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Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution

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Justice Douglas once railed against law review writing in which "the views presented are those of special pleaders who fail to disclose that they are not scholars but rather people with axes to grind."[1] Not so here. Authors of course materials, even casebook authors, package their biases in subtle but effective ways, through their selection, organization, and emphasis of materials. By this essay, which is based on the preface to our multilithed course materials, we mean to disclose our own biases to our students and readers.

This is the basic question we consider at the outset: How is a course on the Constitution different from a course on constitutional law? Our course, "The Framers' Constitution," is about the history and theory of the

In 1989, we were selected to receive the SmithKline Beckman Bicentennial Award in Legal Education. The Award was funded by the SmithKline Beckman Foundation, a private foundation financially supported by the corporation of the same name, and was administered by the Institute for Educational Affairs, a nonprofit educational foundation based in Washington, D.C. A nationwide competition was organized to commemorate the two-hundredth anniversary of the Constitution of the United States and to restore the study of the Constitution to a prominent position in the law school classroom. The competition was launched on September 17, 1987, the bicentennial of the signing of the Constitution by the Federal Convention. Six winning proposals were selected by a committee of distinguished constitutional scholars, judges, attorneys, and law professors including Walter Berns, a constitutional scholar at Georgetown University affiliated with the American Enterprise Institute; Judge Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia; Rutgers University Law Professor John C. Pittenger; and Washington attorneys Michael Uhlmann of Pepper, Hamilton & Scheetz and John Daniel Reaves of Baker & Hostetler. Other professors who received awards were Professor David B. Broyles, Wake Forest University School of Law; Professor Gerhard Casper, University of Chicago School of Law; Professor Richard B. Collins, University of Colorado School of Law; Professor James L. Huggman, Lewis and Clark Law School; and Professor Alan Tarr, Rutgers-Camden University School of Law. The awards funded various course preparation expenses as well as outside-speaker expenses and library acquisitions. This essay summarizes our preliminary approach to the course we developed for the Award, entitled "The Framers' Constitution." A complimentary copy of The Framers' Constitution course materials is available from the authors upon written request.

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1. Douglas, Law Reviews and Full Disclosure, 40 Wash. L. Rev. 227, 228-29 (1965); *see also* Closen, A Proposed Code of Professional Responsibility for Law Reviews, 63 Notre Dame L. Rev. 55, 56-57 (1988) (proposing a law review code of professional responsibility to prevent abuses of the system).

Constitution.[2] The course and the materials we have assembled are about the framers' learning, their ideas, and their vision. Our goal is to understand the intellectual background of the Constitution by studying how it was written and ratified, identifying the major issues and alternatives that were posed, and appreciating how the framers themselves expected the Constitution to function as a practical form of self-government.

In U.S. law schools, as political science Professor Gary McDowell has noted, "[t]he study of the Constitution as the source of our political being has fallen on hard times."[3] He rightly explains that the lawyer's role is inherently "more rhetorical than philosophic."[4] Furthermore, legal reasoning itself is built on the paradigm of the common law, not on a text. Finally, the case method—perhaps the single original innovation in all of legal education—focuses the attention of teacher and student on judicial opinions, in particular on the opinions of the Supreme Court of the United States. The law school regimen thus has inverted the framers' priority—the primacy of a written Constitution. "The result," as Professor McDowell laments, "has been to abandon the study of the Constitution in favor of studying constitutional law."[5]

This emphasis on the Court's opinions and Justices and away from the document is nowhere better demonstrated than in one of the leading casebooks in the field.[6] The first 1601 pages deal with Supreme Court opinions and commentary. The Constitution of the United States is then relegated to Appendix B—just after a listing of the Justices. Our concern is that "[t]he regimen of casebooks may make the reading of original texts into an illicit experience."[7] We do not mean to say that law students should not study the Supreme Court and its opinions. Our more modest argument is that while reading cases is necessary, it is not enough. All too often the study of constitutional law by students is too much like "future horticultur-

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2. The Constitution is one of the great achievements of political philosophy; and it may be the only political achievement of philosophy in our society. The Framers of the Constitution and the leading participants in the debates on RATIFICATION shared a culture more thoroughly than did any later American political elite. They shared a knowledge . . . of ancient philosophy and history, of English COMMON LAW, of recent English political theory, and of the European Enlightenment. They were the American branch of the Enlightenment, and salient among their membership credentials was their belief that reasoned thought about politics could guide them to ideal political institutions for a free people. They argued passionately about the nature of SOVEREIGNTY, of political REPRESENTATION, of republicanism, of CONSTITUTIONALISM; and major decisions in the ferment of institution-building that culminated in 1787 were influenced, if never wholly determined, by such arguments. The final form of the new federal Constitution embodied radically new views. . . .

D. Regan, Philosophy and the Constitution, in 3 Encyclopedia of the American Constitution 1384, 1384-85 (L. Levy, K. Karst & D. Mahoney eds. 1986) (emphasis in original).

3. McDowell, Legal Education and the Constitution, 1 Benchmark 14, 14 (Jan.-Feb. 1984).

4. Id.

5. Id. at 15.

6. W. Lockhart, Y. Kamisar, J. Choper & S. Shiffrin, Constitutional Law (1986).

7. Arkes, The Shadow of Natural Rights, or A Guide for the Perplexed, 86 Mich. L. Rev. 1492, 1522 (1988).

alists studying solely cut flowers; or . . . future architects studying merely pictures of buildings."[8]

The teaching of constitutional law in the law schools has become too predictable.[9] The "typical course"[10] is a first-year, second-semester offering required for graduation. If the leading casebooks have anything in common, it is that they give short shrift to the political and intellectual history of the framers and their document, instead giving emphasis to modern tracts of the tenure track. Furthermore, almost every casebook begins in 1803, with the ascension of the judicial branch to judicial review in *Marbury v. Madison*.[11] This has become something of a Musgrave ritual for first-year law students: generation after generation mouthing the Chief Justice's three questions and dully penetrating his logic and meaning.[12] From there, the casebooks guide the student on a journey through constitutional doctrine using the Supreme Court opinion as vehicle.[13] The decided emphasis in this "opinionology" is on *modern* constitutional law.[14] The prevailing emphasis on contemporary era doctrine presented through the case method is illustrated nicely in the Harvard Law School catalogue description of the introductory course: "A study of basic principles of constitutional law as created, confused, compromised and changed by the Supreme Court."[15] This leads to a certain "hornbookery" with which

