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University of Montana
Department of Political Science

PSCI 471
American Constitutionalism:
Structures of Government
Autumn 2015

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Office Hours: 1-2 pm M, W; by appointment

M, W, F 8:10-9 pm
Classroom: LA 337

This course will examine the development of American constitutionalism, 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 contexts 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 constitutionalism 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, Vol. 1: Structures of Government* (Oxford: 2013)

Recommended Texts:

2. Robert McClosky, *The American Supreme Court*, ed. Sanford Levinson (Chicago: 2010)
3. *The U.S. Constitution: And Fascinating Facts About It* (Oak Hill: 2003)
4. Anthony Weston, *A Rule Book for Arguments* (Hackett: 2008)

Procedures and RequirementsGrading and Assignments:

This course has six requirements, which include the following:

1. Faithful attendance to class, active participation during the discussions, and newspaper article (20% of the final grade; see “Participation” below)
2. 10 Paragraph Responses (10%; see “Teams” and “Starting Discussion & Paragraphs” below)
3. First Essay: 5-6 page paper (**September 26:** 15%; see “Essay” below)
4. Midterm: 50 minute in class examination (**October 17:** 15%; see “In Class Writing Assignments” below)
5. Five one-page response papers (15%; see “Response Papers” below).
6. Final Exam: (**December 14:** 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. **Put tersely: If a student does not participate substantially, he or she will fail the course.**

Teams:

In the attempt to maintain a focus on discussion, we will divide the class into 4 teams composed of roughly 5 people each. Further, during the semester the membership of your team will change

4 times. Thus, be prepared to participate in a collaborative constructive and thoughtful conversation with 4 different teams during the course of the term.

The teams will be listed on Moodle and will run through the following periods:

I. Week 1-4

II. Weeks 6-7

III. Weeks 10-11

IV. Weeks 13-15

Starting Discussion & Paragraphs:

During the term you will be asked 10 times to respond to one of the prep questions for that day's assignment. When we break up into teams or when we open the floor to group discussion, your response to that prep question will be the starting point for the class or your team's discussion.

Prior to the day you have signed up to start discussion, I will distribute to you a paragraph size sheet of paper. Please respond to the question at the top of paragraph. I ask that you turn that paragraph in to me prior to the beginning of the class – i.e. no paragraphs turned in at the end or middle of class.

Typically 2 people from each team will be assigned to start discussion each day. In a go-around at the start of class, you will sketch out a brief answer (3 minutes or so – you can read it from a written-out statement, or an outline, or extemporize). After this go around, the group will switch to a discussion beginning with disagreements people might have with each other, and then proceeding to wherever the discussion might take the group.

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. You 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 1 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, the requirements of the assignment will not have been met. 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 (3 minutes) the article and how it relates to the topic we are addressing that week.

On the Wednesday before the Friday you are to present your newspaper article, you are required to email a copy of the article to the class so that everyone may read it before we meet. (For those responsible for Mon. Dec. 7, please email the article on Sunday)

Classroom Policy:

Because this is a discussion class, we will observe the following rule during the course:

- 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. If people are focused on their computer screens, rather than the human beings they are talking with, then it is difficult to develop such a dialogue.

In Class Writing Assignments:

The course requires 2 in class written examinations.

- The midterm examination will take place on October 17. 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. The test is worth 15% of your grade.
- The final examination also will be open-book, and will follow a similar format as the midterm. It will take place on December 14 from 8 to 10 am.

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 26. 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... 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.

Late Papers: You will note from the syllabus that we do not have class scheduled on the week your essay is due. For this reason, late papers will be marked down a grade every day they are late.

- 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 one-page paper responses will not be accepted.

Finally, neither the short essay nor the one-page response paper should be emailed. Emailing me the paper simply means that I must print it out (someday I am sure I will learn to grade without a pen in my hand – but for now I need the paper printed)

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 for essays.*

Needless to say, there is a great deal of information and material on the Internet that touches on American constitutionalism. 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.

Class Drop Policy:

The University allows students to drop courses until September 21 (i.e. the 15th instructional day). After that, students are required to obtain the signature of the faculty member teaching the course. ***It is my policy to not sign students out of classes.*** That is, you have three weeks (until Sept. 21) to decide if you wish to take this course. If you do not drop the course by September 21, I will assign students the grade they have received in the class. (Side note: It is not good for you or for the class to have students not committed to taking a course, and hence the policy...)

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.

