Government of the USA

Chapter 1 Lecture Notes

This is a course in the government of the United States of America. Essentially, what we are and will be discussing is a political system. It was created over 220 years ago, and has endured despite considerable hardships at times within the country, as well as many cultural changes. There are many things to discuss to understand this system that somehow governs approximately 300 million people, and many questions to answer. What is politics? What is government? What is this thing called America, and how is it held together? These are just a few of the questions we must try to answer this semester. I try to teach this course in a very practical manner. It is hoped that you will leave here with something more than just a few definitions of what some of these concepts are, and that this course will prepare you to become inquisitive citizens within our society. My ultimate goal is to offer some insights into how “it” (meaning our government, our politics, our constant adjusting to different aspects of our life) all comes together. But first we must start with some basic definitions in order to lay the groundwork for later understanding of this complex system.

**Political Thinking and Political Science**

The author of your textbook has completely rewritten the first chapter of your textbook, placing more emphasis on a descriptive dialogue of what he hopes to achieve with this book. In this approach he attempts to reach out to younger citizens of our country and explain the necessity of studying government and politics. It seems that he has become increasing concerned about the involvement of young people in our system of government. Personally, I am not quite as pessimistic as he is, especially in light of the results of our most recent election and the significant impact that young voters had in the reelection of President Obama. Still, I do believe he makes a strong case for the necessity of involvement. The first major concept he covers is what he refers to as **“political thinking”**, which he states, “involves the careful gathering and sifting of information in the process of forming a knowledgeable view about a political issue.” He emphasizes that this “enables citizens to act responsibly”. No matter how we may feel about government and political issues, what is at the heart of our system of government is citizen involvement, especially in a civil discourse on the way we wish to settle the issues. Democracy is not an easy form of government. It places significant demands on its citizens. What it gives us in return is unparalleled freedom.

The second thing that the author introduces us to is **political science**, which he describes as “the systematic study of government and politics”. Through the use of this and the analytical tools it provides (p. 8 in your text) it allows “the citizen to delve more deeply into political developments than would otherwise be possible.” Hopefully, as a “trained” political scientist, I will be able to help you obtain insight into politics and how our system of government functions.

**Political Culture: A Way to Understand a People and their Politics**

One of the things that many scholars (Crevecoeur, Toqueville, Bryce, etc.) have attempted to do over time is to try to define what makes the United States the country that it is. Most nations are built on a common ethnicity, religion, language, history. These things do not apply well to the United States. Other than sharing geographical borders, we are a very diverse nation. Yet there is something quite strong that seems to bond us together. To begin to understand how the United States government was created and functions we have to begin by understanding our unique political culture.

We refer to **political culture** as a “term that refers to the characteristic and deep-seated beliefs of a particular group of people about government and politics”. It is, essentially, a shared system of values, beliefs, and habits of behavior with regard to government and politics. One of the things that several scholars have identified is that there exists a set of “core ideals” that help to create an enduring legacy of political continuity within the United States. We will refer to these as **America’s Core Values**, a somewhat common set of political beliefs unique to American and held by most Americans. By using these we can help create a framework from which we can analyze the political processes and government structures of the United States.

**America’s Core Values**

An understanding of America’s ideals begins with the recognition that they are based on the notion that the government exists to serve the people. The cornerstone of society is the individual rather than the government. These Core Values include the following:

**Liberty.** The principle that individuals are should be free to act and think as they choose, provided they do not infringe unreasonably on the freedom and well-being of others. Also rooted in this core value is the concept of **individualism**, which is defined as “a commitment to personal initiative and self-sufficiency; it rests on the belief that the people should be free of undue government restraints as they seek to advance themselves economically.” It is very important to understand that culturally the United States places great value on individual rights and seek to protect them above all else.

**Equality.** This concept refers to the idea that all individuals are equal in their moral worth and thereby entitled to equal treatment the law. This is an interesting concept in that it is not so clearly stated constitutionally and has been a point of deep divisions in its interpretation. It is an evolving concept which manifests itself through the battle over **civil (equal) rights**, which is studied in depth in Chapter 5.

**Self-government.** This concept refers to the principle that the people are the ultimate source of governing authority and should have a voice in their governing. It has as its basis some of the concepts of John Locke, whom we will discuss more in depth in the Second Chapter, that the people are the ultimate source of governing authority and that their general welfare is the only legitimate purpose of government.

These beliefs are mythical and symbolic in nature, and do not always match reality, yet they provide a basis for understanding how our country acts politically and how our government responds to the desires of the people. Also keep in mind that these are general principles, not fixed rules of conduct, and thus are subject to conflict when putting them into practice. Political ideals have a powerful influence on American politics by shaping what people expect from politics and helping to define the boundaries of acceptable action. What is very interesting in studying our politics is the continued pursuit of the political ideals upon which the nation was founded.

**Politics**

According to your textbook, politics can be defined as “the means by which society settles its conflicts and allocates the resulting benefits and costs.” Political scientist Harold Lasswell defined it as the struggle to determine “who gets what, when, and how”. It involves conflict and the struggle for lesser resources. Political conflict is rooted in two general conditions of society: 1) scarcity, society’s resources are finite, but people’s appetites are not; 2) differences in values, people see things in different ways. In very basic terms, those that have “it” want to keep “it”, those that don’t have “it” want to get “it”.

**Power**

As your textbook points out, “Power is basic to politics.” The author defines power as “the ability of persons, groups or institutions to influence political developments.” Competition for power among a great many interests of all kinds is a major characteristic of American politics. Many people seek to influence public policy, and use a variety of resources to achieve this. Considering all of the factors than can come from policy decisions it is no surprise that people seek political power. What is important is that here in the United States we have rules that help define the struggle for that power. Rules are necessary in politics because the stakes are often very high.

**Government**

Not defined in your textbook, but I feel it is necessary to do so here. Government can be defined as the effort of people to find agreeable ways of living together. It is, essentially, a social institution. We can also view it as a public institution with the authority to allocate values in society. It is a way for defining the relationships between people within a society.

Two aspects to government:

1) the **institutions** in a society which make decisions that affect the whole society

2) it also involves the **processes** by which decisions are made.

Know this: government is deeply involved in politics, but politics is also found in other aspects of society.

**Democracy**

According to your textbook, “democracy is a form of government in which the people govern, either directly or through elected representatives.” It is a form of government based upon the theory that the legitimacy of any government must come from the free participation of its citizens. It is based on the idea of the consent of the governed, which has come mostly to mean majority rule.

**Theories of Power in Modern Democracies**

For our purposes in this class, there are essentially three different theories of power in modern democracy in the United States. These provide a basis for understanding how power is exercised within our country as well as understanding who specifically benefits under each of these theories.

1. **majoritarianism**. This is the concept that the numerical majority prevails not only in counting votes but also in determining public policy. This is sometimes referred to as classical democracy. The problem with this form of democracy is that sometimes minority groups can get overlooked when considering public policy. It is also rare that majorities make decisions under our system of democracy.
2. **pluralism**. This holds that policies are effectively decided through power wielded by special interests that dominate particular policy areas. It helps to protect the rights of minorities. It tries to assure representation for all segments of a diverse (**pluralistic**) society. The problem with this form of democracy is that many times the will of the majority is thwarted.
3. **elitism**. This holds that policy is controlled by a small number of well-positioned, highly influential individuals. It is NOT democratic at all. In most theories of elitism the elite is an economic elite who controls the principal economic resources and products in society. The elite uses its economic power to gain and hold political power, sometimes openly and sometimes covertly.

No one of these theories completely explains how decisions are made, but each has its merits, and, as we shall see during this semester, helps to explain how things happen within our government institutions and processes.

