16.0 | Civil Liberties and Civil Rights: Freedom and Equality

Civil liberties and civil rights are directly related to debates about where to strike the right balance between individual freedom and government power. This chapter

- Defines civil liberties and civil rights;
- Describes the development of specific rights and liberties;
- Explains why they are controversial; and
- Uses crime policy as a case study of civil liberties and rights.
16.1 | Defining Terms

The terms *civil liberties* and *civil rights* are commonly used to mean *individual rights*, there are three differences between civil liberties and civil rights. They have different legal sources—civil liberties are provided in the Constitution while civil rights are provided in statutes. They also serve different purposes: civil liberties generally protect *freedom* while civil rights generally protect *equality*. And they present the two different sides of the power problem: civil liberties limit government power while civil rights expand government power.

16.12 | Civil Liberties

In the U.S., civil liberties are *constitutional* guarantees that protect individual *freedom* from government power. The main source of civil liberties is the Bill of Rights, which are a series of *Thou Shalt Nots* that limit government power. The First Amendment declares that “Congress shall make no law….” limiting freedom of expression. The Fifth Amendment provides that “No person shall be…. deprived of life, liberty, or property without due process of law.” The body of the Constitution also provides some civil liberties (e.g. the writ of habeas corpus). Finally, the 13th, 14th, 15th, and the 19th Amendments provide civil liberties.

Civil liberties cases are conflicts between individual freedom and government power. They are typically conflicts between an individual (or an organization) who claims a right to do something—such as burn a flag as a political protest, demonstrate at a funeral, obtain an abortion, view sexually explicit material on the Internet, carry a handgun or make unlimited campaign contributions—and the government which claims the power to limit that right. As part of the judiciary’s dispute resolution function, courts serve as a neutral third party to settle these civil liberties disputes between individuals and the government. This is an important function in constitutional democracies such as the U.S. because civil liberties are the individual or minority rights that limit the power of the majority. The burden of proof is on the government. If the government “substantially burdens” a fundamental freedom, the government must demonstrate that it has a compelling interest in limiting the freedom *and* that it has no less restrictive means to achieve it.

Civil liberties are provided for in the 50 state constitutions, many of which were modeled on the U.S. Constitution and therefore resemble the provisions of the Bill of Rights. Most state constitutions are, however, much longer than the U.S. Constitution so the civil liberties provisions of state constitutions are more specific. For example, Article I of The Florida State Constitution, “Declaration of Rights,” provides for civil liberties including freedom of religion, speech, press, and the right of privacy. But the Florida Constitution’s provision for freedom of expression is very different than the First Amendment to the U.S. Constitution, and the California State Constitution includes much more detailed and specific civil liberties provisions than the U.S. Constitution.

**Look It Up!**

What civil liberties provisions are in your state constitution?

https://ballotpedia.org/State_constitution
16.13 | Civil Rights

Civil rights are legal claims that are generally provided in statutory law (legislation). Civil rights typically are claims to equal treatment—or freedom from discrimination. Civil rights laws increase government power by giving individuals a legal right to claim that an individual or an organization has discriminated against them. Civil rights laws prohibit racial, ethnic, religious, and gender-based discrimination in voting, education, employment, housing, public accommodations, and other settings. Civil rights movements have expanded equality for members of various groups (racial and ethnic and national minorities, prisoners, juveniles, women, the elderly, the handicapped, aliens, and gays and lesbians) and in various settings (employment; schools; hospitals; etc.). Civil liberties generally promote freedom by limiting government power.

16.14 | Uncivil Liberties: Disturbing the Peace (of Mind)

It is ironic that Americans express strong support for individual rights but are often very critical of the individuals who actually use their civil liberties. These are usually strong-willed people who stand up for their political or religious beliefs despite the threat of community hostility or government sanction. Some of these people are noble individuals who are taking a stand for a political principle; others were ignoble individuals who are merely taking advantage of a legal right. The following is a short list of some of the individuals whose convictions made them part of the American story of civil liberties.

- William Penn preaching on the streets of London and taking a stand for freedom of religion against the charge of unlawful assembly.
- Charles Schenck, the Secretary of the Socialist Party, distributing leaflets that opposed U.S. participation in WWI, which he called a capitalist enterprise to exploit workers, and compared the military draft with slavery.
- Walter Barnette objecting to a school board policy that required school children to recite the pledge of allegiance.
- Gregory Lee Johnson burning an American Flag during the 1984 Republican Party convention.
- Fred Phelps picketing at the funerals of veterans to express his belief that the veteran’s death was God’s punishment for American toleration of homosexuality.
- Xavier Alvarez lying about being a decorated military veteran and then claiming that he could not be prosecuted for violating the Stolen Valor Act of 2005 because the First Amendment prohibits Congress from passing laws that limit freedom of speech.

These are all examples of civil liberties cases where an individual challenged government power to limit freedom of expression. The trial of William Penn is part of the American story of religious freedom because a jury refused to convict him despite the fact that he was guilty of unlawful assembly. Charles Schenck was less fortunate. The Supreme Court upheld his conviction for distributing anti-war leaflets during WWI on the grounds that
Congress can prohibit speech that presents a “clear and present danger” that it will cause evils—in this instance, refusal to comply with a military draft law—that Congress has power to prevent.

A WWII era case, *West Virginia State Board of Education v. Barnette* (1943), had a different outcome. During the wave of wartime patriotism, the West Virginia Board of Education adopted a policy that required all students in public schools to salute the flag as part of daily school activities. Walter Barnette was a Jehovah’s Witness who argued that the policy violated his child’s freedom of religion. The Supreme Court agreed. Gregory Johnson was a member of the Revolutionary Communist Youth Brigade who burned an American flag during a protest demonstration at the 1984 Republican Party National Convention in Dallas. He was convicted of violating a Texas law prohibiting desecration of the flag and fined $2,000. He appealed his conviction arguing that the First Amendment protects expressive actions such as flag burning. The *Supreme Court agreed.* The ruling was very unpopular with the general public and government officials. A constitutional amendment was proposed to ban flag burning but it was not adopted.

Fred Phelps continued this tradition of using freedom of expression to disturb the peace of mind in a particularly uncivil way. For more than two decades members of the Westboro Baptist Church picketed military funerals as a way to express their belief that God is punishing the United States for tolerating homosexuality. The picketing also condemned the Catholic Church for sex scandals involving its clergy. On March 10, 2006 the church’s founder, Fred Phelps, and six parishioners who are relatives of Phelps picketed the funeral of Marine Lance Corporal Matthew Snyder at a Catholic Church in Maryland. Corporal Snyder was killed in Iraq in the line of duty. The picketing took place on public land about 1,000 feet from the church where the funeral was held, in accordance with rules established by local police. For about 30 minutes prior to the funeral, the picketers displayed signs that stated “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You’re Going to Hell.” Matthew Snyder’s father saw the tops of the picketers’ signs on the way to the funeral, but he did not learn what was written on them until he watched that evening’s news broadcast. He sued Phelps and his daughters, and a jury awarded Snyder more than a million dollars in compensatory and punitive damages. Phelps appealed, and the jury award was overturned on the grounds that Phelps’ actions were protected by the First Amendment freedom of expression because they were comments on matters of public affairs and were not provably false. The U.S. Supreme Court ultimately agreed that the First Amendment protected even Mr. Phelps’s vile speech in the case of *Snyder v. Phelps* (2011).

Mr. Alvarez was a member of a water district board who in speeches falsely claimed to be a retired marine and recipient of the Congressional Medal of Honor. Criminal defendants have two defense strategies. They can either challenge the facts (“I did not do what the government says I did!”) or they can challenge the law (“The law used to prosecute me is unconstitutional!”). Mr. Alvarez admitted making the false claims and argued that the Stolen Valor Act was unconstitutional. The Supreme Court agreed that the First Amendment protects lying. Justice Kennedy’s opinion for the Court in *U.S. v. Alvarez* (2012) begins:

“Lying was his habit. Xavier Alvarez…lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in
announcing he held the Congressional Medal of Honor, respondent ventured onto new
ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U.
S. C. §704.”

So Mr. Alvarez, a person whom a Supreme Court justice described as a habitual liar, is
now one of the ignoble individuals whose actions became part of the American story of
civil liberties. The general public and government officials often react to court rulings
that protect hateful and bigoted speech, flag burning, anti-war demonstrations, or even
lying, with disappointment, disbelief, profound disagreement, or disgust.

16.2 | The First Amendment

The First Amendment guarantees freedom of expression: freedom of religion, freedom of
speech, freedom of the press, and freedom to assemble and petition the government to
redress grievances. Freedom of expression is today universally recognized as an essential
condition for democracy and self-government. The political importance of freedom of
expression is reflected in the fact that it is listed as the first of the Bill of Rights freedoms
and the fact that all 50 state constitutions also guarantee freedom of expression. The
following sections of this chapter describe freedom of religion and freedom of speech.
Freedom of the press is examined in the media chapter.

16.21 | Freedom of Religion

What kind of political order did the Constitution establish? Debates about religion and
moral regulatory policy are ultimately debates about the appropriate role of government. Did it establish a liberal
order or a republican order? These two terms probably mean something different than you think. A liberal order is one
where the government’s role is limited to keeping the self-interested actions of individuals and organizations (including
organized religion) under control. This is sometimes called the “night watchman” state because the government’s role is
limited to protecting people from being harmed by others. A republican order is one where the government’s role is to
protect people from harm AND to teach people how they should live a good life in a good society. In a republican
order, the government functions as a kind of “schoolmaster” that instructs people on how
to live a good (moral or ethical) life in a good society.

The American colonies established religions because they believed that the
purpose of politics and government was to make individuals and society good. The
Constitution marked a significant change in this thinking because it established a federal
republic where the national government was prohibited from establishing religion. But
we still debate the kind of political order the Constitution established. In fact, it underlies
many of the political differences of opinion that are framed as legal questions in the
religion cases that come before the Supreme Court.

Freedom House is an organization that compares freedom of expression in
different countries. Check out the rankings of nations:
http://www.freedomhouse.org/
What does the Constitution say about religion? Article VI provides that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The First Amendment has two religion clauses: the Establish Clause and the Free Exercise Clause: “Congress shall make no law...respecting the establishment of religion or prohibiting the free exercise thereof.” But the public, judges, and other government officials do not read the First Amendment to mean there can be no laws limiting freedom of religion.

16.22 Freedom of Religion: the Establishment Clause

There are two interpretations of the Establishment Clause: the Wall of Separation and Accommodation. The Wall of Separation reading holds that the government cannot establish a religion as the official religion of the country, establish religious belief (as opposed to atheism or agnosticism) as the official position of the country, or support or oppose a particular denomination or religion in general. The Wall is a metaphor for the separation of church and state (government). The Accommodation reading is that the government can accommodate or support religions and religious beliefs as long it does not declare an official religion or help or hurt a particular religion. The Accommodation reading allows fairly extensive government support for religion (e.g., school prayer, school aid, tax credits for tuition) and public displays of religious symbols and items (e.g., the Ten Commandments, crèches, crosses and crucifixes, and other religious icons). These two readings of the First Amendment Establishment Clause have consistently divided political conservatives and political liberals as well as legal conservatives and legal liberals. Liberals tend to be secularists who support the Wall of Separation; conservatives tend to be religionists who support government involvement with religion and moral values.

The colonists explicitly believed that government and politics had explicitly religious purposes. Their founding documents such as the Mayflower Compact described government as responsible for making people morally good (as defined by the tenets of an established church) and politics as a community’s efforts to make people morally good (by legislating morality). During the colonial era people came to the new world for, among other reasons, religious freedom. Colonial governments established official churches and used laws for religious purposes including church attendance and punishing blasphemy. The ratification of the Bill of Rights changed the relationship between church and state. But studying religion and American politics reveals ongoing debates about the nature of the relationship between religion and government, debates that have been renewed by the increased religiosity in American politics over the past several decades. In fact, one dimension of the culture wars is the fight over the relationship between church and state.

The Supreme Court developed the Lemon Test to help guide decisions about when government support for religion violates the Establishment Clause. Lemon v. Kurtzman (1971) presented a claim that Pennsylvania and Rhode Island laws providing public support for teacher salaries, textbooks, and other instructional materials in non-public (primarily Catholic) schools violated the Establishment Clause. Chief Justice Burger upheld the laws and explained the three-pronged test to be used in such cases—a test that came to be called the Lemon Test. First, the law must have a secular legislative
purpose (in this case, the state aid helped educate children). Second, the law must *neither help nor hurt religion*. Third, the law must *not foster excessive government entanglement* with religion. The Lemon Test is still used today. However, political conservatives are critical of the Lemon Test for being too separationist, and they advocate the Accommodation reading of the Establishment Clause. The conservative justices on the Supreme Court share this view and it possible that the Court will eliminate the Lemon Test or change its application to allow Accommodation on matters of religion and government, church and state.

Although the Establishment Clause and the Free Exercise Clause are two separate provisions of the First Amendment, they are related in the sense that government support for one religion or denomination can limit the free exercise of individuals who belong to religions other than the one or ones supported by the government.

16.23 | Freedom of Religion: the Free Exercise Clause

Despite the absolutist language of the First Amendment, the American public, government officials, and the courts have never read it to mean that there can be no limits on freedom of religion. The Free Exercise Clause has always been understood to mean that government can limit free exercise of religion. This apparently unusual reading of the Clause can be traced to the Supreme Court’s ruling in the landmark 19th Century case *Reynolds v. U.S.* (1879).

The case arose from a law passed by Congress to prohibit the Mormon Church’s practice of bigamy. The law, the Anti-Bigamy Act, made bigamy a federal offense. George Reynolds was prosecuted in the federal district court for the Territory of Utah with bigamy in violation of the Act: “Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.” Reynolds was a Mormon who argued that church doctrine required male Mormons to practice polygamy. He asked the trial court “to instruct the jury that if they found from the evidence that he was married...in pursuance of and in conformity with what he believed at the time to be a religious duty,” then the jury verdict must be “not guilty.”

The Supreme Court acknowledged that Reynolds sincerely believed that this duty was of “divine origin” and that male members of the Church who did not practice polygamy would be punished by “damnation in the life to come.” The Court noted that the First Amendment expressly prohibited Congress from passing a law restricting the free exercise of religion. However, it also noted that the government has always been allowed to regulate certain aspects of religious freedom. Some of the colonies and states established churches and punished certain religious beliefs and practices. In 1784 Virginia considered a bill to provide state support for “for teachers of the Christian religion.” James Madison wrote *Memorial and Remonstrance* in opposition to the bill. Not only was the bill to provide for teachers of Christianity defeated, the Virginia Assembly passed Thomas Jefferson’s bill “establishing religious freedom.” The act described government efforts to restrain ideas because of their supposed “ill tendency” as a threat to religious liberty. Jefferson maintained that government power should be limited to “overt acts against peace and good order,” that it should not have any power
“in the field of opinion.” According to Jefferson, beliefs are the business of the Church and actions are the business of the government. This principle separating religious beliefs and political opinions from religious and political actions remains an important principle limiting the scope of government power. A little more than a year after the passage of this Virginia statute, the members of the constitutional convention drafted the Constitution. Jefferson was disappointed that the new Constitution did not specifically guarantee freedom of religion but he supported ratification because he believed the Constitution could be improved by an amendment specifically limiting government power to restrict religious freedom. The first session of the first Congress did so by proposing the First Amendment.

In *Reynolds*, the Court quoted Jefferson’s belief that religion is a private matter “solely between man and his god.” Accordingly, a person is accountable only to God “for his faith or his worship.” The legislative powers of government “reach actions only, and not opinions…” This distinction between faith and actions remains one of the most important rules for determining the limits of government power. According to Jefferson, the First Amendment meant that “the whole American people” declared that Congress could make no law respecting an establishment of religion or prohibiting the free exercise thereof,” thereby building a wall of separation between church and state. The Reynolds Court considered Jefferson’s view “an authoritative declaration of the scope and effect” of the First Amendment: “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”

The Court then explained why polygamy was not protected by the First Amendment, why Congress could make a law prohibited polygamy: “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void..., and from the earliest history of England polygamy has been treated as an offence against society.”

*Reynolds* created two legal principles that are still used today to decide civil liberties cases. The first principle is that the First Amendment does not guarantee absolute freedom of religion. It guarantees absolute freedom of belief but it allows government to restrict religious practice. This distinction between religious belief and practice also applies to political expression: the government cannot restrict political ideas but it can restrict political actions. The second principle established in *Reynolds* is that government has the power to limit certain kinds of religious practices that were considered morally or socially unacceptable. Many state constitutions, for example, guarantee freedom of religion but only to those religious practices that are consistent with good moral order. The belief that state governments could prohibit certain morally or socially unacceptable practices is relevant to current debates about state laws that have traditionally defined marriage as between one man and one woman.
16.24 | Free Exercise Today

The Court first began reading the First Amendment to protect the free exercise of religion in the 1940s. In *Cantwell v. Connecticut* (1940), the Court ruled that the Free Exercise Clause of the First Amendment applied to the state governments, not just Congress or the federal government. This ruling signaled the Court’s willingness to review state laws that historically restricted religious beliefs and practices that were considered unpopular, politically unacceptable, or immoral.

16.25 | Defining Religion

The Supreme Court has issued some very controversial rulings, such as the decision declaring that organized school prayer in public schools was unconstitutional, but the Court has been very wary of defining what beliefs systems constitute a religion. The definition of religion is important because there are many important legal benefits, including tax benefits that come with an organization being officially recognized as a religion. A related question is whether an individual’s personal ethical or moral beliefs should be treated as the equivalent of a religion for the purposes of the First Amendment. One material benefit for an organization that is officially recognized as a religion is tax-exempt status. The legal benefit for an individual whose personal beliefs are recognized as religious beliefs, or the equivalent of religious beliefs include religious exemption from compulsory military service (the draft), religious exemptions from certain workplace rules, and religious exemptions from state drug laws for sacramental drug usage (e.g., peyote; marijuana; communion wine).

Three examples of government defining or officially recognizing religions are the “I am” movement, the Department of Veteran’s Affairs policy on cemetery headstones, and the Internal Revenue Service rulings on the Church of Scientology.

Guy Ballard was a follower of the “I Am” movement. He solicited money from people for faith healing. The government accused Ballard’s organization of being a business enterprise that was engaged in fraud while claiming to be a legitimate religious enterprise. Ballard maintained that his organization was a legitimate religious enterprise and took his case to the U.S. Supreme Court. The Court’s reluctance to define what is and what is not a religion, and its reluctance to allow the government to define what is and what is not a religion, is evident in the 1944 case *U.S. v. Ballard*, 322 U.S. 78 (1944). The Court advised the government to be very reluctant to define what was and was not a legitimate religious activity, and to allow very broad claims of religious activity.¹

Since 1944, the Court has broadened the definition of religion by accepting broad claims that beliefs were consistent with the concept of religion. The Court held that an individual could claim that personal “spiritual” beliefs or reasons of conscience (conscientious objector status) were legitimate reasons for religious exemption from the military draft. The claim to exemption from the military draft was not limited to identifiable religious doctrines.

There are many benefits that come with being an officially recognized religion. Must the government recognize witchcraft or humanism as religions? The Department of Veteran’s Affairs had a policy to allow military families to choose any of 38 authorized images of religion that the Department would engrave on the headstones of veterans. The Department created a list of authorized headstone symbols. It included symbols for
Christianity, Buddhism, Islam, Judaism, Sufism Reoriented, Eckankar, and Seicho-No-Ie (Japanese), but not the Wiccan pentacle—a five-pointed star in a circle. The widows of two Wiccan combat veterans (approximately 1,800 active-duty service members identify themselves as Wiccan) sued the government claiming the policy that did not allow their religion’s symbol on headstones violated the First Amendment. The court rulings have directed the Department of Veterans Affairs to allow the Wiccan symbol because the government should not have the power to define a legitimate or acceptable or officially recognized religion. In 2007, the Department finally agreed to allow the Wiccan pentacle to be engraved on veterans’ headstones.

The Church of Scientology engaged in a three decade-long political and legal battle to get the government (specifically, the Internal Revenue Service) to recognize Scientology and related organizations as a church. The government’s initial denial of tax-exempt status was challenged in court. In 1993 the IRS finally recognized Scientology as a religious organization and granted it tax-exempt status as a 501(c)(3) religious or charitable organization for the purposes of the tax code.

Check It Out!
The Department of Veterans Affairs, National Cemetery Administration has an official list of “Available Emblems of Belief for Placement on Government Headstones and Markers.”
https://www.cem.va.gov/cem/hmm/emblems.asp

As organized religions adopt corporate structures that more closely resemble secular enterprises, and provide a broad range of services—education, counseling, social welfare, financial planning, day care, health care, retirement, professional seminars, communication, and media services—questions arise about religious exemptions from generally applicable laws. Can a television station be a church? The Internal Revenue Service (IRS) says, “Yes, it can.”

The European/German Model of Church/State
“For Germans Religious Membership Comes at a Price”

16.26 Content Neutrality

The court ruling striking down a Department of Veterans Administration policy that allowed some religious symbols as headstone markers but not others was based on a well-established legal principle: content neutrality. Content Neutrality is the principle that the government is supposed to be neutral toward political and religious beliefs. Government is not supposed to take sides in political debates by supporting some ideas but not others, or opposing some ideas but not others. Content neutrality applies broadly to freedom of expression both political and religious. It means that the government should not favor one
religion over others, religious belief over non-belief, one ideology over others, or one political party over others. In effect, content neutrality means that government is not supposed to discriminate for or against ideas. If the government regulates religion, for example, the regulations should be content neutral. If the Internal Revenue Service grants religious organizations tax-exempt status, content neutrality prohibits the IRS from granting the status to some religious organizations but not others. The Department of Veterans Affairs might be able to deny all religious symbols on headstones, but the principle of content neutrality prohibited it from singling out the Wiccan symbol for exclusion. State laws that provide tax credits or vouchers for costs associated with sending children to religious schools cannot be limited to Christian schools, for example, without violating the idea of content neutrality. Content neutrality means that the government should not take sides in debates about religious or political ideas.

Of course, the government frequently and inevitably takes sides in debates about the relationship between religion and government and politics. The relationship between church and state was once very close. Most states once had Sunday closing laws which required most businesses to close on Sunday. These laws either established Sunday as the day for religious worship or merely designated Sunday as the day of rest. Today, Sunday closing laws (or laws limiting hours or the sale of certain products such as alcohol) are allowed for secular reasons, but not for religious purposes. But regardless of the reason, Sunday closing laws burden religious believers whose Sabbath did not fall on Sunday because observant Sabbatarians would have to keep their businesses closed two days a week. State and local laws can recognize Christmas as an official holiday, and even put up public displays such as crèches (nativity scenes), but that is primarily because Christmas is treated as a holiday season rather than a religious season.

State and local governments once required bible reading or organized school prayer in public schools. Legal challenges to such laws promoting religion in public schools have resulted in court rulings that they violate either the Establishment Clause or Free Exercise Clause of the First Amendment. These rulings weakened the relationship between church and state. The Supreme Court has upheld state laws that prohibit religious practices such as snake handling, and laws that require vaccinations even though an individual’s religious beliefs forbid vaccinations. These laws are upheld if they serve a secular purpose (e.g., protecting public health) but struck down if they are intended to show public disapproval of a particular religious belief or practice.

States can also pass laws that are intended to discourage drug use even if they restrict freedom of religion. In Employment Division of Oregon v. Smith (1990) the Court upheld an Oregon law that was intended to discourage illegal drug use by denying unemployment benefits to workers who were fired drug use. Native Americans who were fired for sacramental drug use argued that the denial of unemployment benefits was unconstitutional because it restricted their freedom of religion. The Court ruled that it was reasonable for a state to pass such a law to discourage illegal drug usage, and that there was no evidence that the generally applicable law was passed to discriminate against Native Americans. Advocates of religious freedom were very critical of the ruling because the Court said that it would use the reasonableness test to determine whether a generally applicable law that substantially burdened freedom of religion was constitutional. Prior to this ruling, the Court used the strict scrutiny test, which required the government to have a compelling reason for burdening freedom of religion. Religion
advocates saw the reasonableness standard as weakening constitutional protection of free exercise of religion. They lobbied Congress to pass the Religious Freedom Restoration Act of 1993 which by statute restored the strict scrutiny test.

A church in Boerne, Texas used the Religious Freedom Restoration Act to challenge the city’s zoning laws that limited the church’s building expansion. Zoning laws can prohibit churches in residential neighborhoods or limit remodeling and building expansion. The church was located in an historic district of Boerne, Texas. The city rejected the church’s building expansion plan and the church went to court claiming the zoning restriction was a violation of freedom of religion. In Boerne v. Flores (1997) the Supreme Court held that the Religious Freedom Restoration Act was unconstitutional because the Court, not the Congress, determines how to interpret the First Amendment. As a result, the courts still use the reasonableness test when determining whether a generally applicable law, a law that is intended to serve a legitimate public purpose rather than targeting specific unpopular religious practices, can limit freedom of religion. However, Congress then passed the Religious Land Use and Institutionalized Persons Act of 2000 to provide stronger protection for freedom of religion. Advocates of greater protection for religious freedom and more government support for religion challenge the secularist, Wall of Separation understanding of the relationship between church and state.

Although the Establishment Clause and the Free Exercise Clause are two different provisions of the First Amendment, they are not completely separate areas of constitutional law because government support for religion (which is an Establishment Clause matter) can limit the free exercise of religion. Some of the following cases show 1) how laws that provide spiritual support for religion can limit the free exercise of religion; and 2) how Free Exercise claims have changed over the years. Freedom of religion cases used to be brought primarily by minorities (e.g., religious minorities such as Mormons, Jews, Seventh-day Adventists) as well as secular minorities such as atheists). Today, Free Exercise cases are often brought by religious majorities. This change in freedom of religion claims is evident in conservative rhetoric about the need to fight a culture war to take back the country, the Constitution, and the American Judeo-Christian civilization. This rhetoric describes Christians as on the defense, fighting back against the forces of secularization, defending against those who are waging war on Christmas, or Christianity, or religion. Why are today’s religion cases likely to be brought by religious majorities rather than religious minorities? Because the religious right (primarily Evangelical Christians) is a political movement that has since the 1970s adopted political and legal strategies to fight secularization. The “culture wars” include skirmishes that the religious right considers fighting back against the “war on religion” or the war on Christianity.
The conservative majority on the Rehnquist and Roberts Courts has adopted the Accommodation reading of the First Amendment. Is it relevant that the Roberts Court consisted of six Catholics and three Jews until Justice Scalia’s death in 2016—when Neil Gorsuch, a Protestant joined the Court. Does religion matter? Does religion affect the way the justices read the religion clauses? Why would conservatives, including the conservative Supreme Court Justices, read the Establishment Clause narrowly—to allow government accommodation of religion—and read the Free Exercise Clause broadly—to limit government power to restrict religious beliefs? In fact, in *Burwell v. Hobby Lobby, Inc.* (2015), the Court ruled that certain closely-held (family) corporations had First Amendment freedom of religion rights to challenge a law. The figure below portrays the different readings of the two religion clauses:
16.3 | Freedom of Speech

Like freedom of religion, freedom of speech is not absolute: the government can restrict freedom of speech. Freedom of religious belief is absolute but religious action is not. Freedom of thought is absolute but action is not. Political actions are subject to a variety of time, place, and manner restrictions: people cannot say whatever they want (e.g., certain provocative words such as hate speech can be limited), however they want (using bullhorns or loud music or demonstrations), wherever they want (private property or certain public places such as residential neighborhoods or special places such as airports), or whenever they want (e.g., not at 4:00 in the morning). Despite these limits, there is a presumption of freedom of speech. The government bears the burden of proof to show the need to restrict freedom of expression. The U.S. is a capitalist country where the idea of a free market of goods and services has great appeal. The idea of a free marketplace of ideas is similarly appealing. The assumption is that government intervention in the political marketplace should be limited—that individuals should have freedom of choice of goods, services, and ideas.

