State Hearing Questions 2019–2020

Unit One: What Are the Philosophical and Historical Foundations of the American Political System?

1. **“It is impossible to read of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.”\* How did the Founders’ knowledge of the history of republics (or democracies) and confederations affect their ideas about government?**

* Why do you suppose that republican government in the United States has not been “kept in a state of perpetual vibration between the extremes of tyranny and anarchy”?
* What have the past 230 years of our experiment as a constitutional republic taught us about the ability of people to self-govern on behalf of “we the people”?

\* Alexander Hamilton, “The Union as a Safeguard against Domestic Faction and Insurrection,” *Independent Journal*, January 23, 1788, The Federalist Papers: No. 9, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School, accessed August 19, 2019, <https://avalon.law.yale.edu/18th_century/fed09.asp>.

*The founders were influenced by the sources available to them chronicling the histories of ancient Greece and Rome. They relied on Thucydides, who bitterly criticized Athens for its excess of democracy, which he said was at the root of the city’s inability to defend against Sparta. They read Plutarch, whose biographies of such figures as Demosthenes, Philip of Macedon and Alexander the Great emphasized the vulnerability of Greece to the Macedonians because of the lack of a central government. They read Cicero, who wrote of the fall of the Roman republic and the rise of the tyranny of the empire. And they revered Tacitus, whose Annals were an outraged critique of the excesses of the early empire. The Founders drew a number of lessons from these ancient sources.*

*First, they concluded that an excess of democracy (that is, direct democracy) inevitably led to tyranny.*

*Second, the framers drew from Plutarch the idea that too much decentralization rendered the Greek city-states incapable of defending themselves from the Macedonians. The Federalists, in particular, quoted Plutarch.*

*Third, from the histories of the Roman republic, the framers drew the lesson of the importance of civic virtue -- self-sacrifice for the common good -- which they asserted was the backbone of any successful republic. They frequently cited such figures as Lucius Junius Brutus (one of the founders of the republic), Cincinnatus, and Cato the Younger.*

*Fourth, from Cicero and Plutarch, they drew the lesson that republic’s must be constantly vigilant against ambitious individuals (Julius Caesar and Cataline especially) who would be tyrants at the expense of the republic. In that regard, Cato was especially significant. Addison’s play about the republican’s life and death was one of the most popular of the day; in fact, it was the longest running play in America until 1949, when Miller’s Death of s Salesman broke the record. (Nathan Hale’s line -- “I regret that I have but one life to give for my country” -- was taken from the play. So was Patrick Henry’s “Give me liberty or give me death.”)*

*Finally, from Tacitus (and to a lesser extent Suetonius), they drew the lesson that one-man rule was a horror to be avoided at all costs. The excesses of the emperors were often cited. Interestingly, during the ratification debates, the Anti-federalists often compared the Federalists to Roman emperors. (Hamilton, for instance, was called Caesar more than once -- though, technically, Julius Caesar was never an emperor).*

*For terrific background on the influence of Greece and Rome on the framers, see generally Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment. A more abbreviated (and more accessible) version is Carl J. Richard, Greeks and Romans Bearing Gifts: How the Ancients Inspired the Founding Fathers.*

*The framers also drew from existing and historic republics in Italy, Switzerland, and the Netherlands. For example, they learned from Machiavelli's writings on the republics of Italy that the failure of those republics was in their inability to band together into a union to fend off the advances of neighboring monarchies like France, a theme picked up in The Federalist 4 & 40. On the influence of the Swiss confederation, see generally Stephen P. Halbrook, The Swiss Confederation in the Eyes of America's Founders,* <http://stephenhalbrook.com/law_review_articles/swiss_confederation.pdf> .

*The principal reason why the US avoided the "perpetual vibration between tyranny and anarchy" is that the framers adopted a mixed government, a republic with a complex set of separated powers and checks and balances, instead of an Athenian democracy. Still, over the years, the republic has changed, steadily becoming more democratic, more partisan, and more corrupt. Political parties -- unanticipated by the framers -- now dominate politics, with the nation currently as polarized as it has been at any time since the Civil War. With the ratification of the Seventeenth Amendment, senators are now directly elected. At the turn of the twentieth century, half the states adopted some form of direct democracy. In the 1990s, term limits were adopted by many states (for state offices -- term limits for federal offices were declared unconstitutional in US Term Limits v. Thornton). Direct primaries now nominate presidential candidates. Redistricting has become weaponized, further polarizing electoral politics. Campaign contribution and spending legislation has been declared unconstitutional. It could be argued current political events show that the system isn't working anymore and that the country is veering toward tyranny. For an interesting and provocative essay along these lines, see Jeffrey Rosen's piece in The Atlantic, "America Is Living James Madison's Nightmare,"* <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/> .

1. **Nation-states developed relatively recently in history. What significant changes in people’s minds and senses of identity accompanied the rise of nation-states? How have those changes affected the evolution of governments?**

* What challenges, if any, does the United States face in being a diverse nation-state?
* What are some possible solutions for those challenges?

*Just what constitutes a "nation-state" isn't entirely clear. In general, though, it is taken to refer to an entity that joins a political entity (the state) with a cultural and geographic identity (the nation). The basic idea is that the legitimacy of the state derives from the fact that it coincides with its cultural/geographic identity. Even that general conception has problems, though. It suggests that there is ethnic or cultural homogeneity within a particular area. Very few existing nations (perhaps as few as 10%) would meet that definition. Some scholars suggest that a better view is that the nation derives its legitimacy not necessarily from an existing, well-defined and homogenous culture or ethnicity, but from a choice by those in a nation to endorse a particular national culture. The Montevideo Convention of 1933 seems to incorporate that idea in declaring that a nation-state consists of a defined territory with a permanent population that feels like it belongs to the nation and has an effective government and sovereign capacity to enter into relations with other states.*

*There are different theories about the origins of the idea of nation-states. The conventional view is that the idea of the nation-state originated in the seventeenth century, at the time of the Treat of Westphalia (1648), which ended the Thirty Years' War. The treaty required a system of clearly defined entities that recognized one another's sovereignty. it recognized the independence of Switzerland from the Austro-Hungarian Empire and of the Netherlands from Spain. But the treaty didn't exactly invent the nation-state. And the entities that were recognized in the treaty -- the multinational Hapsburg Monarchy and the Holy Roman Empire, for example -- weren't really nation-states. Still, the treaty is recognized as the origin of the idea of the absolute sovereignty of borders. Others suggest that nations -- the political entity -- have existed since antiquity, and the idea of the cultural or ethnic state came into being only as a rationalization to legitimize nations in the nineteenth century. (Italy comes to mind -- a nation that came into being in the 1870s by piecing together quite distinct cultures and ethnic groups, from Sicily to the Papal States to Florence, Venice, and the Piedmont. The unification of Germany around the same time also comes to mind.) The idea of the nation-state was given a racial foundation in the late-nineteenth century with the rise of racism and ethnic nationalism. And, in fact, the racial-ethnically based notions of the nation-state have been at the root of the rise of fascism in the twentieth century.*

