

**COURSE OUTLINE FOR
POLS 1101, AMERICAN GOVERNMENT
BUCKNER F. MELTON, JR.
REVISED 5 AUGUST 2019**

Note: This is not a comprehensive outline. It is merely a guide to the major subjects discussed in class, often omitting the details thereof. You are responsible for knowing all additional material presented/assigned in class and/or on the course website. YOU ARE STRONGLY ENCOURAGED TO PRINT A HARD COPY OF THIS OUTLINE, TO TAKE THOROUGH CLASS NOTES, AND TO INCORPORATE THEM INTO THIS OUTLINE.

You are responsible for knowing all information contained in this outline for quizzes and exams whether or not I cover it in class, unless I make express exceptions. YOU ARE STRONGLY ENCOURAGED TO READ THE OUTLINE MATERIAL BEFORE WE COVER THAT MATERIAL IN CLASS. Always being three to five pages ahead of our current location should normally suffice.

Nothing in this outline or in class should be construed as professional legal advice. If you need advice regarding an actual or anticipated legal dispute, you need to engage the services of a practicing attorney.

All possible essay and short answer/ID questions appear on this outline. If a question appears in two or more sections, information from each section in which it appears will need to be included in a complete answer. The answer to some short answer ID questions may be substantially the same as others, with two or more questions merely differing in their phrasing. YOU ARE STRONGLY ENCOURAGED TO BEGIN REVIEWING AND WRITING PRACTICE ANSWERS TO EACH POSSIBLE ESSAY AND SHORT ANSWER QUESTION EARLY IN THE SEMESTER, AS WE COVER THE RELATED MATERIAL, RATHER THAN WAITING UNTIL JUST BEFORE THE EXAM TO DO SO. IF YOU WAIT UNTIL SHORTLY BEFORE THE MID-TERM OR THE FINAL TO DO THIS, YOU WILL LIKELY FIND IT AN IMPOSSIBLE TASK TO LEARN ALL THE MATERIAL IN SUCH A SHORT TIME.

If you download the Microsoft Word version of this outline, view it in outline mode within Word.

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PART I. The origin of government: two different views

A. Possible essay questions:

- 1. Discuss the basic considerations of society, government, and politics that we examined at the beginning of the course, including the problems regarding the relationship of the individuals to each other and to the group; the definition and nature of “government”; the definitions of “law” and “policy” and how they are related; and the nature and definition of statehood.**
- 2. Describe two different origins of government that we have discussed in class. Which is of particular importance in understanding American history? Why?**
- 3. Write an essay on the concept of the social contract. What role has it played in American history and government? Discuss specific examples.**
- 4. The Declaration of Independence may be understood to contain the elements that Americans believe to be a part of their social contract. What are these elements? What in the history of the colonies to 1776 caused these particular elements to be included?**

B. Possible short answer/ID questions

- 1. The difference between law and policy**
- 2. Aristotle**
- 3. The definition of a state**
- 4. The organic society**
- 5. The social contract**
- 6. Thomas Hobbes**

7. Leviathan

8. John Locke

9. The Second Treatise of Government

10. John Locke and Thomas Hobbes

11. The Mayflower Compact

C. Advance reading assignment: Before class, carefully read the Mayflower Compact at http://avalon.law.yale.edu/17th_century/mayflower.asp (link is on course web page)

D. Section outline:

1. Society, government, and politics: basic considerations

a. The individual and his relationship to other individuals and to the community

(i) Humans as social animals

(A) We exist:

1. As individuals
2. But within a society/community of other individuals with whom we somehow must get along

(B) Aristotle (300s BC):

1. “Man is by nature a social animal; an individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Society is something that precedes the individual. Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god.”

(C) Is Aristotle correct when he declares that “Society is something that precedes the individual”?

(ii) People are individuals who live on the same planet with other individuals

(A) Because individuals have the same basic needs (food, clothing, shelter), and have access to the same resources as other individuals, they can and do come into competition or conflict for resources that may maximize their own positives while offloading the negatives onto other individuals

(iii) How do we ensure that conflicts are resolved correctly?

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- (A) To what degree can/should the community require/force individual to respect the life, liberty, and property of another individual e.g. lifestyle, resources, wealth-making potential, business operations, and such)?
- (B) To what degree can/should an individual require the group to respect his individualism (e.g. lifestyle, resources, wealth-making potential, business operations, and such)?
- (C) To what degree can/should a group require the individual to conform to the common interests of the group?

b. The nature and role of government

- (i) Government is a system that answers these questions authoritatively (although not necessarily correctly) and thus regulates/controls the relationship of the individual to other individuals and to the community/society as a whole
- (ii) Government: From the Greek kybernan, meaning to guide or steer (as in steering a ship)
 - (A) A system by which a state or a community is managed
 - (B) A system for determining and enforcing the policy of a community or state
- (iii) It does this through providing a mechanism for enacting policy into law

c. The difference between law and policy

- (i) Policy:
 - (A) From the Greek politea/polis, meaning “community” or “city”
 - (B) Plan, goals, or results that actors in a common political or legal system (legislators, executives, judges, bureaucrats, lobbyists, activists, voters, citizens) hope to achieve or avoid, often by enacting them into law
 - (C) Different individuals or groups within a country usually have different policy ideas or goals
 - (D) The terms best associated with policy are “should” and “should not”
 - (E) Examples:
 1. A political group or party (we’ll call it the Purple Party) thinks that in order to save gasoline, protect natural resources, and save lives, the nationwide speed limit **should** be 55 mph, and seek political office so they can make this the legal speed limit.
 2. The Purple Party also believes that when farmer A operates a hog farm, A **should** be required to ensure that his farm operations have no significant negative impact on his region’s air or water quality.
- (ii) Law:

- (A) Enforceable rules, principles, and procedures that must be followed
- (B) Words usually associated with law include “can,” “cannot,” “shall,” “shall not,” “must,” “must not”
- (C) Examples:
 1. The Purple Party wins big in this year’s election and passes a law making 55 mph the legal speed limit. Drivers **cannot** exceed the speed limit without being convicted of a crime
 2. The Purple Party passes a second law establishing that hog farmers **must** install water and air filtration equipment that ensure that his farming operations have no significant negative impact on air and water quality of the community.
 - a. If any farmer fails or refuses to do so, or if the equipment fails because of the farmer’s fault:
 - i. the government **can** file a lawsuit forcing the farmer either to comply with the requirement or else to pay a massive fine, and
 - ii. Any private individual who suffers injury due to the contaminated air or water **can** file a lawsuit against the farmer to collect money damages for the injury.
- (D) Most of the following discussions about separation of powers, federalism, civil liberties, and civil rights deal with law, although some of the discussion will deal with policy
 1. The basic idea is that the government is the voice of the community, which uses the government to regulate the behavior of individuals within that community, thus setting up potential conflicts between the community (which tends to want to regulate individuals heavily) and individuals (who typically resist regulation)
- (E) The highest legal/policymaking institution is a political entity known as the state

d. The definitions of “state”:

- (i) A state has four characteristics
 - (A) A sovereign
 - (B) government over
 - (C) land/territory and
 - (D) people
- (ii) Other governments besides states exist, but they lack sovereignty
- (iii) Other governments within a state ultimately must answer to the sovereign authority within the state

- (iv) Beliefs about when and how government and states originate can have a major impact on how people view the extent of a state's authority and even legitimacy

2. The origin of the state and society

a. The organic society

- (i) Described as early as the writings of Aristotle
 - (A) Theory that society that emerges out of the mists of time and human nature without a definable beginning
 - (B) based on the nuclear family, clan, tribe, ethnic nation, and ultimately sovereign nation
 - (C) For practical purposes, there was never a time when people existed without a society
 - (D) Is biased towards a communal view of society, in which the individual and his interests are of less importance than are those of the community as a whole

b. The social contract

- (i) A contract is a legally enforceable agreement between two or more parties
- (ii) The notion of a social contract was first described as early as the writings of Plato (300s BC); its heyday was during the political upheavals of Early Modern Europe (1600s-1700s)
 - (A) During this latter period, due to large-scale religious, social, and political struggles, political thinkers closely examined and theorized about the origins and legitimacy of government and society
- (iii) The social contract is the theory that:
 - (A) humans once lived in a state of nature (Note: "state" here refers to a situation, a status, a condition, not to the definition of state given above)
 - 1. Question: what rights did individuals have in the state of nature?
 - (B) At some specific moment, humans came together and voluntarily made a contract to create a society (including government, defining the powers of that government in the terms of the contract
 - (C) This involved individuals giving up a certain degree of their natural freedom in exchange for some degree of security
- (iv) Major "social contract" theorists in English/European history:
 - (A) Thomas Hobbes:
 - 1. Most famous book was *Leviathan* (1651)
 - 2. Hobbes on the state of nature:

- a. “[T]he state of men without civil society (which state we may properly call the state of nature) is nothing else but a mere war of all against all; and in that war all men have equal right unto all things.”
 - b. A situation in which “every man is Enemy to every man [and] men live without other security, than what their own strength, and their own invention shall furnish them... and which is worst of all, continual fear, and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.”
3. According to Hobbes, the only way to avoid this condition and achieve some degree of security was to establish a strong government with absolute power

(B) John Locke

1. Most famous work was the *Second Treatise of Government* (1689)

- a. Like Hobbes, Locke accepts the ideas of the state of nature and the social contract
 - b. The purpose of forming a government is to provide a neutral means (unlike the state of nature) of protecting each member of society’s rights to life, liberty, and property.
 - i. “The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.”
- (v) Thus, Hobbes and Locke both accept the ideas of the state of nature and the social contract, but they differ in the powers of the government created by that contract
- (vi) But in general the social contract tends to be biased towards the rights of the individual to a greater degree than does the theory of the organic society

(A) This is a tendency, not a concrete requirement

- (vii) Just because you accept the idea that government is founded on a social contract doesn’t mean that you know the [terms of that contract](#)

c. The American Experience: Primarily the social contract

- (i) Example: [The Mayflower Compact](#)
 - (A) The first governing document/instrument of Plymouth Colony
 - (B) An agreement made by the Pilgrims/Separatists in 1620 upon landing off the coast of modern-day Massachusetts
- (ii) Example: The Fundamental Orders of Connecticut, 1639

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- (A) Established on their own authority by towns that spun themselves off from the colony of Massachusetts
- (iii) What are the terms of the American social contract?
- (iv) I.e., what is the purpose of government in the American view? How is the government designed so as to achieve that purpose? What are government's powers and limitations?
- (A) The rest of the course is largely devoted to trying to understand the answer to this question

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PART II. The History of the American Social Contract

A. Advance reading assignment: Before class, carefully read the first two paragraphs of the Declaration of Independence (beginning with “When in the course of human events”) at <http://www.cato.org/publications/commentary/declaration-independence> (link is on course web page)

B. Possible essay questions:

- 1. Write an essay on the concept of the social contract. What role has it played in American history and government? Discuss specific examples.**
- 2. The Declaration of Independence may be understood to contain the elements that Americans believe to be a part of their social contract. What are these elements? What in the history of the colonies to 1776 caused these particular elements to be included?**
- 3. What is the central, ongoing problem of American government? What are the three mechanisms in the Constitution designed to address this problem?**
- 4. Write a history of American government from 1776 to 1789.**
- 5. Write a history of the Philadelphia Convention.**
- 6. Write a history of the Philadelphia Convention and the ratification debates.**

C. Possible short answer/ID questions

- 1. The basic government structure of a typical royal colony**
- 2. Virtual representation**
- 3. Natural rights**
- 4. The Articles of Confederation**
- 5. The Annapolis Convention**

