

**AMERICAN CONSTITUTIONAL DEVELOPMENT
SEMINAR**

FALL 2012

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Office Hours 10-12, by [appointment](#)

SYLLABUS AND COURSE INFORMATION

The most honored and fundamental principles of the American political system, and many of this country's most divisive crises, have been debated and challenged in terms of constitutional law. In this course, we will examine the nature and scope of the powers of the federal judiciary, Congress, the presidency, and the relationship between the federal government and the states, as well as the impact of the Fourteenth Amendment.

One goal of this seminar 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, federalism, representative democracy, liberty, equality, and the rule of law – have changed throughout this country's history. The modern constitutional regime is, in complex ways, vastly different from what the Framers of the Constitution imagined. These changes raise fascinating questions about methods of constitutional interpretation, as well as judicial and political fidelity to our constitutional regime – all of which we will consider as we review these historical developments and the leading cases in the constitutional law canon.

COURSE MATERIALS

Unless otherwise noted, all page references are to American Constitutionalism, Vol. 1, Structures of Government, by Howard Gillman, Mark A. Graber, and Keith E. Whittington (“GGW”)

COURSE REQUIREMENTS

- Two in-class essay examinations (short essay responses, i.d.'s, and case hypotheticals) – 40% each.
- Weekly quizzes, attendance, and participation - 20%

SEMINAR SCHEDULE & RECOMMENDED READINGS

I. Introduction & the Founding Era

A. Reading Assignments

Week 1

- Politics, the Court, and the Constitution
- GGW, Ch. 1, pp. 3-27; Ch. 2, pp. 31-35, 39-40, 43-47
- The Founding Era
- GGW, Ch. 3, pp. 49-91

Week 2

- No class on September 6
- Pauline Maier, Constitution Day Lecture on the Bill of Rights – Wednesday, September 12, 12-2 pm, Shepard 250
- Core Grammar Diagnostic - University of North Carolina Law School
<http://coregrammarforcollege.com/trialtest/register/590-1010>

Week 3

- The Early National Era, 1789-1828
- GGW, Ch. 4, pp. 93-146, 149-158, 163-8, 179-183
- PBS, The Supreme Court, Episode 1
<http://www.pbs.org/wnet/supremecourt/about/index.html>

B. Recommended Reading

- Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913)
- Richard Hofstadter, "The Founding Fathers: An Age of Realism," in *The American Political Tradition* (1948)
- Alpheus T. Mason, "The Federalist – A Split Personality," 57 AM. HIST. REV. 625 (1952)
- Edmund Morgan, *The Birth of the Republic, 1763-89* (1956)
- Merrill D. Peterson, *The Jefferson Image in the American Mind* (1960)
- John Roche, "The Founding Fathers: A Reform Caucus in Action," 55 AM. POL. SCI. REV. 799 (1961)
- Max Farrand, *The Framing of the Constitution of the United States* (1962)
- Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)
- C. Peter McGrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck* (1967)
- Bernard Bailyn, *The Ideological Origins of the American Republic* (1967)

- Bernard Bailyn, *The Origins of American Politics* (1968)
- William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," 1969 DUKE L. J. 1 (1969)
- Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (1970)
- Richard E. Ellis, *Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971)
- Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1972)
- Merrill D. Peterson, *Thomas Jefferson and the New Nation: A Biography* (1974)
- Douglass Adair, *Fame and the Founding Fathers* (1974)
- Lance Banning, *The Jeffersonian Persuasion* (1978)
- Calvin C. Jillson, "Constitution-making: Alignment and Realignment in the Federal Convention of 1787," 75 AM. POL. SCI. REV. 598 (1981)
- Herbert J. Storing, *What the Antifederalists Were For* (1981)
- Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (1982)
- Gary Wills, *Explaining America: The Federalist* (1982)
- David F. Epstein, *The Political Theory of the Federalist* (1984)
- Thurgood Marshall, "A Bicentennial View from the Supreme Court," 101 HARV. L. REV. 1 (1987)
- William Nelson, "Reason and Compromise in the Establishment of the Federal Constitution," 44 WM. & MARY Q. 458 (1987)
- Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (1988)
- Drew R. McCoy, *The Last of the Founding Fathers: James Madison and the Republican Legacy* (1988)
- G. Edward White, *History of the Supreme Court of the United States, Vol. 3, The Marshall Court and Cultural Change, 1815-1835* (1988)
- James Q. Wilson, "Interests and Deliberation in the American Republic," 23 PS: POL. SCI. & POL. 558 (1990)
- Bruce Ackerman, *We the People, Vol. 1: Foundations* (1991)
- William W. Freehling, *The Road to Disunion, Vol. I: Secessionists at Bay, 1776-1854* (1991)
- James M. O'Fallon, "Marbury," 44 STAN. L. REV. 219 (1992)
- Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (1993)
- Gordon S. Wood, *The Radicalism of the American Revolution* (1993)
- Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (1994)
- Willard Sterne Randall, *Thomas Jefferson: A Life* (1994)
- Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the American Republic* (1995)
- Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996)

- Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (1996)
- Jean Edward Smith, *John Marshall: Definer of a Nation* (1996)
- Bruce Ackerman, *We the People. Vol. 2: Transformations* (1998)
- Pauline Maier, *American Scripture: Making the Declaration of Independence* (1997)
- Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* (1997)
- Mark Graber, "Federalist or Friend of Adams: The Marshall Court and Party Politics," 12 *STUD. AM. POL. DEV.* 229 (1998)
- Mark Graber, "The Problematic Establishment of Judicial Review," in *The Supreme Court in American Politics* ed. Howard Gillman and Cornell Clayton (1999)
- Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (1999)
- Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (2000)
- William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (2000)
- Michael Klarman, "How Great Were the 'Great' Marshall Court Opinions?" 87 *VA. L. REV.* 1111 (2001)
- R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (2002)
- James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002)
- Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* (2002)
- Walter F. Murphy, James E. Fleming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation* (3d ed., 2003)
- John Ferling, *Adams v. Jefferson: The Tumultuous Election of 1800* (2004)
- Ron Chernow, *Alexander Hamilton* (2004)
- Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (2005)
- Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (2006).
- Mark R. Killenbeck, *M'Culloch v. Maryland: Securing a Nation* (2006)
- Walter F. Murphy, *Constitutional Democracy* (2007)
- Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789* (rev. ed., 2007)
- Richard E. Ellis, *Aggressive Nationalism: McCulloch v. Maryland and the Foundation of Federal Authority in the Young Republic* (2007)
- Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (2009)
- Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (2010)
- Alison LaCroix, *The Ideological Origins of American Federalism* (2010)
- Herbert Alan Johnson, *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause* (2010)

- The Constitution of the United States
<http://press-pubs.uchicago.edu/founders/tocs/toc.html>
<http://www.gpoaccess.gov/constitution/pdf/con000.pdf> (printable version)
<http://ratify.constitutioncenter.org/constitution/constitution.pdf> (printable version)
- The Founders' Constitution Online
http://press-pubs.uchicago.edu/founders/indexes/author_document_index.html
- History Channel, *The Revolution* (DVD, 2006)
- PBS, *The Supreme Court, Episode 1: One Nation Under Law* (DVD, 2007)

II. The Crisis of the Union: Slavery, War, and Reconstruction

A. Reading Assignments

Week 4

- The Jacksonian Constitution in Crisis
- GGW, Ch. 5, pp. 185-196, 200-214, 216-22, 231-233-234, 243-248

Week 5

- Secession and War Powers
- GGW, Ch. 6, pp. 249-257, 261-262, 277-282, 295-317

Week 6

- Reconstruction
- GGW, Ch. 6, pp. 264-276, 285-295; Ch. 7, 332-342, 346-352, 413-417

B. Recommended Reading

- James G. Randall, *Constitutional Problems Under Lincoln* (1951)
- C. Vann Woodward, *The Strange Career of Jim Crow* (1957)
- Eric McKittrick, *Andrew Johnson and Reconstruction* (1960)
- Stanley I. Kutler, *Judicial Power and Reconstruction Politics* (1968)
- Charles Fairman, *History of the Supreme Court of the United States, Vol. 7: Reconstruction and Reunion, 1864-88* (1971)
- Carl B. Swisher, *History of the Supreme Court of the United States, Vol. 5: The Taney Period* (1974)
- Harold M. Hyman, *A More Perfect Union: the Impact of the Civil War and Reconstruction on the Constitution* (1973)
- Michael Les Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869* (1974)
- David M. Potter, *The Impending Crisis, 1848-1861* (1977)
- Don Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978)
- Daniel Walker Howe, *The Political Culture of the American Whigs* (1979)

