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PSCI 471.01: American Constitutional Law

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University of Montana
Department of Political Science

PSCI 471
American Constitutional Law:
Structures of Government
Autumn 2014

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Office: LA 147
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Office Hours: 11-12 pm M, 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 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 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, Vol. 1: Structures of Government* (Oxford: 2013)

Recommended Texts:

2. Mark Tushnet, *In the Balance: Law and Politics on the Robert's Court* (Norton: 2013)
3. Robert McClosky, *The American Supreme Court*, ed. Sanford Levinson (Chicago: 2010)
4. *The U.S. Constitution: And Fascinating Facts About It* (Oak Hill: 2003)
5. 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 and active participation during the discussions (30% of the final grade; see "Participation" below)
2. First Essay: 5-6 page paper (**September 26**: 15%; see "Essay" below)
3. Midterm: 50 minute in class examination (**October 17**: 15%; see "In Class Writing Assignments" below)
4. Five one-page response papers (15%; see "Response Papers" below).
5. Final Exam or Final Paper: (**December 9**: 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.**

Starting Discussion:

As part of your participation grade, 4 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 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, 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.

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. (Those signed up to present on Monday Nov. 24th, please send out your article on Saturday the 22nd)

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 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 1 to 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. (For strategies on how to succeed when it comes to in class examinations, please see on Moodle my write-up on, “Getting A’s On Bluebooks.”) The test is worth 15% of your grade.
- Students have an option of taking a final exam or completing an essay. The final examination also will be open-book, and will follow a similar format as the midterm. It will take place on

December 9 from 8 to 10 am. In lieu of the final exam, students may write a 10 to 12 page paper in consultation with me. That paper is due on December 9, also. Both assignments are 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 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 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.

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/VPSA/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. 25: Introduction: How Important is Constitutional Structure?

2. Wed., Aug. 27: What do Constitutions Do?

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

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

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

1. Introduction to American Constitutionalism

I. What is a Constitution?

II. Constitutional Purposes

Recommended:

*Stephen Holmes, "Precommitment and the Paradox of Democracy," *Constitutionalism and Democracy* (1988)

3. Fri., Aug. 29: 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

*Mark Tushnet, *In the Balance*, pp. ix-xviii

*Appendix 2: Researching and Reading Government Documents

Week Two: The Beginnings of the American Constitutional Order

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

2. Wed., Sept. 3: 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)

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

Recommended:

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

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

*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. 5: The First American Constitutions (The States)

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

*John Adams, *Thoughts on Government* (1773)

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

*Virginia, *The First Bill of Rights*

**The Virginia Constitution* (1776)

**The Pennsylvania Constitution* (1776)

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

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. 8: 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 Work Ratification Convention

- *James Madison, *Vices of the Political System of the United States* (1787)

- *Room for Debate 3/5th Compromise, *The New York Times*

Recommended:

- *Gordon S. Wood, “Interests and Disinterestedness in the Making of the Constitution”
- *Ibid., *The Creation of the American Republic, 1776-1787* (Chapel Hill: 1998)

2. Wed., Sept. 10: 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, “Eighteen-Century American Constitutionalism”

Recommended:

- *Federalists, Nos. 49, 57, 62

3. Fri., Sept. 12: 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)

- *“Study Guide – Defining Judicial Power”

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

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

Recommended:

- *Wood, "The Great American Argument" *The New Republic*, Dec. 2010
- *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. 15: 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
- *"John Marshall's Dilemma"
- *Wood, "Chief Justice John Marshall and the Origins of Judicial Review"

One-Page Response # 1 Due:

Recommended:

- *Larry Kramer, "Understanding *Marbury v. Madison*," *Proceedings of the American Philosophical Society*, Vol. 148, No. 1 (March: 2004)
- *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*
- *Keith Whittington, "Judicial Review Before the Civil War," *Georgetown Law Journal*, Vol. 97, 2009

2. Wed., Sept 17: 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)
- *Algernon Sidney [Spencer Roane], "On the Lottery Decisions"

Recommended:

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

3. Fri., Sept. 19: 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

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. 22: Workshop

2. Wed., Sept. 24: Workshop

3. Fri., Sept. 26: Paper Due

Week Six: The First American Republic

1. Mon., Sept. 29: Commerce

*Sir William Blackstone On the Police Powers

*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)

*"A Guide to *Gibbons v. Ogden*"

2. Wed., Oct. 1: 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

3. Fri., Oct 3: 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

Week Seven: Civil War and Reconstruction

1. Mon., Oct. 6: Slavery

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

B. Fugitive Slave Clause

- *Salmon Chase, Speech in the Case of the Colored Oman Matilda
- **Prigg v. Pennsylvania* (1842)
- *John J. Crittenden, opinion on the Constitutionality of the
- *Fugitive Slave Bill