6. Shays's Rebellion

7. Separation of Powers

8. Federalism

9. The Federalist, aka The Federalist Papers

10. Antifederalists

11. The Bill of Rights

D. Section outline:

1. The basics of the American social contract is best understood in light of American experience from the founding of England's North American colonies beginning in 1607 to the writing of the Constitution in 1787 and the addition of the Bill of Rights in 1791

2. Colonial foundations

- a. Based more heavily on the social contract than the idea of the organic society**
- b. Colonies were founded at various times for various reasons, the most important reasons being**
 - (i) Economic opportunity/property rights
 - (A) E.g., Jamestown
 - (ii) Religious/personal liberty
 - (A) E.g., Plymouth, Massachusetts Bay, Rhode Island, Pennsylvania, Maryland)
- c. Over time, all colonies adopted systems of government that were somewhat similar to that of England and very similar to each other**
- d. [A Basic Chart of Colonial Government \(Royal Colony\)](#)**
- e. Salutary neglect**

3. The American Revolution, ca. 1760-1776

- a. The end of salutary neglect**
 - (i) Prompted mainly by Parliament's taxation of the colonists to pay down the British Empire's war debt in the wake of the Seven years' War/French and Indian War, 1754-63
- b. Parliament**
 - (i) A powerful central government in which the colonies have no actual representation

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- (ii) Virtual representation versus actual geographical representation

c. Need for culturally and economically diverse colonies to have their different economic interests represented

4. Parliament and central control without geographical representation

a. Lack of geographical representation=lack of representation of diverse economic interests

b. Two types of resented parliamentary law

- (i) Taxation
- (ii) Commercial regulation

5. The Declaration of Independence

a. The classic statement of the American idea of what the terms of the social contract are

- (i) natural rights
 - (A) given by God, not by the government
 - (B) inalienable
 - (C) include
 - 1. life
 - 2. liberty
 - 3. the right to acquire and possess property (“pursuit of happiness,” i.e., right to seek means of procuring food, clothing, shelter)
- (ii) The purpose and nature of government
 - (A) To preserve and protect natural rights
 - (B) To be based on the consent of the governed
 - (C) Right of the people to alter or abolish this government if it fails to protect these rights
- (iii) The puzzle of equality: can it be reconciled with liberty?

6. The Articles of Confederation

a. Established the first system of unified government of the United States

b. A reaction to the excessive power of Parliament/excessive centralization

c. Central government was deliberately designed to be very weak

- (i) In particular:
 - (A) The Confederation Congress can't tax
 - (B) The Confederation Congress can't regulate commerce
 - (C) The laws of the Confederation Congress are administered by the states, not by a national executive
- (ii) Results:

- (A) National government powerless to repay national war debt
- (B) National government powerless to prevent trade wars among the states

7. The Annapolis Convention

- a. An attempt to remedy the perceived weakness of the Articles
- b. Fails but calls for another convention in Philadelphia the following year
- c. Shays's Rebellion provides incentive for states to send delegates to the Philadelphia Convention

8. The Philadelphia Convention and the drafting of the Constitution of the United States, 1787

- a. Seeks to create a national government that
 - (i) unlike the national government under the Articles, is powerful enough to govern effectively, and
 - (ii) unlike Parliament, is not so powerful that it will endanger people's rights to life, liberty, and property
- b. The essential, ongoing problem of American government: How do we give the government enough power to govern effectively (unlike under the Articles of Confederation) while making sure that it isn't so powerful that it threatens our lives, liberty, and property?
 - (i) The goal isn't governmental efficiency
 - (ii) Most of the rest of this course will be devoted to studying the mechanisms in place for attempting to deal with this problem
- c. The Constitution contains three devices to accomplish this goal
 - (i) Two are in the original Constitution
 - (A) Federalism
 - 1. Splitting of power between national and state governments
 - (B) Separation of Powers
 - 1. splitting of power among three branches of the national government:
 - a. Legislative branch (Congress)
 - i. Unlike the Articles, The Constitution (Article I, Sec. 8) gives Congress the power to tax and the power to regulate trade (most notably interstate commerce)
 - b. Executive Branch
 - c. Judicial Branch

9. The Ratification Debates, 1787-1788

- a. The Federalists versus the Antifederalists
 - (i) Federalists:

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- (A) Supported adoption of the new Constitution
 - (B) Stressed the need for a stronger central government
 - (C) A reaction to the Articles of Confederation
 - (D) [The Federalist, aka The Federalist Papers](#)
 - 1. A series of newspaper commentaries supporting adoption written by James Madison, Alexander Hamilton, and John Jay
 - 2. The best-known early commentaries on the Constitution--still worth reading today
 - (ii) Antifederalists
 - (A) Opposed adoption of the new Constitution
 - (B) Showed the fear of a stronger government
 - (C) Shaped mainly by memories of Parliament and the American Revolution
- b. Several states (Massachusetts, New York, Virginia) linked ratification with a demand that a third device be added to the Constitution through the amendment process: a national bill of rights**
- (i) Results:
 - (A) Constitution adopted by 1788
 - (B) Goes into effect in 1789
 - (ii) [The Bill of Rights](#)
 - (A) The first ten amendments to the Constitution, added in 1791
 - (B) The third system of limiting government power (specifically the power of the national government)
 - (C) A list of “Thou Shalt Nots” originally applying only to the national government
 - 1. Many of the provisions in the Bill of Rights were drawn from the bills of rights of the state constitutions

PART III. Federalism

A. Possible essay questions:

- 1. Discuss the various categories of government powers to be found under the system of American federalism. Include related court cases and examples.**
- 2. Identify and describe each of the major constitutional clauses related to federalism.**

B. Possible short answer/ID questions

- 1. Unitary systems of government**
- 2. Confederations**
- 3. Express powers**
- 4. Implied Powers**
- 5. McCulloch v. Maryland**
- 6. Delegated powers**
- 7. Reserved powers**
- 8. Prohibited powers**
- 9. Inherent powers**
- 10. Article I, Section 8**
- 11. Article I, Section 9**
- 12. Article I, Section 10**
- 13. The Supremacy Clause**
- 14. Gibbons v. Ogden**
- 15. Preemption**
- 16. The Full Faith and Credit Clause**

C. Advance reading assignment: Before class, carefully read the following sections of the U.S. Constitution at <https://www.aclu.org/constitution-united-states-america> (link can be found on the course web page):

1. Article I, Section 8

2. Article I, Section 9

3. Article I, Section 10

4. Article VI, Paragraph 2

5. Article IV, Section 1

6. The Tenth Amendment

D. Section outline:

1. Definition of federalism: Two governments exercising authority/sovereignty over the same territory and the same population at the same time

a. Usually by one government having the “last word” in some respects and the other government having the “last word” in other respects

b. In the United States, the two governments are

(i) The national government and

(ii) The state governments

(A) County, city, and other local governments are organs of the state

c. Nevertheless, major issues often arise as to

(i) which government possesses which powers (i.e., where the dividing line is between the powers of the two governments) and

(ii) whether either government possesses a particular power

2. Inefficiency of federalism

a. Duplicate governments

b. Extra government officials

c. Conflicts and disputes over which government has the “last word” in a particular area of law

d. But the goal isn't efficiency, but to ensure the national government doesn't threaten citizens' life, liberty, or property

- (i) To achieve this, some inefficiency is both required and acceptable

3. Advantages of federalism

- a. Theoretically prevents national government from being too powerful**
- b. Allows state, regional, or local problems or issues to be addressed at the regional/local level, presumably by people who are most concerned and familiar with the issue in question**

4. Alternatives to federalism

- a. Unitary system**
 - (i) Central government is all powerful: no regional governments
 - (A) E.g., England
- b. Confederation**
 - (i) Regional governments are all-powerful, or nearly so
 - (A) E.g., United Nations?
 - (B) E.g., The United States under the Articles of Confederation?

5. Types of power in the American federal system

- a. Delegated**
 - (i) Powers that have been given by the states to the national government
 - (ii) Found mainly in Article I, Sec. 8
 - (iii) Two flavors
 - (A) Express
 - 1. Sometimes referred to as the enumerated powers
 - 2. Powers explicitly stated in the text of the Constitution
 - (B) Implied
 - 1. Powers not explicitly stated, but suggested or hinted at
 - 2. Usually connected to an express power by virtue of the Necessary and Proper Clause in Art. I, sec. 8
 - 3. *McCulloch v. Maryland* (1819): holds implied powers to be constitutional
 - a. Does Congress have the implied power to charter a national bank? Yes.
 - b. Given that Congress has that power, can a state interfere with it by taxing the bank to death? No.
- b. Reserved**
 - (i) Powers that haven't been delegated by the states to the national government

- (ii) [The Tenth Amendment](#): An amendment that doesn't really mean anything

c. Concurrent

- (i) Powers that the state and national government share with each other
 - (A) E.g., the power to tax

d. Prohibited/denied

- (i) Powers that the Constitution prevents a government from exercising
 - (A) Article I, Sec. 9: Powers prohibited to the national government
 - (B) Article I, Sec. 10: Powers prohibited to the states

e. Inherent

- (i) Powers that a government has by virtue of the fact that it is a government--doesn't need to be granted by the Constitution
 - (A) E.g., the power to acquire territory
 - (B) Regulation of immigration
 - (C) Policing of borders
 - (D) Recognition (or not) of foreign states

**6. The Supremacy Clause (Article VI, Paragraph 2):
Relationship of state to national power**

a. Gibbons v. Ogden (1824):

- (i) A federal coasting license (held by Gibbons) trumps a state license to operate a steamboat crossing state lines (held by Ogden)
- (ii) When a state law conflicts with a national law, the federal law wins (provided that the national government is acting within the proper scope of its powers)
- (iii) Concept of preemption: the national government, by acting in an area of law, prevents (or preempts) the states from acting (provided that the national government is acting within the proper scope of its powers)

7. The Full Faith and Credit Clause (Article IV, Section 1): Relationship of states to each other

a. A very complex area of law

b. In general:

- (i) Requires each state to recognize the laws, judicial decisions, and public records of the other states.
 - (A) This section helps ensure that court decisions made in one state will be recognized and honored in every other state. One purpose for this is that it prevents someone from moving to another state to avoid a court judgment, or to file a new lawsuit in an attempt to obtain a more favorable outcome on a matter that has already been decided.
- (ii) Doesn't require a state to substitute another state's law or policy for its own, i.e., it does not have to honor something that is specifically against its own law.

