is the legitimate government of Rhode Island can only be decided after sufficient evidence has been introduced in court.
d) only the judicial process can objectively determine the legitimacy of state governments.

2. Chief Justice Taney in *Luther v. Borden* (1849) held:

a) federal courts should not overturn state court rulings on questions of state law.
b) Rhode Island state courts have ruled on and upheld the legitimacy of the Charter government and their decisions should stand.
c) the Guaranty Clause gives Congress the exclusive authority to decide the process of enforcement.
d) all of the above

3. *Luther v. Borden* (1849) holds that political questions

a) decide political party programs
b) arise under the Guaranty Clause
c) concern First Amendment issues
d) are Commerce Clause questions

JUDICIAL DECISION-MAKING

This section contains a fascinating inside account of the Supreme Court at work, written by Justice William J. Brennan, Jr. The selection will reveal to students a wide range of political, social, psychological, personal, and technical considerations that bear upon Supreme Court decision-making.

Reading 70:
William J. Brennan, Jr., *How the Supreme Court Arrives at Decisions*

This selection, written at the height of the Warren Court era, disclaims any responsibility for the Supreme Court to make social, political, economic, or philosophical decisions. In fact, argues Brennan, the contrary is the case, for the Court is not a council of Platonic guardians for deciding our most difficult and emotional questions according to the Justices' own notions of what is just or wise or politic. To the extent that this is a government function at all, it is the function of the people's elected representatives. The Court, argues Brennan, decides according to the law, on the basis of the record before it, and while the Justices may and do consult history and the other disciplines as aides to constitutional decisions, the text of the Constitution and relevant precedents dealing with that text are their primary tools. The cases coming before the Supreme Court often involve intense political conflict, and whatever decision the Court makes will embroil it in controversy. The internal procedures of the Supreme Court guarantee the full consideration of each case by every justice. And it is the decision process of the Supreme Court with which Brennan primarily concerns himself in this selection. His hope is that better public understanding of the internal workings of the Court will lead to greater appreciation and tolerance for what the Court does.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

QUESTIONS FOR DISCUSSION

1. Evaluate Justice Brennan's statement that the Court is not a council of Platonic guardians, nor involved in making social, political, economic, or philosophical decisions, these insofar as they concern government at all being properly the function of the people's elected representatives. The justices are charged with deciding according to law̃(This is Justice Brennan's publicly stated position that the Court is not a policymaking institution, although clearly it is. He does raise the important point that issues must be decided within the framework of concrete cases and controversies that arise before the Court. Although he states that the Court must decide on the basis of facts embalmed in a record made by some lower court or administrative agency, the Supreme Court can and does take judicial notice of extra-record facts. And, how it interprets the law that applies to these facts is entirely up to the Court.)

2. How does a case get docketed with the Supreme Court? (Without getting into the complexities of original and appellate jurisdiction, Brennan notes that of the huge volume of cases that are petitioned to the Supreme Court – we have the authority to screen them and select for argument and decision only those which, in our judgement, guided by pertinent criteria, raise the most important and far-reaching questions. By that device we select annually around six percent…for decision. Although it is true that the Supreme Court has the authority to turn down appeals for writs of certiorari under the Judiciary Act of 1925, the Court must hear some cases from certain courts as a matter of right. These cases involve decisions by the highest state courts, federal courts of appeals, and federal district courts on the constitutionality of federal and state laws.)

3. Do you feel that the procedures of the Supreme Court described by Justice Brennan are adequate for the Court to meet its vast responsibilities? (Discuss here the tremendous number of cases that are appealed to the Supreme Court every year, and the fact that the Court must use a certain amount of shorthand procedure to deal with these matters. Particularly it must be able to have discretion in deciding for the most part which cases will be heard. Note that it has even turned down cases in its original jurisdiction for political and technical reasons. See *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).)

MULTIPLE CHOICE QUESTIONS

1. Limits upon an imperial judiciary include:

   a) the case and controversy rule.
   b) public opinion.
   c) lack of judicial enforcement power.
   <u>d</u>) all of the above

2. Justice William J. Brennan, Jr., goes to great lengths to emphasize that the Supreme Court:

   a) is deeply involved in making social, political, and economic decisions.
   b) is powerless.
   <u>c</u>) does not have the responsibility to make social, political, and economic decisions.
   d) is the only guardian of civil liberties and civil rights.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

3. According to Justice William J. Brennan, Jr., an important limitation upon the Supreme Court is:

a) its inability to initiate action.
b) the requirement that it base its decision upon a record made by the parties to a case.
c) the congressional power of impeachment.
d) a and b