*The idea of the nation-state has never fit the US very well. From the beginning, the US consisted of a wide variety of cultural and ethnic groups -- Native Americans, African slaves, Puritan pioneers, Anglican farmers, Hispanic settlers, and immigrants from every corner of the globe. In no sense, for example, can it be said that the colonies of Virginia and Massachusetts shared a common culture. They may have shared a common language and country of origin, but their cultures were diametrically opposed. See generally David Hackett Fisher, Albion's Seed. There are wide variations within the US to this day. Colin Woodward, in his book "American Nations," argues that there are actually eleven different nations within the United States today. A number of observers suggest that, if the US is a state, it is not in the ethnic or cultural sense, but in the sense that peoples of diverse cultures and backgrounds agree to a set of common values. See, e.g., Jill Lepore, This America: The Case for the Nation. Still, there are some "American nationalists" who insist that the US actually has a common ethnic and cultural identity -- white (European), Christian, capitalist -- which the nation should make greater effort to preserve. It's a fabrication, but a powerful one, as today's politics demonstrate.*

1. **Ideas of power, rights, and limited government varied in the first state constitutions in the United States. Identify and explain some of these ideas and explain why there were some marked differences among the state constitutions.**

* What are someclassical republican and natural rightsideas in the Constitution that were first articulated in state constitutions?
* What role do state constitutions continue to play in the evolution of our constitutional system of government?

*State constitutions actually came first. By 1776, nearly all of the states had adopted constitutions. All started with some explicit assertion of Enlightenment-era political philosophy. All state constitutions declared that individual citizens possess natural rights. Pennsylvania's 1776 Constitution, for instance said that all individuals need government to "enjoy their natural rights." Virginia’s 1776 Constitution declared “that all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity."*

*What were those natural rights? According to Pennsylvania's constitution, those rights are "the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety," as well the right "to worship Almighty God according to the dictates of their own consciences" and the right not to be "compelled to attend any religious worship." Virginia similarly proclaimed natural rights to "the enjoyment of life and liberty, and pursuing and obtaining happiness and safety." It proclaimed as well that the people have a right to be free of excessive bail and fines, freedom of press ("one of the great bulwarks of liberty"), and the right to free exercise (or freedom from) religion.*

*The state constitutions also invoked social compact theory, declaring that all government authority derives from the consent of the governed. Virginia's constitution, for example, said "that all power is vested in, and consequently derived from, the people.” The Massachusetts Constitution of 1780 declared that “the body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen” to create a government for the common good.*

*State constitutions also included provisions that recalled principles of classical republicanism. Pennsylvania's, for instance, declared that, "every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his portion towards the expense of that protection, and yield his personal service when necessary." Virginia's declared that citizens must adhere "justice, moderation, temperance, frugality, and virtue."*

*At the same time, the state constitutions greatly varied. The variations reflected differences among the states in terms of their political cultures and economies. Pennsylvania’s, for example, was the most radical. It abolished property qualifications for voting and holding office. It created a unicameral legislature (Pennsylvania thought an upper house was too much like the aristocratic House of Lords). And it completely eliminated the office of governor (it was reasoned that a governor was just a king by another name). John Adams was aghast. He complained that the constitution was too democratic and that it would “produce confusion and every evil work.” South Carolina’s 1778 Constitution, on the other hand, imposed property qualifications for voting that were so high that 90 percent of all white adults were excluded. The Massachusetts Constitution of 1780 adopted a government of three branches -- a governor, a bicameral legislature, and an independent judiciary.*

*For research on state constitutions, see* <https://law.indiana.libguides.com/state-constitutions> , *and* <http://www.stateconstitutions.umd.edu/index.aspx> , *the Maryland Constitution Project. The best overall source on early state constitutions is Willi Paul Adams, The First American Constitutions.*

*As far as the continuing role of state constitutions, they permit states to experiment, within the limits of the Supremacy Clause. States are, as Brandeis said, "laboratories of democracy." Examples of state constitutional provisions that differ from the federal include: direct democracy (in 24 states), advisory opinions by courts, a right to an education, a right to remedy by due course of law, a right to uniform taxation, a right to a clean and healthful environment, and (my favorite) a right to liquor served by the glass. State constitutional equality guarantees predated the Fourteenth Amendment and have served as the basis for court decisions upholding the right to gay marriage, among other things.*

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Unit Two: How Did the Framers Create the Constitution?

1. **Abigail Adams said that individuals involved in Shays’ Rebellion were “ignorant, wrestless desperadoes, without conscience or principals, [who] have led a deluded multitude to follow their standard, under pretence of grievences which have no existance but in their immaginations.”\* To what extent would you agree with her assessment?**

* What other events of the Confederation Period were cause for concern for many Americans?
* In your view, have there been other events in our nation’s history that were similar to the “crisis of the Confederation Period”?

\* Abigail Adams to Thomas Jefferson, “To Thomas Jefferson from Abigail Adams, 29 January 1787,” January 29, 1787, *Founders Online*, National Archives, accessed August 19, 2019, https://founders.archives.gov/documents/Jefferson/01-11-02-0087.

*Shays’s Rebellion: Following the Revolutionary War, the country suffered a severe economic depression. The war damaged farmland. Meanwhile, Britain stopped much of its trading with the states. (Among other things, Britain barred the importation of goods from America that could be imported from elsewhere in the Empire; British shippers were prohibited from buying ships in America, where they previously had purchased 1/3 of their vessels. The GNP of the new country is estimated to have fallen by 50%. Hard currency (gold and silver) became tough to come by (it fell by 80% in the early 1780s from its pre-war levels), because creditors demanded repayment in specie. At the same time, state legislatures imposed substantial tax increases to satisfy congressional war requisitions. Congress would accept only gold or silver, so the states demanded hard currency from taxpayers. But taxpayers -- especially farmers -- didn’t have any. Tens of thousands of farms were lost. Farmers petitioned state legislatures for relief. Lots of legislatures were responsive. Most often, they authorized the issuance of paper currency to be used to pay debts. But commercial interests -- especially lenders and speculators -- were opposed. Paper money quickly depreciated, which cost the lenders, who claimed that the issuance of paper money (and requiring them to accept it) amounted to a form of a taking of property that enabled farmers to escape their obligations. Their “party line” was that the failure to pay taxes was due to indolence. Affluent Americans complained of western farmers being lazy and spending their money on drink. That view is reflected in the Abigail Adams quote. In Massachusetts, the state legislature refused to enact paper-money or other relief legislation. Groups of farmers seized courthouses to prevent foreclosures from taking place. Daniel Shays, a Revolutionary War captain, led a group of protestors to march on a federal arsenal to get weapons and ammunition. They were met with resistance. Four protesters were killed. The state was powerless to respond. A privately financed military force finally suppressed the insurrection, which terrified the country.*