The 50 state constitutions and virtually all of the national constitutions provide for freedom of expression. Comparing state constitutions and national constitutions can increase understanding of the First Amendment to the U.S. Constitution and the different approaches to guaranteeing freedom of expression.

Choose one or two states, or one or two countries, and compare how their constitutions provide for freedom of expression. Search state government websites, national government websites or sites that provide national constitutions such as http://www.constitution.org/cons/natlcons.htm

16.4 | Civil Rights

Civil liberties are constitutional protections for individual freedom. Civil rights are statutory laws that promote equality. Liberty and equality are democratic values but the relative emphasis on each value varies from country to country and over time. Democratic systems generally value individual freedom more than equality. Socialistic systems value equality more than freedom. In the U.S., equality is today a much more important value than it was when the nation was founded.

Equality is one of the political values extolled in the Declaration of Independence, which asserts human equality in especially memorable language:

“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.”

But the Declaration of Independence is not a governing document (the Constitution is the government document) or a legal document (it does not create any legally enforceable rights claims). Equality is not one of the political values embodied in the Constitution. The Constitution recognized slavery and did not recognize gender equality. Early statutes
also recognized slavery. The Northwest Ordinance of 1787 prohibited slavery in parts of the country (western territories north of the Ohio River) but also provided that fugitive slaves could be “lawfully reclaimed.” The Missouri Compromise of 1820 prohibited slavery in territories north of the parallel 36.5 degrees north of the equator. And the Fugitive Slave Law of 1793 authorized federal judges to recognize a slave owner’s property rights claim to fugitive slaves.

16.41 | Making Equality an American Value

Equality only became an important political and legal value in the latter half of the 19th Century with the rhetoric of Abraham Lincoln, the three Civil War Amendments, and federal civil rights legislation enacted under the authority of the 14th Amendment. The Civil War Amendments were passed to guarantee the rights of newly freed slaves by limiting the power of states to discrimination on the basis of race. The 13th Amendment prohibited slavery. The Fourteenth Amendment prohibited states from making or enforcing any law that shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Fifteenth Amendment prohibited states from denying the right to vote on account of “race, color, or previous condition of servitude.” Section 5 of the Fourteenth Amendment gave Congress the power to enforce “by appropriate legislation” the provisions of the Amendment.

These three Civil War Amendments became the constitutional foundation for civil rights legislation. Congress passed the Civil Rights Act of 1866 to guarantee “citizens, of every race and color…the same right, in every State and Territory…to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property…” and enjoy other benefits of the laws. Congress passed the Civil Rights Act of 1875, which made it a federal offense for owners or operators of any public accommodations (including hotels, transportation, and places of amusement) to deny the enjoyment of those accommodations on account of race or religion. Innkeepers, theater owners, and a railroad company challenged the law as exceeding government power because it regulated private businesses. The Supreme Court agreed in The Civil Rights Cases (1883). The ruling greatly limited Congress’s power to use the 14th Amendment as authority for laws promoting racial equality. As a result, matters of racial equality were left to state laws until the 1930s and 1940s. In Brown v. Mississippi (1936), the Supreme Court abandoned its traditional hands-off policy toward state criminal justice amid growing federal concern about racial discrimination. In Brown the Court unanimously held that police torture of a black suspect in order to compel a confession, questioning that was euphemistically called the third degree, violated due process of law. The subsequent federal court rulings in cases involving racial administration of criminal justice were part of the broader civil rights movement in other areas of public policy.

The Civil Rights Act of 1964 and the Voting Rights Act of 1965 are major landmarks in the civil rights movement. The Civil Rights Act of 1964 expanded the
Congress passed the Act to “enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.” The Voting Rights Act of 1965 expanded the federal government’s power to remedy a specific type of racial discrimination, racial discrimination in voting, that directly affected how the democratic process worked. Section 2 of the 1965 Act provided that “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

16.42 | Does Equality Mean Treating Everyone the Same?

Each of the various civil liberties and rights movements that made equality a more important political value prompted debates about the meaning of equality. It turns out that equality is more complicated that it initially seems, and defining it is harder than one might expect. Equality does not mean treating everyone the same. This chapter began with a famous 1894 quote of the French author, Anatole France, who sarcastically praised a law that prohibited anyone, rich and poor alike, to sleep under the bridges of Paris as egalitarian. On its face, the law treated everyone equally—but of course not everyone needs to sleep under bridges. Almost all laws create categories of individuals and actions, and treat them differently. State driver’s license laws treat people different based on age: very young people and sometimes very old people are treated different than middle-aged people. Food stamp programs and Medicaid are means-tested programs: they limit benefits to individuals below certain income levels. Income tax rates vary according to income levels. Laws typically limit the rights of felons to vote, possess firearms, or hold certain kinds of jobs. Some government benefits are limited to veterans while others are limited to married people. Social security is an age and income based program. Medicaid is a program that provides benefits for the poor.

Equality is a political value with social, economic, political, and legal dimensions. The Equal Protection of the Laws is generally understood to require states to provide legal equality to all persons within their jurisdiction. Legal equality means equal standing before the law, but not social or economic equality. Equality does not mean that everyone must be treated the same. Laws create classifications that treat individuals different. In one sense, then, legislation discriminates by treating individuals and actions differently. This definition of discrimination or treating people different is not what is commonly understood as discrimination. Discrimination is usually used to mean prejudice or bias against individuals or groups based on inappropriate or invalid reasons. This is the pejorative meaning of discrimination. Discrimination also has a positive meaning whereby “to discriminate” means the ability to see or make fine distinctions among individuals, objects, values, or actions. It refers to making valid distinctions or differences between individuals.
16.43 | Expanding federal civil rights law: the constitutional revolution of 1937

As noted in the chapter on the judiciary, 1937 is an important date in U.S. constitutional history because the Court changed from protecting business from government regulation to protecting political liberties. During the latter part of the 19th Century and into the 1930s, the Supreme Court had struck down many federal and state laws that regulated business and economic activity because the Court saw its role as protecting business from government regulation. During the Great Depression, for example, the Court struck down some of the most important provisions of the Roosevelt Administration’s New Deal legislation. The result was a constitutional conflict between the president, and the Court. President Roosevelt used his “bully pulpit” to take to the radio airwaves to blame the Court for not being a team player. Roosevelt’s famous March 9, 1937 Fireside scolded the Court for not being part of the three-horse team that had to pull together if the country were to get out of the Great Depression. Roosevelt also took action against the Court. He proposed a court-packing plan to increase the size of the Court to a maximum of fifteen Justices, with the additional six Justices expected to support the President’s views on government power to regulate the economy because the President would nominate them. Against the background of these political pressures, the Court changed its rulings on the government’s economic regulatory power. In late 1936, Justice Roberts, who had been voting with a conservative bloc of Justices who struck down the New Deal laws, changed sides and began to vote with the liberal bloc that upheld New Deal economic regulatory legislation. This was the constitutional revolution of 1937. Retirements eventually gave President Roosevelt the opportunity to change the ideological balance on the Court, and he appointed eight Justices during his terms in office. As a result, the Court changed its role from one that protected economic liberties from government regulation to one that protected political liberties. And one of the Court’s special concerns was racial discrimination

16.44 | Racial Classifications

Dred Scott v. Sanford (1857) is a landmark Supreme Court case that is famous, or infamous, for its ruling limiting an individual slave’s constitutional rights and Congress’s power to limit slavery. Scott was a slave whose owner took him to Illinois and an area of the Louisiana Territory that prohibited slavery. Scott filed a lawsuit claiming that his residence in areas that prohibited slavery made him a free man. The Supreme Court ruled that Scott, as a slave, was not a citizen and could not go to court to claim that he was free. It also ruled the Missouri Compromise of 1820, which prohibited slavery in certain states, unconstitutional. The Dred Scott ruling made it clear that slavery was not likely to be resolved politically, and that a civil war was likely. The three constitutional amendments that were passed after the Civil War were intended to prohibit state action that discriminated against Blacks. Congress also passed civil rights statutes to promote racial equality. But in The Civil Rights Cases (1883), the Court greatly limited the federal government’s power to regulate racial discrimination. And in Plessy v. Ferguson (1896) the Court held that states could by law require racial segregation as long as the law did not treat one race better than another. This was the famous Separate but Equal Doctrine that allowed states to have racial segregation as a
matter of public policy for schools, public accommodations, and other services and
facilities. Justice Harlan’s dissenting opinion in *Plessy* used memorable language to argue
that racial segregation was unconstitutional: “Our Constitution is colorblind, and neither
knows nor tolerates classes among citizens.” But the majority on the Court held that
states could discriminate between blacks and whites, by requiring segregation, as long as
the separation of the races did not include treating them unequally.

16.45 | The Story of School Desegregation

The story of school desegregation is a classic story of political litigation. Political
litigation is the use of litigation to change public policy. Organizations such as the
National Association for the Advancement of Colored People used the legal arena
(courts) to get what they could not get in the political arena: desegregation of public
schools. The state political systems that created racial segregation in public schools
continued to support segregation despite political efforts advocating desegregation. As a
result, advocates of desegregation went to the federal courts arguing that segregation
violated the 14th Amendment’s equal protection of the laws. The legal strategy worked.
The Supreme Court began chipping away at the Separate but Equal doctrine. In
*Missouri ex rel. Gaines v. Canada* (1938) the Court struck down a Missouri law that
denied Blacks admission to the state’s law school, but provided money for Blacks to
attend out-of-state law schools. Then in 1950 (*Sweatt v. Painter*) the Court struck down a
Texas law that created a separate law school for Blacks as a way to avoid having to admit
a Black man to the University of Texas Law School. And on the same day that the Court
decided, the Court decided *McLaurin v. Oklahoma State Regents* (1950) McLaurin was a
Black man who was admitted to the University of Oklahoma’s School of Education
graduate school, but a state law required that he be segregated from other doctoral
students: separate seating in the classroom; designated cafeteria table; separate library
table. The Court ruled that this violated the equal protection of the laws because the
treatment was separate but unequal. In these three cases the Court struck down the state
segregated education policies because they did not provide separate but equal educational
opportunities. The NAACP and other advocates of desegregation continued to target the
separate but equal doctrine. Finally, in the landmark case of *Brown v. Board of Education
of Topeka, Kansas* (1954), the Court ruled that de jure segregation in public schools,
segregation by law, was unconstitutional. The separate but equal doctrine was itself
unconstitutional.

The *Brown* ruling was extremely controversial. Critics of Chief Justice Earl
Warren put up “Save Our Republic: Impeach Earl Warren” highway billboards because
Warren presided over a Court that issued a broad range of controversial rulings. It
integrated public schools, and its school prayer rulings “kicked God out of” public
schools. The backlash against these rulings included government officials who asserted
states’ rights to oppose expanded federal power over race relations. One classic statement
of federalism-based states’ rights opposition to *Brown v. Board* is the 1956 *Southern
Manifesto*. Strong opposition to the *Brown* ruling prompted the *Florida Legislature to
pass an Interposition Resolution* in 1957. Interposition is a Civil War-era doctrine that
asserts that a state, as a sovereign entity in the U.S. system of federalism, has the power
to “interpose” itself between the people of the state and the federal government whenever
the state believes the federal action is unconstitutional. Interposition is a doctrine that gives states power to protect the people from unwarranted federal action.

At the time of the Brown ruling, William H. Rehnquist, who went on to become Chief Justice of the Supreme Court, served as a law clerk to Justice Jackson. Rehnquist wrote a controversial Memorandum to Justice Jackson which concluded that the Separate but Equal Doctrine was still good law and should be upheld. Rehnquist’s understanding of the legislative history of the intentions of the Framers of the 14th Amendment may be accurate. And requiring racial segregation while treating the races equally, for example by requiring that blacks and whites sit in alternate rows rather than requiring blacks to sit in the back of the bus, may technically meet the “equal protection of the laws” standard. However, the history of separation was inequality. And the argument that the Constitution allows racial apartheid as long as the races are treated equally is no longer considered politically acceptable.

The Brown ruling did not order the immediate desegregation of public schools. The Court stated that the segregated school systems had to be dismantled “With all deliberate speed.” Some states took advantage of this ambiguous phrase to choose deliberation rather than speed.

Beginning in the latter 1960s, after more than a decade of little or no action to dismantle the system of segregated public schools, courts began to order actions to integrate public schools. These actions included court-ordered busing, judicial drawing of school attendance zones, racial quotas, and affirmative action programs.

Court rulings that ordered busing to dismantle segregated schools were always controversial, but court-ordered busing was especially controversial when it was used to remedy de facto racial segregation. Brown ruled de jure segregation unconstitutional. De jure segregation is segregation “by law.” De jure segregation includes segregation that results from any government policy or official actions (such as drawing school attendance boundaries to produce racially segregated schools). De facto segregation is segregation that results “by fact.” De facto segregation results from private actions such as housing patterns where people of one race or ethnicity or class decide to live with others of the same racial or ethnic or economic background and that just happens to result in segregation. As the country became more conservative during the latter 1970s and 1980s, public opposition to school busing and other race-based remedies for segregated schools increased. And in an interesting twist, conservatives turned to Justice Harlan’s 19th Century ideal of a color blind Constitution, which he used to argue that state laws requiring racial segregation were unconstitutional, to argue that affirmative action policies, which take race into consideration when making school admissions decisions or employment decisions, are unconstitutional. Critics of affirmative action also oppose the recognition of group rights rather than individual rights. Indeed, the conservatives on the Rehnquist and Roberts Courts have been very skeptical of affirmative action and closely scrutinize affirmative action policies to determine whether they violate equal protection of the laws.

Think About It!
Should college students have rights? The Foundation for Individual Rights in Education (FIRE) defends individual rights in higher education:
http://thefire.org/
16.46 | Employment Law

The civil rights movements also targeted employment discrimination. Efforts to expand equal opportunity in employment focused on personnel policies related to hiring, firing, and promotion; equal pay for equal work; and awarding business contracts to minority companies. One strategy was to use affirmative action to remedy past discriminatory practices and promote equality. The use of affirmative action to produce a more diverse work force, one that reflected the racial composition of the community was very controversial. Critics called the affirmative action use of racial or gender quotas or targets in employment settings reverse discrimination. As public support for using equal rights laws to promote greater equality in the workplace decreased, the courts limited the use of affirmative action policies particularly race-based policies.

The civil rights movement to end racial discrimination had one unintended negative consequence. Efforts to end racial segregation unintentionally contributed to the breakup of black economic communities that had developed in segregated areas. The end of de jure racial segregation meant that members of the black community were able to live in other neighborhoods and buy goods and services outside of the black business community. This is one of the reasons for the decline in the number of black-owned businesses after desegregation.

Think About It!

“One Family’s Effort to Buy Black for a Year.”
http://www.pbs.org/newshour/bb/business-jan-june12-makingsense_06-19/

16.47 | Gender

Historically, government officials and private sector individuals (such as employers) were free to treat people differently based on gender. The Supreme Court did not examine gender-based legislative classifications until the 1970s. Prior to that time period, the Court did not consider laws that treated women different than men a violation of the Fourteenth Amendment. Gender discrimination was presumed to be constitutional. Laws that treated the “second” sex or the “weaker” sex different from the “first sex” or the “stronger” sex were presumed to reflect natural differences, social values, or public policy preferences. The policy preference for treating women and men differently was considered a matter of politics, not law, a question that was appropriate for the elected representatives of the people rather than the legal judgments of courts.

As a result, states historically used their policy making powers to pass laws that treated men and women different for purposes of voting, employment, education, social welfare benefits, jury duty, and other purposes. Some of these laws were paternalistic in the sense that they were intended to protect women. A good example of such a paternalistic law is the Oregon law that limited the hours that women could work in factories. The law was challenged in court but the Supreme Court upheld the law in
Muller v. Oregon (1908). Justice Brewer’s opinion for the majority reflected the widely accepted belief that it was reasonable for a state legislature to think that women’s physical constitution and the social role assigned to women in raising children might merit special protection in the workplace:

“….That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. …[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved…. [There are individual exceptions but women are generally not equal to men and are therefore properly placed in a class to be protected by legislation]. “It is impossible to close one’s eyes to the fact that she still looks to her brother, and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the wellbeing of the race—justify legislation to protect her from the greed, as well as the passion, of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all.”

Justice Brewer described gender protective laws as benefiting both women and society as a whole. This gender difference rationale reflected the conventional wisdom of the day and provided the justification for a broad range of public policies that treated women different than men. For instance, states prohibited women from serving on juries. Equality does not mean treating everyone the same—but it does require having good reasons for treating people different. The black civil rights movement provided inspiration and energy for the women’s rights movement. Gender discrimination was put on the government’s agenda by the women’s rights movement. The women’s rights movement challenged traditional assumptions about how public policy could treat women different than men, lobbied for statutory laws that prohibited gender discrimination, advocated for an equal rights amendment to the U.S. Constitution, and adopted a legal strategy of political litigation that filed lawsuits that were intended to change public policy toward women.

In 1963 Congress amended the Fair Labor Standards Act to require equal pay for equal work. The Civil Rights Act of 1964 prohibited gender discrimination by employers and labor unions. Title VII of the Civil Rights Act of 1964 prohibits sexual harassment in the workplace. In 1972, the Civil Rights Act was amended to require in Title IX that all programs or activities, including educational institutions, provide equal athletic facilities and opportunities for women. Title IX had a major impact on women’s opportunities.
Chapter 16: Civil Liberties and Civil Rights

Compare the experience of Kathrine Switzer, who in 1967 was the first woman to run in the Boston Marathon with women’s opportunities 40 years after Title IX.

The women’s movement also worked for passage of an Equal Rights Amendment. Congress proposed the ERA in 1972 but it was never ratified by the required three-quarters of the states. Only 35 of the required 38 states ratified the ERA. 

The political litigation strategy was been successful. Court rulings limited gender discrimination. Women’s rights advocates argued that courts should treat gender more like race when considering the enforcement of anti-discrimination laws. Doing so would make gender discrimination more like racial discrimination: a suspect classification. The Court did hold that the Fourteenth Amendment’s equal protection clause applied to women, but it never accepted the argument that gender discrimination was analogous to racial discrimination. Unlike race-based legislative classifications, which are considered suspect classifications that trigger strict scrutiny, the Court has never considered gender classifications suspect classifications that trigger strict scrutiny. But courts do closely scrutinize laws that

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The 40th Anniversary of the 1972 Title IX Amendments marked an occasion to assess its impact on educational opportunity. One aspect of the changes is discussed in the National Public Radio report, “40 Years On, Title IX Still Shapes Female Athletes.”

Gender equality is also an issue in the political and legal debates over abortion policy. The impact on women of state laws prohibiting abortion was a central issue in the decision to adopt a legal strategy to challenge abortion laws, a decision that resulted in the Roe v. Wade (1973) ruling that the right to privacy included the decision whether to continue or terminate a pregnancy.

Think About It! Act on It!
Can an individual make a difference by deciding to act on something they believe in? Listen to Sarah Weddington’s story.

http://www.npr.org/2011/10/25/141692830/are-single-sex-classrooms-better-for-kids

http://www.npr.org/2012/06/22/155529815/40-years-on-title-ix-still-shapes-female-athletes

http://www.bbc.co.uk/programmes/p0133chj
Chapter 16: Civil Liberties and Civil Rights

16.48 | Other Legislative classifications

Alienage? Most of the civil liberties provisions refer to “people” or “persons.” The Fifth Amendment provides that no “person” shall be deprived of due process of law. The 14th Amendment prohibits states from denying “to any person” within its jurisdiction the equal protection of the laws. However, these constitutional provisions do not mean that citizens and non-citizens have the same constitutional rights. There are important differences between the rights of citizens and non-citizens because citizenship is a legal status that is relevant in many areas of law. Aliens do not have the same rights as citizens when aliens are entering the United States or when challenging the decision to be deported. Early in the nation’s history, federal legislation targeted aliens, both alien enemies and alien friends. The Alien and Sedition Acts of 1798 are examples of early federal laws that not only treated aliens different than citizens but subjected aliens to harsh treatment. The Alien Act provided that in time of war or a threat against the territorial integrity of the U.S., the president could arrest and deport as “enemy aliens” any males 14 years or older who are citizens or residents of the “hostile” country.

For most of the 20th Century, immigration matters were entirely political in the sense that Congress had plenary power to determine immigration policy. However, as the various civil rights movements increased expectations of equality for more and more individuals in more and more settings, the legal protections afforded aliens expanded. In a 1971 case, Graham v. Richardson, the Court held that alienage was a suspect classification, and that an Arizona law that limited welfare benefits to citizens and created residency requirements for aliens violated the 14th Amendment provision that prohibited a state from denying to any person within its jurisdiction the equal protection of the laws. And in a 1982 case, Plyler v. Doe, the Court ruled that Texas could not deny public education to undocumented aliens.

But states were not required to treat aliens and non-residents the same as citizens who were residents of the state. A state can charge out-of-state individuals higher college tuition rates and higher fishing and hunting license fees for example. And states can require that individuals who hold certain public sector jobs (including teachers and police officers) be citizens. And states can restrict certain government benefits to citizens. In an interesting 2001 case dealing with a federal citizenship law that was based on both alienage and gender classification, the Court explained that the government had a valid legislative purpose when imposing different requirements for a child to become a citizen depending upon whether the citizen parent is the mother or the father. The law made it easier for a child to become a citizen if the mother was the citizen parent than if the father was the citizen parent. So public policy can make a distinction between a citizen mother and a citizen father. This is an example of how equality, and equal protection of the laws, does not mean treating everyone the same.14

Personhood? Constitutional rights have been expanded to corporations, which are artificial persons. Should constitutional rights be expanded to unborn persons or pre-born persons or fetuses? Pro-life groups have supported a personhood amendment which would specify that the word person in the Fourteenth Amendment includes unborn children so that they could not be denied due process or equal protection of the laws.
Class? Public policies can also treat people different based on income without violating the equal protection of the laws. Public policies that provide government benefits (social security or Medicaid or food stamps) based on income create economic classifications. Tax policies may also treat people different based on income. Progressive income tax laws treat individuals different based on their income, with lower tax rates for lower income levels and higher rates for higher income levels. The history of the federal income tax shows how this occurs. In 1861, Congress passed an income tax law that established a flat 3% tax on incomes over $800. Since then, income tax law has incorporated graduated and even progressive tax rates, and inheritance taxes typically treat estates different based on the size of the estate. What’s in a name? The NPR story “How We Got from Estate Tax to ‘Death Tax’” explains the importance of political rhetoric in framing the terms of political debates.

Most states have public school funding policies that rely heavily on property taxes. The result is large disparities in the amount of money available to school districts. School districts in rich communities have much more money than school districts in poor communities. Does this violate the 14th Amendment equal protection of the laws? The San Antonio Independent School District filed a lawsuit on behalf of its poorer students arguing that Texas’ property tax violated the equal protection of the laws. The Supreme Court disagreed, holding that the 14th Amendment does not require exactly equal funding of districts, that some funding disparities are legal. Most states do transfer some money from wealthier communities to poorer communities in order to reduce funding disparities. These Robin Hood policies of taking from the rich and giving to the poor are generally supported by liberals more than conservatives.

16.5 | The Conservative Civil Rights Movement

The story of civil rights is usually told as the story of (primarily) liberals who used political litigation to achieve greater equality for various political minorities: blacks, women, the elderly, children, gays/lesbians, aliens, handicapped, patients, even prisoners. There is also a conservative civil rights movement that advocates for conservative rights: the right to life (to define an unborn child or fetus as a person); property rights; business rights; gun rights; and religious rights. Like liberal public interest groups before them, conservative public interest groups adopted political and legal strategies to achieve their public policy goals. They used political litigation to challenge campaign finance regulations, zoning laws, and gun control laws. These efforts have been very successful in changing the law. The Supreme Court has ruled that the Second Amendment guarantees an individual right to keep and bear arms, defined campaign contributions as freedom of expression, and expanded property rights claims against government zoning and environmental regulations.

16.6 | Crime Policy

One answer to the question “Why do we have government?” is that creating and maintaining public safety is a core government function. Preventing and investigating crime, prosecuting and trying suspects, and punishing convicted offenders are basic responsibilities of governments everywhere. Public opinion polls indicate that crime is one the most important problems facing the nation.
The following sections have three main goals:

- Explaining ideological thinking about crime. It uses the crime control model of justice and the due process model of justice to explain conservative and liberal thinking about the causes of crime and criminal justice policies that are intended to fight crime.

- Providing basic information about criminal law. This includes constitutional law—particularly the criminal law provisions in the Bill of Rights—and statutory law.

- Describing the criminal justice system, particularly the police, the courts, and corrections.

Crime policy is central to the power problem because the government has the power to take a person’s life, liberty, and property—as long as it does so after providing the person with due process of law. Americans expect government to provide safe homes, streets, subways, and parks. For most of the nation’s history, criminal justice was almost exclusively the responsibility of state and local governments, but today all levels of government are involved with crime policy: local governments have police departments; state governments make and enforce criminal laws in the state; the federal government makes and enforces criminal laws for the nation; and international institutions make and enforce crime policies that target specific transnational criminal activity such as money laundering, drug dealing, and terrorism.

