

9-2013

PSCI 471.01: American Constitutional Law

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University of Montana
Department of Political Science

**American Constitutional Law:
Autumn 2013**

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Office Hours: 11-12 pm M, 11-1 pm W; by appointment

M, W, F 8:10-9 pm

Classroom: LA 337

This course will examine the development of American constitutional law, conceptions, and practices over the course of American history, with particular focus on the structures and powers of American government. The class will be particularly concerned with thinking about American constitutionalism from a political perspective. We will thus situate constitutional development within the political, social and intellectual environments within which they occur. We will be interested not only in the major decisions of the Supreme Court, but also the debates and decisions that occur within the Court, Congress, the executive branch, the states, and the larger public. In keeping with that goal, the material is arranged chronologically, rather than thematically. By approaching the studying of American constitutional law from this point of view, we will gain a richer understanding of the process of constitutional politics and development than the usual law school course offers. We will, further, gain a better appreciation of the range of possibilities for organizing ordinary political contention contained within the American constitutional order.

Some of the key themes the course will examine are:

* How are constitutions written and amended and how have our political practices given shape to our constitutional system?

*How are we to understand the continuing tensions between the Constitution as an empowering device and the Constitution as a limiting structure?

*How has the Constitution served as an instrument of popular power and the embodiment of political ideals, in addition to serving as a fundamental law constraining government?

*How have American constitutional values and practices changed over time, and how can we reconcile those changes with the idea of a stable written constitution embodying a constitutional tradition stretching from the founding to the present?

*How have different political actors with different sets of political ideals and aims struggled to meet the objectives of the moment while remaining faithful to larger constitutional objectives?

Readings

The books listed below may be purchased at the University Bookstore. Anthony Weston's *A Rulebook for Arguments*, while not required, is highly recommended as a reference for how to write college level argumentative essays.

Required Reading:

1. Howard Gilman, Mark Graber, and Keith Whittington, eds., *American Constitutionalism* (Oxford: 2013)

Recommended Texts:

2. Robert McClosky, *The American Supreme Court*, ed. Sanford Levinson (Chicago: 2010)

3. Anthony Weston, *A Rule Book for Arguments* (Hackett: 2008)

Procedures and Requirements

Grading and Assignments:

This course has six requirements, which include the following:

1. Faithful attendance to class and active participation during the discussions (25% of the final grade; see “Participation” below)
2. Workshop a rough draft of your first essay (**September 16:** 5%; see “workshop” below).
3. First Essay: 5-6 page paper (**September 20:** 15%; see “Essay” below)
4. Midterm: 50 minute in class examination (**October 18:** 15%; see “In Class Writing Assignments” below)
5. Five one-page response papers (**Dates:** 15%; see “response papers” below).
6. Final Exam: (**Date:** 25%; see “in Class Writing Assignments” below)

In order to pass the class, you must complete all of the assignments.

Participation:

This will be a discussion class. *Attendance and participation are thus required.*

Come to class with the reading assignments finished (completely read, and carefully thought about) and with questions to ask and ideas and thoughts to share. That is to say, in class it is your job to put your ideas forward for your classmates to endorse, challenge, and transform.

When you are reading the material, “actively” engage with it. That means interrogating the text by asking why the author might say such a thing - what the reasons are for the author asserting the claim he or she does – and what his or her presuppositions are. As you read, and as you ask questions of the text, try writing in the margins questions, thoughts or ideas. Once you are done actively reading the material, then jot down the questions, thoughts, and ideas you have written in the margin of the text. This will give you something to talk about, and also help prepare you for the course’s exams and writing assignments.

Your regular, thoughtful participation will be critical to determining the success of the course and the grade you receive in it.

Starting Discussion:

As part of your participation grade nine times during the term you will be asked to respond to one of the prep questions for that day’s assignment. Your response to these prep questions will be the starting point for our discussion. On the day you have signed up, I will ask you to choose ONE of our questions and, in a go-around at the start of class, you will sketch out a brief answer (5 minutes or so – you can read it from a written-out statement, or an outline, or extemporize). After this, go around we will switch to a discussion beginning with disagreements people might have with each other, and then proceeding to wherever the discussion might take us.

The excitement of college often has to do with the chance you have to learn from each other, to try out your own analyses and comparisons of authors, and to hear your own voices in intellectual

conversation with each other. University of Montana students are wonderfully bright and interesting – this course is an opportunity for you all to be colleagues in an intellectual dialogue, to help modify, create, and deconstruct concepts so as to foreclose new forms of intellectual and political life.

Newspaper Research and Discussion:

During the semester you will be asked to locate two relatively current *New York Times* or *Wall Street Journal* newspaper story (articles may go back 2 years) touching on an aspect of the topic we are considering that week. (Note: I will also entertain legitimate news articles from other sources, but you are responsible for making sure the article is a substantive one from a significant new source. If that condition is not met, your grade on the assignment will be substantially impacted. To avoid such a situation, stick with finding an article via the NYT or the WSJ.) Once you have located the article, you will come to class ready to briefly discuss (5 minutes) the article and how it relates to the topic we are addressing that week.

The evening before the day of class you are to present, you are required to email a copy of the article to the class, so that everyone may read it before we meet.

As mentioned at the top of the syllabus, one aim of this course is to help you develop the ability to engage in constructive critical public argument. This exercise, along with the course's requirement that participants kick-off our discussion, is designed to help strengthen that capacity.

Classroom Policy:

Because this is a discussion class, we will observe several rules during this course:

- If you do not have your class materials, you will be asked to leave the class. Without your class materials, there is simply no way to thoughtfully discuss the text we are considering.
- Electronic devices – cell phones and computers – are not permitted in the course. The success of this course depends on the development of a constructive dialogue among its participants. There is simply no way that can happen if people are focused on their computer screens, rather than the human beings they are talking with.
- Late arrivals to class are not permitted; if you are going to be late, then do not attend class that day. Late arrivals to class frustrate our ability as a group to talk seriously about difficult theoretical and political issues.

In Class Writing Assignments:

The course requires two in class written examinations.

- The mid-term examination will take place on October 18. It will last 50 minutes and cover the material from the course thus far. The test requires you to write an essay on some given topic or theme from the course, which will be presented to you at the time of the exam. The test will be open-book, and is designed to help you learn to master the bluebook format. (For strategies on how to succeed when it comes to in class examinations, please see on Moodle my write-up on, “Mastering In Class Examinations.”). The test is worth 15% of your grade.

- The final examination also will be open-book, and will follow a similar format. It will take place on Wed. December 11 from 8 to 10 am. It is worth 25% of your grade.

One of the aims of this course is to help you learn to write effective “argumentative essays.” The purpose of both these assignments is to help develop that skill.

Essays:

The course requires several out of class writing assignments.

