

GENERAL STUDIES COURSE PROPOSAL COVER FORM

Course information:

Copy and paste **current** course information from [Class Search/Course Catalog](#).

College/School	College of Liberal Arts and Sciences	Department/School	School of Civic and Economic Thought and Leadership
Prefix:	CEL	Number:	394
Title:	The American Constitution I: Structures		Units:
			<u>3</u>

Course description: This course is designed as the first of a two-part sequence on the Constitution and its law and development, with an emphasis on the powers and structures of government, specifically federalism, the separation of powers, and rule by the law of the Constitution itself. We will begin with a discussion of the American Founding, then move to the consolidation of judicial review as we, like earlier Americans, grapple with questions about what the Constitution is and who is authorized to interpret it. From there, we will turn to the division of powers between the states and the federal government and to the allocation of powers between Congress and the president, including in the realms of foreign policy and emergency powers. We also study the different understandings of constitutional interpretation (e.g. originalism and “living constitutionalism”) that underlie these fundamental debates. Unlike many such courses which focus nearly exclusively on judicial decisions and case law, we will situate such discussions within broader constitutional deliberations among legislators, presidents, governors, and the American people. The class will culminate in a moot court exercise. Honors Contracts available for this class.

Is this a cross-listed course? No If yes, please identify course(s):

Is this a shared course? No If so, list all academic units offering this course:

*Note- For courses that are crosslisted and/or shared, a letter of support from the chair/director of **each** department that offers the course is required for **each** designation requested. By submitting this letter of support, the chair/director agrees to ensure that all faculty teaching the course are aware of the General Studies designation(s) and will teach the course in a manner that meets the criteria for each approved designation.*

Is this a permanent-numbered course with topics? No

If yes, all topics under this permanent-numbered course must be taught in a manner that meets the criteria for the approved designation(s). It is the responsibility of the chair/director to ensure that all faculty teaching the course are aware of the General Studies designation(s) and adhere to the above guidelines. Chair/Director Initials

Requested designation: Historical Awareness–H

Mandatory Review: (Choose one)

*Note- a **separate** proposal is required for each designation.*

Eligibility: Permanent numbered courses **must** have completed the university’s review and approval process. For the rules governing approval of omnibus courses, contact Phyllis.Lucie@asu.edu.

Submission deadlines dates are as follow:

For Fall 2019 Effective Date: October 5, 2018

For Spring 2020 Effective Date: March 8, 2019

Area(s) proposed course will serve:

A single course may be proposed for more than one core or awareness area. A course may satisfy a core area requirement and more than one awareness area requirements concurrently, but may not satisfy requirements in two core areas simultaneously, even if approved for those areas. With departmental consent, an approved General Studies course may be counted toward both the General Studies requirement and the major program of study.

Checklists for general studies designations:

Complete and attach the appropriate checklist

[Literacy and Critical Inquiry core courses \(L\)](#)

[Mathematics core courses \(MA\)](#)

[Computer/statistics/quantitative applications core courses \(CS\)](#)

[Humanities, Arts and Design core courses \(HU\)](#)

[Social-Behavioral Sciences core courses \(SB\)](#)

[Natural Sciences core courses \(SQ/SG\)](#)

[Cultural Diversity in the United States courses \(C\)](#)

[Global Awareness courses \(G\)](#)

[Historical Awareness courses \(H\)](#)

A complete proposal should include:

- ☒ Signed course proposal cover form
- ☒ [Criteria checklist](#) for General Studies designation being requested
- ☒ Course catalog description
- ☒ Sample syllabus for the course
- ☒ Copy of table of contents from the textbook and list of required readings/books

It is respectfully requested that proposals are submitted electronically with all files compiled into one PDF.

Contact information:

Name Frank Pina E-mail fpina@asu.edu Phone 480-727-5883

Department Chair/Director approval: (*Required*)

Chair/Director name (Typed): Paul Carrese Date: 9/3/20

Chair/Director (Signature): _____

Arizona State University Criteria Checklist for

HISTORICAL AWARENESS [H]

Rationale and Objectives

Recent trends in higher education have called for the creation and development of historical consciousness in undergraduates now and in the future. History studies the growth and development of human society from a number of perspectives such as—political, social, economic and/or cultural. From one perspective, historical awareness is a valuable aid in the analysis of present-day problems because historical forces and traditions have created modern life and lie just beneath its surface. From a second perspective, the historical past is an indispensable source of identity and of values, which facilitate social harmony and cooperative effort. Along with this observation, it should be noted that historical study can produce intercultural understanding by tracing cultural differences to their origins in the past. A third perspective on the need for historical awareness is that knowledge of history helps us to learn from the past to make better, more well-informed decisions in the present and the future.

The requirement of a course that is historical in method and content presumes that "history" designates a sequence of past events or a narrative whose intent or effect is to represent both the relationship between events and change over time. The requirement also presumes that these are human events and that history includes all that has been felt, thought, imagined, said, and done by human beings. The opportunities for nurturing historical consciousness are nearly unlimited. History is present in the languages, art, music, literatures, philosophy, religion, and the natural sciences, as well as in the social science traditionally called History.

The justifications for how the course fits each of the criteria need to be clear both in the application tables and the course materials. The Historical Awareness designation requires consistent analysis of the broader historical context of past events and persons, of cause and effect, and of change over time. Providing intermittent, anecdotal historical context of people and events usually will not suffice to meet the Historical Awareness criteria. A Historical Awareness course will instead embed systematic historical analysis in the core of the syllabus, including readings and assignments. For courses focusing on the history of a field of study, the applicant needs to show both how the field of study is affected by political, social, economic, and/or cultural conditions AND how political, social, economic, and/or cultural conditions are affected by the field of study.

Revised October 2015

Proposer: Please complete the following section and attach appropriate documentation.

ASU--[H] CRITERIA			
THE HISTORICAL AWARENESS [H] COURSE MUST MEET THE FOLLOWING CRITERIA:			
YES	NO		Identify Documentation Submitted
<input checked="" type="checkbox"/>	<input type="checkbox"/>	1. History is a major focus of the course.	Syllabus
<input checked="" type="checkbox"/>	<input type="checkbox"/>	2. The course examines and explains human development as a sequence of events influenced by a variety of factors.	Syllabus
<input checked="" type="checkbox"/>	<input type="checkbox"/>	3. There is a disciplined systematic examination of human institutions as they change over time.	Syllabus, Moot Court midterm exercise
<input checked="" type="checkbox"/>	<input type="checkbox"/>	4. The course examines the relationship among events, ideas, and artifacts and the broad social, political and economic context.	Syllabus, Essay Prompts
		THE FOLLOWING ARE NOT ACCEPTABLE:	
		• Courses that are merely organized chronologically.	
		• Courses which are exclusively the history of a field of study or of a field of artistic or professional endeavor.	
		• Courses whose subject areas merely occurred in the past.	

Course Prefix	Number	Title	General Studies Designation
CEL	394	The American Constitution I: Structures	H

Explain in detail which student activities correspond to the **specific** designation criteria.
Please use the following organizer to explain how the criteria are being met.