**Sovereignty and the Social Contract**

Sovereignty can be defined as the ultimate authority to govern. Under our system of government, each individual has the authority to govern themselves. They concede some of this sovereignty to a government to help make an orderly society. This is the basis of what is called the “social contract”, first theorized by Thomas Hobbes, which creates an unwritten bond between those who are governed and those who do the governing. This is discussed further in Chapter 2 and in a special handout which you can download and read.

**Legitimacy**

The belief people have that their government is based upon morally right principles, and that therefore they should obey its laws. All governments, in order to be effective, must have this. Somehow, the people must recognize the right of the government to govern.

**Authority**

According to your textbook, authority “is the recognized right of officials to exercise power.” The “rules” that define how power is exercised allow for the institutions that are granted power.

**Constitutionalism**

Rules of this restrict the lawful uses of power, and relate specifically to the idea “that there are limits on the rightful power of government over its citizens. In a constitutional system, officials govern according to law, and citizens have basic rights that government cannot deny or abridge.” Your textbook then goes on to cite examples, such as freedom of expression, of things that government cannot take away from its citizens. Remember, a constitution is a limiting document, its purpose to limit the powers of government.

**Free Market System**

The concept of a free market (laissez-faire) system was first hypothesized by Adam Smith. It is basically a set of rules governing the distribution of supply and demand. In theory it states that government should interfere with the economy as little as possible due to the fact that this is a “natural” system. It emphasizes free enterprise and individual self-reliance. A major characteristic of the American system is a sharp distinction between what is political, and therefore to be decided in the public arena; and what is economic, and therefore to be settled in the private realm.

**Public Policies**

Public policies are what government formulates, or, per your textbook, “decisions by government to pursue a particular courses of action.” Laws, rules, regulations, ordinances - all these things are examples of public policy. There is seemingly no end to the policies that government formulates. This is largely in response to what you, the citizens of this nation, request.

**Political System**

Government is essentially a political system. It exists to resolve conflicts in society. This is a model of our political system and shows how the various parts of the American government are interdependent and how they function. The framework for our government is the Constitution.

**CONSTITUTIONAL FRAMEWORK**

Includes provisions for limited government (e.g. checks and balances), representative government, civil liberties and civil rights.

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| --- | --- | --- |
| Inputs | Political Institutions | Outputs |
| Includes public opinion, voting and other forms of participation, political parties, campaigns, interest groups, and the news media | Includes the major institutions of government: Congress, the presidency, the judiciary, and the bureaucracy | Public Policy: Includes laws, programs, and other actions in such areas as economic policy, social policy, foreign policy, and defense policy |

LECTURE NOTES – CHAPTER 2

Your textbook provides some background as to the reasons that our Founding Fathers eventually wrote the Constitution. However, I feel it is important to go into a little more detail. Why did our forefathers, some 220 years ago, set up the system of government that they did? Why did they create the Constitution in the form that it was adopted? What factors contributed to this form of government? By understanding these questions and going into greater detail of events leading up to the Revolutionary War, and eventually the writing of the U.S. Constitution I believe that it will help you have a deeper understanding of the reasons that our government was created. What we wish to do first is to try to understand the factors that led to this new form of government. Keep in mind that when we say new, it was indeed new for its time. In the mid 1700s, there were no constitutional democracies in existence anywhere in this world.

First, historically, the nature of the relationship between those who governed and those who where governed has changed over time. The philosophical ideas that stated the nature of this relationship changed.

Keep in mind that these ideas are fundamentally “western” in origin. When we say western, we mean Western Europe. We don’t have to study all of western history to know where some of these philosophical ideas came from, but we do have to go back a way.

Europe, following the fall of the Roman Empire, eventually was dominated by monarchies. Rulers often assumed power through what was called “Divine Right”. In other words, they became king because it was deemed that God had divinely ordained that these people had the right to rule. Though the rule was autocratic, some rulers were more civilized to their people than others. This became the dominant form of government in Western Europe for a significant period of time, and is only worth mentioning here because it is the cultural heritage from which the founders of this country came from.

This first major event that had a significant impact on the autocratic rule of monarchies came in England in 1215. Abuses by King John caused a revolt by nobles who compelled him to execute this recognition of rights for both noblemen and ordinary Englishmen. The noblemen forced King John to sign the Magna Carta. It basically established the principle that no one, including the king or a lawmaker, is above the law.

The second major event that had a major impact on how monarchies carried out their rule occurred in the middle 1600s in England. This was known as the Puritan Revolution. The English people were bent upon the establishment of a democratic parliamentary system of civil government and the elimination of the "Divine Right of Kings." King Charles I, the tyrant who had long persecuted the English Puritans by having their ears cut off and their noses slit for defying his attempts to force episcopacy on their churches, finally clashed with Parliament over a long ordeal with new and revolutionary ideas. The Puritans, or "Roundheads" (as they were called), led by Oliver Cromwell, finally led a civil war against the King and his Cavaliers.

Though the Puritans eventually prevailed (and King Charles I was eventually beheaded), what is important for us here is not that the English people were successful in developing a more democratic government, rather what is important here is the influence of the philosophical ideas of Thomas Hobbes that came about as a result of these tumultuous times.

In our 20th century concern for popular government we sometimes forget the service performed in early modern times by the royal monarchs. It was they who suppressed feudal turbulence, established law and order, and molded the first national states. Some were incompetent and some were predatory. Overall, they served a somewhat useful purpose of allowing the development of somewhat safe society in which most citizens were allowed to prosper. It would seem to indicate that in the first three centuries of the modern era, the absolutist kings generally served a useful, and possibly necessary, function. Their role was appreciated and defended by many of their subjects. Thus, not everyone wanted more democratic rule.

During this period several philosophers defended the role of the monarchs during this period. Of these perhaps the most important to us is Thomas Hobbes. Hobbes was dismayed by civil strife then raging in England (the Puritan revolution), and thus decided that only absolute government could maintain law and order. In the book that he published in 1651, Leviathan, he argues that the original state of nature (natural law) is a condition of constant war, which rational and self-motivated people would want to end. There people, then, will establish fundamental moral laws to preserve peace.

The foundation of Hobbes’ theory is the view that humans are motivated by only **selfish interests**. He theorized that basically selfish men, for their own protection, contracted with a king to rule them, but, once having made the compact, could not revoke it. To be effective, the ruler must be all-powerful. For purely selfish reasons, we are better off living in a world with moral rules than one without moral rules. Without moral rules, we are subject to the whims of other people’s selfish interests. This was the beginning of the idea of the so-called **“social contract”**, which means, basically, that a contract existed between those who ruled, and those that were being ruled. Though Hobbes ideas were a bit dated, they created the foundation from which another idea regarding the social contract would later be postulated that greatly influenced the Founding Fathers of this nation.

# The Intellectual Revolution

As we move into the 18th century (1700s), we enter into a dynamic era in which many great new ideas were coming about, largely as a result of the growth of natural sciences: astronomy, mathematics. This period is referred to as the **Enlightenment**. Western thinkers did not, however, limit their attention exclusively to science. They began to speculate on the broader meaning of science, its ethical, political, social, and economic implications. Philosophers began to speculate on what they termed **“natural law”** and man’s place in this natural order.

Though there were many who contributed, the one philosopher who had the most impact on Western thought during this period was John Locke (1632-1704). Locke’s overall philosophical ideas were termed **empiricism** (pursuit of knowledge through observation and experience). However, what his impact in political ideas, which can be found in his books **Two Treatises on Government**,is at the heart of what we need to understand here. As opposed to Hobbes, Locke argued that the state of nature is a pre-political yet moral society where humans are bound by divinely commanded natural law. A social contract is made between citizens who initiate a government to prevent people from occasionally violating natural law.