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/VPISA/index.cfm/page/1321>

Accessibility:

The University of Montana assures equal access to instruction by supporting collaboration between students with disabilities, instructors, and Disability Services for Students. If you have a disability that requires an accommodation, contact me at the beginning of the semester so that proper accommodations can be provided. Please contact Disability Services for Students if you have questions, or call Disability Services for Students (DSS) for voice/text at 406-243-2243. You may also fax the Lommasson Center 154 for more information at 406-243-5330.

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. 31: Introduction: How Important is Constitutional Structure? What do Constitutions Do? The Puzzle of Constitutional Change

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

1. Introduction to American Constitutionalism
 - I. What is a Constitution?
 - II. Constitutional Purposes

Prep: How important is constitutional structure? What is a constitution? What are the purposes of a constitution? Is change in the air? How have constitutions changed in the past?

Recommended:

*Stephen Holmes, "Precommitment and the Paradox of Democracy," *Constitutionalism and Democracy* (1988) [M] (The traditional view today...)

2. Wed., Sept. 2: No Class (American Political Science Association) What do Constitutions Do?

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

- III. Constitutional Interpretation and Decision Making
- IV. Constitutional Authority
- V. Constitutional Change
- VI. Constitutional Politics and Law

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? Should one embrace originalism, textualism, doctrinalism, structuralism, prudentialism, aspirationalism? How should a Constitution be ratified and how does it legitimately change? What is the relationship between constitutional politics and law?

Write paragraph on one of the prep questions.

3. Fri., Sept. 4: No Class (American Political Science Association)

Week Two: The Beginnings of the American Constitutional Order

1. Mon., Sept. 7: No Class Labor Day

2. Wed., Sept. 9: 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 Framer 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?)

PARAGRAPHS DUE

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)

3. Fri., Sept. 11: The Customary Constitution

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

Newspaper Research and Discussion: The People and the Constitution

Prep: What is the "customary constitution?" What are the mechanisms for changing the "customary constitution," according to Kramer? How does it differ from how we think of a constitution today? Why does Larry call his book "The People Themselves?"

Recommended:

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

*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).

Week Three: Centralization of Power and Separation of Powers

1. Mon., Sept. 14: 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 3/5ths 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. 16: 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

*Gordon Wood, "Eighteenth-Century American Constitutionalism" [M]

Prep: What do these documents indicate about the meaning of the separation of powers and executive power in particular? 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? 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? Finally, what does Wood indicate are the distinctive features of American constitutionalism to emerge in the 18th century?

Recommended:

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

THURS., SEPT. 17 EXTRA-CREDIT:

Mark Tushnet (William Nelson Cromwell Professor of Law, Harvard University):
12 pm University of Montana Law School

3. Fri., Sept. 18: 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]

*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. 21: Creating a Power of Judicial Review

*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

*The Judiciary Act of 1789 [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 23: 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. 25: National Power

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 118-37:

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*

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?

Recommended:

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

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

1. Mon., Sept. 28: Workshop

2. Wed., Sept. 30: Workshop

3. Fri., Oct 1: Paper Due

Week Six: The First American Republic

1. Mon., Oct 5: Commerce

*Gillman et al., *American Constitutionalism*, ch. 4, pp. 145, 149-53; ch. 5, pp. 221-23, 226-27

D. Power to Regulate Commerce

**Gibbons v. Ogden* (1824)

IV. Federalism

A. States and the Commerce Clause

**Cooley v. Board of Wardens of the Port of Philadelphia* (1859)

*“A Guide to *Gibbons v. Ogden*” [M]

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*? 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? Finally, how serviceable do you find the distinction drawn in *Cooley* between types of commerce?

2. Wed., Oct. 7: 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 9: 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 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. 12: Slavery

*Gillman et al., *American Constitutionalism*, ch. 5, pp. 206-14:

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

**Wynehamer v. People* (N.Y. 1856) [M]

**Dred Scott v. Sandford* (1857) [M]

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: 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?) How does he fill in constitutional meaning?

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 14: War Powers: Lincoln as a Democratic Dictator?

