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SPECIAL REPORT

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Restoring America as the Land of the Free

Edited by Nicolas D. Loris

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THOMAS A. ROE INSTITUTE FOR ECONOMIC POLICY STUDIES

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Foreword

Kay C. James

For more than a quarter century, The Heritage Foundation's world-recognized *Index of Economic Freedom* has measured the impact of economic liberty and free enterprise in about 180 countries around the globe. Governments throughout the world await the release of each year's *Index* and eagerly seek out their rankings and ways to improve their scores.

The positive correlation between a nation's level of economic freedom and its citizens' health and well-being, their standard of living, their educational attainment, and societal progress underscores just how meaningful the score is. This correlation is why so many countries seek ways to enhance their economic freedoms and, ultimately, the success of their people.

Unfortunately, after reaching a high score of 81.2 in 2006, the United States fell from the "Free" category to "Mostly Free" in 2010. Economic freedom continued to slide, hitting an all-time low of 75.1 by 2017, putting America behind 16 other nations.

Recent aggressive policy changes in a few key areas, such as taxes, property rights, and judicial effectiveness, have helped the U.S. score begin to rebound. Nevertheless, a 2020 score of 76.6 is a slight drop from last year's 76.8, keeping America in "Mostly Free" territory. Other countries have leapfrogged the U.S., which is good news for global prosperity, but it has resulted in America dropping to 17th place in the rankings (from a high of fourth in 2007).

That is why this year, in addition to the annual release of the *Index*, I am proud to present this *Special Report*, "Restoring America as the Land of the Free," authored by a team of Heritage Foundation analysts. These world-class experts are specialized in each of the issue areas that comprise a country's overall score—from property rights to government spending to trade—and their best recommendations for improving the United States' score are represented in this report. "Restoring America" is an important tool to assist American policymakers in their efforts to raise the U.S. *Index* score—and, consequently, to improve the lives of every American.

Americans are so very fortunate to live in a country where the Founders understood the importance of liberty and unparalleled economic freedom. American society and Americans' standard of living have flourished because of it. However, liberty and economic freedom are always at risk, whether through massive government spending bills that drive the country and citizens deeper into debt; or through small, seemingly innocuous regulations like efficiency mandates for lightbulbs. Working to improve the *Index* score means working to protect and enhance those precious freedoms.

Today, policymakers have the opportunity to restore America as the land of the free and to return this nation to its place at the top of the rankings. This *Special Report* is the playbook for how to get that done.

Kay C. James is the President of The Heritage Foundation.

Introduction: Restoring America as the Land of the Free

Nicolas D. Loris

> *The market gives people what the people want instead of what other people think they ought to want. At the bottom of many criticisms of the market economy is really lack of belief in freedom itself.*
>
> —Milton Friedman, *The Wall Street Journal*, May 18, 1961

The Heritage Foundation's *Index of Economic Freedom* is a country's report card of sorts, assessing its propensity for human flourishing. Free people have the ability to improve their lives and the opportunity to innovate and provide the goods and services that people want. Measured by factors that are essential for a free and prosperous society—the rule of law, limited government, regulatory efficiency, open markets, and economic freedom—the *Index of Economic Freedom* provides an objective score for a country's progress or lack thereof.

Using the *Index*'s metrics, this *Special Report* offers policymakers a blueprint for improving the U.S. score and returning America from a ranking of "Mostly Free" to "Free." Some reforms provide bigger opportunities for advancement than others. Failing grades on government spending and fiscal health, for instance, offer significant room for improvement. However, even where the U.S. has one of the highest rankings in the world, such as for labor freedom, policymakers can make meaningful reforms.

Each chapter describes why each category is critical to measuring economic freedom, explores why the U.S. score has changed, and offers policy and regulatory improvements to increase the U.S. score, and accordingly, generate higher levels of freedom and progress.[1] There are a number of policy proposals, such as pension bailouts or additional compliance burdens on businesses, which would reduce the U.S. score. Those fall outside the scope of this report. While policymakers should certainly "first, do no harm," this *Special Report* focuses on proactive policy improvements that will generate a higher score.

The connection between economic freedom and societal improvement is unmistakable. In fact, since The Heritage Foundation began measuring economic freedom over a quarter century ago, key indicators of human development have improved as economic freedom has increased globally.

Dating back even further, the contribution that economic freedom has made to human well-being over the past century is nothing short of astounding. Worldwide poverty, disease, and hunger have decreased significantly even as global population has increased. People in free societies live longer, healthier lives. They have more resources to protect the environment *and* to attract new businesses, more investment, and innovative minds. These advancements in the human condition are simply not possible without economic freedom.

This is why every year, when The Heritage Foundation releases its *Index of Economic Freedom*, policymakers around the world eagerly await their respective country's score. They, along with business leaders and policy influencers, want to know why their score is what it is, and what can be done to improve it. Moving up from "Moderately Free" to "Mostly Free" is a badge of honor. Achieving a higher score than neighboring countries affords legitimate bragging rights. Moving down a rank can place a country amongst unwanted company. The direct line of comparison to other countries, regionally and around the world, motivates government officials to do better.

Policymakers in the United States should approach America's *Index* score with the same sense of pride and urgency. After recording its lowest score in the history of the *Index* in 2017, the U.S. began a slow and steady rebound through 2019 with a score of 76.8 (out of 100) and a ranking of 12th most economically free in the world—its highest ranking in eight years. The U.S. improvement reflects the impact of major regulatory and tax reforms on economic growth, investment, and business confidence.

However, continued progress is not guaranteed. The U.S. score dropped slightly in 2020, falling to 76.6, dropping America back to 17th place. The most significant contributors to the lower score are the Trump Administration's tariffs and protectionist policies, and Congress's failure to get America's fiscal house in order. Setting aside a reputation for being "the land of the free," the U.S. remains stuck in the second-tier rank of "Mostly Free" since 2010.

Policymakers must not rely on America's reputation alone to promote and protect economic freedom. Erosions of personal and economic liberties stemming from the growth of the regulatory state, and from the growth of federal debt, reduce current and future generations' opportunities for a freer and more prosperous society.

The following report consists of 11 chapters that explore each sub-category within the four broad categories that form a country's *Index* ranking:

1. **Rule of law:** (1) property rights, (2) judicial effectiveness, and (3) government integrity;

2. **Government size:** (4) fiscal health, government spending,[2] and (5) tax burden;

3. **Regulatory efficiency:** (6) business freedom, (7) labor freedom, and (8) monetary freedom; and

4. **Open markets:** (9) trade freedom, (10) investment freedom, and (11) financial freedom.

As The Heritage Foundation outlined in *True North: The Principles of Conservativism*,

> America's economy and the prosperity of individual citizens are best served by a system of free enterprise, with special emphasis on economic freedom, private property rights, and the rule of law. This system is best sustained by policies promoting free trade and deregulation, and opposing government interventions in the economy that distort markets and impair innovation.[3]

This *Special Report* offers a detailed playbook for maintaining and enriching an America where freedom, opportunity, prosperity, and civil society flourish.

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Chapter 1: Property Rights

Daren Bakst

Property rights measure the extent to which a country's legal framework allows individuals to acquire, hold, and utilize private property, secured by clear laws that the government enforces effectively. This measure helps to capture the degree to which a country's laws protect private property rights and the extent to which those laws are respected by the government. It also assesses the likelihood of private property being expropriated by the state. The seizure of private property, or severe restrictions on its use, are direct threats to individuals and their pursuit of happiness.

Property rights do not merely protect existing ownership, but also the ability of individuals to acquire property. This opportunity to acquire property makes it possible for all people to improve their lives. Private property, such as land, also has the benefit of allowing individuals to secure loans to invest in new businesses and generate new wealth for themselves.

Private property includes both tangible property, such as land and homes, and intangible property, such as patents and copyrights (intellectual property). While property rights discussions tend to focus on tangible property, the ideas, creativity and innovation that undergird intellectual property are also critically valuable and must be protected.

Property rights protections have a direct impact on incentives. When individuals know that the law protects their property from confiscation by the government or private parties, they can feel free to use it for investment or charitable purposes. Property owners will generally be good stewards of land because it is in their own interest to do so. When individual intellectual property is protected, people have an incentive to innovate, improve social well-being, and increase the nation's standard of living, because they own the returns on their investments.

Measuring Trends in the U.S. Score

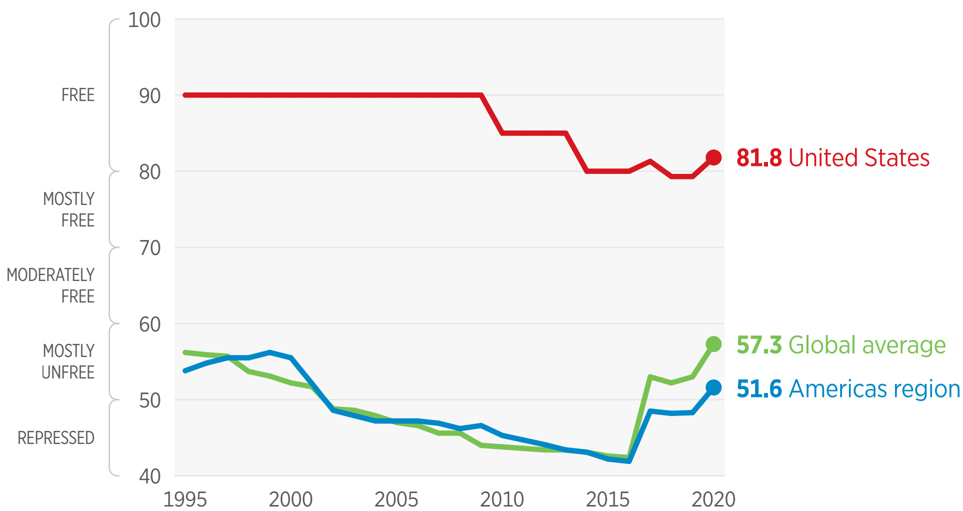
The United States guarantees property rights through the U.S. Constitution. The 50 states, through their constitutions, also afford property rights protections, often greater than those of the federal Constitution. Property rights protections, however, have been applied unevenly, including across the states.

From 1995 through 2009, the United States had a score of 90 (out of 100) for property rights, placing it firmly in the "Free" category. In 2010 and 2014, however, the U.S. score declined by five each year, resulting in a score of 80,

CHART 1

Property Rights

PROPERTY RIGHTS SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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the lowest score of the "Free" category. In 2017, the score climbed to 81.3, but declined the following year to 79.3 ("Mostly Free") and remained there for 2019. In 2020, the property rights score increased to 81.8.

The uneven protection of property rights through civil asset forfeiture by law enforcement and concerns over expropriation (for example, due to government intervention in financial markets) are two reasons for the decline in the property rights score since 2010.

What Can Policymakers Do to Strengthen Property Rights in the U.S.?

While the United States protects property rights, more measures are needed to ensure that these rights are protected consistently. To achieve this goal, Congress should:

- **Prohibit the use of economic development takings.** In 2005, the Supreme Court of the United States held in *Kelo v. City of New London*[4] that the government may seize private property from one person and (after paying just compensation) transfer it to another person for purely "economic development purposes"—that is, simply to increase the alleged economic benefit to the public that can be derived from the property.[5] In her dissent, Justice Sandra Day O'Connor nicely captured the implications of that decision: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz–Carlton, any home with a shopping mall, or any farm with a factory."[6]

While many states have passed laws that might reduce the threat to property rights posed by *Kelo*,[7] the opinion has weakened private property rights protections contained in the U.S. Constitution. In addition to prohibiting economic development takings, Congress should block efforts to circumvent such a prohibition, including the seizure of private property for economic development by using blight laws (which often have overbroad definitions of "blight") as a pretext for seizing non-blighted properties.[8]

- **Provide compensation for regulatory takings.** The taking of private property does not always require the physical seizure of the property. Regulations can sometimes severely restrict the use of private property, in effect acting as a taking. These regulatory takings are especially prevalent in the federal environmental law context. Courts, though, have made it extremely difficult to receive compensation for regulatory takings.[9] There should be practical and efficient means for property owners to be compensated for regulations that significantly restrict their property rights.