Criteria (from checksheet)	How course meets spirit (contextualize specific examples in next column)	Please provide detailed evidence of how course meets criteria (i.e., where in syllabus)
History is a major focus of the course	Nearly all readings are primary and largely canonical source texts from American political and legal history asking questions that have shaped and continued to shape current day legal controversies (first and third perspective noted above)	Only three sessions even include secondary sources; instead readings on every single day force students to engage with the ideas of the past as explained by the practitioners themselves in primary sources. The course begins with the American Founding (Day 1-2) and from there examines jurisprudential and constitutional questions by drawing on how various primary sources have answered the question throughout American history-- for example, Day 4 of the syllabus, asks "who has the authority to interpret the Constitution?", which it considers from the perspective of the Federalist, the Marshall Court, a series of major presidents, and finally, the Supreme Court itself.
The course examines and explains human development as a sequence of events influenced by a variety of factors.	As the second paragraph of the course description explains, unlike a traditional course in constitutional law as taught in a law school or many political science departments, this course on constitutional development includes presidents, Congress, and even state actors like governors to show how the development of the American constitutional tradition is more than a monocausal story of judicial doctrine but instead an interaction among different institutions and actors grappling with ideas	See, for example, Days 4, 5, 7, 10, 12 of the syllabus in which students read competing intellectual perspectives on legal questions, often in response and conversation with and in response to one another and different institutions. For example, Day 7 shows how Madison and Hamilton applied Federalist 33 to the necessary and proper clause in appealing to George Washington in deciding the constitutionality of the Bank of the United States, how Chief Justice John Marshall then updated that in the McCulloch decision, was criticized for it by Virginia Judge Spencer Roane and later President Jackson, with the latter guiding President Tyler's veto of the subsequent bank. For another example, Day 10, discusses how various presidents understood the tax power both in conversation with the president and one another (for example, with Monroe initially viewing himself as a disciple of Madison and enemy of Hamilton, but gradually becoming convinced by Calhoun's Hamiltonian interpretation, which in turn helped convince Jackson that the Democratic-Republican had in the end been captured by Hamiltonians and thus

		<p>required a new Democratic Party to vindicate the proper understanding of the taxing and spending power--which the Supreme Court rejected almost a century later in the Butler and Steward Machine cases--possibly as part of a reaction to Franklin Roosevelt's political pressure leveraged against the Supreme Court. Thus, to understand the development of one clause of the Constitution requires a myriad of actors, era, and ideas, all interacting with one other.</p>
<p>There is a disciplined systematic examination of human institutions as they change over time</p>	<p>The course is largely adapted from the tradition of American political development (often called APD), which uses historical sequencing to understand how American political institutions evolve in response to interactions with one another and in response to circulating political ideas, and in turn shapes those ideas themselves (perspective two).</p>	<p>The course begins with the pre-constitutional origins of America (Day 1 and 2 of syllabus)—how ideas and beliefs and controversies of the Stamp Act in turn led to the Declaration and Resolves of the First Continental Congress and Articles of Confederation leaning very strongly on behalf of decentralized power, with the Constitution itself a correction that strengthened national institutions while still trying to maintain much of those earlier views.</p> <p>From there, the course is largely organized within various political institutions, as the course description on page 1 of the syllabus observes "both topically and chronologically": judicial review/the power of the judiciary, the powers of the states, the powers of Congress (particularly via the commerce clause), and the presidency, in both its domestic and foreign policy realms. Within each institution, we look to how these institutions developed over time—how, for example, the commerce clause (Day 7-10) was initially understood by the Founders, then in John Marshall's time, the New Deal, Great Society, and then in the wake of the New Federalism movement. Similarly, in the first session on the presidency, we look to how the power of the presidency was conceived by the Federalist, how that conception was challenged and modified during the Progressive and New Deal eras, and how it that evolution has received pushback (in the form of a renewed interest in the non-delegation doctrine) in the present day (Day 12-14). In each of these cases of institutional development, students look to how precedents are employed intellectually and rhetorically—are efforts to claim the intellectual force of precedents actually faithful, or are these in fact legal innovations? That is to say, students not only learn about the evolution of these institutions but how the rhetorical force of history itself is employed by the actors.</p>

		<p>The midterm exercise (see page 3 of syllabus and attached Moot Court Exercise document) is a legal brief in which students are required to show how different precedents and legal developments interact and build off one another to create the current state of the law.</p>
<p>The course examines the relationship among events, ideas, and artifacts and the broad social, political, and economic context</p>	<p>As the syllabus notes on page 2, instead of a textbook each of the primary sources was edited by me and includes an extensive historical headnote situating the document within its historical context, which I discuss as a preface, along with additional lecture material, before beginning discussion of the legal arguments from the documents</p>	<p>Many of the assignments explicitly challenge the students to analyze which hypothesis best explains the development of legal doctrine. See, for example, days 5, 6, 8, 12 of the assignments requiring students to assess competing claims of constitutional historians and practitioners</p> <p>“Who has the authority to interpret the Constitution” (Day 4) shows how a succession of presidents claimed the authority of their predecessors- Jefferson to Jackson to Lincoln to Roosevelt, with each claiming fidelity to and an application of the previous president’s actions--- which the students are forced to assess as well as situate within the challenges of the particular historical contexts (Lincoln responding to Dred Scott at the beginning of the Civil War, Roosevelt deliberating a direct challenge to the Supreme Court during the Great Depression and with the advent of radio).</p>

Arizona State University
School of Civic and Economic Thought and Leadership
CEL 494: The American Constitution I: Structures

Sean Beienburg
sbeienbu@asu.edu
Office Phone: 480 727 2921

Fall 2020: MWF 2:00-2:50 (ART 202)
Office Hours: F: 11:15-1:15 (Coor 6652)
[and email for appointment]

"When one examines the Constitution of the United States... one is frightened...by the quantity of...knowledge...and discernment that it supposes in those whom it must rule."

-Alexis de Tocqueville, *Democracy in America*

"...how easily men satisfy themselves that the Constitution is exactly what they wish it to be."

- Justice Joseph Story

Description and Course Objectives:

This course is designed as the first of a two part sequence on the Constitution and its law, with an emphasis on the powers and structures of government specifically federalism, the separation of powers, and rule by the law of the Constitution itself. (The spring course will focus on civil rights and civil liberties, though these will be touched on in this course).

We will proceed topically and broadly chronologically, beginning with a discussion of the American Founding, then moving to the consolidation of judicial review as we, like earlier Americans, grapple with questions about what the Constitution is and who is authorized to interpret it. The bulk of the course will consider the allocation of powers among the various institutions of government: first with the states and then the federal government, before concluding with a discussion of the division of powers among the different branches of the federal government, both at home and abroad. In light of their renewed contemporary relevance, questions of federalism and the division of powers between the states and federal government will receive special emphasis.

Unlike many courses which focus exclusively or nearly exclusively on judicial decisions and case law, we will situate such discussions within broader constitutional deliberations among legislators, presidents, and the American people.

Learning Outcomes:

This class is intended to teach you the structures and division of powers created by the United States Constitution. By the end of this class you should be able to credibly argue whether a claimed government power properly belongs to the states or to the federal government and, if the federal government, whether to Congress or the executive branch. You should be able to identify the major theories of and debates within constitutional interpretation (e.g. originalism v. "living constitutionalism") as well as explain their justifications and assumptions. Finally, you should be able to write a

persuasive essay not only outlining your position and supporting evidence but that also understands and anticipates counterarguments, essential to both legal reasoning and political discourse more generally.

Required Texts/Materials:

There are no texts *required* for this class; all court cases and other course materials will be distributed by email [except for the *Federalist Papers*, see below]. You should expect approximately 150 pages of reading per week.

