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Picking a President: The Nomination Process Across American History

Picking a president of the United States is hard work. The process used by Democrats and Republicans to select Kamala Harris and Donald Trump as 2024 presidential nominees bears little resemblance to the process used to select nominees in our first presidential races.

The first national constitution in the United States was the Articles of Confederation adopted in 1777. The Articles, which organized our political system until 1789,

did not provide for an independent executive branch or a presidential office. But after years of turmoil under the Articles, delegates to the Constitutional Convention sought to remedy this and other governing challenges.

The new constitution that replaced the Articles in 1789 established a executive branch of the national government coequal with legislative and judicial branches also established in the new constitution. The executive branch was to be led by the president. Article II of the

Constitution addresses the core responsibilities, powers, and qualifications of this new executive branch. It also outlines the Electoral College system that Americans still use to elect presidents every four years.

However, our constitution does not explain how to run for president or what process Americans should use to choose presidential nominees. As a result, the presidential nomination process has looked different across American history.

The presidential elections of 1828, 1896, and 1968 caused major reforms in the nomination process.

The Election of 1828

Political parties did not exist when the United States was founded. The first president, George Washington, belonged to no political party and ran unopposed. He was elected by unanimous vote of the electors.

Following George Washington's two terms, an informal process for picking presidential nominees largely was left to a few powerful congressmen. Candidates who represented different legislative factions and various geographic regions competed against each other in a general election. This meant that presidential campaigns and elections were candidate-driven instead of party-driven.

Political parties started to play an essential role in the presidential nomination process by the early 1800s. While John Adams and Thomas Jefferson affiliated with different political parties in the 1796 and 1800 elections, historians and political scientists frequently point to the 1828 presidential election as a transformational election.

Despite Andrew Jackson having won the national popular vote in the 1824 presidential election, John Quincy Adams won a plurality of the electoral college, and the House of Representatives elected Adams as president. (A plurality means the most votes, though short of a majority.) Determined to win the White House, Jackson ran for president again in 1828. Martin Van Buren, himself a future president, led his revamped campaign.

National Party "Machines"

As the mastermind behind Andrew Jackson's 1828 presidential campaign, Martin Van Buren was responsible for engineering a new approach to party organization

and presidential nomination. Van Buren wanted political parties to become national party "machines" that could energize and connect voters, donors, and political leaders from across the country.

National party machines would align local and state party organizations more closely to the party's national leaders. This would make it easier to coordinate activities, organize members, and maintain party discipline on policy issues and election preferences. Van Buren thought that a stronger party organization would build more cohesive support for a presidential candidate and help prevent a repeat of the 1824 election.

Party Conventions

According to Van Buren, nomination rules and an official nominating convention could make political parties' decisions more formal and transparent.

A nominating convention would allow members of the party from across the country to come together, learn more about different candidates, and then pick their party's presidential nominee. These party delegates would then return home and educate their communities about the party's processes and nominees.

In their 1828 presidential rematch, Andrew Jackson beat John Quincy Adams in both the popular vote and the electoral college. And Van Buren's new approach to party organization and presidential nomination fundamentally reshaped American politics. Moving forward, political parties in the United States aimed to become more disciplined, accessible, and nationally cohesive during election season. Party nominating conventions served to formalize and publicize party decision-making while also producing unity around a presidential nominee.

The Election of 1896

In the 1896 presidential election, the Republican William McKinley narrowly defeated the Democrat William Jennings Bryan, winning 23 of the then 45 states and collecting 51 percent of the national popular vote. But well before the November general election, McKinley was approaching his bid for the White House differently. The Ohio governor was running a unique campaign that would forever change the presidential nomination process.

Campaign Key Terms

primary - a state-level presidential election in which voters choose political-party convention delegates by popular vote using ballots; the alternative to a caucus.

caucus - a state-level presidential election in which voters choose political-party convention delegates through in-person voice votes; the alternative to a primary.





Republican candidate William McKinley accepted his first nomination for the presidency at his home in Canton, Ohio, in 1896.

Before McKinley's campaign, the norm of presidential nominations was for candidates to forego a direct campaign for their party's nomination. Instead, a candidate's friends and political allies would attempt to drum up support before the nominating convention began, usually at the state level among soon-to-be convention delegates. But a candidate would not personally campaign or solicit endorsements and public backing for the nomination. The presidency represented a high office of public service, not a personal prize, and candidates were expected to demonstrate restraint, humility, and selflessness in the buildup to their party's nomination.

What McKinley Did Differently

In the two years before the 1896 presidential election, McKinley himself actively campaigned, organized nationwide support for his candidacy, and developed strong connections with political donors. McKinley left Ohio and travelled the country to hold political meetings, make campaign stops, and give speeches about his own policy views and the future of the Republican Party. He met with Republican state leaders and convention delegates in 1895 and 1896, which made him more well known within the Republican Party before the party selected its nominee.

William McKinley's strategy was successful. The Republican Party selected him as its presidential nominee on the first ballot of voting at the party's convention in June 1896. Having built a national coalition of supporters early on, McKinley made speeches from home or close to home during the general election, while supporters traveled around the country campaigning for him. He

raised a lot of money and outspent his opponent, William Jennings Bryan, and then won the presidential election.

McKinley's campaign revolutionized the presidential nomination process. Future presidential candidates would start personally campaigning early to try to gain new donor contacts, greater national visibility, and a growing national coalition long before the political parties' nominating conventions began.