- **Reform civil asset forfeiture laws.** Law enforcement can seize private property if the property is suspected of being involved in illicit activity. The owner of that property need not even be charged with a crime. This legal tool, known as civil asset forfeiture, has grown in scope, with more than 400 federal statutes authorizing its use. Some states have started to reform their laws, but Congress has failed to pass reform legislation. Important reforms include requiring prosecutors to have the burden of proof to show that a property owner knew of the property's use in a crime, and removing financial incentives for law enforcement to use civil asset forfeiture.[10]

Without property rights protections, individuals can hardly be considered to have economic freedom. These reforms should be implemented to provide greater property rights protections for Americans. For too long, property rights have been treated as second-class rights, when they are, in fact, natural rights that are a prerequisite for economic freedom.

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Chapter 2: Judicial Effectiveness

Paul J. Larkin, Jr.

In measuring judicial effectiveness, the *Index* relies on the average of three sub-factors: (1) judicial independence, (2) quality of the judicial process, and (3) favoritism in decisions of government officials. Economic freedom—to say nothing of opportunity, growth, and prosperity—is possible only in a state that (among other things) safeguards such freedom through the rule of law—both the right to own and transfer private property and the right to make binding contracts.[11] Without those protections, no one would be able to have confidence in the stability or transferability of real or personal property. Those guarantees are the *sine qua non* of a free-market economy, which has proved itself as the most powerful engine of economic growth there is.[12] Indeed, a society lacking legal protections for property and contract rights is not far from the *bellum omnium contra omnes*—"the war of all against all"—that Thomas Hobbes depicted in *Leviathan* in which violence, not law or reason, is the order of the day.[13]

Three conditions must be true in each judicial system in order for economic freedom to prosper: Judges must be impartial, independent, and competent. All three features characterize the judicial branches in the United States to a greater or lesser extent. The United States has separate federal and state judicial systems, with advantages and disadvantages to each one. The principal challenge to economic freedom in the United States is not that judges, generally speaking, are partial, dependent, and incompetent. It is that the substantive law that courts must apply unduly favors the government, particularly when dealing with the administrative state.

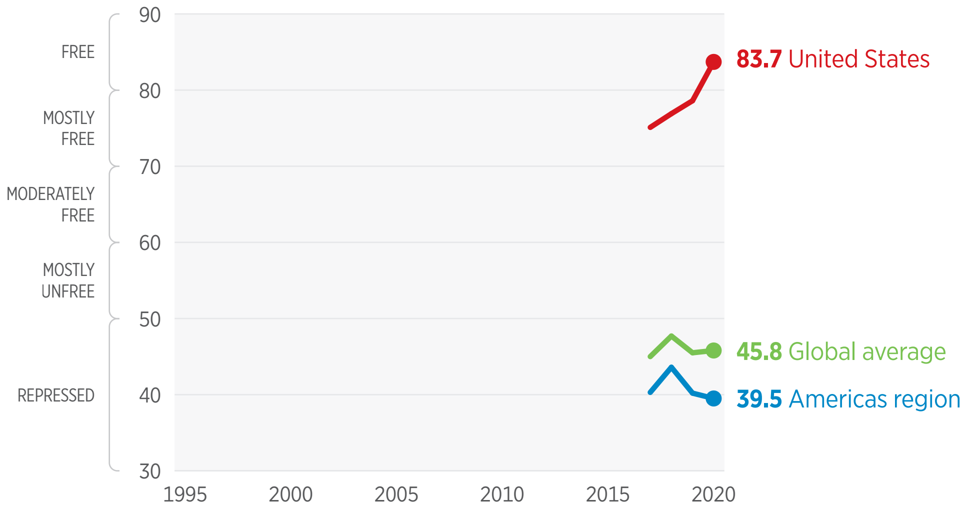
Measuring Trends in the U.S. Score

After years of spending time in the "Mostly Free" category, America's 2020 score for judicial effectiveness ascended to the "Free" category with a score of 83.7. With regard to independence, impartiality, and competence, the U.S. has a high level of judicial effectiveness. The Constitution of the United States guarantees the independence of the federal judiciary by effectively providing judges with life tenure at a non-reducible salary.[14] Congress can impeach and remove a federal judge,[15] and it has done so.[16] Nonetheless, there is a consensus that Congress should not use that power simply because it disagrees with a judge's decisions.[17] That consensus, though not the equivalent of a law, protects the independence of the federal judiciary. There are, however, several downsides to the federal system.

CHART 2

Judicial Effectiveness

JUDICIAL EFFECTIVENESS SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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Life tenure effectively eliminates judicial accountability, especially given the burdensome nature of the impeachment and removal process, which poses the risk that judges will not perform to the best of their abilities. Life tenure also does not eliminate politics from the judicial selection process; it merely moves politics to the front of the appointment process—to the President's decisions about whom to nominate, and the Senate's judgments about whom to confirm.[18] On the whole, however, the process does protect the independence of the federal judiciary.

The states guarantee judicial independence in different ways. The selection of judges involves gubernatorial appointment for life or a fixed term or years, election by voters, or some combination of the above (such as appointment followed by election).[19] Some states also afford voters the opportunity to vote on the retention of judges once their fixed term ends. The state systems involve a trade-off between independence and accountability, one that leans more toward the latter than the former. The effect is to allow, for good or ill, greater influence on the decisions of the state bench by the public and organized interest groups.

Closely related to impartiality is independence. As the Supreme Court has explained, "[a] fair trial in a fair tribunal is a basic requirement of due process."[20] Moreover, a trial (or other judicial proceeding) must not only be fair in fact, it must *appear* to be fair as well if the public is to be confident in its operation.[21] Courts must be indifferent regarding the government and private parties if the latter are to have confidence that courts can safeguard individual property and contract rights against the former.

Statutes, rules of court, and the judicial canons of ethics identify circumstances in which a judge must recuse himself from a case.[22] The Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution are also relevant. They prohibit a judge from adjudicating a case in which there is a serious risk that his impartiality could be compromised. For example, a judge cannot adjudicate a matter if he has a direct, personal financial stake in the outcome;[23] if he had a significant, personal involvement as a lawyer for one of the parties;[24] if he had determined in an earlier proceeding that the state should bring criminal charges;[25] in a criminal prosecution for contempt, if the judge was the party vilified by the alleged contemnor in an earlier proceeding;[26] or if one party to a case was so personally involved in the election of the judge that a reasonable person would inevitably find him biased, even if he was not biased in fact.[27]

The criteria for determining competence to serve as a judge generally include external and internal components. The former measures a person's "candlepower" by using as a proxy his receipt of a juris doctor degree from a law school accredited by the American Bar Association, as well as (generally, but not always, particularly in the case of academics) a currently valid license to practice law issued by a state bar association. The latter component ordinarily focuses on the issue of whether a person has the character trait (or state of mind) denominated as a "judicial temperament"—namely, the willingness to hear both sides of a case before deciding it (known in Latin as *audi alteram partem*);[28] the humility to accept that one might be wrong; and the equanimity to preside over a potentially heated judicial proceeding with the august dignity and evident graciousness that the hearing, the judicial system, and the parties deserve.

What Can Policymakers Do to Increase Judicial Effectiveness in the U.S.?

The U.S. performs admirably in the subcategories of judicial independence, quality of the judicial process, and impartiality in decisions by government officials. Opportunities exist to improve America's overall judicial effectiveness. Federal and state officials should:

- **Abandon illegitimate deference doctrines.** There is a different, but equally serious, problem of impartiality that has arisen as the result of the administrative state. Congress has chartered numerous regulatory agencies and has empowered them to issue all sorts of rules and guidance documents in order to implement their assigned responsibilities. By itself, that is not necessarily a problem. It becomes a problem when the courts effectively delegate their responsibility "to say what the law is"[29] to agencies by deferring to the agencies' interpretation of a statute or rule.[30] Those "deference" doctrines "give the government a benefit that no court would ever afford a private party: the ability to decide what a vague or ambiguous legal rule means."[31] The result is that "deference becomes a systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else."[32] Those doctrines have existed for quite some time, but numerous members of the lower federal courts and the academy have challenged their legitimacy.[33] Justices of the Supreme Court of the United States have also found those doctrines disquieting.[34]

  Recently, the Supreme Court decided to reconsider one of those deference doctrines—the one dealing with an agency's interpretation of its own rules. Yet, a badly fractured Court left the issue unresolved.[35] The rules will resurface in a future case; the Supreme Court would do well to abandon them.

- **Ensure that property is constitutionally protected.** The Framers believed that "property"—whether real or personal property, as well as the ability to pursue a lawful occupation—was an essential ingredient of liberty and must be protected against arbitrary governmental interference.[36] The Framers' generation deemed "property" and "liberty" as being equally important institutions that could exist without the other. The Founders' understanding of the concept of "property" guaranteed personal independence and embraced the legal rights to which everyone was entitled, such as the right to governance under "the rule of law." Property was not immune to regulation, but regulation had to promote "the general Welfare," not the interests of specific groups or people.[37] Beginning with the New Deal the Supreme Court retreated from the protection that the Framers intended for property to receive in the courts.[38]

  Today, the Court still treats property as "a poor relation,"[39] meriting far less legal protection than "life" or "liberty."[40] There is some evidence, however, that the Court might be willing to change the trajectory that the law has followed since the 1930s.[41] Numerous members of the academy and other commentators have urged the Supreme Court to reconsider its decisions relegating property to second-class status.[42] The Court should heed those critics.

The law must be more than what James Madison belittled as a "parchment" barrier to government oppression. As the late U.S. Supreme Court Justice Antonin Scalia observed, even the former Soviet Union had a constitution formally guaranteeing an impressive set of "rights"—albeit ones that the Communist Party Chairman or Politburo could ignore at will.[43] What makes rights effective is a constitution establishing a governmental structure, known in the United States as a system of separated powers, that distributes legal authority so that no one entity may legislate, execute, and adjudicate.[44] Critical to that system is a judiciary that can afford private parties relief from the acquisitive nature of the legislative process. After all, it is far easier for a legislature to take money or property from A and give it to B than to encourage B to strive to achieve the resources to purchase whatever property B desires. Without legal protection for private property, however, parties will refuse to provide the capital necessary for investment in productive enterprises.

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Chapter 3: Government Integrity

John W. York, PhD

Government integrity is a composite measure of several related factors, principally transparency, corruption, and public trust (or distrust) of politicians. For markets to flourish, a government's activities must be predictable and fair. If a government alters laws or regulations capriciously or enforces rules arbitrarily, the long-term calculations that both producers and consumers must make in the marketplace become very difficult.

While integral to the *Index*, government integrity is difficult to measure. Thus, the *Index* rating relies largely on the perception of businesspeople, government officials, economic journalists, and watchdog groups. Though it is hard to know precisely which factors bear most on the final judgment of such experts—bribery or graft, cronyism or nepotism, lack of transparency or prejudicial enforcement of the law—the *Index*'s composite measure gives a sense of how America's reputation for government integrity has changed over time and how it compares to other nations.

Measuring Trends in the U.S. Score

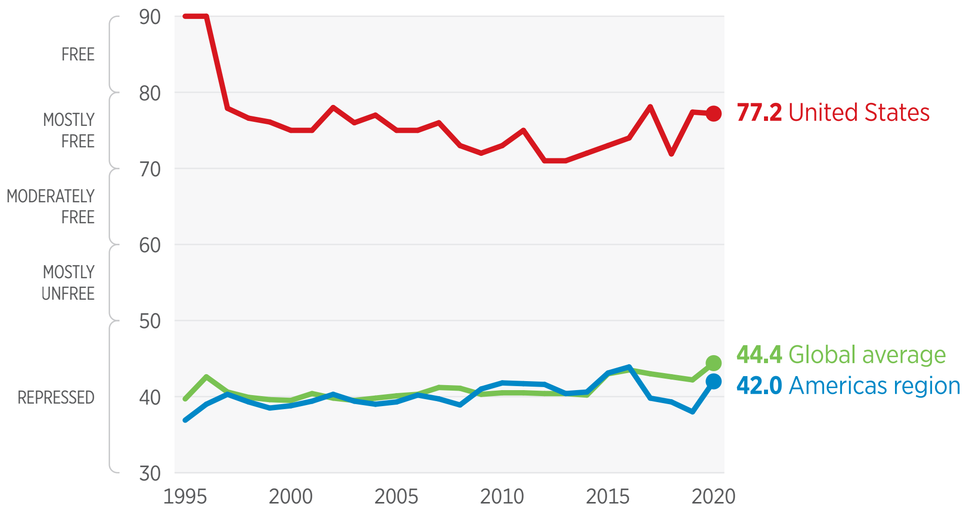
The U.S. government integrity score has dropped slightly from 2019 to 2020 from 77.4 to 77.2. However, this relatively modest fall follows the biggest single-year improvement (5.3 points from 2018 to 2019) in government integrity since this measurement was added to the index in 1995. While news headlines have been filled with declamations of purported Trump Administration scandals, the rising government integrity score suggests that America's reputation for transparent and honest government is on solid footing, at least among leading good governance groups and scholars.