PART IV. Separation of Powers and Policy-Making Institutions

A. Possible essay questions:

- 1. Discuss the concept of separation of powers, including both the theory and the actual elements of separation of powers as found in the American constitutional system.**
- 2. Discuss the concept of checks and balances, including both the theory and the actual checks and balances as found in the American constitutional system.**
- 3. Discuss the differences between the United States Senate and the United States House of Representatives, including (among other things) member qualifications, terms of office, and systems of representation. What impact do these differences have on the climate and operations of the two houses?**
- 4. Write a thorough description of how a bill moves through Congress to become a law, including presidential involvement.**
- 5. Write a thorough description of various processes available for amending the Constitution.**
- 6. Write an essay thoroughly describing the Electoral College, including its basic premises and operation along with modifications that have been made to it.**
- 7. The President's powers can be broken down into his roles as commander-in-chief, diplomat-in-chief, and administrator-in-chief. Describe the constitutional powers and duties of the president in each of these three roles, including both textual and non-textual powers and duties.**
- 8. Write an essay on executive orders.**

- 9. Write an essay on the four basic types of bureaucratic organization to be found in the American national government and how they differ from one another.**
 - 10. Discuss the basic concepts of the Anglo-American judicial system and the basic structure of the federal court system.**
 - 11. Discuss the concepts of jurisdiction and justiciability with regard to the federal judicial power/court system.**
 - 12. Discuss the doctrine of judicial review, including thorough discussions of the leading judicial review cases.**
- B. Possible short answer/ID questions**
- 1. Checks and balances**
 - 2. Bicameralism**
 - 3. The Seventeenth Amendment**
 - 4. Reapportionment**
 - 5. Redistricting**
 - 6. Reapportionment and redistricting**
 - 7. Gerrymandering**
 - 8. The Speaker of the House**
 - 9. The filibuster**
 - 10. The “nuclear option”**
 - 11. The House Rules Committee**
 - 12. Conference committees**
 - 13. Line-item vetoes**

- 14. Clinton v. City of New York (1998)**
- 15. The Pocket Veto Case (1929)**
- 16. Wickard v. Filburn (1942)**
- 17. Safe seats**
- 18. U.S. Term Limits, Inc. v. House of Representatives (1995)**
- 19. The two-term tradition/limit**
- 20. The Twelfth Amendment**
- 21. The Twenty-Fifth Amendment**
- 22. Impeachment**
- 23. The Gulf of Tonkin Resolution**
- 24. The War Powers Resolution**
- 25. United States v. Curtiss-Wright Export Corp. (1936)**
- 26. The treaty power**
- 27. Executive agreements**
- 28. The pardon power**
- 29. Executive privilege**
- 30. United States v. Nixon (1974)**
- 31. Cabinet-level departments**
- 32. Independent stand-alone agencies**
- 33. Independent regulatory agencies**
- 34. Government corporations**

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- 35. The spoils system**
- 36. The Pendleton Act**
- 37. The Hatch Act**
- 38. The Senior Executive Service**
- 39. The inquisitorial and adversarial systems**
- 40. Original and appellate jurisdiction**
- 41. Common law and code/Roman law**
- 42. The Judiciary Act of 1789 and later laws**
- 43. Marbury v. Madison (1803)**
- 44. Fletcher v. Peck (1810)**
- 45. Martin v. Hunter's Lessee (1816)**
- 46. Judicial activism and judicial self-restraint**

C. Section outline:

1. Checks and Balances: Examples

- a. Veto**
- b. Override**
- c. Senate treaty consent**
- d. Senate appointment consent**
- e. "Good behavior" judicial tenure**
- f. Impeachment**
- g. Judicial review (non-textual)**

2. The Legislative Branch

- a. Overview**
 - (i) Article I is the first, longest, and most detailed article
 - (ii) Shows the founders' focus on the legislature as the most important, in their view potentially the most dangerous
- b. Bicameralism**
 - (i) An internal check on congressional power
 - (ii) Point of bicameralism is to divide Congress against itself
 - (iii) This point is lost if the houses are essentially the same

- (iv) Much of the difference to be found in the election provisions:
- c. Member elections and qualifications**
 - (i) Terms of office
 - (A) House of Representatives: Two year terms, elections every even year
 - (B) Senate: Six year terms, one third of seats up for election every even year
 - (ii) Age difference
 - (A) House of Representatives: Must be 25 years old.
 - (B) Senate: Must be 30 years old.
 - (iii) citizenship difference
 - (A) House of Representatives: Must have been a citizen for 7 years
 - (B) Senate: Must have been a citizen for 9 years
 - (iv) electorate
 - (A) House of Representatives: elected by direct popular vote
 - (B) Senate:
 - 1. chosen by state legislatures until 1913
 - a. Gave the state governments direct input into national lawmaking
 - 2. 17th Amendment, 1913, made election of senators by direct popular vote
 - 3. The new system weakens federalism, i.e., state governments now have a much weaker voice in Washington
 - 4. The new system also weakens the difference in House/Senate functionality but doesn't eliminate it since the other differences remain
 - (v) House of Representatives apportionment/reapportionment
 - (A) Representation in the House of Representatives is based on state population
 - 1. The higher the population of a state, the more representatives that state gets
 - 2. no more than one representative per 30,000 persons
 - 3. every state has at least one representative
 - 4. maximum number set by congressional apportionment acts
 - a. by 1929 maximum number fixed at 435
 - (B) Reapportionment of House seats among the states:
 - 1. takes place every ten years based on the federal census to reflect shifts in population
 - (C) Reapportionment does not apply to Senate: Each state always gets two senators, elected in statewide elections
 - (vi) House of Representatives redistricting

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- (A) Congressional districts are drawn by state legislatures once they know how many representatives the state gets as a result of reapportionment
- (B) Gerrymandering: drawing district lines to maximize or minimize the number of seats a party is likely to get
- (C) Redistricting does not apply to Senate: Each state always gets two senators, elected in statewide elections (i.e., there's no such thing as a Senate district)

d. Powers of Congress

- (i) Powers delegated to Congress tend to be related to subjects in which a national voice/solution/approach is appropriate, as opposed to subjects best handled at the state/regional/local level
- (ii) Most but not all express powers of Congress are listed in Art. I sec. 8
- (iii) Other powers are scattered throughout the Constitution
- (iv) Art. I sec. 8 has 5 general categories of express power
 - (A) Monetary powers
 - (B) Commercial regulation
 - (C) Country unification/expansion
 - (D) War powers
 - (E) Judicial powers

e. Structure of Congress

- (i) Party organization
 - (A) Congress is organized heavily by political party, something not contemplated in Constitution since parties didn't exist at the time it was written
- (ii) Senate is smaller, and people stay there longer because of longer terms: This means that
 - (A) The Senate is more informal than the House
 - (B) The Senate is less partisan/more collegial than the House
 - (C) The Senate's formal leadership is somewhat less important than that of the House
- (iii) House of Representatives is large, and membership turns over relatively quickly because of two year terms: This means that:
 - (A) The House leadership is very powerful since the only way to manage it is through strong leadership
 - (B) Party discipline is stronger
 - (C) Thus voting in the House is less individualistic and more along party lines than in the Senate
- (iv) In each house, organization is by party, with majority party controlling the most important leadership positions
- (v) House of Representatives

- (A) Leaders of both parties, and therefore of the House of Representatives, are chosen by party caucuses
- (B)
- (C) Speaker of the House
 1. Chosen by majority and therefore majority party, thus the Speaker is always from the House majority party
 2. Tends to be most powerful member of House of Representatives
 3. Is one of most visible national politicians, especially if he is of a different party than the president
- (D) Majority leader
 1. Same party as speaker, therefore overshadowed by him
- (E) Minority leader
 1. Leader of the opposition party
 2. A shadow speaker who may become actual speaker
- (F) Majority and minority whips
 1. Keep party members in line, turn out the vote especially on big issues
- (G) Limits on floor debate due to large number of members; few people get to speak on a subject, and they don't get to speak for long
- (vi) Senate
 - (A) Vice president
 1. Technically the presiding officer of the Senate
 2. May be of a different party than the Senate's majority party
 3. Can only to vote to break a tie
 4. Is usually absent
 5. In his absence, president pro tempore, the senior member of majority party, presides
 6. But the president pro tempore usually delegates the role to a junior member of his party
 - (B) Majority leader
 1. More powerful than House of Representatives majority leader, is more the leader of his party
 - (C) Minority leader
 1. Similar role to the House minority leader
 - (D) Majority and minority whips
 1. Similar roles to whips in the House
 - (E) The filibuster
 1. The practice of a senator attempting to talk a bill to death or bogging down Senate conduct of business with a very long speech
 2. Exists only in the Senate--not in the House

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3. Exists because under the Senate rules, senators have no time limit on how long they may speak, unless 60 senators vote cloture (cutting off of debate)
4. The Filibuster gives the minority party or a single senator huge power, thus encouraging/forcing collegiality and compromise
5. The threat of a filibuster alone can kill a bill or force negotiations to modify it
 - a. Filibusters are today more often used as a threat than actually engaged in
 - b. This has the practical effect of requiring 60 votes rather than simple majority to pass a bill
6. In place since 1830s
7. Limits
 - a. Some things can't be filibustered, e.g. budget amendments
 - b. Cloture vote
 - c. The "nuclear option":
 - i. A parliamentary maneuver in which the Senate decides by simple majority vote that a filibuster is in violation of the Senate rules
 - ii. invites retaliation, therefore collegiality strongly discourages this
 - iii. Exercised by Democrats in November 2013 for lower federal court appointments (likely eroding sacrosanct nature of the filibuster and inviting eventual Republican retaliation)
 - iv. Exercised by Republicans in 2017 in response to Democratic filibuster of confirmation Supreme Court nominee Neil Gorsuch (and likely in retaliation for Democrats' use of the nuclear option in 2013)
 - v. This dual use of the nuclear option may erode the filibuster by encouraging one or both parties to use the nuclear option in the future on controversial legislation

(vii) Committees

(A) Where most of the work is done in each house

1. Committee membership is based on party, with the majority party in a house having the majority vote on all of that house's committees

(B) Three basic types

1. Standing committees: the most important type
2. Select/special committees: usually investigative, usually doesn't propose laws
3. Joint

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- a. Usually oversight, e.g. overseeing GAO
- (C) importance of Rules Committee in the House of Representatives

1. decides where bills go and if they get to floor

f. The legislative process

- (i) only a member of Congress may introduce a bill
- (ii) idea for a bill may come from the public, lobbyists, interest groups, the president, or other sources
- (iii) a bill may be introduced in either house
- (iv) Exception: Revenue bills must begin in the House of Representatives
- (v) Committee referral
- (vi) Tabling or subcommittee referral
- (vii) Subcommittee markup
- (viii) Bill reported out to floor, ultimately voted on if it survives that long
- (ix) If approved, the process is repeated in the other house
- (x) The same bill must pass both houses to become law
- (xi) Conference committee
 - (A) a special type of joint committee
 - (B) reconciles the two houses' versions of a bill if they are different
 - (C) wields a lot of power
- (xii) Presentment of bill to the president
 - (A) The clock starts ticking when the bill is presented to the president
 - (B) four options
 - 1. He may sign it, in which case it becomes a law
 - 2. It becomes a law without signature after ten days if he takes no action
 - 3. He may veto it (risking override)
 - a. No line-item veto: Clinton v. City of New York (1998)
 - 4. Pocket veto: If the president takes no action on it and Congress adjourns before the ten days are up, the bill dies
 - a. This refers to any adjournment, not just the final adjournment of that Congress (*The Pocket Veto Case* (1929))

g. Congress and finance

- (i) Spending
 - (A) The budget process
 - 1. Is essentially the legislative process
 - 2. i.e. few to no special constitutional provisions

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- a. President submits a proposed budget to Congress each year
 - i. This is required only by law (since 1921), not by the Constitution—Congress is capable of writing a budget itself
- b. Congress then puts various parts of the proposed budget through various committees and subcommittees
- c. Eventually all become part of the Budget Resolution
- d. the Budget Resolution is passed more or less like other laws, although it is a Congressional resolution, not a law (not legally binding)
- e. The Budget Resolution is a guideline of projected revenue and spending goals for the coming fiscal year; it serves to guide Congress as to how to allocate funds to various committees that may pass appropriations bills
- f. Some years there may be no Budget Resolution

(B) Appropriations

- 1. Appropriations bills are the bills that actually authorize the spending of federal money
- 2. Again, they go through the legislative process
- 3. The main committees involved in the process are the House and Senate Appropriations Committees, each of which has numerous subcommittees
- 4. Appropriations are generally made in three ways:
 - a. Regular appropriations bills
 - i. passed annually and provide most of the funding
 - b. Continuing resolutions
 - i. Usually passed when Congress can't decide on a new budget—simply continues spending at previous levels for another day/week/month/year/etc. until Congress can make a budget decision
 - ii. In recent years Congress has had great trouble passing a budget and making regular appropriations, so continuing resolutions have been common
 - c. Supplemental appropriations bills
 - i. Passed when some new/unforeseen circumstance arises requiring additional appropriations
 - ii. E.g., war or natural disaster
- 5. Unlike the Budget Resolution, without annual appropriations, the government must shut down
- 6. This leads to “brinkmanship” between the parties and has resulted in around 18 shutdowns since 1976 ranging from one to 21 days
- 7. Two types of spending: discretionary and mandatory