*Confederation-era problems: There were problems with the Articles themselves. They created a national Congress, but then failed to give it most of the basic powers of a sovereign government. The Articles failed to give Congress the authority to tax. To raise revenue, Congress could “requisition” money from the states, but could not force them to pay. (To get around that problem, Congress issued paper money, but it ended up nearly worthless -- 5% of its printed value by 1779.) When it did requisition from the states, some states declined to pay their share. By 1787, the states had paid only 60% of the 1781 requisition, 20% of the 1785 requisition, and 2% of the 1786 requisition. Because the states didn’t pay, Congress couldn’t repay its loans and, as a result, had a tough time establishing credit with lending nations. The Articles similarly failed to give Congress authority to regulate commerce. In fact, Article IX expressly prohibited Congress from making treaties that interfered with the power of states to conduct trade. The problem was, following the war, the British barred trade with the states for certain goods. Different states responded differently. Some states -- Massachusetts, Rhode Island, New York, and Pennsylvania -- imposed tariffs on imported British goods. But other states -- Connecticut, New Jersey, and Delaware -- took advantage of that by offering the British free ports of call. In retaliation, New York imposed steep tariffs on goods imported from other states that had imported goods from Britain. Connecticut responded by suspending all trade with New York. Congress meanwhile could do nothing. Some thought that the authority of Congress should be expanded. The problem there was that doing that required an amendment to the Articles, and that could happen only with unanimous approval of the states. In 1781, Congress proposed being given authority to levy a 5% duty on imports to raise money for the war. All of the states approved except Rhode Island. (According to Madison, Rhode Island, which got a lot of money from such duties, thought giving Congress the authority to impose duties would cost it money.) A second, similar amendment was proposed in 1783. Again, it failed -- this time with New York rejecting it. (With the end of the war, the sense of urgency to empower Congress had waned, and the state worried that a Congressional duty would interfere with the state’s own duties.) In 1783, Congress proposed an amendment to give it authority to regulate commerce. But southern states resisted out of fear that congressional power to regulate trade would hurt their economies. (Southern states tended to oppose import duties, because they needed to import so much of their tools and farm implements, while the northern states -- which manufactured the things -- liked the import duties.) The Articles similarly imposed a supermajority requirement on congressional action (9 states), and state tendencies to vote their own economic interests meant that Congress often couldn’t garner the votes to do anything. The Articles also failed to give Congress the authority to enforce its otherwise authorized actions. They authorized Congress to enter into treaties with foreign nations, but failed to give Congress the authority to force states to comply with the terms of those treaties. So, for example, the Treat of Paris that ended the revolutionary war required states to return property or provide restitution for property seized from loyalists during the war. But states outright refused to comply.*

*Aside from problems with the Articles themselves, there were sectional conflicts that the Articles couldn’t do anything about. As mentioned, there were trade wars between the states. During the early 1780s, Congress also tried to negotiate a deal with Spain concerning American access to the Mississippi River. The southern states wanted to assert American authority over the river. Spain rejected such claims. The northern states didn’t care about the river and were concerned instead about mollifying the Spanish to stimulate trade with the Eastern Seaboard. John Jay was given authority to negotiate a treaty, but, because of divisions among the states, nothing came of the negotiations.*

*Other events similar to the Confederation crisis: In the sense that the Confederation period revealed significant structural weaknesses in the American system of government, it could be argued that the Civil War was similar. It brought to a head the inconsistency of proclaiming that all are created equal and government-sanctioned slavery and resulted in a fundamental realignment of state and federal authority with the ratification of the Fourteenth Amendment. In a similar vein, it could be argued that the Great Depression of the twentieth century brought to light the inability of government as it then existed to address issues of economic security and resulted (especially after West Coast Hotel v. Parrish) in a significant reconsideration of the limits of national governmental power.*

1. **One historian has suggested that the secrecy rule of the Philadelphia Convention allowed a “group of elite nationalists … some space to maneuver independent of public opinion.”\* What were the reasons for the secrecy rule? In your opinion, were they legitimate?**

* What other rules of the convention, if any, were as important as the secrecy rule?
* In your opinion, are there any circumstances that warrant government proceedings to be shielded from public scrutiny?

\* Michael J. Klarman, *The Framers’ Coup*: *The Making of the United States Constitution* (New York: Oxford University Press, 2016), 253.

*To understand the quote necessitates understanding Klarman’s essential thesis about the Convention. Klarman suggests that the principal problems with the Confederation had to do with an excess of democracy. State governments were too responsive to the immediate whims of the people. Office holders were subject to election every year. There was direct election of legislators. And, as a result, the states tended to respond to the passions of the moment. Of particular concern (at least to political elites and the merchant class -- who were most of the delegates to the Convention), were the actions of state legislatures to authorize the payment of taxes and debts with paper money and the suspension of various tax obligations. They wanted to avoid anything like Shays’s rebellion. Klarman holds that the political elites at the Convention wanted to adopt a form of government that curbed excessive democracy by eliminating direct elections for every office but the House and by adopting checks and balances (the veto anyone?) that would limit the ability of the legislatures to be too hasty in responding to the passions of the public moment. Klarman suggests that, without the secrecy rule, the framers probably wouldn’t have been able to pull of their coup, because public outcry would have made it impossible. He’s probably right.*

*Should government proceedings be shielded from public scrutiny? Great question. Note that some states -- like Oregon -- require government "in the sunshine." There are no secret legislative proceedings (though there are, controversially, some internal executive department deliberations that remain free from public disclosure). And for timely events concerning public scrutiny about government actions, see the recent brouhaha over the resignation of Governor Brown's public records advocate.*

1. **“I do not recollect to have met with a sensible and candid Man who has not admitted that it would be both safer and better if amendments were made to the Constitution … Some thinking that a second Convention might do the business, whilst others fear that the attempt to remedy by another Convention would risk the whole.”\* What were some of the amendments proposed by the Anti-Federalists? Should they have been added before the adoption of the Constitution? Why or why not?**

* Why did Federalists oppose prior amendments to the Constitution?
* In your opinion, why have there been so few amendments to the Constitution?

\* Richard Henry Lee to Edmund Pendleton, “Richard Henry Lee to Edmund Pendleton,” May 26, 1788, ConSource, accessed August 19, 2019, https://www.consource.org/document/richard-henry-lee-to-edmund-pendleton-1788-5-26/20130122083153/.

*Almost immediately following the end of the Convention, opponents (whom supporters of the proposed constitution cleverly and ironically labeled "Anti-Federalists") complained that there was no bill of rights included, as there was in nearly all of the state constitutions. The Anti-Federalists wanted the state ratification conventions to consider amendments before deciding to ratify the proposed constitution. Federalists complained that none was needed and derided the Anti-Federalists as "amendment mongers" or "amendmentites" (the Federalists were great at name-calling). The advanced two reasons -- first, because the proposed constitution was one of limited, enumerated powers, so a bill of rights would be unnecessary; and second, because listing a bill of rights could imply that other rights not mentioned don't exist. Federalists further contended that any attempt to amend the proposed constitution before it was even adopted would endanger its chances of being adopted at all. The Federalists prevailed, at least at first. Five states ratified without considering amendments. But things changed with the Pennsylvania ratification convention, when it was insisted that ratification must be accompanied by resolutions proposing the immediate adoption of amendments. A majority of the convention refused to adopt the resolution, but supporters published the proposed amendments in newspapers. In Massachusetts, the delegates agreed to approve the constitution without prior conditions, but with "recommendatory amendments," which would be taken up by the new Congress. Six of the states followed suit. By the time New York's ratification convention convened, more than 40 amendments had been proposed. Proposed amendments included declaration of rights of conscience and religious freedom, guarantee of a jury trial, a prohibition against excessive fines and cruel and unusual punishments, right of free speech, right to bear arms, right "to fowl and hunt at reasonable times" and to fish navigable waters, limitations on the jurisdiction of federal courts, a declaration that the sovereignty of the states is retained except to the extent expressly stated in the constitution, a requirement that there be one representative in the House of Representatives for every 30,000 people, a right to indictment by grand jury before any criminal charges are maintained, a requirement that no one in public office may accept any title or office from a foreign government, a declaration that search warrants unsupported by oath are "oppressive," a declaration that there can be no national religion, a prohibition of maintaining a standing army in time of peace, and others. For a list (and full text) of all of the amendments proposed during the ratification conventions, see the University of Wisconsin Center for the Study of the American Constitution* <https://csac.history.wisc.edu/document-collections/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/>.