The Election of 1968

The third major reform to the presidential nomination process resulted from a time of extreme national and party division during the 1968 presidential election. By the late 1960s, the Democratic Party was fracturing. Party members increasingly disagreed on a host of major issues, including the Vietnam War, civil rights, and the economy. These divisions were especially present along generational lines, with older Democrats and younger Democrats disagreeing about major issues.

As the 1968 presidential election approached, President Lyndon B. Johnson — a Democrat who had been serving as the U.S. president since 1963 — found that the party's divisions were presenting significant challenges to his administration. He believed that only new leadership could unify the Democratic Party and the country.

On March 31, 1968, President Johnson gave a televised address, in which he told the American people that he would not seek re-election. With the incumbent president out of the presidential race, different Democrats vied for their party's presidential nomination. When the Democratic National Convention began in Chicago, Illinois, in August the main candidates for the presidential



The 1968 Democratic National Convention in Chicago nominated Vice President Hubert Humphrey as its presidential candidate.

nomination were Hubert Humphrey, Eugene McCarthy, and George McGovern.

Over the course of the four-day convention, controversy erupted inside the convention, and violence erupted outside. Fights over which delegates could participate in the convention and what the party's platform would be on controversial subjects such as the Vietnam War widened the party's rifts, as did the party's presidential nomination process.

Despite not having won a single presidential primary or caucus, then-vice president Hubert Humphrey was picked to be the Democratic Party's presidential nominee, and his nomination alienated large segments of the party. At the same time, multiple protests occurred outside the convention, and local police engaged in arrests and violence to quell the unrest.

The McGovern-Fraser Commission

Hubert Humphrey was unable to bridge the divides within his party prior to the November 1968 general election. He lost the election to his Republican opponent, Richard Nixon. These developments spurred the Democratic Party to rethink its nomination process.

The Democratic Party set up the Commission on Delegate Selection and Party Structure, better known as the McGovern-Fraser Commission (the commission was led by then-U.S. Senator George McGovern and then-U.S. Representative Donald M. Fraser). This commission was tasked with creating new rules that would improve the party's presidential nomination process and reorganize the party's convention.

After considering numerous reform proposals, the commission generated a report, called the "Mandate for Reform." This report criticized the Democratic Party for discounting the opinions of its grassroots members and endorsing undemocratic, "back room" nomination practices. The report explained that "no decision is more important to the rank-and-file member than the choice of the party's presidential nominee," so it was imperative that new rules and processes be implemented within the party to allow everyday members a greater voice in the presidential nomination process.

The Democratic Party approved many of the McGovern-Fraser

Commission's rule recommendations in time for the upcoming 1972 presidential election. These rule changes allowed for new "standards of fairness" for the party, including:

- more gender and racial diversity and representation among convention delegates,
- clearer criteria about the selection of delegates, and
- more inclusive state-level processes that could foster greater participation during the primary and caucus season.

Although these important reforms initially only applied to the Democratic Party, state election laws began incorporating these reforms and the Republican Party eventually adopted many of them as well.

The reforms generated by the McGovern-Fraser Commission forced presidential candidates to run a new kind of campaign. For example, following the McGovern-Fraser Commission, state parties were required to "adopt procedures which will provide fair representation of minority views on presidential candidates."

Many state Democratic parties responded by reconstructing their primaries or caucuses, so that these contests would "divide delegate votes among presidential candidates in proportion to their demonstrated strength." So, if a state was responsible for sending 40 delegates to the Democratic National Convention, its presidential primary would be used to determine how to allot those 40 delegates. Presidential candidates who participated in the state's primary and did well would earn a greater

share of the state's delegates to the national convention, while candidates who did not participate in the primary — or who performed poorly in the primary — would not gain as many pledged delegates.

The new primary-election processes allowed for American voters to become more involved in the selection of presidential nominees. It forced presidential candidates to travel to more states and engage with diverse communities and interest groups in order to succeed across different state primaries and caucuses.

The Process Today

Even today, there are differences between the nomination processes used by the two main political parties in the United States, the Democratic Party and the Republican Party. The two parties do not share the same primary and caucus rules, election calendars, rules for determining convention delegates, or even the same organizational structure for their national conventions. For example, the Republican party allows its party in each state to decide whether to use the proportional method or a winner-take-all method for selecting delegates to its national convention. The Democratic Party, however, has mandated a proportional method for selecting delegates. But both parties are committed to selecting presidential nominees every four years and use established criteria for selecting them.

The U.S. Constitution does not require a specific process for choosing presidential nominees. Our political parties have played an important role in an evolving process, as you can see in the landmark elections discussed in this article. There were consequential changes in the 19th

and 20th centuries, and the 21st century will likely bring more changes, as well. As problems with the presidential nomination and election process continue to arise, what creative solutions will citizens, political leaders, and parties use to fix those problems and transform our political system?

Writing & Discussion

1. Describe the major changes to the presidential nomination process in the elections of 1828, 1896, and 1968.
2. What problem did the McGovern-Fraser Commission attempt to solve? Do you think the commission was successful? Why or why not?
3. Do you think that our process for selecting presidential nominees has improved or worsened over time? Why?
4. Work with a partner to research the presidential-nominee selection process in your state. Focus on these core questions:
 - Does your state rely on presidential primaries or caucuses?
 - How many delegates does your state send to the Republican and Democratic National Conventions?
 - How are the primaries and/or caucuses organized in your state?
 - What improvements could be made in your state's selection system?

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ACTIVITY: YOUR REFORMS

It has been more than 50 years since the McGovern-Fraser Commission convened. In its "Mandate for Reform," the commission concluded: "The Commission has proceeded in its work against a backdrop of genuine unhappiness and mistrust of millions of Americans with our political system. We are aware that political parties are not the only way of organizing political life. Political parties will survive only if they respond to the needs and concerns of their members."

