

## **AHG 660: The Federal System**

Summer 2018, Session 2

Instructor: John Dinan

### **Course Focus:**

This course examines the origin and development of the U.S. federal system. We focus on debates and developments regarding the extent of federal and state authority at pivotal points in American history – including the framing of the U.S. Constitution, state challenges to federal authority in the early republic, expansion of federal power via the Civil War Amendments, New Deal and civil rights movement – and then examine conflicts between state and federal authority in the contemporary era on issues such as education policy, marijuana regulation, and immigration.

### **Student Learning Outcomes:**

By the end of the course, students will be able to:

Identify provisions of the U.S. Constitution that structure the authority of federal and state governments.

Identify U.S. Supreme Court decisions that have affected the relationship between the federal and state governments.

Evaluate and analyze primary documents bearing on the extent of federal and state power, including debates about the drafting and ratification of the U.S. Constitution, laws and resolutions passed by state governments, congressional statutes, and presidential speeches.

Articulate the advantages and disadvantages of maintaining a federal system and permitting policy decisions to be resolved at the state versus federal level.

### **Required Texts:**

Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (Signet Classics, 2003), ISBN 978-0451528841

Herbert J. Storing, *What the Anti-Federalists were For* (University of Chicago Press, 1981) ISBN 978-0226775746

Howard Gillman, Mark Graber, and Keith Whittington, *American Constitutionalism, vol. 1: Structures of Government* 2<sup>nd</sup> ed. (Oxford University Press, 2017) (AMERICAN CONSTITUTIONALISM) ISBN 978-0190299477

## **Course Outline:**

### **Federalism and the Framing of the Constitution**

#### **SESSION 1:**

#### **Topic: The Constitutional Convention**

#### **READINGS:**

Michael Zuckert, "Constitutional Convention of 1787," in *Federalism in America: An Encyclopedia* (Greenwood Press, 2006) (Blackboard)

Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*

James Madison letter to George Washington (April 16, 1787)

The Virginia Plan (May 29)

Debate on Veto of State Laws (June 8)

The New Jersey Plan (June 15)

Debate on the New Jersey Plan (June 16)

Plan for National Government (June 18)

Opposition to the New Jersey Plan (June 19)

Debate on Federalism (June 21)

Debate on State Equality in the Senate (June 28-July 2)

Majority Rule: The Basic Republican Principle (July 5, 13, 14)

#### **QUESTIONS:**

How did the Virginia Plan and New Jersey Plan differ regarding the extent of federal government power and relationship between the federal and state governments, and to what extent did the Constitution incorporate aspects of the Virginia Plan and New Jersey Plan in structuring the powers of federal and state governments?

What issues arose in the constitutional convention about the powers of the federal and state governments, and how were these issues resolved?

Why did Madison support a congressional veto of state laws? Why did other delegates object to this proposal?

## **Debates about the Extent of Federal Power under the Constitution**

### **SESSION 2:**

#### **TOPIC: The Anti-Federalists**

#### **READINGS:**

Storing, *What the Anti-Federalists Were For*, chapters 3-4

Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates*

Patrick Henry (June 7)

Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania

Letter from the Federal Farmer, No. 1

Brutus, No. I; No. VI; No. XI; No. XII (Pt. I)

#### **QUESTIONS:**

When Anti-Federalists argued that the power of the federal government was expanded unnecessarily and unwisely in the Constitution, what was the basis of their concerns, and which particular powers generated particular concerns?

Regarding the Articles of Confederation, what position did Anti-Federalists take regarding its effectiveness? Did they contend that it would have been sufficient to retain the Articles of Confederation without any changes, or did they believe that the Articles suffered from problems that required some changes in terms of granting the federal government some additional power and adopting some additional limits on the power of state governments? What type of governmental system did the Anti-Federalist support?

Which political philosophers and historical experiences did Anti-Federalists draw on when expressing their concerns about the extent of federal power under the Constitution?