- A 5 to 6 page essay is due September 20. That essay should be “an argumentative essay.” That is your essay should be *an explication of some feature of the material we have covered in class, along with an argument in favor or against some aspect of the reading.* It is thus not to be a book report, but an opportunity for you to put forth some novel point of view about the material and your reasons for thinking you are right about the material. After all, everyone in the class has supposedly read the material, so just repeating back that material does not move the conversation forward much... (For strategies on how to think and write an “argumentative essay,” see my write-up on Moodle entitled, “How to Write an Introductory Paragraph.”). Two books that are particularly helpful for learning how to write college level argumentative essays are: Anthony Weston, *A Rule Book for Arguments* and William Strunk Jr. and E.B. White, *The Elements of Style*. Consulting these books should give you a sense of what constitutes strong college level writing.
- Throughout the term you are required to write 5 one-page response papers. These too should be “argumentative” in nature. That is to say, they should follow a two- step format. First, they should respond to the question posed; and second they should offer reasons for affirming or denying the claim the first half of the paper has explicated.

Late paper policy:

You will note from the syllabus that we do not have class scheduled on the week your essay is due. Further, you will note that we will workshop (see “Workshop” below) rough drafts of the essay on the Monday prior to the due date of the paper. For these reasons, late papers will be marked down a grade every day they are late.

Fulfilling the Writing 400 Requirements:

Students taking this course to fulfill writing the 400 requirements will be required to revise and expand one of their essays into 10-12 pages. Substantive and grammatical revisions will be expected. Students wishing to complete this requirement must include their original essay with the revised essay.

Graduate Students:

Rather than taking the Final In Class Exam, graduate students will be required to complete a 12 to 15 page research paper that incorporates the secondary literature on a particular theme or issue from the course. This research paper should be developed in consultation with the professor. Further, this paper is to be of graduate quality.

Workshop:

On the Monday of the week your essay is due, we will “workshop” rough drafts of your essay with other members of the course. During these classes, you will share your work with other students to get feedback on your thesis, argument, and writing.

Please bring two copies of your essay with you for this class session, one to work with during class and one for my records. *To complete this assignment sufficiently you must have at least 3 pages of your paper completed, including a working thesis within the paper.* As noted above, during this class you will share your work; unless you have at least 3 pages of work to share, it is not possible to complete this assignment satisfactorily.

One of the aims of this course is to help you learn to engage in constructive critical public argument and to help you improve your writing. This assignment is designed to help you practice both skills.

Sources for Papers:

Essays should largely be written using the sources from the course. In particular, *that means the Internet, unless used to access databases of scholarly articles, or legitimate academic sources, is off-limits as a source of essays.*

Needless to say, there is a great deal of information and material on the Internet that touches on American constitutional law. Unfortunately, much of that information is of a poor quality. Furthermore, it is not always easy to distinguish high from low quality sources of information.

So, if you decide you need to do additional research for your paper, use library sources. In particular, work with a reference librarian to make sure you are accessing high quality sources of information.

Writing Help:

The Writing Center is located in LA 144. To make an appointment with a writing advisor, call 243-2266, email growl@mso.umt.edu, or stop by LA 144.

Disability Services:

If you are a student with a disability who will require reasonable program modifications in this course, please meet with Disability Services for Students in Lommasson 154 for assistance in developing a plan to address program modifications. If you are already working with Disability Services arrange to meet with me during my office hours to discuss reasonable modifications that may be necessary. For more information, visit the Disability Services website at <http://www.umt.edu/disability>.

Academic Dishonesty:

Students in this course are expected to follow the University's standards of academic integrity and honesty. If you are caught cheating or plagiarizing, you may receive a failing grade for the assignment and/or class and may be reported to the University. Students are responsible for understanding what constitutes plagiarism. The Code is available for review online at <http://www.umt.edu/SA/VPSA/index.cfm/page/1321>

Course Topics and Readings:

Reading assignments are to be completed before the class meeting for which they are listed. Bring to class the assigned books, print-outs of online assignments, your reading notes, and this syllabus.

Week One: Constitutionalism, Change, and Obsolescence?

1. Mon., Aug. 26: Introduction: How Important is Constitutional Structure?

2. Wed., Aug. 28: What do Constitutions Do?

Please read through the course syllabus and come prepared to discuss it

*Gillman, Graber, and Whittington, *American Constitutionalism*, ch. 1, pp. 3-10:

1. Introduction to American Constitutionalism

I. What is a Constitution?

II. Constitutional Purposes

*Thomas Paine, "Of Constitutions," *The Rights of Man* (1792) [M]

*Stephen Holmes, "Precommitment and the Paradox of Democracy," *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge: 1997)

Prep: What is a Constitution? What are the purposes of a Constitution? What is the model of constitutionalism that Paine puts forth? What does he think the problems of government are that a constitution is intended to solve? What is the model of a constitution Holmes puts forth? What does he think is the fundamental problem for a constitutional democracy, and how does he respond to it? What might some of the implications be for this theory of constitutionalism? Finally, are there differences and tensions between Paine's 18th century understanding of a constitution and Holmes' 21st century understanding?

Recommended:

*Cass Sunstein, "Tales of Democracy and Law," *Designing Democracy: What Constitutions Do* (Oxford: 2001) [M]

3. Fri., Aug. 30: Constitutional Interpretation and Change

*Gillman, Graber, and Whittington, *American Constitutionalism*, ch. 1, appendix 2, pp. 10-27, 729-38:

III. Constitutional Interpretation and Decision Making

IV. Constitutional Authority

V. Constitutional Change

VI. Constitutional Politics and Law

*Appendix 2: Researching and Reading Government Documents

Handout: "Briefing A Supreme Court Decision"

Newspaper Research and Discussion: Constitutionalism

Prep: Who are the authoritative interpreters of the Constitution and what are the relations among them? How should the authoritative interpreters go about the task of interpreting that Constitution? How should a Constitution be ratified and how does it legitimately change?

Week Two: The Beginnings of the American Constitutional Order

1. Mon., Sept. 2: No Class Labor Day

2. Wed., Sept. 4: Colonial Debates: Law, Democracy, and an Independent Judiciary

*Gillman et al., *American Constitutionalism*, ch. 2, pp. 31-47:

I. Introduction

II. Judicial Power and Constitutional Authority

*William Blackstone, *Commentaries on the Laws of England*

*Massachusetts Assembly Memorial

*John Dickinson, *Letters from a Framers in Pennsylvania*

III. Powers of the National Government

*Thomas Whately, *The Regulations Lately Made*

*Daniel Dulany, *Considerations of the Propriety of Imposing Taxes in the British Colonies*

*John Locke, *Two Treatises on Government*, (selections) [M]

*Edmund Burke, *Speech to the Electors of Bristol* (1774) [M]

Prep: What is Blackstone's theory of law? Is it democratic? What is the problem this theory of law is intended to solve? Is Blackstone's theory right? What is the foundation of political legitimacy and law for Locke? How many branches of government does he see, and how active are the people in the actual operation of the law? Does he subscribe to the same theory Blackstone does and for the same reasons? Finally, how does Burke view the representation of the people in government? (Note: Americans rebelled against the assumptions found in Blackstone, Locke (yes, even Locke), and Burke. But ask yourself, given the contemporary nature of American government and politics, might not early Americans have been wrong, and Blackstone, Locke, and Burke been right? Are we today not perhaps Blackstonian, Lockeian, and Burkeian?)