You work for a nonprofit that focuses on election reform in effort to increase voters' happiness and trust in the U.S. political system. You will work with colleagues to create a report that will be presented to the leadership of the two major parties (Republican and Democrat).

Your report must focus on three questions:

1. What should the two major parties (Republican and Democrat) do to increase happiness with and trust in the political system?
2. What are the pros and cons of having political parties today?
3. Are there ways to improve how presidential candidates are selected?

Be ready to have a spokesperson report on your group's findings with the rest of the class.

Assessment: Write a paragraph on ways that you recommend would increase American voters' happiness and trust in the U.S. political process.





People of the Big Pine Paiute Tribe in the Owens Valley of California stand in front of their community center in the 1920s. Alice Piper is standing at the farthest left side in the upper back row.

Alice Piper's Fight for Educational Equality

In 1923, a 15-year-old Paiute girl named Alice Piper stood at the forefront of a movement that challenged the segregated education system in California for Native Americans. Alice, along with six other Native American children, attempted to enroll at their local public school in Big Pine, California. The students were denied admission solely based on their Native American (or Indigenous) heritage. In response, the Piper family and others jointly sued the school district in a case called *Piper v. Big Pine School District of Inyo County*.

Native American Education in California Before Piper's Case

For thousands of years, Native American communities in California maintained their own ways of educating youth, passing knowledge and traditions down through generations. When the Spanish arrived in California in 1769, they made great efforts to obtain natural resources and forcefully turn Indigenous people into a domestic labor force.

Between 1769 and 1853, Spain established 21 missions in the native lands of California. In the missions, indigenous men, women, and children were forced to work long hours. Indigenous cultural and religious practices were prohibited under the threat of physical

punishment, and California Indians were required to learn and speak Spanish. Resistance was widespread. There were numerous revolts and uprisings by California Indians throughout the Spanish mission period.

The expansion of the United States westward led to growing conflict with California's Indigenous nations. By 1852, the U.S. government had negotiated 18 treaties with 139 different sovereign California Indian nations. These treaties promised to reserve one-third of California's land for Native American communities.

However, those promises were broken. The federal government forced Native Americans onto reservations, which were only a small fraction of the land originally guaranteed by the treaties. Many of these treaties included promises by the U.S. government to provide social services and education to Native American tribes. Despite these assurances from the U.S. government, Native American children faced significant barriers to equal education in California.

Before 1920, the federal government operated Indian boarding and day schools with the primary goal of assimilating Native American children into American society. Richard Pratt, an influential figure in the establishment of these schools, famously stated, "Kill the Indian to save the man."

EARLY FIGHTS FOR EDUCATIONAL EQUALITY IN CALIFORNIA

There have been several landmark cases that challenged racial segregation in California public schools. In each of these California Supreme Court cases, the courts grappled with the question of providing equal education to all children:

Ward v. Flood (1874): The court upheld the decision to deny Mary Frances Ward, an 11-year-old Black student, admission to a San Francisco public school attended by white children. The court ruled that the state's "separate but equal" doctrine allowed for segregation in public education if Black students had access to their own schools.

Tape v. Hurley (1885): The court ruled that the exclusion of an eight-year-old Chinese American child, Mamie Tape, from a public school based on her race violated state law. In the same year as the decision, the California State Assembly passed a bill changing the law to allow for the creation of "separate schools for children of Mongolian or Chinese descent."

Wysinger v. Crookshank (1890): Edmond Wysinger, a Black man, successfully challenged the exclusion of his 12-year-old son Arthur from public school in Visalia, California. The court ruled that denying Arthur admission to the local public school was unconstitutional, affirming the right of Black children to access public education in the state.

Mendez v. Westminster (1947): Sylvia Mendez, an eight-year-old girl, and other Mexican American children were denied access to public school in Westminster, California. The court declared that the segregation of children into separate schools was unconstitutional.

These boarding schools were known for their harsh conditions, poor facilities, and a curriculum aimed at eradicating, or wiping out, Native culture. Native American youth were barred from speaking native languages and practicing their religion. In the schools, boys were taught farming, while girls learned domestic skills to prepare them for work in American households. U.S. government reports noted that the education offered was inadequate, often focusing more on manual labor than academic learning. Moreover, the living conditions were overcrowded with insufficient nutrition and lack of proper medical care being common issues.

By 1921, California law prohibited Native American children from attending public schools with white children, relegating them to separate and inferior educational facilities. Section 1662 of the California Political Code stated that in school districts where federal Indian schools existed within three miles, Native American children could not attend public schools. Alice Piper's case arose in this context of systemic inequality.

Piper v. Big Pine School District

Alice Piper was born in Big Pine, California on June 7, 1908. Alice's mother was Annie Piper, and her father was Pike Piper. Official tribal registration records note that Alice and her family were members of the Paiute tribe in California. Although the Piper family did not live on the reservation, they maintained deep connections with the Paiute community. Alice Piper attended the local Indian school until the fifth grade, which was the highest level offered there.

When Alice Piper attempted to enroll in the local public school, she was denied admission based on her race. The district directed Alice to attend the Indian school to resume her studies, but this school was 30 miles from her home.

In December 1923, the attorney representing Alice Piper and six other Native American children petitioned the California Supreme Court. The group challenged the children's exclusion from the public school in Big Pine, arguing that the California Constitution guaranteed free education to all children. They also claimed the state's provision of separate schools for Native American children was unconstitutional, especially since many areas, including Big Pine, did not have such schools.