Still, there is room for improvement. The 2020 score puts the United States just outside the top 20. America is now roughly on par with Austria, Belgium, and Ireland, as well as Qatar and Japan. However, America lags behind nearly all former British colonies—all of which inherited, and kept alive, elements of England's well-developed legal system. The U.S. also trails nearly all northern European countries. Moreover, the United States is still well short of its government integrity high-water mark of 90, last achieved in 1996.

CHART 3

Government Integrity

GOVERNMENT INTEGRITY SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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What Can Policymakers Do to Increase Government Integrity in the U.S.?

The new millennium brought with it partisan gridlock of a degree unseen since the early 20th century, and a 24-hour news cycle fed by sensationalism and rancor. It is unlikely that America will be able to reverse these long-term and deeply rooted trends easily, but taking the following concrete steps will help to increase government integrity in the U.S. Policymakers should:

- **Abide by the spirit and the letter of the Freedom of Information Act.** For the public to hold its government accountable, the public must have a sense of what that government is doing. Information regarding the conduct of officeholders and civil servants acting in their official capacities must be easily accessible and widely available to citizens, the media, and other stakeholders, such as experts working in think tanks and nonprofits. While the federal government must guard some activities and records for the sake of national security, ongoing law enforcement efforts, and the privacy of its personnel and the public, it should err on the side of disclosure. Career bureaucrats should not be free to determine for themselves which information they release and redact. Aggressive disciplinary steps should be taken against federal bureaucrats who over-classify internal records to shield themselves from accountability.

- **Improve transparency regarding government grants.** The federal government spent over $550 billion on contracts for goods and services last year.[45] This large sum of money represents the most potent inducement to graft and corruption in our regime. Insuring that contracts are awarded only after fair, open, and completely transparent competition should be a top priority of policymakers. To that end, the federal government should provide easily attainable and regularly reported data on the activities that federal grant money and contracts are funding. The public website that reports federal spending, USAspending.gov, does not fulfill this purpose. According to a 2014 report by the Government Accountability Office (GAO), only 2 percent to 7 percent of grant and contract awards on the website contained information that was fully consistent with agency records.[46] Congress should task the GAO with assessing the problems with USAspending.gov, and then should propose legislation to fix this broken system.

- **Improve election integrity.** Little else challenges the public's perception of government integrity like voter fraud. When citizens sense that their votes are not counted, or are effectively canceled out by fraudulent and illegally cast ballots, their faith in democracy erodes. Regrettably, instances of voter fraud are not rare.[47] More regrettably still, it is becoming increasingly difficult to detect fraud because of recent changes to state laws. Particularly troubling, 27 states (plus the District of Columbia) now allow third parties to return absentee ballots for other voters. In these states, it will be extremely difficult—and probably impossible—to determine whether an individual voter is being faithfully represented by his or her proxy.[48]

  State governments must maintain the fairness and integrity of elections. Clearly, voting should not be an unnecessarily complicated process; those who are eligible to cast a ballot should be encouraged to do so. Nonetheless, state lawmakers should remember that high turnout on Election Day, while desirable, should not come at the expense of important safeguards against fraud. As such, rightminded states should repeal or reject practices like same-day registration and vote-harvesting.[49] National lawmakers, for their part, should stand firmly against bills like the For the People Act that would unconstitutionally mandate that all states adopt practices like these.[50]

- **Advance the rule of law by reining in regulations.** The government's adherence to the rule of law is the most indispensable prerequisite for government integrity. Regrettably, the rule of law is disintegrating as the public is governed more often by executive fiat and regulatory agencies than by statute and Congress. The Regulations from the Executive in Need of Scrutiny (REINS) Act would help to change this.[51] The bill would require agencies to get congressional approval of any new major regulation, roughly defined as those with an estimated economic effect of $100 million or more annually. Thus, the REINS Act would give Members of Congress the ability to stop regulations that are significantly out of step with the laws they purport to implement.

- **Ensure that career civil servants are efficient and accountable.** Career civil servants are nearly impossible to fire. They have the highest job security of any sector of the economy. In fact, out of a federal non-military workforce of 2.1 million, only 8,708 persons—0.4 percent—were fired in 2018.[52] Long-serving bureaucrats who disagree with a new Administration's policies can often stymie those policies without a novice political appointee detecting their disloyalty. Even when managers realize that a career civil servant cannot or will not faithfully and efficiently carry out the law, it is nearly impossible to mete out serious discipline. One reason for this lack of accountability is the cumbersome process that managers must endure to remove a single employee.[53] Moreover, federal statutes instated to end the old "spoils system" provide extra layers of insulation against any adverse action that is arguably motivated by political ideology or partisanship.

Congress should give high-level political appointees the ability to remove, in an expedited fashion, poor performers, those guilty of misconduct, and civil servants who refuse to efficiently carry out lawful orders. Congress should also simplify the appeals process for fired federal employees, whether they are removed at the behest of political appointees or career civil servants in management positions. Prior to 1978, one agency processed all appeals. The federal government should return to that streamlined system.[54]

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Chapter 4: Fiscal Health and Government Spending

Justin Bogie and David Ditch

Widening deficits and a growing national debt, caused by poor government budget management, lead to the erosion of a country's overall fiscal health. Deteriorating fiscal health, in turn, is associated with macroeconomic instability and economic uncertainty.

The score for the fiscal health component of the *Index of Economic Freedom* is based on two sub-factors: (1) average deficits as a percentage of gross domestic product (GDP) for the three most recent years, and (2) debt as a percentage of GDP for the three most recent years.

For fiscal year (FY) 2019, the federal government amassed an estimated deficit of $984 billion.[55] The Congressional Budget Office (CBO) projects that by the end of 2020, annual deficits will surpass $1 trillion—and will remain above that level for at least the next decade.[56] Deficits have not risen above $1 trillion since FY 2012. Such high levels of debt are rare during a time of relative economic prosperity.

The gross federal government debt is currently more than 100 percent of GDP. Federal debt held by the public, not including debt owned by the U.S. government, is an estimated 78.9 percent of GDP.[57] Other than in the immediate aftermath of World War II, these are the highest levels of debt that the U.S. has ever experienced.

Fiscal health and government spending are closely connected. Historically high spending is driving sharp increases in federal debt, which has contributed to worsening overall fiscal health.

The *Index*'s government spending metric relates to the volume of government outlays in comparison to the size of the economy. A base level of government is necessary to provide public goods such as law enforcement and national defense. However, it is clear that high levels of government spending produce negative consequences, hampering economic growth and constraining private activity.[58] As such, the *Index* lowers a nation's government spending score for outlay levels above 30 percent of GDP, with the score declining at an exponential rate as spending increases. The score becomes zero at 58 percent of GDP.

Outside of major wars, high levels of government spending reflect shifts away from a focus on core public goods.[59] Excessive government activity includes the subsidization of personal consumption, economic favoritism, and the gradual replacement of private charitable activity. This distorts economic decisions on both the producer and consumer sides, creates disastrous unintended consequences for personal behavior, and crowds out civil society from addressing social problems. In addition, paying for the marginal spending requires increasing taxes, government debt, or both. This has especially been the case for the United States over the course of the past century.

High levels of debt create several threats to the country. First of all, federal spending is a threat to the principles of federalism on which the nation was built. The Founding Fathers envisioned a nation where the federal government and state and local governments have separate policy areas, and where federal activities are limited and well defined. Federal intervention in local policy matters often leads to negative results and stifles state, local, and private policy innovation.[60]

High levels of debt also threaten economic prosperity. According to research from the Mercatus Center, U.S. debt is already reducing economic growth by as much as 1 percentage point each year, and without major fiscal reform, it will continue to do so.[61] Reducing economic growth by 1 percentage point means the potential loss of hundreds of billions of dollars from the U.S. economy.

Measuring Trends in the U.S. Score

Fiscal health is a relatively new measure included in the *Index of Economic Freedom*. Over the past four years, the U.S. score has averaged 53.9, placing the country in the "mostly unfree" category. From 2019 to 2020, the U.S. score rose from 53.1 to 54.3. The score incorporates deficit and debt levels for all levels of government, including state and local.

The slight improvement in the score from 2019 to 2020 can be attributed to better than expected economic growth and historically low unemployment rates.

However, the fiscal challenges currently facing the U.S. are not something that the country can grow out of. From FY 2018 to FY 2019, deficits increased by more than 25 percent, while real GDP growth averaged 2.3 percent through the third quarter of 2019. The CBO projects that U.S. debt will grow by 16.2 percent of GDP between now and 2029.[62]

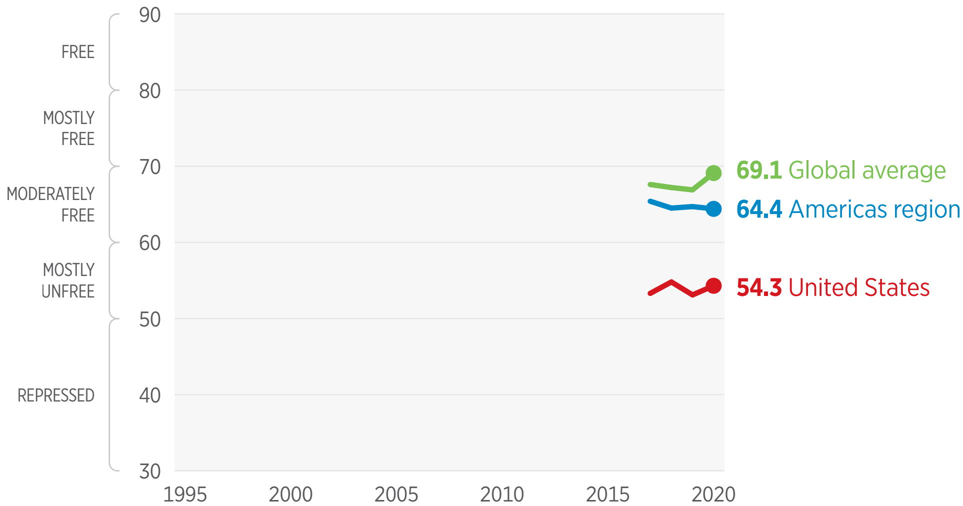
The U.S. score on government spending averaged 58.4 from 1995 through 2020. The metric reached its lowest level of 46.7 in 2012. This was due to a sluggish economic recovery and a hyperactive federal government. While the score then steadily improved as the economy gained momentum and Congress restrained spending growth, America has not returned to the "Moderately Free" score of 60 percent that it attained for every year from 1997 through 2007.