*Gillman et al., *American Constitutionalism*, ch. 6, pp. 256-57, 295-303, 306-313:

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

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. 16: Reconstruction (No Class: Pacific Northwest Political Science Association)

*Gillman et al., *American Constitutionalism*, ch. 6, pp. 294-95:

IV. Federalism

D. Constitutional Amendment and Ratification

*Note: The Validity of the Fourteenth Amendment

Prep: "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. 19: Optional Review

PARAGRAPH DUE

2. Wed., Oct. 21: No Class

3. Fri., Oct 23: 50 Minute In Class Midterm (Association for Political Theory)

Week Nine: The Second American Republic

1. Mon., Oct 26: Courts vs. Democracy

*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. 28: States, Presidents and Bureaucracies

*Gillman et al., *American Constitutionalism*, ch. 7, pp. 389-403, 407-413:

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)

B. Inherent Presidential Power

*Presidents on Presidential Power

C. Nondelegation of Legislative Power

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

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 30: Congress, Civil Rights, and Corporations

*Gillman et al., *American Constitutionalism*, ch. 7, pp. 346-52, 354-56, 365-367:

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)

B. The Power to Regulate Commerce

**Hammer v. Dagenhart* (1918)

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

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? 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, “State Building, American Style” (2007) [M]

Week Ten: A New (Deal) Constitutional Order

1. Mon., Nov. 2: 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 Gilman 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., Nov. 4: The Reemergence of the Courts

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 438-42:

*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

One-Page Response # 4 Due:

How might *Cooper v. Aaron* open up the possibility for the incorporation of the Bill of Rights? Some scholars have argued that Cooper 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

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

3. Fri., Nov. 6: Opening the Doors to Constitutional Litigation

*Gillman et al., *American Constitutionalism*, ch. 8, pp. 442-56

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

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

Week Eleven: The New Deal Constitutional Order

1. Mon., Nov. 9: Congress and the Economy

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

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

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*?

2. Wed., Nov. 11: NO CLASS: VETERANS DAY

3. Fri., Nov. 13: NO CLASS: Northeastern Political Science Association

Week Twelve: The Great Society & A New Constitutional Order?

1. Mon., Nov. 16: 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]

2. Wed., Nov. 18: 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

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)

3. Fri., Nov. 20: Changing Politics of Judicial Review

*Gillman et al., *American Constitutionalism*, ch. 10, pp. 569-82; ch. 11, pp. 619-27, 632-34:

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

*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(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? 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:

1. Mon., Nov. 23: NO CLASS

THANKSGIVING BREAK: 25TH THROUGH 27TH

Week Fourteen: Politics by Other Means and Judicial Supremacy

1. Mon., Nov. 30: Politics by Other Means?

*Benjamin Ginsberg and Mathew Crenson, *Downsizing Democracy* (2002) [M]

*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]

*Julie Hirschfeld Davis, "Behind Closed Doors, Obama Crafts Executive Actions," *New York Times*, August 18, 2014 [M]

Prep: What is the central claim of Ginsberg and Shefter and what evidence do 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 Tushnet, "Business Stooze or Umpire? Business Cases in the Roberts Court," *In the Balance*, pp. 187-214

2. Wed., Dec. 2: Federalism Revolution?

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

*James Madison *Federalist* no. 45 and 46 [M]

*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)

*Jeffrey Rosen, "Flip-Flopping Federalists," *New Republic*, March 29, 2013 [M]

**U.S. v. Windsor* (2013) [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? 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? How do these federalism decisions fit together with the *Windsor* decision? Is there a tension as Rosen seems to claim?

3. Fri., Dec. 4: 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)

**National Federation of Independent Business v. Sebelius* (2012) [M]

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? Similarly, how do you read *Sebelius* in the context of these other decisions?

One-Page Response #5 Due

Week Fifteen: Executive Power

1. Mon., Dec. 7: Executive Power and Executive Privilege

*Hendrik Hertzberg, "Too Great Expectations," *New York Times*, April 28, 1985 [M]

*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)

Newspaper Research and Discussion: Executive Power/Executive Privilege

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)

2. Wed., Dec. 9: War Power

- *President Obama, Warrior in Chief, *New York Times*, April 28, 2012 [M]
- *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)

3. Fri., Dec. 11: Whither the Constitution?

*Bruce Ackerman, "The Decline and Fall of the American Republic," *Tanner Lectures on Human Values*, Delivered at Princeton (2010) [M]

*Louis Michael Seidman, "Let's Give Up on the Constitution," *NYT* (2012)[M]

*Sanford Levinson, "Our Imbecilic Constitution" *NYT* (2012)[M]

*Jeffrey Toobin, "Our Broken Constitution," *The New Yorker*, Dec. 9, 2013 [M]

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 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 EXAM: Monday, Dec. 14, 8:00-10:00 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).