The Federalist: An inexpensive edition has been placed in the bookstore, but you are free to use any edition, print-out, etc. of your choice.

Assignments and Grading Policy:

Your grade [of 100 possible points] will be determined by

- Participation (20%) (I reserve the right to institute quizzes to ensure participation)
- Two short, 5-6 page papers (25% each), which will be responses to the readings.
- One 7-9 page legal brief or judicial opinion (30%) on our moot court.

You must complete all assignments to have a passing grade for this class.

Papers with comments and grades will be returned in person within two, no more than three, weeks of class sessions after submission.

A: 94-100; A-: 90-93; B+: 87-89; B: 83-86; B-: 80-82; C+: 77-79; C: 70-76; D: 60-69; E: 0-59 class.

Paper Policies:

These are due *at the start of class* since they are meant to provoke you to reflect on the material ahead of time. I will distribute sets of paper topics throughout the semester; you may write short papers for any *three* days (and I will take the highest two grades; you need only submit two if you wish).

You must submit at least one paper before Fall Break but you may submit both required papers beforehand. Credit will only be given to one paper submitted after the break, including extra papers submitted. Stated another way, I will read any three papers you choose to write, but no more than one after Fall Break.

Nearly all days will have a prompt, and many will have more than one from which to choose. (Do not answer more than one of the numbered prompts on days where you have a choice.) Because I give you that flexibility to choose both the times and topics of most interest to you, I will not grant extensions or allow late work. This is not designed to be punitive, but because the papers are designed to press you to first grapple with these issues independently before bringing your ideas to the class as a whole. (Because there is no such flexibility with the moot court exercise, late submission will result in a deduction by 10% each day late—including late submission on the due date).

Papers should be submitted in 12 font, Times New Roman, double-spaced 1 in. margins. Double-sided printing is fine as long as it is clear on both sides.

“A” range papers are those which are especially creative, perceptive, and persuasive in presenting original, clear arguments backed up by both textual evidence and fluid writing. Consistent with the learning outcomes for the class, they should also anticipate and seriously grapple with counterarguments. “B” range papers are for solid, clear arguments with textual support and serviceable writing. Papers that contain one or more of the following errors--primarily summarizing, failing to meaningfully engage the prompt or texts, or lacking basic proofreading--will warrant grades C or below.

These are neither collaborative nor research papers. You need not undertake, and indeed, I do not want, outside research for these papers; thoughtful, *individual* reflection on course materials is more than enough.

Citations should be either as parentheticals or endnotes; as no outside research is expected, simple citations (page numbers only) are sufficient. Parenthetical citations or simple endnotes are fine (e.g. Tocqueville 1.2.4; McCulloch; Frymer 20).

Standard canons of academic integrity as described in the college handbook apply. Plagiarism will result in failure of the assignment and referral to the appropriate disciplinary boards. Ask me if you have any specific questions.

I do keep the quality of writing in mind in assigning paper grades. Writing well is one of the essential skills that every college graduate ought to possess, and one which employers increasingly prize, so it is to your benefit to spend time developing your writing. I am happy to work one-on-one with you on your writing. For those interested in improving their writing, I recommend Strunk and White.

I am more than happy to have you run *ideas and thoughts* for papers by me in advance, but I do not review drafts themselves.

Simulation Exercise:

In lieu of a midterm examination, after the midpoint of the course we will do a simulation exercise playing out a constitutional controversy in practice—a moot court. Students will be divided into sections and different institutional roles (e.g. justices and lawyers.) More information about this will be distributed later in the semester.

Attendance/Participation/Discussion:

Thorough preparation for, and faithful attendance of, all classes is expected of all participants in the course.

As participation is an essential part of the course, I expect each of you to contribute to the discussion; merely showing up will not earn a strong grade. I am happy to expand

on any material or answer any questions, but the primary purpose of our meetings is to think hard about the material in conversation with one another. Your participation grade is based not on attendance – which is assumed – but on thoughtful contribution to discussion- *not* measured by how many times you raise your hand but the substance of the contribution. This includes serious engagement with and reference to the texts- which you should bring to class.

As this is a discussion based course, I want your attention focused on what your peers are saying. Thus, with the exception of documented medical needs, the use of laptops, tablets, and other electronic devices is not allowed in class. This is not meant to be punitive or because I don't trust you, but because research has shown participation, retention, and comprehension are drastically lessened even when laptop users conscientiously and diligently focus on participation and note-taking.¹ (Because I believe in conservation I will allow, and indeed encourage, those of you with old-fashioned, e-ink readers such as non-Fire Amazon Kindles to use them and save paper and ink by not printing the materials.)

My expectations include courteous treatment of your peers; this is often controversial material that elicits strong passions (including my own!), but discussion should remain civil and respectful, even when forceful, focused on the ideas and not the speaker, as reasonable people of good will may disagree.

Contact/Office Hours:

I will do my best to respond to emails within 48 hrs, but you should not email me at the last minute for questions about papers. If you have a substantive question – not a logistical one – come to my office instead so we can discuss it. I love discussing this material and really do welcome any chance to meander over it, so you should feel free to come in and discuss it more.

Technology Support

Other than initial retrieval of readings and assignments by email at the start of the semester, and submission of the moot court brief by email on the date assigned, there is no technological or online component to the class.

Other policies, notes, and addenda:

Please arrive on time and do not leave early; let me know if you must be late or depart early. Should you withdraw from the class, please let me know.

I reserve the right to alter this syllabus as necessary with advance notice.

¹ See, for example, <http://www.newyorker.com/tech/elements/the-case-for-banning-laptops-in-the-classroom>.

Unit 1: The Constitution and its Origins:

Day 1: August 29

Introduction: Logistics, syllabus, etc.;

Previewing some problems of constitutionalism, constitutional basics

Lincoln, Lyceum Address (1838)

4

Bolt, "The Devil Speech," *A Man for All Seasons* (1966/1960) [1 min]

<https://www.youtube.com/watch?v=PDBiLT3LASK>

Madison, on structural features of Constitution, National Gazette (1792)

1.5

Day 2 (August 31)

Virginia Resolves on the Stamp Act (1765)

1

Declaration and Resolves of the First Continental Congress (1774)

4

The Declaration of Independence

3

The Articles of Confederation

7

Constitution of Pennsylvania (1776)

10

Madison, "Vices of the Political System of the United States" (1787)

6

Hamilton, "Conjectures about the New Constitution (1787)"

1

Day 3 (September 5):

The Constitution of the United States

Read it three times, and preferably not all at once. First, read through the Constitution for a general sense of the document. Then, review the Declaration and Articles from the previous session. Return to the Constitution for a second reading, with attention to the details—its provisions and their interactions with one another—and then make a final third reading, with a critical eye—what assumptions does it make? Do its provisions seem likely to achieve their stated goals? Is it faithful to the Declaration of Independence? How different is it from the Articles? To what extent, if any, have the subsequent amendments to the Constitution changed the balance of power between the state and federal government? How has it structurally changed through the amendments?

Commented [SB1]: See Criteria III here, building off materials in Day 1

Unit 2 Problems of Constitutional Interpretation

Day 4 (September 7):

Struggling with Interpretation: Slavery

US Constitution, Article IV, Section 2 and 3; 5th Amendment

Prigg v. Pennsylvania (1842)

6

Dred Scott v. Sandford (1857)

20

Day 5 (September 12):

What is the Constitution? (and how to read and brief cases)

Federalist #39 [start with para beginning "but it was not sufficient"]

3

#44 [read first paragraph, then skip to paragraph beginning "Bills of.."]