*Even after the Constitution was ratified, though, the Federalists denigrated the idea of amending it during the first elections to Congress. And, in fact, Congress did nothing until months later, when Madison argued for the adoption of amendments in June 1789.*

*The most complete account of the ratification debates is Pauline Maier, Ratification: The People Debate the Constitution. It's heavy going, though. Michael Klarman has a good chapter on ratification in his Framers' Coup. And the Journal of the American Republic includes a terrific article, "A Tub to the Whale": The founding Fathers and the Adoption of the Federal Bill of Rights, by Kenneth Bowling, which also may be found at* <https://csac.history.wisc.edu/wp-content/uploads/sites/281/2017/07/tub_to_the_whale.pdf> .

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Unit Three: How Has the Constitution Been Changed to Further the Ideals Contained in the Declaration of Independence?

1. **“The right of voting for persons charged with the execution of laws that govern society is inherent in the word liberty, and constitutes the equality of personal liberty.”\* Although voting is essential for liberty and equality, individuals and groups in our country have been denied this right. How and why has this occurred?**

* Which branch of government is responsible for expanding voting rights, and how did it accomplish this expansion?
* Are voting rights best protected and expanded by state or national governments? Explain your position.

\* Thomas Paine, “Thomas Paine - Agrarian Justice,” Social Insurance History, Social Security Administration, accessed August 19, 2019, <https://www.ssa.gov/history/paine4.html>.

*In Britain before the revolution, only adult men who owned a certain amount of property could vote. And in the colonies, the franchise was limited by either ownership of a specified amount (or value) of land or a specified amount of personal property (or, in South Carolina, payment of a tax). The basic idea was that men (and it was only men) who owned property had a sufficient stake in the community that they had a personal interest in the success of that community. In addition, it was thought that property owners were not dependent on others and so their judgment could be trusted. It was feared that those who were economically dependent (wage earners, for instance) could be too easily influenced by others. See Blackstone's Commentaries. The colonies also had residency requirements, to exclude transients who also were thought to have insufficient stake in the community. Women generally were barred, though in some New York and Massachusetts towns, propertied widows could vote. Depending on the colony, Catholics, Jews, Native Americans, and freed blacks could or could not vote.*

*Even after the revolution, the new state constitutions commonly included suffrage requirements. Connecticut limited the vote to those with at least 40 shillings of real estate or 40 pounds of personal property. Delaware required 50 acres of uncleared, or 12 acres of cleared, land. Pennsylvania abolished property requirements and imposed instead a poll tax. Massachusetts had an annual income requirement or real estate worth 60 pounds. Some southern states -- Georgia, South Carolina, Virginia excluded any persons of color. Vermont, however, had no suffrage requirement at all.*

*Note that none of the constitutions -- and even the federal Constitution -- said that there is a right to vote. The founders worried that, if voting is a right, if would be impossible to deny suffrage to anyone. As John Adams said, there would be "no end of it." The federal Constitution itself left it to the states to determine who could vote.*

*Between the revolution and the Civil War, most states eliminated property requirements. But a number of them inserted racial exclusions. Connecticut, Delaware, Illinois, Louisiana, Maryland, Mississippi, Michigan, Jersey, and Pennsylvania, among others, limited the vote to whites. Others, like Indiana and Kentucky, expressly excluded "negroes, mulattoes and Indians." Some states excluded from the vote any paupers, residents of any charitable institution, or others who were receiving any public assistance. Quite a few states adopted exclusions for those convicted of certain (often, "infamous") crimes.*

*With the ratification of the Fifteenth Amendment, states could no longer deprive anyone of the right to vote because of race. But following that, and well into the twentieth, states -- especially southern states that wanted to exclude black voters -- adopted literacy requirements and poll taxes. Meanwhile, Congress enacted the Dawes Act in 1887, which granted citizenship to Native Americans who were willing to abandon their tribes. In 1924, Congress enacted the Indian Citizenship Act, granting citizenship to all Native Americans born in the US. Even so, some states didn't allow Native Americans to vote (in New Mexico, only in 1962!).*

*In the late-nineteenth century, quite a few states allowed women to vote, but only in elections dealing with education. A few allowed women to vote in municipal elections, as well. All that changed with the ratification of the Nineteenth Amendment. In 1964, the Twenty-fourth Amendment prohibited poll taxes. And, in 1965, Congress enacted the Voting Rights Act, which prohibited literacy tests and discrimination in voting on the basis of race, color, or language minority status.*

*Still, to this day, a number of (especially southern) states are creating barriers to the ballot box in ways that are facially neutral but disproportionately affect minorities (e.g. voter ID laws), a number of which have been struck down by lower courts, state and federal.*

*Probably the best, and most thorough, history of voting in this country is Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States. Michael Waldman, The Fight to Vote, is less of a scholarly account, but covers the same material. Carol Anderson, One Person - No Vote, is a terrific, passionate critique of current efforts to limit access to the ballot.*

1. **What is the difference between procedural and substantive due process, and what are the origins of these principles?**

* Are the protections of procedural due process more fully guaranteed in an adversarial or inquisitorial system of justice? Explain your position.
* Does procedural or substantive due process cause more conflict between the national and state governments? Why? Give examples.

*Wow, this question covers a lot of territory. "Due process" generally refers to a guarantee that government cannot act in an arbitrary way. It is modernly understood to have both procedural and substantive components. Procedural due process often is traced by to Chapter 39 of Magna Carta (historians generally don't say "the" Magna Carta"), which declared that no freeman may be seized or his property taken except "by the lawful judgment of his peers or (some translations say "and") the law of the land," that is, the customary practices of the courts. Magna Carta got reaffirmed and restated a number of times in the next couple of hundred years. In 1354, a statute of King Edward III rephrased Magna Carta to change "law of the land" to "due process of law." (The full sentence is "[n]o man of what estate or condition that he be shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.") Parliament enacted the statute in response to Edward III's tendency to skip courts and summarily call offenders directly before him. It didn't do much good, as kings continued to ignore court proceedings. In the early seventeenth century, Charles I imposed taxes and enforced failure to comply without going through courts. This, among other things, resulted in the 1628 Petition of Right, which included a statement that no man can be "taken or imprisoned . . . without being brought to answer by due process of law." This phrasing was picked up in the Fifth Amendment. The Fifth Amendment, however, applied only to limit the authority of the federal government. The Fourteenth Amendment made clear that states as well could not deprive anyone of life, liberty or property without due process.*

