

# **Constitutional Law & Politics: Constitutional Crises, Constitutional Regimes**

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## **I. Description and Objectives**

In this course, rather than focus on the Bill of Rights or the Fourteenth Amendment, we will examine the nature and scope of the powers of the judiciary, Congress, the presidency, and the relationship between the federal government and the states.

The cases and reading material are arranged in order to highlight the historical context of the Court's decisions. My primary goal in this course is to emphasize that answers to questions about the proper ways in which to organize a political system around even the most fundamental principles -- such as separation of powers, checks and balances, federalism, representative democracy, and the rule of law -- have changed throughout this country's history.

## **II. Course Texts and Grading**

### **A. Course Materials:**

The following required textbook is available for purchase at the MU Bookstore:

- James C. Foster and Susan M. Leeson, *Constitutional Law: Cases in Context*, Vol. 1 – *Federal Government Powers and Federalism* (1998) (“FL”)

- John Noonan, *Narrowing the Nation's Power: The Supreme Court Sides with the States* (2003)

- All other assigned readings are available via web link, Blackboard, or “e-reserve”

## **B. Grading:**

One midterm – 35%  
Final exam – 35%  
Critical response essay – 20%  
Class participation – 10%

## **C. Blackboard:**

There will be a Blackboard site for this class: <http://blackboard.miami.edu>

The site will provide a class email discussion list, as well as other resources. It should be up and running by August 30, and I will provide a brief introduction to the site and its features in class soon thereafter.

## **III. Schedule of Readings and Assignments**

**Aug. 29-  
Sep. 2**

### **I. Introduction**

**A. Review FL, Ch. 1, pp. 1-39**

**B. Overview of the Course**

**C. Recommended Reading**

- Keith Whittington, "Yet Another Constitutional Crisis?" 43 WM. & MARY L. REV. 2093 (May 2002).

- Keith Whittington, "The Construction of Constitutional Regimes," Ch. 2 (manuscript)

### **II. The Election of 1800: Establishing Judicial Power**

**A. Background: Adams, Jefferson, Congress and the Federal Courts**

**B. Resolving the Crisis**

*Marbury v. Madison* (1803) FL, p. 40

**C. Authority to Review State Court Decisions**

*Martin v. Hunter's Lessee* (1816) FL, p. 93  
*Cohens v. Virginia* (1821) FL, p.103

#### **D. Recommended Reading**

- William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," DUKE L. J. 1 (1969)

- James M. O'Fallon, "Marbury," 44 STAN. L. REV. 219 (1992)

- Mark Graber, "The Problematic Establishment of Judicial Review," in *The Supreme Court in American Politics* (Howard Gillman and Cornell Clayton eds., 1999)

### **Sep. 3-12 III. The Crisis of the Union: Slavery and Property Rights**

#### **A. Background: The Rise of National Supremacy under Marshall**

*Fletcher v. Peck* (1810) FL, p. 724

*Dartmouth College v. Woodward* (1819) FL, p. 733

*McCulloch v. Maryland* (1819) FL, p. 211

*Gibbons v. Ogden* (1824) FL, p. 222

Gordon Wood, "The Father of the Court (John Marshall)," New Republic (Feb. 17, 1997)

#### **B. The Taney Court, Contract Rights, Slavery, and Congress**

*Charles River Bridge v. Warren Bridge* (1837) FL, p. 741

*Prigg v. Pennsylvania* (1842) FL, p. 523

*Mayor of the City of New York v. Miln* (1837) FL, p. 230

*Cooley v. Board of Wardens* (1851) FL, p. 237

#### **C. The Court's Role in the Controversy Over Slavery**

*Dred Scott v Sandford* (1857) FL, p. 150

#### **D. Lincoln and War Powers**

*Prize Cases* (1863) FL, p. 453

*Ex Parte Milligan* (1866) FL, p. 465

#### **E. Recommended Reading**

- Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978)

- Keith Whittington, "The Road not Taken: *Dred Scott*, Constitutional Law, and Political Questions," 63 *Journal of Politics* 365 (2001)