The attorney for Piper's group presented several key arguments. First, they contended that as children of citizens and taxpayers, Native American students had the right to attend public schools under the Dawes Act. The Dawes Act (1887) aimed to assimilate Native Americans into American society by dividing tribal lands into individual allotments and granting citizenship to Native Americans who lived away from reservation land. Like many others, the Piper family paid taxes and lived off the reservation.

The group also challenged the constitutionality of Section 1662 of the California Political Code, which they claimed violated the equal protection clause of the 14th Amendment of the U.S. Constitution. They argued that the government-run Indian school did not provide an equal education to the public school. The facilities, curriculum, and quality of education at the Indian schools were vastly inferior.



INDIAN CHILDREN MAY ATTEND STATE SCHOOL

Indian children may not be excluded from the public schools of California unless the State establishes other schools for their education, was the opinion of the State Supreme Court yesterday.

This decision, which will have an upsetting effect upon many public school districts within the State, was in answer to the petition for a writ of mandate, filed by the Indian parents of Alice Piper to compel the trustees and teacher of the Big Pine school district in Inyo county, to admit Alice, a 15 year old Indian girl.

Old Question

For many years it has been a much-mooted question in many districts where a federal school for Indians was maintained as to whether the Indian children could attend a district school, maintained by the State, if they preferred.

Section 1662 of the political code states that trustees may exclude Indian children from the State schools where there is a Government school for them to attend, and it is this section of the statutes that was attacked by the Pipers in bringing this case to the State's highest court.

Plaintiff's Contention

Their counsel held this section to be unconstitutional, inasmuch as it attempted to confer the governing bodies of school districts the power to exclude Indian children because of blood differences alone.

The Supreme Court upheld the theory in its lengthy opinion, holding that the enjoyment of the privileges of a uniform State educational system was vouchsafed, to all who have a legal right to attend the public schools, and therefore, cannot be enjoyed by those who are compelled to attend schools outside of the control and supervision of the educational departments of the State.

Function of State

"The education of children is in a sense exclusively the function of the State, and it cannot be delegated to any other agency", the high court determined. "It is the obligation of the State to educate children, and it must educate them in its public schools unless it has provided other schools for them exclusively."

"Excluding children from a school on account of race is violative of the fourteenth amendment of the United States Constitution, which states, 'Nor shall any state deny to any person within its jurisdiction the equal protection of the laws,' the opinion cites.

The Supreme Court also declares that the mere fact that there is a Federal school within the same district is no reason why the State is freed from its legal obligation to provide free education for the Indian children.—San Francisco Chronicle.

An account of Alice Piper's case in the Big Pine Citizen newspaper of June 7, 1924, mentions the "legal obligation" of California to provide free education to Native American children.

Meanwhile, the Big Pine School District maintained that section 1662 of the California Political Code permitted separate schools for Native American children. The district cited *Ward v. Flood* (1874) to support its case, which allowed racial segregation if separate but equal facilities existed for non-white students. The district argued that the government-run Indian school was equal to the public school and "better adapted to the Indian race." In the alternative, the district said that Native American students could attend private schools, but those were, of course, not free of cost and could also discriminate at the time against racial and ethnic minorities.

It further argued that admitting Alice Piper and other Native American children to the public school would lead to a significant increase in Native American students. It claimed the school could not accommodate so many Native American students due to economic and administrative challenges.

On June 2, 1924, the California Supreme Court ruled in favor of Alice Piper. The court held that as a daughter of tax-paying parents who lived apart from their tribe, Piper qualified as a citizen under the Dawes Act. The decision also stated that denying her access to public school violated the 14th Amendment's equal protection clause. In the written decision, the presiding judge, Justice Emmet Seawell, noted that "...schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities... These are rights and privileges that cannot be denied."

Impact of the Piper Decision

The Piper ruling effectively ended the practice of separate schools for some Native American children in California if they qualified as citizens under the Dawes Act. However, it did not end segregation for all Native American children. The practice continued until 1935 when the California legislature amended the Education Code to allow all Native American children to attend their local public schools. Meanwhile, school segregation by race continued for other groups in California and ended in 1947 with the ruling of *Mendez v. Westminster*.

Another effect of the Piper decision was that more Native American children were granted access to public schools in California. This integration provided Native American children with educational opportunities that had previously been denied to them. In 1920, 30,858 Native American students attended public schools in California. After the Piper decision, in 1925, that enrollment increased to 34,452.

The Piper case also had a profound impact on Alice's personal life. Alice attended public school in Big Pine, making the honor roll each year through grades six through eight. After completing her high school studies in Los Angeles, Alice would devote much of her life to supporting indigenous youth. In 1938, Alice was employed as an instructional aide at the Stewart Indian School in Carson City, Nevada. Her commitment to education and the Indigenous community remained steadfast as she strived to provide opportunities and support for Indigenous youth throughout her life.

The Legacy of Alice Piper

The *Piper* decision signaled a turning point in Native American education in California. It was a significant victory in the fight against school segregation, providing legal traction for further challenges to discriminatory practices. The case also underscored the importance of legal action in advancing civil rights, setting a precedent for other school segregation cases. According to scholar Marisela Martinez-Cola, the *Piper* case was used as a legal precedent in 63 cases across the United States. Other following cases, like *Mendez v. Westminster* (1947) and *Brown v. Board of Education* (1954), further dismantled segregation in American schools. Alice Piper's courage and determination 100 years ago continue to inspire others today.