*"Procedural" due process is most directly linked historically to Magna Carta and the Petition of Rights. It refers to the idea that government may not take certain actions -- deprive one of life, liberty or property -- arbitrarily. (Note that due process applies only to those government actions. If there's no taking of life, liberty, or property, the requirement of due process doesn't apply.) It must act in accordance with certain procedures that ensure that any action that the government takes is fair. The leading case on what procedures are required is Matthews v. Eldridge (1976). In brief, the process that is due depends on balancing the value of the private interests involved, the risk of error in the absence of certain processes and the cost to the government of providing them. That usually requires at least reasonable notice, an opportunity to be heard by an unbiased adjudicator, and an explanation for the government action. There are tons of cases involving court determinations of the precise process that is due in particular circumstances.*

*Whether adversarial or inquisitorial systems better protect procedural due process depends on your point of view. The basic assumption of the adversarial system is that having competing adversaries maximizes the possibility that all relevant information will be put before the judge and, as a result, the correct decision will be obtained. Supporters if the inquisitorial system -- in which judges act as both investigators and adjudicators -- argue that the adversarial system is expensive and relies on the unwarranted assumption that adversaries are of equal ability. Trained judges, they say, minimize disparities in ability and resources available to adversaries and are more likely to get at the correct decision.*

*"Substantive" due process is something of an oxymoron. It's the term that courts use to explain that some rights and interests are so fundamental that government cannot take them at all -- or at least not without a demonstrated "compelling" government interest -- even if procedural safeguards are followed. Thus, there are certain substantive areas of legislation that are subject to special protection. Government cannot act in those areas without a sufficient justification.*

*What are those substantive areas? Good question. For a while, the courts focused on economic rights, typified by Lochner v. New York (1905). The courts recognized that a "freedom of contract" was so important that legislation regulating employment conditions were generally unconstitutional. Between 1905 and 1937, over 200 state economic regulations were struck down. That changed in 1937, when the US S Ct repudiated Lochner in West Coast Hotel v. Parrish (1937). In the meantime, courts generally refer to non-economic "fundamental rights," those enumerated in -- or implicit in -- the Bill of Rights, rights of political process, and rights of "discrete and insular minorities." See US v. Carolene Products (1938). Among the rights that the courts regard as fundamental -- thus triggering strict, compelling interest justification -- are the right of parents to control the upbringing of their children, Meyer v. Nebraska (1923); freedom of speech and the press, Gitlow v. New York (1925); the right to privacy, Roe v. Wade (1973); property rights, BMW v. Gore (1996); the right to marry, Loving v. Virginia (1967); among others.*

*The phrase "substantive due process" actually didn't appear until the twentieth century. And it's the subject of sustained criticism as a usurpation of the legislative function. Scalia and Thomas, in particular have argued that the doctrine is illegitimate.*

1. **“The benefits from discussion lie in the fact that even representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments.”\* Does John Rawls’ statement accurately reflect the discussion taking place among political parties today in our legislative branch?   
   Why or why not?**

* What are the benefits and costs of having multiple political parties in a legislative branch?
* Parliamentary government has proven to be very effective in other countries. What might be the advantages and disadvantages of the United States changing to a parliamentary form of government?

\* John Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: The Belknap Press, 2003), 315.

*Of course not. The idea that legislatures are havens of deliberation is terrifically naive, certainly in reference to Congress and many state legislatures today. Political partisanship has become extraordinarily polarized. Single-issue lobbies have become increasingly powerful. Legislative redistricting has incentivized legislators not to compromise, but to play to their constituencies at home. In the last several sessions, Congress has enacted fewer bills than at any time in modern history. Legislative gridlock is now the norm. See, e.g., "As Gridlock Deepens in Congress, Only Gloom is Bipartisan."* <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html>

*Take gun control, for example. After every mass shooting in the last 20 years, there have been calls for legislative action. And polls show that a majority of the population, at least nationally, favors increased regulation of access to weapons, especially assault weapons. One president after another -- Republican and Democrat -- has proposed legislative action. But Congress is incapable of acting. Then there are judicial appointments: Merrick Garland, anyone? And election security: Every federal intelligence agency has concluded that Russia attempted to meddle in the 2016 presidential election. The Senate Majority Leader, however, has foreclosed any legislative action.*

*In theory, at least, political parties mobilize participation, make it easier for voters to express their preferences through party platforms, and provide platforms for debating issues of public consequence. However, the nature of political parties in the US -- especially as a consequence of campaign finance laws, in recent years -- has solidified the dominance of two political parties and made it more difficult for those of different views to be heard.*

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Unit Four: How Have the Values and Principles Embodied in the Constitution Shaped American Institutions and Practices?

1. **Professor Michael J. Klarman argues that “the immediate backdrop against which the delegates in Philadelphia were designing the executive branch—state constitutions—was one of emasculated executives.”\* Why would this be, and do you agree with this assessment? Why or why not?**

* To what extent did the Framers have to imbue the new executive branch with powers not found in state constitutions?
* What were the Framers’ fears of moving toward a more powerful executive in the U.S. Constitution, and have those fears been realized over the years? Explain your position.

\* Michael J. Klarman, *The Framers’ Coup*: *The Making of the United States Constitution* (New York: Oxford University Press, 2016), 214.

*Klarman's assessment seems largely correct. The Framers were suspicious of executive power, which brought to mind royal governors who vetoed legislation enacted by colonial legislatures. The Declaration of Independence listed abuse of the veto power as among the reasons for the revolution. The Articles of Confederation included no provision for an executive at all. It provided for a committee of the states to act when Congress was not in session, but in hardly ever met. The early state constitutions provided for weak executives who were beholden to the legislatures. In eight states, the legislature -- not the people -- chose governors, and most governors served only one-year terms. Pennsylvania's constitution didn't provide for an executive at all. Most state constitutions did not give the governor the power to veto legislation (only Massachusetts and New Hampshire gave the governor the veto power, while the New York Constitution gave the power to a "committee of revision," of which the governor could be a member) or the power to appoint judges. The appointment power was of special concern, as the Framers recalled the ability of the king to corrupt members of Parliament with offers of various government positions.*

*By the time of the Convention, it was clear that a stronger executive power was in order. Everyone agreed that the executive should have power to execute national laws. They also ended up agreeing to give the executive the veto power, to make sure that Congress didn't usurp the power of other branches (or, as Klarman suggests, to make sure that Congress wasn't too responsive to the whims of the people). Still, the executive veto was not absolute; the Framers provided a mechanism for Congress to override it. The Framers also gave the executive the power to appoint various offices, including federal judges. But again, they made the power less than absolute, subject to legislative approval. They also gave the executive the power to act as commander-in-chief of the armed forces, to grant pardons, to call Congress into special sessions, and to make treaties (with the advice and consent of the Senate).*

*The Framers feared that executive power could devolve into monarchy. Randolph, for example, complained that a unitary executive amounted to the "fetus of monarchy" and argued for multiple executives rather than a single president. Williamson similarly worried that an executive would become, in effect, an "elective king."*

1. **According to historian Joseph Ellis, “there was no single source of sovereignty in the new Constitution. What he [James Madison] had initially regarded as the great failure at the Constitutional Convention—the coexistence of federal and state claims to authority—was, albeit inadvertently, in fact the great achievement.”\* Do you agree or disagree with Ellis’s assessment of Madison’s view of shared sovereignty? Why or why not?**

* How has this “shared sovereignty” led to ongoing arguments in our federal system today?
* How has our federal system created both majority and minority control of state and national governments? What are the advantages and disadvantages of this system?