Recommended:

*Bernard Bailyn, "Transformations" *Ideological Origins of the American Revolution* [M]

*John Adams, *The Independence of the Judiciary* (selections) (1772) [M]

*Jack P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge: 2011)

*John Phillip Reid, *Constitutional History of the American Revolution*, Abridged Edition (Wisconsin: 1995)

3. Fri., Sept. 6: The First American Constitutions (The States)

*William Penn, *The Frame of Government* (1682)

*John Adams, *Thoughts on Government* (1773)[M]

**Four Letters on Interesting Subjects* (1776) and *The Interest of America* (1776) [M]

*Virginia, *The First Bill of Rights* [M]

**The Virginia Constitution* (1776) [M]

**The Pennsylvania Constitution* (1776) [M]

Newspaper Research and Discussion: State Constitutional Issues; the People and the Constitution; or the Nature of an Independent Judiciary

Prep: What is the model of constitutionalism John Adams is working with? What are its key features and why? What is the metaphor he uses to describe the nature of the legislative branch? What is his worry about the people? Also, what features distinguish the Virginia and Pennsylvania Constitutions? What rights seem particularly important to American citizens, now that they are no longer English subjects? Finally, how would you characterize the ideas and worries contained in *Four Letters* and *The Interest of America*? More generally, how would you characterize the importance of the American state constitutional tradition: would the federal constitutional tradition be possible without it? Does the state constitutional tradition remain important in contemporary American politics or no and why?

Recommended:

*Larry Kramer, "The Customary Constitution," *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: 2004), pp. 9-34

*Willi Paul Adams, *The First State Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Rowman & Littlefield: 1980)

- * Jack Rakove, "Thinking Like a Constitution," *Journal of the Early Republic*, Vol. 24 (2004).
- * John J. Dinan, *The American State Constitutional Tradition* (Kansas: 2009)
- * G. Alan Tarr, *Understanding State Constitutions* (Princeton: 2000)

Week Three: Centralization of Power and Separation of Powers

1. Mon., Sept. 9: Creating National Power

* Gillman et al., *American Constitutionalism*, ch. 3, pp. 49-56, 64-83:

I. Introduction

III. Power of the National Government

* Articles of Confederation (1777)

* The Virginia Plan

* The New Jersey Plan

* Article I, Section 8 of the Constitution of the United States

* Samuel Adams, Letter to Richard Henry Lee

* The Federalists, Nos. 1, 10, and 23

* Note: Slavery and the Constitution

IV. Federalism

A. Representation of State Interests

* Debate in the Constitutional Convention

* Melancton Smith, Speech to the New York Ratification Convention

* James Madison, *Vices of the Political System of the United States* (1787) [M]

* Room for Debate 3/5th Compromise, *The New York Times* [M]

Prep: Note what Madison says in Sections 9-11 of the *Vices* essay. In particular, note what he says in Section 11. What are the reasons he gives for the topic of Section 11? What is the worry at the heart of Madison's paper? Is it optimistic or pessimistic about "the people?" Do you think Americans during the Revolution had this worry? How would you compare Madison's thinking in the *Vices* essay with his thinking in Federalist 10? What are the main features of the Articles of Confederation, and what does it appear to be missing – are these missing features essential? If so, why? (Note: you may wish to compare it to Art. I, Sec. 8 of the Constitution) Was the 3/5th Compromise necessary? What did it signal about the future direction and development of American politics and constitutional interpretation?

Recommended:

* Gordon S. Wood, "Interests and Disinterestedness in the Making of the Constitution" [M]

* *Ibid.*, *The Creation of the American Republic, 1776-1787* (Chapel Hill: 1998)

2. Wed., Sept. 11: Separating Powers

* Gillman et al., *American Constitutionalism*, ch. 3, pp. 83-91:

V. Separation of Powers

* Debate in the Constitutional Convention

* The Federalists, Nos. 51, 70, and 71

* "Centinel" Letter No. 1

* Federalists, Nos. 49, 57, 62 [M]

Prep: What do these documents indicate about the meaning of the separation of powers and executive power in particular? (Further, you might ask yourself how the arguments found in these documents fit together with the argument Holmes proposed in "Precommitment and the

Paradox of Democracy” regarding the nature of constitutionalism?) Does the separation of powers empower “the people” or weaken them and how so? Similarly, you might ask yourself whether the eventual development of political parties undermines the constitutional separation of powers? Finally, pay particular attention to the arguments of “Centinel.” What are his worries? What does he seem to imply is going on with the formation of the Federal Constitution, and the Separation of Powers?

Recommended:

*Wood, “Eighteen-Century American Constitutionalism” [M]

3. Fri., Sept. 13: Debating the Judiciary and the Bill of Rights

*Gillman et al., *American Constitutionalism*, ch. 3, pp. 56-64:

II. Judicial Power and Constitutional Authority

A. Judicial Review

*Robert Yates, “Brutus”

*The Federalist No. 78

B. The Absence of a Bill of Rights

*James Wilson, State House Yard Speech

*Federalist, No. 84

*James Wilson, *Remarks in the Pennsylvania Ratifying Convention of the United States* (1787) [M]

*“Study Guide – Defining Judicial Power” [M]

*Wood, “Law and an Independent Judiciary,” *The Empire of Liberty* (Oxford: 2011) [M]

Newspaper Research and Discussion: The Federal Judiciary or the Separation of Powers

Prep: The Anti-Federalists had very deep worries about the creation of a federal judiciary – after all the judiciary had traditionally been the tool of executive power, and they had just fought a war to be free of a tyrannical king. Given this history, they worried that federal courts might reach right down into local communities and be used as instruments of tyranny. What was the Federalist (see Federalist No. 78 and 84 and Wilson’s *Remarks*) response to the arguments of the Anti-Federalists (See Brutus)? Could John Locke have made such an argument (specifically could Locke have said what Wilson says?) What, ask yourself, was the key premise Americas established after the Revolution that allowed them to establish an independent judiciary? Finally, ask yourself if that premise is true today – what, that is, is the political legitimacy of the federal judges and courts today?

Recommended:

*Wood, “The Great American Argument” *The New Republic*, Dec. 2010 [M]

*Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (Simon & Schuster, 2010).

*Edward Countryman, ed., *What Did the Constitution Mean to Early Americans?* (Bedford: 1999)

*Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: 1981).

Week Four: The Early Republic and Judicial Review

1. Mon., Sept. 16: Creating a Power of Judicial Review (Lecture)

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 93-113:

I. Introduction

*Alexander Hamilton, Report on Manufactures

*Thomas Jefferson, First Inaugural Address

II. Judicial Power and Constitutional Authority

A. Judicial Review

**Calder v. Bull* (1798)

**Marbury v. Madison* (1803)

B. Judicial Supremacy

*Thomas Jefferson on Departmentalism

*"John Marshall's Dilemma" [M]

*Wood, "Chief Justice John Marshall and the Origins of Judicial Review," *Empire of Liberty* [M]

One-Page Response # 1 Due:

Please answer the following question: In his essay, "Chief Justice John Marshall and the Origins of Judicial Review," what does Gordon Wood see as the core assumption allowing John Marshall to advance the practice of judicial review?

Prep: What is departmentalism and how does it contrast with judicial supremacy? Does judicial review entail judicial supremacy? How might one theoretically justify the power of judicial review – how do the judges in *Calder v. Bull* justify judicial review?