INTERPRETING THE CONSTITUTION: THE CONTEMPORARY DEBATE OVER CONSTITUTIONAL INTERPRETATION

While both John P. Roche and William J. Brennan, Jr. emphasize the limits upon the Supreme Court, and the way in which it has exercised judicial self-restraint more than it has intervened into the political sphere, the Warren Court of the 1950s and 1960s, the Burger Court of the 1970s, and in the last decade of the twentieth century and the first decade of the twenty-first century the Rehnquist Court made far-reaching decisions that stirred strong political controversy. Both liberals and conservatives have always attacked the Court for exceeding its constitutional authority when they disagree with its decisions. For example, liberals were happy with *Roe* v. *Wade* (1973) upholding a woman's right to have an abortion, but they were dismayed when the Court limited the *Roe* decision in later cases. But liberals were not entirely unhappy with the Rehnquist Court which unanimously upheld in *Texas* v. *Johnson*, 491 U.S. 397 (1989), the freedom to burn the flag on the grounds that it was political expression protected by the First Amendment. Conservatives were dismayed with the flag-burning decision.

As the Supreme Court entered the decade of the 1990s, its conservative character became more evident as both Rehnquist and Scalia took strong conservative positions on issues such as a woman’s constitutional right to abortion. Liberals feared an overturn of *Roe* v. *Wade*, which seemed a virtual certainty. The right to abortion was not the only controversial issue confronting the Supreme Court as it grappled with the question of how to interpret the cruel and unusual punishment provision of the Eighth Amendment, particularly as it applied to the rights of prisoners; and the Court continued to review cases concerning the Establishment and Free Exercise Clauses, as well as highly-charged affirmative action cases. Under Rehnquist’s leadership too, the Court took resurrected the activist approach to Commerce Clause jurisprudence that had been dormant since the late 1930s. In *United States* v. *Lopez* (1995) and *United States* v. *Morrison* (2000), Chief Justice Rehnquist wrote the majority opinions striking down congressional laws for being improperly based on the commerce power of Article I.

INTERPRETING THE CONSTITUTION: A CONTINUING DEBATE

Reading 71:
***Roper v. Simmons,* 543 U.S. 551 (2005)**

Ruling

Normally justices look to the “original intent” of the framers in interpreting vague and undefined constitutional text. However, in this death penalty case, the Court can appropriately take into account foreign legal sources because of their unanimous opposition to the imposition of the death penalty in cases of this type involving juveniles.

Discussion

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

How to interpret the Constitution is always subject to debate. Generally conservatives, such as Justice Scalia, favor strict interpretation that adheres to the text of the Constitution. A fallback position for conservatives is original intent.

Liberals, such as Justice Breyer, and formerly Justice Brennan, adopt a flexible approach to constitutional interpretation. They argue that constitutional text and even intent is not always clear, and that the Court should adapt the Constitution to changing societal norms. They seek to apply constitutional principles where the text and original intent is unclear.

Death penalty cases have been particularly controversial over the years. They involve interpretation of the meaning of the Eighth Amendment's prohibition of cruel and unusual punishment. Should the meaning be fixed in time to the eighteenth century when the Bill of Rights was added to the Constitution? Or should the Court take into account evolving societal views on exactly what is "cruel and unusual"?

The case of *Roper v. Simmons* is particularly interesting because Justice Kennedy's opinion for the Court's majority took into account foreign and international law to represent world views of what constitutes cruel and unusual punishment as well as the changing values of United States society on the issue.

Students should be particularly interested in the sharply contrasting approaches to constitutional interpretation of Justices Kennedy and Scalia in the *Roper* case.

Overview of Opinions

Justice Kennedy: "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . ."

Justice O'Connor: "Because I do not believe that a genuine national consensus against the juvenile death penalty has yet developed, and because I do not believe the Court's moral proportionality argument justifies a categorical, age-based constitutional rule, I can assign no such confirmatory role to the international consensus described by the Court. In short, the evidence of an international consensus does not alter my determination that the Eighth Amendment does not, at this time, forbid capital punishment of 17-year-old murderers in all cases."

Justice Scalia: "The Court reaches this implausible result [against applying the death penalty to juveniles] by purporting to advert, not to the original meaning of the Eighth Amendment, but to 'the evolving standards of decency,' of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists."

"Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."

"Foreign sources are cited today, not to underscore our "fidelity" to the Constitution, our "pride in its origins," and "our own [American] heritage." To the contrary, they are cited to set aside the centuries-old American practice."