\*Joseph J. Ellis, *American Dialogue: The Founders and Us* (New York: Alfred A. Knopf, 2018), 139.

*James Madison's views on the subject of federalism have always proved challenging. That's because his views about the proper relationship between states and the federal government shifted over the years and didn't always remain consistent. At first, Madison was something of a nationalist. He came to the Convention with the view that what was needed was a vigorous national government, as evidenced by his role in promoting the Virginia Plan. There followed a shift, as Madison contributed to The Federalist, especially 10, 39, and 51. He advocated a strong national government and expressed concern that state governments will interfere with its authority. At the same time, he advocated a "compound republic" in which government power is divided not only between branches (horizontal) but also between states and the national government (vertical), thereby providing "double security" against oppression. Then, with the national bank controversy, Madison shifted again, leading the opposition to the bank because the federal government lacked the power under the Constitution, taking a very narrow view of national authority.*

*Shared sovereignty has led to multiple tensions between states and the federal government. The poster child for this is the debate over civil rights in the 1950s and 1960s. Opponents of federal civil rights legislation complained that it trampled on "states' rights." There's also Arizona's attempt to refuse state resources to carry out federal immigration policy and its legislation authorizing state law enforcement officers to arrest undocumented immigrants and making it a crime to be in the state without valid immigration papers, struck down in Arizona v. US (2012). The Missouri legislature passed a law (that the governor vetoed) preventing the state from enforcing federal gun laws. Similarly, the Wyoming House approved a bill that would have made it illegal for state police to enforce federal gun laws. The 1996 Defense of Marriage Act injected federal law into the traditionally state-controlled area of domestic relations, part of which was later declared unconstitutional in US v. Windsor (2006). California auto fuel economy standards are running into recent federal efforts to loosen them. Auto companies like Ford, Honda, BMW, and Volkswagen say they are voluntarily going to comply with the tougher California standards. The Trump administration responded by sending a warning to California that such an agreement could be illegal, claiming that only the federal government has the authority to set fuel economy standards. Of course, then there's the recent spate of state marijuana laws, "legalizing" recreational and medicinal marijuana use even though possession and distribution remain federal crimes.*

1. **“Of all times to abandon the Court’s duty to declare the law, this was not the one.   
   The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections.”\* Do you agree with Justice Elena Kagan’s dissent on the Court’s role, or should the courts not get involved in political questions? Why or why not?**
   * Under what circumstances have the courts intervened in “political questions” in the past?

* Looking forward, what role, if any, should the courts play in preserving free, fair, and frequent elections in the United States?

\* Rucho v. Common Cause, 588 US \_ (2019)

*Justice Kagan's dissent could hardly have been more correct, in my view. Others may disagree. But the central premise of the majority's decision -- that there is no way to come up with a "limited and precise standard that is judicially manageable" -- is belied by the recent decision of a North Carolina three-judge court, which held that the state's redistricting violated the state constitutional free elections guarantee.* <https://static1.squarespace.com/static/5beeefdbf407b4c074e45ec6/t/5d6ec8fe5d59b000015acea7/1567541511311/Common+Cause+v.+Lewis+-+9.3.19+-+Final+Judgment.pdf)> .

*The broader question of whether courts should decide "political questions" is trickier. First, there is the issue of the proper judicial role generally. Federal courts have developed a set of "justiciability" doctrines based on the "case" and "controversies" clause of Article III of the Constitution. Nothing in the words "case" or "controversies," however, suggests that courts cannot decide "political questions." The federal courts have invoked a historical aversion of courts to deciding such matters. But legal historians have criticized that justification as based on an inaccurate understanding of history that ignores the practice of British, colonial, and post-revolutionary courts routinely providing advice to executive and legislative bodies on a wide range of matters. For a critique of federal justiciability doctrine see the Oregon Supreme Court's decision in Couey v. Atkins (2015). Second, there is the question of what exactly constitutes a "political question." The leading US S Ct case is Baker v. Carr (1962), which defines a political question in terms of a number of considerations, in particular, a textually demonstrable constitutional commitment of the issue to a coordinate political department and a lack of judicially manageable standards for resolving the issue. The textual-commitment component is especially troublesome. Just because the Constitution delegates a particular issue to another branch doesn't mean that the courts don't have the obligation to say what the Constitution means when it does so. It is "emphatically the province and duty of the judicial department to say what the law is," right? Marbury v. Madison (1803). So, for example, even if the Constitution clearly delegates to the Senate the "sole power to try impeachments," why does it not remain the duty of the courts to say what the constitution means when it refers to the power to "try." Yet, the S Ct declined to address the issue as a political question in Nixon (no, not that Nixon) v. US (1983). Similarly, Article IV has been read to delegate to Congress the responsibility of enforcing the requirement that states have a "republican" form of government. But does it follow that the courts cannot still determine what the Constitution means when it says "republican"? Third, there's the fact that the courts have, in fact, intervened in political questions. Colgrove v. Green (1946) determined that redistricting was a political question. But then, in Baker v. Carr, the court held otherwise. In Powell v. McCormack (1969), the Court intervened in the decision of the House to exclude a member. And, in Bush v. Gore (2001), the Court essentially decided a presidential election. As for lack of judicially manageable standards, the Court has trouble deciding what that means and why, for example, something as amorphous as due process analysis involves judicially manageable standards, but political gerrymandering does not. For a nice, short critique of the S Ct's political question doctrine, see "Questioning the Political Question Doctrine," published in the libertarian magazine Reason.* <https://reason.com/2019/06/30/questioning-the-political-questions-doctrine/>

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Unit Five: What Rights Does the Bill of Rights Protect?

1. **“The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights.”\* Do you agree or disagree with this quote? Explain your position.**

* What is the history of the Fifth Amendment’s self-incrimination clause, and why might it be controversial?
* Should refusing to give up your mobile phone’s passcode be protected under the self-incrimination clause of the Fifth Amendment?\*\* Why or why not?

\* Akhil Reed Amar and Renee B. Lettow, “Fifth Amendment First Principles: The Self-Incrimination Clause,” *Michigan Law Review* 93, no. 5 (March 1995): 857–928.

\*\* Katelin Eunjoo Seo v. State of Indiana, 18S-CR-595 (2018).