8. J. Frank, Courts on Trial 227 (1949).

9. This should *not* be read as a blanket indictment of the existing pedagogy. Some nontraditional techniques hold out the promise of much needed innovation. *See, e.g.*, Auerbach, Teaching Constitutional Law: Some Uses of Themes, 2 Const. Commentary 19 (1985); Bryden, Teaching Constitutional Law: An Eye for the Facts, 1 Const. Commentary 225 (1984); Davidow, Teaching Constitutional Law and Related Courses Through Problem-Solving and Role Playing, 34 J. Legal Educ. 527 (1984); Day, Teaching Constitutional Law: Role-Playing the Supreme Court, 36 J. Legal Educ. 268 (1986). *See generally* Norris, Kauper, Choper, Nathanson, Emerson & Souris, Round Table on Constitutional Law, 20 J. Legal Educ. 485 (1968) ("'a reexamination of the objectives, principles of organization, and procedures for both inquiry about and teaching' of constitutional law"); A Symposium on Constitutional Law, 13 Politics in Perspective 4-60 (1985). Even the most outspoken critic of the law school regime admits that there are "encouraging developments." Reynolds, Constitutional Education, 1987 B.Y.U. L. Rev. 1023, 1032.

10. *See generally* Haimbaugh, The Teaching of Constitutional Law in American Law Schools, 31 J. Legal Educ. 38 (1981).

11. 5. U.S. (1 Cranch) 137 (1803). *But see* W. Murphy, J. Fleming & W. Harris, American Constitutional Interpretation (1986) (reserving the introduction of judicial review for chapter six).

12. A. Doyle, The Memoirs of Sherlock Holmes—The Musgrave Ritual 386 (1960). *See generally* Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

13. *See generally* Haimbaugh, supra note 10, at 47-52 (survey of casebook authors' points of emphasis and deemphasis). *See also generally* Auerbach, supra note 9, at 20-22 (discussing legitimacy of constitutional policymaking by judiciary).

14. *E.g.*, R. Rotunda, Modern Constitutional Law xviii (3d ed. 1989) ("The emphasis is on *modern* constitutional law.") (emphasis in original). *But cf.* P. Brest & S. Levinson, Processes of Constitutional Decisionmaking: Cases and Materials 1-193 (2d ed. 1983) (opening with extensive study of early Supreme Court activities). This is meant to criticize a genre, not a particular work. Professor Baker, who teaches the basic first-year survey course, uses the Rotunda casebook.

15. Harvard Law School Catalog, 1986-87, at 64, quoted in Reynolds, supra note 9, at 1029.

anyone who teaches the basic course is all too familiar.[16]

Even so-called "advanced" courses in constitutional law are structured doctrinally. Such courses typically deal with recent or current issues before the Supreme Court. One is more likely to find a course on "Individual Rights" or courses on particular types of discrimination (gender, race, poverty, age, or sexual preference) than a course on the intellectual history of the Constitution. This sort of curriculum is upside-down, pedagogically as well as chronologically. It would "make more sense to have a required first-year course in constitutional history, followed by upper-class electives on contemporary doctrine."[17]

We believe Chief Justice Marshall's 1803 landmark and its judicial aftermath are, in an important sense, postscripts. The "Framers' Constitution" course reflects our skepticism toward the approach of modern constitutional law teaching that prefers contemporary moral and political ideals, such as the pursuit of "human dignity," over the original theory of the document.[18] We would resist the current tendency to transfigure courts from "the 'bulwarks of a limited Constitution' into the vanguards of an unlimited one; and the judges from arbiters of concrete legal and constitutional disputes into seers and soothsayers pondering the darkest mysteries of Nature and her laws."[19] To surrender to this tendency and begin in 1803 is to ignore the most important lesson learned by that first student of constitutional law, when he exhorted that "we must never forget that it is *a constitution* we are expounding."[20]

Although this is obviously not the place to rehearse the whole debate over the interpretive technique of "original understanding," a topical digression illustrates the obvious: a true constitutional history course will

16. Frank, Constitutional Law: Changes on the Horizon, 3 J. Legal Educ. 110, 112 (1950).

17. Bryden, Teaching Constitutional Law: Homage to Clio, 1 Const. Commentary 131, 134-35 (1984).

18. *See* Easterbrook, An Immutable Vision, Wash. Post Mag., 52-56 (June 28, 1987). Even if one believes in a metaphorically "living Constitution," studying doctrine by reading opinions alone cannot be enough. For example, many unwittingly take Chief Justice Marshall's understanding of *congressional* power under the necessary and proper clause as some generalization on judicial power vis-a-vis the whole document seen as "a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). And even if constitutional law (whether decisional or textual) is merely policy, shaped by the felt necessities of the times, then doctrine alone conveys an inadequate and superficial sense of the historical imperatives which formed the document and which shape its jurisprudential evolution. *See* Hyman, Constitutional Jurisprudence and the Teaching of Constitutional Law, 28 Stan. L. Rev. 1271, 1323-24 (1976).

19. McDowell, supra note 3, at 17. *But see* Kaufman, Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?, 37 J. Legal Educ. 184 (1987).

20. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). *Compare, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) *with* The Federalist No. 78 (A. Hamilton) (C. Rossiter ed. 1961) (Marshall and Hamilton both deriving constitutional judicial review from the nature of a limited constitution containing the highest expression of the fundamental, binding will of "We the People"). *See also* Rehnquist, A Comment on the Instruction of Constitutional Law, 14 Pepperdine L. Rev. 563, 563 (1987) ("I think there may be a place in a law school curriculum for such a course which tries to cover the border land between history and law.").

not slant the material in order to serve what some have called a "Meesean agenda." In his address to the 1985 ABA annual meeting, which largely stimulated the current debate over a jurisprudence of original intent, then Attorney General Edwin Meese himself gave the flat lie to his own claim of an impartial dedication to original understanding. Attorney General Meese endorsed the notion that because "the nation is in the throes of a drug epidemic," the Court must take "a more progressive stance on the fourth amendment."[21] Exactly what Attorney General Meese meant by "a more progressive" approach to the fourth amendment is not made entirely clear in his address, but from our vantage it resembles a "law and order" version of non-interpretivism. For example, Attorney General Meese rejected "the 'conventional interpretation,' widely accepted among judges and scholars," that except in a few limited circumstances, the fourth amendment requires a warrant to issue based upon probable cause before a search or seizure can be conducted.[22] In place of this conventional wisdom—which many have taken to express the "original understanding" of the matter—Attorney General Meese praised the "progressive" cases that dispensed with the warrant requirement for the search of automobiles, even in those instances when the automobile has been impounded and the executive branch enjoys ample time in which to secure a judicial warrant before conducting its search.[23]

The modern "conventional interpretation" of the warrant clause may not have matured into a regnant orthodoxy by the time the fourth amendment was ratified in 1791, probably due in part to the early American fixation with general warrants and writs of assistance as the *bete noire* of a proper search-and-seizure law. There is no doubt, however, that as colonists suffered through interludes of arbitrary search-and-seizure practice in the century between 1690 and 1790, "[w]arrants [became] increasingly requisite for search and arrest."[24] Thus, contrary to the announced "Meesean agenda" for the warrant clause, an impartial originalist should be prepared to live with the results mandated by the original understanding of the fourth amendment, whether those results are "liberal" or "conservative" in terms of modern political philosophy.

Indeed, "result-neutrality" is the leading benefit of taking a *written* constitution seriously: it binds the ideological impulses of those who must apply the sovereign command of the people. To borrow an Augustan-period phrase, a "true and honest study" of the framers' Constitution

21. Meese, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455, 460 (1986).

22. Strossen, The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1178-79 (1988).

23. *See* Meese, supra note 21, at 460 (citing United States v. Johns, 469 U.S. 478 (1985)).

24. Cuddihy & Hardy, A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution, 37 Wm. & Mary Q. 371, 392 (1980). *See* Continental Congress, Address to the Inhabitants of the Province of Quebec (26 Oct. 1774), in 1 Journals of the Continental Congress 1774-1789, 105, 109 (W. Ford ed. 1904) (condemning warrantless general searches by English customs officers and excisemen); Continental Congress, Address to the King's Most Excellent Majesty (25 Oct. 1774), in 1 Journals of the Continental Congress, supra, at 115, 116 (same).

should please neither liberal Democrats nor conservative Republicans all of the time. It may be a measure of the success of our course that the various lessons discomfited everyone in the class at least part of the time. This "discomfort index" might serve as the best measure of the objectivity and honesty of a constitutional history course, for although we are the intellectual heirs of the founding generation, in many respects our generation is radically different and inhabits a different social and intellectual universe. Today, a pat originalism likely is an ideological originalism. A true and honest engagement with the historical sources should teach new lessons to anyone (including the instructor) who is open to edification.

It is simply not enough that a student of the Constitution understand its contemporary interpretation. Only history can provide the necessary perspective, the bas-relief for the text. An intellectual history creates the appropriate context for tracing the genesis and development of our constitutional ideals. The compelling reasons for studying contemporary constitutional principles, which we all urge on our students, are even more compelling towards a study of the framers' dilemmas and their resolutions. We fully admit the problematic nature of this enterprise. Professor Forrest McDonald, a scholar who has spent three decades of his life studying these and similar materials and who admits to his own doubts about his conclusions, holds out a challenge to those who would follow him: "The American founders left an enormous quantity and variety of written materials, informing us from many points of view what they did, what they read, what they believed, and what they thought."[25] The difficulties of incomplete, inaccurate, and even fabricated sources must be overcome.[26] In addition, the even more overwhelming challenge of historians is to avoid a present-minded study of the past. Cognizant of the last two centuries, we must nevertheless assess the minds of the framers as innocent of any awareness of later events and developments as were their contemporaries. An arduous task, however, is only the more worthwhile, especially when something so important is at stake.

Law school should be more than training for a trade. Law school is, after all, graduate education and rightly should partake of the life of the mind.[27] A deeper understanding of first principles and their historical context provides a fuller, more complete appreciation for constitutional law.[28] This develops the necessary background for law-school study of

25. F. McDonald, Novus Ordo Seclorum xii (1985).

26. For the definitive cautionary assessment, see Hutson, The Creation of the Consitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986).

27. "To the extent that you are talking about jurisprudence as a course in intellectual history—a sort of great books course if you will—there can be no doubt that it can be taught effectively and well and that such a journey ought to be made somehow by every educated lawyer." White, Teaching Philosophy of Law in Law Schools: Some Cautionary Remarks, 36 J. Legal Educ. 563, 567 (1986). *See* Baker, A Law Student's Responsibility for a Liberal Education, 20 Tex. Tech L. Rev. 1153 (1989).

28. *See* Liu, Studying United States Constitutional Law: A Personal Experience of a Chinese Student, 37 J. Legal Educ. 346, 348 (1987) (observing that it is difficult to understand or appreciate American constitutional law if one lacks knowledge of "the political, economic, and social background of the cases").

related courses, such as administrative law, civil procedure, criminal law and procedure, and federal jurisdiction. On the other hand, law school is also professional training, and constitutional law, thus broadly considered, provides vital preparation for practice in other related areas such as antitrust law, family law, and labor law.