Elections have policy consequences. The president has a great deal of discretion to determine the criminal justice priorities of the Department of Justice. President Trump’s Attorney General Jeff Session established a strong crime control record as a Republican Senator from Alabama. The Trump administration’s Department of Justice has priorities

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Source: Gallup. July 8-11, 2010. “What do you think is the most important problem facing this country today?”
that are very different than the Obama administration’s Department of Justice. The Obama administration’s DOJ priorities included

- Supporting a bipartisan criminal justice reform to end the mass incarceration that made the U.S. rank number one in the rate of incarceration;
- Making sentencing less punitive, particularly for low-level drug convictions such as marijuana possession;
- Establishing priorities for enforcement of immigration laws that targeted violent criminals for deportation; and
- Initiatives that investigated civil rights violations in police departments and implemented plans to reduce them by, among other things, increasing training.

Under Attorney General Sessions, the DOJ priorities were

- Stricter enforcement of immigration laws;
- Reviving the war on drugs;
- Ending the initiatives to reduce civil rights violations by police departments; and
- Emphasizing fighting street crime rather than white-collar (financial) crimes.

16.61 | Crime Policy

An ideology is a set of beliefs and a program for acting on them. One of the beliefs is typically about crime. Crime policy is one of the issues that over the last several decades have consistently divided liberals and conservatives, and Democrats and Republicans. There are ideological and partisan differences of opinion about the causes of crime, the best ways for criminal justice officials to fight crimes, and the purposes of punishment. Science and social science have extensively studied the causes of crime. There are two basic theories explaining the causes of crime: the human nature theory and the social theory. The human nature theory attributes crime to human nature generally and individually. Human nature is generally capable of evil, and individuals who commit crime have demonstrated that capacity. Accordingly, individuals should be held responsible for their criminal acts. There are actually two variations of human nature theory. The first variation is the belief that some people are simply born bad: they have bad seed or an evil nature. The second variation is that human beings are by nature rational actors who make choices. Criminals choose to commit a crime rather than to obey the law because they think they will gain from the illegal act. In everyday life, people calculate the costs and benefits of different courses of action, and some sometimes choose crime. They are to blame for crime.

The social theory of crime explains the fact of crime as caused by social circumstances, economic conditions, or cultural values. Accordingly, people are not born criminal. Criminals are made not born by social conditions such as
poverty or wealth, domestic violence, racial or ethnic discrimination, neglect or abandonment or just a bad upbringing, poor education, or some other condition or treatment. Note that the above list includes both poverty and wealth as social causes of crime. Poverty is most often mentioned as a social cause of crime. Some crime figures are even portrayed sympathetically or even heroically because of their dire economic circumstances or their willingness to take from the rich and give to the poor. Far less attention is paid to wealth as a social cause of crime. But wealth, particularly the sense of entitlement or the opportunity to commit white-collar crimes such as fraud can be a social cause of crime.

Ideological beliefs about the causes of crime have a major impact on crime policy, particularly sentencing policies. The purposes of punishment include deterrence, incapacitation, retribution, and rehabilitation. The belief that criminals are evil justifies punishment policies that emphasize incapacitation and retribution. The belief that criminals are rational actors justifies policies that make the costs of crime higher than the benefits. The belief crime is caused by poverty or discrimination justifies punishment policy that encourages rehabilitation. The American political culture of individualism creates support for punishment policies that hold individuals responsible for their actions, including crimes.

The social theory of crime plays an interesting role in American popular culture, which includes memorable images of outlaws who are portrayed as people who were driven to their lives of crime by injustice. The social injustice (economic or political exploitation) transforms the victim into a Robin Hood figure who steals from the rich and powerful and gives to the poor and powerless. This is the mythology surrounding some of the notorious criminal figures in American history: Jesse James, Butch Cassidy and the Sundance Kid, Bonnie and Clyde (pictured), and even Al Capone. The enduring appeal of their criminal exploits is at least partly due to their images in popular culture as victims of social circumstances or outsiders who challenge a corrupt establishment.

In terms of the politics of crime, liberals generally support the social theory of crime. It has exposed liberals to the charge that they are blame society firsters who are soft on crime. Conservatives generally support the human nature theory. The fact that they blame individuals for their criminal acts and support punishment rather than rehabilitation has resulted in the fact that conservatives are considered tough-on-crime.

The Due Process and Crime Control Models of Justice are useful for explaining liberal and conservative thinking about crime.\footnote{The crime control model emphasizes effective crime fighting more than protecting individual rights. The due process model of justice emphasizes protecting individual rights by among other things providing due process of law to suspects and defendants because it is better for 100 guilty to go free than one innocent person found guilty. The two models represent the ends of a spectrum of thinking about crime. Members of the general public, government officials, and even judges are called conservative or liberal because of how much they value rights or effective crime fighting. Liberals generally support using due process rights to check the government’s power while conservatives generally defend the power of police and prosecutors as key figures in the war on crime.} The crime control model emphasizes effective crime fighting more than protecting individual rights. The due process model of justice emphasizes protecting individual rights by among other things providing due process of law to suspects and defendants because it is better for 100 guilty to go free than one innocent person found guilty. The two models represent the ends of a spectrum of thinking about crime. Members of the general public, government officials, and even judges are called conservative or liberal because of how much they value rights or effective crime fighting. Liberals generally support using due process rights to check the government’s power while conservatives generally defend the power of police and prosecutors as key figures in the war on crime.
Incarceration (imprisonment) is not the only form of punishment, but it is
certainly the one that receives the most public attention. Trials and prisons capture the
public’s imagination. The rate of incarceration is one of the most common measures of
sentencing policy. The following describes some changes in punishment policy over
roughly the last century.

Table 16.63
RATE (PER 100,000 RESIDENTS) OF SENTENCED PRISONERS IN STATE AND
FEDERAL INSTITUTIONS
[Sourcebook of Criminal Justice Statistics, 1985; and Bureau of Justice Statistics]

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate (per 100,000 Residents)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925</td>
<td>79</td>
</tr>
<tr>
<td>1930</td>
<td>104</td>
</tr>
<tr>
<td>1935</td>
<td>113</td>
</tr>
<tr>
<td>1940</td>
<td>131</td>
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<tr>
<td>1945</td>
<td>98</td>
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<td>1950</td>
<td>109</td>
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<tr>
<td>1955</td>
<td>112</td>
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<td>1960</td>
<td>117</td>
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<td>1965</td>
<td>108</td>
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<td>1970</td>
<td>96</td>
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<tr>
<td>1975</td>
<td>111</td>
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<tr>
<td>1980</td>
<td>138</td>
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<tr>
<td>1985</td>
<td>201</td>
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<tr>
<td>1990</td>
<td>292</td>
</tr>
<tr>
<td>2000</td>
<td>481</td>
</tr>
<tr>
<td>2002</td>
<td>702</td>
</tr>
<tr>
<td>2005</td>
<td>737</td>
</tr>
<tr>
<td>2010</td>
<td>500</td>
</tr>
</tbody>
</table>

The above table shows changes in the RATE of incarceration for various years. The total
prison population on December 31, 2010 was 1,612,000. The increase in the rate
beginning in the latter 1970s and the recent decline beginning in 2010 reveal the life
cycle of the crime control model of justice.
Social scientists try to explain public policies. What explains crime policy—particularly rates of incarceration? What explains the long-term increase in the rates of incarceration, and then what explains what appeared to be the recent decrease in the rate of incarceration beginning around 2010? Does the U.S. have high, medium, or low rates of incarceration? One way to determine whether the rates are high or low is to examine historical rates, look at trends, and to compare sentencing rates with other countries.

“We’re Number One!” U.S. Inmate Count Dwarfs Rest of World
http://www.sentencingproject.org/template/page.cfm?id=107

It is logical to expect that there is a causal relationship between crime rates and the rate of incarceration, so that a country like the U.S. with a high crime rate would also have a high rate of incarceration. And it is logical to expect that increases in crime rates would produce increases in the rate of incarceration. But the relationship between crime and punishment is more complicated than simply changes in the rate of crime (increases or decreases) produce changes in the rate of incarceration (increases or decreases).

For example, for the past several decades the crime rate has been stable or even declining while the rate of imprisonment continued to increase. So legal scholars have studied other variables that might explain rates of incarceration:

- The Media Effect. Do media news stories and legal fiction tend to promote crime control values by focusing on crime as a public problem independent of actual crime rates?
- Ideology. Is conservative thinking about crime, specifically crime control values, a factor that explains the high rate of incarceration despite stable or even declining crime rates?
• Economics. Crime and punishment are big business. Does privatization—specifically the creation of a private, for-profit sector of the economy that makes money from imprisoning criminals and detaining immigrants create incentives for businesses to increase rates of incarceration?

When he left office, President Dwight Eisenhower warned the country about the creation of a military-industrial complex. The military-industrial complex is a term that refers to how the defense issue network works together to maintain and increase the defense budget. The congressional defense committees, the department of defense, and the aerospace and defense industries, have political and economic relationships that work together for their special interests. The term prison-industrial complex refers to the crime issue network that works together to maintain a large prison population. The issue network consists of private companies (the private, for-profit companies that build and run prisons and provide services such as food, health care, transportation, reentry programs for parolees); state and local government officials who consider prisons important to local economies; and prison guard unions that lobby to protect prison jobs.

In poorer states and rural regions, state and local government officials consider prisons part of economic development. In communities such as Walnut Grove, Mississippi, or Louisiana, a poor state with a relatively weak economy, for-profit prisons have been a growth industry. In Texas, the privatization of prisons created communities that became dependent on for-profit prisons for jobs and for taxes. The dependency was politically beneficial when the rate of incarceration was increasing but it became problematic as the rate of incarceration declined and private prison profits declined.

The Bill of Rights includes provisions that protect against unreasonable search and seizure, self-incrimination, violations of due process, and cruel and unusual punishment. It also guarantees the right to trial by jury, the assistance of counsel, and the right to confront the accuser. Why do so many of the provisions of the Bill of Rights limit the government’s criminal justice powers? Were the Founders soft on crime? Were the Founders trying to protect suspects and criminals? The answer to these questions is that the Founders were very concerned about the government criminal law powers. Their concerns were rooted in their political experiences. The government’s criminal law powers are indeed worth thinking about because the government can take a person’s property, liberty, and even life—as long as it provides due process before it does it. The Founders had lived through the period when the English King and colonial governors used criminal law powers for political purposes—to punish opponents or critics. The political use of criminal justice powers explains why the Fourth Amendment declared that individuals had a right to be free from unreasonable searches and seizures, why the Fifth Amendment guarantees due process of law and the right against self-incrimination, why the Sixth Amendment guarantees the right to a jury trial, and why the Eighth Amendment prohibits cruel and unusual punishment. The fact that these provisions of the Bill of Right are written in such general language means that criminal cases have been such an important part of the Supreme Court’s docket.
16.62 | *The Second Amendment*

Gun rights are an important part of American political culture. The Second Amendment declares, “A well regulated Militia being necessary to the security of a free State, the right to keep and bear Arms shall not be infringed.” There are two readings of this Amendment: an individual rights reading and a federalism reading. For 70 years the Supreme Court read the Second Amendment as a provision of the Constitution that was intended to protect state militias from the federal government. This is the federalism reading of the Second Amendment. It holds that the Second Amendment was included in the Bill of Rights to protect the states from the federal government. The new Constitution reduced the powers of the states and greatly increased the power of the federal government by among other things, giving Congress the power to create a military. The Second Amendment protected state militias by preventing the federal government from abolishing state militias. This federalism reading of the Second Amendment is a “state’s rights” reading.

Then in *District of Columbia v. Heller* (2008) the Court ruled that the Second Amendment guaranteed an individual right to keep, bear, and use arms. Justice Scalia’s opinion for the 5–4 majority held that the right was a fundamental right that had two basic purposes. The first purpose is self-defense. Individuals have the right to keep and bear arms to fight crime. The second purpose is more explicitly political. Individuals have the right to arm themselves to fight against government tyranny. This right includes the right of racial minorities to arm themselves against a majority. Justice Scalia did acknowledge that the right to keep and bear arms was not an absolute right, and he stated that the ruling did not raise questions about existing gun control laws such as the long-standing prohibitions against felons owning guns. However, the ruling left it up to future cases to determine which gun control laws were constitutional. Because Second Amendment rights are fundamental freedoms, the government has the burden of proof to demonstrate that gun control laws serve a compelling interest. The *Heller* ruling also did not say whether the Second Amendment applied to the states (and local governments). In *McDonald v. Chicago* the Court ruled that it did, so now individuals can use the Second Amendment to challenge state and local gun laws. The right to use arms to fight crime is less controversial than the right to use arms to hold the government accountable.

**Think About it!**

Does the Second Amendment give individuals or groups of individuals a constitutional right to armed rebellion against the government? Read about the Stono Slave Rebellion in South Carolina in 1739.

[http://www.pbs.org/wgbh/aia/part1/1p284.html](http://www.pbs.org/wgbh/aia/part1/1p284.html)

16.63 | *The Fourth Amendment*

The meaning of the Fourth Amendment has changed over time. The Court originally interpreted the Fourth Amendment to places and things. The home and papers were given
greater protection than other places and things. In *Olmstead v. U.S.* (1928) the Court ruled that the government did not have to get a search warrant before wire-tapping a suspect because a wiretap was not a physical search or an actual seizure. The Court considered wiretap technology something that enabled the government to listen to a telephone conversation without actually searching or seizing anything. Technology has greatly increased the government’s power to gather information without ever physically seizing or searching anything. As a result, courts today interpret the Fourth Amendment more broadly. In *Katz v. U.S.* (1967) the Court held that wiretapping was a search and seizure that triggered the Fourth Amendment warrant protections.

The Fourth Amendment provides constitutional protection against unreasonable search and seizure. But it does not define what an unreasonable search is—or what a reasonable search and seizure is. The Court’s case law defines these provisions of the Fourth Amendment. The general rule is that a search is reasonable if a warrant is obtained from an independent magistrate (a judicial branch official). In order to obtain a search warrant, the police must convince the magistrate that there is probable cause that search of person or place will produce evidence of the criminal activity that they are investigating. This is the rule. There also is a long list of exceptions to the rule that a reasonable search requires a search warrant:

- **Consent**—an individual can knowingly give up the right to have a warrant.
- **Stop and frisk**—a stop is not really an arrest and a frisk is not really a search so a warrant is not required for a police officer to stop and frisk a person. (*Terry v. Ohio*)
- **Plain view**—if the police officer has a right to be where he or she is, then contraband and evidence can be seized without first getting a search warrant. The plain view doctrine also applies to concept of “open fields,” which includes fields, buildings, garbage put out at the curb, and material seized using technology such as helicopters, drones, and even infrared technology when used to see or otherwise detect using thermal imaging marijuana grow houses.
- **Incident to a lawful arrest**—a police officer may search the area under immediate control of a person in order to ensure officer safety or to preserve evidence.
- **Hot pursuit**—a police officer in hot pursuit of a suspect does not have to stop the chase, get a search warrant, and then resume the pursuit.
- **Motor vehicles**—the mobility of motor vehicles presents special problems so there are many circumstances where warrant-less searches are allowed. Motor vehicles, telephones, cell phones, and computers are examples of how technological developments have changed reading of the Fourth Amendment’s protection of persons, houses, papers and effects from unreasonable searches.
- **Drug testing**—the government has a compelling interest in public safety, therefore certain employees such as railway workers and customs officials can be required to submit to drug tests without warrants, probable cause, or individualized suspicion.
- **Schools**—schools are special institutions, therefore the standard for justifying the search of a student’s locker or backpack is merely whether the search was
reasonable rather than the higher standard of probable cause that the search will produce evidence of criminal activity.

- **Administrative searches**—Fourth Amendment rights are not as strong in settings other than criminal justice, such as enforcement of game laws by searching coolers or freezers, business regulation and inspection, food safety inspections of restaurants, immigration law enforcement, and enforcement of public housing rules.

- **National security**—Fourth Amendment protections are weaker than in other areas of law. The Foreign Intelligence Surveillance Act of 1978 created a special legislative court system, the foreign intelligence surveillance court (FISC), which reviews government requests to gather intelligence without having to show probable cause. The USA PATRIOT ACT removed the “wall of separation” between intelligence gathering and criminal prosecution. The Federal Bureau of Investigation can issue National Security Letters demanding that individuals or companies produce requested information, and the National Security Agency has conducted secret intelligence surveillance.\(^{17}\)

The general rule is that the Fourth Amendment requires a search warrant for a search and seizure to be constitutional. The large number of exceptions to the rule raises an interesting question. Is it still accurate to say that search warrants are required in order for a search to be constitutional? The rule is misleading. Would it be more accurate to say that there is a new rule: a warrant is not required for a search to be constitutional except under certain circumstances?

The Fourth Amendment declares a right to be free from unreasonable searches and seizures. But it does not provide a remedy for violations of that right. The Supreme Court has provided one (for violations of the Fourth Amendment or the 5\(^{th}\) Amendment due process of law). The remedy is called the **Exclusionary Rule**. The Exclusionary Rule is a judge-created policy that evidence obtained illegally cannot be used in court to obtain a conviction. The Exclusionary Rule was first created and applied to federal courts in *Weeks v. U.S.* (1914). In *Mapp v. Ohio* (1961) the Warren Court applied the Exclusionary Rule to state courts.

Conservatives have consistently opposed the Exclusionary Rule for several reasons. First, the Exclusionary Rule is a legal policy that the Supreme Court created. As such, it is an example of judicial activism or legislating from the bench. Second, the Exclusionary Rule allows the guilty to go free on what conservatives consider legal technicalities such as the failure to get a search warrant or a warrant with a typographical error. The Exclusionary Rule does indeed sometimes allow a person to get away with murder. In those cases where a confession or a gun or a weapon is ruled inadmissible in court because the evidence was illegally obtained, a guilty person gets off on a legal technicality. Critics of the ER do not think that evidence should be given the “death penalty” merely because of the way it was obtained. Finally, conservatives oppose the Exclusionary Rule because they prefer giving police officers broad discretion to use their judgment to decide how best to go about doing their job. This difference between liberal and conservative views on how the criminal justice system should work is the reason for Tom Wolfe’s quip in *The Bonfire of the Vanities*, the 1987 satirical novel about greed, race, and class in New York City, that a conservative is a liberal who was mugged (and
want to get tough on crime), and a liberal is a conservative who was arrested (and quickly lawyers up). It also reflects the differences between the crime control and due process models of justice.

In fact, since the Warren Court the Court has become more conservative and significantly limited the ER by creating exceptions to the rule that illegally obtained evidence cannot be used. The exceptions include:

- **Grand jury**—illegally obtained can be presented to a grand jury.
- **Harmless error**—if the police made a harmless error the evidence can be used.
- **Civil court**—the ER does not apply to civil courts.
- **Good faith**—if the police made a good faith mistake the evidence can be used.
- **Independent source**—if the evidence could have been obtained through another source, then it can be used.
- **Inevitable discovery**—if the evidence would have been discovered inevitably, it can be used.
- **Public safety**—if the police acted illegally, but to ensure public safety, the evidence can be used.
- **Preventive detention**—the ER does not apply to decisions about whether a person should be detained in order to prevent a criminal act.
- **Parole revocation**—the ER does not apply to decisions to revoke parole.
- **Prisoners**—the ER does not apply to disciplinary hearings for inmates.
- **Impeaching a witness**—illegally obtained evidence can be used to impeach a defendant’s own testimony or that of an accomplice.
- **Physical evidence**? An emerging exception is for physical evidence (e.g., a gun a bullet or a knife) as distinct from testimonial evidence (e.g. a confession)?

The growing exceptions to the Exclusionary Rule raise the same question that has been raised about the rule that a search warrant is required for a search to be reasonable: Does the long and growing list of exceptions to the ER mean that the exceptions have now become the rule? Both examples do illustrate how changes occur in the reading of the U.S. Constitution’s protections for civil liberties. The words in the Constitution may not change but their meaning does—and the changed legal meanings reflect political (ideological) changes.

**16.64 The Fifth Amendment**

The Fifth Amendment includes a number of provisions that protect individual liberties: protection against self-incrimination, protection against double jeopardy, and a guarantee of due process of law:
Think about it!

Should the police, soldiers, or CIA agents do whatever it takes to get information from a suspected criminal, enemy, or terrorist?

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

The provision protecting against self-incrimination has ancient roots in the English tradition of common law. The right is central to one of the most important and familiar features of the U.S. legal system: the assumption that a person is innocent until proven guilty. The assumption of innocence places the burden of proof on the accuser (the government). The accused does not have to prove that they are not guilty as charged. The government must prove beyond a reasonable doubt that the accused did what they were accused of doing. Why place the burden of proof on the government? It would certainly be easier to obtain convictions if the accused had to prove they were innocent. The protection against self-incrimination can be traced to the reaction against religious investigations (inquisitions) that used torture in order to obtain confessions of sin. The story of John Lambert the heretic (1537) illustrates the revulsion against using torture to obtain confessions of sin (or otherwise):

“No man ever suffered more diabolical cruelty at the stake than this evangelical martyr, he was rather roasted than burnt to death; if the fire became stronger, or if the flame reached higher than they chose, it was removed or damped. When his legs were burnt off, and his thighs were reduced to mere stumps in the fire, they pitched his broiling body on pikes, and lacerated his flesh with their halberds. But God was with him in the midst of the flame, and supported his spirit under the anguish of expiring nature. Almost exhausted, he lifted up his hands, such as the fire had left him, and with his last breath, cried out to the people, NONE BUT CHRIST! NONE BUT CHRIST! These memorable words, spoken at such a time, and under such peculiar circumstances, were calculated to make a deeper and more lasting impression on the minds of the spectators, than could have been effected by a volume written on the subject. At last his remains were beat down into the flames, while his triumphant soul ‘mocked their short arm, and, quick as thought, escaped where tyrants vex not, and the weary rest.’”

The religious justification for torturing a person was to ensure that sinners confessed before meeting their maker.

Think about it! Conservatives think the Exclusionary Rule is an inappropriate remedy for violations of the Fourth Amendment. They recommend a tort law remedy: to sue the police for wrongful injury. Would this work?
The use of the “third degree” by police officers in order to obtain confessions of crime was traditionally considered a politically and legally acceptable practice. However, in *Brown v. Mississippi* (1936) the Supreme Court held that torturing suspects was unconstitutional—in a case where the police torture appeared to have produced a tainted confession by a man who simply wanted the pain to stop. The Court ruled that due process of law prohibits trial by ordeal: “The rack and torture chamber may not be substituted for the witness stand.”

The Fifth Amendment provision prohibiting a person from being “compelled to be a witness against himself” is not limited to forced confessions. The Supreme Court has broadened the scope of the Fifth Amendment so that suspects have a constitutional right to be informed of their constitutional rights prior to being questioned. This was the holding in the landmark case of *Miranda v. Arizona* (1966), which resulted in police officers reading suspects their Miranda Warnings. This decision is probably depicted in popular culture (television police shows and crime films) more than any other Court ruling.

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney. If you cannot afford an attorney, one will be appointed for you. Do you understand these rights as they have been read to you?

—Typical Miranda Warning

The Sixth Amendment includes several provisions that provide rights in the criminal justice system.

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

The traditional reading of the Sixth Amendment right to the assistance of counsel was that a defendant had the right to pay for a lawyer if the defendant could afford one, but the state had no obligation to provide a defendant with a lawyer. However, in the 1930s, beginning with *Powell v. Alabama* (1932), the Court began to require states to provide defendants with lawyers in capital punishment cases involving special circumstances. The special circumstances included cases where there was evidence of racial hostility. Over time, number of special circumstances expanded to include cases involving very young offenders, poverty, illiteracy or a lack of education. The modern
understanding of the right to the existence of counsel is that the right applies in all cases where an individual could lose his or her liberty.

16.7 | The Criminal Justice System

The criminal justice is the system of policies and institutions that are used to maintain public order, deter crime, investigate crimes, prosecute and try the accused, and punish individuals who have been convicted of crimes. Criminal justice was traditionally the responsibility of state and local governments. Beginning in the 1930s, the federal government began to make crime a national issue. The U.S. department of Justice and then the federal courts were concerned about corruption in state and local criminal justice systems, the emergence of organized crime that crossed local and state jurisdictions, and racial discrimination in law enforcement. The Warren Court’s criminal justice rulings resulted in federal judicial supervision of state criminal justice policies. The liberal rulings expanded the rights of suspects and prisoners. Then, beginning in the 1960s, the media called an increase in crime a crime wave. Crime was transformed from a local/state issue into a national political issue—but for different reasons. Liberals wanted the national spotlight focused on the social causes of crime. Conservatives wanted crime control. The national political debate was shaped by conservatives who blamed liberals and judges for expanding rights in ways that made it harder for police to fight crime. The result was further “federalization” of crime, but now it was for getting tough on crime rather than providing more federal protection of the rights of suspects and prisoners in the states. The 1967 President’s Commission on Law Enforcement and Administration of Justice was charged by President Johnson to develop a plan that would allow us to “banish crime.”

The Commission’s Report, “The Challenge of Crime in a Free Society,” made more than 200 recommendations as part of a comprehensive approach toward preventing and fighting crime. Some of the recommendations were included in a major new federal law, the Omnibus Crime Control and Safe Streets Act of 1968. This Act established the Law Enforcement Assistance Administration (LEAA), which provided federal grants for research on criminology, including the study of the social aspects of crime. As a result, universities created academic programs in criminology and criminal justice that eventually included sociology, psychology, and public law in departments of political science—disciplines that provided a comprehensive study of the causes of crime and the organization and operation of the criminal justice system.

The Omnibus Act recommended that the criminal justice system be made more effective by improving coordination among the three main components of the criminal justice system: police, courts, and corrections. The politics of the 1968 Omnibus Crime Control Act are very interesting. It was passed in spring of 1968 by a Democratic Congress that was worried that Democrats were going to do badly in the upcoming fall elections because they were increasing seen as soft on crime and a time when the public was becoming much more worried about street crime than police brutality. Republicans
sensed the public fear of crime and took tough on crime positions while portraying Democrats as soft on crime. Republican Richard Nixon’s presidential campaign used getting tough on crime rhetoric and when he took office he began implementing crime control policies.

Two criminal justice issues that divide the ideological right and left are gun control and capital punishment. Guns are an important part of American political culture therefore debates about the wisdom and the legality of using gun control to increase public safety are often heated. Liberals generally support gun control as crime control. Conservatives generally oppose gun control as crime control. The debates are partly about effectiveness: the question whether gun control affects rates of crime and levels of public safety. The debates are also about rights. The Second Amendment guarantees the right to keep and bear arms. For a seriously funny alternative to gun control as a way to reduce violence listen to comedian Chris Rock’s routine recommending bullet control rather than gun control. Can the constitutional problems with gun control be avoided because the Second Amendment mentions the right “to keep and bear arms” but says nothing about the right to keep and use bullets?