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- a. Discretionary must be passed every year (i.e., annual appropriations) and is typically good for only one year
 - i. E.g., most of the money appropriated for the armed services
 - b. Mandatory is money that is automatically spent without an annual appropriation; most of this goes to entitlements, [and the amount is growing](#)
 - i. E.g., Social Security
 - ii. Medicare
 - iii. Medicaid
 - c. Congress can reduce or eliminate entitlements and mandatory spending, but this is always a hugely unpopular move that would ruin the careers of members of Congress
- (ii) Revenue
 - (A) The raising of money that Congress has to spend
 - (B) [Sources](#)
 - (iii) Overspending
 - (A) Deficit spending:
 - 1. Spending more money than is coming in from revenue
 - (B) National debt:
 - 1. The total amount of money that a government owes, i.e. the accumulation of debt acquired through deficit spending
 - (C) The U.S. has been [almost constantly running a deficit since 1933](#) and the debt is [becoming dangerously high](#) with no change in sight

h. Congresses and sessions

- (i) A Congress meets for two years; it usually has two sessions of one year each
- (ii) Both Congresses and sessions are numbered, e.g., Fifth Congress, Second Session
- (iii) Congresses begin early (i.e., January) in odd years (following the previous, even election year)
- (iv) To determine the number of a Congress meeting in a given year, use the following formula: $(\text{Starting year of Congress} - 1787)/2$
 - (A) E.g., Which Congress met starting in 1797?
 - 1. $(1797-1787)/2=5$, i.e., the Fifth Congress
 - (B) E.g., Which Congress met starting in 2013?
 - 1. $(2013-1787)/2=113$, i.e. the 113th Congress
- (v) To determine the year of a particular Congress, use the following formula: $(\text{number of Congress} \times 2) + 1787$
 - (A) E.g., What year did the 31st Congress first convene? $(31 \times 2) + 1787 = 1849$

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- (B) E.g., What year did the 101st Congress first convene?
 $(101 \times 2) + 1787 = 1989$

i. The American parliament

- (i) Growing Congressional power
- (A) Wickard v. Filburn (1942)
1. Establishes the Orwellian idea that by not engaging in interstate commerce, a farmer is somehow engaging in interstate commerce and thus subject to federal law
 2. A massive expansion of the commerce power and a consequent massive weakening of state power/federalism
- (ii) Growing Congressional entrenchment and perks
- (A) Originally, Congress was a part time job, with each session lasting only several weeks or a few months
- (B) 2d Continental Congress put everything on the line and would have been hanged for traitors
- (C) today, service in Congress is essentially a full-time career, with low turnover, high salary, and many perks
1. In mid-1800s, 5 years was the maximum average time a member of Congress stayed in office
 - a. today, much longer: 20, 30, or even 50 years
 2. In mid-1800s, half of incumbents retired or were defeated every election
 - a. today, fewer than 10 percent
- (D) perks
1. high salary
 2. private retirement program
 3. exemption from laws like Obamacare and insider trading rules
- (E) Safe seats: seats from states or districts in which the opposing party has little or no chance of taking the seat
1. Most seats these days are safe
- (F) Why low turnover:
1. Patronage
 2. Presence (staff, local offices)
 3. Pork
- (G) All of this means that members of Congress have little actual responsibility to the voters, since they can manage to stay in office relatively easily unless they do something so heinous as to alienate a high percentage of voters
- (iii) Attempts to remedy American Parliament
- (A) Demands to balance the budget
- (B) Attempts to impose term limits

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1. *U.S. Term Limits, Inc. v. House of Representatives* (1995), was a case in which the Supreme Court of the United States ruled that states cannot impose qualifications for prospective members of the U.S. Congress stricter than those specified in the Constitution. The decision invalidated the Congressional term limit provisions of 23 states. The parties to the case were U.S. Term Limits, a non-profit advocacy group, and the politician Ray House of Representatives, among others.

(C) [The amendment process](#) and Article V refusal

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3. The Executive Branch: The President

a. Choosing the president/vice president

- (i) Natural born citizen
- (ii) [The Electoral College](#)
 - (A) A continued vestige of federalism and the importance of states qua states
 - (B) Election of the president is based on geographic distribution of population as well as state sovereignty—NOT direct popular vote
 - (C) Original system didn't anticipate the development of a two-party system
 - (D) Twelfth Amendment: modification to reflect the development of a two-party system
- (iii) Two-term tradition/limit
 - (A) Theodore Roosevelt, 1912
 - (B) Franklin D. Roosevelt, 1940
 - (C) Twenty-Second Amendment
- (iv) Presidential succession
 - (A) Twenty-Fifth Amendment (1967)
 - (B) An attempt to clarify various issues regarding presidential or vice-presidential death or incapacity
 - (C) Proposed and ratified in response to the assassination of John F. Kennedy in 1963
 - (D) Addresses, among other things:
 - 1. Presidential succession
 - a. Prior to this amendment, the Constitution didn't clearly state that vice president was to become president on death or removal of president
 - b. See Art. II, sec. 1, cl. 6
 - 2. Vice-presidential vacancy
 - 3. Presidential incapacity

b. Removing the president

- (i) Impeachment
- (ii) "high crimes and misdemeanors"

c. Powers of the president

- (i) Commander-in-chief
 - (A) [The War Power](#)
 - (B) Purse versus sword
 - (C) Congressional abrogation of responsibility
 - 1. The Gulf of Tonkin Resolution (1964)
 - 2. The War Powers Resolution (1973)
- (ii) Diplomat-in-chief
 - (A) *United States v. Curtiss-Wright Export Corp.* (1936)

1. The power of the United States to conduct foreign relations is an inherent power
 2. and this power inheres in the executive branch
 3. i.e., the president's power to conduct foreign affairs isn't subject to limitations that Congress may try to put on it
- (B) President's power to recognize (or not) foreign states/regimes
- (C) Current events: *Trump v. Hawaii* (2018)
1. Supreme Court upheld ban on travel to U.S. from eight Muslim countries whose nationals potentially constitute a national security threat to U.S. despite Trump's repeated blanket statements that Muslims are a threat to the U.S. (See First Amendment Establishment Clause)
- (D) Treaty power
1. Senate concurrence required (2/3 supermajority)
 2. Advice, consent, and George Washington's experience
- (E) Executive agreements
1. A major element in the greatly-expanding power of the president at the expense of the Senate
 2. President may make legally binding agreements with foreign states without congressional approval
 3. Have largely replaced treaties
 - a. 1789-1839, US entered into 60 treaties and 27 published executive agreements
 - b. 1940-1989, US entered into 759 treaties and 13,016 published executive agreements
 4. Limitations: Executive agreements are limited to situations in which
 - a. Congress authorizes such an agreement in advance, by statute
 - b. An existing treaty (which has been approved by the Senate) authorizes such an agreement
 - i. E.g., the U.S.-Japan Status of Forces Agreement, 1960, signed incident to the U.S.-Japan Security treat, which authorized it
 - c. The Constitution arguably grants the president the implied power to enter into such an agreement
 - i. E.g., an agreement that rests on the president's power as commander-in-chief, such as the Iraq status of forces agreement, 2008
- (iii) Administrator-in-chief
- (A) Appointments of many executive officers
1. E.g., Cabinet officers

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2. E.g., other executive agencies
 3. Recess appointments issue
 - a. NLRB v. Noel Canning (2014): If the the Senate rules allow it to transact business at a particular moment, then it isn't in recess at that moment and no recess appointments are allowed
- (B) Executive orders
1. Orders from the president to executive branch employees to do something, not to do something, or how to do something
 2. These orders implement or interpret some presidential power, treaty provision, or law of Congress
 3. Similar executive actions may go by different names such as
 - a. Presidential directives
 - b. Presidential memoranda
 - c. Presidential determinations
 4. Executive orders aren't mentioned expressly in Constitution
 5. Basis: several different bases and theories, including:
 - a. Implied from express powers of president
 - i. E.g., Article II, sec. 2 expressly states that the president is the commander-in-chief. Since commanders-in-chief presumably can issue orders to the armed forces, the president by implication may issue executive orders in this regard.
 - ii. E.g., Article II, sec. 2 expressly grants the president the power to grant pardons. By implication, he may use an executive order to pardon an individual or group.
 - b. Statutory grant of authority by Congress to the president
 - i. In this case Congress is always free to revoke this grant by changing or repealing the statute (which of course is subject to the president's veto power)
 6. Nevertheless, executive orders have been issued by nearly every president since Washington, often to achieve far-reaching and very controversial results
 7. Examples:
 - a. George Washington: Proclamation of neutrality instructing executive officers to take legal action against American citizens who aided any European state currently at war
 - b. Abraham Lincoln: the Emancipation Proclamation
 - c. Franklin D. Roosevelt:

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- i. criminalizing private citizens' possession of most gold, essentially taking America off the Gold Standard (was later reversed)
 - ii. Deportation of American citizens of Japanese descent to internment camps during World War II
 - d. Truman: Desegregation of the U.S. armed forces
 - e. Eisenhower: ordering federal troops to desegregate public school in Little Rock, Arkansas
 - f. Clinton: Required the federal government to offer services and benefits in foreign languages (ruled unconstitutional)
 - g. Obama: Order delaying enforcement of statutory employer mandate requirement of Obamacare
 - h. Trump: Ban on travel to U.S. from eight predominately Muslim countries whose systems for managing and sharing information regarding its nationals were deficient and thus a threat to U.S. national security
8. Number has grown considerably over the past century
9. Today often used in ways calculated to thwart the will of Congress
- a. E.g., President Obama, 2014: "We're not just going to be waiting for legislation in order to make sure that we're providing Americans the kind of help they need. I've got a pen and I've got a phone. And I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward"
10. Can be overturned in some cases by acts of Congress (which are of course subject to presidential veto)
11. *Youngstown Sheet & Tube v. Sawyer* (1952)
- a. In the face of a national steel workers' strike during the Korean War, President Truman seized the nation's steel mills by executive order without congressional authority, claiming the inherent power to do so
 - b. The Supreme Court found the seizure unconstitutional
 - c. Jackson's analysis
 - i. When an executive order is based upon express or implied support of Congress, president's powers are at their strongest/presumably valid
 - ii. When Congress has so far been silent, president's powers are moderate
 - iii. When an executive order runs counter to the expressed will of Congress, president's powers are at their weakest

(iv) Other powers

(A) Veto

- 1. Based on law or based on policy?

