The approach of this class is dictated by its textbook, a brand new text that is very different from the others that are available. GGW is organized by historical period, rather than topic: so where a traditional textbook would have a section on “freedom of expression” and trace that idea through a series of historical stages of development (freedom of expression in the 1920s, freedom of expression in the 1960s, freedom of expression in the 1990s). GGW, instead, looks at an historical period and reviews all the major constitutional questions that arose in that time.

The point is to recognize that in different periods, different approaches to interpreting and applying the Constitution have appeared or been dominant, and these approaches often cut across doctrinal subject areas. So, for example, take the case of “textualism,” the idea that the proper way to interpret the Constitution is to focus on the words of the text (the “four corners” of the text). In the late 19th century textualism was largely unknown in judicial opinions. Across fierce disagreements about the nature of property rights and the limits of government authority there was nonetheless widely shared agreement that the Constitution was not to be interpreted word for word or clause by clause as in the manner of a legal document, but rather in terms of its expression of broad philosophical principles. This broadly “interpretivist” approach (a modern term) was applied across a wide range of subjects. So if we want to understand how courts and politicians understood property rights in the late 1800s, we may be better served to compare those understandings with the way freedom of religion was understood in the same period rather than with the way property rights were understood in the 1990s.

That, at any rate, is the premise of the GGW text and of this course. We are studying the historical development of American constitutionalism—not just the legal rules that define constitutional rights and liberties, but the ways of thinking about those subjects that prevailed in different historical periods. This is a class in American history, social and
economic development, political theory, and law all rolled together. Because all of those elements meet in debates about the meaning of the U.S. Constitution.

The GGW text is divided into ten historical periods. Each historical period is then divided up into treatments of six different themes:

I. Introduction

II. Foundations
   A. Sources
   B. Principles
   C. Scope

III. Individual Rights
   A. Property
   B. Religion
   C. Guns
   D. Personal freedom and public morality

IV. Democratic Rights
   A. Free Speech
   B. Voting
   C. Citizenship

V. Equality
   A. Equality under law
   B. Race
   C. Gender
   D. Native Americans

VI. Criminal Justice
   A. Due Process and Habeas Corpus
   B. Search and Seizure
   C. Interrogations
   D. Juries and Lawyers
   E. Punishments

In this course we will be omitting VI. Criminal Justice for the most part. We will also be skipping the material that specifically relates to guns. This is extremely unfortunate, but there is not time enough in one semester to cover everything, and we have other classes that focus on criminal law—including a significant emphasis on constitutional law—that are offered in the Political Science Department, the Legal Studies program, and elsewhere at this University. When we get to the last part of the semester, we will leave the historical approach behind and engage in a thematic review of the modern state of constitutional doctrine.
One thing that should be immediately apparent is that in different historical periods, different themes receive more or less attention. Why is that? Why were racial equality or religious freedom or property rights more central constitutional issues in one period than in another?

Also, in different periods the discussion may be more or less legal as opposed to philosophical or political. For example, until the adoption of the XIVth Amendment, the guarantees of the Bill of Rights were held not to apply to state governments at all. As a result, there was very little constitutional “law”, in the sense of cases and doctrines, about those rights—the only real questions were whether the federal government had the power to take some action or other, and much of that discussion did not have to do with governmental powers and institutions (the subject of the first semester of Constitutional Law) rather than rights and liberties. But the relative paucity of legal rules and cases does not mean that there was not a great deal of thinking and discussion of constitutional principles going on!

In addition to the lectures, there will be weekly meetings of the discussion sessions. These sessions are partly to give students an opportunity to ask questions, and partly to extend the discussion of class materials in a less formal setting. There will be no meeting of sections during the first week of class. Participation in sections will count 10% of the final grade.

There will be one midterm exam, a moot court exercise (including the submission of a written brief), and a final exam, which will count for 20%, 30%, and 40% of the course grade, respectively. Exams are take-home, and ample time is provided for their completion. Consequently, unless an arrangement has been made with the professor or TA prior to the due date, any exam that is turned in late will suffer a reduction in grade of 10% per day.
Introduction to the Course

Sept. 3 Introduction: 3-21

“How to Read a Case” (course moodle)

Syllabus (course moodle)

What do we mean when we talk about “constitutionalism,” “constitutional law,” “constitutional politics,” and “the Constitution”? What have these terms meant in other historical periods? What are the major modes of constitutional interpretation? This introductory lecture presents some of the basic conceptual vocabulary with which we shall be working throughout the course.