Writing & Discussion

1. Describe the state of Native American education in California before the *Piper* case. How did government policies affect Native American students?
2. What were the impacts of the *Piper* decision on Native American education in California?
3. How important is legal action in advancing civil rights? Can you think of other examples where legal challenges have led to significant social change?

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This statue outside the Big Pine School memorializes Alice Piper and was dedicated on June 2, 2014, the 90th anniversary of her court victory.

ACTIVITY: EDUCATIONAL EQUALITY RESEARCH

- A. In small groups, students use the article about Alice Piper to discuss this compelling question: *How did Alice Piper's case become a pivotal moment in the struggle for educational equality?* Each group should have a notetaker keep notes about their answers.
- B. Direct the same student groups to each research one of the following cases that, like Alice Piper's case, paved the way for greater educational equality:

<i>Ward v. Flood</i> (1874)	<i>Tape v. Hurley</i> (1885)
<i>Wysinger v. Crookshank</i> (1890)	<i>Mendez v. Westminster</i> (1947)
<i>Brown v. Board of Education</i> (1954)	<i>Milliken v. Bradley</i> (1977)
<i>Plyler v. Doe</i> (1982)	

Students should consider the significance of each case and compare it to Alice Piper's case.
- C. Guide students to create a poster or digital presentation summarizing their findings. They may include:

Case background	Key legal arguments
Court decision	Impacts and significance
Comparisons with the Alice Piper case	
- D. Have each group present their case to the class. Then, facilitate a class discussion on each case and its comparison with Alice Piper's case.

Supreme Court Highlights 2024

Welcome to BRIA's Supreme Court Highlights for 2024, an election year in the United States! In this feature, we include four of the landmark cases decided by the nation's highest court. Landmark cases are those which are expected to have a wide-ranging impact on the people, laws, and political institutions of the United States.

Many more cases were decided in 2024 than we can include here. Of the 7,000 to 8,000 petitions to the United States Supreme Court every year, the Court agrees to hear relatively few of them. In this term, the Court heard 62 cases and issued 60 decisions. For each case we review here, we do include short excerpts from the majority opinion and, where applicable, at least one dissenting opinion.

The cases we've included can be used for classroom discussion and writing assignments for U.S. government and U.S. history classes.

Some useful vocabulary terms are:

Alleged – not yet proven beyond a reasonable doubt in a court of law; for example: *The defendant's alleged crimes have gotten much public attention.*

Chief executive – the president as the head of the executive branch of the United States government, executing the powers given the president in Article II of the Constitution.

Dissent – the minority of justices whose opinion did not prevail; dissenting Supreme Court justices typically write one or more *dissenting opinions*.

Indictment – a formal accusation against someone for criminal acts.

Majority – in a Supreme Court decision, more than half of the justices who agree on the outcome, making that decision prevail; one justice in the majority writes a *majority opinion*.

Plaintiff – a person, business, or organization bringing a civil lawsuit against another person, business, or organization.

Unanimous opinion – a decision joined by all nine Supreme Court justices without any dissent.

Trump v. United States

In August 2023, Special Counsel Jack Smith issued an indictment against former President Donald Trump. In the indictment were four criminal counts connected to things Trump did after the November 2020 election while he was still president. The indictment said that after losing the election, Trump tried to change the results by spreading false claims of election fraud to stop the process of collecting, counting, and certifying the votes.

The criminal charges included conspiracy to defraud the United States by pressuring Department of Justice officials to support false slates of electors in Arizona and Georgia. These false electors would vote for Trump instead Joe Biden, who won the election in those states. The charges also included conspiracy to obstruct an official



proceeding by means of a speech Trump gave on January 6, 2021. That speech is alleged to have incited thousands of attendees to storm the U.S. Capitol and try to stop Congress from approving the election results.

Trump claimed to have "presidential immunity" from criminal prosecution. Presidential immunity has historically protected presidents from being found personally liable for acts undertaken in the course of their presidential duties. No other president has

ever before been charged with crimes for actions he took while in office. In claiming immunity, Trump asked that the case be dismissed.

U.S. District Judge Tanya Chutkan denied Trump's request to dismiss the indictment. Trump appealed to the D.C. Circuit Court, which upheld Judge Chutkan's decision.

Finally, Trump appealed to the Supreme Court of the United States.

On a number of issues, the Supreme Court decided in Trump's favor, with six justices joining in the majority opinion. Three justices dissented. The majority held that presidential immunity falls within one of three categories:

- *Absolute immunity* applies to actions within a president's "conclusive and preclusive constitutional authority" (i.e., the Constitution says only the president can do it). For example, the Constitution gives the president the exclusive power to pardon anyone for federal crimes. Therefore, even if the president accepts a bribe in exchange for pardoning someone, that conduct would be absolutely immune.
- *Presumptive immunity* applies to all other official acts. The Court reasoned that presidents should be able to carry out their duties without having to second-guess themselves all the time. For example, presidents need to respond to national emergencies without worrying about being exposed to criminal charges after leaving office. It is up to prosecutors, then, to prove that a prosecution of a former president won't "intrude" on the business of the executive branch of government.
- *No immunity* is given to a president for unofficial or personal actions while in office. For example, if a president participates in a robbery, that would not be part of any official act.

The Court said that the motives, or reasons, behind a president's actions should have no relevance. It doesn't matter why a president does something. It only matters whether the president's action was official or unofficial. It is up to the trial court to determine what acts are official or unofficial, and if official, whether they deserve absolute or presumptive immunity.