(B) Pardon power

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1. Watergate: Ford's pardon of Nixon
 2. Carter's pardon of draft dodgers
- (C) Executive privilege
1. Watergate: United States v. Nixon (1974)

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4. The Executive Branch: The Bureaucracy

a. Section outline:

- (i) The “fourth branch of government”
 - (A) Federal agencies
 - (B) Created by Congress but in the executive branch
 - (C) Staffed by unelected specialists
 - (D) Engaged in
 - 1. Delivering goods and services
 - 2. Or regulating aspects of economy or society
 - 3. Making rules regarding delivery and decision making
 - 4. Adjudicating conflicts related to its rules and policies
 - (E) Subject to varying degrees of presidential control
 - (F) Bureaucrats and their agencies can make administrative regulations that have the force of law
- (ii) Types of bureaucratic agencies
 - (A) Cabinet-level departments
 - 1. The biggest
 - 2. The most generalized
 - 3. The only ones mentioned in the Constitution
 - 4. Examples:
 - a. Department of State
 - b. Department of Defense
 - c. Department of the Treasury
 - d. Department of Justice
 - 5. Department heads:
 - a. Nominated by president, confirmed by Senate
 - b. The Tenure of Office Act, 1867: Andrew Johnson impeached for firing Secretary of War Stanton without Senate’s permission
 - c. But Myers v. United States (1926) held that Senate approval not needed for removal of department heads
 - 6. May have subordinate or “dependent” agencies (as opposed to the independent stand-alone agencies listed below) , such as
 - a. Department of the Treasury: Internal Revenue Service
 - b. Department of Justice: Federal Bureau of Investigation
 - (B) Independent stand-alone agencies
 - 1. “Independent” in the sense that they report directly to president, unlike subordinate agencies within departments
 - 2. Usually more specialized than departments
 - 3. Examples
 - a. Central Intelligence Agency
 - b. Selective Service System
 - (C) Independent regulatory agencies/commissions

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1. “Independent” in the sense that they are relatively independent not of other departments but independent of the president
2. Usually headed not by an individual but by a group of commissioners
 - a. Nominated by president
 - b. Confirmed by Senate
 - c. With a set term of office (e.g., five years)
 - d. Goal is to insulate the agency from politics
 - e. Removable by the president only for cause (e.g., malfeasance, corruption--not for policy reasons)
3. Job is usually to regulate a particular industry or subject matter
4. Usually headed by a commission rather than by an individual, with members having specialized knowledge of the subject matter
5. First such agency was the Interstate Commerce Commission
 - a. Created in 1887 by the Interstate Commerce Act in reaction to the Wabash Case of 1886
 - b. Purpose is to regulate interstate railroad rates
6. Other examples:
 - a. Securities Exchange Commission
 - b. Federal Reserve Board
 - c. Federal Communications Commission
 - d. Federal Aviation Administration

(D) Government corporations

1. Supply goods or services like private corporations, but owned by the government
2. Goal is to provide goods/services in areas of commerce or physical places not well served by private corporations
3. Often less efficient than private corporations
4. Examples:
 - a. United States Postal Service
 - b. Amtrak
 - c. Corporation for Public Broadcasting

(iii) Depoliticizing the bureaucracy

(A) Keeping politics out of the bureaucracy

1. Presidential appointees
 - a. Out of millions of bureaucrats, only about 3000 appointed by the president
 - b. 600 confirmable
 - c. 2400 not
 - d. generally chosen for party loyalty
 - e. often leave at or before expiration of the president’s term

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2. Senior Executive Service

- a. 6400 career executives
 - i. i.e. managerial level
 - ii. appointed through merit system
 - iii. non-political--keep their jobs as presidents come and go

3. Civil Service

- a. Lower-level federal employees
- b. Were originally political appointees, chosen by the spoils system
 - i. Popularized by Andrew Jackson
 - ii. Made civil service highly politicized
 - iii. Led to assassination of president James A. Garfield, 1881, by a disappointed office-seeker
 - iv. Garfield's assassination led to the Pendleton Act 1883
- c. Pendleton Act created a series of competitive examinations for civil service positions, de-politicizing the civil service

(B) Keeping the bureaucracy out of politics

1. The Hatch Act

- a. Passed 1939, revised 1993
- b. Restricts political party involvement (party office holding, fundraising, etc.) by federal employees
- c. Original act curtailed/chilled free speech rights of federal employees

(iv) Powers of the bureaucracy

(A) Legislative: bureaucrats can and do make huge numbers of administrative regulations that have the force of law

(B) Executive: bureaucrats have the legal authority to enforce these regulations

(C) Judicial: bureaucrats have the legal authority to interpret these regulations when challenged in quasi-judicial proceedings by citizens

1. The Chevron Doctrine (Chevron U.S.A. v. Natural Resources Defense Council (1984)): Courts defer to administrative agencies in determining what a congressional law pertaining to that agency's authority means

- a. Does an ambiguity exist in the law?
- b. If so, has the agency interpreted it in a reasonable way?
- c. If the answers to both questions is "yes," then the courts will let the decision stand.

(D) This leads to a destruction of separation of powers and the safeguards that it provides

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(E) Concentration of executive, legislative, and judicial powers in the hands of a large group of unelected officials

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5. The Judicial Branch

a. Basic concepts of the Anglo-American judicial system

- (i) Adversarial system
 - (A) E.g., football: two teams and referees
 - (B) As opposed to inquisitorial system
 - 1. In which the referees would play in the game as well as referee
- (ii) Distinction between civil law and criminal law
 - (A) Civil law
 - 1. Plaintiff and defendant
 - 2. Often between two private parties; may involve the government as a party (either as plaintiff or defendant)
 - 3. civil remedies usually involves money damages or restoring plaintiff to his prior economic position, or compelling a party to carry out his legal duties
 - (B) Criminal law
 - 1. Prosecution (AKA the people, the state) and defendant
 - 2. The government is always a party (always the prosecution)
 - 3. criminal penalties include jail time, execution, huge criminal money penalties, and a criminal record
- (iii) Distinction between law and fact
 - (A) fact is what actually happened, as best the factfinder can determine based on the available evidence
 - (B) law is about (among other things) what may and may not be introduced into evidence
 - (C) During a trial, the judge determines the law
 - (D) During a trial, the jury determines the facts (subject to the evidence that the parties present and that the judge allows to be introduced)
 - (E) in bench trials, the judge determines both the law and the facts
- (iv) Distinction between trial courts and appellate courts
 - (A) i.e., original jurisdiction and appellate jurisdiction
 - (B) trial court
 - 1. the court where a case originates
 - 2. the court where the trial occurs
 - 3. the court in which the facts are determined
 - (C) appellate court
 - 1. a court that reviews the legal rulings of the trial judge to determine if he committed some error in applying the law that might have improperly affected the outcome of the case

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- 2. there may be an intermediate appellate court and a higher appellate court
- (v) common law
 - (A) a system in which judicial opinions themselves become the law for similar later cases (precedent) and aren't overruled without good reason (stare decisis)
 - (B) as opposed to code law/Roman law, in which judicial decisions usually have no authority in subsequent cases
- b. The basic structure of the federal court system**
 - (i) Article III
 - (ii) The Judiciary Act of 1789 and later laws
 - (A) Federal district courts
 - (B) Federal courts of appeal
 - (C) The United States Supreme Court
- c. What cases can federal courts hear?**
 - (i) Justiciability
 - (A) No advisory opinions
 - (B) Standing
 - (C) Ripeness
 - (D) Mootness
 - (E) Political Question Doctrine
 - (ii) Jurisdiction
 - (A) Diversity
 - (B) Federal Question
- d. Judicial review**
 - (i) Marbury v. Madison (1803):
 - (A) Judicial review of national laws
 - (ii) Fletcher v. Peck (1810):
 - (A) Judicial review of state laws
 - (iii) Martin v. Hunter's Lessee (1816):
 - (A) Judicial review of state courts' rulings on national laws
- e. Supreme Court practice**
 - (i) Each year, the Court gets about 7000 requests to hear cases
 - (ii) Decides fewer than two hundred cases each year (hears arguments on fewer than 100)
 - (iii) The Court's term begins on the first Monday in October; usually lasts until late June
 - (iv) Cases before the Court are argued by written brief and oral argument
 - (v) The conference
 - (vi) Opinions
 - (A) Majority opinion
 - (B) Dissenting opinion
 - (C) Concurring opinion

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(D) John Marshall and the Opinion of the Court

f. Judicial activism versus judicial self-restraint

- (i) Activism: a judge is more willing to base his decision on policy (i.e., what he thinks the law ought to be)
- (ii) Self-restraint: a judge is more likely to rule on what he thinks the law actually is, even if that leads to a result that he personally dislikes
- (iii) Activism may be either liberal or conservative; currently tends to be more liberal

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PART V. Rights and Liberties: Civil Liberties

A. Possible essay questions:

- 1. Discuss the idea of incorporation. How, why, and when did it happen? What impact did it have, if any, on federalism?**
- 2. Discuss the First Amendment freedoms of speech and press.**
- 3. Discuss all three religion clauses of the Constitution, including the court cases that have interpreted them and the tests established by those cases.**
- 4. Discuss the concept of due process (not including incorporation).**
- 5. Discuss the right to privacy, including abortion.**
- 6. Discuss all aspects of criminal procedure as found in the United States Constitution.**

B. Possible short answer/ID questions

- 1. Civil liberties**
- 2. Bills of attainder**
- 3. Ex post facto laws**
- 4. Everson v. Board Of Education (1947)**
- 5. Lemon v. Kurtzman (1971)**
- 6. The Lemon test**
- 7. Sherbert v. Verner (1963)**
- 8. Employment Division v. Smith (1990)**
- 9. Religious Freedom Restoration Act**

10. **City of Boerne v. Flores (1997)**
 11. **Symbolic speech**
 12. **Tinker v. Des Moines Independent Community School District (1969)**
 13. **Cohen v. California (1971)**
 14. **Procedural due process**
 15. **Substantive due process**
 16. **The right to privacy**
 17. **Griswold v. Connecticut (1965)**
 18. **Roe v. Wade (1973)**
 19. **Planned Parenthood v. Casey (1992)**
 20. **Obergefell v. Hodges (2015)**
 21. **Kelo v. City of New London (2005)**
 22. **Katz v. United States (1967)**
 23. **Exclusionary rule**
 24. **Double jeopardy**
 25. **Gideon v. Wainwright (1963)**
 26. **Miranda v. Arizona (1966)**
 27. **Furman v. Georgia (1972)**
 28. **Gregg v. Georgia (1976)**
- C. Advance reading assignment: Before class, carefully read the Bill of Rights (the first ten amendments to the Constitution) at <http://www.let.rug.nl/usa/documents/1786-1800/bill-of-rights-and-the-amendments-to-the-constitution.php> (link is on course web page). Then go through this exercise.**

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D. Section outline:

1. Definition of civil liberties:

- a. Civil liberties relate mainly to the behavior of individuals**
- b. Compare this definition to the definition of civil rights**

2. Original Constitution

- a. Art I sec. 9: A “little bill of rights” against the national government**
 - (i) Habeas corpus
 - (ii) Bill of attainder
 - (iii) Ex post facto law
- b. Art I sec. 10: A “little bill of rights” against the state governments**
 - (i) Bill of attainder
 - (ii) Ex post facto law
 - (iii) Contract Clause

3. The Bill of Rights

- a. Incorporation of the Bill of Rights into the Fourteenth Amendment Due Process Clause**
 - (i) The Bill of Rights of the U.S. Constitution originally applied only to the NATIONAL government
 - (A) A reaction to the fear/hatred of Parliament, lack of representation in parliament, and the fear of a strong central government
 - (B) State governments were closer to the people, more subject to popular control, and were limited by the bills of rights within the state constitutions
 - (ii) Incorporation extends its application to STATE governments as well
 - (iii) Occurred in the early and mid-20th century as a result of increasing diversity in
 - (A) Ethnicity
 - (B) Religion
 - (C) Political ideas
 - (iv) Occurred in two waves
 - (A) Civil protections, occurring in 1920s/1930s (e.g., freedom of speech, free exercise of religion, etc.)
 - (B) Criminal procedure, occurring in 1950s/1960s
 - (v) Some Bill of Rights provisions have not been incorporated
 - (A) Fifth Amendment requirement of grand jury indictment
 - (B) Seventh Amendment right to a jury in civil trial
 - (C) Eighth Amendment right against excessive bail

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- (vi) Recent incorporation cases
 - (A) McDonald v. Chicago (2010)
 - 1. Incorporates Second Amendment after a gap of nearly 50 years since last incorporation case
 - (B) Timbs v. Indiana (2019)
 - 1. Incorporates Eighth Amendment's Excessive Fines Clause (forfeiture)

b. First Amendment

- (i) Religion Clauses
 - (A) Art VI Religious Test Clause
 - (B) Establishment Clause
 - 1. Everson v. Board of Education (1947)
 - a. Court quotes "separation of church and state" language but allows aid to religious schools
 - 2. Best current test: Lemon test, Lemon v. Kurtzman (1971)
 - a. The Lemon test: To avoid an establishment of religion, a law must
 - i. Have a secular legislative purpose, and
 - ii. Have a primary effect that neither aids nor hinders religion, and
 - iii. Avoid excessive government entanglement with religion
- (C) Free Exercise Clause
 - 1. Sherbert v. Verner (1963)
 - a. Sherbert, a Seventh-Day Adventist, was fired for refusing to work on Saturday and denied unemployment benefits
 - b. Court announces a four part test
 - i. Does the claim involve a person's sincere religious belief?
 - ii. Does the government action impose a substantial burden on the person's ability to act on that belief?