The Founding Period (skipped colonial period)

Sept. 8 I-II Introduction and Foundations –
Backgrounds - 81-108

Sept. 10 III-IV Individual Rights, Democratic Rights

III. Individual Rights
Property - 108-110
Religious establishment and free religious exercise – 113-18

IV. Democratic rights
Voting - 125-29
Gender: John and Abigail Adams on gender equality – 134-36

Between 1785 and 1795 no fewer than three constitutional revolutions occurred: one in the United States, one in France, and one in Poland. These were not separate events: when the Baron de Lafayette rose in the French National Assembly to propose the Declaration of the Rights of Man of 1789 he was drawing on American State constitutions, particularly that of Virginia, and in Poland careful note was made of the ways in which the new constitution differed from the American and French models. Back home in the U.S., the debates between Federalist supporters of a new Constitution creating a powerful national government and Antifederalists who preferred to retain a system of sovereign States bound only by a loose confederation set the tone and provided the elements of constitutional debates that continue to the present day.
The Early National Era (1791-1828)

Sept. 15  I-II Introduction, Foundations - 145-56
Calder v. Bull
The United States v. The La Jeune Eugenie
Marbury v. Madison
“background – Marshall’s approach” (course moodle)

Sept. 17  III-V Individual Rights, Democratic Rights, Equality

III. Individual Rights
Intro - 157-60
Property rights: Fletcher v. Peck - 160-63
Religion 164-70

IV. Democratic Rights
Free speech, 173-80

V. Equality
Congressional Debate over Missouri Compromise – 186-88
Slavery and the courts - 192-94
Native Americans - Johnson v. MacIntosh 196-98

This period presents the very first generation of constitutional interpretation. One thing to notice is that from the very beginning there were numerous competing understandings of the Constitution. Another thing to notice is that the way judges, in particular, thought about the Constitution was radically different from what we are used to today. Pay close attention to Calder v. Bull and United States v. La Jeune Eugenie. Would this kind of reliance on natural law and international legal norms be acceptable today? Keep in mind that the justices in these cases were themselves participants in the creation of America. Chase and Wilson both served in the Continental Congress and signed the Declaration of Independence, Wilson went on to serve in the Constitutional Convention and led the fight for ratification in Pennsylvania, in the process delivering the first lectures on American constitutional law anywhere. Iredell and Marshall were among the first generation of prominent American judges. Yet these men, all of whom were present at the creation, disagreed vigorously—and changed their own opinions as time passed—on the meaning and the proper mode of interpretation of the Constitution.
The Jacksonian Era (1829-1860)


I. Intro. 211-16

II. Foundations, 217-19

III. Individual Rights, 219-34

A. Property
   *Charles River Bridge* (1837)
   *Beekman v. The Saratoga and Schenectady RR Co.* (1831)
   *Taylor v. Porter & Ford* (1843)
   *Wynehamer v. People* (1856)

B. Religion, 229-34

Sept. 24  IV-V Democratic Rights, Equality: 239-64

IV. Democratic Rights: Free Speech, Voting, Citizenship - 239-47

V. Equality - 247-64

A. Class Legislation

B. Race/Slavery
   *Dred Scott v. Sanford* (1857)
   *Roberts v. City of Boston* (1849)

Jefferson and Adams both died on July 4, 1826. John Marshall died on July 6, 1835, and James Madison died on June 28, 1836. The story is that the Liberty Bell cracked the day it rang to announce the death of Marshall. By 1829 a whole new generation of leaders was in place, with different ideas. The economy, politics, and society of America in 1829 would have been difficult to recognize in 1776. This is the period of railroad building and expansion in the states of the “Old Northwest” (now known as the upper Midwest), industrialization, the rise of business corporations and banks and political parties...and slavery. Charles River Bridge and Dred Scott are emblematic of the two opposing poles of development.
Civil War and Reconstruction (1861-1876)

Sept. 29 I, III Introduction and Individual Rights: 281-85, 312-44 and moodle

“background to Civil War Amendments” (course moodle)

I. Introduction – 281-85

IV. Democratic Rights
A. Free Speech: Vallandingham – 312-16
B. Voting – 316-19
C. Citizenship – 319

V. Equality
A. Equality Under Law – 320-24

Oct. 1 “Privileges and Immunities”

Slaughterhouse Cases (1873) (course moodle)
background to Reconstruction Amendments (course moodle)