### **SESSION 3:**

#### **TOPIC: The Federalists**

#### **READINGS:**

Storing, *What the Anti-Federalists Were For*, chapter 5

Federalist Nos. 9, 10, 15, 16, 17, 22, 23, 39, 45, 46 (Blackboard)

#### **QUESTIONS:**

How did Madison and Hamilton respond to Anti-Federalist critiques regarding the extent of federal government power under the Constitution?

What lessons did Madison and Hamilton draw from the experience of governance under the Articles of Confederation? How can you explain the different lessons that the Federalists and Anti-Federalists drew from the experience of governance under the Articles of Confederation?

Which political philosophers and historical experiences did Madison and Hamilton draw on in supporting the proposed Constitution and particularly the extent of the powers of the federal government? Did the Federalists and Anti-Federalists draw on different philosophers and historical experiences, or did they reach different interpretations and conclusions from the same philosophers and experiences?

#### **SESSION 4:**

##### **TOPIC: The national bank**

##### **READINGS:**

Powers of the National Government, AMERICAN CONSTITUTIONALISM, pp. 118-127

“House Debate on the Bank” (1791) (excerpts), AMERICAN CONSTITUTIONALISM, pp. 127-128

Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (1791) (excerpts), AMERICAN CONSTITUTIONALISM, pp. 128-129

Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (1791) (excerpts), AMERICAN CONSTITUTIONALISM, pp. 129-130

*McCulloch v. Maryland* (1819), AMERICAN CONSTITUTIONALISM, pp. 130-135

Spencer Roane and John Marshall on *McCulloch v. Maryland* (1819), AMERICAN CONSTITUTIONALISM, pp. 135-138

President Andrew Jackson, Veto Message Regarding the Bank of the United States (1832), AMERICAN CONSTITUTIONALISM, pp. 201-204

##### **QUESTIONS:**

How should the “necessary and proper” clause be understood and interpreted, according to Hamilton and Marshall? How should the clause be understood and interpreted, according to Jefferson? How should the clause be understood and interpreted, according to Jackson?

What reasons does Jackson give for concluding that it is permissible to veto a bill reauthorizing the national bank, even though the Supreme Court had already concluded that a national bank is constitutional?

## **The Role of State Governments in the Federal System: Challenges to Federal Authority in the Early Republic**

### **SESSION 5:**

#### **TOPIC: Interposition**

#### **READINGS:**

Virginia Resolution of 1798 (Blackboard)

Kentucky Resolutions of 1798 and 1799 (Blackboard)

“Replies of the States” to the Virginia and Kentucky Resolutions (1798-1799), in Herman V. Ames, *State Documents on Federal Relations* (Blackboard)

Report on the Virginia Resolutions (1800) (excerpts) (Blackboard)

The General Court of Massachusetts on the Embargo (1809), in Ames, *State Documents on Federal Relations* (Blackboard)

Report and Resolutions of Rhode Island on the Embargo (1809), in Ames, *State Documents on Federal Relations* (Blackboard)

Report of the Hartford Convention (1815), in Bruce Frohnen, ed., *The American Republic: Primary Sources* (Blackboard)

#### **QUESTIONS:**

When various state legislators argued that they had a right and duty to engage in interposition, what did they mean by interposition? What exactly were state officials seeking to accomplish by passing resolutions opposing the Alien and Sedition Acts of 1798, Embargo Act of 1807, and prosecution of the War of 1812? What arguments and evidence from the Constitution and ratification debates did state officials draw on to support their claims about the propriety of interposition?

On what grounds did many state legislators reject the argument that state officials can engage in interposition? Which actions and avenues of redress did these other state legislators recommend in response to and as an alternative to interposition in the early republic?