- Harold M. Hyman and William M. Wiecek. *Equal Justice under Law: Constitutional Development, 1835-1876* (1982)
- Robert J. Kaczorowski, *The Politics of Judicial Interpretation: the Federal Courts, Department of Justice, and Civil Rights, 1866-1876* (1985)
- R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (1986)
- Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (1987)
- Merrill D. Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* (1988)
- Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988)
- James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (1989)
- Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1990)
- Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America, 1815-1848* (1990)
- Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (1993)
- David Herbert Donald, *Lincoln* (1996)
- Bruce Ackerman, *We the People, Vol. 2: Transformations* (1998)
- Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (1998)
- William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1998)
- Pamela Brandwein, *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (1999)
- Robert V. Remini, *Andrew Jackson* (1999)
- Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999)
- Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (2000)
- Keith E. Whittington, "The Road not Taken: *Dred Scott*, Constitutional Law, and Political Questions," 63 J. POL. 365 (2001)
- George Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (2001)
- David W. Blight, *Race and Reunion: The Civil War in American Memory* (2002)
- Daniel Farber, *Lincoln's Constitution* (2003)
- Ronald Labbe and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (2003)
- Michael B. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era* (2003)
- Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (2003)
- Mark A. Graber, "Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited," 16 CONST. COMM. 485 (2004)

- Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (2004)
- Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (2006)
- Pamela Brandwein, "The Civil Rights Cases and the Lost Language of State Neglect," in *The Supreme Court and American Political Development* (Ronald Kahn and Ken I. Kersch eds., 2006)
- Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (2006)
- Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil* (2006)
- Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (2006)
- Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (2007)
- William W. Freehling, *The Road to Disunion, Vol. II: Secessionists Triumphant, 1854-1861* (2007)
- James F. Simon, *Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers* (2007)
- Brian McGinty, *Lincoln and the Court* (2008)
- Ronald C. White, A. *Lincoln: A Biography* (2009)
- Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (2009)
- Joan Waugh, *U.S. Grant: American Hero, American Myth* (2009)
- Ken Burns, *The Civil War* (DVD, 1990)
- Ken Burns, *Not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony* (DVD, 1999)
- Henry Louis Gates, *Looking for Lincoln* (DVD, 2009)
- PBS, *The Supreme Court, Episode 2: A New Kind of Justice* (DVD, 2007)
- PBS, American Experience, *Reconstruction: The Second Civil War* (DVD, 2004)
- PBS, American Experience, *Ulysses S. Grant: Warrior/President* (DVD, 2002)
- PBS, American Experience, *The Rise and Fall of Jim Crow* (VHS, 2002)

III. From the “*Lochner* Era” to the New Deal “Revolution of 1937”

A. Reading Assignments

Week 7

- Federalism & Economic Rights: The Crisis of the Old Order
- GGW, Ch. 7, pp. 319-326, 329-332, 352-367, 389-407

Week 8

- “The Switch in Time That Saved Nine?”
- GGW, Ch. 8, pp. 417-438, 458-471, 488-492

- The “Imperial Presidency” & the Rise of the Modern Administrative State
- GGW, Ch. 8, pp. 493-512

B. Recommended Reading

- Edward S. Corwin, *Constitutional Revolution, Ltd.* (1941)
- Robert L. Stern, “The Commerce Clause and the National Economy, 1933-1946: Part Two,” *HARV. L. REV.* 883 (1946)
- Robert H. Wiebe, *The Search for Order, 1877-1920* (1966)
- Loren P. Beth, *The Development of the American Constitution, 1877-1917* (1971)
- Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (1977)
- Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacity, 1877-1920* (1982)
- Owen M. Fiss, *History of the Supreme Court of the United States, Vol. 8: Troubled Beginnings of the Modern State, 1888-1910* (1993)
- Howard Gillman, *The Constitution Besieged: The Rise and Decline of Lochner Police-Powers Jurisprudence* (1993)
- William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (1994)
- G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (1995)
- William E. Leuchtenburg, *The Supreme Court Reborn* (1995)
- Columbia University, [FDR and the New Deal](#)
- Jeffrey D. Hockett, *New Deal Justice* (1996)
- Paul Kens, *Justice Stephen Field: Shaping American Liberty from the Gold Rush to the Gilded Age* (1997)
- Bruce Ackerman, *We the People, Vol. 2: Transformations* (1998)
- Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (1998)
- Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998)
- David M. Kennedy, *Freedom from Fear* (1999)
- Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941-1953* (1999)
- G. Edward White, *The Constitution and the New Deal* (2000)
- Kevin McMahon, *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown* (2003)
- Keith E. Whittington, *Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* (2007)
- Melvin I. Urofsky, *Louis D. Brandeis: A Life* (2009)
- Burt Solomon, *FDR v. The Constitution: The Court-Packing Fight and the Triumph of Democracy* (2009)
- Jeff Shesol, *Supreme Power: Franklin Roosevelt v. The Supreme Court* (2010)
- Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme*