Beyond its curricular ripple effect, a broadly conceived study of the Constitution informs what Tocqueville called the "habits of the heart"[29]—the components of an American character, fashioned during our nation's beginning when philosophies, values, and customs began to assume the shape of moral and intellectual traditions. Our commitments to limited government, separated powers, federalism, and individual rights constitute the essential terms of the fundamental social compact that defines our country and our people. Thus, one need not be an originalist to care about the framers' Constitution. Their ideas, as refracted over the intervening 200 years, have shaped and continue to shape our destiny. Even a non-originalist understanding of our current selves benefits by an understanding of our former selves, though we may never wholly succeed at either understanding. That we care, really and deeply care, about the answers we reach provides us with an added worry over selective perception—that we will understand only what we want to understand and only how we want to understand it—but this merely obliges a more careful and sensitive study.

Lawyers and the legal profession have a special responsibility for maintaining the integrity and continued vitality of our constitutional order.

> A constitution establishing free government is not a machine that runs forever once set in motion; by nature, its success depends on the citizenry. However firm its foundation, however cunning its structure, however self-evident its truths, a constitution cannot guarantee that liberty will be passed on effortlessly from generation to generation. As [the framers] understood, freedom is renewed and sustained only by vigorous education.[30]

Law schools are to the modern United States what Oxford and Cambridge were to Victorian England: the grammar schools for those who will govern the nation from public and private positions of leadership. We lawyers, beyond all cavil, have a first responsibility to learn about the rule of law.[31] As law teachers, the authors are convinced that the framers are our best teachers.

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29. A. de Tocqueville, Democracy In America 287 (G. Lawrence trans.; J.P. Mayer & M. Lerner eds. 1966).

30. Bennett, Education and the Constitution: The Case of Citizen James Madison, 14 J.C. & U.L. 417, 421-22 (1987).

31. That this is a timeless challenge may be gleaned from Aristotle's entreaty:

> But of all the things which I have mentioned that which most contributes to the permanence of constitutions is the adaptation of education to the form of government, and yet in our own day this principle is universally neglected. The best laws, though sanctioned by every citizen of the state, will be of no avail unless the young are trained by habit and education in the spirit of the constitution . . . .

Aristotle, Politics V, 9, 1310a, in 2 The Complete Works of Aristotle 2080 (J. Barnes ed. 1984).

The course we have fashioned is a three-hour elective. Each lesson in the following syllabus corresponds to a class week. Class assignment A is for the first weekly session, a two-hour session of lecture and discussion. Class assignment B is for the second weekly session, a one-hour discussion usually focused on Supreme Court decisions.

We set out to read and ponder what the founding generations in the United States read and wrote during the late seventeenth through the late eighteenth centuries. In our class discussions, we make every effort to create a seminar atmosphere, an atmosphere of reflection and contemplation, of critical inquiry and synthesis. The structuring of the materials conveys our pedagogical emphasis on originalism and interpretivism, although the materials support regular and extended consideration of alternative theories of constitutional interpretation.[32] Our purpose needs to be made explicit: we developed a course on the intellectual history *of* the framers, not a course on contemporary historiography *about* the framing.[33]

We assembled a 426-page set of course materials which was distributed to the students. These materials expose our students to the framers' thoughts directly, not through some scholar's filter. In some evolved form, we hope to publish it as an anthology. In addition, we ask students to purchase five paperback texts.[34] *The Federalist Papers*[35] and *The Anti-Federalist Papers*[36] are necessary primary sources, of course. Two additional texts are necessary secondary materials to help guide our students through the original materials: Gordon Wood's classic intellectual history[37] and the more recent and more broad-ranging survey by Forrest McDonald.[38] Finally, as a foil for our own views and with the expectation that it would challenge the basic assumptions of most of our students, we include Jules Lobel's provocative book of readings from the radical and progressive

32. *See, e.g.*, Lesson 3 of Syllabus, infra. Others may prefer to begin such a course with a discussion of originalism and the competing theories of constitutional interpretation and rely on this discussion as a *leitmotif* for the remainder of the course. *See* supra note 2.

33. *See* D. Farber & S. Sherry, A History of the American Constitution 3-21 (1989).

34. The most difficult part of choosing the books was to select just a few from among the dozens available. The Bicentennial seems to have loosed a horde of scholars to write on the Constitution. The intellectual history of the Constitution has become something of a growth industry. *See, e.g.*, Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085 (1989) (stating that the originalism debate "has extended beyond academics to include judges and other government officials"); Sherry, The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship, 5 Const. Commentary 323 (1988) (an attempt to synthesize the massive historiography of the intellectual origins of the Constitution). Some, though not all, of it is quite good. There are even writings on the writings, which themselves are helpful in selecting texts. J. Greene, A Bicentennial Bookshelf: Historians Analyze the Constitutional Era (1986); Bernstein, Charting the Bicentennial, 87 Colum. L. Rev. 1565 (1987); Onuf, Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective, 46 Wm. & Mary Q. 341 (1989); Book Notes, 101 Harv. L. Rev. 849 (1988); *see also* Wood, The Fundamentalists and the Constitution, N.Y. Rev. of Books 33-40 (Feb. 18, 1988).

35. The Federalist Papers (C. Rossiter ed. 1961).

36. The Anti-Federalist Papers and the Constitutional Convention Debates (R. Ketcham ed. 1986).

37. G. Wood, The Creation of the American Republic, 1776-1787 (1969).

38. F. McDonald, supra note 25.

viewpoint.[39]

What follows is our set of lesson plans with major themes identified in italics.

LESSON 1

America In The 18th Century: *The Political and Social Context of Colonial America*

Class Assignment:

A. G. Wood, THE CREATION OF THE AMERICAN REPUBLIC. Chapel Hill: University of North Carolina Press (1969), pp. 1-90.

B. G. Wood, supra, pp. 91-255.

Smith, *The Lessons of American History*, in THE FRAMERS' CONSTITUTION: DOCUMENTS AND MATERIALS (T. Baker & J. Viator eds. 1988), pp. 6-16 [hereinafter DOCUMENTS AND MATERIALS].

Chronology of Important Dates in the History of the United States Constitution, Appendix A, in DOCUMENTS AND MATERIALS, supra, pp. 404-20.

Supplemental Reading (asterisks denote especially noteworthy readings):

* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY (R. Beeman, S. Botein & E. Carter eds.). Chapel Hill: University of North Carolina Press (1987), pp. 23-37, 333-48 [hereinafter BEYOND CONFEDERATION].