### **SESSION 6:**

#### **TOPIC: Nullification**

#### **READINGS:**

South Carolina Ordinance of Nullification (1832) (Blackboard)

President Andrew Jackson’s Proclamation on South Carolina’s Nullification Ordinance (1832) (Blackboard)

“Replies of the Co-states Regarding the 1832 Tariff Controversy,” in Ames, *State Documents on Federal Relations* (Blackboard)

James Madison, *Notes on Nullification* (1835-1836), in Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison* (University Press of New England, 1981) (Blackboard)

*Ableman v. Booth* (1859), in Frohnen, ed., *The American Republic: Primary Sources* (Blackboard)

Wisconsin Defies the Federal Courts (March 19, 1859), in Ames, *State Documents on Federal Relations* (Blackboard)

## **QUESTIONS:**

When state officials in South Carolina and Wisconsin sought to nullify federal acts, what arguments and evidence from the Constitution and debates surrounding its ratification did they draw on to support their claims about the legitimacy of state nullification?

When Jackson, Madison, Taney, and officials from various states contended that nullification was illegitimate, what arguments and evidence from the Constitution and ratification debates did they draw on to support their conclusions?

Focusing on the writings and arguments of Madison, how does Madison reconcile his support for the actions of the Virginia Legislature in resisting the Alien and Sedition Acts of 1798 with his opposition to the actions of South Carolina in resisting the Tariff of 1832?

## **SESSION 7:**

### **TOPIC: Secession**

### **READINGS:**

South Carolina, Declaration of the Causes of Secession (1860) (Blackboard)

State Ordinances of Secession (1860-1861) (Blackboard)

Abraham Lincoln’s First Inaugural Address (1861) (Blackboard)

Abraham Lincoln’s July 4, 1861 Address to Congress (Blackboard)

Charles Sumner, “State Rebellion, State Suicide” (1862) (excerpt), *AMERICAN CONSTITUTIONALISM*, pp. 281-282

*Texas v. White* (1869), *AMERICAN CONSTITUTIONALISM*, pp. 283-287

## **QUESTIONS:**

What arguments did state officials advance in defense of the legitimacy of secession?

What arguments did Lincoln and the Supreme Court advance against secession?

## **Expansion of federal power from the post-Civil War Era through the Contemporary Era**

### **SESSION 8:**

#### **TOPIC: The Post-Civil War Amendments and the Supreme Court Response**

#### **READINGS:**

U.S. Constitution, Amendments XIII, XIV, XV, AMERICAN CONSTITUTIONALISM, p. 704

Michael Zuckert, "Fourteenth Amendment," *Federalism in America: An Encyclopedia* (Greenwood Press, 2006) (Blackboard)

*Slaughter-House Cases* (1873), AMERICAN CONSTITUTIONALISM, pp. 325-333

*Civil Rights Cases* (1883), AMERICAN CONSTITUTIONALISM, pp. 339-344

#### **QUESTIONS:**

In drafting the Fourteenth Amendment, what changes did Congress intend to bring about in the American federal system? In what ways did Congress intend to augment the powers of the federal government? In what ways did Congress intend to impose new limits on the powers of state governments?

When the Supreme Court issued decisions in the 1870s and 1880s concerning the meaning of the Fourteenth Amendment, what did the Justices understand to be the extent and limits of the additional powers granted to the federal government by passage of the amendment? What were the principal grounds of disagreement on this question?

### **SESSION 9:**

#### **TOPIC: The New Deal and Civil Rights Movement and the Supreme Court Response**

#### **READINGS:**

Powers of the National Government, AMERICAN CONSTITUTIONALISM, pp. 441-444

*Schechter Poultry Corp. v. U.S.* (1935), AMERICAN CONSTITUTIONALISM, pp. 444-447

*U.S. v. Butler* (1936), AMERICAN CONSTITUTIONALISM, pp. 463-467

*NLRB v. Jones & Laughlin Steel Corp.* (1937), AMERICAN CONSTITUTIONALISM, pp. 447-450

*Steward Machine Co. v. Davis* (1937), AMERICAN CONSTITUTIONALISM, pp. 467-470

*Wickard v. Filburn* (1942), AMERICAN CONSTITUTIONALISM, pp. 450-452

Federal Power to Enforce Civil Rights, AMERICAN CONSTITUTIONALISM, pp. 454-455

*Heart of Atlanta Motel v. U.S.* (1964), AMERICAN CONSTITUTIONALISM, pp. 457-459

*South Carolina v. Katzenbach* (1966), AMERICAN CONSTITUTIONALISM, pp. 460-463

### **QUESTIONS:**

On what grounds did the U.S. Supreme Court determine that Congress exceeded its authority when enacting certain New Deal programs?