4

#45 [start with para beginning "the state governments will"]

3.5

#84 [read until the paragraph beginning "Another objection which..."]

5

Brutus #2

3

Calder v. Bull (1798) 3

Day 6 (September 14):

Interpreting the Constitution

“Constitutional Arguments,”
from Mark Graber, *A New Introduction to American Constitutionalism*, 71-86
Madison, on Constitutional Interpretation 1.5
Debates on the 14th Amendment (1866) and Civil Rights Act of 1875 11
Adkins v. Children’s Hospital (1923) 4
Griswold v. Connecticut (1965) 9

Unit 3: Who has the Authority to Interpret the Constitution?

Day 7 (September 19):

Judicial Review

US Constitution Article III, Section 1 and 2; Article VI, second paragraph
Brutus #11, #12, #15 (1788) 8
Federalist #78 6
#80 [skip everything after “Having thus...” except for last paragraph] 2.5
#81 [read to “Let us resume...”] 4
Marbury v. Madison (1803) 3
Eakin v. Raub (Supreme Court of PA, 1825) 4
Judiciary Act of 1801 and *Stuart v. Laird* (1803) 2
Ex Parte McCordle (1869) 1

Commented [SB2]: Criteria II here

Day 8 (September 21):

Judicial Review II: Judicial Supremacy and Departmentalism

Jefferson, Letters on Departmentalism (1804, 1819) 2
Jackson, Veto of the Bank Reauthorization (1832) 4
Webster, Reply to Jackson’s Bank Veto (1832) 3
Lincoln on *Dred Scott*
(from Lincoln-Douglas Debates, First Inaugural Address) (1857, 1861) 3
Roosevelt, F., “Undelivered Speech on the Gold Clause Cases” (1935) 2
Cooper v. Aaron (1958) 4
City of Boerne v. Flores (1997) 5
[bring *Marbury v. Madison* with you]

Commented [SB3]: Criteria IV here

Day 9 (September 26):

State Interpretation?

Federalist #28 [start with “Independent of all other reasonings...”] 2
#39 [review after “But it was not sufficient”] 2
#46 6
Virginia and Kentucky Resolutions (1798) 6
Calhoun, “Fort Hill Address” (1831) (read before the Webster-Hayne Debates) 5.5
Webster-Hayne-Livingston Debates (1830) 11.5
South Carolina Ordinance of Nullification (1832) 2
Jackson, “Proclamation on Nullification” (1832) 4

Commented [SB4]: Criteria II here

Day 10 (September 28):

State Interpretation? II

<i>Ableman v. Booth</i> (1859)	4
<i>In re Neagle</i> (1890)	6
Altgeld and Lewelling on economic regulation, state sovereignty, and the Pullman Strike (1895)	2
“Address on the State of Illinois,” January 19, 1895	
“Farewell Address to the Kansas Legislature,” January 9, 1895	
Coolidge, Veto of Massachusetts Beer Bill (1920)	1
Committee Report of Massachusetts Legislature on Repealing Prohibition (1930)	2
Long, Louisiana Tenth Amendment Enforcement Law (1935)	1
<i>Cooper v. Aaron</i> (1958) (review)	
Montana Firearms Freedom Act (2009)	2

Unit 4: State Powers: State Sovereignty and the Police Powers

Day 11 (October 3):

State Powers I: Contract, Charters, and Corporations

<i>Fletcher v. Peck</i> (1810)	2
<i>Dartmouth College v. Woodward</i> (1819)	3
<i>Charles River Bridge v. Warren Bridge</i> (1837)	4.5
<i>Wynehamer v. New York</i> (NY, 1856)	6
<i>Munn v. Illinois</i> (1877)	4
<i>Stone v. Mississippi</i> (1879)	2.5
<i>Mugler v. Kansas</i> (1888)	3
<i>Minnesota Rate Case</i> (1890)	4

Day 12 (October 5):

State Powers II: Health and Economic Protection

<i>Jacobson v. Massachusetts</i> (1905)	3
<i>Allgeyer v. Louisiana</i> (1897)	1.5
<i>Holden v. Hardy</i> (1898)	2
<i>Lochner v. New York</i> (1905)	3
<i>Muller v. Oregon</i> (1908)	2
<i>Adkins v. United States</i> (1923)	4
<i>Morehead v. New York ex rel Tipaldo</i> (1936)	4
<i>West Coast Hotel v. Parrish</i> (1937)	3
<i>Williamson v. Lee Optical</i> (1955)	1
<i>Ferguson v. Skrupa</i> (1963)	1

Day 13 (October 10):

State Powers III: Civil Rights

Root, “How to Preserve the Local Governments of the States,” (1906)	2
Hoadly, Inaugural Address, on Ohio Public Accommodations Law (1884)	2
[before reading review debates on Civil Rights Act of 1875]	

<i>Plessy v. Ferguson</i> (1896)	6
<i>Brown v. Board of Education of Topeka</i> (1954)	3
Eisenhower, "Address to the Nation on Introduction of Troops in Little Rock" (1957)	4

Unit 5: Federal Powers, Federalism, and American Political Development

Commented [SB5]: Example of Criteria III here, Commerce Clause Days 1-4 below

Day 14 (October 12):

Commerce Clause I: The Bank of the United States

US Constitution, Article I, Section 8, first three paragraphs and last paragraph
10th Amendment

Brutus # 5 3

Federalist #33 4

Opinions on the Constitutionality of the Bank (1791)

Jefferson and Hamilton 5

Madison (in Barnett, "Original Meaning of Necessary and Proper" 188-96)

McCulloch v. Maryland (1819) 5

Roane and Marshall on *McCulloch* (1819) 6

Jackson, Veto of the Bank Reauthorization (1832) 4 [review]

Gibbons v. Ogden (1824) 4

Tyler, Death of the Bank (1841) 3

"Address upon Assuming the Presidency," April 9, 1841

"Special Session Message, June 1, 1841"

"Veto Message of Proposed Third Bank of the United States," August 16, 1841

"Veto Message of Proposed Third Bank of the United States," September 9, 1841

Commented [SB6]: Criteria II here

October 17- Fall Break

Day 15 (October 19):

Commerce Clause II: 19th and Early 20th Century

US Constitution, Article I, Section 8, first three paragraphs and last paragraph
10th Amendment

United States v. E.C. Knight (1895) 5

Champion v. Ames (1903) 4

Adair v. United States (1908) 5

Hoke v. United States (1913) 3

Hammer v. Dagenhart (1918) 3

Bailey v. Drexel Furniture (1922) 2

Day 16 (October 24):

Commerce Clause III: The New Deal

US Constitution, Article I, Section 8, first three paragraphs and last paragraph
10th Amendment

Federalist #17 (first paragraph only)

#45 (last paragraph only)

Schechter Poultry v. United States (1935) 3

<i>Carter v. Carter Coal</i> (1936)	4
<i>United States v. Butler</i> (1936)	4
<i>NLRB. v. Jones and Laughlin Steel</i> (1937)	3
<i>United States v. Carolene Products</i> (1938)	2
<i>United States v. Darby</i> (1941)	2
<i>Wickard v. Filburn</i> (1942)	2

Day 17 (October 26):