LESSON 2

The Political and Constitutional Theory of the American Revolution: *The Ideas and Issues Behind the Movement for Independence and Revolution*

Class Assignment:

A. G. Wood, supra Lesson 1, pp. 259-343.

B. G. Wood, supra Lesson 1, pp. 344-467.

Supplemental Reading:

* B. Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION. Cambridge: Harvard University Press (1967), pp. 1-93.

* Tate, *The Social Contract in America, 1774-1787*, 22 William and Mary

39. A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution 3 (J. Lobel ed. 1988) ("The underlying theme of this volume is how radicals and progressives have addressed the mythology and symbolism that surround the Constitution.").

Quarterly 375 (1965).

C. McIlwain, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION. New York: Cornell University Press (1958).

F. Kern, KINGSHIP & LAW IN THE MIDDLE AGES. Des Plaines: Greenwood Press (1948 ed.).

Rossiter, *The Political Theory of the American Revolution*, in ORIGINS OF AMERICAN POLITICAL THOUGHT 97. New York: Harper & Row (J. Roche ed. 1967).

LESSON 3

The Road to the Philadelphia Convention: *The Political and Social History of the Confederation Years*

Class Assignment:

A. G. Wood, supra Lesson 1, pp. 471-564, 593- 615.

F. McDonald, NOVUS ORDO SECLORUM. Lawrence, Kansas: University Press of Kansas (1985), pp. 97-183.

Madison Bibliography, Appendix B, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 421-26.

B. Schauer, *The Varied Uses of Constitutional History*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 17-27.

Supplemental Reading:

* L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION. New York: Macmillan (1988), pp. 1-29.

J. Agresto, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY. Ithica, New York: Cornell University Press (1984), pp. 19-55.

* Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 Boston University Law Review 811 (1983).

Symposium on the Uses of History in Constitutional Law, 24 California Western Law Review 221 (1988).

Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 Iowa Law Review 1177 (1987).

Perry, *Interpreting the Constitution*, 1987 Brigham Young University Law Review 1157.

Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contribution of Special Theories of Judicial Review*, 35 University of Florida Law Review 209 (1983).

G. Anastaplo, THE UNITED STATES CONSTITUTION OF 1787. Baltimore:

Johns Hopkins Press (1989).

M. Jensen, ARTICLES OF CONFEDERATION. Madison: University of Wisconsin Press (1939).

M. Jensen, THE NEW NATION: A HISTORY OF THE U.S. DURING THE CONFEDERATION, 1781-1789. Boston: Northeastern University Press (1981).

LESSON 4

The Classical Heritage and the Constitution: *The Lessons Gleaned from Classical History and Philosophy—A Brief Sampling from the Framers' Didactic Reading*

Class Assignment:

A. Sterling & Scott, *Plato the Republic*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 28-59.

Jowett & Twining, *Aristotle's Politics*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 60-82.

B. White, *The American Judicial Tradition*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 83-93.

Letter to the Alexandria Gazette from "A Friend of the Constitution" (30 June 1819), in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 94-99.

Supplemental Reading:

Polybius, THE HISTORIES. New York: G.P. Putnum's Sons (1922).

* M.C. Cicero, DE REPUBLICA. Columbus, Ohio: Ohio State University Press (1929).

M.C. Cicero, DE LEGIBUS. Heidelberg: F.H. Karle (1950).

H.T. Colburn, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION. Chapel Hill: University of North Carolina Press (1965), pp. 3-39, 40-56, 185-93.

W. Von Leyden, ARISTOTLE ON EQUALITY AND JUSTICE. New York: St. Martin's Press (1985).

A. D'Entreves, NATURAL LAW: AN HISTORICAL SURVEY. New York: Harper (1951), pp. 7-86.

* M. Reinhold, CLASSICA AMERICANA: THE GREEK AND ROMAN HERITAGE IN THE UNITED STATES. Detroit: Wayne State University Press (1984), pp. 94-115, 142-73.

Botein, *Cicero as a Role Model for Early American Lawyers: A Case Study in Classical "Influence,"* 73 The Classical Journal 313 (1973).

D. Nolan, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION.

Indianapolis: Michie Co., Bobbs-Merrill Co. (1980), pp. 197-215.

LESSON 5

Constitutionalism and a Written Constitution: *A Survey of Classical and Modern Ideas About the Rule of Law and Constitutionalism*

Class Assignment:

A. Laslett, *John Locke: Two Treatises of Government*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 100-12.

U.S. Congress, A Declaration by the Representatives of the United States of America (The Declaration of Independence), in DOCUMENTS AND MATERIALS, supra, pp. 113-15.

THE FEDERALIST PAPERS, Nos. 2, 22. New York: New American Library (Clinton Rossiter ed. 1961) [hereinafter FEDERALIST PAPERS (cited by number only)].

THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES. New York: New American Library (Ralph Ketcham ed. 1968), pp. 79-86, 219-21, 264-69 [hereinafter ANTI-FEDERALIST PAPERS].

F. McDonald, supra Lesson 3, pp. 1-55.

B. *Marbury v. Madison*, 5 U.S. 137 (1803).

FEDERALIST PAPERS, No. 78, supra Lesson 5.

A LESS THAN PERFECT UNION. New York: Monthly Review Press (J. Lobel ed. 1988), pp. 195-210.

Supplemental Reading:

* A. McLaughlin, THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM. New York: The New York University Press (1932), pp. 13-85.

J. Greene, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788. Athens: University of Georgia Press (1986), pp. 129-80.

Lutz, *From Covenant to Constitution in American Political Thought*, 10 Publius 101-33 (1980).

Thompson, *The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution*, 91 American Historical Review 1103 (1986).

J. Burgh, POLITICAL DISQUISITIONS (1775) (reprinted New York: DaCapo Press (1971)).

R. Hooker, OF THE LAWS OF ECCLESIASTICAL POLITY (1594).

Sir Edward Coke, *Bonham's Case*, 8 Coke 113b (1610).