## Sep. 15-29 IV. The "Revolution of 1937"

### A. Background on the Commerce Power & Economic Rights: The Crisis of the Old Order

- *Munn v. Illinois* (1877) FL, p. 779
- *Santa Clara County v. So. Pacific RR* (1886) FL, p. 791
- *United States v. E.C. Knight Co.* (1895) FL, p. 244
- *Pollock v. Farmers' Loan & Trust Co.* (1895) FL, p. 252
- *Lochner v. New York* (1905) FL, p. 796
- *Adair v. United States* (1908) FL, p. 808
- *Hammer v. Dagenhart* (1918) FL, p. 577
- *Adkins v. Children's Hospital* (1923) FL, p. 818
- *Nebbia v. New York* (1934) FL, p. 827
- *Home Bldg. & Loan Assoc. v. Blaisdell* (1934) FL, p. 754

### B. The Supreme Court Confronts the New Deal

- Schechter Poultry v U.S.* (1935) FL, p. 262
- U.S. v. Butler* (1936) FL, p. 270

### C. Roosevelt's Plan and the Nation's Response

- <http://newdeal.feri.org/court/proposal.htm>
- <http://newdeal.feri.org/court/articles.htm>

### D. The Supreme Court Adopts a New Approach: "The Switch in Time That Saved Nine"?

- West Coast Hotel v. Parrish* (1937) FL, p. 836
- NLRB v Jones & Laughlin Steel* (1937) FL, p. 280
- Steward Machine Co. v. Davis* (1937) FL, p. 291
- U.S. v. Darby* (1942) FL, p. 302
- Wickard v Filburn* (1942) FL, p. 311

### E. The Commerce Clause and Civil Rights

- Heart of Atlanta Hotel, Inc. v. United States* (1964) FL, p. 315

## **F. Recommended Reading**

- Howard Gillman, *The Constitution Besieged: The Rise and Decline of Lochner Police-Powers Jurisprudence* (1993)
- Columbia University, FDR and the New Deal
- Bruce Ackerman, *We the People, Vol. 2 Transformations* (1998)
- Barry Cushman, *Rethinking the New Deal Court* (1998)

## **Oct. 1-6 V. The Mid-20<sup>th</sup> Century “Imperial Presidency”**

### **A. Background: The Constitutional Powers of the Executive**

- Myers v. United States* (1926) FL, p. 415
- Humphrey’s Executor v. United States* (1935) FL, p. 426
- Missouri v. Holland* (1920) FL, p. 443

### **B. Inherent Executive Powers**

- U.S v Curtiss-Wright Corp* (1936) FL, p. 471

### **C. The Military, the President and the Exclusion of Japanese Americans**

- Korematsu v United States* (1944)\*

### **D. The Korean War: Truman and the Steel Strike**

- Youngstown Sheet & Tube Company v Sawyer* (1952) FL, p. 478

### **E. Recommended Reading**

- Arthur M. Schlesinger, Jr., *The Imperial Presidency* (1977)
- Louis Fisher, *Presidential War Power* (1995)
- Louis Henkin, *Foreign Affairs and the Constitution* (2<sup>nd</sup> ed., 1997)

**Oct. 8-10 VI. The Challenge of McCarthyism**

**A. Background: The Nature of Legislative Powers and the Power to Investigate**

**B. The Supreme Court and McCarthyism**

*Watkins v U.S.* (1957) FL, p. 371

*Barenblatt v U.S* (1959) FL, p. 382

**C. Recommended Readings**

- Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* (1971)

- Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (1987)

**Oct. 13-15 VII. Watergate: Congress, the Courts and President Nixon**

**A. Overview of the Watergate Scandal**

<http://watergate.info/index.shtml>

**B. The Supreme Court Steps In**

*United States v Nixon* (1974) FL, p. 58

**C. Watergate's Legacy: The 30<sup>th</sup> Anniversary 2002**

<http://www.washingtonpost.com/wp-srv/national/longterm/watergate/front.htm>

**D. Recommended Reading**

- Philip Kurland, *Watergate and the Constitution* (1978)

- Charles M. Lamb and Lisa K. Parshall, "U.S. v. Nixon Revisited: A Case Study in Supreme Court Decision-Making," 58 U. PITT. L. REV. 71 (1996)

- Akhil R. Amar, "Nixon's Shadow," 83 MINN. L. REV. 1405 (1999)