If the answer to both of these questions is "yes, then the government must prove

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- iii. that the state action furthers a compelling state interest, AND
 - iv. that the government is acting in the least restrictive way to religion
 - 2. Employment Division v. Smith (1990):
 - a. Free exercise of religion does not allow a person to use a religious motivation as a reason to disobey a neutral law of general applicability
 - b. Largely overrules Sherbert test
 - 3. Religious Freedom Restoration Act, 1993 (RFRA)
 - a. Seeks to overrule Employment Division v. Smith and restore Sherbert test
 - b. City of Boerne v. Flores (1997):
 - i. Court holds that RFRA can't override Court's interpretation of the Free Exercise Clause in regard to state law
 - ii. RFRA test only applies in cases of federal action
- (ii) Speech
 - (A) Reasons:
 - 1. The marketplace of ideas
 - 2. Truth will prevail
 - 3. Free exchange of information is necessary for a self-governing society
 - 4. Speech as a safety valve
 - 5. First Amendment is designed to protect unpopular speech
 - 6. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. ... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." --Justice William O. Douglas, writing in Terminiello v. Chicago (1949)

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(B) Continuum of belief

1. belief is absolute and cannot be restricted
2. action is subject to restriction
3. speech is not as absolute as belief, not as subject to restriction as action
 - a. e.g., no right to falsely shout fire in a crowded theater
4. Yet speech as designed to produce action--this is the whole point of speech
5. what sorts of restrictions are allowed?
 - a. Time/place/manner restrictions--more ok
 - b. Content neutral restrictions--more ok
 - c. Commercial speech restrictions--more ok
 - d. Political speech restrictions--less ok
 - e. Prior restraint--least ok

(C) Symbolic speech

1. Tinker v. Des Moines Independent Community School District (1969)
 - a. Students wear black armbands to protest the Vietnam War
 - b. In order for officials to justify censoring speech, they "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."
 - c. Schools may only forbid conduct that would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
2. Cohen v. California (1971)
 - a. Cohen wears a jacket that has "F_ck the Draft" written on it into a court house
 - b. States cannot censor their citizens in order to make a "civil" society.
 - c. Knowing where to draw the line between harmless heightened emotion and vulgarity can be difficult.
 - d. People bring passion to politics and vulgarity is simply a side effect of a free exchange of ideas—no matter how radical they may be.

(D) Unprotected speech

1. Defamation
 - a. Libel of public figures requires actual malice (knowledge of falsehood or reckless disregard for truth)
 - b. Parody is permissible since it isn't taken as true
2. Obscenity
 - a. Average person, applying contemporary standards of decency, finds work as a whole to appeal to prurient interest

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- b. Work depicts in a patently offensive way sexual conduct specifically defined by applicable statute
- c. Work lacks serious literary artistic social or political value
- 3. Fighting words
 - a. Words that by their very utterance inflict injury or incite breach of the peace
 - b. Court has adopted a “sticks and stones” approach, allowing a degree of fighting words to be permissible
- 4. Advocacy of violation of the law
 - a. Mere advocacy isn’t enough to ban speech
 - b. There must be advocacy plus incitement of immediate lawless action and is likely to produce such action
- 5. Hate speech
 - a. any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group. The law may identify a protected individual or a protected group by certain characteristics.
 - b. Hate speech restrictions have generally been frowned on by courts
 - c. Hate speech proscriptions must be content-neutral

(iii) Press

- (A) Printed word is more persistent than spoken word but is less invasive
- (B) In order to exercise prior restraint, the Government must show sufficient evidence that the publication would cause a “grave and irreparable” danger.

(iv) Broadcast/cable

- (A) More intrusive than press (hearing as opposed to seeing), and airwaves are a limited public resource
- (B) Therefore more regulation is allowed than for press

(v) Internet

- (A) More persistent, like press
- (B) Less intrusive than broadcast/cable
- (C) Courts have frowned on regulation so far

(vi) Assembly

- (A) Regulations must be reasonable and consistently applied
- (B) Content-neutral time/place/manner restrictions are permissible

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c. Due Process Clause

- (i) Fifth Amendment Due Process Clause applies to the national government; Fourteenth Amendment Due Process Clause applies to state governments
- (ii) Goes back to Magna Carta, 1215
- (iii) Basic idea is that the government itself must follow the law; there are some things that it cannot do, at least without following certain legal processes
- (iv) But hard to pin down—depends on circumstances
- (v) One proposition: Due process is hierarchical, life being the most important and property being the least important
- (vi) Liberty is the most vague
 - (A) Supreme Court: Liberty is “not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”
- (vii) Procedural versus substantive due process
 - (A) Procedural due process
 1. Actual reading of Due Process Clause: “nor shall any person be deprived of life, liberty, or property, without due process of law”
 2. Under procedural due process, the Due Process Clause appears to read “nor shall any person be deprived of life, liberty, or property unless the government follows proper legal processes.”
 3. Limits executive and judicial branches
 4. Degree of due process required depends on the circumstances
 - a. Civil v. criminal
 - b. Big personal interest v. small personal interest
 - c. Big government interest v. small government interest
 - d. Big chance of error v. small chance of error
 5. Generally
 - a. As construed by the courts, it includes
 - b. an individual's right to be adequately notified of charges or proceedings,
 - c. the opportunity to be heard at these proceedings, and
 - d. that the person or panel making the final decision over the proceedings be impartial in regards to the matter before them
 6. many aspects of procedural due process are also covered by explicit Bill of Rights guarantees
 7. Current events: Do aliens have due process rights?

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- a. Basic concept: There is a difference between exclusion (forbidding entry) and deportation after entry
- b. The Chinese Exclusion Case (1889) and *Nishimura Ekiu v. United States* (1892): Every sovereign state, as a right of self-preservation, has the power to forbid the entrance of foreigners or to allow their entrance under whatever conditions it wishes
- c. *Shaughnessey v. United States ex rel. Mezei* (1953): An alien who has not yet entered the United States (including those held at ports of entry) has no procedural due process rights and may be excluded in accordance with existing immigration law
- d. *Knauff v. Shaughnessy* (1950): Immigration laws passed by Congress notwithstanding, the president does have some inherent authority based on his powers over foreign affairs (see *Curtiss-Wright* above) to exclude aliens
- e. *Yamataya v. Fisher* (1903): Once within the United States, even illegal aliens have due process rights (such as the right to a hearing before deportation)
- f. *Kwong Hai Chew v. Colding* (1953): An alien legally residing permanently within the United States can't be excluded or denied due process when returning from outside the country
- g. *Zadvydas v. Davis* (2001): While the Fifth Amendment doesn't apply to aliens outside the territory of the United States, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."

(B) Substantive due process

- 1. Actual reading of Due Process Clause: "nor shall any person be deprived of life, liberty, or property, without due process of law"
- 2. Under substantive due process, the Due Process Clause appears to read "nor shall any person be deprived of life, liberty, or property."
- 3. Is a basis for judicial activism, i.e. substituting judgment of courts for judgment of legislature
- 4. A basis for striking down laws that the courts believe to be "unreasonable"
- 5. Limits the legislature/is often antimajoritarian (i.e., there are some things the people, acting through the democratic lawmaking process, can't do)
- 6. Is thus often highly controversial

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7. Is also a basis for courts to create rights not mentioned by the Constitution
 - a. Dred Scott (1857)
 - i. Congress can't prohibit a white citizen's right to own slaves (property) in federal territory
 - b. Lochner v. New York (1905)
 - i. A state legislature can't establish maximum working hours because it violates "liberty of contract"
 - ii. By late 1930s the Court had backtracked on this
 - c. Roe v. Wade (1973)
 - i. The legislature can't restrict a woman's liberty to have an abortion
 - d. Obergefell v. Hodges (2015)
 - i. The legislature can't restrict a same-sex couple's liberty to be married
 - e. Logically, substantive due process justifies all of these decisions if it justifies any of them

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d. Privacy

- (i) Unwritten rights added by Court since the 1960s
 - (A) Griswold v. Connecticut (1965)
 1. A penumbral (nontextual) right of privacy: a state may not ban married couples' use of birth control
 2. Black's dissent: "[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts, and worse for the country."

e. Abortion

- (i) Roe v. Wade (1973)
 - (A) The right to abortion is greatest during the first trimester of pregnancy
 - (B) After the first trimester, the state's interest in protecting maternal health and "potential life" allows greater restrictions on abortion
 - (C) Fetuses (i.e., human beings in utero) aren't "persons" within the meaning of the Due Process Clause
 - (D) Based on
 1. Griswold/right to privacy
 2. Substantive due process
 3. Cf. Dred Scott case
- (ii) Planned Parenthood v. Casey (1992)
 - (A) Replaces Roe's trimester formula with state's right to impose reasonable regulations that don't unduly burden the right to abortion

f. Same-sex marriage

- (i) Obergefell v. Hodges (2015):
 - (A) Right of same-sex couple to marry based on substantive due process, not equal protection

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g. Problems with Substantive Due Process and Privacy rights

- (i) The uncertain and arbitrary nature of the extent of unwritten rights: “Secret Supreme Court Decoder Glasses”
 - (A) Example: Does privacy extend to
 - 1. Only married couples?
 - 2. Single couples?
 - a. Eisenstadt v. Baird (1972)
 - 3. Underage couples?
 - a. Carey v. Population Services International
 - 4. Gay/lesbian couples?
 - a. Bowers v. Hardwicke (1986)
 - i. No right of privacy for gay sodomy
 - b. Lawrence v. Texas (2003)
 - i. Overrules Bowers

h. Property rights

- (i) Fifth Amendment Takings Clause
 - (A) Eminent domain
 - (B) Regulatory takings
 - (C) Just compensation
 - (D) Public use clause
 - 1. Kelo v. City of New London (2005)
 - a. Public “use” actually means public “benefit”

i. Criminal Procedure

- (i) 4th, 5th, 6th, and 8th Amendments
- (ii) Reasons for these protections
 - (A) Government has far more resources than even the biggest criminal syndicate
 - (B) Governments can use criminal law arbitrarily and/or to oppress its political enemies
- (iii) Two big areas of criminal procedure
 - (A) Investigation
 - (B) Adjudication