16.71 | Criminal Law

Law is a system of rules that are backed by sanctions for not complying with them. Sanctions mean that compliance is not voluntary. The U.S. legal system is divided into two forms of law: civil law and criminal law. Civil laws are generally the rules that govern interactions between individuals or organizations. Civil law is sometimes called private law because it does not usually involve the government. Business contracts, for example, are typically private law. Criminal laws are the system of rules that 1) define what behaviors are considered illegal and therefore criminal; 2) the legal procedures used to investigate, prosecute, and try those who are accused of crimes; and 3) the punishments (i.e., the sentences) that are considered appropriate for convicted offenders. Criminal law is public law for two reasons. First, crimes are considered harmful to both the individual victim and society in general: crimes are offenses against the public order. Second, the government prosecutes and punishes offenders.

The primary purposes of criminal law are to protect individuals from being harmed by others and to punish those who commit crimes. All countries have criminal laws. The oldest known codified law is the Code of Hammurabi, which was established around 1760 BC in ancient Mesopotamia. Historically, criminal law was private law in the sense that individuals and groups provided their own protection and punished offenders rather than relying on government to do so. The development of professional criminal justice officials (including police, prosecutors, and judges) and a system of codified laws (to replace common law), have diminished the layperson’s role in delivering justice. However, in recent years vigilantism (individuals or organizations taking the law back into their own hands) and the gun rights movement have expanded the layperson’s role.
16.72 | The Criminal Justice System

The criminal justice system consists of three main parts: (1) the police (sometimes called law enforcement; (2) the courts; and (3) corrections (jails and prisons). The police (including police officers and sheriffs), judges, and corrections officials (including guards and wardens) are all part of the criminal justice system. Another important set of criminal justice officials are prosecutors, who can be considered part of the policing or law enforcement function.

16.73 | The Police

A police officer is the criminal justice official that the typical person is most likely to have contact with. Police officers are in the community patrolling neighborhoods, streets, and areas where people congregate. The police are also the first criminal justice officials that an offender will have contact with because it is the police who investigate crimes and make arrests. The primary functions of the police are to prevent and investigate violations of criminal laws and to maintain public order. Police officers are empowered to use force and other forms of legal coercion and legal means to effect public and social order. The word police is from the Latin *politia* (“civil administration”), which itself derives from the Ancient Greek word for *polis* (“city”). The London Metropolitan Police established in 1829 by Sir Robert Peel is considered the first modern police force. It promoted the police role in preventing and deterring urban crime and disorder rather than the tradition reactive role of investigating crimes that had already been committed. In the United States, police departments were first established in Boston in 1838 and New York City in 1844. Early police departments were not held in very high regard because they had reputations for being incompetent, corrupt, and political.

In the 1990s, the New York City Police Department developed CompStat (*Computer Statistics*) an information-based system for tracking and mapping crime patterns and trends. CompStat is also a tool for holding police departments accountable for dealing with crime. It has been replicated in police departments across the United States and around the world, and is an example of computer information systems are applied to organizations related to policing. The **Federal Bureau of Investigation** is the pre-eminent law enforcement agency in the U.S. It is responsible for investigating interstate crimes and crimes violating federal laws. Although the FBI is the most prominent police organization, it accounts for only a small portion of policing activity in the U.S. Most policing activities such as order maintenance and services such as crowd control or security are actually provided by a broad range of state and local organizations (e.g., state highway patrols; county sheriffs; city police; and school police).
The courts are examined in a separate chapter so this section provides a brief description of criminal trials. A trial is, in its simplest terms, a fact-finding process. In the U.S., the primary function of a trial court is dispute resolution. In the criminal justice system, the primary figures are the judge, the jury, the prosecutor, and the defense attorney. The courtroom work group also includes magistrates (who may perform some of the preliminary or ministerial functions of a trial), probation or parole officers, and other professionals who provide relevant information about a defendant or convicted offender. In the past, judges did not have to be lawyers. Justices of the peace were elected members of the community similar to other local leaders. Today, however, a judge in a criminal case is a lawyer. The jury, however, consists of lay people. The U.S. uses this combination of professional and lay people more than most countries, which have decreased their reliance on lay juries. It is a reminder of the close relationship between politics and law in the U.S. administration of justice.

The U.S. legal system is an adversarial system. An adversarial system is one where each of the two parties, the adversaries, presents its side of the case and challenges the other side’s version of the facts and understanding of the law during a trial or a hearing. A neutral third party—a judge, a panel of judges (some appeals courts hear cases with panels of judges), or a jury—decides the case. The case should be decided in favor of the party who offers the most sound and compelling arguments based on the law as applied to the facts of the case.

The adversarial process allows each side to present its case to the judge or jury. The judge or jury is the neutral third party. Having a neutral third party settle a dispute between two disputants is one of the oldest and most basic elements of justice—the belief that no one should be a judge of his or her own cause. Justice requires having a neutral third party deciding which side wins the case. In criminal justice, this means that a judge or jury determines whether a person is guilty or not guilty. In some American states, the jury verdict must be a unanimous decision; in others a majority or supermajority vote is enough to obtain a conviction. The prosecutor or district attorney is the government lawyer who brings charges against the person, persons or corporate entity accused of a crime. The prosecutor explains to the court, including the jury if it is a jury trial, what crime was committed and the evidence used to prove the charge. In the U.S. legal system, prosecutors have a great deal of discretion. They can decide whether to charge an individual with a crime, what charge to file, when to go to trial and what kinds of cases to prosecute, and what penalties to ask for upon conviction. For these reasons, prosecutors
are extremely important figures in the criminal justice system. They are not merely bureaucrats who follow orders or implement the law. Prosecutorial discretion makes prosecutors powerful figures.

A defense attorney counsels the accused on the legal process, advises of the likely outcomes, and recommends legal strategies. The accused, not the lawyer, has the right to make final decisions on the most important aspects of their legal strategy, including whether to accept a plea bargain offer or go to trial, and whether to take the stand and testify at the trial. The defense attorney has a duty to represent the interests of the client, raise procedural and evidentiary issues, and hold the prosecution to its burden of proving guilt beyond a reasonable doubt. Defense counsel may challenge evidence presented by the prosecution or present exculpatory evidence and argue on behalf of their client. At trial, the defense attorney typically offers a rebuttal to the prosecutor’s accusations.

The Sixth Amendment right to the assistance of counsel was originally understood to mean only that a person had a right to a lawyer if they could afford to pay for one, a right that was gradually expanded during the 20th Century. The right to a lawyer was first expanded to cases where a person could receive the death penalty (capital cases). Then the right was expanded to all cases where there were special circumstances such as very young defendants, uneducated defendants, or evidence of racial hostility. Then the right was expanded to all felony trials. And then it was further expanded to all serious cases. In the U.S. today, an accused person is entitled to a government-paid defense attorney, a public defender, if he or she cannot afford an attorney and the charge is so serious that a conviction could result in loss of life or liberty. These changes occurred primarily because judges came to consider the assistance of counsel an essential element of the administration of justice.

The vast majority of cases are settled by plea bargains, not trials. **Plea-bargaining** is when the accused pleads guilty in exchange for a reduction in the number of charges or the sentence. Ideally, a plea bargain is a deal that benefits both the prosecutor and the defense. The prosecutor saves time and money, avoids the risk of losing the case, and may include a requirement that the defendant cooperate with the police by testifying against others. The defendant typically gets a reduction in the number of charges, the severity of the charge offenses, a reduced sentence, and avoids the risk of a more serious loss of liberty or even life. Plea bargains settle over 90% of cases. Many nations do not permit the use of plea-bargaining because it can coerce innocent people to plead guilty in an attempt to avoid harsh punishment. Plea-bargaining is also controversial because it creates the public impression that criminals are getting much less punishment than they deserve. Because a plea bargain usually involves getting a sentence that is substantially less than the maximum penalty for an offense, the public tend to think of plea bargaining as evidence that the system is not as tough on crime as it might be.

16.75 | Barriers to Justice

There are a number of ways that the criminal justice system can produce unjust outcomes. The police can coerce confessions or make honest mistakes. Prosecutors may hide exculpatory evidence. Defense counsel can be inadequate. The judge or jury can acquit a guilty person or convict an innocent person. Or a person can be found guilty of a crime that is more or less severe than the one they actually committed. These mistakes
can be intentional (misconduct) or unintentional. Bias presents an interesting case. Bias can undermine decision-making in any setting whether civil or criminal justice, employment, education, or health-care. Individuals can be biased for or against someone or something. A cognitive bias is the tendency to make systematic errors that are based on cognitive factors (what someone believes to be true) rather than the factual evidence. Cognitive biases are a common attribute of human thought, and often drastically skew the reliability of anecdotal and legal evidence. Biases can lead to discrimination. Prejudice on the part of the police, prosecutors, judges, or jurors can undermine the legitimacy and credibility of the legal process.

A prejudice is a prejudgment, an assumption or belief that is made about someone or something without knowledge of the facts. Prejudice is commonly thought of a preconceived judgment toward a person or a person because of race, class, gender, ethnicity, age, disability, religion, or political beliefs. A prejudice can be a positive prejudice (a favorable predisposition) or a negative prejudice (an unfavorable predisposition). Cognitive prejudice refers to what someone believes to be true. Affection Prejudice refers to what people like and dislike (e.g., attitudes toward members of a particular class, race, ethnicity, national origin, or creed). Behavioral prejudice refers to beliefs about how people are inclined to behave. Prejudices are an extremely important issue during the selection of juries. The jury selection process includes lengthy questions about individual backgrounds and attitudes in order to get a better sense of what prejudices might be indicated. If you have ever been called for jury duty you know how important discovering attitudes and biases is in the voir dire process of questioning the jury pool.

Racism is a combination of racial prejudice and discrimination. It involves prejudging a person based on their race or ethnicity. It attributes to individuals characteristics associated with members of a group. Trials are fact-finding processes that use elaborate rules of evidence partly to minimize the impacts of bias.

One additional source of problems in the criminal justice system is inequality of resources. Legal representation is expensive. The lack of adequate financial or other resources puts a person at a significant disadvantage at all stages of the criminal justice process, not just the trial. The states are required to provide public defenders for those who cannot afford legal counsel, but the state systems vary a great deal and public defenders are not paid well in some states. This is particularly troubling in death penalty cases. This is why capital punishment is jokingly explained by the quip, “If you don’t have the capital, you get the punishment.”

16.76 | Corrections

After conviction, an offender is turned over to correctional authorities for incarceration in a detention facility (for juveniles), a jail (for shorter terms, usually less than one year), or a prison. The types and purposes of punishment have changed over the years. In early civilizations, the primary forms of punishment were exile, execution, or other forms of corporal (bodily) punishment such as dismemberment (e.g., amputating the hand of a thief) or branding. Traditional societies also relied extensively on informal methods of
social control. Laws are a formal method of social control that may be supplemented by other, informal methods of social control, such as religion, professional rules and ethics, or cultural mores and customs. Punishment can also be formal or informal. Shame and shunning were ways to censure individuals whose behavior the community considered inappropriate. The Puritan stocks and the scarlet letter are examples of traditional methods of informal social control. Today, however, prisons and jails are the most important methods of punishment. Formal methods of social control—prosecution for violating the law—have replaced informal methods of social control and punishment. Monetary fines are one of the oldest forms of punishment and they are still used today. These fines may be paid to the state or to the victims as a form of reparation. Probation and house arrest are also sanctions that seek to limit an offender’s mobility and opportunities to commit crimes without actually placing them in a prison setting. Many jurisdictions may require some form of public service as a form of punishment for lesser offenses.

William Penn and the Quakers initiated correctional reform in the United States in the latter part of the 17th century. Pennsylvania’s criminal code was revised to forbid torture and other forms of cruel punishment. Quakers advocated replacing corporal punishment with institutions where criminals could be rehabilitated or made penitent—hence the idealistic name penitentiary now more casually called the pen, which is more likely to be thought of as an enclosure.

The purposes of punishment have also changed over time. The Quaker movement is commonly credited with establishing the idea that prisons should be used to reform or rehabilitate criminals. Punishment serves four purposes: incapacitation (removing offenders from the general population; deterrence (sending a message that crime does not pay); rehabilitation (reforming offenders); and retribution (“payback”). Many societies consider punishment a form of retribution, and any harm or discomfort the prisoner suffers is just “payback” for the harm they caused their victims. A third purpose is rehabilitation or reform. One aspect of the shift from liberalism to conservativism has been the shift from liberal thinking about crime to conservative thinking about crime. Beginning in the 1970s, sentencing policy moved away from rehabilitation and toward incapacitation, deterrence, and retribution. This policy change has resulted in the U.S. having the highest incarceration rate in the world. The economic and social costs of maintaining such a large prison population has prompted new efforts to find out who really needs to be imprisoned. Can science be used to better predict who will commit crimes or who is really a psychopath?
Think about it! Can we develop a test to predict who is a psychopath? If so, should we use it to prevent crime? Listen to “Can a Test Really Tell Who’s a Psychopath?” [http://www.npr.org/2011/05/26/136619689/can-a-test-really-tell-whos-a-psychopath](http://www.npr.org/2011/05/26/136619689/can-a-test-really-tell-whos-a-psychopath)

**16.77** | *Capital Punishment*

Capital punishment is probably the most controversial punishment issue. Once widely used in the U.S., it is now limited to capital crimes. Concerns about wrongful convictions, inadequate legal representation, arbitrary or discriminatory application of the death penalty, and a general sense that execution is no longer consistent with the values of civilized societies, have reduced the use of the death penalty. However, efforts to declare it unconstitutional because it violates due process of law or is cruel and unusual punishment have been unsuccessful.

One current death penalty issue is who should be eligible to be sentenced to death. Should mentally handicapped individuals be eligible for the death penalty? At what point does a low IQ score make a person ineligible for the death penalty? Should minors be eligible for the death penalty? Determining the age at which children become culpable for their behavior is a controversial question. It raises political, moral, and increasingly even scientific questions. Recent advances in brain science have greatly increased the understanding of brain development and the relationship between brain development and behavior, including the kinds of youthful risk-taking behavior that include crime. Brain research has discovered that humans have a rather primitive brain, primitive in the sense that the human brain developed from a jellyfish foundation (which is characterized by primitive neural networks), then added a serpent’s brain (which is characterized by simple threat response), and then added the mammal brain (the ape brain).

*Think About It!*


What does this have to do with crime policy? Brain science research has had an impact on thinking about punishment. The Supreme Court Justices tend to be empirical decision makers in the sense that they rely on evidence-based argument for or against a law. When considering the constitutionality of a law that limits television or radio broadcasts of offensive or indecent material, the Justices consider the empirical evidence of the government’s interest in regulating programming. What is the evidence of harm? What percentage of the audience are children during the hours from 10:00 p.m. to 6:00 a.m.? The Justices will also take empirical evidence into consideration when deciding cases involving challenges to laws that make minors eligible for the death penalty. What does the latest brain development research say about the brains of adolescents? Should adolescents be held accountable for their violent actions in the same way that an adult is, and be tried as adults?
In recent years the Supreme Court has decided a number of cases that have limited state crime policies that govern the trial and punishment of minors. In *Eddings v. Oklahoma* (1982), the Court overturned the death sentence of a 16-year-old. In *Thompson v. Oklahoma* (1988), the Court ruled that it was unconstitutional to execute a person who was under age 16. In *Stanford v. Kentucky* (1989) the Court upheld state laws that provided capital punishment for juveniles who were 16 years old or older when they committed the crime. Once the Court ruled that it was unconstitutional to execute minors it had to decide when someone was too young to execute. This required drawing a minimum age line. Could a person who committed a crime at 17, 16, 15, or 8 years of age be sentenced to death? Then in *Roper v. Simmons* (2005) the Court ruled that a person who was under age 18 could not be executed.

### Comparative Death Penalty Policies for Juveniles

https://deathpenaltyinfo.org/execution-juveniles-us-and-other-countries

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**16.78 | Resources**

The U.S. Department of Justice (DOJ) is one of the most valuable sources of information about crime and the federal criminal justice system. The Bureau of Justice Statistics (BJS) is one of the DOJ agencies that gathers and reports criminal and civil justice statistics. The BJS data on crime rates and rates of incarceration and prison populations provide information about a broad range of subjects including public opinion. The BJS reports include the prison population, rates of imprisonment, and changes in rates of imprisonment. The BJS reports also provide information about capital punishment (i.e., “Death Penalty”). The high rate of incarceration during the years of getting tough on crime has made the U.S. the country with the highest rate of imprisonment in the world. The heavy reliance on imprisonment as punishment is a public policy issue because it is expensive to maintain prisons and because there are questions about its effectiveness.

**16.79 | The States**

As sovereign entities in a federal system of government, the states have substantial responsibility for crime policy. Each state can create its own criminal laws and criminal justice system. As a result, crime policies vary widely. The rate of incarceration varies dramatically from state to state and region to region. The Southern states have the highest rates of incarceration. The map below indicates the number of state prison inmates per 100,000 residents. **Incarceration Rates, 2006**
16.8 | Internet Sources

An Overview of Civil Rights: [http://topics.law.cornell.edu/wex/Civil_rights](http://topics.law.cornell.edu/wex/Civil_rights)


Photographs of the Civil Rights Movement in Florida: [http://www.floridamemory.com/OnlineClassroom/PhotoAlbum/civil_rights.cfm](http://www.floridamemory.com/OnlineClassroom/PhotoAlbum/civil_rights.cfm)


The U.S. Department of Justice gathers and reports criminal and civil justice statistics. The Bureau of Justice Statistics data on crime rates and rates of incarceration and prison populations provides important information about criminal justice policies: [http://www.ojp.usdoj.gov/bjs/](http://www.ojp.usdoj.gov/bjs/)


The Florida Department of Corrections also provides information about prisons in Florida at [http://www.dc.state.fl.us/](http://www.dc.state.fl.us/).
Information about Florida’s Death Row (who is on death row, or what a death row cell looks like), is available at: http://www.dc.state.fl.us/oth/deathrow/index.html

**TERMS**

The Crime Control and Due Process Models of Justice

Civil law

Criminal law

Federal Bureau of Investigation

Federalizing Crime

Rates of Incarceration

Adversarial system

Plea bargaining

Prejudice

Legal Discrimination

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1 http://religiousfreedom.lib.virginia.edu/court/us_v_ball.html
4 For additional information about Dred Scott, see http://www.pbs.org/wgbh/aia/part4/4p2932.html
http://www.oyez.org/cases/1851-1900/1856/1856_0
http://www.oyez.org/cases/1851-1900/1882/1882_2
6 See http://www.oyez.org/cases/1851-1900/1895/1895_210/
7 The Missouri case is available at:
http://en.wikipedia.org/wiki/Missouri_ex_rel._Gaines_v._Canada
The Texas case is available at:
The Oklahoma case is available at:
The Kansas case is available at:
9http://americanhistory.si.edu/brown/history/6-legacy/deliberate-speed.html
In *Hoyt v. Florida* (1961) the Court unanimously concluded that the equal protection clause did not prohibit the State of Florida from excluding women from jury duty. See


http://www.equalrightsamendment.org/
http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/nineteenth.htm

See *Reed v. Reed* (1971). One of the lawyers who represented Sally Reed is Ruth Bader Ginsburg, who later became a Supreme Court Justice. Her personal employment experience, and her professional legal experience representing women in court, may explain her voting record as a Justice who is sympathetic to claims of gender discrimination in the workplace.


http://law.jrank.org/pages/13163/Reed-v-Reed.html


On the Foreign Intelligence Surveillance Act Courts, see

http://judgepedia.org/index.php/United_States_Foreign_Intelligence_Surveillance_Court


http://www.pbs.org/wnet/supremecourt/rights/landmark_miranda.html

http://www.pbs.org/wnet/supremecourt/rights/landmark_miranda.html

http://www.quaker.org/wmpenn.html


See http://www.ojp.usdoj.gov/bjs/


17.0 | Global Affairs

Presidents—and their lawyers in the Department of Justice—periodically claim that the president is the sole organ of the national in its dealings with other countries and that neither Congress nor the courts can review a president’s military action as Commander-in-Chief. President Georg. W. Bush simply summarized the political and legal theory supporting these claims when he asserted that he was, in effect, the *decider-in-chief*. This phrase originates with President Bush’s April 2006 rejection of calls to fire his Secretary of Defense, Donald Rumsfeld. In a rather testy tone, President Bush declared, “I hear the voices [calling for Rumsfeld’s firing]…. But I am the decider!” The reference to himself as *the decider* was widely parodied as a claim that the
president is the decider of all things—or at least all things related to war powers and national security.

The statement does illustrate by the main power problem in global affairs is accountability, particularly the difficulty holding presidents politically or legally accountable for the use of power related to war and national security. The power problem in global affairs has been an issue from the founding of the republic to current debates about counterterrorism policy:

- **The Constitutional Convention of 1787.** The delegates to the constitutional convention extensively debated how to hold the government accountable on matters related to war powers and external (foreign) affairs.

- **The early years of the republic.** Accountability remained an important issue during the early years of the republic because the U.S. was surrounded by imperial powers that were ambitious to expand their sphere of influence, and because Native Americans sometimes resisted westward expansion into their lands.

- **Becoming a world power.** The U.S. became an economic and military power during the latter years of the 19th Century. The use of military power to acquire territory and exert influence beyond the nation’s original borders was especially controversial because it conflicted with the country’s identity as a republic opposed to imperial power.

- **Acting as the world’s policeman.** The U.S. assumed the role of world policeman and leader of the free world in the early years of the 20th Century. In a democracy, projecting power abroad raises fundamental questions about legitimacy and accountability.

- **The Cold War.** During the Cold War (1947–1991), the emphasis on secrecy and emergency powers in the global fight against communism weakened the ordinary methods of holding government officials accountable for their actions. The epitome of congressional delegation of power to the president is the 1964 Gulf of Tonkin Resolution which stated that Congress approved the president’s decision as Commander-in-Chief “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”

- **The War on Terror.** On September 18, 2001, Congressional approved the Authorization for the Use of Military Force (AUMF) that granted the president the power to use “all necessary and appropriate force against the nations, organizations, or persons he determines planned, authorized, committed, or aided” the 9/11 terror attacks or “harbored such organizations or persons.” Al Qaeda is the organization responsible for planning and committing the attacks. President Bush claimed the AUMF authorized him to decide to invade Afghanistan and Iraq. President Obama relied on the AUMF to kill Osama bin Laden (the leader of al Qaeda), to continue the wars in Afghanistan and Iraq, and to use drone strikes, bombs, and other military actions against other terrorists and terrorist organizations such as ISIS that were not even in existence when the 9/11 attacks occurred. President Trump has claimed the AUMF grants the president power
implement counterterrorism policy that includes acts of war such as bombing Syrian
government forces. The AUMF’s broad language and the reluctance of either Congress
or the courts to limit the AUMF to those connected to the 9/11 terror attacks illustrates
how ineffective the legal model of accountability has become.

Global affairs include foreign policy, national security policy, and war powers. Foreign
policy is the federal government’s plans to advance national interests in dealing with other
nations. National security includes the policies and actions that are intended to protect against
domestic and foreign political threats to individuals, the government, and the country’s territorial
integrity. War powers include using military force pursuant to formal declarations of war as well
as the broad range of military actions undertaken without a formal declaration of war. This
chapter examines the following questions about global affairs:

• How should the U.S. engage in global affairs? The question whether the U.S. should
engage in global affairs is simplistic because it frames the question as either isolation or
engagement. Global affairs policy making is more accurately described as making
choices about how to achieve foreign policy goals, particularly whether to use soft power
(economics and diplomacy) or hard power (military force).

• What are the goals of global affairs policy? The two main theories of international
relations are realism and idealism. Realism is the theory that describes nations as political
actors that pursue national interest above other political values. Some realists also argue
that international relations work best to maintain good order when nations pursue their
national interest. Idealism is the theory that describes nations as political actors that can
and should pursue national interest while also placing a high priority on political values
such as democracy, human rights, justice, and the common good.

• Who should make global affairs policy? The history of global affairs is marked by
institutional struggles for control over policy, primarily conflicts between Congress and
the president but also conflicts between the president and the courts.

• How can presidents be held accountable for their actions, particularly the war powers and
national security actions taken as Command-in-Chief?

The U.S. was founded as a republic. It won a revolutionary war for independence from an
imperial power (Britain). It then assumed the role as protector of young New World (Caribbean
and Central American) republics from European imperial powers—in fact, the U.S. thought of
the Caribbean Sea as “an American lake” where it was free to use its military, economic, and
political power to accomplish foreign policy goals. The U.S. became an imperial power. Then
the U.S. assumed the role of world policeman—and the president became the leader of the free
world during the Cold War. These developments were usually controversial and often debated.
The war on terror has once again revived old debates about the U.S. role in global affairs.
Counter-terrorism policy includes debates about using military power to export democracy,
achieve regime change, and prevent or preempt national security threats.

The first question about global affairs is whether to stay out of foreign affairs as much as
possible or to actively engage in foreign affairs. If the decision is to engage, the government
must then determine its goals and the means to achieve them. International trade is a good
example of these decisions. If the government decides to promote international trade, it must
then decide what the goals of international trade policy:

• To promote free trade in general;
• To promote importing cheap goods made abroad in order to reduce consumer costs, or to promote exporting expensive goods made domestically;
• To promote American agriculture, or to protect American manufacturing or intellectual property interests from foreign competition; or to
• To promote economic development abroad.

Other issues related to trade include whether the U.S. should include in international trade agreements provisions that protect labor (wages and worker rights), the environment (e.g., conservation or sustainable development), or human rights (e.g., democracy promotion). Trade and economic development policies are no longer considered unrelated to environmental, human rights, and democratic developments. Environmental issues such as global warming are increasingly recognized as global issues that are related to economic policies. The Obama administration promoted U.S. leadership in integrating economic and trade policy with environmental and human rights issues by participation in the Paris Climate Accords and the Trans-Pacific Partnership. The Trump administration’s America First and economic development priorities have downplayed the integration of these issues in multi-national agreements.

Politics involves the authoritative allocation of scarce resources. Foreign policy making also requires establishing regional priorities. The U.S. has been politically, economically, and militarily engaged in the Middle East for more than half a century. Has the U.S. achieved its goals? Working for peace in the Middle East is a laudable goal but one that has not been achieved. It also has opportunity costs. An opportunity cost is a potential benefit that is given up by choosing an alternate action. Spending time, energy, and resources in the Middle East means that the U.S. does not receive potential benefits from pursuing foreign policy goals in other regions of the world. For instance, the Obama administration’s planned pivot to Asia, a region of the world where rising economic and political powers presented new challenges and opportunities, was preempted by turmoil in the Middle East. Preoccupation with the Middle East also results in relative neglect of South America and large parts of Africa. China’s economic expansion has made it “the world’s expansionist superpower,” but its expansion has been primarily economic, not military. China’s massive foreign investments all over the world, but especially in economically poor but resource-rich countries, has made China the largest trading partner in more than 100 countries.