More troubling, the score declined from 57.1 in 2019 to 56.5 in 2020, despite continued economic growth. This was the inevitable result of

CHART 4

Fiscal Health

FISCAL HEALTH SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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two key federal spending decisions motivated by short-term political concerns. First, Congress has taken no legislative action to address the growth of Social Security, Medicare, and other government-funded health care programs. Spending for these programs is expanding at a fundamentally unsustainable rate.[63] There is an urgent need for reform, primarily due to long-term demographic shifts.[64] Second, legislators have resolved debates regarding limits on annual appropriations legislation through large spending increases rather than careful deliberation and setting priorities.[65]

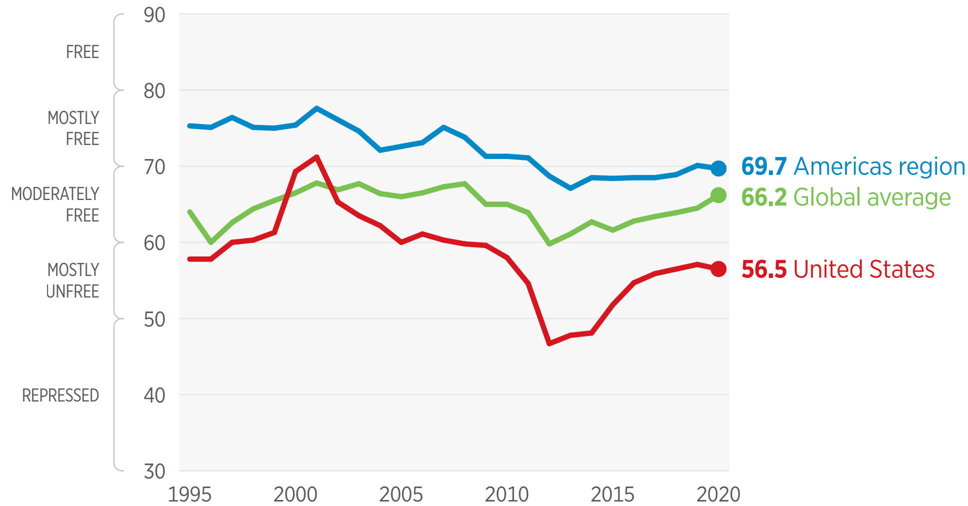
Combining sharp increases of spending in the discretionary category with the ratchet effect of formulaic growth in programs under the mandatory category caused federal spending as a share of GDP to increase from 20.3 percent in 2018 to 20.8 percent in 2019.[66]

The rising costs of Social Security and health care entitlement programs, as well as Congress's unwillingness to restrain discretionary spending, are causing steady increases to deficit and debt levels. Until lawmakers undertake major entitlement reforms that reduce spending and reduce federal debt to GDP, it is unlikely that the nation's *fiscal health* score will improve.

CHART 5

Government Spending

GOVERNMENT SPENDING SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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Moreover, while many states have some form of balanced budget requirement, they are experiencing increased pressure (to raise taxes or cut spending) because of massively underfunded public pension systems that are growing in size each day.

What Can Policymakers Do to Reduce Government Spending and Increase Overall Fiscal Health in the U.S.?

To reduce spending and increase fiscal health, lawmakers should pursue policies that prioritize federal spending toward the government's constitutional responsibilities, empower state and local governments, and reduce the national debt over the long term. State and local lawmakers must confront their unfunded public pension and health benefit costs. Specifically, Congress should:

- **Establish a cap on all non-interest spending, with enforcement through sequestration.** Past spending caps have been focused too narrowly, and have exempted or limited cuts to Social Security and health care entitlement programs, the main drivers of spending growth. Statutory caps on all federal spending should push lawmakers to prioritize funding on constitutional needs and implement structural reforms to the federal government's largest programs. Sequestration would serve as a means to ensure that spending reductions take place if Congress cannot agree on how to implement reforms.[67]

- **Adopt a business-cycle-based balanced budget amendment.** One of the problems with statutory spending caps is that Congress can amend them relatively easily. The Budget Control Act of 2011 set discretionary spending caps for FYs 2012 to 2021. Congress delayed implementation of spending reductions in FY 2013 and raised the spending caps for FYs 2014 to 2021. Adopting a constitutional balanced budget amendment would make it much more difficult for Congress to change spending levels. However, adjusting the spending cap with the business cycle would allow lawmakers the flexibility to respond to periods of economic strength or weakness.[68]

- **Focus the federal government on core functions.** The steady growth in the number of federal agencies and programs has caused a tremendous amount of waste and overlap, especially as the government has grown too large for Congress to oversee properly. Reducing the federal role would be a better fit for America's system of limited government and divided powers. This would improve the nation's fiscal well-being and enhance democratic accountability.[69]

- **Reform entitlement programs.** Social Security, Medicare, and Medicaid are growing faster than the nation's ability to pay for them. Refining these programs to the provision of a basic safety net for vulnerable citizens would end an over-reliance on the federal government.[70] Just as important, such a reform would provide Americans greater control, choice, and responsibility when it comes to retirement savings and health care.

- **Stop suspending the debt limit and fully pay for the costs of any debt limit increase.** *Reaching* the debt limit should serve as a moment for lawmakers to confront the repercussions of their spending decisions. Suspending the debt limit undermines the very notion of a limit and allows Congress to avoid confronting broader fiscal issues.

Congress should maintain a debt limit and not waive it via suspensions. If Congress decides to increase the debt limit, it should be accompanied by corresponding spending reforms.[71]

- **Take a federal taxpayer bailout of reckless state and local governments off the table.** By implementing reforms that prohibit the federal government from providing financial assistance to state and local governments for pension costs, federal policymakers can help compel state and local lawmakers to confront their unfunded pension and other liabilities before they spiral completely out of control. Without the hope of a federal bailout, state and local governments will be more likely to enact necessary reforms, such as shifting to defined-contribution retirement plans and limiting the growth in public employee costs.

Implementing these reforms would revive the budget process and place limits on spending. This, in turn, would reduce deficits and debt, streamline the federal government, and empower state and local jurisdictions—thereby reducing federal spending and increasing the fiscal health and economic freedom of the U.S.

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Chapter 5: Tax Burden

Adam N. Michel, PhD

Taxes directly affect the freedom and well-being of every citizen. While taxes are a necessary evil to fund a limited constitutional government, a well-designed revenue system minimizes the damage caused to individuals and businesses' ability to innovate and create new jobs. Taxes that are too high or poorly designed can destroy wealth, discourage investment, and stifle economic opportunity.

The *Index*'s tax burden score is a composite measure which incorporates the top marginal tax rates for individual and corporate income as well as the total tax burden as measured by revenue as a percentage of economic output—gross domestic product.

Measuring Trends in the U.S. Score

Until a dramatic change in the 2019 *Index*, the U.S. tax burden score has tended to remain within the bounds of the "Moderately Free" designation for the past 25 years. The significant uptick in the U.S. score followed the 2017 Tax Cuts and Jobs Act (TCJA), which was a structural reform to the U.S. tax code to remove disincentives to work and invest. The tax cuts for individual Americans included lower marginal tax rates so that people can work and save more. The reform also cut taxes on new investments by lowering the corporate income tax rate. These two changes temporarily reduced revenue as a percentage of the economy. The individual tax cuts are scheduled to expire at the end of 2025. The 2020 score of 74.6 is nearly 10 points higher than the tax burden score before TCJA's passage.

Chart 6 shows a sustained higher score from the early 2000s through 2013 which was driven by marginal tax rate cuts during the George W. Bush presidency. The marginal rate cuts were allowed to expire in 2013 and income tax rates increased.

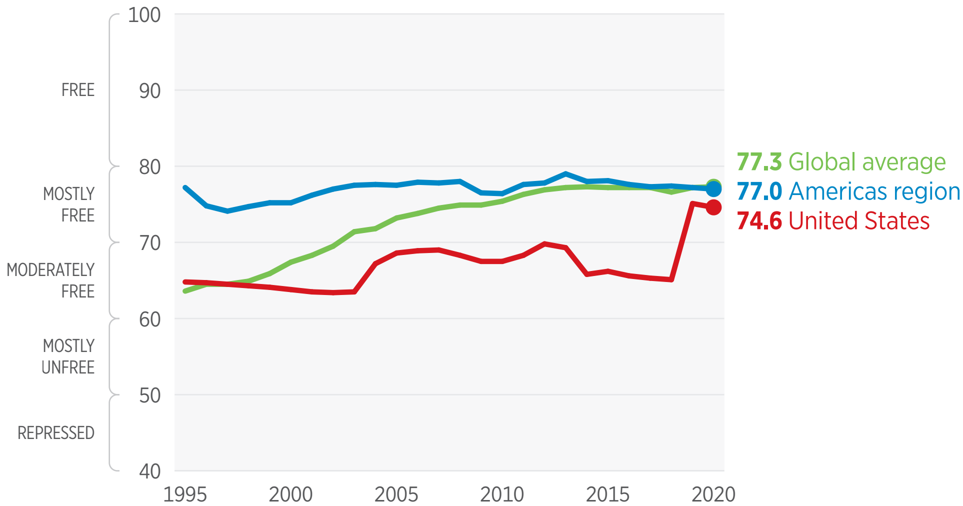
What Can Policymakers Do to Increase Tax Freedom in the U.S.?

At its core, the U.S. tax code remains too complex and includes a fundamental bias against saving and investment. Myriad subsidies and carve-outs for the politically connected endure, adding to complexity and economic distortions. The biggest distortion is caused through a double-taxing of savers, by levying a tax on wages and a second tax on any earnings if the

CHART 6

Tax Burden

TAX BURDEN SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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wages are saved and invested. The most important reforms will cut taxes on savings and investment, and will lower marginal tax rates to reduce current barriers to economic opportunity and growth.

To improve the tax code, tax freedom, and the U.S. tax burden score, Congress should:

- **Make the temporary provisions of the TCJA permanent.** The TCJA included a number of pro-growth components, such as a deep reduction in the corporate tax rate, a scaled-back state and local tax deduction, full (albeit temporary) expensing for most investments, and lower individual tax rates. All but the lower corporate rate expires before 2026. Making the temporary provisions permanent will allow businesses and individuals to plan more comfortably for the future and keep the tax burden score from rising in future years.

- **Expand expensing to structures.** By not allowing companies to account for the full cost of their investments when they are incurred, the U.S. tax code reduces investment, which translates to lower productivity and smaller income gains. The 2017 tax cuts temporarily fixed this problem by allowing companies to immediately "expense" some short-lived investments, but other investments, such as buildings, still have to use the costly and complicated pre-TCJA system. Permanent tax cuts and expanded expensing to all investments could significantly boost the economy and lower the tax burden, improving the U.S. score.[72]

- **Allow universal savings accounts (USAs) to supplement retirement savings.** The current tax code essentially tells Americans to save only for retirement—not for other things, such as replacing a car or a rainy day fund—by not offering the same tax protections to other forms of saving that workers get through their 401(k) plans and individual retirement accounts. USAs reduce taxes on savings for all Americans and help families build their own financial security through a single, simple, and flexible account.[73]

- **Repeal the estate and gift tax.** Commonly known as the "death tax," the estate and gift tax should be fully repealed, as it is an additional layer of tax on saving and investment. The TCJA temporarily increased the death tax's standard deduction. A pro-growth, pro-economic freedom agenda should repeal the tax completely.

- **Lower tax rates for businesses and workers.** Further lowering the corporate tax rate from 21 percent to the originally proposed 15 percent would continue to support the job and wage gains that followed tax reform. Reducing the individual income tax rates beyond the modest 2017 tax cuts could further decrease disincentives to work, and allow the millions of small businesses that are taxed as individuals to expand. These two reforms would boost the tax burden score significantly.

Without spending cuts, tax cuts that improve the tax burden score through reduced revenue will be counteracted by a decrease in the fiscal health measure by widening the deficit. Tax cuts that are paired with spending reductions would be good policy and would turbocharge the U.S. economic freedom score through improvements in all three "government size" variables included in the *Index*. Permanent tax cuts that focus on removing disincentives for work and saving will continue to increase Americans' tax freedom.

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Chapter 6: Business Freedom

David R. Burton

The business freedom component measures the extent to which the regulatory and infrastructure environments constrain the efficient operation of businesses. The score is derived from an array of measurements of the difficulty of starting, operating, and closing a business.

Entrepreneurship matters. It fosters discovery, innovation, and job creation. It leads to more effective production processes that improve productivity and real wages. Entrepreneurs develop new and less-expensive products that improve consumer well-being. They make markets more efficient. New firms account for most of the net job creation in the United States. Moreover, the vast majority of economic gains from innovation and entrepreneurship accrue to the public at large, not to the individual entrepreneurs.

Measuring Trends in the U.S. Score

For the past 25 years, the U.S. score for business freedom has generally been 85 of (100) or better, falling into the "Free" category. The score gradually declined from 2006 until 2018 but in 2019 the score improved to 83.8. Despite a small decline in 2020, the U.S. remains in the "Free" category with a score of 83.3.