The Supreme Court's decision sent the case back to Judge Chutkan to determine if the alleged criminal acts were official actions or not, including Trump's public comments on January 6, 2021. The Supreme Court did determine that Trump's alleged attempt to persuade the Department of Justice (DOJ) to pressure Arizona and Georgia to create support electors deserved absolute immunity. The Court reasoned that the Constitution gives the president exclusive authority over DOJ investigations and prosecutions. (Therefore, if Trump pressured officials to investigate what Trump considered election fraud, that is part of his exclusive authority as the chief executive of the country.)

From the majority opinion, written by Chief Justice John Roberts:

A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, "the independence of the Executive Branch" may be significantly undermined. . . . The Framers'* design of the Presidency did not envision such counterproductive burdens on the "vigor" and "energy" of the Executive.

* "Framers" refers to the delegates at the Constitutional Convention in 1787.

From the dissenting opinion, written by Justice Sonia Sotomayor:

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President . . . the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

Writing & Discussion

1. How did the Supreme Court define "conclusive and preclusive constitutional authority" of the president? What did the Court say about absolute immunity?
2. Do you agree with the Court's three levels of immunity? Why or why not? If not, what immunity, if any, would you give presidents for actions they take while in office?
3. Imagine a cousin of a president has been arrested for theft in a foreign country. The cousin was put on trial and sentenced to prison. The president orders U.S. Marines to invade the country for no other reason than to break the president's cousin out of prison. Would that be an official act, in your opinion? If so, imagine the president is later prosecuted for alleged crimes related to misuse of the U.S. military. Should that conduct be protected by absolute immunity or presumptive immunity? Why?



NetChoice v. Paxton/Moody v. NetChoice

In 2021, both Florida and Texas passed laws restricting the ability of social media companies, or platforms, to remove some posts while making other posts more prominent. The state legislatures were concerned that the companies were censoring users based on their political views.

In particular, Texas was concerned with “viewpoint discrimination,” which means including or favoring some views but not others. Viewpoint discrimination by the government is generally prohibited by the free-speech clause of the First Amendment. Texas wanted the social media platforms not to favor one view over its opposing view.

NetChoice, is an organization that claims to represent large social media platforms like Facebook and YouTube. NetChoice challenged these state laws on their face, which means it argued that the language in the laws violated the social media platforms’ First Amendment right to freedom of speech. (This is called a facial challenge to a law.) NetChoice argued that viewpoint discrimination is sometimes essential for a platform. For example, NetChoice pointed out that, under the Texas statute, a website that published suicide-prevention materials might be required to publish pro-suicide information. That would be an absurd thing to do, but the law could be read as requiring it.

NetChoice lost its challenges to the state laws and then appealed its cases to the Fifth and Eleventh Circuit Courts of Appeals, respectively. The Fifth Circuit affirmed the lower court’s ruling. It upheld the Texas law, ruling that platforms’ “content-moderation activities” are not speech and thus are not protected under the First Amendment.

The Eleventh Circuit, however, reversed the lower court’s ruling and decided against the Florida law. The court held that the Florida law violated the First Amendment. The Fifth and Eleventh Circuit cases were combined into one and went before the Supreme Court of the United States.

In a unanimous decision, the Supreme Court vacated both judgments and sent the cases back to their trial courts. According to the Supreme Court, the first step in reviewing a First Amendment facial challenge to a law is for a trial court to determine the breadth of what the law covers. Then the trial court must weigh the unconstitutional applications of that law against the legitimate ones. It is a balancing process.



Gerd Altmann / Pixabay

The Supreme Court itself can’t determine what all those applications are. Only a trial court can do that, where witnesses testify, and where evidence is presented. Given that both trial courts failed to do the required fact-finding, the Supreme Court sent the cases back for re-evaluation.

The Supreme Court took particular issue with the Fifth Circuit’s evaluation of the Texas law. The Court stated that the Fifth Circuit’s decision to uphold the Texas law violated several past cases that held that curating people’s speech (allowing some posts to appear but not others) is a kind of speech in itself.

From the unanimous opinion, written by Justice Elena Kagan:

Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice’s challenge. The courts mainly addressed what the parties had focused on. . . . But arguments in this Court revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could well matter, even when the challenge is brought under the First Amendment . . . the question in such a case is whether a law’s unconstitutional applications are substantial compared to its constitutional ones. To make that judgment, a court must determine a law’s full set of applications, evaluate which are constitutional and which are not, and compare the one to the other. Neither court performed that necessary inquiry.

Writing & Discussion

1. Explain viewpoint discrimination. Why did NetChoice believe that the laws in Florida and Texas unfairly took away social media platforms’ ability to use viewpoint discrimination?
2. NetChoice argued, and the Supreme Court agreed, that curating people’s speech is a kind of speech in itself. Do you agree? Why or why not?



Food and Drug Administration v. Alliance for Hippocratic Medicine

In the United States, the most common method of abortion is called medicated abortion. Women using this method take one of two drugs approved by the Federal Drug Administration (FDA), one of which is called mifepristone. These drugs account for 63% of all abortions in the United States.

The FDA first approved mifepristone — commonly called the “abortion pill” — in 2000. Its distribution was limited to hospitals and other medical facilities (e.g., clinics). Other regulations, or rules about prescribing the drug, followed:

- In 2016, the FDA expanded access to mifepristone partly by allowing medical practitioners with special certifications to prescribe it to patients outside of a hospital or similar setting.
- In 2021, during the COVID-19 pandemic, the FDA further expanded access by allowing mifepristone to be mailed directly to patients at home.