The question how to project power abroad is usually framed as the choice between hard power and soft power. As the sole remaining military superpower, American government officials and the general public tend to think of global problems as military problems that have a military solution. The war on terror has revived the Cold War era debates about whether national security problems are political or military. The Obama administration leaned toward the liberal and Democratic approach, which frames terrorism as a political problem that requires soft power. The Trump administration leans toward the conservative and Republican approach, which frames terrorism as primarily a military threat to be confronted with military power.

The question of who should make policy is primarily about the relative power of Congress and the president. The fact that the modern president is in the driver’s seat, with Congress riding shotgun in the passenger’s seat, has greatly weakened the already weakened system of checks and balances in global affairs. The president is also much freer to act in global affairs because the interest group networks that have developed around foreign affairs are less well developed that they are in domestic affairs. The mass media pay less attention and devote few resources to investigative reporting about global affairs. The courts generally stay out of
matters related to national security. And the general public pays less attention to global affairs than local or community issues. Taken together, these factors have weakened the system of checks and balances for holding presidents legally or politically accountable for their use of power abroad.

Two doctrines create special accountability problems. The first is the **Sole Organ Doctrine**. The Sole Organ Doctrine holds that the president is the sole organ of the nation in its dealings with other countries. The second doctrine is **executive discretion**. Executive discretion is defined as an executive official’s power to decide upon a course of action without having that power limited by law. An example of executive discretion is commander-in-chief powers that Congress or the courts cannot limit. Another example of executive discretion is statutes that delegate the president power to do whatever the president thinks is necessary and appropriate. These broad delegations of power make it virtually impossible to hold a president legally accountable for actions because the president is given virtually unfettered discretion to decide whether to act and what to do.

### 17.1 | A Compromised System of Checks and Balances

Global affairs policy is political, but there are important differences between the politics of domestic affairs and global affairs. One difference is the system of checks and balances is much weaker in global affairs than domestic affairs. The model of political accountability and the model of legal accountability are not particularly effective in global affairs because the politics is distinctive. Global affairs, particularly those directly related to national security and war powers, are more likely to be framed as the kinds of issues where the normal democratic politics of negotiating, bargaining, and political compromise are considered inappropriate. In domestic affairs, policy choices typically reflect **economic** conflicts (e.g., the competing interests of business and labor), **partisan** conflict (e.g., Republicans versus Democrats), **ideological** conflict (e.g., conservative and liberal views on the size and role of government), and **institutional** conflicts among Congress, the president, the Supreme Court, or between the national and state governments. This means that global affairs have historically involved a different set of government and non-government actors than those that are typically involved with domestic affairs. For example, state and local governments and the interest group networks that participate in domestic policy making are not as prominent in global affairs.

A second difference concerns the legitimacy of government action. Democratic governments have authority over the people who live within their territorial jurisdiction. But what gives one country, whether democratic or not, the authority to use its economic, political, or military power to influence or control people in other countries? Political scientists differentiate between power and authority. Power is the ability to make someone do what you want. Authority is legitimate power. Legitimacy means that a law, a policy, or a government action is generally considered appropriate, good, legal, or just. Democracy is considered a legitimate form of government because it is based on self-government. The legitimacy problem with global affairs is projecting power abroad. Legitimacy is especially problematic in global affairs because the system for holding government officials accountable is not very effective. Political accountability is compromised because the foreign targets of the power cannot vote for or against the government officials, and legal accountability is compromised by weak commitments to the rule of law.
Partisanship

The old saying that politics stops at the water’s edge is based on the belief that it is not appropriate to play politics in foreign policy, that party politics and other political differences should be set aside so that the U.S. can present a united front when dealing with other countries. This description of non-partisan foreign policy has always been more an aspiration or hope than an actual description of foreign policy making. And globalization has blurred many of the distinctions between domestic and foreign policy so it is not surprising that the partisan divisions of opinion that characterize the ordinary politics of domestic affairs have spilled over into global affairs.

Separation of Powers

The separation of powers created three co-equal branches of government in the sense each one is provided for in the Constitution. But this legal equality does mean the three branches have the same amount of power. The president is in the driver’s seat because Congress generally follows the president’s lead while the Supreme Court generally tries not to be a backseat driver when it comes to foreign affairs—particularly those related to national security. However, when individuals, companies, or Congress have challenged presidential actions related to foreign affairs, the Supreme Court has generally broadly interpreted presidential power.

An example of this is *U.S. v. Curtiss-Wright Export Corporation* (1936). Curtiss-Wright was a major American company that, among other things, was an international arms dealer. President Franklin Roosevelt declared an arms embargo that prohibited American companies from selling arms to two South American countries that were fighting over a disputed border region. The president issued the arms embargo because he thought that it would help bring peace to the region. The company sued, claiming the president did not have the power to issue the arms embargo. The Supreme Court ruled that the president did have the power to issue the embargo because the president the “sole organ” of the nation in its dealings with other nations. The Sole Organ Doctrine is not in the Constitution. The term came from a speech that Congressman John Marshall made on the floor of the House of Representatives. From this shaky origin, the Sole Organ Doctrine has become a powerful legal and political claim that presidents have the power to conduct foreign policy as they see fit—without Congress or the courts telling them what they can and cannot do. When presidents call for bipartisan support for their national security actions, or when they call critics of their actions un-American or unpatriotic, they are relying on the Sole Organ Doctrine to limit criticism or opposition.

Federalism

The politics of global affairs is also distinctive because it is almost exclusively the responsibility of the national government. The Constitution’s Supremacy Clause provides that federal laws (the Constitution, statutes, and treaties) shall be “the supreme law of the land.” This means that federal laws trump state (or local) laws if the state law conflicts with federal law in an area of policy where the federal government has extensively regulated, thereby preempting state law. Take, for example, immigration policy. States located along the southern border with Mexico have comparatively high Latino populations and special interests in enforcing the border and immigration law. These states and cities can pass laws, adopt policies, or implement programs
that provide resources for immigrants that the government does not provide, but the laws, policies, or programs cannot conflict with federal immigration policy. States cannot, for example, deny public education to children of illegal immigrants, deny illegal immigrants housing, or make it a crime for undocumented immigrants to seek work, or employers to offer work to undocumented immigrants. As immigration policy became more controversial, some border states (e.g., Arizona) passed anti-illegal immigration laws that purported to help the federal government enforce its own immigration laws.

The failure to provide border security was cited as one of the reasons for the failure to prevent the terrorist attacks on 9/11. As a result, the federal government was reorganized in order to provide more control over immigration. The Department of Homeland Security includes the Customs and Immigration Services Agency (CIS). The CIS combines the provision of services for immigrants and the function of enforcing immigration laws. However, the perception that the federal government was not enforcing immigration laws, or maintaining control over the southern border, caused some states to enact laws that were intended to toughen enforcement. The Arizona Legislature passed the Legal Arizona Worker’s Act, which required state employers to check the immigration status of employees and provided for revoking the business license of companies that employed undocumented workers. The U.S. Chamber of Commerce challenged the law, arguing that 1) the federal government has complete power over immigration policy; and 2) the Supremacy Clause’s preemption doctrine invalidates a state law that conflicts with a valid federal law. In Chamber of Commerce of the U.S. v. Whiting (2011), the Supreme Court upheld a state law requiring employers to check the immigration status. The Arizona legislature also passed SB1070, which made it a crime to be in the state illegally and required Arizona law enforcement officials to determine the immigration status of individuals they detained. In Arizona v. U.S. (2012) the Court struck down three of the four provisions of the state law.

Not all local governments support getting tougher on immigration. Some cities joined the sanctuary movement and announced that they are sanctuary cities that will not enforce federal immigration laws. The federal government cannot force state and local governments to help enforce federal laws, but the federal government can use financial incentives and penalties to encourage them to do so.

17.14 | Public Opinion

In democratic systems, public opinion is a vital essential check on government power. There are three reasons why public opinion is often a weak check on government power in global affairs. **First,** the public is not as well informed about foreign affairs as domestic affairs. The typical voter pays closer attention to domestic issues such as the condition of the schools, the economy, and the roads than foreign affairs. **Second,** the public is more dependent on the federal government for information about global affairs. The people who drive local roads and have children in local schools have direct knowledge of their condition, and know about crime rates and the local economy. But people are dependent on the government for information about most of the issues related to global affairs. This information dependency gives the government a freer hand to act independent of public opinion or even to create public opinion. **Third,** the typical initial public reaction to an international crisis or foreign threat or actual attack is to rally around the flag. The rally effect is an increase in patriotic support for the government. The president can expect increased public support in the immediate aftermath of a foreign crisis that touches on national security. However, the rally effect does tend to fade over time, and public support does
tend to decline if a crisis continues, a hostage rescue or military action fails, or a war lingers on for a long period of time.

17.2 | The Main Traditions

The main traditions in global affairs policy are described in terms of 1) isolationism or engagement and 2) realism or idealism. Isolationism refers to staying out of global affairs as much as possible. Engagement refers to active participation in global affairs using economic, political, and military power to accomplish public policy goals. Isolationists believe that the government should place a high priority on domestic or internal affairs such as economic prosperity, political stability, and public safety. The isolationist tradition in American politics can be traced to three sources. First, the country was founded as a republic that won a revolutionary war for independence against an imperial power and came to see itself as opposed to the idea of government intervention in the political affairs of other countries. Second, the U.S. was protected from European power politics by two great oceans—the Atlantic in the east and the Pacific in the west—that allowed the young republic to focus on domestic affairs rather than trying to protect itself from foreign invasions by entangling alliances with other countries. Countries that are surrounded by other countries are more likely to have to pay more attention to global affairs. The third reason for the isolationist tradition is ideology. American political culture has elements of an “anti-statist ideology” that is wary of centralized government power.

Nevertheless, the U.S. does have a strong tradition of engagement in global affairs. Supporters of engagement maintain that the U.S. should use its economic, military, and political power to strategically advance its national interests while promoting democracy abroad. In fact, one of the points of this chapter is that it is simplistic to describe U.S. policy as either isolationism or engagement because it has always had elements of both traditions. This also applies to the second set of terms commonly used to describe global policy: realism and idealism. Realism is the international relations theory that nations primarily pursue their national interest as the paramount goal of international relations. Some realists also think that it is appropriate for nations to pursue their national interest because an international system where each nation pursues its national self-interest is more likely to create and maintain good international order than a system that expects nations to pursue lofty, idealistic goals such as the common good. Idealism is the international relations theory that nations should pursue goals other than purely self-interest or power politics, that nations should also pursue goals such as democracy, human rights, conservatism, the common good, and justice.

The early years of the Trump administration indicate how presidential administrations have different priorities within the main foreign policy traditions. During the campaign, Donald Trump’s rhetoric was labeled isolationist because he emphasized solving domestic problems rather than global engagement—nationalism rather than globalism. However, President Trump quickly adopted internationalist or globalist positions that reflected the Republican Party’s foreign policy establishment (e.g., support for the North Atlantic Treaty Organization and Middle East engagement). But during his first foreign trip, President Trump upset European allies by not explicitly committing to Article Five of the North Atlantic Treaty Organization—the collective defense article of NATO—and then returned to the U.S. to announce that he was withdrawing the U.S. from the Paris Accords, the international agreement to address global warming, in order to protect U.S. sovereignty. Protecting U.S. national sovereignty is an aspect of President Trump’s America First approach.
So is the Trump administration’s global policy isolationism/nationalism or engagement/globalism? David Brooks, a traditional conservative Republican, explains by citing a Wall Street Journal editorial written by President Trump’s National Security Advisor H. R. McMaster and chief economic advisor Gary D. Cohn that provides a key insight into how President Trump thinks about global affairs. According to McMaster and Cohn, the president “embarked on his first foreign trip with a clear-eyed outlook that the world is not a ‘global community’ but an arena where nations, nongovernmental actors and businesses engage and compete for advantage.” Brooks believes that this is an indication that the Trump administration has a Hobbesian realistic view of international affairs: Hobbesian in the sense that it sees global affairs as a dog-eat-dog world of national competition for survival; realist in the sense that it describes governments as self-interested actors with little regard for idealistic goals such as cooperation in pursuit of the common good.

This assessment is consistent with descriptions of President Trump and Secretary of State Rex Tillerson as transactional leaders whose business careers before government service involved making deals. And President Trump’s initial foreign policy has been based on 1) personal relationships between the heads of government rather than established doctrines or official policies; 2) bi-lateral deals between the U.S. and another country rather than multilateral agreements among the governments in a particular region; and 3) deals that involve single issues such as trade, military defense, human rights, or environmental protection rather than comprehensive, multilateral agreements. Donald Trump’s campaign for change was successful in part because he rejected both the Republican and Democratic establishments’ support for globalism and military intervention abroad. During the campaign, this was commonly but mistakenly described as isolationism. The campaign is more accurately described as one that promised to change priorities to emphasize national interests rather than global issues. In this respect, Trump joined the growing chorus of conservative and liberal populists in the U.S. and other liberal democracies who believed that economic nationalism was the solution to problems that were created by globalism. The Make America Great Again and America First slogans made economic nationalism a viable political and economic alternative to the extremes of isolationism or globalism.

17.21 | Isolation

American politics has from the early years of the republic debated whether and how to be engaged in foreign affairs. President George Washington’s Farewell Address is often remembered today as wise counsel from the father of the country warning future leaders to stay out of foreign affairs, to avoid entangling alliances and the kinds of international intrigues that made European politics a seemingly endless series of destructive wars. Washington did indeed advise the country’s leaders to avoid entangling alliances, but he did not advise isolation. He did not urge the nation’s leaders to look inward rather than outward. His advice was more nuanced. He advised having commercial (or business) relations with other nations but not political relations:

“History and experience prove that foreign influence is one of the most baneful foes of republican government…. The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible.”
Washington thought that avoiding entangling political connections was the best way for the young republic to avoid becoming entangled in the European web of political conflicts. In effect, Washington urged the country’s future leaders to be skeptical of “entangling” U.S. peace and prosperity with the European tradition of political intrigue and imperial greed. When emergencies or other situations required political connections with other countries, he recommended entering into “temporary alliances.” He warned leaders to “steer clear of permanent alliances with any portion of the foreign world” because he believed that “a small or weak” country (such as the U.S.) that attached itself to a “great and powerful nation dooms the former to be the satellite of the latter.”

Washington’s *Farewell Address* was not limited to practical advice about how the country could pursue its national interest while avoiding war or becoming subservient to imperial powers. He advised future leaders to remain true to the nation’s founding values while pursuing national self-interest. He specifically mentioned keeping good faith and justice towards all nations, promoting peace and harmony with all nations, avoiding “inveterate antipathies” against some nations and “passionate attachments” to others, and advocating trade with all nations. Washington was not an isolationist. He and other leading members of the Federalist Party, most notably Alexander Hamilton, wanted the U.S. to develop as a “commercial republic” that engaged in international trade. Some of Hamilton’s contemporaries believed that the development of commercial republics would bring about a peaceful world because countries that valued international trade more than territorial expansion or national glory would be less likely to go to war with one another. But in *Federalist Number 6* Hamilton wrote that it was naïve idealism or “utopian” thinking that commercial republics would make war obsolete.

Future leaders did not heed Washington’s advice about avoiding entangling alliances. In a July 4th, 1821 *Independence Day speech* delivered to the House of Representatives, John Q. Adams reminded the members of Congress of what America had already given mankind. America proclaimed natural rights as “the only lawful foundations of government,” and “introduced the language of liberty and equality” to other countries while respecting national sovereignty and staying out of the affairs of other nations. Adams idealistically described the U.S. as a republic that assumed a leadership role in the world by serving as a model of republican government without succumbing to the temptation to “go abroad in search of monsters to destroy.” Isolationists have been the strongest voices resisting the temptations of great powers to go abroad in search of monsters to destroy. Isolationists opposed U.S. participation in WWI and WWII. Charles Lindbergh was a national hero whose reputation was permanently damaged by his strong statements urging the U.S. to stay out of WWII. His 1941 *Address to the America First Committee* remains a strong statement of isolationism or non-intervention as a guiding principle for foreign and national security policy.

17.22 | Engagement

Engagement also has roots in early American politics. The *Monroe Doctrine* (1823) declared that the U.S. sphere of influence included the entire Western Hemisphere. It put European imperial powers on notice that their efforts to colonize countries, or to interfere with Latin American efforts to gain independence from Spain, would be considered justification for
American military action. The concepts of **Manifest Destiny** and **American Exceptionalism** justified territorial expansion. Manifest Destiny is the belief that the United States was destined to expand its sphere of influence over the western territories of North America and even beyond the region. It justified westward expansion to settle the American frontier and to fight Indian Wars to remove Native Americans from their traditional lands. The **Louisiana Purchase** (1803) almost doubled the geographic size of the nation. Spain ceded the territory of Florida in 1819 and the U.S. annexed Texas in 1845.

**Manifest Destiny** justified the Mexican-American War (1846-1848) and the Spanish-American War (1898). The U.S. acquired from Mexico the vast territories that comprise California, Arizona, and New Mexico. The U.S. bought Alaska from Russia Empire in 1867 and annexed the Republic of Hawaii in 1898. The U.S. victory over Spain in the Spanish-American War gave the U.S. possession of the former Spanish colonies of the Philippines and Puerto Rico and control over Cuba. The Spanish-American War was particularly controversial because the use of military power to acquire territory abroad indicated the country was abandoning the republican ideals expressed in The Declaration of Independence and by the Revolutionary War. In “The Conquest of the U.S. By Spain” (1899), William Graham Sumner (1840-1910) argued that the U.S. paid a high price for winning the Spanish-American War because it lost its status as a republic by acquiring control over other peoples.

**American Exceptionalism** is the belief that the U.S. is a special country with a special responsibility to use its political, economic, and military power to be a leader in global affairs. **American Exceptionalism** continues to justify engagement in world affairs. The Founders were wary of engaging in foreign affairs, but they did not advise isolation. The **Records of the Constitutional Convention of 1787** and the **Federalist Papers** reveal extended debates about how to deal with other nations. The Founders were acutely aware of world politics and realized that the country had to be strong enough to be secure from foreign threats. They understood that the American Revolutionary War for Independence was part of a broader, global conflict that involved the U.S., England, France, Spain, and the Netherlands. They realized that the U.S. could not isolate itself from politics outside the country. Creating a commercial republic that was actively involved with international trade made political sense because the U.S. was a struggling young nation facing economic and political challenges. Sectional differences among the north, the south, the eastern seaboard, and the frontier regions weakened national unity. The young republic was surrounded by Indian Tribes and three imperial powers (France, England, and Spain).

National identity and American sovereignty have functioned as political glue binding Americans together. Nationalism is still strong. But globalization, treaties and executive agreements, and an expanding body of international law have eroded U.S. national sovereignty. Conservative nationalists have opposed the United Nations, the International Criminal Court, and treaties that commit the U.S. to recognizing the rights of children or obligate the U.S. to take actions to address climate change. The emergence of economic nationalism in the 2016 elections, particularly Donald Trump’s economic nationalist campaign, is an aspect of the resurgence of national sovereignty as a backlash against globalism.

**Foreign Policy**

Foreign policy is defined as the set of goals and public policies that a country establishes for its interactions with other nations and, to a lesser extent, non-state actors. Foreign policies are
designed to promote national interests, national security, ideology, political values, and economic prosperity. The tools of foreign policy include economic, political, social, diplomatic, technological, and military resources.

As U.S. economic and military power increased during the latter part of the 19th century, the U.S. became an increasingly important player on the global stage. This aspect of American political development marked an important, long-term shift in U.S. foreign policy that included territorial expansion, more active involvement in foreign affairs, and more engagement in international relations. In the early years of the 20th Century, U.S. foreign policy was shaped primarily by 1) promoting American business abroad; 2) worries about increased immigration from regions other than Britain and northern Europe; 3) participation in World War I; and 4) intervention in Caribbean and Central American politics. The U.S. role on the global stage continued to expand after WWII with American efforts to avoid another global conflict by bringing order to the anarchistic world of international relations. International relations were “anarchistic” in the sense that each country used power politics to pursue its national interest; military force was the primary way to settle disputes between nations; and justice reflected the principle might makes right. The U.S. interest in taking a leadership role in promoting world peace has roots in President Woodrow Wilson’s ambitious plan to use American power to make the world safe for democracy. Wilson was an internationalist—today we would say a globalist—who believed that the creation of international organizations such as the League of Nations—a precursor to the United Nations—would reduce war by creating alternative ways to settle conflicts. President Wilson pleaded with the Senate to ratify the Versailles Treaty, which contained the Covenant of the League of Nations, but the Senate did not ratify the Treaty. The American political tradition of taking unilateral action, rather than joining international organization, and preserving U.S. sovereignty doomed the League of Nation.

Think About It!
“Dare we reject it [the Versailles Treaty] and break the heart of the world.”
President Woodrow Wilson, September 11, 1914
https://www.whitehouse.gov/1600/presidents/woodrowwilson

In the years preceding WWII, the United States promoted international trade but otherwise tended to be rather isolationist. As a result, the Roosevelt administration had to overcome strong public resistance to joining international efforts to confront the threats presented by Germany and Japan when they built up their military forces in the 1930s and used them against their neighbors. President Roosevelt bent the law prohibiting providing military aid to Britain by using the Lend-Lease Program to help Britain fight Nazi Germany. The U.S. then entered the war in 1941 and led the allies against Germany, Japan, and Italy. The conversion of the American economy from peacetime production to wartime production was a major factor in winning the war. The pattern of mobilizing for war and then demobilizing after war ended with WWII when, for the first time in its history, the U.S. won a war and then kept a standing peacetime army. The U.S. also made permanent some of the most important wartime institutions that were considered essential for protecting national security and ensuring military readiness. And Congress created federal agencies responsible for national defense, national security, and intelligence gathering. The federal government often responds to crises by creating government agencies to deal with them. The Great Depression of the 1930s resulted in the creation of the
social welfare state. World War II and the Cold War resulted in the creation of the warfare state. The term warfare state refers to the permanent national defense, national security, and intelligence agencies, including the Department of Defense, the Central Intelligence Agency, and the National Security Agency.

During the Cold War Era, the primary goal of U.S. foreign policy was national security. The end of WWII—and actual hot war—began the extended period of military and political conflict between the U.S. and the Soviet Union known as the Cold War. The foreign policy of containment used American military, economic, and political influence to limit the Soviet expansion of its spheres of influence in various regions of the world. In terms of economic power, the U.S. used foreign aid and other types of economic or development assistance as instruments of foreign policy to contain Soviet influence. In terms of political influence, the U.S. used diplomacy, regional treaties including the North Atlantic Treaty Organization (NATO) and the Southeast Asia Treaty Organization (SEATO), and executive agreements to counter the influence of the Soviet Union and China. In terms of military power, the U.S. used mutual defense treaties, military actions (e.g., the Korean War and the Vietnam War), proxy wars, and numerous covert or secret military or CIA operations as instruments of foreign policy. A proxy war or conflict is one where major military powers support or sponsor a smaller country’s military actions because the major powers think that the fighting serves the major powers’ interests.

In a famous Farewell Address delivered January 17, 1961, President Eisenhower warned of the dangers presented by the new national security state, and advised the public and government officials to “guard against the acquisition of unwarranted influence...by the military-industrial complex.” Nevertheless, military-industrial complex grew more powerful during the Cold War Era and developed into the national security state. There were expectations that the end of the Cold War with the dissolution of the Soviet Union in 1989 would produce a peace dividend—tax savings from lower defense spending—and a foreign policy that relied less on national security and placed a higher priority on international trade, human rights, and diplomacy. The 9/11 terrorist attacks ended expectations of a peace dividend or a reordering of foreign policy priorities.

17.24 | The Modern Conservative Era

The modern conservative era began in the latter 1960s and early 1970s when liberalism was blamed for weakening the U.S. economically and militarily. Liberalism was blamed for the following:

- Going soft on communism. Conservatives thought that American foreign policy was no longer sufficiently anti-communist, that liberal faith in peace and diplomacy and accommodation appeased the Soviet Union in ways that resembled British efforts to appease Hitler’s Germany prior to WWII.
- The Vietnam Syndrome. The loss of the War in Vietnam was brought home to many American homes by television images of a chaotic withdrawal when Saigon fell in 1975. The resulting loss of confidence in the military and political leadership created doubt
about American foreign policy ideals and the legitimacy of using military force abroad. Conservatives diagnosed this national malaise as the “Vietnam Syndrome.” A syndrome is a medical condition that manifests with multiple symptoms. In an August 1980 presidential campaign speech delivered at the Veterans of Foreign Wars Convention (VFW), Ronald Reagan pledged to end the Vietnam Syndrome by restoring American military power to fight effectively AND reviving the American spirit, the willingness to fight for noble causes.

- Energy dependency. In the 1970s, two oil embargoes by The Organization of the Petroleum Exporting Countries (OPEC) exposed how vulnerable the American economy (and lifestyle) was because of dependence on foreign oil.
- The Iran Hostage Crisis. On November 4, 1979 Americans were taken hostage in Iran as part of a revolution against the Shah of Iran, an authoritarian ruler who had been an ally of the U.S. The taking of the hostages and a failed hostage rescue mission reinforced the perception that President Carter and the U.S. were weak.
- The Soviet invasion of Afghanistan. The Soviet Union invaded Afghanistan in December 1979. The invasion and other aggressive actions so soon after the Iran Hostage Crisis began contributed to the sense that American power was in decline. Ironically, by the time the Soviet-Afghan War ended in 1989 with a Soviet withdrawal, Afghanistan was called the Soviet Vietnam.

17.25 | Declinism (Or “The Sky is Falling!”)

The dominant theme of national security debates is whether the U.S. is strong (enough), weak, or declining (going soft). The U.S. has a long history of declinist politics. Declinism refers to warnings that the country has lost its edge, has gotten weak, or is going soft. Politicians and government officials can rarely go wrong by pledging to buildup the military or promising to increase national security. In the latter 1950s and the 1960 presidential election, Democrats claimed that Republican policies created a “bomber gap” and “missile gap” that left the country vulnerable to a Soviet attack. Then Republican presidential candidate Richard Nixon’s July 1967 Address to the Bohemian Society provided the foundations for his administration’s foreign policy goals and those of Republican Presidents Reagan, George H.W. Bush, and George W. Bush. Nixon’s Address is significant because it shows that already in the mid-1960s Republicans were

- Describing communism as a failing ideology;
- Crediting American military superiority for the post-WWII era of Pax Americana;
- Supporting a military buildup to keep the “Peace Through Strength;” and
- Supporting American economic power as an instrument of foreign policy to counter Soviet influence across the globe.