In this book Locke argued that man has “natural rights”: life liberty and property. To safeguard these rights men voluntarily contracted to surrender a certain amount of his sovereignty to government. The powers of government are strictly limited. Government must be built on the consent of the governed. No government can violate the individual’s rights to these things. If it does, the people who set it up can and should overthrow it. The sole purpose of government was to protect a person’s natural rights. These ideas would eventually have a profound impact on our founding fathers.

Though Locke is certainly the most influential of the thinkers that were proposing new ideas during this period, others contributed ideas that eventually made their way into our system of government. Among these was **Baron de Montesquieu** (1689-1755). Montesquieu was less a theorizer than a discerning student of history and a shrewd analyst of political systems. In this book, The Spirit of the Laws, he came to the conclusion that different types of government are best suited to various conditions. For instance, absolute monarchy is best for countries of vast area, limited monarchy for countries of moderate size like France, and republics for small states like Venice or ancient Athens. Not only did he approve of Locke’s doctrine of limited sovereign, but he specified how it can best be secured – by a system that would separate the powers of government. The powers and functions of government should be equally divided among kings, lords, and commons, each on being checked by the other two. His model was converted into executive, legislative, and judicial branches in the American system.

Another related development that occurred during this period that had an impact on American society dealt with some of the concepts of economics. Some French thinkers began to teach that economics has its own set of natural laws, that the most basic of these laws is that of supply and demand, and that these laws operate best when commerce is freed from governmental regulation. This doctrine came to be known as that of **laissez faire** (or free trade and enterprise). The chief formalizer of the theory of laissez faire was **Adam Smith**, a Scottish professor of philosophy who spent time in France. His book, Wealth of Nations, was published in 1776 and has remained the bible of laissez faire economics ever since.

**The American Revolution**

As we can see, a lot of dynamic social changes were occurring during the period of the late 1600s to early 1700s. Into this atmosphere of significant change in Western Europe came the growing American colonies, and the issues leading up to the American Revolution.

The American Revolution was a fairly complex movement, and its details are more suited for history classes, but some things we should know here. Most notably, it was **not** a revolution for social changes. It was a very conservative revolution in that it set out to keep things that the colonists felt were their rights that were being denied to them by the British. To a very large degree, the Americans were very happy with their life in the Colonies, and what they were fighting for was to keep things the way they were. In addition, in the century and a half prior to 1776, American society had become fundamentally different than British and European societies, and we need to understand what these differences were.

First of all, America was geographically distant from Europe. It took one to two weeks to make the journey from Europe to American by boat. This distance began to lend itself to a growing sense of independence among the people in America. Americans could not depend upon the British to be there when they needed them, thus the Americans develop a strong ability to deal with things on their own. Americans became very practical in handling the day-to-day issues that arose in the new territory.

Secondly were the economic differences from Europe. The colonial economy was a diversified agricultural economy and had grown to be independent of Britain. With the growing surplus of agriculture came the development of merchants and manufacturing, and the beginning of trade with other nations (mostly raw materials). The colonies were not totally self-sufficient, but they were not totally dependent on Britain and Europe. American entrepreneurs were intent on protecting and expanding their own interests, and wanted to do so more and more without constraints.

Third were the social differences from Europe. Almost none of Europe’s aristocracy had immigrated to America. American aristocracy was based on wealth rather than on blood. It was possible for an enterprising and lucky man of the lower classes to attain aristocratic rank by amassing a fortune. The frontier also offered an opportunity to men of humble origin, who resented aristocratic dictation, to achieve rank and privilege by moving westward and forging new wealth for themselves mostly through agriculture.

Finally were the political differences. These were probably the sharpest of all the differences. Although each colony had its own government, a common pattern had developed by 1776. Each colony had a governor who represented the authority of the British crown and who was usually chosen by the king. Each colony (except Pennsylvania) had a two house legislature. The lower house was elected by property owners, while the upper house was usually appointed by the British king or by the governor. Governors did have power of veto over legislature, but did not exercise this often for fear of political reprisal. The court system was patterned after British courts and had incorporated tradition of English common law which included the right to a trial by a jury and due process of law. Colonial governments had grown increasingly accustomed to a wide range of freedom, and the colonists increasingly felt that it was their right to decide their own fate.

Keep in mind that the most Americans were still very much Englishmen and English citizens, and were still closely attached to their European tradition.

Starting in 1763, a gradual change in English policies began to negatively affect the colonists. On the English side, they had just finished fighting the Seven Years’ War (also know as the French and Indian War) in America. It had been marked by a refusal of the Americans to raise troops and money, their blatant trafficking with the enemy (France), and by open defiance of the royal authority. England began to realize how inadequate her system of control over the colonies was. The war also left England with a huge debt, incurred in part to save the Americans from the French and the Indians. In the minds of the English taxpayers it was time for the ungrateful colonials to pay up. They started passing laws that placed new taxes on the Americas and the Americans began to resist these. More and more talk centered around the concept of “taxation without representation”. In other words, the colonists felt that they were unfairly being taxed without having a say in the policies that created the taxes.

As time went by, the colonists began more resistance to the English policies. In 1773, a group of Bostonians, dressed up as Indians, raided a ship docked in Boston harbor and dumped all of the contents (mostly tea) into the harbor. This was the so-called “Boston Tea Party). It greatly angered those back in England. In response, the English pass what are called in the colonies the “Intolerable Acts”, which close the port of Boston, and places Massachusetts under the control of a military commander. The British go so far as to quarter their troops in the homes of citizens. The colonials are not happy.

In 1774, at the instigation of leaders in Virginia, the First Continental Congress was summoned to meet in Philadelphia. This meeting is dominated by many very radical leaders: Patrick Henry, Samuel Adams, John Hancock, and others. Though they did not actually accomplish much other than vocal protests, the meeting showed to all the leaders of the various colonies that a general feeling of dissatisfaction with the English existed throughout the colonies. They agree to meet again the following spring.

On May 10, 1775, the Second Continental Congress gathered in Philadelphia, and the leaders move quickly to declare independence. They nominated George Washington as commander of the American armies, and charge him with raising troops. They began to try to provide financing for the coming war. They sent members to France to open diplomatic relations. Finally, they began to create and issue papers stating their positions on various issues. During this time, a variety of skirmishes take place between the English army and the colonials. Finally, in June of 1776, a committee is selected to write a formal declaration of independence.

Although Benjamin Franklin, John Adams, Thomas Jefferson, Roger Sherman and Robert B. Livingston comprised the committee charged with drafting the Declaration, the task fell to Jefferson, regarded as the strongest and most eloquent writer. The document is mainly his work, with a few minor exceptions. Its purpose was to set forth the principles upon which the Congress had acted two days earlier when it voted in favor of Richard Henry Lee's motion to declare the freedom and independence of the 13 American colonies from England. The Declaration was designed to influence public opinion and gain support both among the new states and abroad -- especially in France, from which the new "United States" sought military assistance.

As a scholar well-versed in the ideas and ideals of the French and English Enlightenments, Jefferson found his greatest inspiration in the language and arguments of English philosopher John Locke, who had justified England's "Glorious Revolution" of 1688 on the basis of man's "natural rights." Locke's theory held that government was a contract between the governed and those governing, who derived their power solely from the consent of the governed and whose purpose it was to protect every man's inherent right to property, life and liberty. Jefferson's theory of "natural law" differed in that it substituted the inalienable right of "the pursuit of happiness" for "property," emphasizing that happiness is the product of civic virtue and public duty.

Jefferson emphasized the *contractual justification* for independence, arguing that when the tyrannical government of King George III of England repeatedly violated "natural law," the colonists had not only the right but the duty to revolt. Basically, the Declaration held that the British government had violated their rights as Englishmen and thus had no claim of allegiance of its subjects. They were therefore entitled to form a new contract to ensure their rights. Consent of the governed made the exercise for political power legitimate, not divine rights or tradition.