Court Justices (2010)

- PBS, American Experience, *One Woman, One Vote* (DVD, 2005)
- PBS, American Experience, *FDR* (DVD, 1994)
- History Channel, *FDR: A Presidency Revealed* (DVD, 2005)
- PBS, *Of Civil Rights and Wrongs: The Fred Korematsu Story* (DVD, 2007)
- PBS, American Experience, *Truman* (DVD, 1997)

Week 9 Midterm (in-class, laptop required, open book and outlines)

IV. The Warren Court and the “Rights Revolution”

A. Reading Assignments

Week 10

- Handouts on *Brown v. Board of Education*
- GGW, Ch. 8, pp. 438-456, 471-480

B. Recommended Readings

- Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (1962)
- Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (1987)
- Philip Kurland, *Watergate and the Constitution* (1978)
- Mark V. Tushnet ed., *The Warren Court in Historical and Political Perspective* (1993)
- Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (1999)
- Lucas A. Powe, Jr., *The Warren Court and American Politics* (2000)
- Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Civil Rights* (2004)
- PBS, American Experience, *Eyes on the Prize: American’s Civil Rights Years, 1954-1968* (DVD, 1987)
- Peter Gilbert, *With All Deliberate Speed: A Look at the Landmark Brown v. Board of Education* (DVD, 2004)
- PBS, *The Supreme Court, Episode 3: A Nation of Liberties* (DVD, 2007)

V. The Conservative Counter-Revolution? The Burger and Rehnquist Court Era

A. Reading Assignments

Week 11

- Stealth Activism?
- GGW, Ch. 9, pp. 513-6, 846-64

- GGW, Ch. 10, pp. 563-582
- GGW, Ch. 11, pp. 615-627

Week 12

- The States' Rights "Revival"
- GGW, Ch. 9, pp. 530-537
- GGW, Ch. 10, pp. 583-594
- GGW, Ch. 11, pp. 637-676

Week 13

- Separation of Powers
- GGW, Ch. 9, pp. 543-559
- GGW, Ch. 10, pp. 596-613
- GGW, Ch. 11, pp. 676-714

B. Recommended Readings

- Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 COLUM. L. REV. 543 (1954)
- Sue Davis, *Justice Rehnquist and the Constitution* (1989)
- Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* (1990)
- Louis Fisher, *Presidential War Powers* (1995)
- Louis Fisher, *Conflicts between Congress and the President* (1997)
- Bernard Schwartz ed., *The Burger Court: Counter-Revolution or Confirmation?* (1998)
- Tinsley E. Yarborough, *The Rehnquist Court and the Constitution* (2000)
- Larry D. Kramer, "Putting the Politics Back Into the Political Safeguards of Federalism," 100 COLUM. L. REV. 215 (2000)
- Daniel J. Meltzer, "State Sovereign Immunity: Five Authors in Search of a Theory," 75 NOTRE DAME L. REV. 1011 (2000)
- Keith E. Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive," 51 DUKE L.J. 477-521 (October 2001)
- Jack Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 VA. L. REV. 1045 (2001)
- Jed Rubenfeld, "The Anti-Antidiscrimination Agenda," 111 YALE L.J. 1141 (2002)
- Dawn E. Johnsen, "Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change," 78 IND. L. J. 363-412 (2003)
- Earl M. Maltz ed., *Rehnquist Justice: Understanding the Court* (2003)
- Mitchell Pickerill and Cornell Clayton, "The Rehnquist Court and the Political Dynamics of Federalism," 2 PERSP. POL. 233 (2004)
- Thomas Keck, *The Most Activist Supreme Court: The Road to Modern Judicial Conservatism* (2004)

- Mark V. Tushnet, *The New Constitutional Order* (2004)
- Mark V. Tushnet, *A Court Divided* (2005)
- Craig Bradley ed., *The Rehnquist Legacy* (2005)
- Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for the Control of the Law* (2008)
- PBS, *The Supreme Court, Episode 4: The Rehnquist Revolution* (DVD, 2007)
- PBS, Frontline, *Bush's War* (DVD, 2008)
- PBS, Frontline, *Cheney's Law* (DVD, 2007)
- Sig Libowitz & Adam Rodgers with The University of Maryland School of Law, *The Response* (DVD, 2009)