Ronald Reagan won the 1980 presidential election partly because he promised to rebuild the military to fight Soviet communism and to restore American confidence in global leadership. After the fall of the Soviet Union, neo-conservative intellectuals argued that the U.S., as the sole remaining superpower, had a responsibility to actively engage in world leadership. In The Case for Goliath: How America Acts as the World’s Government In the Twenty-First Century (2006), Michael Mandelbaum argued that the U.S. had become a de facto world government.
Chapter 17: Global Affairs

17.26 | New Foreign Policy Issues: Trade

The end of the Cold War in 1991 began a period where American foreign policy placed a higher priority on economics (e.g., the promotion of free trade; economic development; and global economic competition) and human rights. China, India, and the European Union emerged as major economic competitors. China is a particularly interesting case because it is a Communist country whose policy of rapid economic growth and development created the second largest economy as measured by Gross Domestic Product. China’s emergence as an economic competitor has raised concerns about whether China’s economic power will eventually present a military and political threat to the U.S. In fact, this is the main foreign policy question about U.S. policy toward China.

The emergence of new international economic competitors has also prompted debates about what public policies the U.S. should adopt to ensure that the U.S. remains competitive in the global marketplace. The Conference Board is a “global business membership and research association” that describes itself as working to advance the public interest by providing the world’s leading organizations with practical knowledge to improve their performance and to better serve society. Like many other business organizations, the Conference Board promotes public policies that encourage economic growth. It believes that the current low rates of economic growth in the U.S. have two main causes. The first is demographics. The U.S. and other developed countries have aging populations—an increasing percentage of older people who require more medical care and other social services. They are also less likely to be working. This means that the country has an increasing percentage of people who are consumers of services rather than producers. Immigration policies were used to import a younger labor force to offset these demographics. The Conference Board believes that the second cause of low economic growth is educational: stagnant educational attainment is blamed for stagnant economic growth rates. The Conference Board recommends changing immigration policy to solve the demographic problem of an aging population—specifically, changing immigration policies to allow more high-skilled workers into the country. Business interest groups generally support immigration policy as a partial solution to the problem of stagnant educational attainment or a mismatch between what employers need and employee skill sets.

Should the U.S. grant more temporary work visas for skilled foreign workers in order to meet the domestic demand for high tech workers? The H-1B Visa Program was designed to do so but employers use the program for a different purpose, as explained in the NPR story “Older Tech Workers Oppose Overhauling H-1B Visas.”

Think about it!
See the British Broadcasting Corporation’s “Meet China’s Booming Middle Class” Aired July 2012
http://www.bbc.co.uk/news/business-18901437

Think About It!
Is immigration the solution to the problem of low economic growth?

Act on It!
Contact a government official (in the U.S. or another country), a business leader, or an interest group or political party official to see what they think is the solution to the problems with current immigration policy.
Globalism is a broad term that refers to interconnected and interdependent economies, societies, cultures, and governments. Globalization initially involved international business interests promoting international trade. It now includes issues such as human rights, environmental policy, sustainable development, and even good governance. Globalism has blurred distinctions between domestic and global affairs.

Americans know much less about the people, politics, geography, and economics of other countries than people in other countries know about the U.S. American media do not provide much coverage of politics in other countries compared to other countries’ media coverage of U.S. politics. Read a newspaper or magazine, watch a television news program, or go to your favorite web site to see how much news coverage is state/local, national, and international.

**Think About It!**
What do people in other countries think about U.S. presidential elections?
http://www.theworld.org/
http://www.theworld.org/2012/11/the-world-votes-election-views-from-london/

**Act on it!**
Write a letter to the editor of one of the major newspapers of the world to see whether it gets published.

**New Foreign Policy Issues: Human Migration and Religion**

During most of the post-WWII era, immigration policy was not very controversial in the U.S., Britain, or Europe. In fact, these countries recruited foreign workers as their populations aged and as their economic growth rates slowed. Immigration became very controversial as good jobs became harder to find, as the increased number of immigrations created worries about national identity, and as terrorism transformed immigration policy from an economic issue into a national security issue. In fact, immigration policy has become a national security issue primarily because
immigration became an issue closely related to religion and American national identity. Latino immigrants, who are primarily Catholic, first raised concerns about their effect on American Protestant culture. Then radical Islamic terrorism framed immigration policy as a central element of the conflict between Christian civilization and Islamic civilization. It is ironic that religion became a threat even while foreign policy made freedom of religion a higher priority. For example, the Department of State’s Office of International Religious Freedom describes its mission as promoting religious freedom as a “core objective” of foreign policy. The Office provides information about the status of freedom of religion in various countries that serves as a benchmark for assessing how free a political system is.

17.3 | Instruments of Foreign and Defense Policy

Treaties and executive agreements are the two major forms of official agreements with other countries. The major difference between them is that executive agreements are less formal than treaties and they are not subject to the constitutional requirement of ratification by a two-thirds vote of the Senate.

17.3.1 | Treaties

Treaties are formal written agreements between two or more countries. The Treaty Clause of the Constitution (Article II, Section 2) provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur....” The president or his advisors negotiate a treaty with another country or countries, but the Senate must ratify it in order to take effect. The Senate can reject a treaty for any reason. Senators might oppose the substance of the treaty: they may oppose what the treaty does the way they oppose what a law does. For example, President Wilson proposed the Treaty of Versailles after World War I, but the Senate rejected the peace treaty primarily because the isolationist tradition made Senators wary of U.S. participation in the League of Nation.

Sovereignty and federalism are also reasons why Senators, state government officials, and the general public are wary of treaties. Sovereignty is defined as the supreme and independent government authority. The American commitment to preserving U.S. national sovereignty is very strong—the idea of national sovereignty is much stronger in the U.S. than in many European countries. Treaties that obligate U.S. government officials to comply with international law or treaty obligations weaken U.S. national sovereignty. Defenders of U.S. national sovereignty such as Sovereignty International, Inc., alert Americans to the threats presented by specific treaties or executive agreements as well as the general trend toward global governance. The preservation of national sovereignty is one of the reasons for opposition to the United Nations, opposition to putting U.S. troops under UN control in peacekeeping operations, and even opposition to treaties that strengthen human rights or the rights of children. Protecting children may be a laudable goal, but doing so in ways that erode national sovereignty is controversial.

Figure 17-31 below describes three levels of sovereignty: state, national, and supranational. Over time, political power has flowed upward. The Founders intended to create a state-centric system. Over time, the power of the national government expanded and the political system has become more national-centric. In fact, opposition to big government is often directed
at the national government. Internationalist efforts to create supranational governing authorities are even more controversial than the development of a national-centric system because it involves locating sovereignty outside the U.S.

**Figure 17.31: Three Levels of Sovereignty**

Federalism is one reason for American wariness of treaties. Federalism complicates the legal status of treaties. Treaties (and executive agreements) are considered federal laws. Their legal effect on state law is complicated. The Supremacy Clause of the U.S. Constitution provides that federal law trumps state laws that conflict with federal law. But state government officials may be even more opposed to treaties than to ordinary federal statutes because treaties are associated with international law or organizations such as the United Nations. Can a migratory bird treaty that protects Canada Geese as they fly south from Canada to winter near the Gulf of Mexico trump state laws that allow hunting Canada Geese? Can a treaty require a state that arrests a foreign national for crime to notify that person’s government that one of its citizens has been arrested? Article 36 of the Vienna Convention on the Right to Consular Access gives any foreign national who has been arrested for a crime the right to consular access. The State of Texas argued that the Vienna Convention did not obligate a state. The Supreme Court agreed in *Medellin v. Texas* (2008).

**Think About It!**

Why would the U.S. sign a treaty that required governments that arrest a citizen of another country to notify that country that it has arrested one of its citizens?
Where do treaties fit into the U.S. legal system? Treaties are the legal equivalent of federal statutes. The president can unilaterally reinterpret provisions of treaties. President Carter unilaterally reinterpreted the **Panama Canal Treaty** to return possession of the Panama Canal to Panama. The Supreme Court has ruled that it has the authority to declare a treaty unconstitutional, just as it has the authority to declare a statute unconstitutional, but the Court has never done so. The **Vienna Convention on the Law of Treaties** provides for the legal status of treaties. The State Department reports on treaties. The following are some major treaties:

- The North Atlantic Treaty (1949) established the **North Atlantic Treaty Organization** (NATO). NATO was the major international treaty organization during the Cold War era. The Treaty created the major alliance between the Western powers that confronted the Soviet Union.
- The **World Trade Organization** (WTO) is one of the international bodies that promotes and regulates international trade with the goal of *liberalizing* international trade—that is, minimizing trade barriers. The WTO’s emphasis on trade reflects the post-Cold War shift toward trade rather than national security.
- The **North American Free Trade Agreement** (NAFTA) is an example of the foreign policy emphasis on promoting free trade in regions of the world.

### 17.32 | Executive Agreements

An **executive agreement** is a formal document that is negotiated between the president and the head of another government—typically the prime minister. As such, executive agreements are not permanent agreements because they do not bind subsequent presidents the way that treaties do. Because executive agreements do not have to be ratified by the senate, presidents have relied less on treaties and more on executive agreements. The number of treaties has greatly decreased; the number of executive agreements has greatly increased. The Constitution does not mention executive agreements. But in **U.S. v. Belmont** (1937) the Supreme Court held that executive agreements were constitutional, the president had power to enter into executive agreements, and ruled that executive agreements had the same legal status as treaties. So executive agreements also have the same status as federal statutes. The president’s power to enter into executive agreements is now part of the American political and legal tradition of presidential legislation in global affairs.

### 17.4 | Actors: Institutions and Organizations

Government and non-government actors participate in the Global Affairs policy-making process, particularly foreign policy. The following describes some of the major participants in the global affairs issue network, their roles, and their goals.

#### 17.41 | Congress

Article I of the Constitution vests all the legislative power in Congress, grants Congress the power to declare war, and requires treaties—which are negotiated by the president—to be ratified by the Senate. Congress also has the power of the purse. This budget power is relevant to global
affairs because it means that Congress enacts the State Department’s civilian budget, which is one of the main foreign policy actors, and the military budget for the Department of Defense. Congress uses its power of the purse, its budget authority, to influence foreign and national security policy.

The House Foreign Affairs Committee and the Senate Foreign Relations Committees are the primary congressional committees with jurisdiction over foreign policy—but other committees, including the defense and commerce committees, also deal with policies that are related to foreign policy. The Senate Foreign Relations Committee website describes the committee history, members, hearings, and legislation. The committee plays an important role in shaping foreign policy as well as legislative oversight of the government agencies responsible for implementing foreign policy. The Committee’s website candidly acknowledged that the president, not Congress, takes the lead in foreign policy. According to the History of the Committee, the executive branch “does take the lead on nearly every aspect of foreign policy, [but] congressional committees use the power of the purse” to exert influence over the president’s policies. In the 113th Congress, the House Foreign Affairs Committee website (accessed February 2, 2013) described its jurisdiction as being “responsible for oversight and legislation” related to a broad range of policy responsibilities, including oversight and legislation relating to foreign assistance; the Peace Corps; national security developments affecting foreign policy; strategic planning and agreements; war powers, treaties, executive agreements, and the deployment and use of United States Armed Forces; peacekeeping, peace enforcement, and enforcement of United Nations or other international sanctions; arms control and disarmament issues; activities and policies of the State, Commerce and Defense Departments and other agencies related to the Arms Export Control Act, and the Foreign Assistance; international law; promotion of democracy; international law enforcement issues, including narcotics control programs and activities; Broadcasting Board of Governors; embassy security; international broadcasting; public diplomacy, including international communication, information policy, international education, and cultural programs; and other matters.

17.42 The President

The president and the secretary of state, a presidential appointee, are the primary actors responsible for making and managing foreign policy. The importance of the president is reflected in the fact that the president’s name is often attached to the administration’s main foreign policy: the Monroe Doctrine; the Truman Doctrine; the Kennedy Doctrine; the Nixon Doctrine; the Reagan Doctrine; the Bush Doctrine; the Obama Doctrine; and eventually the Trump Doctrine. A doctrine typically announces the major outlines of an administration’s policy. The Monroe Doctrine announced that the U.S. considered the Caribbean within its sphere of influence and would act to oppose European imperial intervention. The Truman Doctrine announced the Cold War policy: stopping Soviet expansion; supporting free people who were resisting subjugation; and negotiating regional defense treaties (the Rio Pact of 1947—Latin America; NATO in 1949); ANZUS with Australia and New Zealand; and SEATO with Southeast Asia). The Truman Doctrine greatly expanded the role of the U.S. as the world’s policeman. A president’s foreign policy doctrine also announces the administration’s policy concerning the use of military force—particularly whether it will rely on hard power (the military) or soft power (diplomacy) to pursue national interests and resolve international conflicts.
A president who is of a different party than his predecessor is likely to announce a foreign policy doctrine that is different than the predecessor—particularly if foreign policy was an issue in the presidential campaign. For example, Republican President George W. Bush’s Bush Doctrine emphasized unilateral military action to advance national interests and regime change—particularly in the Mideast. Democratic President Barack Obama’s Obama Doctrine emphasized multilateral action, diplomacy, and resistance to regime change in the Mideast.

The secretary of state is the functional equivalent of the foreign minister in a country with a parliamentary system of government. In parliamentary systems, foreign policy is the responsibility of the prime minister, who is the head of the government. The prime minister’s principal foreign policy advisor is the foreign minister, who is a political appointee of the prime minister. The secretary of state conducts diplomacy, state-to-state policy discussions, and certain interactions with the government officials of other countries. The secretary of state and ambassadors are nominated by the president and confirmed by the Senate. Congress also has power to regulate commerce with foreign nations.

It is ironic that global affairs is the president’s domain because most presidents come to office with little or no experience with global affairs. Most presidents come to office with experience in domestic politics (e.g., governor; senator; vice-president) or business. The lack of experience with global affairs means that the leader of the free world must get on-the-job training. Presidents do come to office with high public expectations of the president as the leader of the free world, hosting world leaders at the White House, acting on the global stage by flying around on Air Force One, and acting as the Commander-in-Chief when deploying the military.

Congress has greatly increased presidential power over global affairs by statutorily delegating broad legislative power to the president. With the possible exception of the War Powers Resolution of 1973, the following are examples of congressional delegations of legislative power to the president on matters of national security, war powers, and emergency powers. They illustrate the problem of holding presidents legally accountable for the use of power because they grant the president the power to do whatever the president thinks is necessary and appropriate. The language is so vague that it is virtually impossible to hold a president legally accountable.

- **Hostage Rescue Act (1868).** This Act authorized the president to take “all actions necessary and proper, not amounting to war, to secure the release of hostages.”
- **The Gulf of Tonkin Resolution (1964).** “WHEREAS, the communist regime in Vietnam...have repeatedly attacked U.S. vessels lawfully present in international waters....” RESOLVED, That the Congress approves the determination of the President “to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”
- **The First War Powers Act of 1941.** This Act delegated broad powers to the president to organize and wage war.
- **The War Powers Resolution** of 1973. In order to ensure collective judgment when committing troops to hostilities or situations where hostilities are imminent, the president shall consult with Congress, report to Congress, and shall seek authorization to maintain commitments beyond specified time periods.
- **International Economic Emergency Powers Act** (1977). This Act authorizes the President to declare a national emergency and order embargoes, trade sanctions, asset seizures.
• Authorization for Use of Military Force Against Terrorists. (Public Law 107-40, Enacted September 18, 2001.) The AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

• Authorization for Use of Military Force Against Iraq Resolution. (Public Law 107-243, Enacted October 16, 2002.) This AUMF resolution began “WHEREAS, Iraq remains in material and unacceptable breach of its international obligations, [Followed by a list of 22 “whereases” listing among others the invasion of Kuwait, violations of UN cease fire terms of disarmament, weapons inspections, weapons of mass destruction, threat to the national security of the United States, 9/11 attacks and terrorists known to use Iraq, UN Sec. Council Res. 678 authorizing use of force to enforce UN Resolutions] and resolved that “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate” in order to (1) defend the national security of the United States and (2) “enforce all relevant United Nations Security Council resolutions regarding Iraq.”

17.43 | The Department of State

The State Department is the main executive branch agency responsible for developing and implementing foreign policy under the president’s direction. The State Department’s mission statement (for Fiscal Years 2004 – 2009) described American diplomacy as based on the belief that “our freedoms are best protected by ensuring that others are free; our prosperity depends on the prosperity of others; and our security relies on a global effort to secure the rights of others.” The November 2010 Agency Financial Report described foreign policy goals as advancing freedom “for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.”

The above language reflects the State Department’s and the foreign policy establishment’s belief in globalism integration of governance and areas of public policy: political (democracy promotion); security (military); and economic (prosperity and development). These priorities are likely to change during the Trump administration. During the 2016 presidential campaign and as President, Donald Trump pledged to drain the (Washington) swamp. The “Drain the Swamp” slogan would be especially apt if he meant draining Foggy Bottom—the low-lying riverside area of Washington D.C. where the State Department moved in 1947—to rely more on the military as an instrument of foreign policy. Trump’s initial budget proposal called for a 30% reduction in spending for the State Department and its foreign aid programs and diplomatic activity. This reduction and the budget increases for national defense and national security and border control reflect the shift in his administration’s priorities.

Check it Out!
How much do you think the U.S. spends on foreign aid? What percentage of the federal budget do you think is spent on foreign aid? The Congressional Research Service describes foreign aid, the amount spent, and the share of the 2015 federal budget.
Foreign policy has become more complicated since the end of the Cold War. During the Cold War era, global affairs were organized around a bi-polar world where the free Western bloc of countries confronted the communist Eastern bloc of countries. The collapse of the Soviet Union in 1991 left the U.S. as the sole remaining military superpower. The U.S. military hegemony prompted discussions about what the U.S. should do in the new, unipolar world order. One proposal was to use the peace dividend from reduced spending on defense and national security to spend on domestic affairs? The other proposal was to take advantage of the American position as the only superpower to use American military power abroad to accomplish foreign policy goals such as regime change in the Mideast. Neoconservatives, in particular, argued that the U.S. had a responsibility to use its power abroad to accomplish, among other things regime change in countries where the U.S. wanted new leadership. During both Bush administrations, neoconservatives were successful in getting the government to launch military attacks in the Mideast: the Gulf War in 1991 and the invasion of Iraq in 2003. Both were military successes, but the U.S. was unprepared for the insurgencies that developed to oppose U.S. power projection in the Mideast.

The brief unipolar moment of U.S. military hegemony has surprisingly quickly turned into a multi-polar world where there are many competing regional interests, some of which threaten peace and others where there is armed conflict. The instability of this new world disorder has challenged U.S. policy, which has been criticized for both over-reaching (e.g., regime change in Iraq) and under-reaching (indecisive action toward the civil war in Syria). The lack of any clear guiding principles in the more chaotic world order was particularly evident in the Obama administration. Its foreign policy—which seemed to be inspired by the slogan, “Don’t do stupid stuff!”—was a natural political reaction against the ongoing foreign policy failures in Afghanistan and Iraq.

The political violence and failed states in the Middle East and Africa created a migration crisis that threatens the post-WWII world order in Europe and Britain. Counter-terrorism policy that targets individuals and organizations resembles a game of whack a mole. And American military superiority is unlikely to solve these complicated, multidimensional problems. Which may explain why some foreign policy makers and analysts actually sound nostalgic for the Cold War era when global affairs were organized by the bi-polar conflict between the East and the West. Richard Hass, the President of the Council on Foreign Relations, describes the current state of global affairs as The World in Disarray (2017). The nostalgia for the Cold War world order is reminiscent of comments about a crime wave in the U.S. in the late 1960s and early 1970s. The federal government effectively prosecuted organized crime in the mid-1960s, but then the unorganized, violent street crime wave of the 1970s seemed worse than the organized crime.

Learn About Other Countries!
The Department of State’s “Countries & Regions”
https://www.state.gov/p/
The CIA’s World Factbook:
The Library of Congress “Country Studies” books:
https://www.loc.gov/collections/country-studies/about-this-collection/
The Department of Defense (DOD) is an executive department that is headed by the Secretary of Defense, a political appointee who is usually a member of the President’s inner cabinet—the heads of the most important agencies: State; Defense; Treasury; and Justice. The Pentagon is the building where much of the DOD policy making and business operations are headquartered.

The U.S. spends a great deal on national defense. The National Priorities Project, whose mission is to inspire action “so our federal resources prioritize peace, shared prosperity, and economic security,” reports that in 2015, U.S. military spending was $598.5 billion, which is 54% of the federal government’s discretionary spending and about 37% of the total $1.6 trillion in world military spending. U.S. military spending is about equal to about the next seven countries with the largest military spending combined. The assumption is that defense spending reflects the level of national security threats. However, federal budgets often reflect the priorities of special interests more than the general public. The issue network that participates in the formulation of the defense budget consists of the Department of Defense, congressional committees, and defense contractors. Each of these three participants—government bureaucrats, elected officials, and business interests—has a vested interest in maintaining or increasing defense spending. Military contracts are distributed across states and congressional districts. The National Conference of State Legislatures provides data on defense spending in the states.

The National Security Agency (NSA) is such a secret agency that its letters are sometimes said to refer to No Such Agency. The NSA is an intelligence agency in the Department of Defense. The Director of National Intelligence heads the NSA. The NSA’s core missions are to protect U.S. national security systems and to produce foreign signals intelligence information. The Information Assurance mission protects intelligence and communications systems. The Signals Intelligence mission collects, processes, and disseminates intelligence information from foreign signals for intelligence and counterintelligence purposes and to support military operations. This Agency also enables Network Warfare operations to defeat terrorists and their organizations at home and abroad, consistent with U.S. laws and the protection of privacy and civil liberties.” The NSA is responsible for collecting and analyzing foreign communications and foreign signals intelligence as well as protecting U.S. government communications and information systems.

The Central Intelligence Agency website provides information about its history, organization, and mission. The CIA’s mission statement describes the agency as “the nation’s first line of defense,” which it carries out by:

- “Collecting information that reveals the plans, intentions and capabilities of our adversaries and provides the basis for decision and action.
- Producing timely analysis that provides insight, warning and opportunity to the President and decision makers charged with protecting and advancing America’s interests.”
The mission statement reflects the fact that the CIA was created to be an intelligence gathering and analysis agency. But presidents have used the CIA to conduct covert operations. The most controversial CIA operations have been plots to assassinate foreign leaders and domestic surveillance operations. In the 1970s, the Senate Church Committee investigation uncovered illegal domestic actions and questionable foreign operations and recommended reforms to increase accountability.  

17.47 | The Department of Homeland Security

The Department of Homeland Security (DHS) was created in 2003 to better coordinate anti-terrorist activities. The DHS is a huge, complicated organization that performs varied functions. It can be considered an umbrella organization because it has responsibility for a broad range of functions ranging from transportation to immigration to telecommunications. The Transportation Security Agency (TSA) is one national security policy that the average American sees (and sometimes feels!) because it conducts airport screening of passengers. The TSA’s passenger screening policy is based on a strategy that involves searching for bombs rather than bombers. Passengers and luggage are searched to find materials that could be used for terrorism. The alternative strategy is to search for bombers—to look for individuals who are likely to be threatening or dangerous, to screen passengers than luggage. Screening individuals is controversial because it relies on gathering about people and making assumptions about who is likely to be a threat and who is not. Creating government data banks raises concerns about big government monitoring people and maintaining No Fly or other watch lists. Changing TSA policies to search individuals based on their physical appearance, name, religion, dress, nationality, or ethnicity also raises questions about profiling. Profiling is suspecting someone of criminal behavior based on his or her identity. Is profiling stereotyping or is it predicting risk based on valid information? Should profiling be used when screening airline passengers? What about when screening people who are entering the country?

The DHS is a massive federal agency responsible for aspects of immigration policy: maintaining border security, providing immigration services, and enforcing immigration laws. Counter-terrorism policies have substantially increased the size and scope of the DHS, and the agency’s political profile has been raised because immigration policy has become a salient political issue during the Obama and Trump administrations. President Trump’s executive orders related to immigration were just the latest occasion for debating the extensive powers of this important federal agency.

17.48 | Non-governmental Organizations (NGOs)

Government officials are not the only actors involved with global affairs. A large and growing body of non-governmental actors participate in making and implementing foreign policy. The interest groups are varied, with organizations advocating on behalf of economic, ideological, ethnic and national identity, religious, and other issue-based interests or causes.
The Foreign Policy Association (FPA) is a non-profit organization that was founded in 1918 to foster public knowledge of and interest in the world by providing publications, programs, and forums. The Foreign Policy Association’s website describes its mission as serving “as a catalyst for developing awareness, understanding of, and providing informed opinions on global issues” and “encourage[ing] citizens to participate in the foreign policy process.” One of the FPA’s outreach efforts is the Great Decisions Global Affairs Education Program. Great Decisions has become the largest nonpartisan public education program on international affairs in the world. It has published a Citizen’s Guide to U.S. Foreign Policy and founded the World Affairs Council of Washington, D.C.

Think tanks and public policy organizations such as the Council on Foreign Relations are also influential in the policy making process. They produce studies of various issues, they provide policy experts who testify at congressional committee hearings, and they lobby for and against specific policies and issues. These organizations are also influential because their members are recruited for government positions. When a new administration comes into office, it recruits government officials from these organizations: Republican presidents tend to recruit government officials from organizations with Republican or conservative leanings while Democratic presidents tend to recruit government officials from organizations with Democratic or liberal leanings. Think tanks and public policy organizations also provide places for policy experts to work while they, their party, or their ideas are out of government.

The Council on Foreign Relations (CFR) was established in 1921. The CFR website describes the CFR as “an independent, nonpartisan membership organization, think tank, and publisher” that serves as a resource for its members, government officials, business executives, journalists, educators and students, and civic and religious leaders.

Economic interest groups are also active lobbyists in formulating foreign policy. Business organizations such as the Chamber of Commerce and the National Association of Manufacturers, as well as labor organizations such as the AFL-CIO, lobby on behalf of international trade, commerce, and labor issues. In fact, globalization and the importance of international trade as an aspect of foreign policy have expanded the political arena in the sense that economic interest groups lobby for or against public policies in both the domestic and foreign policy arenas. Interest group politics now extends beyond the territorial boundaries of the U.S.