- (iv) Investigation
 - (A) Involves everything up to arrest
 - (B) Mainly [Fourth Amendment](#)
 - (C) A reaction to the colonial/revolutionary writs of assistance
 - (D) prohibits general search warrants
 - (E) No arrests or warrants to be issued by courts without probable cause
 - 1. reasonable grounds to believe
 - a. that a crime has been committed and
 - b. that the arrestee has committed it
 - (F) Where and when are warrants required?
 - 1. Physical intrusion into a protected area, or
 - 2. Katz v. United States (1967)
 - a. Fourth Amendment applies when a person has a “reasonable expectation of privacy”
 - b. The Fourth Amendment protects people, not places.
 - c. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection
 - (G) Warrantless searches are allowed in some situations as long as probable cause exists, for example
 - 1. search incident to lawful arrest: the body, clothing, and containers within the arrestee’s “wingspan”
 - 2. exigent circumstances, for example
 - a. Evidence that would dissipate or disappear in the time it would take to get a warrant (doesn’t include blood tests for DUI but does include breathalyzer)
 - b. Hot pursuit
 - 3. Plain view exception: police, lawfully present, see/smell/hear object in plain view that they reasonably believe to be evidence of crime
 - 4. automobiles under various circumstances, eg
 - a. when, during a routine traffic stop, police develop probable cause to believe evidence of a crime is within the automobile
 - b. when the police reasonably believes driver or passenger is dangerous, he may search the areas of a car where a weapon may be placed or hidden
 - c. when police have arrested an occupant of the car, to search for evidence of a crime
 - (H) Stop and Frisk
 - 1. Brief detention for purposes of investigating suspicious conduct
 - 2. may include pat-down of outer clothing for weapons for officer’s protection

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3. NO probable cause needed, but reasonable suspicion is needed
 - a. must be based on articulable facts that lead officer to believe that criminal activity is present (i.e., more than a hunch)
- (I) Police always need probable cause to make an arrest, but don't always need warrants
 1. E.g., arrest in a public place = no arrest warrant required
- (J) Exclusionary rule
 1. Evidence obtained by an illegal search isn't admissible
 2. Designed to deter illegal searches
 3. Alternative of holding the police liable doesn't work very well and doesn't get you out of jail

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- (v) Adjudication
 - (A) Begins with arrest
 - (B) Continues through sentencing
 - (C) Main rights
 - 1. Indictment, Fifth Amendment
 - a. grand jury finding that sufficient evidence exists to permit trial
 - b. Not incorporated
 - 2. Self-incrimination, Fifth Amendment
 - 3. Double jeopardy prohibition, Fifth Amendment
 - 4. Assistance of counsel, Sixth Amendment
 - a. Gideon v. Wainwright (1963):
 - i. Criminal defendants have the right to an attorney even if they cannot afford one
 - 5. Speedy trial, Sixth Amendment
 - 6. Trial by impartial jury, Sixth Amendment
 - 7. Right to be informed of charges, Sixth Amendment
 - 8. Compulsory process, Sixth Amendment
 - (D) Miranda v. Arizona (1966)
 - 1. Not enough to have these rights—given the trauma of being arrested, courts require you to be reminded of them
 - 2. [Why you should never talk to the police, even if you are sure you are innocent](#)
 - 3. Prior to a custodial interrogation, Police must advise the you of the following rights even before you are formally charged with a crime
 - a. You have the right to remain silent.
 - b. Anything you say can and will be used against you in a court of law.
 - c. You have the right to an attorney.
 - d. If you cannot afford an attorney, one will be provided for you.
 - e. Do you understand the rights I have just read to you?
 - f. With these rights in mind, do you wish to speak to me?"
 - 4. These rights need not be given at the moment of arrest, but merely prior to custodial interrogation
 - (E) Reasonable doubt
 - 1. A standard of proof
 - 2. Mandated in criminal cases by the Due Process Clause
 - (F) Appeal
 - 1. Convictions may be appealed if a defendant alleges that his criminal procedural rights have been violated
 - 2. Double jeopardy means, among other things, that acquittals can't be appealed

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- (G) Cruel and unusual punishment, Eighth Amendment
 - 1. Capital punishment has long been accepted
 - 2. It was certainly acceptable at time Eighth Amendment was adopted
 - 3. The death penalty is both extreme and irreversible
 - 4. In the last twenty years, DNA evidence has shown that a lot of death penalty convictions have been erroneous
 - 5. Furman v. Georgia (1972):
 - a. Court held that the states were arbitrarily applying the death penalty and overturned all capital punishment laws
 - 6. Gregg v. Georgia (1976):
 - a. Court upheld new death penalty laws as long as the states impartially applied them
 - b. Punishment of any crime can't be grossly disproportionate to the crime committed

(vi) Effect of terrorism on criminal law

- (A) With terrorism, no clear end of war
- (B) USA Patriot Act, 2001
- (C) Section 206 of the Patriot Act, also known as "roving John Doe wiretap" provision, permits the government to obtain intelligence surveillance orders that identify neither the person nor the facility to be tapped. This provision is contrary to traditional notions of search and seizure, which require government to state with particularity what it seeks to search or seize.

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PART VI. Rights and Liberties: Civil Rights

A. Possible essay questions:

- 1. Write a history of civil rights in the United States from the end of the Civil War to the present.**
- 2. Discuss the Equal Protection Clause as it relates to civil rights.**
- 3. Write a history of voting in the United states as it relates to civil rights.**

B. Possible short answer/ID questions

- 1. Civil rights**
- 2. The Fourteenth Amendment, Section 1**
- 3. The Fifteenth Amendment**
- 4. Civil Rights Act of 1875**
- 5. Civil Rights Cases (1883)**
- 6. de jure segregation**
- 7. de facto segregation**
- 8. Jim Crow laws**
- 9. Rational basis review**
- 10. Strict scrutiny**
- 11. Intermediate or heightened scrutiny**
- 12. Shelley v. Kraemer (1948)**
- 13. Civil Rights Act of 1964**
- 14. Heart of Atlanta Motel Inc. v. United States (1964)**
- 15. Katzenbach v. McClung (1964)**

16. Affirmative action
17. Regents of the University of California v. Bakke (1978)
18. Grandfather clause
19. Literacy test
20. White primary
21. Poll tax
22. 24th Amendment
23. Voting Rights Act
24. Shelby County v. Holder (2013)
25. Craig v. Boren (1976)
26. Romer v. Evans (1996)
27. Obergefell v. Hodges (2015)
28. Plyler v. Doe (1982)

C. Advance reading assignment: Before class, carefully read the following sections of the Constitution at <http://www.let.rug.nl/usa/documents/1786-1800/bill-of-rights-and-the-amendments-to-the-constitution.php> (link is on course web page):

1. Thirteenth Amendment
2. Fourteenth Amendment, Section 1
3. Fifteenth Amendment

D. Section Outline

1. Definition:
 - a. Civil rights forbid or guarantee some sort of treatment to groups of people who typically are defined not by behavior but by some ingrained characteristic such as being black or being female

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b. Compare this definition to the definition of civil liberties

2. Race

a. Equal Protection

- (i) May apply when similarly-situated persons or groups are treated differently, depending on
 - (A) nature of persons/groups and/or
 - (B) reason for the different treatment
- (ii) History of 14th Amendment ratification
 - (A) Thirteenth Amendment grants slaves nothing but freedom
 - (B) Fourteenth Amendment adds
 - 1. The Citizenship Clause
 - 2. The Fourteenth Amendment (state) Due Process Clause
 - 3. The Equal Protection Clause
- (iii) Equal Protection Clause applies only to state action, not private discrimination
 - (A) Civil Rights Act of 1875
 - (B) Civil Rights Cases (1883)
- (iv) Plessy v. Ferguson, 1896
 - (A) Separate but equal is permissible under equal protection
 - (B) Legitimizes Jim Crow laws (de jure segregation)
- (v) Brown v. Board of Education. (1954)
 - (A) Overrules Plessy
 - (B) Separate is inherently unequal
- (vi) Standards of review used by the courts
 - (A) Rational basis review
 - 1. Deference to legislature
 - 2. Usually used with regard to property
 - 3. Laws are rarely struck down under rational basis standard
 - (B) Strict scrutiny
 - 1. Usually used in race as well as other cases (e.g. Sherbert v. Verner)
 - 2. To survive strict scrutiny:
 - a. The law or policy must be justified by a compelling governmental interest
 - b. The law or policy must be narrowly tailored to achieve that goal or interest
 - c. The law or policy must be the least restrictive means for achieving that interest
 - (C) Intermediate or heightened scrutiny
 - 1. A middle standard
 - 2. Used in sex-based discrimination and a few others, such as content-neutral speech restrictions

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- (vii) De facto discrimination
 - (A) Originally a major problem in the North
 - (B) Tends to be private action and so not dealt with under Equal Protection Clause
 - 1. Exception: Shelley v. Kraemer (1948)
 - 2. Held: judicial enforcement of neighborhood restrictive covenants would constitute state action
 - (C) But generally Courts haven't touched de facto discrimination without legislative action
 - (D) But Congress has

b. Congressional action against de facto discrimination: The Civil Rights Act of 1964

- (i) Title II
 - (A) Outlawed discrimination based on race, color, religion or national origin in hotels, motels, restaurants, theaters, and all other public accommodations engaged in interstate commerce
 - 1. Heart of Atlanta Motel Inc. v. United States (1964): Upholds constitutionality of Act
 - 2. Katzenbach v. McClung (1964): Applies very broad definition of interstate commerce
- (ii) Title III
 - (A) Prohibited state and municipal governments from denying access to public facilities on grounds of race, color, religion or national origin.

c. Affirmative action

- (i) definition
 - (A) Policies in which government or recipient of government funds take positive steps
 - (B) to prohibit discrimination based on
 - (C) race, color, religion, sex, or national origin
 - (D) in employment or school admission
- (ii) originated in executive orders of presidents John F. Kennedy and Lyndon B. Johnson regarding federal contractors
- (iii) many states have affirmative action policies as well
- (iv) Affirmative Action has been criticized as being discriminatory
 - (A) reverse discrimination/race based preferences
 - (B) Regents of the University of California v. Bakke (1978):
 1. Affirmative action isn't discriminatory
 2. Quotas not allowed, i.e. setting aside a certain number of positions for minorities
 - (C) Thereafter, affirmative action law becomes very complex

d. Voting

- (i) 15th amendment
 - (A) dodges used by states, all eventually found unconstitutional
 1. grandfather clause
 2. literacy test
 3. white primary
 4. poll tax
 - a. 24th Amendment, 1964: federal elections only
- (ii) Voting Rights Act of 1965
 - (A) Section 5
 1. prohibited states and local governments with a history of discriminatory voting practices from implementing any change affecting voting without first obtaining the approval of the United States Attorney General or a three-judge panel of the U.S. District Court for D.C., a process known as "preclearance"
 2. Section 5 has been renewed and amended by Congress four times, the most recent being a 25-year extension signed into law by the President George W. Bush in 2006.
 - (B) Section 4(b):
 1. this preclearance requirement is specifically applied to states and political subdivisions (mostly in the South) that had used a "test or device" to limit voting and in

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which less than 50 percent of the population was registered to vote, or voted, in the 1964, 1968, or 1972 presidential election.^[11]

2. **Shelby County v. Holder (2013):**

- a. the Supreme Court struck down Section 4(b) of the Act, which contains the coverage formula that determines which state and local jurisdictions are subject to Section 5 preclearance, as unconstitutional.
- b. The Court said that although the formula was rational and necessary at the time of its enactment, it is no longer responsive to current conditions.^[18]
- c. The Court did not strike down Section 5, but without Section 4(b), no jurisdiction will be subject to Section 5 preclearance unless Congress enacts a new coverage formula.