*The Fifth Amendment right against self-incrimination was based on then-existing state constitutional rights, such as the Virginia constitutional declaration that no man can be "compelled to give evidence against himself." The deeper historical origins are a matter of controversy.*

*The conventional view, originally proposed by John Wigmore and later developed by Leonard Levy, is that the right may be traced to sixteenth-century protestant objections to the oath* ex officio *-- the requirement of the Star Chamber that suspects swear in advance to answer truthfully questions about their religious and political beliefs. The practice forced the suspects either to lie under oath (and thereby risk eternal damnation) or refuse to take the oath (and risk corporal punishment) or take the oath and answer truthfully (and risk corporal punishment). Puritans, in particular, objected to the oath requirement. In 1641, Parliament agreed and abolished the court of Star Chamber. Other scholars, more recently, argue that the right wasn't actually recognized until the late 1700s, when criminal defendants could be represented by counsel (before then, defendants were required to represent themselves, which more or less required self-incrimination). Even after the ratification of the Fifth Amendment, these scholars point out, courts didn't invoke the right against self-incrimination. Magistrates routinely questioned an accused, and if the accused stood mute, that refusal was reported to the jury. It wasn't until the early 20th century that the right against self-incrimination as we now know it came into being, in response to police coercion. For a history of the right against self-incrimination (and a summary of competing views) see generally, State v. Davis (Or. 2011).*

*Amar's critique of Fifth Amendment jurisprudence is largely focused on the fact that US Supreme Court decisions make little sense (shocking news!) and the fact that there is no agreement about the historical origins of the right. He suggests that the amendment be read literally, so that it precludes a defendant only from being a "witness" in the ordinary sense (taking the stand) in his own "criminal case" (that is, the trial).*

*Seo v. Indiana is still pending before the Indiana Supreme Court. The police had seized her iPhone at the time of arrest. She was asked to unlock the phone, but she refused. The police went to court, which ordered her to comply. When she refused, the court held her in contempt. She appealed. The Indiana Court of Appeals, Seo v. State, 109 NE3d 418 (2018),* <https://www.leagle.com/decision/ininco20180821261>

*vacated the order of contempt. The somewhat lengthy opinion -- with a nice summary of the relevant US S Ct case law -- is worth reading. In a nutshell, it holds that an iPhone passcode is testimonial in nature, particularly given the extraordinary amount of information that a smart phone contains. The opinion is also notable for the thoughtful dissent. At bottom, the court split over an issue of analogies: Is an encrypted telephone like a locked wall safe?*

1. **The U.S. Supreme Court has used a two-pronged test to evaluate speech. First, speech can be prohibited if it is “directed to inciting or producing imminent lawless action” and second, if it is “likely to incite or produce such action.”\* Using this test, the Court held that an Ohio law violated Clarence Brandenburg’s right to speech in *Brandenburg v. Ohio*. Do you agree or disagree with the Court’s decision and the use of a two-pronged test?**

* Under what conditions, if any, should freedom of expression be limited?
* Why is freedom of expression a necessary part of representative government?

*\** Brandenburg v. Ohio, 395 U.S. 444 (1969).

*Over the course of the twentieth century, the US S Ct has recognized a number of limitations on freedom of expression. The Court has always recognized that defamation constituted a limitation on free expression, though in NY Times v. Sullivan (1964), it recognized constitutional limits on actions for defamation. Similarly, the Court has recognized that laws prohibiting false advertising may constrain free expression, though again, the Constitution may impose some limits on such legislation. See, e.g., Konigsberg v. State Bar (1961). Laws restricting the publication of obscenity also constitute a permissible limit on free expression; obscenity is not considered "expression" for purposes of the First Amendment. Roth v. US (1957). (Note that state constitutions can be more protective, and Oregon's is more protective in the area of obscenity. See State v. Ciancanelli (2005).) Laws may also impose "time, place, and manner" restrictions on free expression so long as the restrictions are content neutral, narrowly tailored and serve significant government interests. See Ward v. Rock Against Racism (1989). Laws -- the Freedom of Information Act, for instance, contains exceptions for matters of national security -- may prohibit disclosure of certain government information, though again there are constitutional limits. See US v. Nixon (1974). And laws may prohibit expression that urges others to take immediate action that is against the law. This is the category of limitations illustrated by the Brandenberg case. The Brandenberg "imminent lawless action" test was supposed to be an improvement on the more quotable, but less precise, "clear and present danger" test of Schenck v. US (1919). See, for example, Dennis v. United States (1951), in which the Court upheld the constitutionality of convictions for urging the overthrow of the government at some undefined point in the future. (So much for the "present" part of "clear and present danger.") The Brandenberg test required actual imminence, as confirmed in Hess v. Indiana (1973) (advocacy of illegal action at some undefined time in the future isn't sufficient). Still Brandenberg has suffered withering criticism from commentators and inconsistent application in lower courts.*

1. **In 1784, Patrick Henry proposed a general tax called the Bill Establishing a Provision for Teachers of the Christian Religion. In reaction, James Madison wrote, “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”\* Do you agree with Patrick Henry or James Madison? Why?**

* How have the courts interpreted the establishment clause of the First Amendment?
* How is the right of free exercise of religion balanced against other interests of society?

\* James Madison, “Memorial and Remonstrance against Religious Assessments, [CA. 20 June] 1785,” June 20, 1785, *Founders Online*, National Archives, accessed August 19, 2019, <https://founders.archives.gov/documents/Madison/01-08-02-0163>.

*Patrick Henry's proposal predated the First Amendment's Establishment Clause and, in fact, was the sort of thing that precipitated its adoption. At the time, the Church of England was the established state church in Virginia, as it was in all the southern states, while Congregationalist churches dominated the New England states. Delaware, New Jersey, Pennsylvania, and Rhode Island didn't have established churches. A statute disestablishing the Church of England in Virginia had been drafted in 1777 and introduced in 1779, but it didn't pass until 1786. Minority denominations like the Virginia Baptists were worried about the effects of government support for a favored denomination, especially if the national government were to get involved. Pretty much everyone agrees that the Establishment Clause was intended to preclude establishing and financially supporting with public funds a national religion. There is debate, however, about whether the clause was intended to preclude government support for Christianity generally. Some point to the fact that the same Congress that proposed the First Amendment opened each legislative day with a prayer and voted to appropriate federal dollars to support Christian missions in Native American lands. They suggest that the Establishment Clause should be understood to apply to only certain types of government involvement: government control over doctrine, mandatory attendance at the established church, financial support of the established church, restrictions on worship in minority churches, restrictions from members of minority churches from voting or holding public office, and the like. See, e.g., Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I (2003)* <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1382&context=wmlr> .

*Others point to writings of Jefferson and Madison on the need to maintain a "wall of separation" between church and state. See, e.g., Everson v. Board of Education (1947). For general background, see generally Leonard Levy, The Establishment Clause: Religion and the First Amendment (1994).*

*S Ct cases to consider: The leading case is Lemon v. Kurtzman (1971), which held that a Pennsylvania statute authorizing the superintendent of public schools to reimburse the salaries of religious school teachers violated the Establishment Clause. The case is famous for its "purpose, effects, and entanglements" test. To satisfy the Establishment Clause, a law concerning religion must have a secular legislative purpose, its principal effect must not advance or inhibit religion, and it must not result in excessive government entanglement with religion. The test has proved easier to state than to apply, causing some to call for its abandonment. Scalia called it a "ghoul in a late night horror movie" in Lamb's Chapel. Thomas has said that Lemon should be overruled. Gorsuch has characterized Lemon as a "misadventure." Alito said that the case had "shortcomings." Kavanaugh has suggested that the case is no longer good law. Still, in McCreary County v. ACLU (2005), the petitioner asked the Court to overrule Lemon, and the Court declined to do so. There are tons of cases that the students can have fun with in debating how Lemon actually gets applied. See, e.g., Marsh v. Chambers (1983) (prayers at the beginning of Nebraska legislative session did not violate Establishment Clause); ( Lynch v. Donnelly (1984) (Christmas display on public property did not violate Lemon test); County of Allegheny v. ACLU (1989) (Christmas display in county courthouse did violate the Lemon test, while a menorah display did not); Lamb's Chapel v. Center Moriches Union Free School Dist (1993) (actually the Court held that refusal to allow showing of religious film on school property after hours violated rights of free expression, but the court mentioned Lemon, and that mention prompted separate opinions on the vitality of the Lemon case); Santa Fe Independent School Dist v. Doe (2000) (student-led prayer at high school football games violates the Establishment Clause); Van Orden v. Perry (2005); (display of Ten Commandments in county courthouses did not violate the Establishment clause, according to plurality, which did not apply Lemon); American Legion v. American Humanist Association (2019) (maintenance of a Latin "peace cross" to commemorate WWI dead on public land did not violate Establishment Clause)*

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Unit Six: What Challenges Might Face American Constitutional Democracy in the   
Twenty-first Century?