Commerce Clause IV: The 1960s to the Present

US Constitution, Article I, Section 8, first three paragraphs and last paragraph 10 th Amendment; 14 th Amendment, Section 1 and 5	
<i>Heart of Atlanta Motel v. United States</i> (1964)	4
<i>Katzenbach v. McClung</i> (1964)	2
<i>United States v. Lopez</i> (1995)	5
<i>United States v. Morrison</i> (2000)	4
<i>Gonzales v. Raich</i> (2005)	5
<i>NFIB v. Sebelius</i> (2012) [skip the Medicaid sections for now]	9

Day 18 (October 31):

The Negative Commerce Clause and Immigration

Article I, Section 8, third, fourth, tenth paragraphs	
<i>Federalist</i> #32 [second and last paragraphs only]	1
#42 [start with "The powers included in the third.. and read through "...immoderate gain." Then skip to paragraph beginning "The dissimilarity" and read to the end	3
<i>New York v. Miln</i> (1837)	7
<i>Hall v. Decuir</i> (1877)	1.5
<i>Morgan v. Virginia</i> (1946)	3
<i>Southern Pacific Railroad v. Arizona</i> (1945)	4
<i>United Haulers Assn v. Solid Waste Management</i> (2007)	4
<i>Arizona v. United States</i> (2012)	9

Day 19 (November 2):

Taxing and Spending Power I:

Articles of Confederation, Section VIII	
US Constitution, Article I, Section 8, first paragraph; 10 th Amendment	
<i>Federalist</i> #41 [last four paragraphs]	1
Hamilton, Report on Manufactures (1791)	2
Madison, Veto of the Bonus Bill (1817)	2
Monroe, On Internal Improvements (1817-23)	6
First Annual Message to Congress, December 2, 1817	
Cumberland Road Veto (and addendum) May 4, 1822	
Seventh Annual Message to Congress, December 2, 1823	
Jackson, Veto of the Maysville Road Bill (1830)	2
Clay, Speech on the Maysville Road Veto (1830)	2
Cleveland, Veto of the Texas Seed Bill (1887)	1
Miller, N., Speech to the Bar Association	

on the Sheppard-Towner Maternity Act (1922)	2
<i>Massachusetts v. Mellon</i> , <i>Frothingham v. Mellon</i> (1923)	3
<i>United States v. Butler</i> (1936) (review)	4
<i>Steward Machine v. Davis</i> (1937)	4
<i>Helvering v. Davis</i> (1937)	2

Commented [SB7]: Criteria II here

Moot Court Assigned

Day 20 (November 7):

Taxing and Spending Power II and Compelling the States?

US Constitution, Article 1, Section 3 (first paragraph)

17th Amendment

National League of Cities v. Usery (1976) 3.5

Garcia v. San Antonio Metropolitan Transit Authority (1985) 4

South Dakota v. Dole (1987) 4

New York v. United States (1990) 6

Printz v. United States (1992) 7

NFIB v. Sebelius (2012) [Medicaid section only] 4

Moot Court Briefs Due by 11 am by email to me for redistribution to peers.

Day 21 (November 9):

Simulation Exercise/Moot Court

Day 22 (November 14):

Judicial Review and Federalism: State Sovereignty

Chisholm v. Georgia (1793) 4

US Constitution, 11th Amendment

Cohens v. Virginia (1821) 3

Reynolds v. Sims (1964) 5

Lucas v. 44th General Assembly of Colorado (1964) 4

Seminole Tribe v. Florida (1996) 6

Alden v. Maine (1999) 7

Moot Court Judicial Opinions Due

Unit 6: Separation of Powers

Day 23 (November 16)

The Executive Branch I:

US Constitution, Article II

Federalist

#47 (skip from "I pass..." until the last paragraph) 3.5

#48 (skip from "The first example..." until the last paragraph) 2

#70 (skip last three paragraphs) 4

#71 2.5

Commented [SB8]: Example of Criteria III here, Exec Branch Day 1-4

#72	3.5
Johnson, Veto of the Tenure in Office Act	
and Debate on Impeachment (1867)	3

Day 24 (November 21)

The Executive Branch II:

US Constitution:

Article II: Section 1, first and last paragraphs;

Section 2, first paragraph; Section 3, last two clauses

Article IV, Section IV

Lincoln, On Constitutional Executive Power in War and Peace: (1861-64): 10

Habeas Corpus

Fourth of July Message to Congress, July 4, 1861

Proclamation Suspending the Writ of Habeas Corpus, September 24, 1862

Letter to Erastus Corning and others, June 12, 1863

Reply to the Ohio Democratic Convention/Birchard Letter, June 29, 1863

Emancipation

Letter to O.H. Browning, September 22, 1861

The Emancipation Proclamation, January 1, 1863

Letter to Treasury Secretary Salmon Chase, September 2, 1863

Letter to Albert G. Hodges, April 4, 1864

Exchange with Zechariah Chandler, from John Hay's Diary, July 4, 1864

Roosevelt, T., on the stewardship theory of the president, from the

Autobiography of Theodore Roosevelt (1913) 6

Taft, "The Limitations of the Presidential Power,"

from *Our Chief Magistrate*

[136-48, 156-57]

Youngstown Sheet & Tube Co. v. Sawyer (1952) 6

Commented [SB9]: Criteria II here

Thanksgiving Break- November 23

Day 25 (November 28):

The Executive Branch III:

US Constitution: Article II, Section 2, second paragraph

Johnson, Veto of Tenure in Office Act

3

Myers v. United States (1926)

6

Humphrey's Executor v. United States (1935)

3

Morrison v. Olson (1988)

7

United States v. Nixon (1974)

3

INS v. Chadha (1983)

6

Day 26 (November 30):

The Executive Branch IV: Reconsidering the Separation of Powers and Bureaucracy

Federalist #51

3

Wilson, "The Study of Administration" (1887)

9

J.W. Hampton v. United States (1928)

2

<i>Chevron v. National Resources Defense Council</i> (1984)	2
<i>Dept of Transportation v Assn of American Railroads</i> (2015)	6
<i>Trump v. Hawaii</i> (2018)	10

Unit 7: The Constitution and Foreign Policy

Day 27: (December 5)

Foreign Policy I: Treaty Powers

US Constitution: Article II, Section 2	
<i>Federalist</i> #75 [read until “....expense alone ought to condemn the project.”]	2
Washington’s Farewell Address (1796)	6
<i>Worcester v. Georgia</i> (1832)	4
<i>Missouri v. Holland</i> (1920)	2
<i>United States v. Curtiss-Wright</i> (1936)	3
Debate on the Bricker Amendment (1950s)	12
<i>United States v. Bond</i> (2014)	4

Day 28 (December 7)

Foreign Policy II: War Powers and Wrap Up

US Constitution: Article II, Section 2	
<i>The Prize Cases</i> (1863)	8
Declarations of War or Authorizations of Military Force (1917-2001)	6
War Powers Act of 1973 and Nixon, “Veto of the War Powers Resolution” (1973)	6
<i>U.S. O’Brien</i> (dissent by Justice Douglas) (1968)	0.5
<i>Campbell v. Clinton</i> (D.C. Circuit 2000)	3.5
OLC Memorandum on Military Force in Libya (2011)	3.5

University Policies

Absences

Absences will be excused in order to accommodate religious observances or practices (in accord with ACD 304-4 “Accommodations for Religious Practices”) or for university sanctioned events (in accord with ACD 304-02 “Missed Classes Due to University-Sanctioned Activities.”) Accommodations for Students with Disabilities.