The assembled Continental Congress deleted a few passages of the draft, and amended others, but outright rejected only two sections: 1) a derogatory reference to the English people; 2) a passionate denunciation of the slave trade. The latter section was left out, as Jefferson reported, to accede to the wishes of South Carolina and Georgia, who wanted to continue the importation of slaves. The rest of the draft was accepted on July 4, and 56 members of Congress began their formal signing of the document on August 2, 1776.

You should read the preamble and first part of the Declaration (down to the part that begins listing specific grudges that the colonists had against the King of England) that is located in the back of your textbook. It is one of the most eloquent statements for freedom in the history of western civilization.

The Revolutionary War was fought for a significant period of time (approximately 7 years). I am not going to go into depth to discuss it here. To a degree it is better discussed in your textbook, but really the facts of the War are really better left to history courses). It ended with the Treaty of Paris in 1783, in which Britain recognized America’s independence and ceded to America all territories east of the Mississippi from the Great Lakes to Spanish Florida.

Besides the Declaration of Independence, the Second Continental Congress had also begun the creation of a new government. Dominated by strong radicals, they had a very intense distrust of strong government over which the populace had no control. Also, they had the long tradition of existing as separate colonies. The new government reflected these feelings. The result of this work ultimately led to the Articles of Confederation which were originally shaped in 1777, and were ultimately adopted by all the states by 1781. They established a national congress in which each state had one vote. It was given authority to conduct foreign affairs, declare war, issue money, raise armies, fix weights and measures, and borrow money. However, it was not given the power to tax or to regulate commerce among the states! The Articles thus established a loose union of thirteen nearly independent states headed by a central government that could not compel them to do anything but could only encourage them to cooperate.

**A New Constitution**

The Articles survived until 1789. The primary problem facing the new states dealt with problems of regulating commerce. Some states were issuing paper money which was nearly worthless, which caused inflated prices, benefited debtors, and nearly wiped out the fortunes of the wealthy. There was no uniform monetary standard, and policies favoring debtors over creditors did not please the economic elite, who had once controlled the states’ legislatures.

In 1786 an important event occurred in western Massachusetts that had a profound impact on the thinking of the economic elite throughout the states. A series of armed attacks by farmers on courthouses to prevent judges from foreclosing on their farms. These attacks were led by former Revolutionary War Captain Daniel Shays, and came to be known as Shay’s Rebellion. Many of these farmers were former Revolutionary War veterans who had been promised against foreclosure during their tenure in the war (the colonies did not have money to pay the soldiers during the Revolutionary War, so they were promised land instead). This further frightened the economic elite. They were scared at the thought that people had taken the law into their own hands and violated the property rights of others. A general fear of lawlessness moved the elite to action.

In May 1787 the Congress under the Articles authorized a convention “for the sole and express purpose of revising the Articles of Confederation”. Representatives from 12 states (only Rhode Island was absent) were sent to Philadelphia (a total of 55 delegates). Most of the delegates were wealthy, many had a college education, and most also had practical political experience. Rather than working on revising the Articles, the convention delegates immediately decided to scrap the Articles in order to write a new Constitution (please note that they did not have the authority to do this).

Major Issues facing the delegates:

The first major issue dealt with **representation** and the makeup of the new legislature. Two plans were proposed for the new Congress.

**The New Jersey plan (or “Small State plan”)** called for each state to be equally represented in the new Congress, just as they were under the Articles. When we say small state, we mean states that were small in terms of population. Smaller states were concerned that if the new Congress was based on population they would not have as much of a say in policies.

**The Virginia plan (or “Large State plan)** called for giving each state representation in Congress based on the state’s share of population. The fear of the large states was the equal representation with the smaller states would thwart the will of the majority of the populace.

The ultimate solution to these two positions came with what has been called the **Great Compromise, or sometimes the Connecticut Compromise**. Roger Sherman and William Johnson of Connecticut proposed that the new Congress be made up of two houses. One body, the Senate, would have equal representation of each state (each state would have two members). The second body, the House of Representatives, would have representation based on population. This compromise satisfied the needs of both groups advocating the two separate positions.

The second major issue that confronted the delegates was that of **slavery**. Slavery was still legal in every state except Massachusetts. It was, however, concentrated in the south. The southern states were heavily dependent upon agriculture for the support of their economies, and this intense agriculture required the heavy use of manpower to make it economically feasible. To the southern delegates, the only way to keep their economies supportable was the continued use of slavery. This issue threatened to divide the convention and keep the states from being united. In a way, the delegates of the convention “punted”, not dealing directly with the issue but in many ways leaving some of the thorniest problems to future generations. The delegates could only agree that the new Congress could limit the future importation of slaves. They also agreed that slavery could be outlawed after 1808, rather than outlawing it outright at this point in time. A major problem, however, was how to count slaves with regard to population in determining representation. Southern states were adamant that slaves should be counted as people when discussing **apportionment** (how many members of the House of Representatives each state was to get). Ultimately, the convention agreed on what is known as the **three-fifths compromise** (sometimes called the North-South compromise). Every five slaves would count as three persons for determining population. It was an ugly solution that would lead to horrible consequences later in the history of the young country, but it was necessary to hold the new, fragile, coalition together.

# Providing for Limited Government and Giving the People a Voice

As we have stated previously, the people of the colonies were deeply suspicious of governing power. Even though the delegates to the Convention wished to strengthen the powers of the central government, they also were aware that too much power in any one level of government could eventually lead to abuses of power. Thus, one of the main goals of the Convention was the establishment of a national government that was restricted in its lawful uses of power **(limited government)**, and that gave the people a voice in their governance **(self-government)**. The Constitution seeks to establish a government strong enough to enforce national interests, but not so strong to destroy liberty. Thus the document creates a rather complicated and intricate system of government. The primary architect of this was James Madison. Among the specific features built into the Constitution to accomplish are as follows:

1. limited government was built into the Constitution thought both specific **grants of power** and **denials of power**. Each branch of government was given specific tasks which they could or could not do (will discuss more in federalism and in chapters specifically on each branch later in semester). Examples: Article I, Section 8 defines Congress’s lawmaking authority and confines it to 17 specific powers. One denial of power is that the writ of habeas corpus cannot be suspended (except in time of war. A court order which enables persons detained by authorities to secure an immediate inquiry as to the causes of their detention).
2. Framers sought to check power with power (Madison: “ambition must be made to counteract ambition”) by dividing the authority of the government so that no single institution could exercise great power without the agreement of other institutions. This was known as **separation of powers**.
3. Limited government was reinforced by a system of separated institutions sharing power, creating elaborate **checks and balances** between the three branches of the national government.

There are other limitations within our system of government that also help to limit the power of the national government:

**Federalism**. This helps to protect liberty by dividing power further between the national and state/local levels of government (discussed further in Chapter 3).

**The Bill of Rights**. Added after Constitution was adopted. Designed to protect individuals’ **civil liberties** (discussed further in Chapter 4) from being taken away by the national government.

Finally, a very important check on the legislative and executive branches is the judiciary, which ultimately determines whether the government is operating within its constitutional framework of powers. **Marbury v Madison (1803)** established the principle of **judicial review**. Please make sure you read about this case in your text and understand its implications.

In terms of providing for self-government, the framers were more reluctant to give direct power to the citizens. The framers feared the **tyranny of the majority** and proposed to control the power of the majority. (Actually, they called it **faction**, and feared both majority and minority factions. Madison wrote directly about this in **Federalist Number 10**, which is located within your textbook and is highly recommended reading. It is considered one of the finest essays on political thought in the history of western civilaztion.). Madison believed it was essential to keep most of government beyond the control of majority factions. Thus, the framers distinguished between a **democracy** and a **republic**.