Recommended:

*Larry Kramer, "Understanding *Marbury v. Madison*," *Proceedings of the American Philosophical Society*, Vol. 148, No. 1 (March: 2004) [M]

*William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Kansas: 2000)

*Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (Norton: 1971)

*Michael Treanor, *Judicial Review Before *Marbury** [M]

*Keith Whittington, "Judicial Review Before the Civil War," *Georgetown Law Journal*, Vol. 97, 2009 [M]

2. Wed., Sept 18: Judicial Review of the States

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 113-118:

C. Federal Review of the States

**Martin v. Hunter's Lessee* (1816)

**Fletcher v. Peck* (1810) [M]

*Algernon Sidney [Spencer Roane], "On the Lottery Decisions" [M]

Prep: Does federalism support the practice of judicial review? Moreover, ask yourself whether you think the federal courts could exercise the power of horizontal review (i.e. the review of other coordinate branches of government) absent the power to review state laws ("vertical review")? What are Spencer Roane's arguments against the expansion of national power under the Marshall Court? Summarize the argument of *Martin v. Hunter's Lessee*. Summarize the argument of *Fletcher v. Peck*.

Recommended:

*Robert McClosky "The Establishment of the Right to Decide: 1789-1810," *The American Supreme Court*, pp. 16-34

3. Fri., Sept. 20: National Power

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 118-45:

III. Powers of National Government

A. General Principles

Note: Strict Construction

B. Necessary and Proper Clause

*Debate on the Bank of the United States

**McCulloch v. Maryland* (1819)

*Spencer Roane and John Marshall on McCulloch

*Debate on the Military Draft

C. Territorial Acquisition and Governance

*Senate Debate on the Louisiana Purchase

*House Debate on the Missouri Compromise

Newspaper Research and Discussion: Judicial Review

Prep: How would you characterize the political and institutional strength of the Supreme Court during this period of time? Further, how do you interpret the necessary and proper clause – is this constitutional provision broadly empowering or does it require a much more narrow, limited interpretation? How might you decide? How, that is, should one fill in constitutional meaning of the necessary and proper clause? Summarize *McCulloch v. Maryland*. What’s the understanding of national power presented in that decision? How did Jefferson square his opinion about the constitutionality of a national bank with the Louisiana Purchase? What were the implications of the Louisiana Purchase for the 3/5ths Compromise? Does this show the dynamic ability of American constitutional government to work? Or does this show up its fundamental weakness?

Recommended:

*McClosky, “The Marshall Court and the Shaping of the Nation: 1810-1835,” *The American Supreme Court*, pp. 16-34

Week Five: FIRST SHORT PAPER DUE (5-6 PAGES)

1. Mon., Sept. 23: Workshop; Draft of Essay Due in Class

2. Wed., Sept. 25: Optional Meetings

3. Fri., Sept. 27: Paper Due

Week Six: The First American Republic

1. Mon., Sept. 30: Commerce

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 145-56; ch. 5, pp. 221-27

D. Power to Regulate Commerce

**United States v. The William* (1808)

*Josiah Quincy, Speech on Foreign Relations

**Gibbons v. Ogden* (1824)

E. Taxing and Spending Power

*House Report on Internal Improvements

*James Monroe, “Views of the President of the United States on the Subject of Internal Improvements”

IV. Federalism

A. States and the Commerce Clause

- **Willson v. Black Bird Creek Marsh Company* (1829)
- **City of New York v. Miln* (1837)
- **Cooley v. Board of Wardens of the Port of Philadelphia* (1859)

Handout: “A Guide to *Gibbons v. Ogden*”

Prep: Article 1, Section 8 of the Constitution gave the federal government a power not found in the Articles of Confederation. What though did the power to regulate commerce include? Again, read Article 1, Section 8, and see what you think. What do the words mean? How are you going to fill in constitutional meaning? How does Marshall go about the task of interpreting the commerce clause in *Gibbons v. Ogden*? Similarly, what is the reasoning in *United States v. William*? Ask yourself what some of the political and constitutional consequences were of Marshall’s interpretation of the commerce clause in *Gibbons*. What implications might it have for issues of federalism? Specifically, how do these issues play out in *City of New York v. Miln*? Finally, how serviceable do you find the distinction drawn in *Cooley* between types of commerce?

2. Wed., Oct. 2: The Power of States

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 156-66:

IV. Federalism

A. Sovereign Immunity

**Chisholm v. Georgia* (1793)

*Note: The Passage of the Eleventh Amendment

B. State Authority to Interpret the Constitution

*Virginia and Kentucky Resolutions of 1789

*Resolution of the State of Rhode Island and Providence Plantations to Virginia

Prep: Is the Constitution a compact between the states or something more? How, that is, would you characterize the constitutional role of the states in American government? What are the implications of the passage of the 11th amendment, the Virginia and Kentucky Resolutions, and the Resolutions of the State of Rhode Island? Do you think the early Marshall Court may have been overreaching? How do these square with the reasoning of *Gibbons*? Do they have to?

3. Fri., Oct 4: Presidential Powers

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 166-83:

V. Separation of Powers

A. General Principles

*Note: The Power to Act beyond the Constitution

B. Appointment and Removal Powers

*House Debate on Removal of Executive Officers

C. Executive Privilege

*House Debate on the Jay Treaty

*George Washington, Response to the House on the Jay Treaty

*James Madison, Response to the President’s Message

D. Legislative Powers of the President

*Note: The Veto Power and the Legislative Role of the President

E. Presidential Power to Execute the Law

*William Writ, Opinion on the President and Accounting Officers

F. Elections and Political Parties

*Note: The Constitution and the Election of 1800

Newspaper Research and Discussion: Regulation of Commerce, the States, or Presidential Power

Prep: Based on your readings, how would you characterize the original understanding of the constitutional powers of the President? Does Article II vest the President with “inherent” powers? If so, where does that authority come from constitutionally? To what extent do the documents presented here show constitutional practice tracking the original intention of the framers and to what extent does it show constitutional practice deviating from it? That is, is the law “on the books” different from the law “in action” here, and if so, then should the latter influence how we read the former?

Week Seven: Civil War and Reconstruction

1. Mon., Oct. 7: Slavery (Lecture)

*Gillman et al., *American Constitutionalism*, ch. 5, pp. 206-21:

B. Fugitive Slave Clause

*Salmon Chase, Speech in the Case of the Colored Woman Matilda

**Prigg v. Pennsylvania* (1842)

*John J. Crittenden, opinion on the Constitutionality of the

*Fugitive Slave Bill

C. Territorial Acquisition and Governance

*Congressional Debate on the Annexation of Texas

**Dred Scott v. Sandford* (1857)

*Abraham Lincoln, Speech on Slavery in the Territories

*Frederick Douglass, What to the Slave Is the Fourth of July? (1852) [M]

Newspaper Research and Discussion: Political Resistance to the Courts or Congress

One-Page Response # 2 Due:

Please explicate the Constitutional argument of *Prigg v. Pennsylvania*. Is this argument “constitutionally” sound? In answering this question, think carefully about what evidence you think appropriate in determining the constitutional soundness of *Prigg*. Further, you may wish to think about how *Prigg* opened the door for *Dred Scott*.

