

Exam 2
PS 3255 Development of the American Constitution
Nov. 14, 2018

General Instructions

Choose ANY FOUR of the five questions below, and answer all parts. If you attempt to answer more than four questions, please indicate which four you would like to count. Otherwise, your four lowest-numbered questions will be graded.

It should be possible, in principle, to answer each question in about four well-formulated sentences. You are free to write more, but avoid irrelevant or extraneous material in your answer.

You have until 4:00 (approximately 80 minutes) to complete your answers. No matter what happens, plan your time so that you don't end up addressing fewer than four questions.

Please try to skip lines and write on only one side of each page in your test booklet. If you notice you've forgotten this, don't worry; just start doing it then. Extra test booklets are freely available; write your name on each booklet you use.

On the front of your first booklet, please indicate the numbers of the questions you have answered.

Free crib sheet material

Following the questions, you will find lists of statutes, court cases, and assigned readings for your convenience, should you want to refer to them by name. This should not be taken to imply that any of these items should play a part in any of your answers to the exam questions; nor that these items will be sufficient to answer the exam questions.

Exam Questions (choose 4 of 5)

1. During both the Jim Crow era and the “civil rights revolution,” political processes other than constitutional amendments changed American understandings of the Constitution with respect to race and civil rights in major ways. For each of those two periods, give one such change in understanding, and briefly specify the political process that brought it about.
2. What main roles have political parties historically played, or been thought to play, in supporting the basic constitutional principles and constitutional processes in the United States?
3. How did the advent of a “democratic ideal” between 1800 and 1844 change the Constitution?
4. Describe (a) a feature of the administrative state that might threaten American constitutional principles such as the democratic ideal or the republican ideal; and (b) a feature that might promote or protect such a principle? In each case, explain how that feature performs as you suggest.
5. (a) Describe an act (or collection of acts) of constitutional hardball in the process of federal judicial nominations and confirmations. (b) For that act, apply Fishkin and Pozen’s two-part definition, by describing what constitutional convention was violated or what rapid constitutional shift was being sought. (c) Assess how some escalation either led to, resulted from, or might result from that instance of hardball.

Statutes:

Enforcement Acts of 1871 and 1872.
Civil Rights Act of 1875
Chinese Exclusion Act of 1882
Immigration Act of 1924
National Security Act of 1947
Civil Rights Act of 1964
Voting Rights Act of 1965
Immigration and Nationality Act of 1965
Civil Rights Act of 1968 (Fair Housing Act)

Our readings:

William M. Wiecek, "The Witch at the Christening: Slavery and the Constitution's Origins." Book chapter.

Philip Klinkner with Rogers Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America*.

Bruce Ackerman, "The Living Constitution." *Harvard Law Review*

Brown v. Board of Education, Supreme Court decision (1954).

The Southern Manifesto.

Brad Snyder, "How the Conservatives Canonized Brown." *Rutgers Law Review*.

Lyle Denniston, "Opinion recap: Voting law in deep peril." *SCOTUSblog*. (On the *Shelby County v. Holder* decision).

Richard P. McCormick, *The Presidential Game*.

Steven Levitsky and Daniel Ziblatt, "How a Democracy Dies." *The New Republic*.

Fred W. Riggs "Bureaucracy & the Constitution." *Public Administration Review*.

Lawrence Lessig and Cass R. Sunstein, "The President and the Administration." *Columbia Law Review*.

Richard J. Pierce, Jr., "Rulemaking and the APA." *Tulsa Law Review*.

Center for Effective Government, "Administrative Procedure Act." Website.

Linda Greenhouse, "A Conservative Plan to Weaponize the Federal Courts." *NY Times*.

Rob Goodman, "Hey Democrats, Fighting Fair Is for Suckers: Court-packing! Puerto Rican statehood! Votes for felons! Why—and how—the next Democratic majority should play dirty." *Politico*.

Joseph Fishkin & David E. Pozen "Asymmetric Constitutional Hardball." *Columbia Law Review*.

Neal Kumar Katyal "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within." *Yale Law Journal*.

John J. Adair and Rex Simmons, "From Voucher Auditing to Junkyard Dogs: The Evolution of Federal Inspectors General." *Public Budgeting & Finance*.

Joe Davidson, "As inspectors general are celebrated, VA tried to intimidate its IG." *Washington Post*.

Supreme Court cases

Blyew et al. v. U.S. (1873) approved Kentucky prohibition of black witness testimony

U.S. v. Cruikshank (1875) Enforcement Act of 1870 doesn't apply against private persons

U.S. v. Reese (1875) Enforcement Act of 1870 exceeds Cong. power to regulate elections

Civil Rights Cases (1883) invalidated Civil Rights Act of 1875 (public accommodations)

The Slaughterhouse Cases (1883) recognized 14th Amendment; narrowly defined rights of U.S. citizens

Plessy v. Ferguson (1896) "separate but equal"

Williams v. Mississippi (1898) refused to invalidate voter qualification laws

Giles v. Harris (1903) refused to enforce against discriminatory voter registration practices

McCabe v. AT&SF Railway (1914) segregated railway must provide first-class accommodations for both races, regardless of low demand

Myers v. U.S. (1926) Congress can't require Senate consent for President to remove executive officials, even those whose appointment required Senate consent.

Humphrey's Executor v. U.S. (1935) Congress may limit President's removal power for officials having "quasi-legislative" or "quasi-judicial" responsibilities.

Gaines v. Canada (1938) required in-state law school for blacks, citing *McCabe*

U.S. v. Carolene Products (1938) filled milk case: presumed rational basis for legislative actions

Erie Railroad v. Tompkins (1938) state power to interpret common law

Coleman v. Miller (1939) political question doctrine re: Congress' determinations of whether Amendments are ratified

U.S. v. Darby (1941) reversing *Hammer v. Dagenhart*

Wickard v. Filburn (1942) wheat grown for private consumption affects interstate commerce

Sipuel v. Board of Regents of Univ. Okla. (1948) applied *Gaines* to force law school admission

Sweatt v. Painter (1950) judged relative quality of white & black law schools

McLaurin v. Okla. State Regents: (1950) 14th Amdt forbids segregation of a student admitted

Brown v. Board. of Ed. (1954) segregated public schools facilities are inherently unequal

Lassiter v. Northampton Board of Ed. (1959) upheld literacy tests

Heart of Atlanta Motel Inc. v. U.S. (1964) upheld Civil Rights Act of 1964 applied to motel

Katzenbach v. McClung (1964) upheld Civil Rights Act of 1964 applied to a local restaurant

Katzenbach v. Morgan (1966) upheld Voting Rights Act rejection of literacy tests

Parents Involved (2007) overruling Seattle & Louisville voluntary school integration programs due to their use of individual racial classifications

Shelby County v. Holder (2013) overruling Voting Rights Act preclearance requirements.