The score measures factors like the time and cost involved in starting a business, closing a business, getting electricity running, and obtaining a license. Other than obtaining a license in certain industries (finance, health care, manufacturing, mining), these are not typically major problems in the U.S. The problem is the plethora of regulations (tax, labor, employment, immigration, energy, environmental, financial, health care, governance) involved in operating a business. Even the smallest, simplest businesses must comply with dozens of complex laws. Complying with these laws imposes high costs and reduces operational flexibility and dynamism. This, in turn, hinders entrepreneurship and economic growth and reduces wages and job creation.

What Can Policymakers Do to Increase Business Freedom in the U.S.?

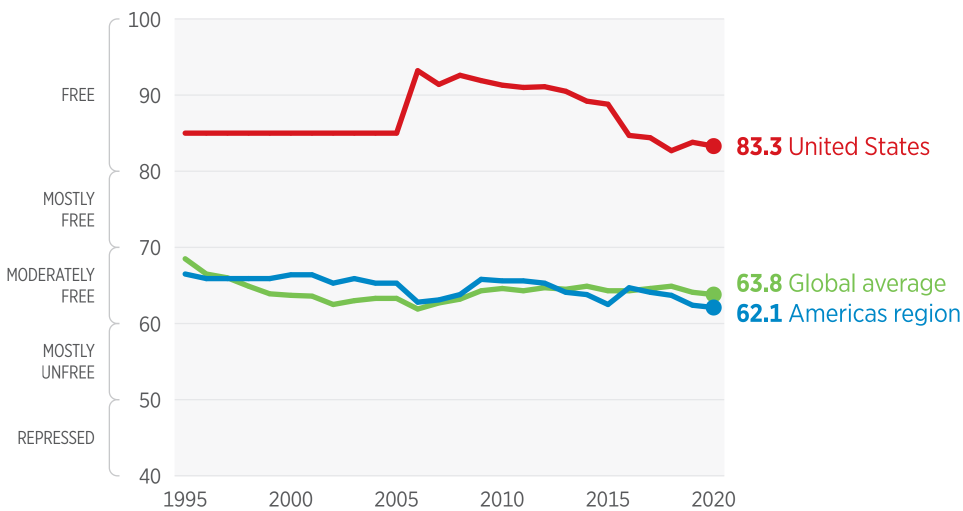
To promote business freedom, Congress and the relevant agencies should:

- **Remove regulatory impediments to entrepreneurs raising capital.** Congress or the Securities and Exchange Commission (SEC)

CHART 7

Business Freedom

BUSINESS FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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should expand eligibility for who may invest in private Regulation D offerings,[74] reduce the regulatory burden on equity and debt Title III crowdfunding,[75] improve secondary markets for smaller companies,[76] improve Regulation A,[77] reduce the Regulation S-K burden on smaller reporting companies,[78] and allow small businesses to use finders or private-placement brokers to find investors.[79]

- **Reduce the regulatory burden on small broker-dealers and community banks.** The regulatory burden is leading to increasing concentration in these industries and less access to capital for entrepreneurs. Congress should also enact the Small Business Audit Correction Act,[80] and modernize federal anti-money-laundering laws.[81] The SEC and the Financial Industry Regulatory Authority (FINRA) should reduce the burden of FINRA rules on small broker-dealers.[82]

- **Remove impediments to bank and non-bank lending to small businesses.**[83] Congress should repeal section 1071 of the Dodd–Frank Act,[84] which imposes reporting obligations on lenders that will raise the cost of small-business lending.[85] Congress should also repeal restrictions on credit union lending to small businesses. Specifically, section 107A of the Federal Credit Union Act[86] imposes a 12 ¼ percent limit on credit union business lending (which is almost exclusively small-business lending). This arbitrary limit should be repealed, and Title III of the JOBS Act, and Regulation CF which implements Title III, should be modified to facilitate peer-to-peer lending (debt crowdfunding) to small businesses by reducing the continuing disclosure requirements for companies that issue only debt securities.[87]

- **Reform the Securities and Exchange Commission.** The SEC is the most important regulator of U.S. capital markets. Although its budget has increased much faster over the past 10 years than the economy or most other government agencies, its effectiveness remains in question. Resources have flowed into unnecessary management, "support," and ancillary functions, while core functions have been neglected. Its organizational structure is unwieldy. It needs to be restructured. The SEC needs to be better managed: It does not need more managers. Additionally, its information technology programs are unnecessarily costly. Policymakers should introduce a number of reforms to ensure that the SEC can support well-functioning capital markets.[88]

After complying with the multitude of state and federal legal requirements, business owners should still have time left to actually run their businesses. Entrepreneurs should not have to be lawyers to run businesses in the United States. Unfortunately, that is just about where we find ourselves today. It is not where we want to be if we desire a return to sustained prosperity. If we want a return to a prosperous America with opportunity for all and rising real wages, Congress and the Administration need to address these issues systematically and with alacrity.

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Chapter 7: Labor Freedom

Rachel Greszler

Labor freedom is crucial for individual liberty, opportunity, and economic prosperity. Fewer government restraints on workers and employers lead to more jobs, higher productivity, greater opportunities, and higher wages. Moreover, the less that government extracts from workers' compensation—whether through taxes or regulations that make workers less productive and limit resources—the more people will work. The more people work, the more they earn, and the more the economy grows.

Labor freedom is a key component of reducing poverty and dependence, and across the globe, countries with the highest labor freedom scores have the highest incomes and greatest opportunities. Outside of preventing extortion and other abuses, the federal government should allow workers and employers to freely enter into mutually beneficial labor agreements. The federal government should also allow state and local governments to decide whether or not they want to impose restrictive labor laws because national policies would unfairly hurt certain areas of the country and particular workers.

Measuring Trends in the U.S. Score

For the past 15 years, the U.S. score for labor freedom averaged 94.6, consistently in the "Free" category. However, the U.S. score for labor freedom declined significantly both in 2016, and again in 2019 and 2020. The 2020 score of 87.9 is 1.5 points below the 2019 level and a full 10.6 points lower than it was in 2015.

The primary factors affecting the recent decline include rising minimum wages and increased regulatory burdens that drive up the cost of employment while simultaneously reducing workers' take-home pay. Despite the overall decline, and some headwinds that could reduce labor freedom, the U.S. labor market was extremely healthy in 2019. Strong economic growth in recent years has contributed to plentiful jobs and solid wage growth, which has drawn more prime-age individuals into the labor force.

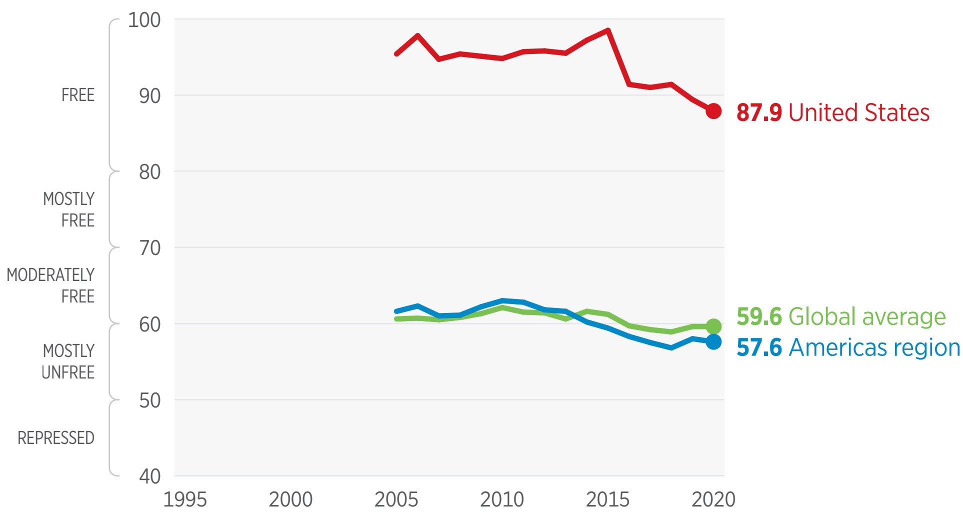
What Can Policymakers Do to Increase Labor Freedom in the U.S.?

Federal government intervention in the labor market threatens future growth, opportunity, and prosperity. While the U.S. remains "Mostly Free"

CHART 8

Labor Freedom

LABOR FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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for labor, the declining trend is troublesome, as are the progressive policies that would further reduce labor freedom in the U.S. What can Congress do now to turn a declining labor score into a rising one?

To promote labor freedom, Congress should:

- **Clarify and harmonize the government's definition of an employee.** Congress should clarify that the sole test for independent contractors is the "common law" test based on how much control an employer exerts over a worker. This would help prevent job losses among the estimated 42 million workers in the U.S. (out of 157 million total) that engage in some form of independent business. If businesses can be held liable for the actions of contractors over whom they exercise little or no control, they simply will not hire those individuals.

- **Expand expensing for investments.** Investment in capital is what makes workers more productive and leads to higher wages and more jobs. By generally not allowing companies to account for the full cost of their investments when they incur the costs, the U.S. tax code reduces investment, which translates to lower productivity and income gains. Permanent tax cuts and expanded expensing could boost the size of the economy by 4.3 percent,[89] leading to significant income gains across all income groups.

- **Make the Tax Cuts and Jobs Act permanent.** Raising taxes will hurt workers and the economy and could lead to a European-style tax structure where even low-wage workers face marginal tax rates above 50 percent. Higher taxes cause people to work less and save less, which means smaller incomes and a smaller economy. Keeping taxes low is an important component of encouraging innovation and entrepreneurship, and it is the primary way to promote worker freedom and prosperity.

- **Let markets, not politicians, set wages.** The economic literature is clear.[90] Doubling the federal minimum wage would lead to millions of lost jobs; a survival-of-the-fittest labor market with the least-skilled and least-advantaged workers priced out of employment altogether; expedited automation; inflation and higher prices for everyone, particularly affecting lower-wage earners; a smaller economy; lower overall family incomes; higher interest rates; and larger federal deficits. A one-size-fits-all national $15 minimum wage is not suited for 50 different states and thousands of diverse towns and cities. Better solutions for raising incomes for low-wage workers include free trade, reducing barriers to entry for workers and entrepreneurs, ceasing interference in the growing gig economy, and putting the government's fiscal house in order.

- **Protect employees' rights and freedoms.** Workers should be free to choose if they want a union to represent them. They should also be free to vote in secret ballot elections; protected from violence, coercion, and penalties if they do not want to join a union; and given the opportunity to vote on continued union representation. They should not be required to provide their personal information to a union. Moreover, Congress should reform the National Labor Relations Board to make it less political.

The more freedom that workers and employers have to pursue their ambitions, the greater the goals to which they will aspire and the higher they will rise—and in doing so, they will help to increase prosperity for all Americans.

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Chapter 8: Monetary Freedom

Norbert J. Michel, PhD

Monetary freedom combines a measure of price stability with an assessment of price controls. Both inflation and price controls distort market activity. Price stability without microeconomic intervention is the ideal state for the free market.

Monetary freedom through increased competition in the free market is, ultimately, the only way to discover what people view as the best means of payment. Unfortunately, the federal government's monopoly on money necessarily limits the extent to which competitive forces can strengthen money.[91]

This federal monopoly also exposes the means of payment for all goods and services to the mistakes of a single government entity. Nothing can provide as powerful a check on the government's ability to reduce the quality of money as allowing competitive private markets to provide it, so the federal government should not interfere with citizens' ability to choose whichever method of payment they desire.

Measuring Trends in the U.S. Score

For the past 25 years, the U.S. score on monetary freedom averaged approximately 81, hovering between the "Free" and "Mostly Free" categories. However, the U.S. score on monetary freedom declined slightly for each of the past few years. (The score fell from 80.1 in 2017, to 78.6 in 2018, 76.6 in 2019, and 75.5 in 2020.) The main reason for this slight decrease was a small uptick in inflation, but there are many other ways that the U.S. could improve its monetary freedom score.