Prep: In what ways did the Fugitive Slave Bill spell the beginning of the end for the Compromise of 1850? Similarly, what was one of the terrifying implications of the *Dred Scott* decision for Northerners? And why does Justice Taney argue that African Americans can never be citizens of the United States? (What might he be worried about constitutionally if he were to allow the converse of that premise to be accepted?) Finally, if Taney is right, then what indeed is the Fourth of July to a Slave – Douglas, of course, disagrees; but by what constitutional right does he do so, since Taney, after all, has said he can never be a citizen? By what constitutional right does Douglas speak as he does, and who authorize him to do so?

Recommended:

*McClosky, “The Court Under Taney: The Natural History of Judicial Prestige,” *The American Supreme Court*, pp. 53-66

*Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge: 2008)

2. Wed., Oct 9: War Powers: Lincoln as a Democratic Dictator?

*Gillman et al., *American Constitutionalism*, ch. 5, pp. 240-43; ch. 6, pp. 256-57, 295-313:

B. Presidential War and Foreign Affairs Powers

*James Polk, Second Annual Message

*House Debate on the Constitutionality of the Mexican War

B. Judicial Supremacy

*Lincoln on Departmentalism

V. Separation of Powers

A. General Principles

*Abraham Lincoln, Fourth of July Message to Congress

B. Martial Law and Habeas Corpus

**Ex Parte Merryman* (1861)

*Edward Bates, Opinion on the Suspension of the Privilege of the Writ of Habeas Corpus

*The Habeas Corpus Act of 1863

C. Presidential War and Foreign Affairs Powers

*Abraham Lincoln, "Emancipation Proclamation"

*Benjamin Curtis, Executive Power

**The Prize Cases* (1863)

Prep: What is Lincoln's response to the Dred Scott decision? Like Douglas, by what right does he challenge that decision of the Supreme Court? During the Civil War, Lincoln exercised extraordinary Presidential powers. Do you think Lincoln was constitutionally justified in doing so? Or was he acting out of a moral imperative, one disconnected from constitutional principle? Put simply, how do you interpret Lincoln's actions within the context of the Civil War from a constitutional point of view? More specifically, how does Taney view Lincoln's actions in *Ex Parte Merryman* and how does the executive branch view its actions (see Bates' *Opinion*)? Similarly, how does Lincoln justify the "Emancipation Proclamation" and what is Curtis' critique?

3. Fri., Oct. 11: Session and Reconstruction

*Gillman et al., *American Constitutionalism*, ch. 6, pp. 277-295:

IV. Federalism

A. Secession

*South Carolina Ordinance of Secession

*Jeremiah Black, Opinion on the Power of the President in Executing the Laws

*Abraham Lincoln, First Inaugural Address

B. Federalism During the Civil War

*Federalism in the North

*Note: The Creation of West Virginia

*Federalism in the South

C. The Status of the Southern States during Reconstruction

*William T. Sherman, "Memorandum"

*Andrew Johnson, First Annual Message

*Henry Winter Davis, "No Peace Before Victory"

*Charles Sumner, "State Rebellion, State Suicide"

*Thaddeus Stevens, Speech on Reconstruction

**Texas v. White* (1869)

D. Constitutional Amendment and Ratification

*Note: The Validity of the Fourteenth Amendment

Prep: Based on the documents from today's class respond to one or more of the following questions posed by Gilman et al.: "Why exactly is the Fourteenth Amendment a valid part of the U.S. Constitution? Was the process by which that amendment was ratified consistent with Article V? May constitutional amendments be ratified by some process other than that mandated in Article V? Bruce Ackerman maintains that Reconstruction Republicans successfully convinced Americans to adopt a more nationally entered process for constitutional change, one that largely cuts states out of the constitutional amendment process. Is Ackerman correct when he claims that Congress under certain conditions may effectively coerce state ratification of constitutional amendments? What is the appropriate state role in the amendment process after the ratification of the Fourteenth Amendment?"

Recommended:

- *Melvin Urofsky, "The Union Restored," *The March of Liberty Vol. I*, pp. 429-451 [M]
- *Bruce Ackerman, "Reconstruction," *We the People: Transformations* (Harvard: 1998)
- *Akhil Reed Amar, "Part II: Reconstruction," *The Bill of Rights: Creation and Reconstruction*, pp. 137-295
- *Michael Les Benedict, "The Conservative Basis of Radical Reconstruction," *Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era*, pp. 3-22

Week Eight: MIDTERM

1. Mon., Oct. 14: Optional Review
2. Wed., Oct. 16: No Class
3. Fri., Oct 18: 50 Minute In Class Midterm

Week Nine: The Second American Republic

1. Mon., Oct 21: Courts vs. Democracy (Lecture)

- *Gillman et al., *American Constitutionalism*, ch. 7, pp. 319-45:
 - I. Introduction
 - *David J. Brewer, "The Nation's Safeguard"
 - *Woodrow Wilson, "The Meaning of Democracy"
 - II. Judicial Power and Constitutional Authority
 - A. Judicial Review
 - **Slaughter-House Cases* (1873)
 - *Theodore Roosevelt, "A Charter of Democracy"
 - *William Howard Taft, Veto of Arizona Statehood
 - B. Constitutional Litigation
 - **Frothingham v. Mellon* (1923)
- **Lochner v. New York* (1905) [M]

One-Page Response # 3 Due:

The Slaughter-House Cases were the first cases in which the Supreme Court offered an interpretation of the 14th Amendment. What was that interpretation and what assumptions do you see behind it?

Prep: The conclusion of *Lochner* is that the 14th Amendment's Due Process clause ("nor shall any State deprive any person of life, liberty, or property, without the due process of law") contains within it a "freedom of contract." Yes? No? How so? (i.e. what's the argument for and

against). What else does the case decide? Is the case a “bad” decision? Why or why not? Finally, what got people so worked up about the case?

Recommended:

*McCloskey, “The Judiciary and the Regulatory State: 1900-1937,” *The American Supreme Court*, pp. 91-120

*Howard Gilman, *The Constitution Besieged*, pp. 61-193 (Duke: 1992)

*Paul Kerns, *New York v. Lochner* (Kansas: 1998)

*David Mayer, *Liberty of Contract: Rediscovering A Lost Constitutional Right* (Cato: 2011)

*David Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: 2011)

2. Wed., Oct. 23: States, Presidents and Bureaucracies

*Gillman et al., *American Constitutionalism*, ch. 7, pp. 389-413:

IV. Federalism (States)

A. States and the Commerce Clause

**Wabash, St. Louis and Pacific Railway Co. v. Illinois* (1886)

B. Police Powers

*Thomas M. Cooley, *Constitutional Limitations*

**Munn v. State of Illinois* (1877)

C. Representation of State Interests

*George F. Hoar, “Direct Election of Senators”

V. Separation of Powers (Presidents and Bureaucracies)

A. Appointment and Removal Power

**Meyers v. United States* (1926)

B. Inherent Presidential Power

*Presidents on Presidential Power

C. Nondelegation of Legislative Power

**J.W. Hampton, Jr. & Co. v. United States* (1928)

**United States v. Midwest Oil Company* (1915) [M]

*Presidential Power in the Age of Congressional Government [M]

Prep: In what ways does *Wabash* develop the ideas expressed earlier in *Cooley v. Board of Wardens*? Why might the doctrine developing out of *Wabash* have been important to the future development of the country? In what way do you think the courts facilitated this development, and to what extent do you think it merely reflected technological and economic transformations? Recall the way in which the Court carved up social space in the Slaughter House Cases. Do you see a similar distinction in *Munn*? What is the Court doing in *Munn*? Finally, what major shifts do you see taking place in the American constitutional order? How are the powers of the president expanding and how is American government beginning to develop a “fourth branch” of government?