On what grounds did the U.S. Supreme Court determine that Congress was authorized to enact certain other New Deal programs?

On what grounds did the U.S. Supreme Court determine that Congress was authorized to enact civil and voting rights acts in the 1960s?

### **SESSION 10:**

**TOPIC: Expansion of Federal Power in the Late Twentieth and Early Twenty-First Centuries and the Supreme Court Response**

### **READINGS:**

Powers of the National Government, AMERICAN CONSTITUTIONALISM, pp. 607-610

*U.S. v. Lopez* (1995), AMERICAN CONSTITUTIONALISM, pp. 610-617

*Printz v. U.S.* (1997), AMERICAN CONSTITUTIONALISM, pp. 641-647

*NFIB v. Sebelius* (2012), AMERICAN CONSTITUTIONALISM, pp. 617-629

*Shelby County v. Holder* (2013) (excerpts) (Blackboard)

### **QUESTIONS:**

On what grounds did the U.S. Supreme Court determine that Congress exceeded its authority when enacting the Gun-Free School Zones Act and Brady Handgun Violence Prevention Act?

In ruling on the legitimacy of the Affordable Care Act in the Sebelius case, on what grounds did the U.S. Supreme Court determine that Congress was authorized to levy a financial penalty on persons not purchasing health insurance? On what grounds did the Court determine that Congress exceeded its authority when ordering states to expand Medicaid coverage under penalty of losing the entirety of their federal Medicaid funding?



On what grounds did the U.S. Supreme Court conclude that it was unconstitutional for Congress to continue relying on a longstanding formula in the Voting Rights Act for determining which states and localities have to secure pre-approval from federal officials for any changes in voting laws or procedures?

How did the U.S. Supreme Court distinguish between congressional acts upheld in the 1930s and 1960s and congressional acts invalidated in whole or in part in the 1990s and 2000s?

## **Contemporary Conflicts Regarding State and Federal Authority**

### **SESSION 11**

#### **TOPIC: Individual rights and state authority**

#### **READINGS:**

John Dinan, “The U.S. Supreme Court and Federalism in the Twenty-first Century,” *State and Local Government Review* 49 (September 2017): 215-228 (Blackboard)

*Chicago v. McDonald* (2010) (excerpts) (Blackboard)

*Obergefell v. Hodges* (2015) (excerpts) (Blackboard)

#### **QUESTIONS:**

On what grounds did the U.S. Supreme Court conclude that the Second Amendment should limit state governments as well as the federal government?

Why did certain Supreme Court Justices argue that the Second Amendment should not be held applicable to state governments?

On what grounds did the U.S. Supreme Court conclude that recognition of same-sex marriage is required by the U.S. Constitution?

On what grounds did dissenting Justices argue that recognition of same-sex marriage is not guaranteed by the U.S. Constitution? What advantages did dissenting Justices perceive in permitting states to continue to decide whether or not to recognize same-sex marriage?

What are the advantages and disadvantages of maintaining a uniform federal policy regarding recognition or non-recognition of same-sex marriage versus permitting individual states to set policies regarding recognition of same-sex marriage?