1. in a direct democracy the public decides issues directly.
2. In a republic, or representative government, officials elected by the public meet in representative institutions to decide policy for the public.
3. The Framers adopted the trustee theory of representation as proposed by the philosopher Edmund Burke. Representatives were trustees, not necessarily obligated to the majority.

It is important to note that NO PROVISIONS WERE MADE FOR DIRECT POPULAR PARTICIPATION AT THE NATIONAL LEVEL.

Only the House of Representatives would be elected directly by the people, but not at large, only within districts to be equally divided on the basis of population. House members also serve only two year terms. The House is thus designed to be more responsive to the will of the people.

Senators were to be appointed by the legislatures of each state and serve 6 year terms. This makes them less susceptible to the will of the people.

The president was to be chosen by electors from each state rather than a popular election. Each state has as many electors as members of Congress and can appoint them in any manner they seem fit. President serves 4 year terms.

Judges were to be appointed rather than elected.

All these things severely limit the ability of you the voting public to have access to the people who run your government. Essentially the Framers did not trust the will of the people in making governing decisions!

It is important to note that this Constitution creates a very deliberate decision making process. It has a built-in conservative bias because it favors the *status quo*. Change is slow and awkward. When change has occurred it is when there has been a *sizable majority* wanting something. The Madisonian system encourages moderation and compromise, and retards change. This is one of the reasons why it has been called an elitist document by some.

Your textbook discusses how this has changed some over the history of the United States. Jefferson championed greater citizen participation, but really made little impact. Jacksonian Democracy – changed the election of the president into a system more based on popular vote (**unit rule**). Abolished property ownership as a requirement for voter registration. Promotion of grass-roots parties.

Progressive Era (late 1800s early 1900s). Many reforms. (17th Amendment, 1913, provided for the direct election of Senators, 19th Amendment, gave women the right to vote.

Make sure you read this section and understand how the Constitution has changed gradually over time due to these movements.

# Ratification of the Constitution

Immediately after the creation of the new Constitution, a fierce battle erupted between the so-called **Federalists** and **anti-Federalists**. The Federalists favored a stronger, more powerful central government. The Federalists were led by Madison, Alexander Hamilton, and John Jay, who, separately, wrote a series of papers (under the pseudonym of “Publius”) called the Federalist Papers (85 articles published in newspapers around country). These papers defended the proposed Constitution in detail, but also represented an important statement of political philosophy.

The Anti-Federalists, led primarily by Jefferson, feared that the new Constitution was a *class-based document* intended to ensure that a particular economic elite controlled the public policies of the proposed national government. They feared that the new government would erode *fundamental liberties* and would *weaken the power of the states*. They thought that the new government was a threat to the hard fought freedom that they had just fought a war to achieve and worried about the government being run by an elite few. They insisted on a Bill of Rights to protect individuals. As a compromise the Federalists promised to add new amendments to the document specifically protecting individual liberties immediately upon adoption of the new Constitution.

**Ratification of the Constitution**

Members of Constitutional Convention specified that each state must ratify the new Constitution by a **state convention** rather than the state legislatures. Also, they stated that it would take effect if **only two-thirds (nine states)** of the states approved of it, rather than all the states (as had been the mandate of the convention). They were keenly aware that getting all of the states to agree to the new document was probably not feasible. Thus they took the power to approve away from the government of the Articles of Confederation (which would have required all states to agree to the new document).

On December 7, 1787, Delaware was first of the states to approve the new Constitution. Within six months nine states had approved. The others quickly followed for fear of being left out. Eventually in 1788 the United States held its first elections for the new national government under the new Constitution. On April 30, 1789, George Washington took the oath of office to be sworn in as the first president of the new national government.

# How to change the Constitution

**Formal Amendments**

Formal amendments can be added to the Constitution by one of two methods. This is essentially a two-step process, proposal and ratification and each of these two steps has two possible procedures.

**Proposal**

Congress can propose an amendment by a 2/3 vote of both houses (this is the only method which has ever been used)

-or-

A national convention called by Congress at the request of 2/3’s of the state’s legislatures (this has never been used)

**Ratification**

By a vote of ¾’s of the state legislatures (all but one of the

amendments – 26 times)

-or-

By special conventions called in ¾’s of the states (used only once,

the 21st Amendment, which repealed the 18th Amendment)

As of today, there are a total of 27 Amendments to the Constitution of the United States.

# Summary: U.S. Constitutional Democracy Today

The United States today has a hybrid system of constitutional democracy that combines original counter-majoritarian elements with newer majoritarian aspects.

* 1. The U.S. conducts elections for the House of Representatives and for the chief executive more frequently than any other democracy.
  2. Popular rule in the U.S. is illustrated by primary and general elections.
  3. Less majoritarian elements of the U.S. system are the separation of powers and staggered terms of office which encourage separate constituencies.
  4. The link between an electoral majority and a governing majority is less direct in the American system that in European democratic systems.

This is a complex system of government, deliberately so, in order that any one person or group could not be able to take control of government and set unpopular policies. Understanding it takes a considerable amount of time. It asks a lot of the people, but offers much, in terms of individual liberty, in return. It has now been our guiding document for over 220 years, and is currently the oldest system of government on the planet.

**Chapter 3 Federalism**

**Essentially, the power of government must be equal to its responsibilities. The Constitution was needed because the nation’s preceding system (under the Articles of Confederation) was considered too weak to accomplish its expected goals, particularly those of a strong defense and an integrated economy. However, creating a new constitution was not easy due to the autonomy of the states. The system of government that we now have in the U.S. is considered unique in the world because of the separate levels of government that exist (the states and the national government). During the history of this country this has been the source of a lot of conflict in trying to determine which level of government is supposed to carry out different policy objectives. Thus it is important for us to know the nature of this relationship, how it came about, and how it has evolved over time.**

**Federalism**. A way of organizing a nation so that two or more levels of government have formal authority over the same area and people. It is a system of shared power between units of government. In the United States, it is the division of governing authority (sovereignty) between the national government and the state governments.

Keep in mind that federalism is NOT a fixed principle for allocating power between units of government. It is a principle that has changed over the course of time in response to political needs.

There are two other types of government besides federalism we need to know about: unitary, confederacy.

Unitary: most of the world’s governments. All power resides in a central government.

Confederacy: a union of states in which the states retain all sovereignty.

The federal system of government here in the United States decentralizes our politics. For example, in November, there are actually 51 separate presidential elections, one for each state and one for the District of Columbia (this is how the electoral college actually works, which we will explain later in our chapter on the presidency). It offers more layers of government, which allow for more opportunities for political participation. With more people wielding power, there are more points of access in government, and more opportunities for interests to have their demands for public policies satisfied. With more decisions made in the states, there are fewer sources of conflict at the national level.

HOWEVER, the federal system not only decentralizes our politics but also decentralizes our policies too. The history of the federal system demonstrates the tension between the states and the national government about policies: who controls it and what it should be.

The word federalism does not appear in the Constitution. In the late 1700s the people of the country thought of themselves as citizens of their respective states, not necessarily as Americans. The authors of the Constitution were very aware that the people of the country were sensitive to the issues of governing authority, and were very suspicious of a strong national government. Thus they carefully spelled out the powers of the state and national governments.

Figure 3-1 in the textbook, page 70 illustrates this.

**Enumerated (sometimes called expressed or delegated) powers**. Article I, Section 8, of the U.S. Constitution spells out the specific powers of the national government. Among these are the power to:

Coin money

Conduct foreign relations

Regulate commerce with foreign nations and among states

Provide for an army and a navy

Declare war

Establish post offices and postal roads

(Note: you do not have to remember the specific powers listed under Article I, Section 8, just be sure you understand what the concept of enumerated powers means.)

The primary purpose of the Framers was to establish a national government strong enough to regulate commerce and provide for a common defense. And yet, they were wise enough to foresee two possibilities with regard to the relationship between the states and the national government.