MULTIPLE CHOICE QUESTIONS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

1. The relevant constitutional text in *Roper v. Simmons* (2005) was:

a) the Fifth Amendment
b) the Sixth Amendment
c) the Eighth and Fourteenth Amendments
d) the Ninth Amendment

2. The most controversial constitutional interpretation in *Roper v. Simmons* (2005) was the Court's:

a) citation of common law.
b) reference to the Bible.
c) citation of international and foreign law.
d) citation of the views of Hamilton in *Federalist 78.*

THE CONSTITUTIONAL RIGHT TO PRIVACY AND ABORTION

The next three selections are all parts of the Court's decision in *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992), in which the Court faced an opportunity to strengthen, limit, or overturn its landmark decision in *Roe* v. *Wade*. The three selections offer an opportunity to examine the contemporary debate over Constitutional interpretation, as each part of the decision emphasizes different aspects of the Court's role.

Reading 72:
Justice Sandra Day O'Connor, *Constitutional Liberty and the Right to Abortion*

Theme

In this selection, Justice O'Connor delivers a Joint Opinion upholding the central rule decided in *Roe* v. *Wade*. O'Connor relies on the force of precedent in a vigorous defense of the earlier ruling's essential holding.

The Significance of the Case

Planned Parenthood v. *Casey* grew out of the 1982 Pennsylvania Abortion Control Act (amended in 1988 and 1989). This act imposed a set of regulations on women seeking abortions and on facilities providing them. The act's requirements provided an opportunity for the Court to rule on what kind of restrictions would be allowed under the previous *Roe* ruling.

Allowing all of the act's restrictions might have significantly narrowed *Roe* and sent the message that virtually any state regulations on abortion services would be acceptable. At the same time, the Court might have decided to overturn *Roe* outright, a result hoped for by many pro-life advocates. Alternately, the Court might have struck all of the Pennsylvania Act's provisions, issuing a significant victory to pro-choice forces seeking to erase all restrictions on access to abortion services.

The Provisions of the Pennsylvania Act:

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

The act's main provisions were:

(1) A woman is required to give informed consent prior to an abortion procedure, and must be provided with certain information at least 24 hours before the procedure. This is essentially a 24-hour waiting period.

Pro-choice advocates argued that such a regulation might impose severe burdens on women who lacked easy access to clinics. Women in rural areas might be forced to travel long distances twice, imposing high costs in time and money, or they might be forced to stay at expensive hotels. Pro-choice advocates also argued that the waiting period assumed that women had not thought about the decision to have an abortion prior to entering a clinic, and that it was, therefore, demeaning. Pro-life advocates argued that the supplying of information about abortion, its consequences, and alternatives such as adoption imposed no serious burden.

(2) A minor must obtain the informed consent of one parent. Permission can be obtained from the judiciary if the minor cannot or does not want to obtain a parent's consent.

Pro-life forces argued that this protected families and minors. Pro-choice advocates argued that it imposed burdens on minors who might not be able to secure parental permission, or who came from families where securing that permission would lead to physical or other abuse.

(3) A married woman must sign a confirmation that she has informed her husband of her intent to have an abortion.

Pro-life advocates again argued that the provision was a reasonable effort to protect families as well as the interests of men involved in abortion decisions. Pro-choice advocates countered that fathers were often unavailable, and that such a requirement might encourage abuse of the woman.

(4) The act imposed certain reporting requirements on facilities providing abortions.

(5) The act exempted compliance with some of the regulations in the case of medical emergency.

The Joint Opinion

O'Connor rejected the argument that *Roe* should be overturned. Instead, the Joint Opinion clearly reaffirmed the three basic holdings of *Roe*: (1) the original right to abortion under the Due Process Clause of the Fourteenth Amendment; (2) the state's power to regulate abortions after the point of viability; and (3) the state's legitimate interest in protecting the health of the woman and the life of the fetus.

Significance

The opinion is significant for O'Connor's in-depth discussion of the factors necessary to overturn precedent. She notes several questions that must be asked of a ruling to determine if the ruling should be overturned:

(1) Has the central rule become unworkable?

(2) Can the rule be removed without serious iniquity to those who have relied upon it in the past, and can the rule be removed without damaging the stability of society?

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

(3) Has the rule become an anachronism discounted by society?

(4) Have facts changed such that the rule's central holding is now irrelevant or unjustifiable?