3. Sex

a. Equal protection applies

b. Court has applied both the rational basis test and intermediate scrutiny, but not strict scrutiny, to sex-based discrimination

(i) **Craig v. Boren (1976)**

- (A) Oklahoma passed a statute prohibiting the sale of beer to males under the age of 21 but allowed females over the age of 18 to purchase it.
- (B) The court instituted a standard, dubbed "intermediate scrutiny," whereby the state must prove the existence of specific important governmental objectives, and the law must be substantially related to the achievement of those objectives

4. Homosexuality

a. Activity or ingrained characteristic?

b. Rational basis review has been applied

(i) **Romer v. Evans (1996)**

- (A) Colorado declares that homosexuals may not claim special/minority rights
- (B) Supreme Court strikes down the law using the rational basis test, i.e., Colorado can have no rational basis for passing such a law

(ii) **Obergefell v. Hodges (2015)**

- (A) Court hints but does not state that ban on same-sex marriage fails rational basis test

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5. Illegal Aliens

a. Plyler v. Doe (1982): The Equal Protection Clause applies to illegal aliens

- (i) Texas passes law denying illegal aliens access to public education
- (ii) Supreme Court, applying the rational basis test, rules the law unconstitutional

PART VII. Political Parties

A. Possible essay questions:

- 1. Discuss the different types of party system and the elements of each (if any) that can be found within the American political system or American history.**
- 2. Discuss both the Democratic Party and the Republican Party. What are their major differences?**

B. Possible short answer/ID questions

- 1. Single party system**
- 2. Multiparty system**
- 3. Two-party system**
- 4. Dominant party system**
- 5. Third party system**
- 6. Paleoconservatives**
- 7. Neoconservatives**
- 8. Tea Party Movement**
- 9. Methods of presidential nomination**
- 10. Open and closed primaries**

C. Section outline:

1. Definition of party:

- a. a political organization/group consisting of individuals who share similar views about**
 - (i) political ideology (i.e., the role of government) and/or**
 - (ii) policy (i.e., what types of laws the government should pass)**
- b. that typically seeks to control the government, usually by electing their own candidates to political office.**

2. Functions of parties

- a. **Organize the competition for positions (help decide who is going to run for what)**
- b. **Unify the electorate (within the party as an instrument of compromise)**
- c. **Organize the government, given that the majority party controls the operation of legislative chambers**
- d. **Make policy**
- e. **Provide a loyal opposition, monitoring majority party actions and forcing accountability**

3. Types of party system

a. Single party system

- (i) A system in which other political parties are effectively outlawed
- (A) Exclusive: a small party with rigorous standards of admission--not all citizens are members
- (B) Inclusive: a large party in which nearly every citizen is expected to be involved

b. Multiparty system

- (i) Usually based on proportional representation
- (ii) no single party can easily gain a legislative majority since so many major parties split the vote
- (iii) therefore, relies heavily on coalitions

c. Two-party system

- (i) Former British empire
- (ii) Encouraged by single-district voting, winner take all
- (iii) The basic system in the United States

d. Dominant party system

- (i) Other parties exist or are allowed, but the dominant party has a lock on votes/government

e. Third party system

- (i) A two party system in which a third party plays a subordinate role
- (ii) Found in the United States

4. American Political Parties

a. Not mentioned in original Constitution

- (i) Founders feared the development of parties

b. But have evolved to play a major role in American government

c. History of American Political Parties

- (i) Federalists and Republicans, ca. 1790-ca. 1820
- (ii) Democrats and Whigs, ca. 1828-1852
- (iii) Democrats and Republicans, ca. 1854-present
- (iv) Parties since 1933

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- (A) Democratic Party
 - 1. “Big government”
 - a. Economic redistribution
 - b. Pro-Union/pro-labor
 - 2. Internationalism
 - 3. Civil Rights Act
 - 4. Equality and new social values
 - a. African Americans
 - b. Sex
 - c. Homosexuality
 - 5. Abortion rights
- (B) Republican Party
 - 1. Paleoconservatives
 - a. Small/limited government
 - i. Classical economics/capitalism
 - ii. Stronger role for state governments
 - b. Isolationism
 - c. Traditional social values
 - 2. Neoconservatives
 - a. Strong emphasis on national defense
 - b. Emphasis on role of United States as world policeman/world power
 - c. Strong emphasis on traditional social values
 - 3. Tea Party Movement
 - a. Emphasis debt crisis and critical need to control federal spending
 - b. Emphasizes traditional social values
- (v) The nomination of presidential candidates
 - (A) Methods of nomination
 - 1. Caucus, to 1824
 - 2. National convention, 1824-1900s
 - a. Meets every four years
 - b. Since 1984, almost entirely for show
 - 3. Direct Primaries, Progressive era-present (to circumvent party bosses)
 - a. Open primary
 - i. Crossover voting
 - b. Closed Primary
 - (B) Party platform
 - 1. Ponderous and deliberately vague
 - (C) National committee
 - 1. Governs party between conventions
 - 2. Main job is to win elections
 - 3. Is the instrument of the president if he is a member of that party
- (vi) Role of parties in government

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- (A) Congress operates based on a party organization
 - 1. In a divided government (one party controls a house), one or both houses serve in watchdog role
- (B) Executive branch totally dominated by one party
- (C) Judicial appointments
 - 1. are increasingly partisan, although party officially plays no role on bench or in court organization
 - 2. there can be surprises, but often judges vote predictably and in line with politics of the appointing president
- (D) at state and especially local level, issues tend to be different from national party issues, and individuals are sometimes more important than their party

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PART VIII. political Ideology

A. Possible essay questions:

- 1. Discuss each of the following: Liberalism, Conservatism, Socialism, Communism, and Libertarianism.**
- 2. Discuss the differences between classical liberalism and modern liberalism.**
- 3. Discuss the differences between traditional conservatism and modern conservatism.**

B. Possible short answer/ID questions

- 1. Classical liberalism**
- 2. Modern liberalism**
- 3. Traditional conservatism**
- 4. Modern conservatism**
- 5. Socialism**
- 6. Communism**
- 7. Libertarianism**
- 8. Crawford v. Marion County Election Board (2008)**

C. Section outline:

- 1. A consistent pattern of ideas and beliefs regarding politics or the role of government**
- 2. The ideological matrix**
 - a. The two major variables/issues of political ideology:**
 - (i) Personal liberties (corresponding to due process liberty)
 - (ii) Economic liberties (corresponding to due process property)
 - b. The two major axes of political ideology**
 - (i) Individualism (i.e., individual autonomy, individual rights, individual freedom of action)
 - (ii) Collectivism (group/government authority or power, e.g., “the People”)

3. Major ideologies

a. Liberalism

- (i) Optimistic view of human nature: People (either as individuals or as “the People” are basically good/selfless/worthy of consideration
- (ii) The past and the institutions it has produced are imperfect, restrictive, obstacles to improvement and greater human freedom and dignity something from which we must liberate ourselves
- (iii) Future is one of progress, improvement
- (iv) Classical liberalism:
 - (A) Belief in natural goodness of man
 - (B) Liberation (movement away) from the restrictive, status-based institutions of the past
 1. Feudalism and serfdom
 2. Hereditary aristocracy and hereditary monarchy
 3. The political power of the Church
 - (C) Emphasis on individualism rather than collectivism in both personal and economic liberties
 1. A movement towards individual initiative and achievement
 2. A movement towards limited government that acknowledges individual liberties
 - a. E.g., natural rights
 - b. The Declaration of Independence is one of the greatest documents of classical liberalism
 3. Emphasizes both personal liberty rights and private property rights/capitalism
- (v) Modern liberalism:
 - (A) Belief in the natural goodness of man
 - (B) Liberation from inequality of wealth and the political and social power exercised by the wealthy in law and politics
 1. Born of a reaction to the huge concentrations of wealth that become possible because of the Industrial Revolution of the 19th century
 - (C) Emphasis on economic collectivism
 1. Corresponding de-emphasis on individual property rights since the (relatively few) wealthy industrialists are exploiting the liberties and labor of the many workers to make themselves richer
 2. Seeks greater government economic involvement/control/collectivism to protect the economic interests of middle and lower income groups

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- (D) Still at least theoretically (though sometimes not in practice) champions of at least some personal liberties insofar as they don't privilege wealth or interfere with economic collectivism
 1. E.g., liberal opposition to *Citizens United v. Federal Election Commission* (2010)
 - a. In *Citizens United*, the Court held that corporate spending in support of political advertisements was political speech protected by the First Amendment
 - b. The Democratic Party has denounced this holding, arguing that it allows wealthy corporations and donors to have a corrupt influence on elections through their great wealth, e.g., buying political influence
 - i. The Republican Party usually raises more money from campaign contributions than the Democratic Party

- (E) The American Progressive movement is an example of modern liberalism
 1. Progressivism emerged in the late 19th/early 20th century
 2. Based on the idea that "big government" is necessary to curtail the excesses of big business by regulating and restricting the latter's freedom of action in the marketplace
 3. Continues to be a major element of Democratic thought and (to a considerably lesser extent) Republican thought

(vi) Socialism:

- (A) A more extreme version of modern liberalism
- (B) Argues for government ownership of means of production, or some of means or production (strong collectivism)
 1. Rationale: [Obama: "You didn't build that"](#), i.e., government, not the market, regulates social order
- (C) runs contrary to classical liberalism and free market of conservatives
- (D) decreases individual initiative
- (E) Socialism is enacted through a democratic process

(vii) Marxism /Communism:

- (A) A more extreme form of socialism, achieved through revolution rather than through democratic processes
- (B) Collective (social or governmental) ownership of all value
- (C) No private property rights
- (D) Enforced by authoritarian state

b. Conservatism

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- (i) Pessimistic view of human nature
- (ii) Current/past institutions provide safety, stability, protection from calamity, must be conserved
- (iii) Future holds threat of disaster, dystopia, destruction
- (iv) Traditional conservatism:
 - (A) Solicitous of both personal and property rights, with some emphasis on property
 - (B) individuals are responsible for their own welfare
 - (C) government should be limited to providing defense, law and order, enforcement of contracts, and protection of property while permitting operation of the free market
 - 1. i.e., the market, not government, regulates the social order
- (v) Modern conservatism:
 - (A) more emphasis on traditional social structures and morals as fundamental elements of a stable society
 - (B) Manichean view of good versus evil and the need for good to confront evil, born of religious (Moral Majority) sentiment
 - (C) Strong emphasis on traditional social values (traditional family, religion as fundamental basis of society)
 - 1. Deviation from established mores/norms are frowned upon, thus less protection of personal rights when they conflict with these norms
 - (D) Protection of property rights
 - (E) Strong emphasis on strong national defense and confrontation of perceived threat
 - (F) American exceptionalism

c. Socialism and Communism

d. Libertarianism

- (i) Minimalist government regarding both liberty and property, both economic and social legislation
- (ii) The Libertarian credo: “It’s none of your business, government”

4. Participation: Translating Opinions into Action

a. Political ideology is translated into action by, among other things:

- (i) Discussing politics
- (ii) Signing petitions
- (iii) Voting
- (iv) Protesting
- (v) Letters to editor
- (vi) Contacting elected officials

- (vii) Running for office
- (viii) Use of violence against the political system
 - (A) Usually occurs when one's core values or personal interests are strongly affected/injured/endangered by the ruling ideology and the system is perceived to be unresponsive/unfair

b. Voting

- (i) Gradual expansion of suffrage
 - (A) Ending of property qualifications
 - (B) 15th Amendment
 - (C) 19th Amendment
 - (D) 24th Amendment (poll tax)
 - (E) Voting Rights Act, 1965
 - 1. Shelby County v. Holder (2013)
 - a. Held: Section 4(b) is unconstitutional because the coverage formula is based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states
- (ii) Voter ID
 - (A) Crawford v. Marion County Election Board (2008)
 - 1. An Indiana law requiring voters to provide photo IDs did not violate the Constitution of the United States.
 - (B) Issue is still currently in flux as to whether voter ID laws are discriminatory
- (iii) Turnout
 - (A) Descending order of turnout:
 - 1. Presidential general election
 - 2. Presidential primary
 - 3. Midterm elections
 - 4. Special elections

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