F. Coleman, HOBBES AND AMERICA: EXPLORING THE CONSTITUTIONAL FOUNDATIONS. Toronto: University of Toronto Press (1977).

Curti, *The Great Mr. Locke: America's Philosopher*, in M. Curti, PROBING OUR PAST 69. New York: Harper (1955).

G. Mace, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF THE AMERICAN POLITICAL HERITAGE. Carbondale: Southern Illinois University Press (1979).

L. Leder, LIBERTY AND AUTHORITY: EARLY AMERICAN POLITICAL IDEOLOGY, 1689-1763. Chicago: Quadrangle Books (1968), pp. 37-60.

* Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, in CORWIN ON THE CONSTITUTION 56. Ithica: Cornell University Press (R. Loss ed. 1981).

* Faulkner, *John Marshall*, in AMERICAN POLITICAL THOUGHT 89. Itasca, Illinois: F.E. Peacock Publishers (M. Frisch & R. Stevens eds. 1983).

Friedman, *The Constitution and American Legal Culture*, 32 St. Louis University Law Journal 1 (1987).

Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 Duke Law Journal 1.

LESSON 6

Republicanism and a Republican Form of Government: *Detailed Discussion of Gordon Wood's Work and the Discovery of Civic Humanism in the American Founding*

Class Assignment:

A. Bolingbroke, *The Idea of a Patriot King*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 116-32.

Madison, *Fear of Power: Essays for the Party Press, 1791-1792*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 133-48.

FEDERALIST PAPERS, Nos. 11, 29, 63, supra Lesson 5.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 189-216.

F. McDonald, supra Lesson 3, pp. 57-96.

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 396-420.

B. *Luther v. Borden*, 48 U.S. 1 (1841).

Parker, *The Past of Constitutional Theory—And Its Future*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 149-53.

Supplemental Reading:

* B. Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION. Cambridge: Harvard University Press (1967), pp. 1-93.

THE ENGLISH LIBERTARIAN HERITAGE: FROM THE WRITINGS OF JOHN TRENCHARD AND THOMAS GORDON IN THE INDEPENDENT WHIG AND CATO'S LETTERS. Indianapolis: Bobbs-Merrill (D. Jacobson ed. 1965), pp. 38-80, 93-123, 215-42.

D. Lutz, POPULAR CONSENT AND POPULAR CONTROL. Baton Rouge: Louisiana State University Press (1980), pp. 1-52.

P. Conklin, SELF-EVIDENT TRUTHS. Bloomington: Indiana University Press (1974), pp. 1-73.

* Banning, *Republican Ideology and the Triumph of the Constitution, 1789-1793*, 31 William & Mary Quarterly 167 (1974).

W. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION. Ithica: Cornell University Press (1972).

M. Tushnet, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW. Cambridge: Harvard University Press (1988).

Rossum, *Representation and Republican Government: Contemporary Court Variations on the Founders' Theme*, in TAKING THE CONSTITUTION SERIOUSLY 417. Iowa: Kendall/Hunt Publishing Company (G. McDowell ed. 1981).

Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 William & Mary Law Review 57 (1987).

* Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Supreme Court Review 127, reprinted in R. Lerner, THE THINKING REVOLUTIONARY 91. Ithica: Cornell University Press (1987).

LESSON 7

The Separated and Balanced Constitution—The Theory of Separation of Powers: *The Origins and Heritage of the Mixed and Balanced Polity and Its Transformation into Modern Separation Theory*

Class Assignment:

A. Montesquieu, *The Spirit of the Laws (Book XI)*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 154-68.

Adams, *Thoughts on Government*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 169-76.

Thomas Jefferson, *Notes on the State of Virginia*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 177-78.

FEDERALIST PAPERS, Nos. 47, 48, 51, 66, supra Lesson 5.

B. ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 62-86, 114-24, 159-60, 165-73, 227-56, 311-16, 331-35.

The Complete Anti-Federalist, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 179-84.

F. McDonald, supra Lesson 3, pp. 225-60.

Morrison v. Olson (J. Scalia, dissenting), in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 185-220.

A LESS THAN PERFECT UNION, supra Lesson 5.

Supplemental Reading:

* M. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS. Oxford: Clarendon Press (1967), pp. 53-97, 119-75.

* P. Conkin, SELF-EVIDENT TRUTHS. Bloomington: Indiana University Press (1974), pp. 143-84.

T. Pangle, MONTESQUIEU'S PHILOSOPHY OF LIBERALISM. Chicago: University of Chicago Press (1973).

W. Gwyn, THE MEANING OF THE SEPARATION OF POWERS. New Orleans: Tulane University (1965).

Wright, *The Origins of the Separation of Powers in America*, in ORIGINS OF AMERICAN POLITICAL THOUGHT 139. New York: Harper & Row (J. Roche ed. 1967).

Sharp, *The Classical American Doctrine of the Separation of Powers*, 2 University of Chicago Law Review 385 (1935).

Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 87 University of Pennsylvania Law Review 842 (1938).

Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 French Studies 25 (1949).

Carpenter, *The Separation of Powers in the Eighteenth Century*, 22 American Political Science Review 32 (1928).

C. Weston, ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS. New York: AMS Press (1965), pp. 9-12, 23-31, 85-88, 123-42.

LESSON 8

The Separated and Balanced Constitution—The Legislative Branch and Popular Sovereignty: *The Traditions of Popular Participation in Government and Legislative Supremacy*

Class Assignment:

A. FEDERALIST PAPERS, Nos. 10, 30-36, 42, supra Lesson 5.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 37-39, 357-64 (Arts. of Confederation); 39-41, 49-53 (Representation in the National Legislature); 92-109 (Senate); 317-21 (President).

F. McDonald, supra Lesson 3, pp. 261-93.

B. *INS v. Chadha*, 462 U.S. 919 (1983).

Supplemental Reading:

Diamond, *The Federalist*, in AMERICAN POLITICAL THOUGHT 69. Itasca, Illinois: F.E. Peacock Publishers (M. Frisch & R. Stevens eds. 1983).