The XIVth Amendment was adopted in 1868. There is a very real argument that this marks the beginning of serious discussions of “constitutional rights” in America. For the first time, the Constitution protected Americans’ rights against infringement by State governments as well as the national government. And those protected rights were described in the broadest imaginable terms, starting with “equal protection of the law” and “due process of law.” But what, exactly, did those terms mean? Congress was given sweeping new powers under section 5 of the XIVth Amendment—what would be the limits of those powers? The Slaughter-House Cases were the first efforts by the Supreme Court to answer those questions. Unlike the justices of the first generation—Chase and Wilson and Iredell and Marshall—these justices had no connection to the people who had created the new constitutional order. In fact, a number of them were Southerners with strong Confederate and later Southern sympathies. Among many other things, this moment marks the beginning of the idea that Congress might be moving in one direction while the Court is moving in another: a true and fateful test of the system of checks and balances.
The Republican Era (1877-1932)

Oct. 6  I-II Introduction and Foundations: 357-76, 379-83

I.  Introduction- 357-63

II.  Foundations
Prohibition Debates,
The Paquette Habana (1900),
Twining v. New Jersey (1908) – 363-76
Civil Rights Cases (1883) – 379-83

Oct. 8  III.A. Individual Rights-Property: 383-397

Substantive Due Process and the limits of police powers
Mugler v. Kansas (1887) (prohibition)
Pennsylvania Coal Co. v. Mahon (1922) (regulatory takings)
In Re Jacobs (1885) (factories in tenements)
Holden v. Hardy (1898) (safety regulations)

Oct. 13  III.A. Individual Rights-Property, continued: 397-406

Lochner v. New York (1905) (working hours, men) (course moodle)
Muller v. Oregon (1908) (working hours, women)
Adkins v. Children’s Hospital (1923) (minimum wage, women and children)

Oct. 15  IV-V Democratic Rights and Equality

IV.  Democratic Rights: Free Speech and Free Press - 418-29
Democratic Rights: Citizenship – 433-38

V.  Equality: Race and Gender - 438-58
Yick Wo v. Hopkins (1886)
Plessy v. Ferguson (1896)
Buchanan v. Worley (1917)
United States v. Bhagat Singh Thind (1923)

“The past is another country, they do things differently there” as the man said. From 1877 to 1932, the United States Constitution and especially the XIVth Amendment were called upon to respond to new and unprecedented challenges posed by a modernizing industrial economy and an increasingly powerful and active state and national
governments. One crucial area of conflict centered around property rights, now couched in terms of “due process” and “equal protection.” During this period American law, both common law and legislation, were completely reconfigured to accommodate the demands of the new social and economic realities brought on by industrialization, urbanization, and immigration. During the same period, however, the Supreme Court stood as a bastion of conservative resistance to change, insisting that constitutional law would remain unaffected. In the words of Howard Gillman conservative and libertarian justices viewed themselves the “guardians of a Constitution besieged.” Today most commentators look back on this period with a less charitable view, finding the justices’ insistence on preserving 18th century common law principles in constitutional law to be a sign of ideology or partisan politics. Other “revisionist” commentators take a different view, and argue that the Court was laying the groundwork for the protections of constitutional rights that would emerge clearly in the next era. The key case to think about here is Lochner v. New York.

In other areas, too, the Court was called upon to determine the meaning and scope of the XIVth Amendment. One crucial and yet unanswered question had to do with the extent of Congress’ powers under XIV(5): see the Civil Rights Cases for the answer that the Court gave to that question, and consider the ways in which the subsequent history of American politics might have been different if the justices had reached a different conclusion. Pay close attention to the takings and due process cases: the issues raised in these cases are very far from being fully worked out to this day. The early free speech cases and Plessy are probably familiar to you from your earlier studies: how (if at all) do they appear differently for being placed in the context of broader patterns of constitutional understanding?

New Deal and Great Society (1933-68)

  Palko v. Connecticut (1937) incorporation (course moodle)
  Duncan v. Louisiana (1968) incorporation
  Reid v. Covert (1957) extraterritoriality
  Smith v. Allwright (1944) state action
  Shelley v. Kraemer (1948) state action

Oct. 22 III Individual Rights: 511-38

A. Property
  Home Bldg & Loan Ass’n v. Blaisdell (1934), mortgage contracts
  West Coast Hotel v. Parrish (1937) minimum wage reconsidered
  Williamson v Lee Optical (1955) rational basis scrutiny

B. Religion: Establishment and Free Exercise
Engel v. Vitale (1962), prayer in public schools
Sherbert v. Verner (1963), accommodation