When the Federal Reserve was created in 1913, the idea of maintaining price stability and maximum employment was nowhere to be found in the Federal Reserve Act. Instead, the main objective was "to furnish an elastic currency," one that would better meet the seasonal currency demands of the agriculture-based American economy. Decades later, Congress tasked the Fed with maintaining "long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[92]

In addition to these ill-defined requirements, the Dodd–Frank Act enmeshed the Fed in the government's nebulous efforts to maintain financial stability, giving it the power to potentially regulate all kinds of financial activities. Compounding the lack of a clear statutory or objective economic definition for these items, Congress has given the Fed a great deal of discretion to interpret how these duties should be performed. As a result, Congress cannot possibly hold the Fed accountable for performing these tasks.

What Can Policymakers Do to Increase Monetary Freedom in the U.S.?

The federal government's monopoly of money and implementation of modern monetary policies are widely believed to have stabilized the economy, but a great deal of evidence casts doubt on this belief.[93] Still, given that the U.S. dollar is currently the preferred method of payment throughout the U.S., and that Congress has delegated its monetary responsibilities to the Federal Reserve, a key policy question is: What can Congress do now to ensure that the Fed is a good steward of money?

To achieve this goal, Congress should:

- **Give the Fed the single goal of achieving monetary neutrality by stabilizing overall spending in the economy.** Targeting total spending, instead of inflation, would give the Fed the best chance of achieving monetary neutrality because that framework requires the central bank to respond to changes in the demand for money.[94] This framework would be superior to inflation targeting because it would allow prices to better reflect goods' actual scarcities, particularly in the face of productivity changes, and because it would avoid major information problems faced by inflation-targeting central banks. Additionally this type of rule would allow Congress to hold the Fed accountable for its operations.

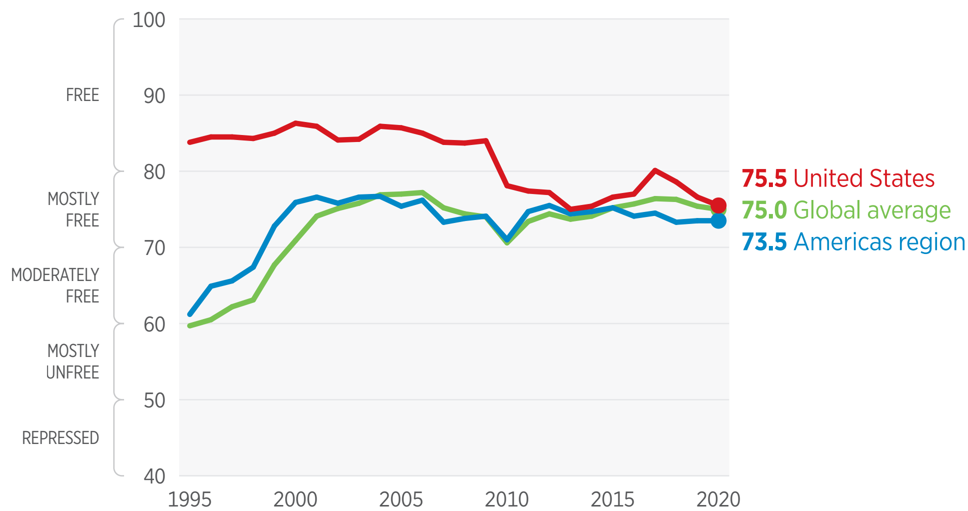
- **Narrow the Fed's statutory mandate.** The Fed's mandate includes too many broad macroeconomic goals, and Congress should require the Fed to implement a rules-based monetary framework. These changes will add clarity, accountability, and transparency to the central bank's operations.

- **Ensure that the Fed conducts monetary policy transparently, with maximum accountability to citizens through their elected representatives.** Congress is too often able to deflect blame to the Federal Reserve, whose officials are not elected, because the

CHART 9

Monetary Freedom

MONETARY FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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Fed's mandate is overly broad. For instance, subjecting the Fed's non-monetary policy functions to the regular appropriations process is a perfectly reasonable change that would improve accountability and transparency for the Fed's operations. Furthermore, the Fed has morphed into a financial regulator with a reach that goes beyond the traditional banking industry. As such, the Federal Reserve's employees should be held to disclosure and ethics standards similar to those of the Securities and Exchange Commission, the main U.S. securities regulator.[95] Increased transparency and accountability will lead to monetary policies that produce better economic outcomes for all Americans.

- **Limit the Fed's footprint in financial markets so that it does not distort prices, crowd out private credit and investment, create moral hazard problems, or transfer financial risks to taxpayers.** The larger the Fed's role in financial markets, the greater the expectation that the federal government will bail out failed financial firms, leading to moral hazard problems well beyond the banking industry.

Too many policymakers view the Fed as a temple of scientists who know exactly which dials to turn in order to speed up or slow down the economy at precisely the right time, even though there is more than enough evidence to question this idea. Congress has an obligation to oversee the Fed, and it is clear that the Fed has not, even according to its own projections, delivered on its economic promises. Congress should hold the Fed accountable, and ensure that it no longer has the discretion to "manage" the economy however it sees fit through some vague macroeconomic mandate. These reforms, along with protecting individuals' ability to choose whichever means of payment they desire, would greatly increase Americans' monetary freedom.[96]

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Chapter 9: Trade Freedom

Tori K. Smith

Trade freedom measures the degree to which individuals within an economy have the ability to buy from and sell to people around the world free from government intervention. Barriers to trade freedom include tariffs (taxes on imports), as well as non-tariff barriers. Non-tariff barriers are more elusive and can range from quotas to trade-distorting subsidies and regulations. Trade barriers are implemented by governments to manage the flow of imports and exports, and to insulate domestic producers from foreign competition. However, the lines of domestic and foreign-made products are increasingly blurred due to the rapid growth of international supply chains, as well as the shift to services and digital trade.

For more than 25 years, The *Index of Economic Freedom* has shown a strong correlation between high levels of overall trade freedom and more prosperity for individuals within an economy. Economies with higher levels of trade freedom have higher incomes per capita, and the individuals within these economies have greater food security, healthier environments, increased political stability, and higher levels of social progress. This is because eliminating trade barriers that would otherwise give local producers a competitive edge requires those producers to compete to simply offer the best product at the best price. This competition fosters innovation and allows consumers to access goods and services at market prices.

Measuring Trends in the U.S. Score

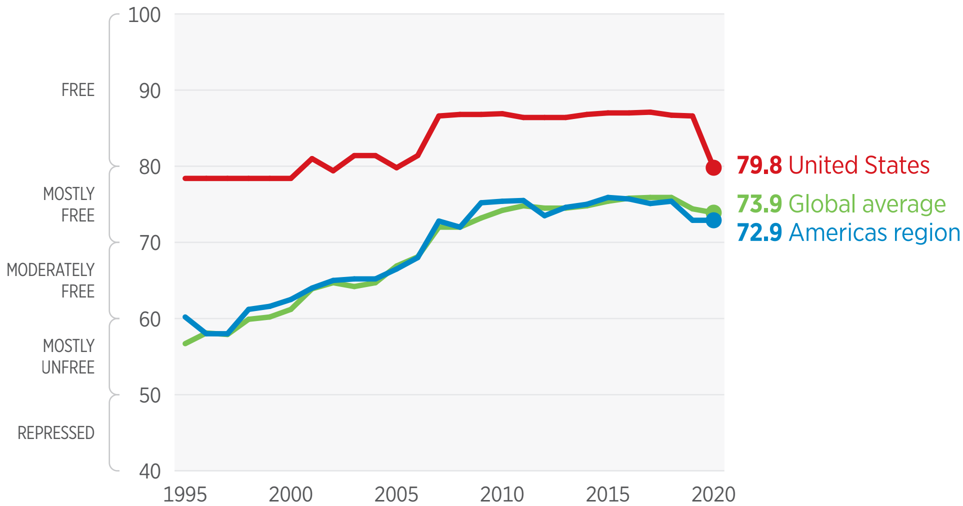
The *Index* takes both tariff rates and non-tariff barriers into account when determining a country's score. The U.S. trade freedom score has been relatively steady and firmly in the "Free" category for more than a decade, averaging at roughly 86.7 since 2007. Thanks to a fairly low average tariff rate and relatively fewer non-tariff barriers than the rest of the world, Americans experienced their highest level of trade freedom, as measured by the *Index* at 87.1, in 2017. Six new U.S. free trade agreements with 10 countries have taken effect since 2007, and the U.S. trade strategy during this period was generally geared toward lowering trade barriers at home and abroad.[97]

The 2020 trade freedom score of 79.8 drops the U.S. down to "Mostly Free" and is the lowest score for the U.S. since 2005. The score for this indicator fell by 6.8 points in 2020, the single largest drop in U.S. trade freedom since the inception of the *Index*. Such a significant drop in trade freedom was due to a worsening of both tariffs and non-tariff barriers in the U.S.

CHART 10

Trade Freedom

TRADE FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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during 2018 and 2019. In the 2019 *Index*, the U.S. average tariff rate was 1.7 percent, but it increased to 2.6 percent. This can be primarily attributed to the trade dispute with China, which resulted in the U.S. increasing tariffs on Chinese imports by more than 20 percentage points.[98] As for non-tariff barriers, the United States has thousands. Most countries have no more than 100 non-tariff barriers, and many countries have only one. In the 2019 *Index*, the U.S. trade freedom score was subject to a non-tariff-barrier penalty of minus 10 points. This year, new non-tariff barriers associated with quotas and other barriers imposed under Section 232 of the Trade Expansion Act of 1962 and Section 201 of the Trade Act of 1974 increased the U.S. penalty to minus 15 points.[99]

What Can Policymakers Do to Increase Trade Freedom in the U.S.?

The primary components of trade freedom measure tariff barriers and non-tariff barriers, and these reflect the impediments to free trade that Americans face when trading with individuals in other countries. Since

2017, the strategy of U.S. trade policy has been for the President to impose trade barriers unilaterally through various trade laws in an effort to negotiate "better" trade relations. This tactic has failed and instead resulted in Americans facing far higher barriers to trade today than in the past decade.

Article 1, Section 8 of the U.S. Constitution says: "Congress shall have the power...to regulate commerce with foreign nations," but over the years, Congress has delegated a great deal of that power to the executive branch. There is a role for both the executive branch and Congress in rebalancing trade authority between the branches and restoring trade freedom for Americans.

To that end, Congress and the Administration should:

- **Remove all tariffs and non-tariff barriers that have been imposed on imports to the U.S. since 2017.** The increase in the average U.S. tariff rate is primarily due to the tariffs placed on billions of dollars' worth of imports from around the world. Included in these barriers are tariff-rate quotas on washing machines and solar products, tariffs and quotas on steel and aluminum imports, and tariffs on most imports from China.

- **Negotiate new, full-scale free trade agreements with the European Union, Japan, and other countries.** One of the best ways to eliminate tariffs and non-tariff barriers on products is to establish new free trade agreements. The priority in these negotiations should be eliminating barriers, not harmonizing them.

- **Use the World Trade Organization (WTO) to resolve trade disputes, rather than imposing unilateral tariffs.** The U.S. has a nearly perfect record against China and other trading partners at the WTO, and seeking resolution through the organization will minimize harm for Americans.

- **Reform Section 232 to prevent the continued misuse of the law.** Section 232 of the Trade Expansion Act of 1962 is an antiquated trade tool that gives the executive branch virtually unchecked authority to impose or increase tariffs on imports to the U.S. if those imports are thought to threaten U.S. national security. President Trump has used this tool to impose tariffs and tariff-rate quotas on steel and aluminum imports. This law has been employed too broadly by the Administration and it is imperative that trade authority be rebalanced.[100]

- **Commit to tariff preference programs for the long term.** Congress regularly approves legislation for two tariff preference programs—the Generalized System of Preferences (GSP) and the Miscellaneous Tariff Bill (MTB). The GSP eliminates tariffs for materials, components, and machinery from developing countries, which allows U.S. businesses of all sizes to access cost-effective and competitive inputs.[101] The MTB eliminates tariffs for products that are not available in the United States.