* W. Hamilton & D. Adair, THE POWER TO GOVERN. New York: De Capo Press (1937), pp. 103-83.

* W. Kendall & G. Carey, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION. Baton Rouge: Louisiana State University Press (1970), pp. 3-74.

E. Morgan, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA. New York: Norton (1988).

R. Palmer, THE AGE OF DEMOCRATIC REVOLUTION. Princeton: Princeton University Press (1959), pp. 213-32.

LESSON 9

The Separated and Balanced Constitution—The National Executive and Foreign Affairs: *The Foreign-Policy Powers of the President and the Theory of Executive Prerogative*

Class Assignment:

A. Laslett, *John Locke: Two Treatises of Government*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 221-23.

FEDERALIST PAPERS, No. 8, supra Lesson 5, pp. 23-26.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 80-84, 91-92, 42-43, 116-19, 183-86, 207-08, 252-55, 298-92, 194-98, 221-23, 225-41, 291.

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 221-48.

B. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Supplemental Reading:

* L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION. New York: Macmillan (1988), pp. 30-53.

E. Corwin, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS. Princeton: Princeton University Press (1917).

C. Thach, THE CREATION OF THE PRESIDENCY 1775-1789. Baltimore:

Johns Hopkins Press (1922).

* Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 Seton Hall Law Review 527 (1974).

Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 Washington Law Review 1 (1979).

A. Sofaer, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER. Cambridge: Ballinger Publishing Company (1976).

* Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 Virginia Journal of International Law 1 (1974).

F. Wormuth & E. Firmage, TO CHAIN THE DOGS OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW. Dallas: Southern Methodist University Press (1986).

M. Marcus, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER. New York: Columbia University Press (1977).

Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 Columbia Law Review 53 (1953).

L. Fisher, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT. Princeton: Princeton University Press (1985).

Presidential Studies Quarterly Bicentennial Issue: The Origins and Invention of the American Presidency (T. Corwin ed. Spring 1987).

LESSON 10

The Separated and Balanced Constitution—The Judiciary Department: *The Evolution of the Theory of Judicial Sentryship of the Constitution*

Class Assignment:

A. FEDERALIST PAPERS, Nos. 78-81, supra Lesson 5.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 120-27, 293-308, review pp. 244-47.

B. Symposium, *The Great Debate: Interpreting Our Written Constitution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 224-69.

Cooper v. Aaron, 358 U.S. 1 (1958).

Supplemental Reading:

* L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION. New York: Macmillan (1988), pp. 54-99.

* C. Wolfe, THE RISE OF MODERN JUDICIAL REVIEW. New York: Basic

Books (1986), pp. 3-89.

C. Beard, THE SUPREME COURT AND THE CONSTITUTION. New York: Macmillan (1912).

Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 University of Pennsylvania Law Review 1166-85 (1972).

Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 Law & History Review 101 (1985).

* Corwin, *The Establishment of Judicial Review*, 9 Michigan Law Review 102 (1911).

Goldstein, *Popular Sovereignty, the Origins of Judicial Review and the Revival of Unwritten Law*, 48 Journal of Politics 51 (1986).

C. Haines, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY. New York: DaCapo Press (1932).

L. Boudin, GOVERNMENT BY JUDICIARY. New York: W. Goodwin, Inc. (1932).

T. Higgins, JUDICIAL REVIEW UNMASKED. West Hanover, Massachusetts: Christopher Publishing House (1981).

LESSON 11

Federalism: *A Study of Sovereignty, Ancient Confederationism, and Modern Federalism: The Background of the American Theory of Divided Sovereignty*

Class Assignment:

A. FEDERALIST PAPERS, Nos. 9, 10, 15, 28, 39, 44, 45, 51 (review), 56, 58, supra Lesson 5.

ANTI-FEDERALIST PAPERS, supra Lesson 5, pp. 257-64, 268-80.

Wilson, *Considerations on the Bank, 1785*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 270-71.

Kurland & Lerner, *The Founders' Constitution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, p. 271 (Jefferson to Madison).

Kurland & Lerner, *The Founders' Constitution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 272-73 (Madison to Washington).

Diamond, *What the Framers Meant by Federalism*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 274-92.

B. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985).

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 361-76.

Supplemental Reading:

* Scheiber, *Federalism and the Constitution: The Original Understanding*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 85. Cambridge: Harvard University Press (L. Friedman & H. Scheiber eds. 1978).

McLaughlin, *The Background of American Federalism*, 12 American Political Science Review 215-40 (1918).

Van Alstyne, *Federalism, Congress, The States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke Law Journal 769.

* Banning, *The Practicable Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism*, in BEYOND CONFEDERATION 162. Chapel Hill: University of North Carolina Press (R. Beeman, S. Botein & E. Carter eds. 1987).

R. Berger, FEDERALISM: THE FOUNDERS' DESIGN. Norman: University of Oklahoma Press (1987).

Lofgren, *The Origins of the Tenth Amendment*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 331. Durham: Carolina Academic Press (R. Collins ed. 1980).

LESSON 12

Individual Rights—The Declaration of Independence and the Bill of Rights: *The Philosophies of Natural Law and Natural Rights*

Class Assignment:

A. Bailyn, *The Ideological Origins of the American Revolution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 293-314.

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 56-70, 379-86.

B. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 104-34, 303-34, 346-60.

Supplemental Reading:

* L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION. New York: Macmillan (1988), pp. 137-73, 267-83.

* L. Strauss, NATURAL RIGHT AND HISTORY. Chicago: University of Chicago Press (1953) pp. 1-8, 165-251.

H. Jaffa, THE CONDITIONS OF FREEDOM. Baltimore: Johns Hopkins University Press (1975), pp. 149-60.

* Corwin, *The "Higher Law" Background of American Constitutional Law*, in CORWIN ON THE CONSTITUTION 79. Ithica: Cornell University Press (R. Loss ed. 1981).

Coby, *The Law of Nature in Locke's Second Treatise: Is Locke a Hobbesian?*, 49 Review of Politics 3 (1987).