1. **National citizenship is defined as follows: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”\* Should the definition be changed to reflect additional or different criteria for national citizenship? Why or why not?**

* What are the rights and responsibilities of citizenship?
* What are the opposing positions regarding “birthright citizenship” and what might be the consequences of either side prevailing? Explain your position on this issue.

\* Fourteenth Amendment, 1868

*Birthright citizenship: There are differing views about whether the Fourteenth Amendment actually grants birthright citizenship. The conventional (correct) view is that, at common law -- dating back to the 1608 Caleb's case -- citizenship was determined by geographic place of birth. If you were born in the US, you were a citizen of the US. At least until 1857 and the Dred Scott decision, in which the Supreme Court recognized, in effect, an exception for blacks, because they "are beings of an inferior order." The Fourteenth Amendment's citizenship clause was intended to repudiate Dred Scott and a restoration of the common-law rule that geography determines citizenship. Recently, an alternative view has emerged, that the Fourteenth Amendment doesn't have that effect. Michael Anton, a former national security advisor, published an op-ed piece in the Washington Post in which he suggests that the Fourteenth Amendment has more limited effect and that only persons "subject to the jurisdiction thereof" -- that is, in the country legally -- become citizens if born here.* <https://www.washingtonpost.com/opinions/citizenship-shouldnt-be-a-birthright/2018/07/18/7d0e2998-8912-11e8-85ae-511bc1146b0b_story.html> . *According to Anton, if you look at the legislative history of the 39th Congress that adopted the Fourteenth Amendment, a Senator Jacob Howard explained that the "subject to the jurisdiction thereof" qualification was intended to exclude "persons who are aliens or who belong to families of ambassadors." The problem with the argument is that the actual quotation excludes the "or," so that Howard explained that the "subject to the jurisdiction thereof" qualification was only intended to exclude "aliens who belong to families of ambassadors." Anton later acknowledge that he basically rewrote Howard's statement, but he insisted that his rewrite better reflects what Howard really meant to say. Pretty neat trick, getting to literally rewrite history.*

*Rights and responsibilities: All citizens, including naturalized citizens possess all the rights and guarantees stated in the Constitution -- free speech, free exercise of religion, right against self-incrimination, right to hold property, right to be free from unreasonable searches, etc. (Actually, the rights and guarantees in the Bill of Rights and the Fourteenth Amendment apply to all persons, not just citizens.) In addition, citizens may hold public office (subject to local residency requirements). Citizens have the right to vote (although that was not always the case). All citizens have corresponding obligations to obey laws, pay taxes, serve on juries, and (on occasion) serve in the military.*

1. **“The Americans, on the contrary, are fond of explaining almost all the actions of their lives by the principle of interest rightly understood; they show with complacency how an enlightened regard for themselves constantly prompts them to assist each other, and inclines them willingly to sacrifice a portion of their time and property to the welfare of the State.”\* What is the meaning of the concept of self-interest rightly understood, and does it still apply today?**

* What role, if any, does participating in civil society have for a well-functioning democracy?
* Should schools require community service in order to promote the concept of self-interest rightly understood? Why or why not?

\* Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (Washington, D.C.: Regnery, 2002), 484.

*The key here is self-interest "rightly understood." There are several approaches to self-interest in political theory. There's greed, or "unenlightened self-interest," which is generally regarded as a bad thing, because it is unlikely that there will be a net benefit to society. Although objectivists like Ayn Rand argue that "rational selfishness" is the only defensible approach and that there will be societal benefits as byproducts. Critics suggest that such "rational egoism" privileges short-term interests over long-term ones; it is sometimes better -- even for the individual -- to postpone immediate individual interests for long-term societal interests. Then there's enlightened self-interest, the idea that the ultimate self-interest is what is in the best interests of the society as a whole. This latter is most likely what the quote refers to. It's another way of getting at the idea of civic virtue -- individual acts for the common welfare of the community.*

**3. “We define populism as *a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the* volonté générale *(general will) of the*** ***people.*”\*   
Do you agree or disagree with this definition of populism? Why?**

* What challenges, if any, have populist movements presented to our representative democracy?
* What are some examples of populist movements around the world, and what impact have they had on their respective political systems?

\* Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (New York: Oxford University Press, 2017), 5–6.

*Historically, the term "populism" was coined by a late-nineteenth century American political party, The People's Party, which promoted aid to farmers, a progressive income tax, direct election of senators, and the initiative and referendum. The political party expired by the turn of the century. But the word "populism" survived to refer more generally to more or less left-wing political movements that cast themselves as anti-corporate establishment. (For a terrific account of populism in Oregon -- or, more specifically, Portland -- see generally Robert D. Johnston, The Radical Middle Class: Populist Democracy and the Question of Capitalism in Progressive Era Portland.) Nowadays, the term is used to refer to a belief in the wisdom or virtues of the "common people," as opposed to "elites." It's not a very useful definition, as it depends on who the "people" are and who are the "elites." Thus, both Bernie Sanders and Donald Trump have been referred to as "populists." And, in fact, political scientists now recognize both right-wing and left-wing versions of "populism." Right-wing populists tend to define "the people" in narrower terms -- tending to exclude minorities and other "outsiders," while referring to "elites" as liberal technocrats and government bureaucrats. Left-wing populists tend to define "the people" more broadly and refer to "the elites" as wealthy, corporate interests. The idea of "populism" also assumes that there is a general will (volonte generale) that the people share -- defined how? Usually by simple majoritarianism. In that sense, populism can be seen as standing in some tension with traditional notions of representative government. Think of the political consequences (some might say, havoc) of the adoption of direct democracy.*

*The meaning of the term is a subject of debate among scholars. Some -- prominently, English political scientist Margaret Canovan -- suggest that the term is too ambiguous to be useful and should be abandoned. Others, like Dutch political scientist Cas Mudde, think that, in spite of its ambiguity, the term is too important to be cast aside. Still, most academics recognize that the term "populism" refers to some sort of distinction between "the people" and "the elites." The Mudde reference to "thin-centered" ideology is pretty abstruse stuff for high school students, by the way. It refers to the idea that populism is too intangible to amount to an actual platform or program for social change. It stands in contrast to "thick-centered" ideologies -- capitalism, socialism, fascism, nationalism.*

*Depending on how you define "populism," different examples can be cited: The Progressive Era of the early twentieth century in America (especially the West); the Share the Wealth movement of Huey Long; the anti-communist fervor of the McCarthy era; the Tea Party of the early twenty-first century; the Occupy movement; various populist movements (from Peron in Argentina to Fujimori in Peru) in Latin America in the twentieth century (for whom the "elites" were American imperialists or the IMF).*