First, the last paragraph of Article I, Section 8, gives Congress the power “to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers…”. This is the so-called **“necessary and proper” clause**, sometimes called the **elastic clause**, of the Constitution. It allows for the national government to adapt to changing conditions. The framers did not want to overly stifle the new government with only the expressed powers. They wanted to provide flexibility to grow and adapt as changes to the political environment required. It gives the national government **implied powers**, which have changed over time.

**Secondly, the framers were aware that there might be disagreements between the states and the national government. The Framers were shrewd enough to foresee this possibly happening. Which prevailed, the national or the state laws?** Article VI **of the Constitution provides the answer to this. The framers state that the Constitution, the Laws of Congress, and Treaties made under the authority of the national government “shall be the supreme Law of the Land”. It also instructs judges in every state to obey the U.S. Constitution even if their state constitutions or state laws directly contradicted it. This is known as the** supremacy clause **of the Constitution.**

**As you can imagine, this was a very tough thing to try to sell to the people of the country in the late 1700s. People were very skeptical of granting the new government what was considered to be a lot of power. During the debate over whether to adopt the new constitution or not, many of the arguments of the anti-federalists were directed at these, claiming that the proposed government would be too strong and would usurp the states’ authority.**

**The response to this was the** Tenth Amendment **to the Constitution, the last of the Bill of Rights. The Tenth Amendment states, very simply, the “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”. This has come to be known as** reserved powers**.**

**This is indeed rather broad and vague, much like the supremacy clause or the elastic clause. There has been no set answer to exactly how each of these powers interrelate, and the definitions of each of these have change in scope and power over time.**

Evolution of Federalism

**To understand how federalism has existed through time as well as understand the contentious nature of the relationship between the states and the national government, the author of your text takes a look at how this relationship has evolved over time. He identifies three distinct periods of time that he contends represents how this relationship has existed. I’ll not go over all aspects of it here since it is covered well in your textbook, but there are some important points that I feel need to be highlighted. The key thing to understand is that the country overall has become more national in nature** (nationalization)**. As time has gone by we have come to look more towards the national government to resolve major policy issues that seem to affect us all. In looking at the three eras the author has identified that define the relationship we can see this evolution:**

**First Phase (1789-1865), which was characterized by conflict between the nationalist and states’-rights views.**

1. **The nationalist view, reflected in the** McCulloch v. Maryland (1819) **decision held that when national and state law conflict, national law prevails. The case also articulated the implied powers doctrine which held that the national government’s powers extend beyond a narrow reading of its enumerated powers. At issue was whether the national government had the right to create a national bank and compel the states to be a part of it. The chief justice of the Supreme Court at the time of this decision was John Marshall, who believed more in a nationalist point of view and thus sided with the creation of the bank.**
2. **John C. Calhoun was more of an advocate of states’-rights. He felt that the national government was a “government of states…not a government of individuals’. This line of reasoning led him to adopt his “doctrine of nullification”, which stated that a state had a constitutional right to nullify a national law. Eventually the idea of states’-rights led to the Supreme Court decision of the Dred Scott case (1857). Basically the Court ruled that the so-called Missouri Compromise (which made slavery illegal in free states or territories) was unconstitutional. The Court went further and ruled that slaves were property, not people, and thus can never earn citizenship. This ruling caused a major fraction of the Democratic Party at the time, and was a factor that ultimately led to the Civil War.**
3. **Ultimately the nationalist view was upheld by the election of Lincoln and Union victory in the Civil War.**

**Second Phase (1865-1937), which brought about the development of the principles of dual federalism and laissez-faire capitalism.**

1. Dual federalism **held that a precise separation of national and state authority was both possible and desirable.**
2. Laissez-faire capitalism **holds that business interests should be allowed to act without government interference. The Supreme Court interpreted the commerce clause to protect business from substantial regulation by either state or national governments.**
3. **After 1937 the Supreme Court recognized that an industrial economy must be subject to some level of national regulation if it is to serve the nation’s needs and interest, thus weakening dual federalism and laissez-faire capitalism.**
4. **In the Roosevelt era the Supreme Court broadened its interpretation of the federal government’s taxing and spending powers while upholding legislation of the New Deal programs.**

Federalism Today (since the 1930s)

**The national government’s policy authority has expanded greatly since the 1930s even though that authority has been reduced somewhat in recent years. Two countervailing trends in the development have emerged.**

1. **the first is a long-term expansion of national authority that began in the 1930s and continued for the next half century.**
2. **The second trend is more recent and involves a partial contraction of national authority know as “devolution”.**

**The states and citizens have become increasingly interdependent, providing the impetus for a stronger national government.**

1. **National, state and local policymakers are encouraged to collaborate to solve policy problems. This is known as** cooperative federalism**, which stresses shared policy responsibilities rather than sharply divided ones.**
2. **The federal government’s involvement in policy areas traditionally reserved for the states has increased its policy influence and has diminished state-to-state policy differences.**
3. **The federal government raises more tax revenues than do all the states and local governments combined, which led to the development of fiscal federalism.** Fiscal federalism **holds that the federal government provides some or all of the money for a program, while the states and localities administer it.**
4. **Federal assistance (such as** grants-in-aid**) provides a significant share of state revenue, though this varies from state-to-state. The two main types of federal assistance to state and local governments are** categorical grants **(designated activities, such as textbooks, teachers) and** block grants **(general areas, education for example, where the states or localities are free to spend as they see fit).**

Devolution **is the idea that American federalism will be improved by a shift in authority from the federal government to state and local governments.**

1. **Both budgetary pressures and a shift in public opinion led to changes in relations among the national, state, and local levels of government.**
2. **The Republican Revolution in Congress in 1995 took steps to decentralize federalism by reducing federal unfunded mandates and giving states more control over how money would be spent. States were encouraged to take more responsibility for welfare reform.**
3. **Public opinion plays a role in defining the boundaries between federal and state power.**

**The author feels that this movement (devolution) has stalled somewhat due to a couple of factors. First is the adoption of the No Child Left Behind Act under president George W. Bush. President Bush felt that the nation needed national standards for the education of children and thus pushed for a law to establish these rather than letting the states maintain their traditional independence in developing educational policy. Second, the September 11, 2001 attacks resulted in and expansion of national authority to protect the people by creating a new cabinet level Department of Homeland Security.**

**I am not sure I totally agree with the author that devolution is completely stalled. In the last few years we have seen contentious battles over the national budget and whether the national government should continue major programs. Conservative Republicans have pressed for a reduction of the national debt and a return of many programs back to the states rather than the national government.**

**From an overall perspective, however, the important thing to remember about federalism is that the relationship between our national government and the state governments has changed and evolved over time. It is expected that this trend will continue due to the changing priorities of public opinion.**

**Civil Liberties and Civil Rights**

It seems that no matter how many times I discuss these two concepts, some students invariably get them confused. Let us first start by stating the basic definitions of each.

**Civil liberties** are the basic liberties we have from arbitrary action by the government. What I think confuses students is that the book defines civil liberties as the specific individual rights that are constitutionally protected against infringement by the government. In addition, the primary protector of individual rights is the Bill of Rights of the U.S. Constitution. These are the first ten amendments to the U.S. Constitution.

**Civil Rights**, on the other hand, are the rights of all persons to be treated equally under the law. This concept is much less clear to understand, and rather than having specific guarantees for individuals, such as the Bill of Rights, many of the ideas that support civil rights have developed over the years in response to the demand for greater participation within the government by its citizens. Let us look at each of these in more depth.

**Civil Liberties**

Again, civil liberties protect us from government interference in certain areas of our lives. The rights insured by the First Amendment – the freedoms of expression, religion, and assembly – are essential to a democracy. If people are to govern themselves, they need access to all available information and opinions in order to make intelligent, responsible, and accountable decisions. If the right to participate in public life is to be open to all, then Americans, in all their diversity, must have the right to express their opinions.