Academic Integrity

Academic honesty is expected of all students in all examinations, papers, and laboratory work, academic transactions and records. The possible sanctions include, but are not limited to, appropriate grade penalties, course failure (indicated on the transcript as a grade of E), course failure due to academic dishonesty (indicated on the transcript as a grade of XE), loss of registration privileges, disqualification and dismissal. For more information, see <http://provost.asu.edu/academic-integrity>.

Accommodations for students with disabilities

Students who feel they will need disability accommodations in this class but have not registered with the Disability Resource Center (DRC) should contact DRC immediately. The DRC Tempe

office is located on the first floor of the Matthews Center Building. DRC staff can also be reached at: (480) 965-1234 (V) or (480) 965-9000 (TTY). For additional information, visit: www.asu.edu/studentaffairs/ed/drc.

Expected Classroom Behavior: see **Attendance/Participation/Discussion** above.

Policy against Threatening Behavior

All incidents and allegations of violent or threatening conduct by an ASU student (whether on or off campus) must be reported to the ASU Police Department (ASU PD) and the Office of the Dean of Students. If either office determines that the behavior poses or has posed a serious threat to personal safety or to the welfare of the campus, the student will not be permitted to return to campus or reside in any ASU residence hall until an appropriate threat assessment has been completed and, if necessary, conditions for return are imposed. ASU PD, the Office of the Dean of Students, and other appropriate offices will coordinate the assessment in light of the relevant circumstances.

Title IX and University Policy on Sexual Discrimination

Arizona State University is committed to providing an environment free of discrimination, harassment, or retaliation for the entire university community, including all students, faculty members, staff employees, and guests. ASU expressly prohibits [discrimination](#), [harassment](#), and [retaliation](#) by employees, students, contractors, or agents of the university based on any protected status: race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, gender identity, and genetic information.

Title IX is a federal law that provides that no person be excluded on the basis of sex from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity. Both Title IX and university policy make clear that sexual violence and harassment based on sex is prohibited. An individual who believes they have been subjected to sexual violence or harassed on the basis of sex can seek support, including counseling and academic support, from the university. If you or someone you know has been harassed on the basis of sex or sexually assaulted, you can find information and resources at <https://sexualviolenceprevention.asu.edu/faqs>.

As a mandated reporter, I am obligated to report any information I become aware of regarding alleged acts of sexual discrimination, including sexual violence and dating violence. ASU Counseling Services, <https://eoss.asu.edu/counseling>, is available if you wish to discuss any concerns confidentially and privately.

Copyright of Materials

Course content, including this syllabus, lectures and instructional materials, are copyrighted materials and may not be shared outside the class, uploaded, sold, or otherwise redistributed.

Honors Contracts Available

If you are interested in pursuing an Honors Enrichment Contract for this course, please consult with your instructor at the beginning of the semester. For more information about honors contracts, please see the following website: <https://barretthonors.asu.edu/academics/honors-courses-andcontracts/honors-enrichment-contracts>.

In lieu of a midterm examination, we will be doing a moot court exercise designed to review the materials from class so far. I have written a hypothetical case, with some of you representing lawyers and others justices.

Course materials are sufficient to do this; do not bring in outside material. [Remember; this is primarily designed to serve as a synthesis and review of course materials, thoroughly demonstrating knowledge of the readings]. At the most basic level, you need to demonstrate a clear command of what the current state of the law is, situating the precedents within context of one another. If you think the precedents are against you, you must explain why they don't apply, or if they should be overruled why that step must be taken and is the appropriate course of action for the Court. [As a judge, you may adopt whatever jurisprudential persona[s] you see fit [originalist, doctrinalist, etc] provided you demonstrate an understanding of the cases and how your views would apply and fit together consistently.

Creative and original arguments are welcome and obviously make stronger A-range papers, provided they are persuasive and reasonable- the burden of proof is on you to demonstrate why such a claim is serious and not tortured logic, and worth the space you are spending on it. Obviously, you need to be thinking of possible counterarguments. Part of legal reasoning is being able to "prebut" whatever you think will prove particularly strong for the other side; the better you are able to do so the stronger your brief or opinion is. If you think that requires you to make points from various jurisprudential methods, so be it; if you think you should concede or ignore some, that's potentially fine too. Basically, you need to make the case about why, in the end, the justices should vote for you and why a reader well-versed in constitutional law would agree.

Scotusblog.com has briefs to many recent cases if you want an example of how it's done. (Here's a link to the briefs in *Citizens United*, for example): <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/>

Briefs should look broadly similar, though I'm not going to penalize you for putting Roman numerals instead of Arabic numbers in formatting, etc. The Table of Contents and Question section are worth doing like the pros do it, simply to make sure the argument is framed and clear for the justices or reader to follow. (This obviously doesn't count against the page limit).

Moot court opinions should be *seriatim* – that is to say, you write independently of how the judicial conference vote goes. A good model for an opinion is Chief Justice Roberts's *Sebelius* opinion which similarly treats a multi-part case and shows how one can split between the parties on various sub-issues.

Both lawyer briefs and judicial opinions should be between 7-9 pages, 12 Times 1 in margins.

Logistics:

Lawyers Briefs: due to me electronically November 7 at 11 am
[so that I can redistribute them to the other lawyers and justices]

Moot Court Exercise: November 9:

You will be divided into two 35 minute sections. Each section will be independent in hearing the case, and will have one lawyer assigned to the petitioner and one to the respondent. Everyone else will be a justice [one of you will be designated chief justice but this is basically ceremonial.]

Lawyers presenting oral arguments: you can simply present your brief to the court, since you will spend most of the time answering questions and interruptions. Each lawyer will present for 10 minutes.

Justices' Opinions: Due to me at the start of class on November 14.

If you know you will be unable to work on this during that weekend, arrange to be a lawyer

DeWitt v. Comstock

A new drug dubbed IOpen Vigor has been invented which is found to drastically increase worker productivity but which is widely feared to have longterm negative health consequences, including brain damage and hallucinations. (Assume that its materials can be made from products found within every state/do not require importation of component chemicals.) The FDA, having no consistent evidence of health dangers, at least in the short term, approves IOpen Vigor for market use, which follows shortly thereafter. Some businesses, hoping to increase productivity, begin conditioning employment on its use and firing employees who decline to take it. In response to lobbying from both labour and religious groups, the federal government passes the Free Body Work Zones Act, which aimed to prevent IOpen use for a period of five years while even further clinical analysis is undertaken. The Act has two parts: First, to protect the health of employees, it made use or requirement of use of IOpen at "any place of business affecting interstate commerce" punishable by federal law with up to a year in prison.

Second, in order to enlist state assistance and increase enforcement capacity, the act sought to induce states to strip business licenses from those institutions that did not pledge to periodically test their employees for its use (and fire those found to be in violation). States choosing to participate by passing a law implementing that regime would receive an additional federal grant equal to one fifth of their current federal aid for crime-fighting. States choosing not to participate would not only forfeit that additional grant but lose a fifth of their pre-existing/currently appropriated federal aid to criminal enforcement funding. (Assume that the state spends a total of 20% of its *total* revenues on crime fighting, half of which is raised from state taxes and half of which comes from federal grants. Thus, the threatened loss of pre-existing federal aid would amount to a reduction in 2% of the state's *total* budget). The bill would sunset after five years, during which time further study is expected.