3. Fri., Oct 25: Congress, Civil Rights, and Corporations

*Gillman et al., *American Constitutionalism*, ch. 7, pp. 346-77:

III. Powers of the National Government

A. Federal Power to Enforce Civil Rights

*Note: From the Civil Rights Act to the Civil Rights Cases

**Civil Rights Cases* (1883)

*Congressional Debate on Lynching

**Fong Yue Ting v. U.S.* (1893) [M]

B. The Power to Regulate Commerce

- *Senate Debate on the Sherman Anti-Trust Act
- **United States v. E.C. Knight Company* (1895)
- *Note: Federalism, the Sherman Act, and the Unions
- **Champion v. Ames* [“The Lottery Case”] (1903)
- **Hammer v. Dagenhart* (1918)

C. Taxing and Spending Power

- **Pollock v. Farmers’ Loan and Trust Company* (1894)
- * *Pollock v. Farmers’ Loan and Trust Company* (Rehearing) (1894)
- **Bailey v. Drexel Furniture Company* [“The Child Labor Case”] (1922)

Newspaper Research and Discussion: The Courts vs. Democracy; Corporations; or Bureaucracies

Prep: How does the Court interpret the 14th Amendment in the *Civil Rights Cases*? Does that ruling owe something to *Munn*? What is Harlan’s critique of the majority opinion? And what is the political context within which this decision is handed down? How would you characterize the Court’s thinking during this period regarding the commerce power? The taxing and spending power? What are the features of this constitutional order, and how would you characterize the courts’ role in this system? Traditionalist, liberal, conservative, radical, or is something altogether different going on and what might that be and why?

Recommended:

*Louis Galambos, “Technology, Political Economy, and Professionalization: Central Themes of the Organizational Synthesis,” *Business History Review*, Vol. 57, No. 4 (Winter, 1983).

Week Ten: A New (Deal) Constitutional Order

1. Mon., Oct. 28: The Taming of the Courts

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 417-38:

I. Introduction

- *Franklin D. Roosevelt, Commonwealth Club Address
- *Dwight Eisenhower, Letter to Edgar Newton Eisenhower

II. Judicial Power and Constitutional Authority

A. Judicial Review

- **United States v. Carolene Products* (1938)

B. Judicial Supremacy

- *Franklin Roosevelt, Undelivered Speech on the Gold-Clause Cases
- *Franklin Roosevelt, Fireside Chat on Court-Packing Plan
- *Senate Judiciary Committee Report on President Roosevelt’s Court-Packing Plan

Prep: What is the point of *Carolene Products*? Read carefully footnote 4. What are the various parts of the footnote? What vision of judicial review is the Court giving voice to? Is *Carolene Products* an assertion of judicial power, or a sign of judicial retreat? Finally, do you think Roosevelt was justified in threatening the Court in the way he did? Or as Gillman et al, put the question: How far can political actors go to get around a Court they believe is wrong? What authority, that is, do presidential and popular understandings of the Constitution have?

Recommended:

*Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (Norton: 2013)

*Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford: 1998)

2. Wed., Oct. 30: The Reemergence of the Courts (Lecture)

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 438-58:

*The Southern Manifesto

*Dwight Eisenhower, Address to the Nation on the Introduction of Troops in Little Rock

**Cooper v. Aaron* (1958)

*Note: Court-Curbing and the Warren Court

C. Constitutional Litigation

*Note: Declaratory Judgments

**Flast v. Cohen* (1968)

**Baker v. Carr* (1962)

D. Federal Review of the States

*Note: The Incorporation of the Bill of Rights

One-Page Response # 4 Due:

How does *Cooper v. Aaron* open up the possibility for the Court to issue *Baker v. Carr*, and more generally to begin the process of incorporating the Bill of Rights? Some scholars have argued that this was a radical innovation, distinct from the constitutional practice and history that came before it. What do you think?

Recommended:

*McCloskey, "Civil Liberties, Civil Rights, and the Supreme Court," *The American Supreme Court*, pp. 147-204

*Morton Horwitz, "'The Warren Court and the Pursuit of Justice,'" *Washington and Lee Law Review*, Vol. 50, Issue 1 (1993): 5-13 [M]

**Ibid.*, *The Warren Court and the Pursuit of Justice* (Wang and Hill: 1999)

3. Fri., Nov. 1: Lyndon Johnson: The High Tide of American Liberalism

*Lyndon Johnson, *Great Society Speech* [M]

*David E. Rosenbaum, "20 Years Later, The Great Society Flourishes," *New York Times*, April 17, 1985 [M]

*We will watch clips from Lyndon Johnson and the American Experience

Newspaper Research and Discussion: Political Resistance to the Courts or Judicial Supremacy

Week Eleven: The New Deal Constitutional Order and the Great Society

1. Mon., Nov. 4: Congress and the Economy

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 458-71, 480-88:

III. Powers of the National Government

A. Power to Regulate Commerce

**Schechter Poultry Corp. v. United States* (1935)

**National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937)

**Wickard v. Filburn* (1942)

*Justice Robert Jackson, Memo on Wickard

C. Taxing and Spending Power

- **United States v. Butler* (1936)
- **Steward Machine Co. v. Davis* (1937)

Prep: How do the decisions of *Schechter* and *National Labor Relations* signify a new constitutional order, relative to the *Lochner* Era? What are the facts of *Wickard* and what is the argument advanced by the justices? What is left of American federalism after *Wickard*? What is Justice Robert Jackson’s view of the matter in his Memo on *Wickard*? Finally, how do the decisions of *Butler* and *Steward Machine Co* also signal a new constitutional order relative to the *Lochner* Era?

2. Wed., Nov. 6: Congress and Civil Rights

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 471-80:

B. Federal Power to Enforce Civil Rights

- *Congressional Debate over the Civil Rights Act of 1964
- **Heart of Atlanta Motel, Inc. v. United States* (1964)
- **South Carolina v. Katzenbach* (1966)

**Katzenbach v. Morgan* (1966) [M]

**Katzenbach* obituary *The New York Times*, May 9, 2012 [M]

*Louis Menand, “The Color of Law,” *The New Yorker*, July 8, 2013 [M]

**“Room for Debate: Is the Civil Rights Era Over?” *New York Times*, June 26, 2013 [M]

Prep: What according to *Heart of Atlanta Motel* and *Katzenbach* were the constitutional justifications for the federal power to enforce civil rights? Does this constitutional justification have implications for the most recent ruling by the Court on the Voting Rights Act? Finally, pay particular attention to *Heart of Atlanta Hotel* – as yourself what the core constitutional value seems to be in this case.