Individual participation and the expression of ideas are crucial components of democracy, but so is majority rule, which can conflict with individual rights. The majority does not have the freedom to decide that there are some ideas it would rather not hear, although, at times, the majority tries to enforce its will upon the minority.

The First Amendment to the U.S. Constitution is considered the cornerstone to our basic freedoms. It provides protection for five essential areas of individual behavior:

“Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.”

## Freedom of Speech

**Freedom of expression is the most basic of democratic rights.** This freedom allows citizens to influence government and to act to protect their other rights.

People are not free unless they can freely express their views. A democracy depends on the free expression of ideas. Thoughts that are muffled, speech that is forbidden, and meetings that cannot be held are the enemies of the democratic process. Totalitarian governments know this, which is why they go to enormous trouble to limit expression. Though freedom of expression is not an absolute right, it has received broad protection from the courts in recent decades.

Keep in mind: NO RIGHT IS ABSOLUTE! Where do you draw the line between what is permissible and what is not permissible? Many people often want to limit expression. Ideas can be viewed as threats. In some ways, today we seem to have more government protection of being able to express ourselves than in the past, yet in other ways, since September 11, 2001, government has tried to monitor expression which it views as a threat against the safety of the people.

In earlier historical periods, Americans were less free to express their political views.

1. the Sedition Act of 1798 made it a crime to print false or malicious newspaper stories about the president or other national officials.
2. Also, during the Civil War era, as well as the “red scares” of the 1920s and 1950s, limits on free expression were imposed.

In the modern period, free expression has been protected by the Supreme Court’s development of standards regarding when the government could infringe on political expression.

The Supreme Court has generally devised **“tests”** for determining certain criteria when applied to questions of acts being determined to be constitutional or not. In the modern period, free expression has been protected by the Supreme Court’s development of standards regarding when the government could infringe on political expression.

1. the **clear-and-present-danger** test stipulated that political expression can be restricted only if speech was “of such a nature as to create a clear and present danger of substantive evils” to the nation’s security. 1919 (Schenck v. United States)
2. Supreme Court distinctions between **verbal speec**h and **“symbolic speech”** mean that the government can prohibit actions that threaten a legitimate public interest as long as the main purpose is not the inhibit free expression. Example: the burning of a draft card.
3. The court held that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Example: 1989 Texas v. Johnson.
4. Issues of **prior restraint**. Refers to a government’s actions that prevent material from being published. In a word, it is a form of censorship. If the government thinks a speech or publication might threaten “national security”, it often tries to prevent that from occurring, “prior to the fact”. The Court has generally struck down any attempts by the government to do this. Viet Nam era: New York Times was getting ready to publish the so-called “Pentagon papers”. The national government sued to prevent these from being published, but the Court struck this down.

Keep in mind that the Bill of Rights did not originally apply to the states. The Bill of Rights was considered necessary to protect citizens from the perceived abuses of the national government. The first statement of the First Amendment gives an pretty good idea of what they meant by this: “Congress shall make no law….”.

It was not until a 1925 Supreme Court case that the protections of the Bill of Rights began to be extended to all levels of government.In the case of **Gitlow v New York (1925)** theSupreme Court used the 14th Amendment’s **equal protection of the laws clause** to say to the states that they cannot deny freedom of expression:

“No State shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

This began an era of the Court where the doctrine of **selective incorporation** began. This means that the Court began to apply selected parts of the Bill of Rights to apply to the states as well as the federal government. Over time the Court gradually applied the protections under the Bill of Rights to the states.

## Since the 1930s the Court has broadly protected freedom of expression from action by the states and by local governments.

1. States cannot restrict free expression except when such expression is almost certain to result in **imminent lawlessness**.
2. The right of free expression takes precedence over the mere possibility that exercising the right may have undesirable consequences.
3. The Court has broadly held that while “hate speech” cannot be silenced, hate crimes can be prosecuted.
4. The time, place, and conditions of public assembly can be regulated.
5. Any government effort to regulate the content of a message is highly suspect.
6. Libel, slander, and obscenity are not protected as free expression.

## Freedom of Religion

“Congress shall make no law respecting the establishment of religion,…”

**The** establishment of religion clause **has been interpreted by the courts to mean that government may not favor one religion over another or support religion over no religion. Though assistance to religion is sometimes allowed, it is NOT to create the environment for an official religion of the state.**

**The Supreme Court has stated that a** “wall of separation” **must be maintained between the church and the state. State aid for educational purposes given to church-affiliated schools must primarily serve secular educational objectives. The court has consistently reaffirmed the ban on state-sponsored prayer.**

“…or prohibiting the free exercise thereof;….”

**The** free-exercise of religion clause **stipulates that Americans are free to hold any religious belief they choose. When possible, the Supreme Court tries to balance any potential conflict between the “free exercise” and “establishment” clauses, though sometimes one must yield to the other.**

# Rights of the accused

More for state and local government class, since 95% of all trials occur there. Nevertheless, it is important to know some things about the legal system at the national level, since the ultimate authority of what is legal comes from the supreme court.

Stages of the criminal justice process:

1. crime
2. arrest (warrant)
3. prosecution
4. trial
5. verdict

**Protection of persons accused of crimes has its roots in the concept of procedural due process of the law.**

**“Due process”** refers to the legal protections that have been established to preserve the rights of the individual.

**“Procedural due process”** refers primarily to procedures that authorities must follow before a person can legitimately be punished for an offense.

Specific procedural protections for the accused are spelled out in the Fourth, Fifth, Sixth, and Eighth Amendments.

Police cannot arrest a citizen without a reason. The need evidence to arrest and courts need evidence to convict. Before making an arrest, police need what the courts call “probably cause” to believe that someone is guilty of a crime. The Fourth Amendment is quite specific in forbidding unreasonable searches and seizures. To prevent abuse of police power, the Constitution requires that no court may issue a search warrant unless probable cause exists to believe that a crime has occurred or is about to occur. Warrants must specify the area to be searched and the material sought in the police warrant.

A warrant is NOT a constitutional requirement for a reasonable search, however. Most searches in this country take place without warrants.

**Exclusionary rule**: used by the Supreme Court since 1914. This rule prevents illegally seized evidence from being introduced in court, but until 1961 this only applied to the federal government. In the case of **Mapp v. Ohio (1961),** local police entered a home in Cleveland searching for evidence in a gambling case. They found pornographic materials and charged the person with that crime. Supreme Court overturned this case, so now Fourth Amendment protections extend to states too.

**Self-incrimination**. The Fifth Amendment states that no person shall be compelled to testify against himself. This was firmly established by the Supreme court in the case of **Miranda v. Arizona (1966).** Essentially, it ruled that you have the right to remain silent and may stop answering questions at any time. It also required police officers to notify you that anything said can be used against you in a court of law, that you have the right to an attorney, and if you cannot afford one, one will be provided for time.

**Right to counsel**. The Sixth Amendment always protected accused in federal courts. Majority of cases in U.S. are tried in state courts. In the case of Gideon v. Wainwright (1963), the Supreme Court ruled that accused felons must have the right to legal counsel in all cases.

Cruel and unusual punishment. The Eighth Amendment protects persons against cruel and unusual punishment. Historically the Court has upheld the death penalty, but this continues to be (at times) a hotly debated topic as to whether the death penalty itself constitutes cruel and/or unusual punishment, as well as how the death penalty is carried out.

Issues of crime and punishment in America still center around infringements on individual rights, especially those of minorities and the poor. One of the most important issues of justice is whether adherence to proper legal procedures produces reasonable outcomes. Justice = fairness. In many circumstances we find that those who are of lower socio-economic status, as well as minorities, seem to be disproportionately punished for commissions of crimes as opposed to the rest of society.