**Oct. 17-20 VIII. Checks and Balances in the Modern Era**

**A. Background: Excessive Delegation in the Post-New Deal Era?**

**B. Limits on Delegation**

*INS v. Chadha* (1983) FL, p. 342

*Bowsher v. Synar* (1986) FL, p. 351

*Mistretta v. United States* (1989) FL, p. 362

**C. Executive Power Checked: The Line-Item Veto**

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

**D. Recommended Reading**

- David Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?" 83 MICH. L. REV. 1223 (1985)

- Robert F. Nagel, "The Legislative Veto, the Constitution, and the Courts," 3 CONST. COMM. 61 (1986)

**Oct. 22-27 IX. The Impeachment of President Clinton**

**A. Background: Executive Privilege, Independent Counsels and Paula Jones**

*Morrison v. Olson* (1988) FL, p. 432

*Clinton v. Jones* (1997)

- Washington Post, [Jones v. Clinton Special Report](#)

**B. The Impeachment Power: Overview, The Constitutional Provisions, The Process and History**

- Washington Post, [Impeachment Special Report](#)

**C. Clinton's Impeachment in Context: What Constitutional Issues?**

- Jonah Micah Marshall, "[Clinton Hating](#)," *Common-place* (July 2002)

- Keith Whittington, "High Crimes' After Clinton: Deciding What's Impeachable," *Policy Review* 99 (February-March 2000): 27-40.

#### **D. Recommended Reading**

- Law Professors' Congressional Testimony, The History and Law of Impeachment

- Keith Whittington, "Bill Clinton was no Andrew Johnson: Comparing Two Impeachments," 2 U. PA. J. CONST. LAW 422 (2000)

### **Oct. 29-31 IX. The Election of 2000**

#### **A. Background: The Electoral College, Election Crises, and the Constitution**

#### **B. Bush v. Gore: Law or Politics?**

*Bush v. Gore* (2000)

#### **C. Recommended Reading**

- Howard Gillman, *The Votes that Counted* (2001)

- Jack M. Balkin, "Bush v. Gore and the Boundary Between Law and Politics," 110 YALE L.J. 1407 (2001)

- Peter Berkowitz and Benjamin Wittes, "The Professors and Bush v. Gore," *Wilson Quarterly* (Autumn 2001)

- Gary Rosen, "Reconsidering Bush v. Gore," *Commentary* (October 2001)

- Gary Rosen, "Bush v. Gore and the Conservatives," *Commentary* (March 2002)

**Nov.3-  
Nov. 28**

### **X. The Rehnquist Court: An Imperial Judiciary?**

#### **A. Background: The Rehnquist Court and Deference to Congress**

- Simon Lazarus, "[The Most Dangerous Branch?](#)" The Atlantic Monthly (June 2002)

## **B. The Commerce Power & Congressional Regulatory Statutes**

*United States v. Lopez* (1995) FL, p. 324

## **C. Section 5, State Sovereignty & Congressional Civil Rights Statutes**

*City of Boerne v. Flores* (1997)

*Alden v. Maine* (1999)

*Seminole Tribe v. Florida* (1996) FL, p. 620

*Kimel v. Florida Bd. of Regents* (2000)

*United States v. Morrison* (2000)

*Alabama v. Garrett* (2001)

- Michael Dorf, "[Supreme Court 4, Congress 0, How the Court Has Rejected Congress' View of Civil Rights in Four Recent Cases.](#)" Writ (March 23, 2001)

- *Nevada v. Hibbs* (2003)

- Joanna Grossman, "[A Victory for Families, But Hardly a Panacea.](#)" Writ (June 3, 2003)

## **D. An Imperial Judiciary?**

- Linda Greenhouse, "Impolitic: The Separation of Justice and State," New York Times (July 1, 2001)

-Neil Devins, "[Congress as Culprit: How the Lawmakers Spurred on the Court's Anti-Congress Crusade.](#)" 51 DUKE L.J. 435 (October 2001)

-Stuart Taylor Jr., "[As Congress Shrinks, Bush, Courts Fill the Void.](#)" *National Journal* (July 2, 2002)

- John Noonan, "[Narrowing the Nation's Power: The Supreme Court Sides with the States](#)" (2003)