Business interests have a major stake in foreign and national security policy. The federal government does not manufacture military equipment. It buys military equipment from private sector companies. Consequently, the aerospace and defense industry has a vested interest in defense spending, the budget of the National Aeronautics and Space Administration (NASA), and other federal programs. The decision to end the shuttle program has had major impacts on the aerospace industry and the communities surrounding the manufacturing and launching sites. The closure of military bases also has major effects on local budgets. Privatization has increased the private sector’s stake in the defense budget. The U.S. military now relies on private sector companies to provide goods and services that were once provided by members of the military. The Army and Air Force Exchange Services, which the government created to provide merchandise and services to members of the military, strives to provide American troops and their dependents with a “taste of home” wherever they are stationed across the globe. These tastes include familiar fast food franchises and other amenities. The military now contracts with food service companies to provide food that was once provided by army cooks in mess halls.
Privatization is not limited to support services such as food or amenities. Most military contractors are unarmed service providers, but the military signs logistics contracts with companies that provide armed security guards for the military and civilian support personnel. Of the more than 70,000 private sector civilians that were working in Iraq in 2011 on military contracts to provide necessities and amenities for troops in Iraq and Afghanistan, a great majority are service sector workers. Many of these employees are “third-country nationals,” workers hired by foreign companies to work under service sector contracts for the military. Privatization—relying on private sector to provide public services—presents serious accountability problems. The U.S. military is responsible for its own actions. The U.S. government negotiates Status of Forces Agreements (SOFA) with countries where the military is deployed. The SOFA agreements typically include provisions that describe which country’s court system will be used to try individuals who commit crimes. Who is responsible for poor or unsafe working conditions when the military contracts with companies who use subcontractors or employers or employees who are not American? Who is legally accountable when a military contractor commits a crime? Blackwater, Inc. was a U.S. company that was founded by Erik Prince. Blackwater received large government contracts to provide security services in Iraq and Afghanistan. Prince described Blackwater’s mission as doing for the national security apparatus what FedEx did to the postal service. When Blackwater employees were accused of criminal acts including rape, torture, and murder, the murky legal accountability presented serious problems that were highlighted during congressional hearings. Corpwatch chronicles the company’s story. Today Prince runs a company called Academi, which provides private mercenary forces for countries.

Think about it!
Should the U.S. hire private “soldiers”? See “Private Warriors”
http://www.pbs.org/wgbh/pages/frontline/shows/warriors/

Should American companies be allowed to sell arms or provide private armies for anyone or any country?

17.5 | War (and Emergency) Powers

Striking the right balance between granting and limiting power is especially important for war and national emergencies. The Founders worried about giving the new national government too much power, and they were particularly wary of executive power which they considered monarch-like. They eased some of the worries by dividing control over war powers.

17.51 | Divided Control of War Powers

The war powers are divided between Congress and the president. Congress was delegated the power to declare war and the power to raise and support armies. The president was made the Commander-in-Chief of the armed forces: the president waged war as the “top general.” This division of control over war powers is usually described by saying that Congress makes war
(decides whether to go to war) and the president wages war (as the Commander in Chief). During the colonial era, the Founders experienced the offensive use of war powers by imperial powers. The British, French, and Spanish imperial model of government included using military power to expand the empire. The colonists’ experience with offensive imperial power caused the delegates to the Constitutional Convention in 1787 to be concerned about war powers. They decided to give the new national government defensive war powers so that it could effectively defend the young republic against foreign invasion. But they nevertheless worried about war powers.

In “Political Observations” (April 20 1795), James Madison described war as the “germ” that presented the greatest threat to liberty and republican government:

“Of all the enemies of true liberty, war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. The same malignant aspect in republicanism may be traced in the inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and in the degeneracy of manner and of morals, engendered in both.

No nation can preserve its freedom in the midst of continual warfare.
War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasuries are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed; and it is the executive brow they are to encircle.

The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venal love of fame, are all in conspiracy against the desire and duty of peace.

*Letters and Other Writings of James Madison* (Volume IV, page 491)

This is an extremely strong warning about the dangers that war powers present to republican government! Madison acknowledged that the decision to increase security by granting the government power to repel foreign invasions also increased insecurity by exposing the nation to the risk that the war powers would be used internally to threaten republican government. Is this germ theory of war powers accurate? As the U.S. became an economic and military power, it did use its powers to extend American influence abroad. Two notable 19th Century examples of this use of U.S. military power are the Mexican-American War and the Spanish-American War. World Wars I and II were fought primarily for reasons other than extended American power abroad, but one consequence of WWII was a greater awareness of how the U.S. could use its economic, political, and military power abroad to prevent war. This was once of the policies underlying the Cold War foreign policy. As a result military force was not limited to defensive actions but also included offensive actions. This was an important shift in thinking about national security and foreign policy. President George W. Bush declared that his administration was adopting the doctrine of preventive war, which is the use of military force for policy wars or using military force as an instrument of foreign policy. President George W. Bush’s September
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2002 National Security Strategy announced elements of what was unofficially called the Bush Doctrine, the set of principles that guided the Bush Administration’s foreign policy. The Bush Doctrine had two main principles. First, it announced that the U.S. would unilaterally withdraw from treaties dealing with arms control and global warming. Second, it stated that the U.S. would take unilateral military action to protect national security interests: the U.S. would act alone to use military force and it would take preventive military action. The Bush Doctrine of preventive military force was controversial because it declared that as a matter of policy the U.S. would not wait to use military force defensively—it would use military force preemptively in order to prevent threats to national security interests. According to the National Security Strategy document,

“...The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction.... The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies’ efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So we must be prepared to defeat our enemies’ plans, using the best intelligence and proceeding with deliberation. History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.”

17.52 Wars: Imperfect and Perfect

The U.S. has formally declared war upon foreign nations only five times.

- **War of 1812** (1812-1814). The U.S. declared war upon the United Kingdom in 1812. The war ended with the Treaty of Ghent in 1814.
- **Mexican-American War** (1846-1848). The U.S. declared war upon Mexico in 1846. The war ended with the Treaty of Guadalupe Hidalgo in 1848.
- **Spanish-American War** (1898). The U.S. declared war upon Spain in 1898. The war ended with the Treaty of Paris 1898.
- **World War II** (1939-1945). The U.S. declared war upon Japan on December 8, 1941 and Germany on December 11th, 1941. The U.S. and the Allies fought the global war against the Axis Powers (Japan, Germany, and Italy). The war on Japan ended with the V-J Day Instrument of Surrender on September 2, 1945 and the V-E Day German Instrument of Surrender on May 8, 1945.

The U.S. has, of course, taken many more military actions than these officially declared wars. These military actions include undeclared wars, conflicts, special-forces operations, participation in United Nations police actions, hostage rescue missions, blockades of foreign ports, bomb and missile and drone attacks, and cyber-attacks. Congress or an international governing body such
as the United Nations approved some of these military actions. These military actions include the following:

- The Quasi-War with France (1798–1800)
- The Indian Wars
- The Civil War (1861–1865)
- The Russian Civil War (1918)
- The Korean War (1950–1953)
- The Vietnam War (1961–1975)
- Afghanistan War 2001—)
- Iraq War (2003—)

Two of the most prominent military conflicts (that is, undeclared wars) are the Korean War and the Vietnam War. The Vietnam War was an especially controversial war. It has had a profound and lasting impact on American politics. Long after the war was over, political debates about foreign affairs, national security, and war powers still reference Vietnam. Supporters and opponents of the Vietnam War, and supporters and opponents of contemporary military action, still refer to the war to justify their positions for or against war. The critics of military action (e.g., in Afghanistan or Iraq or Iran) appeal for “No more Vietnams.” This slogan is usually meant to remind the public and government officials that the decision to use military force as an instrument of foreign policy is fraught with risks. On the other hand, those who support the use of American military power abroad urge the nation to recover from “The Vietnam Syndrome.” They use the term Vietnam Syndrome to describe a condition where the nation is so worried about the use of military power that it is afraid to use U.S. military power to accomplish foreign policy objectives. The modern conservative movement’s support for building up the military and the use of military force during the Republican presidencies of Ronald Reagan, George H.W. Bush, and George W. Bush, was intended to recover from the Vietnam Syndrome.

17.53 | The War of 1812

The War of 1812 was fought against Britain, Canadian colonists loyal to Britain, and Native Americans who were allied with the British. The U.S. declared war because it wanted to expand its national borders into the Northwest Territory, which included areas under British control; trade restrictions during Britain’s war with France limited U.S. commerce; the British had impressed—that is forced—American merchant sailors to serve in the British Royal Navy; and British support for Indian tribes threatened westward expansion into frontier areas. Britain did not actively resist American westward expansion when Britain was preoccupied with the war against France. But after Napoleon was defeated, British troops captured and burned Washington, D.C. in the summer of 1814. Then in the fall and winter of 1814, U.S. forces defeated British forces in New York and New Orleans. Winning the battle of New Orleans created a renewed sense of American patriotism. The defense of Baltimore inspired the U.S. national anthem, The Star-Spangled Banner. The national pride in fighting and winning a second war against Britain produced what historians called The Era of Good Feelings—a label attached to the period from around 1816 to 1824 when partisan politics and domestic political conflict was subdued compared to the preceding era.
What a person thinks about a war depends upon which side they were on. Americans have a very different perspective on the War of 1812 than Canadians. Southerners have a different perspective on the Civil War than Northerners. And Vietnamese have a different view of the “The American War” than Americans. Writing in The American Legion magazine, Michael Lind describes the Vietnam war as one of the conflicts that comprised the Cold War, which he thinks is best understood as the third World War of the 20th Century—and part of that noble cause.19

Think About It!
Is the War of 1812 taught the same in the U.S. and Canada?
http://www.npr.org/2012/06/18/155308632/teaching-the-war-of-1812-different-in-u-s-canada

17.54 | The Mexican-American and Spanish-American Wars

These two 19th Century wars are considered together here because they were declared for basically the same purpose: territorial expansion and global influence. The Mexican-American War was fought to expand the territory of the U.S. over the North American continent as part of the belief in Manifest Destiny and westward expansion to settle frontier areas. The Spanish-American War was fought during an era of American politics included debates about how to project the American economic, political, and military power and influence abroad. The Spanish-American War was controversial because it resulted in the U.S. acquiring territories abroad, which opponents believed transformed the U.S. from a republic, which had fought the Revolutionary War against imperial power, into an imperial power. The following image is a poster from the 1900 presidential campaign. It describes the Spanish-American War of 1898 as one that was fought for political ideals (using military power in the service of humanity) rather than for projecting American imperial power abroad.
The Cold War was the period of almost continuous conflict between western democracies and communist countries (primarily the Soviet Union and China) from the end of World War II until the fall of the Soviet Union in 1991. In a famous 1946 “Sinews of Peace” Speech at Westminster College in Fulton, Missouri, Winston Churchill described an Iron Curtain descending across Eastern Europe along the countries that bordered the Soviet Union. The Iron Curtain metaphor captured the West’s imagination about the new threat presented by the Soviet Union. In 1947, the U.S. intervened in a civil war in Greece in order to prevent Greece from falling into the Soviet sphere of influence. In 1948, the U.S. implemented the Marshall Plan—the European Recovery Program—as a comprehensive approach to rebuild Europe as a bulwark against Soviet expansion.

The Cold War included proxy wars. A proxy war is a war where major powers use third parties—usually smaller countries or even non-state actors such as freedom fighters, revolutionaries, insurgents, or terrorists—to fight for them. The U.S. and the Soviet Union sponsored proxy wars in Korea, Vietnam, Angola, Afghanistan, and Latin America. The U.S. and its allies (including Great Britain, France, and Western Germany) confronted the Soviet Union and its satellite states (East Germany; Poland; Hungary). The Cold War competition included the space race (the first to launch a satellite; the first to put a man on the moon) and even Olympic competition.

The U.S. and Soviet militaries never directly fought one another. The Cold War conflict was expressed through mutual defense treaties, coalitions, conventional force deployments, monetary and military support, espionage, propaganda, arms races, and technological competitions such as the Space Race. The Cold War fundamentally changed American politics and government. It created the warfare state—the network of permanent national security agencies. It created the American public’s acceptance the belief that life in the nuclear age meant living with an enemy that was an existential threat to the U.S. Strong government meant that power flowed from state and local governments to the national government, which had primary responsibility. It also meant that power flowed from Congress to the president.

Watching government videos that were produced to “educate” the public about the threat of nuclear war, and how to protect against it, provides good insights into how national security presented the opportunity for government to use popular culture to influence public opinion. The “Duck and Cover” videos were intended to teach children how to protect themselves in case of a nuclear attack by ducking under desks and covering themselves with whatever was available. Target Nevada is one of the declassified government videos of nuclear tests that were conducted in the 1950s in a Nevada valley. What do the images, the video style, the tone of the voice-over
narrator, and the substantive content of these government videos, particularly Target Nevada, reveal about the purposes of the videos?

President Truman created the Nevada Test Site in 1950 to provide a continental nuclear test site that was cheaper than the actual test sites in the Pacific. Two of the videos are Operation Plumbbob and Let’s Face It:

- The U.S. Atomic Energy Commission presents Operation Plumbbob, the Department of Energy Video #0800022 “Military Effects Study.” Operation Plumbbob consisted of around 30 nuclear test explosions to measure the impacts of nuclear explosions on buildings, animals, plant life, soil and air contamination—and people, including the people who witnessed the explosions.
- The Federal Civil Defense Administration presents Let’s Face It, U.S. Nuclear Test Film #55.

Tourists can now visit the Nevada Test Site and walk through “Doom Town” where more than 100 atomic tests were conducted. One Atomic Tourist Web site reassures potential visitors with the following statement: “Radiation badges are no longer necessary when visiting.”

17.6 The War on Terror

The war on terror is a distinctive kind of warfare or armed conflict. First, it is conflict with individuals and organizations, not nations. But international law defines war as a state of armed conflict between two or more nations. The war on terror was originally against al Qaeda. Today, counterterrorism policy includes other organizations such as ISIS (Islamic State in Syria or ISIL, Islamic State in the Levant) and related offshoots and movements. Second, Congress did not declare war on al Qaeda. Congress passed a joint resolution (the AUMF) that authorized the president to use armed force against those responsible for the 9/11 attacks. So the AUMF granted the president power to go to war RATHER than Congress actually declaring war.

Third, the war on terror is distinctive because it is a global war without a battlefield or geographic “theater of war.” It is fought in physical spaces such as Iraq and Afghanistan and Syria, cyber-space (cyber-attacks on financial systems and infrastructure), and the Internet—where terrorist organizations such as ISIS recruit supporters and rely on viral videos and other publicity to attract attention to the cause, while governments monitor social media to counter recruitment campaigns and detect and disrupt terrorist plans. Fourth, the war on terror is distinctive because it seems to be a war with no apparent end. In conventional warfare, there are familiar benchmarks for determining how the war is going and one side usually wins and the war is declared over. The war on terror lacks these benchmarks.
17.61 | Political Violence

Political violence is the use of violence to achieve a political goal. War is political violence. Terrorism is also a kind of political violence. Not all acts of political violence are terrorism. War is a kind of political violence that is not usually considered terrorism—although it may include state-sponsored terrorism. Revolutionary movements for national independence including guerrilla warfare or armed insurgencies are political violence that may or may not be terrorism. Organized mob actions, including vigilantism, are a kind of political violence that may or may not be terrorism. Police and civilian use of deadly force to fight crime and for self-defense is a form of political violence. In fact, the American political experience includes a great deal of political violence. Political violence has been an important part of some of the nation’s most important developments: the Revolutionary War founded the republic; the Civil War preserved the union and abolished slavery; the westward expansion of the country and the settling of the frontier was violent; and the U.S. used military force for territorial expansion and to extend the U.S. sphere of influence globally. Terrorism is generally defined as the inappropriate or illegal use of political violence by non-state actors. The central problem with this definition is the difficulty clearly and objectively differentiating between legitimate and illegitimate acts of political violence. This difficulty is reflected in the saying, “One person’s freedom fighter is another’s terrorist.” Those who consider political violence appropriate for certain purposes or causes are challenged to provide principled distinctions that can be applied to actual historical or contemporary examples. It is easy to fall into the subjectivity trap: defining causes that you support as legitimate and those you oppose as illegitimate, or concluding that the ends justify the means—so that if the end is legitimate then the means are legitimate.

17.62 | The Three Long Wars: Afghanistan, Iraq, and Terrorism

The wars in Iraq and Afghanistan are already the longest wars in American history. The war on terror is also a distinct, ongoing but unconventional war. A conventional war is warfare between the uniformed military of two or more countries (or nation-states). Unconventional wars and conflicts involve insurgents—individuals, organizations, and movements rather than governments:

- The combatants may not be in uniform;
- The combatants may not be part of a formal military chain of command;
- The combatants may not carry arms openly;
- The combatants may be intermingled with the general population;
- There may not be a battlefield, an actual geographic place where the fighting takes place. The fighting can occur where people live and work and while they go about their daily lives.

These aspects of unconventional warfare make fighting unconventional wars difficult to fight. It is often hard to identify the enemy, whose physical appearance may be identical to civilians who are not the enemy. It is hard to limit civilian casualties. And the conflicts typically have explicitly political objectives that make military strategies of limited utility in determining who wins. Symmetrical warfare is warfare where the combatants have roughly equal military might, kinds of power, and weapons. Asymmetrical warfare is warfare where one side has a
great deal more military power than the other. The two sides in asymmetrical warfare are likely to use very different weaponry. The wars in Iraq and Afghanistan are asymmetrical warfare. The U.S. has vastly greater economic, military, and technological power than Iraq and Afghanistan. The U.S. uses its military and technological advantage to wage high technology warfare that relies on sophisticated weapons systems including missiles, airplane bombers, and unmanned drones that are controlled by personnel who can be stationed halfway around the world from the actual battlefield. This asymmetry does not guarantee military success. Neither the British nor the Soviets won their wars in Afghanistan. In Iraq and Afghanistan the U.S. is engaged in the kinds of asymmetrical warfare that frustrate military superpowers. The counter-insurgencies made it very difficult for the British and Soviets, two military superpowers, to get out of the country after invading it and experiencing initial success.

Think about it!
Is it easier for a military power to enter a country than it is to exit? Listen to the National Public Radio Broadcast, “For Invaders A Well-Worn Path Out of Afghanistan,” (December 6, 2010) http://www.npr.org/2010/12/06/131788189/for-invaders-a-well-worn-path-out-of-afghanistan

The Iraq war began with the U.S. blitzkrieg air and ground attack that quickly overwhelmed Iraqi defenses. But then the U.S. faced resistance and conflicts that eventually became an insurgency that required a military occupation of Iraq. The Joint Chiefs of Staff initially refused to call the ongoing conflict an insurgency because 1) the word insurgency evoked memories of the U.S. being bogged down in Vietnam; 2) the military was not prepared to fight such a conflict. The U.S. Army is a large bureaucratic organization. The Army field manual still assumed that battles would be large scale “set pieces” where the armies of warring countries at war would engage one another on a battlefield. This conventional wisdom left the U.S. military unprepared for the ongoing conflict in Iraq and Afghanistan. A small band of high-ranking young officers with military experience fighting unconventional wars in Vietnam and elsewhere realized that the Army had to change in order to be prepared to fight insurgencies. One of these “insurgents” was David Petraeus. In The Insurgents: David Petraeus and the Plot to Change the Army Way of War (2012), Fred Kaplan describes how this “cabal” of “insurgents” forced the Army to adapt to the new unconventional warfare.

One challenge in unconventional warfare is minimizing the risks of civilian casualties, which are often euphemistically called “collateral damage.” Civilian casualties are an especially serious problem in unconventional warfare because “the people are the prize” in campaigns against insurgencies. Campaigns against insurgencies are politico-military campaigns. Success usually requires paying some attention to “winning the hearts and minds of the people” so that they will not support insurgents. Innocent civilian casualties that are dismissed as collateral damage make it harder to succeed. During the Obama administration, the emphasis on military operations that minimized civilian casualties both limited military actions and stimulated efforts to reduce risks in an environment where it has often been hard to identify friend and foe. The U.S. military has the most sophisticated weapons technology available. It has also developed sophisticated information systems to help solve the problem of identifying the enemy in Iraq and Afghanistan—and more broadly as part of counterterrorism policy. The military is using social
network analysis to identify insurgents who are a threat that lives and works among the general population, which is not a threat. Terrorist groups such as al Qaeda and insurgencies are organized as networks of individuals or groups that work together. This networking helps identify insurgents among the civilian population. The military now uses social network analysis to attack the network of insurgents rather than merely to target individual insurgents who might plant a roadside bomb or other Improvised Explosive Device (IED).

The objective in conventional warfare may be to overwhelm the enemy by destroying its military resources and undermining popular support for continued fighting. Counterinsurgency warfare has different goals. Jingoist slogans such as “Bomb them back to the Stone Age!” or “Nuke them all and let God sort them out!” are morally, politically, and militarily problematic because “[t]he people are the prize in a counterinsurgency operation.” But campaign rhetoric is still likely to include tough, jingoistic language. During the presidential campaign, Donald Trump promised to take decisive action to destroy the terrorist organization ISIS saying, “I would bomb the sh**t out of them.” And take their oil! Once in office, he authorized the military to drop “the mother of all bombs” on Taliban leaders hiding in caves in the mountains of Afghanistan. And on April 7, 2017, President Trump authorized launching a 59 Tomahawk cruise missile strike against a military airbase in Syria as a warning to the Syrian government.

17.63 | War Gamers and “Air Wars”?

Technology changes warfare AND media coverage of warfare. Vietnam War was the first television war that was brought into American living rooms. The Gulf War of 1991 (Operation Desert Storm) was presented as a blockbuster video game war. The U.S. military’s overwhelming technological superiority produced awe-inspiring optics of real-time Cruise missiles that used GPS technology to strike targets in Baghdad that appeared in the crosshairs. Audiences could watch communications buildings, tanks, and other military equipment being destroyed and Iraqi troops being killed. Reporters announced the start of the war from the upper floors of a Baghdad hotel with the flippant comment, “I guess its show time.” The television images of the nighttime strikes resembled fireworks displays, and the news coverage had story lines that made stars of General Colin Powell, General Norman Schwarzkopf, and the sophisticated military technology—particularly Patriot missiles. It is hard to imagine any reality television show that could compete for viewership with the Desert Storm TV show that the military and the media brought to American living rooms. The difference between the Vietnam, the first living room war, and Operation Desert Storm, the second living room war, could not be greater. In fact, conservatives consider Desert Storm evidence that the U.S. is finally recovering from the Vietnam Syndrome—the unwillingness to use American power abroad.
The term **air power** usually refers to missiles, bombers, jet fighters, helicopters, and now drones (unmanned aerial vehicles). The U.S. Air Force is the primary branch of the military that fights air wars and strives to maintain control over the skies. The terms *air power* and *air war* also refer to using the mass media or airwaves for military purposes. When Iraq invaded Kuwait in August of 1990, the Bush administration (Bush 41, George H. W. Bush) initially said the conflict was an Arab conflict to be settled by Arab states. Subsequently, however, President Bush decided to use military force to remove Iraq from Kuwait. But the administration had to convince the American public to support going to war in a distant land—a country that was disparagingly called a family-owned oil company with a seat in the United Nations! The Kuwaiti government hired the Washington DC public relations firm Hill & Knowlton to produce a political marketing campaign to sell the American public on going to war against Iraq. The campaign was so successful in *building public support* for going to war that the government then used the mass media as a force multiplier *during* the Gulf War. The media war plan included providing the public with the military’s views of the war, both by releasing the dramatic, almost real time video images of American military technology and by embedding reporters with troops. The media war plan developed and maintained public support for the Gulf War.

**17.64 | Drones**

Drones are one of the latest technologies to change warfare. The Obama administration began the extensive use of drones—unmanned aerial vehicles (UAVs)—for “targeted killings.” Targeted killing presents serious political, legal, and moral questions.

- Is “targeted killing” a euphemism for assassination—which is illegal?
- Who decides who gets put on the *kill list*?
- Should the U.S. develop a legal regime governing the use of drones or simply allow the technological development and use without rules of warfare?
- What will happen when other nations or organizations develop or obtain the technology to use drones against the U.S. or its allies?

**Think About it!**

The following PBS program examines Targeted Killings:

[http://www.pbs.org/newshour/rundown/2013/01/targeted-killings.html](http://www.pbs.org/newshour/rundown/2013/01/targeted-killings.html)

The **Association for Unmanned Vehicle Systems International** is an organization whose mission includes supporting and advocating for unmanned systems and the robotics industry. The
Association originally was closely aligned with military uses of the technology, but it now actively promotes using the unmanned vehicle technology for law enforcement.

17.65 | The Military Law of Unintended Consequences

_The Fog of War_ is an unofficial post-mortem documentary that critically examines the government’s decision-making during the Vietnam War. President Johnson’s former Secretary of Defense Robert McNamara exposes some of the problems with fact-based decision-making during the fog of war: facts may be hard to get in the middle of a crisis; and people working in the organizational chain of command can manipulate data for political purposes. McNamara was the head of Ford Motor Company with a reputation as a modern management-by-data leader who was brought to the Department of Defense to try to get good data on how the war in Viet Nam was going. The White House wanted data to show that the U.S. was winning the war. The military got the message and provided body counts of the enemy killed in battle. The first problem with this data-driven approach to war fighting was the political pressure for data showing that the war was being won created incentives to inflate body counts. The second problem was the tendency to think that the war was being won because so many enemy fighters were being killed.

The U.S. war on terror initially focused on al Qaeda, the terrorist group responsible for the 9/11 terrorist attacks. For example, Afghanistan was invaded in 2001 because it was a safe haven for al Qaeda. But then the U.S. invaded Iraq in 2003. The original stated reasons were to accomplish regime change because the President of Iraq had weapons of mass destruction and connections with al Qaeda. Neither reason was accurate. But one unintended consequence of the Iraq War was the creation of an opportunity for a new terrorist organization even worse than al Qaeda. ISIS is currently the primary terrorist target of the global war on terror. The rise of ISIS or ISIL (Islamic State in Iraq or Islamic State in the Levant) caught Americans by surprise because it had been a major terrorist organization. The PBS Frontline Documentary _The Secret History of ISIS_ explains that the U.S. overlooked ISIS even though analysts at the CIA’s Counterterrorism Center gave the White House a report describing its leader, Abu Musab al-Zarqawi, as an ambitious radical leader who was a serious threat. The threat was overlooked because Vice-president Cheney wanted the CIA to provide evidence that Saddam Hussein, the President of Iraq, had connections with al Qaeda, the terrorist group responsible for the 9/11 terrorist attacks. A CIA analyst reports receiving direct calls from the Vice-president’s office challenging the report describing ISIS as a threat to address because the Vice-president was focused on the al Qaeda-Hussein connection as a justification for invading Iraq. Then, after the U.S. invaded Iraq and killed Hussein, Iraq became a failing state that required a continued U.S. military occupation. The military occupation then created the opportunity for a terrorist policy entrepreneur like Zarqawi to present himself as the leader of Islamist fighters against the Westerners who had invaded and occupied Iraq after doing the same in Afghanistan.

Think About It!