**Wynehamer v. People* (N.Y 1856)

**Dred Scott v. Standford* (1857)

One-Page Response # 2 Due

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 8: 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)

3. Fri., Oct. 10: Session and Reconstruction

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

- IV. Federalism
 - A. Secession
 - *South Carolina Ordinance of Session
 - * 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

Newspaper Research and Discussion: Political Nature of the Judiciary; Federalism; or Civil Right

Recommended:

- *Melvin Urofsky, “The Union Restored,” *The March of Liberty Vol. I*, pp. 429-451
- *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. 13: Optional Review

2. Wed., Oct. 15: No Class

3. Fri., Oct 17: 50 Minute In Class Midterm

Week Nine: The Second American Republic

1. Mon., Oct 20: 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)

One-Page Response # 3 Due

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. 22: 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)

*Presidential Power in the Age of Congressional Government

3. Fri., Oct 24: 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)

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

Recommended:

*Louis Galambos, "State Building, American Style" (2007)

Week Ten: A New (Deal) Constitutional Order

1. Mon., Oct. 27: 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

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. 29: The Reemergence of the Courts

*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:

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., Oct. 31: The High Tide of American Liberalism

- *Lyndon Johnson, *Great Society Speech* [M]
- *Morton Horwitz, "'The Warren Court and the Pursuit of Justice,'" *Washington and Lee Law Review*, Vol. 50, Issue 1 (1993): 5-13 [M]
- *David E. Rosenbaum, "20 Years Later, The Great Society Flourishes," *New York Times*, April 17, 1985 [M]

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. 3: 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)

2. Wed., Nov. 5: 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)
- *Katzenbach obituary *The New York Times*, May 9, 2012
- *Louis Menand, "The Color of Law," *The New Yorker*, July 8, 2013
- *"Room for Debate: Is the Civil Rights Era Over?" *New York Times*, June 26, 2013

Recommended:

* Adam Liptak, "Supreme Court Invalidates Key Part of the Voting Rights Act," *The New York Times*, June 25 2013

3. Fri., Nov. 7: 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)

**Ex parte Endo* (1944)

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. 10: No Class: Veterans Day

2. Wed., Nov. 12: 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

*Mark Tushnet, *In the Balance*, pp. 44-101

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

Recommended:

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

3. Fri., Nov. 14: 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

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)

Recommended:

Hadley Arkes, "A Natural Law Manifesto," *Claremont Review of Books* (Fall: 2011)

Week Thirteen: Politics by Other Means and Judicial Supremacy

1. Mon., Nov. 17: Politics by Other Means?

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

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

*Jeffrey Rosen, "Supreme Court, Inc.," *New York Times*, March 16, 2008

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

Recommended:

- *Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* (1957)
- *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 Stooge or Umpire? Business Cases in the Roberts Court,” *In the Balance*, pp. 187-214

2. Wed., Nov. 19: Federalism Revolution?

- *Herbert Wechsler, “The Political Safeguards of Federalism,” *Columbia Law Review*, Vol. 54, No. 4 (1954): 543-60
- *James Madison *Federalist* no. 45 and 46
- *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

- *U.S. v. Windsor (2013)

3. Fri., Nov. 21: 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]

- *Mark Tushnet, *In the Balance*, pp. 1-43

Newspaper Research and Discussion: Politics by Other Means

Week Fourteen: The Unitary Executive

1. Mon., Nov. 24: Executive Power and Executive Privilege

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

- *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”

*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)

*Video: NLRB v. Noel Canning: Inside the Case:

<https://www.youtube.com/watch?v=5g3r15xyS8Y>

*Audio: Oral Argument in NLRB v. Noel Canning: http://www.oyez.org/cases/2010-2019/2013/2013_12_1281#sort=seniority

*Adam Liptak, “Supreme Court Rebukes Obama on Right of Appointment,” *New York Times*, June 26, 2014

Newspaper Research and Discussion: The Unitary Executive

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)

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

THANKSGIVING BREAK: 26TH THROUGH 28TH

Week Fifteen: Presidential Power and War Powers

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

*President Obama, Warrior in Chief, *New York Times*, April 28, 2012

*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

Recommended:

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

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

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

2. Wed., Dec. 3: War Powers II

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

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

D. Martial Law and Habeas Corpus

**Hamdi v. Rumsfeld* (2004)

**Ramdan v. Rumsfeld* (2006)

**Boumediene v. Bush* (2008)

*Julie Hirschfeld Davis, "Neither Obama Nor Congress Seems Eager for a Vote on Military Action in Iraq," *New York Times*, August 19, 2014

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. 5: 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)

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

News Paper Research and Discussion: Presidential War Powers

FINAL ESSAY OR EXAM: PAPER DUE DECEMBER 9; FINAL EXAM DEC. 9 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).