A coalition of business professionals and state attorneys general sought an injunction against the law. The specific named plaintiff is DeWitt Investigations, a family owned and operated private security and detective company of only ten employees, based in New York and whose clientele is almost exclusively local clients. DeWitt requires its investigators to take IOpen Vigor, arguing that the ability to work longer hours is essential to successful stakeouts. DeWitt and the state attorneys general argued that the Free Body Work Zones Act exceeded the enumerated powers of the federal government (both interstate commerce and taxing/spending powers) and thus fell afoul of the Tenth Amendment, and, third, that even if the federal government could spend to encourage states, that the spending terms coerced states into implementing federal policy.

Petitioner: DeWitt Investigations [attacked the constitutionality of the law]

Respondent: Zachary Comstock [Deputy Assistant of Health and Human Services,
tasked with enforcing the Free Body Work Zones Act]

Constitution I Essay Prompts:

Remember, these prompts are due on the day listed, at the beginning of class. If there are more than one numbered prompt, choose among them—*do not write on multiple prompts on the same day.*

Dred Scott

1: In *Dred Scott*, Chief Justice Taney invokes an originalist reading and examination of Founding era practices to argue that blacks could never be full members of the American citizenry. Justice Curtis, rooting his opinion in similarly originalist grounds, argues that Taney's reading is too general and ignores predominantly northern state practices in which blacks exercised full or nearly full political rights of citizenship. Do you find one account more persuasive than the other—if so, why? Did the fact that blacks could not be citizens in some states mean, as Taney insisted, that such rules also logically scaled up to American citizenship?

2: Roger Taney had been Attorney General to Andrew Jackson, both of them loyal members of a Democratic Party built to hold the U.S. government to its constitutionally enumerated powers and thereby vindicate states' rights. (Justice John McLean, one of the dissenters, had similarly been Jackson's Postmaster General). Throughout the 1840s and 1850s, the Democratic Party began splintering into pro and anti-slavery factions, with each insisting that the other side attempted to nationalize its slavery position and impose it on the states. (Although the Republican Party's rank-and-file were disproportionately former Whigs, its leadership was disproportionately composed of these former anti-slavery Democrats). Which side in *Dred Scott*—the majority and concurrences, or the dissenters—do you think better reflects the Democratic Party's traditional commitment to constitutional federalism and why?

What is the Constitution?

As we see in *Federalist* 84, the advocates of the Constitution argued that a Bill of Rights defeated the concept of enumerated powers by implicitly converting the Constitution into a framework of plenary/policy powers. Anti-Federalists and other skeptics of federal power like Thomas Jefferson insisted that it did no such thing and simply added a redundant, additional check on government. Which of these arguments do you find more convincing?

Interpreting the Constitution

At their core, the debates in *Calder v. Bull* and *Griswold v. Connecticut*, and between Senators Sumner and Morrill, are questions about what the Constitution is. On the one side, Justices Chase and Douglas argue that the Constitution has embedded within it a moral vision and broader principles that judges should seek to implement. Justices Iredell and Black argue that the Constitution is basically limited to the text, with historical practices perhaps helping inform understandings of ambiguous phrases, but ultimately the text is what judges are

obligated to follow. Others take a position somewhere in the middle (but closer to the textualist camp), arguing that legislators, presidents, and citizens should be informed by these background principles but that judges should disregard such moral visions and root their decisions in text. Are Chase and Douglas right to charge judges with enforcing a moral vision of the Constitution? If so, how would we/they identify it?

Judicial Review

1: Does the Constitution institute the practice of judicial review by which judges overturn statutes as inconsistent with its text?

2: The anti-Federalist Brutus agreed that the Constitution established judicial review, which he argued was a reason to reject it. Is Brutus right that the Constitution's end result is that an unelected body, free of "any power under heaven," is the most powerful institution in America?

Judicial Supremacy and Departmentalism

1: Legal scholars Larry Alexander and Frederick Schauer argue that departmentalism and other constitutional theories in which multiple institutions act as constitutional interpreters descend into constitutional anarchy, and that, while others may consider the Constitution in casting votes, vetoes, etc., ultimately our system requires other branches to defer to a single, authoritative interpreter. Others take Lincoln's position that ceding constitutional interpretation to a single body – and one not elected by the people – is effectively the cession of self-government, and that the clash between institutions produces a healthier constitutional society. Assess these competing claims: is departmentalism or judicial supremacy ultimately more conducive to fidelity to the Constitution?

State Interpretation I

Commented [SB1]: Criteria IV

Calhoun's nullification theories were widely disputed, attacked by both nationalists like Daniel Webster and even moderate or strongly states' rights officials, predominantly mainstream Democratic officials like Andrew Jackson, Martin Van Buren, or Senator Edward Livingston. Legal scholar Keith Whittington dubs this latter tradition "centrist federalism" and suggests that its uncertain position--between nullificationists and nationalists--makes it particularly vulnerable to collapsing into the other two. Is it possible to develop and defend such a theory of "centrist federalism" that still takes enumerated powers seriously? What would it look like? Which institutions would implement it and what techniques would they use to defend it?

State Sovereignty

1: The judges siding with the states in the sovereign immunity decisions like *Alden* and *Seminole Tribe* are those who usually profess themselves to be textualists first, and in some cases with an originalist gloss on top of that. Do you

think they were rightly decided? If so, why or why not? Are these decisions defensible on textualist grounds?

2: Perhaps the keenest division in the reapportionment decisions is whether states can have an unequally apportioned upper house of their legislatures. The dissenters appeal to the model of the US Senate as incorporating an unequal apportionment reflecting important geographic differences and communities, an analogy which the majority opinion finds inappropriate. Is it? Stated another way, what, consequence if anything, should the existence of the US Senate have in upholding or rejecting unequally apportioned state chambers?

State Powers I: Charters and Corporations

Do the positions taken in *Mugler* and by the dissent in *Wynehamer* (which typify majority opinions in most states' alcohol cases) simply embody the flexibility of the states' Tenth Amendment police power to advance the public good (even if creating undesirable and even unfair results), or do Harlan and Johnson enable unchecked and even possibly tyrannical economic regulation by the states, as Judge Comstock warned? What constitutional limits, if any, exist to protect property by restricting economic regulation or seizures/takings by states? Focus on *Mugler* and *Wynehamer* but you should also consider the other cases assigned for today in answering this prompt.

State Powers II: Health and Economic Protection

1: Some revisionists, most notably Howard Gillman's *Constitution Besieged* and David Bernstein's *Rehabilitating Lochner*, argue that we should understand the so-called Lochner era from the 1890s to the 1930s and similar cases not as manifestations of laissez-faire libertarianism but as a sort of Jacksonian egalitarianism hostile to the government creation of special privilege – against laws in which government picked winners and losers [as when the Jacksonians had protested government chartering of monopolies like the Bank]. Do you agree, or does the traditional account's emphasis on free markets better capture the Court's logic?

2: Some constitutional historians such as Julie Novkov have argued that what largely determined whether the Court upheld state economic regulations is how the Court viewed the recipients of the legislation. If they were understood to be self-reliant market actors, the Court would strike the legislation, but if it viewed them as weak and dependent on government paternalism in order to survive, it uphold the regulation. According to this account, the expansion of economic regulatory power culminated with Parrish deciding that effectively all workers were so dependent and throwing away most barriers to protective economic regulation. Do you find this account a persuasive explanation of the Court's jurisprudence? (You should consider the majority of the readings, at least in passing, in assessing whether Novkov's theory explains the Court's decision-making).