In response, O'Connor writes that no changes under these headings have occurred to justify overturning the Court's original decision. Moreover, she writes, "An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." Overturning *Roe*, in other words, would change the rules by which society has been governed for more than 30 years.

O'Connor proceeds to examine cases where the Court *has* overturned important precedents, focusing on *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (which began the dismantling of the *Lochner* decision), and *Brown* v. *Board of Education* (which overturned *Plessy* v. *Ferguson*). O'Connor argues that in each of these cases, facts had changed or come to light in such a way as to justify reversing previous decisions.

O'Connor's appeal to the force of precedent in the absence of compelling changes in economic and social facts and conditions is a clear statement of one theory of Constitutional interpretation.

QUESTIONS FOR DISCUSSION

1. Discuss with students the burdens imposed by the various provisions of the Pennsylvania Abortion Control Act. Are waiting periods, parental notification, and spousal notification necessarily burdens? How should we decide when they become burdens? Is a 24-hour waiting period a burden? What about 48 hours? Ask students to consider how these restrictions might impose different burdens on different people: urban women with access to many clinics, for example, might not be as burdened as rural women who have to travel long distances to find a facility that performs abortions. This travel might be more burdensome to a poor woman than to a rich one. A woman estranged from her husband, or one who is in an abusive relationship, might face a more severe burden from the spousal notification requirement than a woman in a better environment.

2. Is O'Connor's argument about *stare decisis* convincing? Have facts changed within the ambit of the *Roe* decision? I s O'Connor grasping at straws in order to uphold the earlier ruling? Is there a qualitative difference between the *West Coast Hotel* and *Brown* decisions and the situation surrounding *Roe*? Should this discussion even be a part of the decision, or should it have been left out?

   (See the next two selections for more debate over the logic and acceptability of the Joint Opinion, particularly Antonin Scalia's indictment of the Court's decision. O'Connor volunteers an argument that opens her to criticism from Scalia, in an example of what has become an increasing Court tendency to discuss broader principles when not absolutely necessary. O'Connor argues that an in-depth discussion of precedent and how it applies to this case is warranted, given the continued public debate over the abortion issue. In the past, the Court tried very hard to be as succinct as possible, choosing not to elaborate if not strictly necessary. Compare O'Connor's opinion here with the idea of judicial restraint, as discussed by John Roche in selection 67.)

MULTIPLE CHOICE QUESTIONS

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

1. In *Planned Parenthood* v. *Casey*, Justice O'Connor writes that:

   a) nothing has happened to warrant reversing the central finding in *Roe* v. *Wade.*
   b) new scientific facts support the basic decision in *Roe*.
   c) reversing *Roe* v. *Wade* would have little impact on society.
   d) precedent is unimportant in the way the Court reaches decisions.

2. Which of the following was *not* a requirement under the Pennsylvania Abortion Control Act?

   a) a 24-hour waiting period
   b) parental notification if the woman was a minor
   c) a signed statement that the woman has notified her husband, if she is married
   d) a judge's approval for the abortion procedure

3. Justice O'Connor argues that the *West Coast Hotel* and *Brown* cases, which overturned important Supreme Court decisions:

   a) were mistakes.
   b) were justified because relevant facts had changed.
   c) are fundamentally the same as the *Roe* and *Planned Parenthood* cases.
   d) should be reversed because they did not rely on the facts.

Reading 73: Chief Justice William Rehnquist, *Liberty, Privacy, and the Right to Abortion*

Theme:
Chief Justice Rehnquist argues that the Court, in *Roe*, interpreted earlier decisions much too broadly. He writes that the prevalence of statutes restricting or banning abortions at the state and territorial level throughout U.S. history demonstrates that no consensus ever existed that would justify finding a fundamental right to terminate one's pregnancy.

Rehnquist criticizes the Court's reliance on what he sees as a flawed precedent. In the remainder of his opinion, Rehnquist called the *Planned Parenthood* decision a sort of judicial Potemkin Village, which may be pointed out to passersby as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion.

Rehnquist notes, "A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in way rationally related to a legitimate state interest." Using this as a guideline for examining the provisions of the Pennsylvania law, Rehnquist found that all of that act's provisions were constitutional.

QUESTIONS FOR DISCUSSION

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

1. Is public opinion or the agreement of state and local law a necessary element in a fundamental right? (Rehnquist argues that state statutes restricting abortion prove that no consensus has ever existed to make the right to abortion a fundamental right.)