## **SESSION 12:**

### **TOPIC: Education policy**

#### **READINGS:**

Patrick McGuinn “From No Child Left Behind to the Every Student Succeeds Act: Federalism and the Education Legacy of the Obama Administration” *Publius: The Journal of Federalism* 46 (2016): 392-415 (Blackboard)

Andrew Saultz, Lance D. Fusarelli, and Andrew McEachin, “The Every Student Succeeds Act, the Decline of the Federal Role in Education Policy, and the Curbing of Executive Authority,” *Publius: The Journal of Federalism* 47 (2017): 426-444 (Blackboard)

#### **QUESTIONS:**

In what ways, and for what reasons, did the federal government assume more control over education policy at the start of the twenty-first century?

In what ways, and for what reasons, did the federal government cede some control over education policy in the 2010s?

What are the advantages and disadvantages of making decisions about education policy at the national level versus permitting these decisions to be made by states and localities?

## **SESSION 13:**

### **TOPIC: Marijuana regulation**

#### **READINGS:**

Colorado, Amendment 64, *Use and Regulation of Marijuana* (2012) (Blackboard)

U.S. Department of Justice, Office of the Deputy Attorney General, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) (Blackboard)

U.S. Department of Justice, Office of the Attorney General, *Memorandum for all United States Attorneys regarding Marijuana Enforcement* (Jan. 4, 2018) (Blackboard)

Sam Kamin, “The Battle of the Bulge: The Surprising Last Stand against State Marijuana Legalization,” *Publius: The Journal of Federalism*, vol. 45: 3 (Summer 2015): 427-451 (Blackboard)

#### **QUESTIONS:**

What are the advantages and disadvantages of maintaining a uniform federal policy regarding marijuana regulation versus permitting individual states to set policies regarding marijuana?

## **SESSION 14:**

### **TOPIC: Immigration policy**

#### **READINGS:**

Pratheepan Gulasekaram, “Immigration Federalism,” in Christopher P. Banks, ed., *Controversies in American Federalism and Public Policy* (New York: Routledge, 2018) (Blackboard)

*Arizona v. U.S.* (2012) (excerpts) (Blackboard)

President Donald J. Trump, “Executive Order 13768: Enhancing Public Safety in the Interior of the United States” January 25, 2017 (Blackboard)

U.S. Justice Department, Office of the Attorney General, “Implementation of Executive Order 13678,” May 22, 2017 (Blackboard)

*County of Santa Clara v. Trump* (N.D. CA, Nov. 20, 2017) (excerpts) (Blackboard)

#### **QUESTIONS:**

What is the nature and extent of federal authority regarding immigration?

What is the nature and extent of state authority regarding immigration?

What are the advantages and disadvantages of the federal government exercising control over immigration-related matters versus permitting states to set policies affecting immigration?

## **The Value of a Federal System**

## **SESSION 15**

### **TOPIC: Twenty-First Century Perspectives on Federalism**

#### **READINGS:**

Malcolm Feeley and Ed Rubin, *Political Identity and Tragic Compromise* (University of Michigan Press, 2009), Chapter 4 (Blackboard)

Martha Derthick “Federalism,” in Peter H. Schuck and James Q. Wilson, *Understanding America* (Perseus Books, 2008), Chapter 5 (Blackboard)

Heather K. Gerken and Joshua Revesz, “Progressive Federalism: A User’s Guide,” *Democracy: A Journal of Ideas* 44 (Spring 2017) (Blackboard)

#### **QUESTIONS:**

Does the American federal system contribute to effective governance? What are the principal benefits of a federal system? Are certain benefits more compelling today than in prior years? Are certain benefits less compelling today than in the past?

For what reasons do some scholars conclude that the U.S. might be better governed by operating a unitary system or at the least a less robust federal system?

Does a robust federal system require strong citizen attachment to and identification with state political communities? To what extent are citizen attachment and identification with state political communities present in America in the 21<sup>st</sup> century?

How do you assess the opportunistic nature of support for decentralization of authority, whereby public officials are more likely to support decentralization when their party is out of power in Washington and less likely to support decentralization at other times? Does the opportunistic nature of these appeals to federalism cast doubt on the strength of the principle of federalism?