_The Secret History of ISIS_

17.66 | Types of Military Action

Table 17.66 below describes three types of military action. The first type, defensive use of military force, is not politically or legally controversial. The Constitution specifically provided for it. The second type, using military power to preempt an imminent attack is politically controversial because there are likely to be debates about whether it was actually necessary. It is not legally controversial, however, because the Supreme Court has recognized that the government can act militarily before an armed enemy that is poised to attack actually attacks. War powers can be initiated by an imminent threat of attack. The third type of military action, preventive military action, is controversial politically and legally. A preventive war is a policy war in the sense that the government simply decides to use military force to prevent a possible threat of some kind. Preventive military action is more speculative. The War in Afghanistan was a defensive war in the sense that it was fought against a country that provided a safe haven for a terrorist organization to attack the U.S. The War in Iraq was a preventive war. The Bush administration decided to use military force for regime change in Iraq. Attacking a country in order to change its government is illegal under international law, therefore the Bush administration claimed that preventive war was necessary because Saddam Hussein had contacts with al Qaeda and Iraq possessed weapons of mass destruction. In fact, the Bush administration created public support for going to war in Iraq by falsely claiming that Saddam Hussein had contacts with al Qaeda and possessed weapons of mass destruction (WMDs).

Think About It!
Can the government create public opinion about global affairs? http://www.youtube.com/watch?v=qxhlkzTg14M

Table 17.66: TYPES OF MILITARY ACTION

<table>
<thead>
<tr>
<th>DEFENSIVE</th>
<th>PREEMPTIVE</th>
<th>PREVENTIVE</th>
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<tr>
<td><strong>Enumerated Powers:</strong></td>
<td><strong>Case Law:</strong></td>
<td><strong>Policy Wars:</strong></td>
</tr>
<tr>
<td>Article I, section 8 provides that “The Congress shall have Power...To declare War...; ...suppress Insurrections and repel Invasions.”</td>
<td>Supreme Court rulings allow the government to respond to a “clear and present danger,” a legal doctrine. The logic of conspiracy also means that the government does not have to wait until an armed enemy that is poised to attack actually attacks.</td>
<td>The decision to use military force as an instrument of foreign policy.</td>
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<tr>
<td>Article II grants the president power as Commander-in-Chief</td>
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<tr>
<td><strong>Implied Powers:</strong></td>
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<tr>
<td>The government, particularly the president, has the implied power to use military force for rescue missions (such as the Mayaguez and Iranian Hostage rescue missions).</td>
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17.67 | Presidential Wars

The U.S. now wages presidential wars. The personal presidency is nowhere more evident than the use of war powers, where the power problem is to find ways to hold presidents politically or legally accountable for their actions as Commander-in-Chief. The following quotes are statements that President George H. W. Bush made during the buildup to the first Iraq War—the Gulf War (1990–1991). The quotes, which are excerpted from Jean Edward Smith’s *George Bush’s War* (1992), illustrate the problem reconciling modern presidential thinking about war powers with the American commitment to the rule of law:

“… I am getting increasingly frustrated.” (News Conference November 23, 1990)
“Consider me provoked.” (News Conference, November 30, 1990)
“…I am not ruling out further options….” (News Conference, November 1, 1990)
“I don’t want to say what I will or will not do.” (News Conference, November 8, 1990)
“And today, I am more determined than ever in my life.” (Speech, November 1, 1990)
“So, I have not ruled out the use of force at all…” (News Conference, November 8, 1990)
“But I have no specific deadline in mind.” (News Conference November 21, 1990)
“I will never—ever—agree to a halfway effort.” (News Conference November 30, 1990)

“I have an obligation as president to conduct the foreign policy of this country as I see fit.” [He then quoted the famous statement by Representative (and later, Chief Justice) John Marshall that the president is “the sole organ of the nation in its external affairs” as evidence that the Framers of the Constitution wanted the president to have such plenary power.]

I think Secretary of Defense Dick Cheney expressed it very well when he said “there is no question that the president, as commander in chief, can order the forces to engage in offensive action…” “I feel that I have the constitutional authority to” go to war.

“It was argued I can’t go to war without Congress. And I was saying, I have the authority to do this.”

17.7 | National Security

The term national security refers to a country’s use of economic, political, and military power and influence to maintain its territorial integrity and political institutions. The concept of national security can be traced to the creation of nation-states, when armies were used to maintain domestic order and provide protection from foreign attacks. People create governments and form nation-states to provide for the defense of individuals and their civilization. These are basic government functions: “The most elementary function of the nation-state is the defense of the life of its citizens and of their civilization.” A government that is unable to defend these values “must yield, either through peaceful transformation or violent destruction,” to one that is capable of defending them. Each nation develops and implements its national security policy as an attribute of national sovereignty.
17.71 | Elements of National Security

Hans Morgenthau was a leading figure in international relations theory, politics, and law. His classic *Politics among Nations* (1948) describes national security policy as consisting of the following elements:

- **Diplomacy.** Diplomacy is the practice of negotiating agreements between two or more nations. Diplomacy is used to build alliances and isolate threats. Professional diplomats usually conduct diplomatic relations as representatives of their nation on matters related to war and peace, trade, economics, culture, the environment, and human rights. U.S. diplomats negotiate the terms of international treaties and executive agreements prior to their endorsement by the president and, if a treaty, ratification by the Senate.

- **Emergency Preparedness.** Protecting national security includes protecting communication systems, transportation, public health systems, and the economy from attacks. The increased reliance on electronic communications in these sectors has highlighted the importance of protecting them from cyber-attacks.

- **Economic power.** Nations use their economic power to reward allies by creating favorable trade and foreign aid agreements, to build international support by such favorable treatment, and to punish threats by, for example, promoting trade sanctions or even embargoes.

- **Military force.** Nations use military force or the threat of military force to meet threats to national security interests and to prevent nations or organizations from presenting threats.

- **Domestic Legislation.** Laws that target individuals or organizations that support violence or terrorism, for example. The State Department maintains a list of terrorist nations and laws such as the PATRIOT Act give the government power to prosecute individuals or organizations that provide material aid to such groups.

- **Surveillance.** Nations use surveillance, spying, and covert operations for national security purposes. The U.S. uses its intelligence agencies to respond to threats and to prevent them. The Central Intelligence Agency, the National Security Administration, and the Defense Intelligence Agency are federal agencies that are responsible for providing surveillance related to national security (as opposed to ordinary criminal activity). The Cold War and the War on Terror have blurred some of the traditional lines between domestic surveillance and foreign surveillance.

- The FBI’s mission is to protect the country from internal threats to national security or public order.

17.72 | U.S. National Security

During the Cold War era, U.S. national security relied heavily on military force or the threat of military force. National security became an official guiding principle of U.S. foreign policy with the enactment of the *National Security Act of 1947*. The Act created

- The National Military Establishment (which became the Department of Defense when the Act was amended in 1949);
- A Department of the Air Force from the existing Army Air Force;
Separate military branches that were subordinated to the Secretary of Defense, which was a new cabinet level position;

- The National Security Council. The National Security Council was created to coordinate national security policy in the executive branch. The NSC is the president’s main forum for considering national security and foreign policy issues.
- The Central Intelligence Agency. The CIA was the nation’s first peacetime intelligence agency.
- The National Security Agency. The National Security Agency was so secretive that the letters NSA were humorously said to mean No Such Agency. The NSA Web site describes it as the home of the government’s “code makers and code breakers.”

For most of the 20th Century, national security was defined primarily in terms of military power—having a military strong enough to protect the country from foreign attacks or threats. WWI and WWII were armed conflicts between nation-states. In WWII, the U.S. and its allies fought against countries (Germany, Japan, and Italy) that had invaded other countries. The Cold War included armed conflict between nation-states, but it primarily involved non-state actors that were supported by nation-states. Today, non-state actors including terrorist organizations and international drug cartels are considered greater threats to U.S. national security than a military attack by another country. As a result, the concept of national security has been broadened to include economic security, technology, and vital natural resources, and even environmental conditions.

During the Obama administration, the Department of State’s mission statement included advancing freedom by building a more democratic, secure and prosperous world where government addressed the needs of the people—including poverty. The Trump State Department’s mission statement reflects a more America First and less egalitarian mission: “The Department’s mission is to shape and sustain a peaceful, prosperous, just, and democratic world and foster conditions for stability and progress for the benefit of the American people and people everywhere. This mission is shared with the USAID, ensuring we have a common path forward in partnership as we invest in the shared security and prosperity that will ultimately better prepare us for the challenges of tomorrow.”

Nongovernment organizations such as The Center for New American Security define natural security to include natural resources. The broader definition of national security actually began recognition of the importance of petroleum. The world’s economies are dependent on fossil fuels: oil, coal and natural gas. American dependence on imported oil is one of the reasons why the U.S. is so engaged in the Middle East. Energy independence is a goal with economic, military, and national security benefits. However, oil is not the only natural resource that is considered vital to national security.

17.73 | Food and Water

Governments are responsible for providing an adequate and safe food supply. Population growth and hunger are related issues that can become national security issues. The U.S. has a strategic oil reserve that is used to prevent disruptions in the energy supply. China, the world’s most populous country, has a strategic pork reserve that it uses to prevent food scarcity from becoming a national security issue.
Water is also a vital resource for human and other life. Access to an adequate and safe supply of fresh water is considered a component of a nation’s security in a world where there is increased competition for this valuable and increasingly scarce resource. A United Nations Report “Water Scarcity” states that almost 20% of the world’s population now lives in areas of physical scarcity. It provides information about and prospects for “water for life” in a world where (to quote Samuel Coleridge, Rime of the Ancient Mariner) there is “Water, water everywhere, nor any drop to drink.” As nations compete for access to water, water will become a more important component of a nation’s national security.

Every four years the National Security Council compiles a Global Trends Report that describes and analyzes developments that are likely to affect national security. The National Security Council is comprised of 17 U.S. government intelligence agencies. The 2012 Report predicted that 2030 would be “a radically transformed world.” Asian countries will have surpassed the U.S. and Europe. The good news is that there will be less poverty, more democracy, more individual rights, and increased health. The bad news is that the world of 2030 is likely to include much more fighting over natural resources, particularly food and water.

Non-fuel minerals are also important for advanced economies where rare and precious minerals used in the manufacturing and high-tech economies of the world. Non-fuel minerals are essential to manufacture of aircraft and computers and automobiles. In the information age, cell phones require tantalum, liquid crystal displays require indium, and other familiar products that are part of everyday modern life require platinum group metals. Rare earth minerals with properties such
as conductivity, luminescence, and strength are very valuable for high-tech economies. Organizations such as the Center for New American Security, which identifies national security as increasingly dependent on a secure supply of natural resources, lobby for a broader perspective on national security, one that includes energy, minerals, water, land, climate change, and even biodiversity.

17.75 | Immigration

The U.S. proudly proclaims to be a nation of immigrants. The Statue of Liberty famously welcomes immigrants seeking opportunities for a better life and realizing the American dream of individuals and families working hard for a better life for themselves and their children. Immigration policy is usually about economic opportunity and political freedom (e.g., refugee policy) but periodically immigration becomes about national security. The post-WWII trend toward extending rights to immigrants, and making immigration policy less political and more legal, was reversed by three events:

- The War on Terror. Terrorist attacks and the threat of terrorism transformed immigration policy—particularly control of the nation’s borders or border security—into national security policy. As a result, national security interests began to trump support for protecting immigrant rights by extending due process rights to them.
- Patriotism. The patriotic fervor that swept the country in the aftermath of the terrorist attacks on 9/11 revived the feeling that the U.S. needed to better protect the distinctive American national identity by limiting the number and kinds of people who were coming to the country legally or illegally. Throughout American history, immigration policy debates have periodically been shaped by worries about protecting national identity.
- The Great Recession. The Great Recession and structural changes in the American economy created a sense that economics and politics had become zero-sum. In zero-sum economics and politics, one person’s (or group’s) gains come from another person’s (or group’s) losses. This created the perception that immigrant rights were limited native-born citizens’ rights, and that immigrants, particularly illegal immigrants, were taking scarce jobs from citizens, depressing wages, and consuming government benefits such as education, health care, and social welfare without paying a fair share of taxes.

17.76 | The Trump-Russia Scandal

Congressional investigations of Russian intervention in the 2016 U.S. elections have expanded the scope of national security beyond the terrorism-related threats that were the focus of policymakers since the 9/11 attacks. The Russian intervention in the 2016 elections was initially considered a narrowly targeted campaign against Hillary Clinton. Subsequently, however, it was apparent that the Russian campaign had far broader goals:

- First, it was considered an anti-Clinton campaign;
- Then it was considered a pro-Trump campaign;
- Then it was considered an attempt to erode confidence in American democracy;
- Then it was considered part of a campaign to erode support for NATO;
- Then it was considered part of a campaign to erode support for, or even to abolish the European Union; and finally
It was considered, at its broadest, a campaign to erode support for western liberal democracy.

Vladimir Putin’s organized campaign to undermine elections in the U.S. and other democracies was also initially assumed to be part of the effort to “Make Russia Great Again” by reviving the Cold War conflict. Subsequent analyses describe Putin as trying to initiate in a new type of conflict called non-linear warfare. The Cold War conflict was a conflict between relatively stable coalitions. Non-linear warfare is different. There is no distinction between peace and war; no actual battlefield; there are constantly shifting patterns of allies and enemies rather than stable sides; global affairs involves frenemies: friends are sometimes enemies and enemies are sometimes friends; and non-linear warfare is a new kind of total warfare in the sense that it is not all-out total are, but war is waged using economic, political, communications, and military assets and targets. Among the various federal government agencies involved with efforts to fight cyber-attacks, cyber-warfare and cyber-crime are The Department of Defense, the Central Intelligence Agency, and the Federal Bureau of Investigation.

The Department of Defense:

The Federal Bureau of Investigation describes itself as the “lead agency” for investigating cyber-attacks “by criminals, overseas adversaries, and terrorists.”
https://www.fbi.gov/investigate/cyber
https://www.fbi.gov/wanted/cyber

The Central Intelligence Agency’s Directorate of Digital Innovation hires Cyber Operations Officers:

The Russian Cyber-attacks during the 2016 elections have been one of the main stories in the first year of the Trump administration. The Senate Intelligence Committee held hearings on Russian intervention in the 2016 elections, particularly on behalf of Donald Trump. The testimony of Clinton Watts (beginning at 52 minutes) explains Russia’s timing of their fake news tweets. They knew when Trump was likely to re-tweet them. They also knew which states were swing states in the election and targeted them. The cyber-attack was effective mainly because Trump spread their propaganda.

The testimony of former FBI agent Clinton Watts

17.8 | Comparative Politics and International Relations

17.81 | Comparative Politics

Comparative politics is a field of political science that relies heavily on the comparative method of studying government and politics. Comparative politics is one of the oldest fields in the study
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of politics. Aristotle compared the different forms of government to determine the best form of government. Today, comparative politics is generally divided into area-specialists (e.g., Africa, Latin American, Asia, or the Middle East) and scholars who use social science methods to study different political systems by comparing and contrasting different systems. Comparative politics can refer to American politics—for example, comparing state or regional government and politics within the United States—but comparative politics is primarily the study of government and politics in other countries. One way to increase understanding of U.S. government and politics is to compare it with other countries. Comparative works include Giovanni Sartori’s 1976 study of party systems, Gabriel Almond and Sidney Verba’s 1963 study of civil culture, and Samuel Huntington’s 1968 study of developing countries. Today, global organizations describe and analyze issues such as freedom, economic development, good government, and corruption from a comparative perspective. Transparency International provides information about corruption in various countries. It defines corruption as the “abuse of entrusted power for private gain.” It examines corruption related to topics such as access to information, education, humanitarian aid, and intergovernmental bodies. The organization’s goal is to work toward government, politics, business, and civil society that is free of corruption.

Think about it!
When comparing countries, would a non-geographic map be useful?

17.82 | International Relations

International relations (or international studies) is the study of relations between countries. International relations includes the study of organizations, law, and issues including national security, economic development, crime (drug, terrorism, trafficking), environmental sustainability, social welfare, and human rights. International relations examines nation-states or countries but it is not limited to governments. International relations is also the study the behavior of intergovernmental organizations such as the United Nations and the Organization of American States; non-governmental organizations; and multinational corporations. In fact, international non-governmental organizations and businesses have become very important participants in international relations. Interpol, the International Criminal Police Organization, is an international intergovernmental organization whose mission is to “Connect Police for a Safer World.” The development of national and international organized criminal enterprises prompted the development of international policing efforts. With 190 countries as members, Interpol is one of the largest intergovernmental organizations. Its organizational structure includes a president, and executive committee, and a General Assembly that meets annually to discuss coordination of policing.

Historically, international law was the body of rules and principles that governing nations and their dealings with individuals of other nations. This is public international law because it deals with government bodies. International law, which included jus gentium (the law of nations) and jus inter gentes (the agreements between nations), was the body of rules of conduct that are generally accepted as binding or controlling. International law is based on the consent of the
parties that are subject to it. The United Nations is the major public international law organization. Its main judicial body is the International Court of Justice. Over time, international law has extended its scope to include non-government actors. This is private international law—the body of rules and principles that govern individuals and non-governmental organizations. International law is a growing body of law that has been developing piecemeal, subject area by subject area, policy domain by policy domain. Trade law, intellectual property and contract law, human rights law, criminal justice law, and environmental law have been developed largely independently of one another, based on the interests and consent of the parties, rather than as a comprehensive strategy for coordinated legal development enacted by a single authoritative source. Internationalists are advocates of U.S. engagement in global affairs.

17.83 | Realism and Idealism

One element of a political ideology is a belief about human nature as good or bad, self-interested or public-minded. Ideological assumptions about individual behavior are also applied to thinking about the behavior of nations (which are, after all, organizations of individuals). Realism and idealism are based on different assumptions about the behavior of nations.

**Realism** is the theory that international relations can be best explained by the fact that nations are rational actors that primarily pursue their self-interest. Realists assume that human beings are by nature self-interested and competitive rather than benevolent and cooperative. This self-interested behavior also characterizes the behavior of nations. Accordingly, a nation’s paramount self-interest is national security: survival in a Hobbesian world where nations, like individuals, pursue their self-interest without being constrained by morals or ethics or national or international governments. Realist believe that values such as democracy, equality, peace, human rights, and justice are important, but they are secondary to the primary goal of national self-interest. Human rights and justice can be recognized when they happen to coincide with national interest, but national interest trumps these values when they conflict with national interest.

Realists assume that the natural state of international relations is anarchy. Anarchy is a condition where governments (or individuals) are able to pursue their own interests without legal restrictions. Without a governing body or set of rules to limit the actions of nations, countries exploit power advantages over one another to achieve their national interest. Realism is therefore associated with power politics. Power politics is the belief that (national) might makes right. In other words, there is no objective understanding of justice because justice is merely whatever the stronger power (e.g., the winner of a war) says it is.

The Italian political philosopher Niccolo Machiavelli (1469-1527) and the English political philosopher Thomas Hobbes (1588-1679) are classical political theorists whose views reflect realist assumptions about human and national behavior. In *The Prince*, Machiavelli argued that a political leader had to use power politics in order to accomplish the two main goals that he though all good leaders should strive for: maintaining the state (or nation) and achieving great things. Machiavelli defined power politics to include deception, manipulation of other actors, and the use of force—whatever means were necessary to accomplish their goals. In
Leviathan (1651), Hobbes argued that strong government was necessary to create and maintain good order because individuals were by nature self-interested and had to be controlled. Both Machiavelli and Hobbes are considered realists in the sense that they believed that good strong leadership required a willingness to do what was effective rather than what was morally or legally right.

Idealism is the theory that international relations can be organized and conducted according to values other than, and perhaps even higher than, national self-interest. These values or higher ideals include justice, human rights, and the rule of law. In international relations, idealists believe that the behavior of nations can include actions that are motivated by political values other than national interest. In contrast to realists, idealists believe that the self-interested nature of individuals and governments can be tempered or limited by the introduction of morality, values, and law into international relations. President Woodrow Wilson (1913-1921) is perhaps the American political official who is most strongly identified with idealism. Indeed, in International Relations idealism is sometimes referred to as Wilsonian Idealism. After the end of WWI, Wilson worked to create what he called a “Just Peace.” He believed a just peace could be creating by developing an international system where individual nations were able to put aside their narrow self-interest and power politics to work for international peace and cooperation. At the Paris Peace Conference in 1919, Wilson advocated for a treaty, The Treaty of Versailles, which would commit nations to a peace plan and create the League of Nations. However, the U.S. Senate failed to ratify the Treaty partly because of the fear that U.S. national sovereignty would be compromised by legal requirements to comply with decisions of the League of Nations.

Critics of the United Nations or specific treaties still worry about weakening U.S. national sovereignty. This is one of the main reasons for opposition to U.S. signing the Rights of the Child Treaty, the United Nations Framework Convention on Climate Change (The Paris Agreement), and the Law of the Seas Treaty (LOST). The Senate has not ratified the LOST, which was negotiated during the United Nations Law of the Sea Conference from 1973–1982. Opponents worry that environmental policies to promote sustainability of marine resources and environments will require increased government regulation of business. This concern is reasonable because the Law of the Seas Treaty marks a change from the traditional law of mare liberum, a legal regime that allowed each nation to use resources in international waters as they saw fit, to a legal regime that regulated international waters to conserve resources and achieve sustainability. Conservative organizations such as the Heritage Foundation and the National Center for Policy Research, and libertarian organizations such as the Cato Institute, opposed ratification of the Treaty because they believed it would further erode U.S. sovereignty by requiring the United States to enforce laws that were developed to represent interests other than American interests.

The Senate’s Role in the Ratification of Treaties
http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm
Debates about how the U.S. should use its power, whether the means and the ends should be idealist or realist, are not merely theoretical: they shape policy. Cold War debates about idealism or realism were framed as the question whether the U.S. should adhere to democratic values and the rule of law or adopt a “whatever it takes to win” strategy. Conservative hawks leaned toward realism (i.e., fighting the way the enemy fought; doing whatever was necessary to win) while liberal doves leaned toward idealism (i.e., playing by the rules of limited warfare). The war on terror has revived these debates. The realists in the Bush administration argued that neither the legal regime for crime nor the legal regime for conventional warfare was adequate for the war on terror, so the administration authorized the use of enhanced interrogation and special military commissions for the enemy combatants who were captured. The term illegal enemy combatants was used to differentiate detainees from prisoners of war, who were protected by established international and domestic laws. Idealists considered terms like “enhanced interrogation” a euphemism for torture—which is prohibited by domestic and international law. Idealists also defended the use of existing legal regimes—the criminal justice system and the Uniform Code of Military Justice (UCMJ)—as adequate to prosecute individuals suspected of terrorism and opposed the use of special military commissions to try them.

Think About It!
Donald Trump’s *Whataboutism* strategy
Donald Trump has adopted an old Soviet tactic when faced with criticism or an uncomfortable situation. When westerners mentioned the low pay in communist countries, Soviet officials asked how much slaves were paid in the United States! Or when the leader of the free world criticized the Soviet Union for violating human rights, the Soviet Union would create a Human Rights Division and then mention that the U.S. lacked one.

Think about it!
Watch the video of the congressional investigation of the use of “coercive management techniques” for perspectives on the debate about torture, harsh interrogation, or enhanced interrogation: [http://video.pbs.org/video/1629461216](http://video.pbs.org/video/1629461216)

17.84 | Summary of Recent Developments

The following are some of the most significant recent trends in global affairs:
- **Terrorism.** Counterterrorism policy promises to be part of a long war that shapes U.S. domestic and national security policy.
- **Declining support for Democracy.** The decades-long trend toward declining support for democracy, and increasing support for authoritarian government, may signal an end to the post-WWII model of governance. The Trump administration’s America First approach, particularly its nationalism, marks a change in global affairs policy.
• Anti-immigration. Anti-immigration movements in the U.S., Britain, and Europe have transformed immigration (including refugee policy) from an economic issue into a national security issue. This is likely to be a long-term trend that ends the period where globalism supported human migration—freer movement of people across national borders just as freer trade made it easier for goods to move across national borders.

• Nationalism. The rise or return of nationalism—both national identity and economic nationalism—is altering basic assumptions about global governance. This includes the status of the European Union and the trans-pacific partnership between the U.S., Britain, and Europe.

Think About It!
Does the U.S. have a 1.0 Constitution for a 2.0 world order? Does the Constitution describe how government actually works in global affairs? In *The World in Disarray*, Hass says that national sovereignty was the foundation of the old world order 1.0. He supports a new world order 2.0 where a nation has an obligation to deal with the kinds of internal problems that cause global problems (disease; human migration; environmental degradation).

17.9 | Additional Resources


17.91 Additional Resources

The U.S. Department of State Country and Foreign Policy Information

The United Kingdom: https://www.gov.uk/
U.S. relations with the United Kingdom: http://www.state.gov/p/eur/ci/uk/

Canada: http://www.canada.gc.ca/home.html
U.S. relations with Canada: http://www.state.gov/r/pa/ei/bgn/2089.htm

Mexico: http://en.presidencia.gob.mx/
U.S. relations with Mexico: http://www.state.gov/r/pa/ei/bgn/35749.htm

Israel: http://www.gov.il/firstgov/english
U.S. relations with Israel: http://www.state.gov/r/pa/ei/bgn/3581.htm

Germany:
http://www.bundesregierung.de/Webs/Breg/EN/Homepage/_node.html
U.S. relations with Germany: http://www.state.gov/r/pa/ei/bgn/3997.htm

Brazil: http://www.brasil.gov.br/?set_language=en
U.S. relations with Brazil: http://www.state.gov/r/pa/ei/bgn/35640.htm


China: http://english.gov.cn/
U.S. relations with China: http://www.state.gov/r/pa/ei/bgn/18902.htm

Saudi Arabia:
http://www.saudi.gov.sa/wps/portal/yesserRoot/home/?ut/p/b1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOId3Z2dgj1NjAz8zUMMDTxNzZ2NHU0NDd29DFWDU_P0_Tzyc1P1C7IdFQFV9YhO/dl4/d5/L2dBISEvZ0FBIS9nQSEh/
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7. Sumner’s anti-imperialist, anti-war essay defending republican government is available at http://praxeology.net/WGS-CUS.htm
8. Eisenhower’s Farewell Address is available at: http://www.americanrhetoric.com/speeches/dwightdeisenhowerfarewell.html
10. Nixon’s Address is available at http://www.state.gov/r/pa/ho/frus/nixon/i/20700.htm
11. For an educational perspective on how to present globalization see http://www.cotf.edu/earthinfo/remotesens/remotesens.html
13. http://www.state.gov/g/drl/hr/treaties/
16. https://www.state.gov/artandhistory/history/common/investigations/ChurchCommittee.htm