   In an interesting footnote to Rehnquist's argument, Justice Ruth Bader Ginsburg wrote, prior to joining the Court, that state laws at the time of *Roe* were *loosening* their restrictions on abortion. She used this argument to make the case that the Court acted impulsively in *Roe*. While she supported a right to abortion, Ginsburg would have located this right in the Constitution's equal protection clause. The Twelfth Edition of *American Government: Readings and Cases* includes an excerpt from Ginsburg's argument.

MULTIPLE CHOICE QUESTION

1. In *Planned Parenthood* v. *Casey*, Chief Justice Rehnquist wrote that:

   a) 21 states had active laws restricting abortion in 1973.
   b) all states had banned abortion in the late 1960s.
   c) restrictions on abortion were loosening at the time *Roe* was decided.
   d) the Court should ignore state statutes dealing with abortion.

Reading 74:
Justice Antonin Scalia, *Liberty and Abortion: A Strict Constructionist's View*

Scalia's Opinion

Abortion is not a liberty protected by the Constitution.

Scalia's Reasoning

Justice Scalia poses the question simply: Is the power of a woman to abort her unborn child…a liberty protected by the Constitution of the United States[?] He finds that it is not, for two reasons. First, [T]he Constitution says absolutely nothing about it. Second, echoing Rehnquist's opinion, American traditions have permitted abortion to be proscribed.

Scalia argues that the Court is merely defending a value judgment, a political position, dressed up as a reasoned decision. He suggests that the reasons that the Court finds to defend the fundamental right in this case could also apply to other actions which the Court has decided are *not* protected under the Constitution. He lists several, including sodomy, adult incest, and suicide.

This opinion is notable for its forcefulness, reflecting conservative frustration at the Court's unwillingness to overturn *Roe*. Scalia's conclusion offers a scathing indictment of O'Connor's interpretation of the role of *stare decisis* in this case, and he accuses the Court of holding to the original decision with czarist arrogance. He states that the Court's motivation is to show how sturdy and stoic it can be in the face of opposition. Satirically, he gives voice to the Joint Opinion's persistence: We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little [the protesters] intimidate us.

QUESTIONS FOR DISCUSSION

Copyright © 2010, Pearson Education, Inc., Publishing as Longman

1. Scalia argues that the Court's language defending the right to abortion might equally be used to defend other actions the Court has found are not protected rights. Is he right? Has he taken some of the language out of context? Is the Court, in the abortion decisions, deciding on the basis of reason and law, or on the basis of political concerns and value judgments? Is the Court susceptible to continuing a decision just to keep from looking weak and indecisive in the face of protest?

   (The Justices are human, and they are deeply involved in political issues. Scalia's indictment of the Court's motives for protecting precedent in this case should not be dismissed too quickly. On the other hand, a reversal at this point would not only be disruptive to the lives of millions of American citizens, but it would severely damage the authority and power of the Court. This is why the Court has always tried to avoid broad reversals of prior rulings. It is difficult, of course, to know how political and personal dynamics play out within the Justices' chambers, but the view that the Court holds too tightly to precedents, even when it believes them to have been wrong, is a fundamentally serious charge against the Supreme Court's decision-making processes.)

2. Given a situation where the Court felt it had decided wrongly, but where it also believed that a reversal would seriously disrupt citizens' lives, what should it do? Scalia argues that the Court's stubbornness denigrates the institution. Is it possible that criticism like Scalia's also casts doubt on the motives of the Court, damaging the Court's reputation by different means? Does the answer to this question differ when one decides what is best for the public, and when one decides what is best for the Court? Discuss with students the fact that despite the pitfalls facing the Court throughout the nation's history, it retains a reputation for integrity and fairness that exceeds that of virtually any other political institution in the country.

MULTIPLE CHOICE QUESTIONS

1. In *Planned Parenthood* v. *Casey*, Justice Scalia suggests that the Court's adherence to its ruling in *Roe* v. *Wade* is:

   a) duplicitous.
   b) stubborn.
   c) wavering.
   d) unconstitutional.

2. According to Antonin Scalia, the reasoning behind the *Roe* decision might also support a right to:

   a) suicide.
   b) incest.
   c) polygamy.
   d) all of the above

3. Antonin Scalia argues, in *Planned Parenthood* v. *Casey*, that the Constitution:

   a) protects the right to abortion through the Due Process Clause of the Fourteenth Amendment.
   b) protects the right to abortion through the penumbra argument.
   c) does not protect a liberty to have an abortion.
   d) should be amended to protect abortion explicitly.

Copyright © 2010, Pearson Education, Inc., Publishing as Longman