The U.S. Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s Health Organization* removed the federal right to an abortion under *Roe v. Wade*. Several states then filed lawsuits to restrict the sale of mifepristone. An anti-abortion organization formed after the *Dobbs* decision called the Alliance for Hippocratic Medicine (“Alliance”).

The Alliance and other groups challenged the FDA’s approval of mifepristone in federal district court. They alleged that the FDA failed to weigh the evidence of health risks when it first approved the medication in 2000.

In 2023, the district court suspended the FDA’s approval of mifepristone. The FDA appealed the court’s decision, and the Fifth Circuit U.S. Court of Appeals upheld the FDA’s original 2000 approval. But the Fifth Circuit reinstated the pre-2016 regulations that required distribution of the drug only in hospitals and medical facilities. The court also concluded that the FDA’s 2021 decision to allow mifepristone to be dispensed by mail did not take into consideration safety concerns when making the drug more accessible.

In December 2023, the case was brought to the Supreme Court of the United States. The Court had to decide three main questions:

1. Did the Alliance have legal standing to challenge the FDA’s changes to the conditions of mifepristone’s use in 2016 and 2021? A person, group, or organization has “standing” to bring a lawsuit against a law or policy in court if they are directly affected by the law or policy.

2. Was the FDA’s approval of the conditions of mifepristone’s use reasonable and based on sufficient evidence?
3. Was the federal district court’s decision to stop the FDA’s approval of mifepristone legally appropriate?

In a unanimous decision, the Supreme Court held that the Alliance for Hippocratic Medicine lacked standing under Article III of the United States Constitution. The Court stated that the doctors from the Alliance did not prescribe mifepristone and did not allege any injuries from the FDA’s changing the regulations of mifepristone. Because the doctors could not prove the FDA’s action would cause them to suffer any specific injury, they lacked standing.

Since the Alliance for Hippocratic Medicine lacked standing, the Court did not address the other two questions. This decision means that the FDA’s regulation of mifepristone, including the expanded access approved by the FDA in 2016 and 2021, remains in effect.

From the unanimous decision, written by Justice Brett Kavanaugh:

The plaintiffs have sincere legal, moral, ideological, and policy objections to elective abortion and to FDA’s relaxed regulation of mifepristone. But . . . the plaintiffs have failed to demonstrate that FDA’s relaxed regulatory requirements likely would cause them to suffer an injury in fact. For that reason, the federal courts are the wrong forum for addressing the plaintiffs’ concerns about FDA’s actions. The plaintiffs may present their concerns and objections to the President and FDA in the regulatory process, or to Congress and the President in the legislative process. And they may also express their views about abortion and mifepristone to fellow citizens, including in the political and electoral processes.

Writing & Discussion

1. Describe the changes in regulation of the “abortion pill” by the FDA since 2000. Why did the Alliance for Hippocratic Medicine object to the expanded access the pill?
2. Why didn’t the Supreme Court have to decide all three questions presented to it?
3. What were the ways described in the U.S. Supreme Court’s unanimous decision for Americans to influence public policy (i.e., “address concerns” about public policy)?



Alexander v. South Carolina State Conference of the NAACP

Following the 2020 census, the South Carolina legislature redrew its congressional districts. The new district border in District 1 created a stronger Republican majority there. To accomplish this goal, the lines South Carolina drew moved nearly 200,000 voters in or out of District 1, including tens of thousands of Black voters. Changing the lines of districts to increase or decrease certain voting populations is called *gerrymandering*.

The National Association for the Advancement of Colored People (NAACP) and a District 1 voter challenged in federal court South Carolina's redistricting. The challengers argued that South Carolina relied on racial data and used gerrymandering to spread out Black populations in multiple districts in order to dilute the voting power of South Carolina's Black voters.

A three-judge federal district court held a nine-day trial on this issue. The court decided that South Carolina violated the Equal Protection Clause of the U.S. Constitution by gerrymandering District 1 by race. South Carolina appealed that decision to the Supreme Court of the United States.

Six of the Supreme Court justices held that the district court's finding was in error. According to the Court's majority, a state legislature is free to draw the state's congressional district lines. Courts should presume the legislature has a proper purpose in drawing the lines. A state legislature can even pursue partisan goals when redistricting.

The Court stated that the state legislature cannot give race a predominant role in redistricting decisions. Doing so would be unconstitutional racial discrimination. In the Supreme Court's view, however, the challengers did not have enough evidence to show that race played a predominant role in South Carolina's redistricting. Therefore, the Court reversed the district court's decision and dismissed the racial gerrymandering claim.

The Supreme Court further concluded that the district court failed to recognize that there are two relevant legal theories at play in this case: racial gerrymandering and vote-dilution. As to vote-dilution, the Court sent this case back to the district court for further proceedings, with the guidance in the majority opinion's quote below.



South Carolina congressional districts in 2022, during the 118th Congress.

From the majority opinion, written by Justice Samuel Alito:

A plaintiff pressing a vote-dilution claim cannot prevail simply by showing that race played a predominant role in the districting process. Rather, such a plaintiff must show that the State “[purposely tried] . . . to minimize or cancel the voting potential of racial or ethnic minorities.” In other words, the plaintiff must show that the State’s districting plan “has the purpose and effect” of diluting the minority vote.

From the dissent, written by Justice Elena Kagan:

This Court has prohibited race-based gerrymanders for a reason: They divide citizens on racial lines to engineer the results of elections (without the justification of protecting minority voters’ rights) . . . In every way, the majority today stacks the deck against the Challengers. They must lose, the majority says, because the State had a “possible” story to tell about not considering race — even if the opposite story was the more credible.