- **Eliminate tariffs on all intermediate goods.** More than two-thirds of all imports are either inputs or capital goods. Both categories of imports are used by American manufacturers to produce finished goods. When the costs of their inputs are at the most competitive prices, manufacturers are able to produce goods more efficiently. They are also able to re-invest profits in their business and employees, rather than paying tariffs to the federal government. Ultimately, American consumers benefit from this level of competition, as it allows for greater options and competitive prices.[102]

Implementing these changes will not only reverse the damage that has been done to trade freedom in the U.S.—these reforms will help Americans to experience higher levels of trade freedom than ever before.

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Chapter 10: Investment Freedom

Riley Walters

Investment freedom is the ability of individuals and firms to move their resources in and out of specific activities, both internally and across the country's borders, without restriction. In an economically free country, there would be no constraints on the flow of investment capital with the exception of activities that threaten national security.

Investment positively supports economic activity, such as employment, research and development, and productivity. "Greenfield" investments, such as investments in new manufacturing facilities, represent investors' confidence in the stability of a local economy. Portfolio investments represent investors' faith in the success and profitability of local firms.

Countries that hinder the inflow of capital limit the potential gains to their economic prosperity. Some countries restrict access to foreign exchange; some impose restrictions on payments, transfers, and capital transactions; in some, certain industries are closed to foreign investment. Countries that restrict the outflow of capital incentivize foreign investors to invest elsewhere, while at the same time leading the capital that is domestically available to be allocated less efficiently.

Investment is also positively related to other economic activities, such as trade. Higher levels of investment freedom, and greater domestic and foreign investments, facilitate greater trade and trade-related employment.

Measuring Trends in the U.S. Score

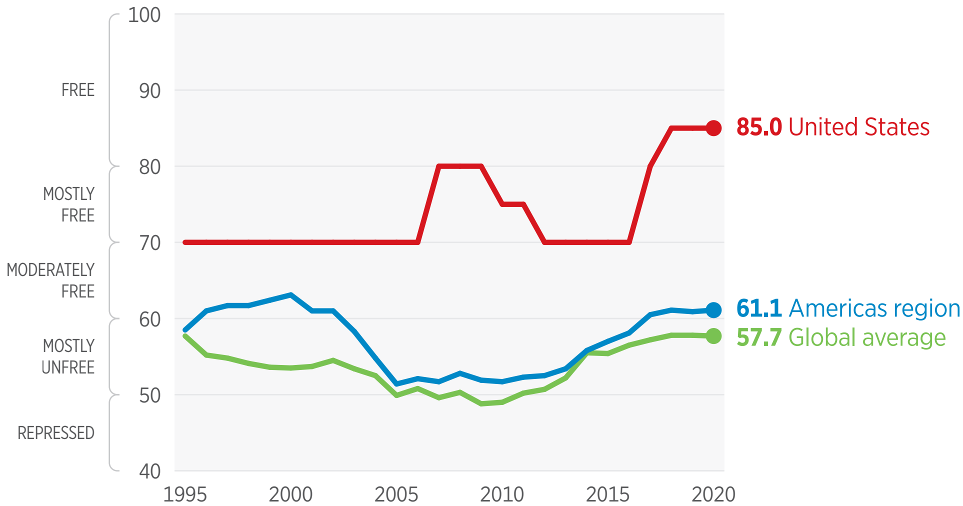
In 1995, the U.S. investment freedom score was 70 points out of 100, considered "Mostly Free." Over the years, investment freedom in the U.S. has increased. Since 2017, U.S. investment freedom now falls in the category of "Free." With a score of 85 in 2020, the U.S. is tied for seventh place with 13 other countries, such as Singapore, Switzerland, and Iceland, in the investment freedom ranking. The Tax Cuts and Jobs Act of 2017 made changes to incentivize more investment in America, which has brought important benefits to workers through higher wages and more jobs.

Because of its relative investment freedom, the U.S. is the leading destination for foreign direct investment (FDI), both on a historical-cost basis and when measuring FDI flows annually.[103] For the past five years, the U.S. has received more than $200 billion in new FDI a year. The stock of FDI in the U.S. has increased seven-fold since 1995. And, by 2018, the U.S. had received at least one dollar for every five dollars invested in the world. U.S.

CHART 11

Investment Freedom

INVESTMENT FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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investors are also the leading investors in the world thanks to the ease of moving capital outside the U.S. By the end of 2018, the U.S. had invested a total of $7.5 trillion in the global economy.[104]

Unfortunately, the U.S. still has some laws and regulations that directly and indirectly restrict foreign investment both at the federal and state levels. According to the Organization of Economic Co-operation and Development's *Foreign Direct Investment Regulatory Restrictiveness Index*, the U.S. scores a 0.09 out of 1.0, where a 1.0 equals maximum restrictions.[105] In the U.S., there are federal and state limitations on foreign investment in fishing, farming, mining, air and maritime transportation, insurance, energy, banking, telecommunications, and defense-related activities.[106]

In 2018, Congress passed the Foreign Investment Risk Review Modernization Act, which increased the criteria by which the Committee on Foreign Investment in the U.S. (CFIUS) can review foreign investment for national security concerns. While the CFIUS process may restrict foreign investment, restrictions on foreign investments that raise legitimate national security concerns are appropriate.

Because the U.S. has relatively few investment restrictions, business decisions in the U.S. are more likely to be negatively affected by non-investment-related restrictions. According to business surveys, uncertainty about new trade deals and trade policy, such as an increase or sustainment of tariffs, concerns over the health of the U.S. employment system, and a deteriorating infrastructure system are just as likely to hamper business operations.[107]

What Can Policymakers Do to Increase Investment Freedom in the U.S.?

Relative to the rest of the world, the U.S. scores quite well on investment freedom. However, labor regulations, corruption, red tape, weak infrastructure, and political and security conditions adversely affect the freedom that investors have in a market. To that end, Congress and the Administration should:

- **Separate those sectors that are essential to U.S. national security, and therefore warrant security review and protection, from those that are simply critical sectors and may not require foreign investment restrictions.** Too often, policymakers use national security as a justification for protectionism or to prop up a specific industry when no legitimate national security concern exists. The government should allocate its resources to protect sectors that are essential. Doing so would provide more clarity and opportunity for foreign investors.

- **Repeal laws that unnecessarily restrict foreign investment and are no longer essential to U.S. national security, such as the Jones Act and the Foreign Dredge Act.** The Merchant Marine Act (commonly known as the Jones Act) and the Foreign Dredge Act were both enacted in the early 20th century to protect American maritime interests from foreign competition. The Foreign Dredge Act of 1906 prohibits any foreign-built or chartered ships from dredging in the U.S. The result is to exclude the world's largest dredging companies that could provide better and cheaper service for dredging projects at the behest of a few politically connected companies. Repealing these laws would invite more investment and economic activity at America's ports.

- **Remove all restrictions on foreign investment in banking, transportation, and on foreign ownership of land.** Arbitrary restrictions on investment based on where it is coming from hurts America's ability to take full advantage of the capital that is available for economic growth. Removing these unnecessary restrictions would spur more foreign investment and create more competitive markets in these sectors.

- **Appropriately fund CFIUS so that its operations do not unduly restrict foreign investment beyond what is necessary to protect U.S. national security interests.** As the committee reviews more foreign investments, it is important that good investments are not being held up because of the protracted time it takes to review bad investments.

- **Support new rules at the World Trade Organization and bring certainty back to U.S. trade policy.** The U.S. should lead other countries to remove barriers to trade and allow the free flow of investment. Bringing certainty back to U.S. trade policy will bring stability and investment growth.

- **Scale back the growth of regulations over the past decades that hinder new investment.** Companies' decisions to invest are impacted just as much by burdensome regulations that arbitrarily increase the cost of doing business. Eliminating or reducing costly, ineffectual regulations would lower the costs of investment. Congressional checks on excessive regulation would provide much needed business certainty.

Foreign investment supports more than seven million American jobs.[108] The U.S. government can facilitate greater economic prosperity by ensuring greater investment freedom through policy reforms that create more opportunities for foreign investment while protecting America's national security.

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Chapter 11: Financial Freedom

Norbert J. Michel, PhD

Financial freedom is an indicator of banking efficiency as well as a measure of independence from government control and interference in the financial sector. State ownership of banks and other financial institutions, such as insurers and capital markets, reduces competition and generally lowers the level of access to credit. Financial firms are the arteries through which money from one sector of the economy flows into others, creating jobs and wealth in the process. Just as with nonfinancial businesses, excessive government regulation disrupts that smooth functioning, preventing financial firms from serving the needs of their customers and society. Excessive government control and regulation ultimately destabilizes the economy and impedes the financial system's ability to serve consumers, investors, businesses, and entrepreneurs.

All types of financial firms—not just banks—have long dealt with increasingly complex capital rules, liquidity rules, disclosure rules, leverage rules, and the constant threat of regulators making up new rules or enforcing existing rules differently. The 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act simply doubled down on this failed approach, inserting the federal government as the arbiter of risk in everything from derivatives markets to small consumer loans. More than ever before, federal oversight of U.S. financial markets relies on regulators to plan, protect, and maintain the safety of the financial system. One of the main effects of this regulatory approach has been to stifle growth and opportunity because it makes it more difficult to create and maintain jobs and businesses.

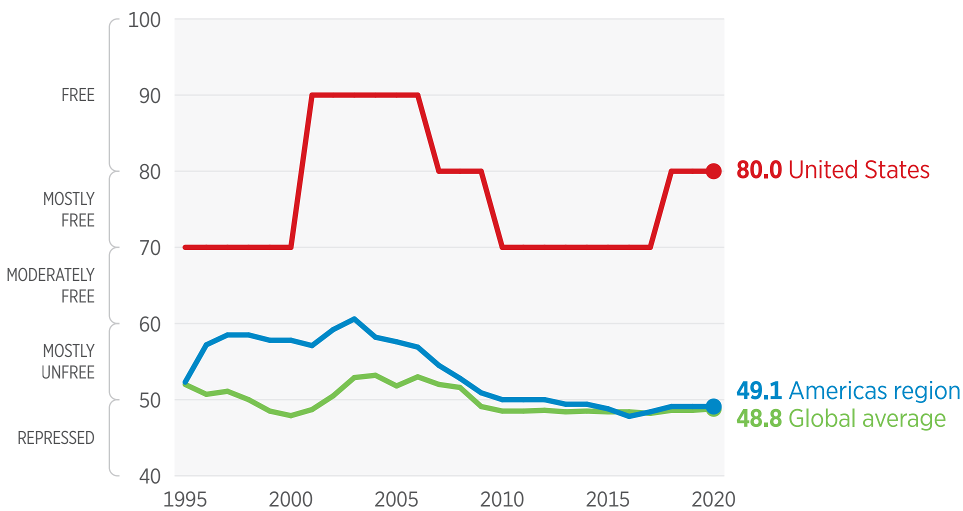
Measuring Trends in the U.S. Score

The U.S. score for financial freedom averaged 76.8 for the past 25 years, with more than half of those years in the "Moderately Free" category. From 2017 to 2018, the score rose from 70 to 80, where it remained through 2020. The main reason that the score increased in 2018 is that the Economic Growth, Regulatory Relief and Consumer Protection Act was signed into law. This law amended certain aspects of the Dodd–Frank Act, and the resulting rule amendments have reduced the regulatory burden for many U.S. banks. However, this new law did not repeal a single title of the Dodd–Frank Act—it left them all in place and merely provided special exemptions to various requirements for (mainly) smaller banks.

CHART 12

Financial Freedom

FINANCIAL FREEDOM SCORES IN THE *INDEX OF ECONOMIC FREEDOM*



SOURCE: Terry Miller, Anthony B. Kim, and James M. Roberts, *2020 Index of Economic Freedom* (Washington: The Heritage Foundation, 2020), http://www.heritage.org/index.