Recommended:

* Adam Liptak, “Supreme Court Invalidates Key Part of the Voting Rights Act,” *The New York Times*, June 25 2013 [M]

3. Fri., Nov. 8: The New Deal President

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 490-512:

V. Separation of Powers

A. General Principles

**Youngtown Sheet & Tube Co. v. Sawyer* (1952)

B. Appointment and Removal Powers

**Humphrey’s Executor v. United States* (1935)

C. Nondelegation of Legislative Powers

**Schechter Poultry Corp. v. United States* (1935)

**United States v. Curtiss-Wright Export Corporation* (1936)

D. Executive Privilege

*William P. Rogers, Senate Testimony on Executive Privilege

**Ex parte Quirin* (1942) [M]

**Ex parte Endo* (1944) [M]

Newspaper Research and Discussion: Executive Power; Civil Rights; or The Taxing and Spending/Regulating Commerce Power of Congress

Prep: America’s rise as a world power, and more specifically its conducting of the Cold War, had profound implications for American government and law. In what ways do the case we have read

for today highlight this new reality, and what implications do you see for the American constitutional order? (Try in your responses to highlight specific examples of re-adjustments within the structure of American government and the constitutional interpretation of the structures and powers of American government.) Similarly, the development of the American economy, requiring massive division of labor, and the rise of administrative coordination, spawned an extensive administrative bureaucratic state. Did this fourth branch of government weaken or strengthen American democracy? What, indeed, were the constitutional arguments in favor and against such development?

Recommended:

*McCloskey, "The Court and Postwar America: 1937-1959," *The American Supreme Court*, pp. 120-145

*Doris Kerns Goodwin, *Lyndon Johnson and the American Dream* (St. Martin's: 1991)

Week Twelve: A New Constitutional Order?

1. Mon., Nov. 11: No Class: Veterans Day

2. Wed., Nov. 13: Law and Politics in Transition

*Gillman et al., *American Constitutionalism*, ch. 9, pp. 513-19; ch. 10, pp. 563-68; ch. 11, pp. 615-19:

I. Introduction

*Richard Nixon, Speech Accepting the Republican Presidential Nomination

*Jimmy Carter, Inaugural Address

II. Judicial Power and Constitutional Authority

I. Introduction

*Ronald Regan, First Inaugural Address

II. Judicial Power and Constitutional Authority

I Introduction

*William Clinton, Fourth Annual Message

*Barack Obama, Inaugural Address

II. Judicial Power and Constitutional Authority

*We will watch a few video clips on the 1968 Democratic Convention, the Bork and Thomas nomination.

Hand-Outs: Party Alignment and Demographic Trends

Prep: In what way do the speeches by Nixon, Regan, Clinton, and Obama signal a shifting "Constitutional Order?" Are there themes or ideas present in these speeches that contrast with themes and ideas one finds during the New Deal and the Great Society? What implications might this shift in political configurations have for the role of the Supreme Court in American society and government?

Recommended:

*McCloskey, "Judicial Monitoring of the New American Welfare State," *The American Supreme Court*, pp. 205-257

3. Fri., Nov. 15: Changing Politics of Judicial Review

*Gillman et al., *American Constitutionalism*, ch. 10, pp. 569-82; ch. 11, pp. 619-27, 632-37:

A. Judicial Supremacy

*Edwin Meese, “The Law of the Constitution”

B. Judicial Review

*William H. Rehnquist, “The Notion of a Living Constitution”

*William J. Brennan, “The Constitution of the United States: Contemporary Ratification”

*The Nomination of Robert H. Bork to the U.S. Supreme Court

*Note: Modern Court-Curbing

A. Judicial Review

**City of Boern v. Flores* (1997)

*The Nomination of Samuel Alito to the U.S. Supreme Court

C. Judicial Structure and Selection

*Note: Judicial Appointments and Confirmations

*Senate Debate on the “Nuclear Option”

*Larry Kramer, “We the People: Who Has the Last Word on the Constitution?” *Boston Review of Books*, pp. 1-19 [M]

Newspaper Research and Discussion: The Post-New Deal Constitutional Order (Nixon, Carter, Regan, Clinton, or Obama) (i.e. Find an article that highlights the differences between the New Deal Constitutional Order and today)

Prep: What is the notion of a “living constitution?” How do the views of Brennan and Rehnquist and Meese differ as to the nature of a constitution? What is Kramer’s major argument? How does his theory of the Constitution differ from the theory of the Constitution we saw Stephen Holmes arguing for on our first day? Do you agree or disagree with Kramer’s arguments and his understanding of history? Would Kramer be more sympathetic toward Brennan’s ideas or those of Rehnquist and Meese?

Recommended:

Hadley Arkes, “A Natural Law Manifesto,” *Claremont Review of Books* (Fall: 2011) [M]

Week Thirteen: Politics by Other Means and Judicial Supremacy

1. Mon., Nov. 18: Politics by Other Means?

*Benjamin Ginsberg and Martin Shefter, “Institutional Combat” *Politics by Other Means* (Norton: 2002), pp. 132-69 (especially pp. 146-59) [M]

*Jeffrey Rosen, “Supreme Court, Inc.,” *New York Times*, March 16, 2008 [M]

Prep: What is the central claim of Ginsberg and Shefter and what evidence to they give to support their position? How does Rosen’s piece reflect the ideas advanced by Ginsberg and Shefter? What implications does this phenomenon have for the role of the Supreme Court within American democracy? What do you think explains this phenomenon?

Recommended:

*Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* (1957)[M]

*Martin Shapiro, “The Supreme Court: From Watergate to Burger,” *The New American Political System*, ed. Anthony King (American Enterprise Institute: 1978)

*Ibid., “Fathers and Sons: The Court, the Commentators, and the Search for Values,” *The Burger Court: The Counter-Revolution That Wasn’t*, ed. Vincent Blasi (Yale University Press: 1983)

*Mark Silvertstein and Benjamin Ginsberg, "The Supreme Court and the New Politics of Judicial Power," *Political Science Quarterly*, Vol. 102 (Fall 1987) [M]

2. Wed., Nov. 20: Federalism Revolution?

*Gillman et al., *American Constitutionalism*, ch. 9, 530-37; ch. 10, 583-94; ch. 11, 637-57, 664-70:

IV. Federalism

A. State Immunity from Federal Regulation

**National League of Cities v. Usery* (1976)

III. Powers of National Government

A. General Principles

*Ronald Reagan, Remarks at the National Conference of State Legislatures

III. Powers of National Government

A Power to Regulate Commerce

**United States v. Lopez* (1995)

**Gonzales v. Raich* (2005)

B. Federal Power to Enforce Civil Rights

**United States v. Morrison* (2000)

*Herbert Wechsler, "The Political Safeguards of Federalism," *Columbia Law Review*, Vol. 54, No. 4 (1954): 543-60 [M]

Prep: What is Wechsler's argument? What is he trying to do? Does the argument he advances make sense? Or is there an implicated judicial double standard here? Finally, how do you read *National League of Cities*, *Lopez*, *Raich*, and *Morrison*, given the backdrop of Wechsler's argument? Does the Court seem to go along with the argument of Wechsler or no?