Writing & Discussion

1. Imagine you are a district-court judge deciding this issue. What evidence would you consider deciding whether the state legislature gave race a predominant role in redistricting decisions?
2. The Supreme Court allows state legislatures to redraw district lines “to achieve a partisan end.” Do you agree that state legislatures should be allowed to redraw congressional district lines for political gain? Why, or why not? If not, what would be allowable reasons for redrawing district lines?



Standards Addressed

Picking a President: The Nomination Process Across American History

California History-Social Science Standard 12.6: Students evaluate issues regarding campaigns for national, state, and local elective offices. (2) Discuss the history of the nomination process for presidential candidates and the increasing importance of primaries in general elections.

CA HSS Framework, Ch. 17, p. 446 (Grade Twelve): In today's society, individuals participate as citizens by voting, jury service, volunteerism, serving as members of advisory bodies, in military service, in community organizations, and by engagement in the electoral and political process. In this unit, students study the role of political parties, the nomination process for presidential candidates, including the primary system, and the role of polls, campaign advertising and financing, the Electoral College, and methods of direct democracy utilized in California and various states. They do this by considering the following questions: How do you get elected? Who gets elected, and who does not? and What impact do polls, political parties, and PACs have upon elections?

C3 Framework

D2.Civ.5.9-12. Evaluate citizens' and institutions' effectiveness in addressing social and political problems at the local, state, tribal, national, and/or international level.

D2.His.2.9-12. Analyze change and continuity in historical eras.

Common Core State Standards: SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

Alice Piper's Fight for Educational Equality

CA HSS Framework, Ch. 12, p. 274 (Grade Eight): Yet, in order for the West to be developed in this way, American Indians had to be once again relocated and, in many situations, removed. The American Indian wars, the creation of the reservation system, the development of federal Indian boarding schools, and the re-allotment of Native lands profoundly altered Native American social systems related to governance, family diversity, and gender diversity. . . .

CA HSS Framework, Ch. 16, p. 416 (Grade Eleven): Some of the most successful state and federal court cases challenged racial segregation and inequality in education, including cases in state and federal district courts, such as *Mendez v. Westminster* (1947), which addressed segregation of Mexican and Mexican-American schoolchildren and involved then-Governor Earl Warren, who would later, as Chief Justice of the U.S. Supreme Court, write the *Brown* decision. The NAACP in 1954 achieved a momentous victory with the *Brown v. Board of Education of Topeka et al.* (1954) decision in challenging racial segregation in public education. . . . Exploring why African Americans and other minorities demanded equal educational opportunity early on in the Civil Rights Movement is important for students to consider and understand.

C3 Framework

D2.Civ.12.9-12. Analyze how people use and challenge local, state, national, and international laws to address a variety of public issues.

D2.His.1.9-12. Evaluate how historical events and developments were shaped by unique circumstances of time and place as well as broader historical contexts.

Common Core State Standards: RH.6-8.4, RH.6-8.10; RL.8.10; WHST.6-8.10, SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

Supreme Court Highlights 2024

California History-Social Science Standard 8.2: Students analyze the political principles underlying the U.S. Constitution and compare the enumerated and implied powers of the federal government. (6) Enumerate the powers of government set forth in the Constitution and the fundamental liberties ensured by the Bill of Rights.

California History-Social Science Standard 12.2: Students evaluate and take and defend positions on the scope and limits of rights and obligations as democratic citizens, the relationships among them, and how they are secured. (5) Describe the reciprocity between rights and obligations; that is, why enjoyment of one's rights entails respect for the rights of others.

California History-Social Science Standard 12.5: Students summarize landmark U.S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms (religion, speech, press, petition, and assembly) articulated in the First Amendment and the due process and equal-protection-of-the-law clauses of the Fourteenth Amendment.

CA HSS Framework Ch. 17, p. 443 (Grade Twelve): What makes a law or an action unconstitutional, and does that determination ever change? . . . Whenever possible, students should learn through illustrations of the kinds of controversies that have arisen because of challenges or differing interpretations of the Bill of Rights. For example, the unit can be organized around case studies of specific issues, such as the First Amendment's cases on free speech, free press, religious liberty, separation of church and state, academic freedom, and the right of assembly or the Fourth Amendment's warrant requirements and protections against unreasonable search and seizure.

C3 Framework

D2.Civ.9.9-12. Use appropriate deliberative processes in multiple settings.

D2.Civ.12.9-12. Analyze how people use and challenge local, state, national, and international laws to address a variety of public issues.

D2.Civ.14.9-12. Analyze historical, contemporary, and emerging means of changing societies, promoting the common good, and protecting rights.

Common Core State Standards: RH.6-8.4, RH.6-8.10; RL.8.10; WHST.6-8.10, SL.11-12.1, SL.11-12.3, RH.11-12.1, RH.11-12.2, RH.11-12.10, WHST.11-12.10.

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Since 1963, we've been known as Constitutional Rights Foundation. Now, six decades later, in 2023, we have changed our name to Teach Democracy!

Our materials, our approach, and our vision have not changed. But the scope of our work has expanded beyond teaching about the Constitution to include engaging students in all facets of civic learning.

To reflect this historic change, we are excited to present to you, our dear readers, a new look and layout for BRIA curricular magazine! You will see the same high quality of content you have come to know in this publication, now with a bold and even more readable format.

We know that civic participation begins with civic education. That's why we are more committed than ever to ensuring that our representative democracy is brought alive for those who hold its future in their hands: students.

Join us as we become Teach Democracy.

<https://teachdemocracy.org>

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