* Storing, *The Constitution and the Bill of Rights*, in THE AMERICAN FOUNDING 29. Port Washington, New York: Kennikat Press (R. Rossum & G. McDowell eds. 1981).

L. Leder, LIBERTY AND AUTHORITY. Chicago: Quadrangle Books (1968), pp. 118-30.

J. Pocock, VIRTUE, COMMERCE, AND HISTORY. Cambridge: Cambridge University Press (1985), pp. 37-50.

Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 Supreme Court Review 49.

I. Shapiro, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY. Cambridge: Cambridge University Press (1986), pp. 3-148.

Sisson, *The Idea of Revolution in the Declaration of Independence and the Constitution*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 403. Durham: Carolina Academic Press (R. Collins ed. 1980).

LESSON 13

Slavery, the Declaration of Independence, and the Constitution: *"The Witch at the Christening"—Whether the Principles of the Declaration are Fulfilled or Denied in the Constitution of 1787*

Class Assignment:

A. Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 315-53.

B. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Supplemental Reading:

C. Becker, THE DECLARATION OF INDEPENDENCE. New York: Alfred A. Knopf (1944).

Grimes, *Conservative Revolution and Liberal Rhetoric: The Declaration of Independence*, in 200 YEARS OF THE REPUBLIC IN RETROSPECT 1. Charlottesville, University Press of Virginia (W. Havard & J. Bernd eds. 1976).

W. Kendall & G. Carey, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION. Baton Rouge: Louisiana State University Press (1970), pp. 75-95.

Mansfield, *Thomas Jefferson*, in AMERICAN POLITICAL THOUGHT 23. Itasca, Illinois: F.E. Peacock Publishers (M. Frisch & R. Stevens eds. 1983).

Freehling, *The Founding Fathers and Slavery*, 77 American Historical Review 81 (1972).

Lynd, *The Compromise of 1787*, 81 Political Science Quarterly 225 (1966).

* Storing, *Slavery and the Moral Foundations of the American Republic*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 313. Charlottesville: University Press of Virginia (R. Horwitz ed. 1986) [hereinafter MORAL FOUNDATIONS].

D. Fehrenbacher, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS. New York: Oxford University Press (1978).

Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 University of Puget Sound Law Review 351 (1987).

Jensen, *The Extraordinary Revival of Dred Scott*, 66 Washington University Law Quarterly 1 (1988).

* Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, 41 Public Interest 39 (Fall 1975).

J. Noonan, PERSONS AND MASKS OF THE LAW. New York: Farrer, Straus & Giroux (1976), pp. 29-64.

THE DRED SCOTT DECISION: LAW OR POLITICS? Boston: Houghton Mifflin (S. Kutler ed. 1967).

* E. Corwin, THE DOCTRINE OF JUDICIAL REVIEW. Gloucester: P. Smith (1914), pp. 129-57.

Anastaplo, *The Declaration of Independence*, 9 St. Louis University Law Journal 390 (1965).

LESSON 14

Perspectives: *A Study of Beard, the Anti-Beardians, the Neo-Beardians, the Progressives, the Straussians, the Civic Humanists, and Critical Legal Studies Scholars*

Class Assignment:

A. Adair, *The Tenth Federalist Revisited*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 354-73.

Wood, *The Fundamentalists and the Constitution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 374-80.

F. McDonald, supra Lesson 3, pp. 185-224.

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 17-31, 73-91, 135-50.

B. Turner, *"Democracy" and Other Words You Won't Find in the Constitution*, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 380-84.

Views from the Bench, in DOCUMENTS AND MATERIALS, supra Lesson 1, pp. 385-403.

A LESS THAN PERFECT UNION, supra Lesson 5, pp. 1-15, 40-55.

Supplemental Reading:

Hutson, *Country, Court, and Constitution: Antifederalism and the Historians*, 38 William & Mary Quarterly 337 (1981).

* Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 American Political Science Review 799 (1961).

S. Boyd, THE POLITICS OF OPPOSITION: ANTIFEDERALISTS AND ACCEPTANCE OF THE CONSTITUTION. Millwood, New York: KTO Press (1979).

D. Lutz, POPULAR CONSENT AND POPULAR CONTROL. Baton Rouge: Louisiana State University Press (1980), pp. 171-212.

Hofstadter, *The Founding Fathers: An Age of Realism*, in MORAL FOUNDATIONS 62, supra Lesson 13.

M. White, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION. New York: Oxford University Press (1987).

D. Epstein, THE POLITICAL THEORY OF THE FEDERALIST. Chicago: University of Chicago Press (1984).

* M. Kammen, A MACHINE THAT WOULD GO OF ITSELF. New York: Alfred A. Knopf (1986), pp. 3-39, 127-55, 282-312, 381-400.

A WORKABLE GOVERNMENT?—THE CONSTITUTION AFTER 200 YEARS. New York: Norton (B. Marshall ed. 1987).

Abraham, *Freedom and the Constitution: A Second Century Appraisal*, 1987 Utah Law Review 847.

* J. Main, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788. Chicago: Quadrangle Books (1961), pp. 268-81.

THE ANTIFEDERALISTS. Boston: Northeastern University Press (C. Kenyon ed. 1985).

THE CONSTITUTION RECONSIDERED. New York: Columbia University Press (C. Read ed. 1938).

R. Rutland, THE ORDEAL OF THE CONSTITUTION: THE ANTIFEDERALISTS AND THE RATIFICATION STRUGGLE OF 1787-1788. Norman: University of Oklahoma Press (1966).

Rossum, *Statemanship and the Future of the American Commercial Republic*, in THE AMERICAN FOUNDING 157. Port Washington, N.Y.: Kennikat Press (R. Rossum & G. McDowell eds. 1981).

Montesquieu, THE SPIRIT OF THE LAWS (Book XX, i-ii). Berkeley: University of California Press (D. Carrithers ed. 1977) (effects of commerce on a republic).

AMERICA IN THEORY: IS THERE A FOUNDING MYTH OF AMERICA? New York: Oxford University Press (L. Berlowitz, D. Donoghue & L. Menand eds. 1988)