State Powers III: Civil Rights

Commented [SB2]: Both prompts illustrate Criteria IV

1: *Plessy* is today one of the most reviled Supreme Court cases in history, but some have argued it was more or less a fairly typical ruling in line with the Court's police powers decisions of that era. Is *Plessy* simply part of a line of what we have read in the last two classes? Why or why not?

2: Was *Bolling v. Sharpe* rightly decided? Is Warren's equation of the due process clause binding the federal government with the equal protection clause binding the states constitutionally persuasive? Stepping back a bit, might we want different standards of equal protection for the states and federal government – why or why not?

Commerce Clause I:

1: If you were Washington would you sign or veto the Bank when presented with Jefferson's/Madison's and Hamilton's competing legal positions? That is to say, is the bank constitutional? (Note that you can agree with Hamilton or Jefferson's arguments for interpreting the Constitution while believing that said interpretation does not support this application, e.g. Hamilton's definition of necessary and proper is correct, but this bank doesn't match that.) You should consider Federalist 33 and Brutus 5 as well.

2: Although relatively few, even among the old Jeffersonians, disagreed with the Court's judgement in upholding the Bank in *McCulloch*, many, including fellow Virginians Spencer Roane and James Madison, argued that Marshall's rhetoric was dangerous to the structure of limited, enumerated powers and threatened to massively and illegally enlarge the federal government, perhaps even converting it to one of police powers. Do you find that position defensible? (One way you could address that would be to offer a critique or alternative reasoning/write an opinion that would come to the same judgement.)

Commerce Clause II

1: 1920s critics of the Supreme Court and especially its decision in *Dagenhart* argued that the Court was effectively imposing morality instead of law. In this argument, *Hoke* and *Champion* created a federal police power, and no consistent legal principle – only the justices' imposing moral views on desirable and undesirable acts and goods – could connect the rulings in the three cases. First, do you agree that *Hoke* and *Champion* create a police power? Second, are the critics right to see *Dagenhart* as incompatible with them?

2: Holmes dissented from *Hammer v. Dagenhart* but joined the majority in *Bailey*. Are his two votes in tension, or could one consistently come to his votes in both cases?

Commerce Clause III

Chief Justice Hughes's *Jones and Laughlin* opinion purports to accept the realities of an integrated market economy while still preserving judicial enforcement of federalism and a limited scope for the interstate commerce clause. Do you think Hughes's opinion is closer to the era of *Schechter*, *Carter Coal*, etc. or to *Wickard*?

Commented [SB3]: Criteria IV

Commerce Clause IV

1: Was the Court right to rely on the commerce clause in *Heart of Atlanta* and *McClung*? Were these cases correctly decided? Correctly justified? [Consider the alternative 14th Amendment reasoning the justices avoided as a possible preferable justification.]

2: Did *Gonzales v. Raich* end the federalism revolution of the Rehnquist Court?

The Negative Commerce Clause

Justice Thomas contends that the “negative commerce clause” is, like *Lochner*’s liberty of contract,” judicially manufactured and an inherently policy based test rather than rooted in law. As such, he would have the Court abandon the doctrine of the negative commerce clause entirely and leave the states to make regulations that do not explicitly conflict with congressional regulation. Is he right—is the negative commerce clause test judicial policy-making rather than constitutional enforcement?

Taxing and Spending Power

1: Against Hamilton, who argued for a more expansive interpretation of the spending power, Madison argued that only his interpretation of that clause is consistent with dual federalism and enumerated powers, a position later figures like Jackson, Cleveland, and Miller argued as well. How does the Madisonian position differ from that of Hamilton (and from the New Deal Court’s)? What limits, if any, exist on Hamilton’s interpretation of the spending power? On the New Deal Court’s? Was Madison correct?

2: Although the Court has made narrow exceptions to *Frothingham*’s prohibition on taxpayer lawsuits to enforce constitutionality, the rule generally holds to this day. Do you think *Massachusetts* and *Frothingham v. Mellon* were rightly decided—is Sutherland’s opinion persuasive? If he is right, do the political processes provide sufficient recourse in guarding against illegitimate expansion of the tax and spending power? If he is wrong, how would you answer his worry that allowing taxpayer suits would completely overwhelm the American court system?

Compelling the States?

1: Several of the cases we read today adopt, explicitly or implicitly, Herbert Wexler’s “Political Safeguards of Federalism” thesis which holds that the Court should generally refrain from enforcing federalism on the grounds that the states themselves are represented in the political process and can safeguard their own interests. Justice Lewis Powell argues that by that logic, the courts wouldn’t need to enforce individual rights since all members of Congress, police officers, etc. are themselves individuals and would therefore be sensitive to individual rights.

Is Wexler right that the courts should refrain from enforcing federalism since state interests are represented, or is Powell's critique persuasive?

2: The justices' alignments in *National League of Cities* and *Garcia* are essentially the same, but for Justice Blackmun who reversed, stating that the tests proposed in *National League of Cities* were unworkable and impossible to apply. Was he right to do so?

Executive Branch I:

[no prompt; moot court opinions.]

Executive Branch II:

1: Is Theodore Roosevelt's stewardship theory of the presidency, in which he can act anywhere not explicitly prohibited by the Constitution, faithful to the constitutional design of an executive "with energy" as described in the *Federalist*, or is the constitutional authority of the presidency better understood as wielding specific powers and implementing congressional enactments, as the Court indicated in *Youngstown*? Consider Taft's response and the implications for both federalism/ enumerated powers and the separation of powers—remember that Article II invests the "executive power" in the president. (Make sure to pay special attention to the first and last paragraphs of Article II, Section 1, as well as Article IV, Section 4.) [This is a long prompt, with many reminders to pay attention to the materials, but experience has shown that the question has tripped up students who have often wandered far from the texts.]

2: Roosevelt places himself within the tradition of what he calls "Lincoln-Jackson- presidents," arguing that his constitutional understanding of the president more closely approximates Lincoln's constitutional theory than does the "Buchanan-Taft" theory. Taft, in turn argues his understanding of presidential power was far closer to Lincoln's, with both arguing that both he and Lincoln hold that only constitutional authorization, either directly with an explicit or implicit power, or in executing a congressional statute, authorizes the exercise of presidential power. Which of the two 1912 rivals for the presidency is more faithful to Lincoln's constitutional theory?

Commented [SB4]: Criteria IV

Executive Branch III: Bureaucracy

1: Constitutional historian Phillip Hamburger has argued that "administrative law" is unconstitutional, and that administrative agencies ought to serve as experts proposing rules to Congress, but never making their own binding laws. Is that right? Consider what the *Federalist* readings on the separation of powers (from the various executive power sessions) argue in formulating your answer.

2: Does "Chevron deference" follow from the Court's opinion in *J.W. Hampton*?

Foreign Policy Treaty-making

Is *Missouri v. Holland* as dangerous in expanding (or correctly applying) the treaty-power to swamp, as Bricker feared? Was the Bricker Amendment (or Scalia's proposal to overturn *Holland* in *Bond*) necessary to ensure the constitutional guarantees of both states' and individuals' rights cannot be dispensed with by treaty?

Foreign Policy Warmaking

To this day presidents engaged in military conflict are careful to describe their reports to Congress as "consistent with" rather than required by the War Powers Resolution. Is the War Powers Resolution unconstitutional, as presidents have long contended?