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While these banks were surely happy to have any regulatory relief, even these new exemptions came with the type of regulations that a more comprehensive effort—one that truly deregulates—would have eliminated. The problem is that even if Congress repealed the entire Dodd–Frank Act, which it should, a highly flawed regulatory structure would still remain. Even though the dominant narrative is that deregulation in the 1990s caused the 2008 crash, the truth is that the regulatory framework—particularly the risk-weighted bank capital rules[109]—was a principal cause of the crisis. While some aspects of financial regulation certainly changed in the 1990s, financial markets simply were not deregulated.[110]

In fact, there has never been a substantial reduction in the scale or scope of U.S. financial regulations, and virtually every crisis period has been followed with the same response: more federal regulation. Despite this approach, the U.S. has one of the worst financial-stability records among developed nations. Data show that the U.S. has had 15 banking crises since 1837, a total that ranks among the highest of all developed countries.[111] Similarly, among severe economic contractions in six developed nations from 1870 to 1933, banking crises occurred *only* in the U.S.[112] More recently, the

U.S. was one of only three developed countries with at least two banking crises between 1970 and 2010.[113]

What Can Policymakers Do to Increase Financial Freedom in the U.S.?

To increase financial freedom, lawmakers need to introduce more market discipline into the financial system, a major shift from the regulatory approach used during the past 100 years. Specifically, Congress should:

- **Require major changes to (among other areas) the Federal Deposit Insurance Corporation (FDIC) bank-resolution process, the FDIC deposit-insurance scheme, and the Fed's emergency lending authority.** All of these areas involve the government in private markets in ways that it does not need to be involved, thus crowding out private businesses.

- **Shrink the government's role in housing finance by implementing the following reforms:** (1) Reduce the conforming loan limits (that is, ensure that the government-sponsored enterprises (GSEs) will purchase, and that the Federal Housing Administration (FHA) will insure, only lower-priced homes); (2) narrow the GSEs' and FHA's focus to the financing of primary homes; (3) eliminate the charters of the GSEs; and (4) raise the GSEs' guarantee fees (g-fees) and the FHA's mortgage insurance premiums. These policies will allow private market participants to appropriately price and insure financial risks. The economy will further benefit from reduced government interference in the housing market as the artificially large flow of capital to the housing market is allocated to other sectors.

- **Focus financial regulation on deterring and punishing fraud, while fostering reasonable, scaled disclosure of information that is material to investors' investment choices.** The Securities and Exchange Commission (SEC) and Congress should work together to create a reasonable, harmonized scaled disclosure regime for Regulation D, Regulation A, crowdfunding, and other exemptions and for small public companies.[114] When regulators focus on protecting individuals and firms from fraud and violations of contractual rights, they protect the integrity of financial institutions that are critical to growth and prosperity.

- **Repeal the Dodd–Frank Act, an 800-plus-page boondoggle that expanded the failed regulatory approach that helped to create the 2008 crisis.** The Dodd–Frank Act ensured that financial firms would further rely on the federal government to plan, protect, and prop up the financial system, thus enshrining "too big to fail" into law. Repealing Dodd–Frank would reduce the increased risk socialization that the act created and would be a step in the right direction toward private and competitive financial markets that are essential for healthy economic growth.

- **Create new financial company charters that eliminate activity restrictions and reduce regulations in return for straightforward higher equity standards.**[115] Centralized government regulation and micromanagement of financial risk has repeatedly failed to maintain the safety and soundness of the financial system. Replacing government regulation of financial firms with private firms that absorb their own losses would lower the risk of future financial crises and improve individuals' ability to build wealth.

- **Broaden the definition of "accredited investor."** The SEC should substantially increase the number of investors who may invest in Regulation D private offerings by providing bright line tests of sophistication. By doing so, more individuals would be able to participate in private securities offerings, thus improving the ability of businesses to raise capital.

Each of these reforms would ultimately replace government regulation with competition and market discipline, thus lowering the risk of future financial crises and improving individuals' ability to create wealth through more financial freedom.[116]

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Endnotes

1. While this *Special Report* covers unique categories that shape a country's *Index* score, many of the categories are linked. Therefore, some of the chapters have overlapping policy recommendations.
2. "Fiscal health" and "government spending" are combined into one chapter.
3. The Heritage Foundation, *True North: The Principles of Conservatism*, 2019, https://www.heritage.org/truenorth.
4. *Kelo v. City of New London*, 545 U.S. 469 (2005), https://www.law.cornell.edu/supct/html/04-108.ZS.html (accessed March 23, 2020).
5. Daren Bakst, "A Decade After Kelo: Time for Congress to Protect American Property Owners," Heritage Foundation *Backgrounder* No. 3026, June 22, 215, https://www.heritage.org/courts/report/decade-after-kelo-time-congress-protect-american-property-owners.
6. *Kelo v. City of New London.*
7. For a comprehensive and updated discussion of state responses to *Kelo*, the blight issue (including state blight laws), and more, see Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* (Chicago: University of Chicago Press, 2015).
8. See, for example, Daren Bakst, "Prohibiting Abuse of Eminent Domain," *ALEC Journal* (July/August 2011), The American Legislative Exchange Council, https://www.alec.org/app/uploads/2011/07/InsideALEC_JulAug2011.pdf (accessed November 21, 2019).
9. See, for example, *Murr v. Wisconsin*, 2017, https://www.scotusblog.com/case-files/cases/murr-v-wisconsin/ (accessed January 7, 2020).
10. See, for example, John G. Malcolm, "Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform," Heritage Foundation *Legal Memorandum* No. 151, April 20, 2015, https://www.heritage.org/crime-and-justice/report/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-reform; John G. Malcolm, "Civil Asset Forfeiture: A System in Need of Reform," testimony before the Oklahoma State Senate, September 1, 2015, https://www.heritage.org/article/testimony-civil-asset-forfeiture-system-need-reform; and Jason Sneed and Elizabeth Slattery, "The Supreme Court Signals It May Rein in Abusive Property Seizures," Heritage Foundation *Commentary*, November 30, 2018, https://www.heritage.org/courts/commentary/the-supreme-court-signals-it-may-rein-abusive-property-seizures.
11. See, for example, Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Currency, 2013); Douglass C. North, *Understanding the Process of Economic Change* (Princeton, NJ: Princeton University Press, 2010); Douglass C. North, *Institutions, Institutional Change and Economic Performance*, 2nd ed. (Cambridge, UK: Cambridge University Press, 1990); and "Order in the Jungle," *The Economist*, March 13, 2008, https://www.economist.com/briefing/2008/03/13/order-in-the-jungle (accessed January 7, 2019). For a discussion of the development of the concept of the "rule of law" in Anglo-American law, see John Phillip Reid, *The Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb, IL: Northern Illinois University Press, 2004).
12. For a description of a current, ongoing example of what happens when property and contract rights are not protected, see Moises Naim and Francisco Toro, "Venezuela's Suicide: Lessons from a Failed State," *Foreign Affairs* (November/December 2018), https://www.foreignaffairs.com/articles/south-america/2018-10-15/venezuelas-suicide (accessed January 7, 2020).
13. Edwin Curley, ed., *Hobbes: Leviathan* (Indianapolis, IN: Hackett Publishing Company 1994), p. 80.
14. U.S. Constitution, Article III, § 1. ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their continuance in Office.")
15. U.S. Constitution, Article I, § 2, cl. 5. ("The House of Representatives…shall have the sole Power of Impeachment."), and ibid., § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments.")
16. For example, in*, Nixon v. United States*, 506 U.S. 224 (1993) (involving the impeachment and removal of U.S. District Judge Walter Nixon for committing perjury before a federal grand jury).
17. Although it once tried. See William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York, NY: Harper Perennial, 1999).
18. For a recent example of the political shenanigans that can occur, see Mollie Hemingway and Carrie Severino, *Justice on Trial: The Kavanaugh Confirmation and the Future of the Supreme Court* (Washington, DC: Regnery, 2019).
19. United States Courts, "Comparing Federal & State Courts: Selection of Judges," https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts (accessed November 13, 2019).
20. *In re Murchison*, 349 U.S. 133, 136 (1955).
21. *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice").
22. See, for example, 28 U.S. Code § 455(a) (2019) ("Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."), § 455(b)(1)-(5) (specifying instances in which a justice, judge, or magistrate must recuse himself).

23. See, for example, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986), ruling that due process required a state supreme court judge to recuse himself from deciding a case when he had a similar claim pending against one of the parties; *Connally v. Georgia*, 429 U.S. 245 (1977), ruling that due process invalidates a search warrant issued by a magistrate whose compensation rests on the number of search warrants he issued; *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973), ruling that a state board of optometrists could not conduct disciplinary hearings looking toward the revocation of the license of a competing optometrist; *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), ruling that due process invalidates a trial before a mayor whose income was derived from the fines, fees, and costs he imposed when sitting as a judge; and *Tumey v. Ohio*, 273 U.S. 510 (1927), trial before a mayor whose salary was supplemented when he sat as a judge by the fees and costs imposed on convictions. The principle endorsed in those cases stems from the ancient rule that *nemo judex in cause sua* (no one may be a judge in his own cause). *Spencer v. Lapsley*, 61 U.S. (20 How.) 264, 266 (1858); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("a law that makes a man a Judge in his own cause…is against all reason and justice."); and James Madison, *The Federalist* No. 10, p. 59 (Jacob E. Cooke ed. 1961).
24. See, for example, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), ruling that a state supreme court justice could not participate in the appellate review of a conviction in a case in which, as district attorney, he had approved seeking the death penalty.
25. See, for example, *In re Murchison*, 349 U.S. 136–39, ruling that a judge could not both determine that criminal charges should be brought for perjury before the judge as a "one man grand jury" and later preside over the perjury trial.
26. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971).
27. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881-87 (2009).
28. See, for example, *In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to…an opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence…"); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence."); and *Rex v. Chancellor of the University of Cambridge*, 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (K.B. 1723) ("The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence.")
29. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
30. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (adopting a deference standard applicable to an agency's interpretation of one of its own rules), and *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) (adopting a deference standard applicable to an agency's interpretation of one of its own).
31. Paul J. Larkin Jr., and Elizabeth H. Slattery, "The World After *Seminole Rock* and *Auer*," *Harvard Journal of Law and Public Policy* (2019), pp. 625 and 641 (2019), https://www.harvard-jlpp.com/wp-content/uploads/sites/21/2019/04/Larkin-Final.pdf (accessed January 10, 2020).
32. Ibid.
33. Ibid., pp. 629 and 630 and footnotes 22 and 24 (collecting supporting authorities).
34. Ibid., pp. 630 and 631 and footnotes 25 and 26 (collecting supporting authorities).
35. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). For discussions of the *Kisor* decision, see Paul J. Larkin Jr., "Agency Deference After *Kisor v. Wilkie*," *Georgetown Journal of Law and Public Policy* (forthcoming 2020), and Paul J. Larkin Jr., "Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law*: Kisor v. Wilkie*," *Cato Supreme Court Review* (2019), p. 69, https://www.cato.org/sites/cato.org/files/2019-09/cato-supreme-court-2019-5.pdf (accessed January 10, 2020).
36. Paul J. Larkin Jr., "The Original Understanding of 'Property' in the Constitution," *Marquette Law Review*, Vol. 100, No. 1 (Fall 2016), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5302&context=mulr (accessed January 10, 2020).
37. Which is a reason why the Constitution was adopted. See the Preamble of the Constitution.
38. Paul J. Larkin Jr., "Public Choice Theory and Occupational Licensing," *Harvard Journal of Law and Public Policy*, Vol. 39, Issue No. 1 (2016), pp. 209, and 250–253.
39. *Dolan v. Tigard*, 512 U.S. 374, 392 (1994).
40. See, for example, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).
41. See, for example, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), and *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419 (2015). See also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).
42. See Larkin, *supra* note 28, p. 254 footnote 14 (collecting examples).

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    [I]t is a mistake to think that the Bill of Rights is the defining, or even the most important, feature of American democracy. Virtually all the countries of the world today have bills of rights. You would not feel your freedom secure in most of them—though you likely would in England or Australia, which are two of the very few exceptions. Consider, for example, the following sterling provisions of a modern bill of rights:

    "Every citizen...has the right to submit proposals to state bodies and public organisations for improving their activity, and to criticise shortcomings in their work.... Persecution for criticism is prohibited. Persons guilty of such persecution shall be called to account..."

    "[C]itizens...are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio."

    Wonderful stuff. These were provisions of the 1977 Constitution of the Union of Soviet Socialist Republics. They were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-Life. They are what the Framers of our Constitution called "parchment guarantees," because the real constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything. (Footnote omitted.)

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