Summary:

The United States was founded on the belief that individuals have an innate right to personal liberty: To speak their minds, to worship as they choose, to be free of police intimidation. Historically the Court has been the most important branch of government in protecting these rights. Popular majorities are often tempted to diminish the freedom of those who hold minority views, have unconventional lifestyles, or simply look different.

**The Bill of Rights** (as arranged by function)

**Protection of free expression:**

*Amendment 1*: freedom of speech, press, and assembly; freedom to petition government.

**Protection of personal beliefs:**

*Amendment 1*: no government establishment of religion; freedom to exercise religion.

**Protection of privacy:**

*Amendment 3*: no forced quartering of troops in homes during peacetime.

*Amendment 4*: no unreasonable searches and seizures.

**Protection of defendant’s rights:**

*Amendment 5*: grand-jury indictment required for prosecution of serious crime; no second prosecution for the same offense; no compulsion to testify against oneself; no loss of life, liberty, or property without due process of law.

*Amendment 6*: right to a speedy and public trial by a local, impartial jury; right to legal counsel; right to compel the attendance of favorable witnesses; right to cross-examine witnesses.

*Amendment 7*: right to a trial in civil suit where the value of controversy exceeds $20.

*Amendment 8*: no excessive bail or fines; no cruel and unusual punishments.

**Protection of other rights:**

*Amendment 2*: right to bear arms.

*Amendment 5*: no taking of private property for public use without just compensation.

*Amendment 9*: unlisted rights are not necessarily denied.

*Amendment 10*: powers not delegated to the national government or denied to the states are reserved for the states or the people.

**Equal (Civil) Rights**

**Equal rights (or sometimes referred to as civil rights)** involves issues of equality. As stated earlier, all persons have the right to be treated equally under the law, and have equal access to society’s opportunities and public facilities. Historically in the United States, disadvantaged groups (primarily minorities) have had to struggle for equal rights.

The original Constitution does not mention the word “equality”. The words “all men are created equal” actually comes from the Declaration of Independence, penned by Thomas Jefferson. Not even the Bill of Rights mentions equality.

So where do our ideas of people being treated “equally” come from? The Bill of Rights does have implications for equality, because it does not limit its guarantees to specific groups in society.

The first and only place in which the idea of equality appears in the Constitution is in the **Fourteenth Amendment**.

This one was of the three major amendments passed at the end of the Civil War. (The Thirteenth Amendment abolished slavery and the Fifteenth Amendment extended the right to vote to former slaves)

As we mentioned above, the Fourteenth Amendment forbids the states from denying to anyone **“equal protection of the laws”.** Just these few words were enough to begin assuring that all Americans were treated equally.

Disadvantaged groups have had to struggle to gain a variety of rights: voting, education, employment, disabilities. To a large degree, this struggle to achieve “equality” has been a struggle of the African Americans in our society. Other groups: women, elderly, Hispanics, Asian Americans, Native Americans, and the disabled.

The struggle of African Americans to achieve equal rights is most notable in studying American history. Most African Americans originally arrived in this country as slaves. It isn’t my intent to go into a great amount of detail here on the history of the Black Civil Rights movement, but there are some things you need to be sure that you are aware of.

One of the events that helped lead to the Civil War was the Supreme Court case of Dred Scott v. Sandford (1857), sometimes referred to simply as the Dred Scott case. The essential thing to note about this case was that it ruled that slaves were property, not citizens, and thus were not entitled to many rights under the law.

With the end of the Civil War (1865) came the end of slavery. As mentioned above, the Thirteenth Amendment to the Constitution officially ended the practice of slavery in all of the United States. However, this did not end discrimination. In the South, various methods were devised to continue to deny African Americans rights under the law. Among these were Jim Crow laws, which were a series of laws passed by Southern states that sought to limit access to public facilities by African Americans, as well as limit their ability to vote. These laws mandated separate facilities for whites and blacks (schools, restrooms, movie theaters, restaurants). In the Supreme Court case of **Plessy v. Ferguson (1896),** the Court upheld the concept of separate facilities by saying that separate facilities were legal if they were equal.

This practice of **“separate but equal”** continued until the case of Brown v. Board of Education (1954). This case is probably the single most important case of the 20th Century by the Court. The Supreme Court ruled that separate but equal violated the equal protection of the laws clause of the Fourteenth Amendment. It ordered states to remove these barriers “with all due speed”.

Still, progress was slow as Southern states continued to resist federal mandates. In 1964 Congress passed the **Civil Rights Act**. This hallmark piece of legislation provided for the following:

1. Prohibited federal aid to school districts that remained segregated
2. Made racial discrimination illegal in hotels, restaurants, and other places of public accommodations
3. Forbade discrimination in employment on the basis of race color, national origin, religion or gender
4. Created the Equal Employment Opportunity Commission (EEOC) to monitor and enforce protections against job discrimination
5. Provided for withholding federal grants from state and local governments and other institutions that practiced racial discrimination
6. Strengthened voting rights legislation
7. Authorized the U.S. Justice Department to initiate lawsuits to desegregated public schools and facilities

There are two types of segregation that you need to be aware of:

**De facto segregation**: segregation that is a consequence of social, economic, and cultural bias.

**De jure segregation**: segregation that is based on law.

The Civil Rights Act of 1964 was a major step towards ending de jure segregation. However, it still did not address a very important element of the rights of African Americans, and that was their right to vote. We will discuss this more in the next unit, but this was another major area of trying to restrict equality. The **Fifteenth Amendment**, adopted in 1870, guaranteed that former slaves had the right to vote, however, Southern states used a variety of laws to circumvent this. Poll taxes, literacy tests, and white only primaries helped to exclude African Americans their right to vote.

The **Voting Rights Act of 1965** prohibited any government from using voting procedures that denied a person the vote on the basis of race or color.

**Equality of results** (sometimes referred to equality of outcome or equality of condition) is a term that refers is the aim of policies intended to reduce or eliminate de facto segregation. Initially this was aimed at trying to make sure that the result of any policy decision, whether in the public arena or the private arena, was such that the ending result of that decision allowed for a dissemination of wealth throughout society that represented the statistical variations of different groups within that society. For example, if African-Americans made up approximately 15% of the overall society, then they should have approximately 15% of the overall wealth of the society. This is in contrast with the concept of **equality of opportunity**, which basically states that all people should be similarly regardless of race, gender or other conditions.

In the wake of the Civil Rights movement on the 1950s and 1960s, policies were put in place that sought to try to “balance” out past discriminations against disadvantaged groups. In general we referred to these policies as **affirmative action**. Affirmative action programs aim to “provide full and equal opportunities in employment, education, and other areas for women, minorities, and individuals belonging to traditionally disadvantaged groups.” The goal of these programs was the result, which meant that in order to try to make sure that disadvantaged groups were able to obtain opportunities then compensations were considered so that anyone from one of those groups was to be considered first in various decisions, whether it was admission to schools or to obtain a job. This concept was very controversial and was met with considerable opposition. Eventually the courts began to reverse some policy decisions on the basis that they constituted what has been referred to as reverse discrimination. A noteworthy case that demonstrated the concern the Supreme Court had with affirmative action policies was University of California Regents v. Bakke (1978). In this circumstance a white male, Allan Bakke, had been ruled ineligible for the medical school in California because a quota system had been developed for minorities to aid in the admission into the school. California had allowed minorities who had lesser qualifications than Mr. Bakke to enter the medical school to satisfy this quota. However, Court did not completely strike down all aspects of affirmative action. As time has gone by, the Court has ruled several times that separate policy structures designed to aid minorities in obtaining access to various resources of society (education, jobs positions, contracts) have been illegal. Today the general concept of affirmative action is very limited, and the policy of equality of opportunity is more often used as the basis for these policy decisions.