3. Fri., Nov. 22: Reining in Congress?

*Gillman et al., *American Constitutionalism*, ch. 10, pp. 596-602; ch. 11, 676-81:

V. Separation of Powers

A. Sharing the Legislative Power

**Immigration and Naturalization Service v. Chadha* (1983)

V. Separation of Powers

A. Sharing Legislative Power

**Clinton v. City of New York* (1998)

Newspaper Research and Discussion: Politics by Other Means

Prep: What role is the Court articulating for itself in *Chadha* and *City of New York*? What do you think the theoretical justifications for such rulings are? Are these rulings modest or are expansive in terms of judicial power? Finally, do you think, based on your reading of Gillman et al. that these decisions are constructive and justified in the American democratic constitutional system?

Week Fourteen: The Unitary Executive

1. Mon., Nov. 25: Executive Power and Executive Privilege

*Gillman et al., *American Constitutionalism*, ch. 10, pp. 602-03, 606-13; ch. 11, pp. 681-86:

B. Presidential Power to Execute the Laws

**Morrison v. Olson* (1988)

B. Presidential Power to Execute the Laws

*Walter Dellinger, “Presidential Authority to Decline to Execute Unconstitutional Statutes”

*Note: The Bush Administration, Presidential Signing Statements, and the Obligation to Faithfully Execute the Law

*Walter Dellinger, “The Legal Significance of Presidential Signing Statements” [M]

*Gillman et al., *American Constitutionalism*, ch. 9, pp. 553-58; ch. 11, pp. 708-11:

B. Executive Privilege

**United States v. Nixon* (1974)

E. Executive Privilege

**Cheney v. U.S. District Court for the District of Columbia* (2004)

**In re Sealed Case* (2002) [M]

*Hendrik Hertzberg, “Too Great Expectations,” *New York Times*, April 28, 1985

Newspaper Research and Discussion: The Unitary Executive

Prep: How would you characterize the Article II powers of the President, specifically as it related to executive power and executive privilege? How expansive to you think the power of the president is to executive laws and what privileges attach to the office? Are the powers of the President limited by Congress and if so is this the case in all situations? Or perhaps the President is only very modestly limited by the actions of Congress? (Note: when trying to answer these questions examine the language of the Constitution for clues as to how one might make out either side of the argument.)

Recommended:

*Arthur M. Schlesinger, Jr. *The Imperial Presidency* (Mariner: 2004)

*Theodore Lowi, *The Personal President: Power Invested, Promise Unfilled* (Ithaca: 1985)

*Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* (2009) [M]

*Bruce Ackerman, *The Decline and Fall of the American Republic* (Harvard: 2010)

THANKSGIVING BREAK: 27TH THROUGH 29TH

Week Fifteen: Presidential Power and War Powers

1. Mon., Dec. 2: War Powers I

*Gillman et al., *American Constitutionalism*, ch. 11, pp. 627-29, 686-90, 696-700

B. Constitutional Litigation

**Doe v. Bush* (2003)

C. President War and Foreign Affairs Powers

*John Yoo, The President’s Constitutional Authority to Conduct Military Operations

*Memoranda on Standards of Conduct of Interrogation [“Torture Memos”]

*Jay S. Bybee, Memo to Alberto R. Gonzales, Counsel of the Department of Defense

*John Yoo, Memo to William Haynes II

*Daniel Levin, Memo to James B. Corney, Deputy Attorney General

*Caroline D. Kass, Memorandum Opinion on the Authority to Use Military Force in Libya

*John Cornyn, Speech on Congressional Authorization for the Use of Military Force in Libya

*Justice Department on National Security Agency Activities [M]

Prep: What is the proper balance between the interests of national security and individual and collective freedom? How should we understand the role of the constitution, the courts, Congress, and the executive branch in this process? Does the Constitution establish bright lines when faced with significant national security concerns? Or is the document more flexible, and how are we to understand the proper interpretation of the Constitution given these conditions within the context of American democracy?

Recommended:

*Jane Mayer, "The Hidden Power: The Legal Mind Behind the White House's War on Terror," *The New Yorker*, July 3, 2006 [M]

*Harold Koh, *The National Security Constitution* (Yale University Press: 1990)

*Louis Fisher, *Presidential War Powers* (University of Kansas: 2004)

2. Wed., Dec. 4: War Powers II (Lecture) (Perhaps NSA FISA Court Issue)

*Gillman et al., *American Constitutionalism*, ch. 11, 700-08:

D. Martial Law and Habeas Corpus

**Hamdi v. Rumsfeld* (2004)

**Ramdan v. Rumsfeld* (2006)[M]

**Boumediene v. Bush* (2008)[M]

*Stephen Holmes, "Salute!" (Review of Wills' Bomb Power), *London Review of Books* (April: 2010) [M]

Recommended:

*Stanford Levinson, "Coda," *The American Supreme Court*, pp. 267-284

*Gary Wills, *Bomb Power: The Modern Presidency and the National Security State* (Penguin: 2011)

3. Fri., Dec. 6: Whither the Constitution?

*Robert Dahl, "On Removing Certain Impediments to Democracy in the United States" [M]

*Louis Michael Seidman, "Let's Give Up on the Constitution," *NYT* [M]

* Sanford Levinson, "Our Imbecilic Constitution" *NYT* [M]

News Paper Research and Discussion: Presidential War Powers

Prep: Is constitutionalism still possible today, given the nature of asymmetric warfare, terrorism, the development of globalization and capitalism? Perhaps the American constitution is an 18th and 19th century artifact that today is obsolete in the 21st century? If, though, constitutionalism is possible today, then does the American constitution need to be radically changed to the respond to contemporary challenges, or perhaps it merely needs to be reformed? Perhaps, however, it already has the necessary resources within it to adapt to contemporary affairs, or perhaps we need merely to re-establish and re-commit ourselves to the constitutional principles that stand behind our constitutional history and development. What say you?

Final: December 11, 8-10 am

Sources for the Study of American Constitutional Development

The range of materials appropriate for the study of American constitutional development is truly massive. That makes its study particularly engaging, but also challenging.

Robert McCloskey's *The American Supreme Court* contains a superb bibliographical essay, which documents several important secondary sources for the study of American constitutional development. In addition, Gilman, Graber and Whittington's *American Constitutionalism* also contains useful bibliographical material at the end of each chapter. In addition to the Recommended Readings listed throughout the syllabus, these two books should be your starting point for conducting further research.

Another good introductory source, and the standard textbook in American constitutional history, is Melvin Urofsky and Paul Finkelman's two volume, *A March of Liberty: A Constitutional History of the United States* (Oxford: 2012). Not only are these volumes wonderful introductory texts, they also contain excellent small bibliographical essay at the end of each chapter. The standard introductory political science text on the Supreme Court is Lawrence Baum's *The Supreme Court* (Congressional Quarterly: 2012). This book contains a selected bibliography that explores some of the most important political science literature on the Supreme Court. Students interested in the political science study of the law, and in particular graduate students, should also be aware of the Keith Whittington, R. Haniel Kelemen, and Gregory A. Caldeira, eds., *The Oxford Handbook of Law and Politics* (Oxford: 2008). Finally, students of American constitutional law should be aware of Kermit L. Hall, ed., *The Oxford Companion to The Supreme Court of the United States* (Oxford: 1992).