***FIRST MIDTERM DISTRIBUTED FRIDAY OCT. 23, DUE FRIDAY, OCT. 30. HAPPY HALLOWEEN!***

Oct. 27

III. Individual Rights, cont.
C. Personal Freedom and Public Morality
   Meyer v. Nebraska (1923) (course moodle) education of children
   Pierce v. Society of Sisters (1925) (course moodle) education of children
   Skinner v. Oklahoma (1942), sterilization of criminals
   Perez v. Sharp (1948) interracial marriage
   Griswold v. Connecticut (1968) contraception

IV. Democratic Rights: Freedom of Speech and Press 538-58
   West Virginia St. Bd. of Educ. v. Barnette (1943) compelled speech
   Dennis v. United States (1951) sedition
   United States v. O’Brien (1967) expressive conduct
   Brandenburg v. Ohio (1969) incitement

Oct. 29

IV. Democratic Rights, cont’d. – voting 563-71
   Baker v Carr (1962) (course moodle)
   Reynolds v Simms (1964)
   Katzenbach v Morgan (1966)

Nov. 3

V. Equality: race 577-602
   Korematsu v. United States (1944) Japanese-American internment
   Brown II (1955) “all deliberate speed”
   Green v. County School Bd. of New Kent County (1968) from desegregation to integration
This is the great period of transition in modern American constitutionalism, the years in which the modern, familiar version of the Constitution appears. From 1933 through 1937 the Court to a great extent continued to play the role of a barrier to government action, striking down numerous New Deal programs at the federal level and continuing its somewhat uneven Lochner-style review of state labor and economic legislation. Starting in 1937, the Supreme Court abandoned its opposition to many of these programs (though not all of them!), thus joining the courts to the process of ushering in the modern national state. Some of that process of development appears in discussions of property rights (West Coast Hotel v. Parrish, Blaisdell). This is also the period, however, in which modern conceptions of equal protection (Brown) and “strong rights” were adopted as constitutional doctrines across the broad range of constitutional guarantees. From the 1930s through the 1950s the process only appears in glimpses—take a look at Skinner, then compare Dennis, and Korematsu—but with the appointment of Earl Warren as Chief Justice in 1953 we begin to see the announcement of our familiar strong versions of free speech, equal protection, privacy, and other constitutional protections, including those related to criminal justice—which is why this is the only section of the course in which that portion of the chapter is included in the readings. Issues of Equal Protection as they applied to racial segregation were especially divisive: when federal judges after Brown II began compelling school districts to desegregate, widespread resistance to “judicial activism” became a key element of conservative political appeals, as it had been for Progressives in the 1910s and 1920s.

For the most part, the rights that were established in this period remain in force: subsequent developments have altered the details, but left the basic conceptual structure unchanged. One exception to that rule is cases involving the Religion Clauses of the First Amendment—as we move forward, keep an eye on the way the reasoning in the cases in this period gives way to a different mode of analysis in the Reagan Era.

Liberalism Divided (1969-80)

Nov. 5


III. Individual Rights

_Dandridge v. Williams_ (1970) SDP and welfare
_Wisconsin v. Yoder_ (1972) free exercise
_Roe v. Wade_ (1973) abortion
_Moore v. East Cleveland_ (1977) (moodle)
Nov. 10
IV. Democratic Rights: 664-85

IVA. Free Speech
   Buckley v. Valeo (1976)

IVB. Voting
   Voting Rights Act
   Richardson v. Ramirez (1974) felons
   Gaffney v. Cummings (1973) reapportionment

Nov. 12
V. Equality: 685-712
   San Antonio School Dist. v. Rodriguez (1973) school funding

The title of this section (“Liberalism Divided”) is debatable. Certainly the authors are correct that the New Deal state and its extension into the Great Society remained in place and unchallenged as constitutional exercises of congressional authority (which is basically true to this day). And it is also true that in this period the Court continued to strengthen the strong rights guarantees that had begun to emerge in the preceding decades. So in those ways it is sensible to speak of a liberal consensus, and debates as divisions within liberalism. On the other hand, in American politics this is also a period of conservative resistance, exemplified in Nixon’s successful “Southern Strategy” of appealing to Southern white resistance to integration in his presidential campaign. Nixon also explicitly made constitutional legal issues central to his campaigns, promising to appoint justices who would crack down on pornography, crime, and the general moral laxity that in the view of conservatives had led to the massive social deviance of the 1960s. Politically, this marked the beginning of the end of the New Deal coalition: the South began to move from solid Democratic to solid Republican, while in the North working class white voters in the Midwest gravitated toward the GOP’s social conservatism and strong pro-war stance. Yet on matters of social and economic policy, in today’s terms Nixon governed as an extreme liberal—far to the Left of most members of Congress in the Democratic Party, let alone his own Republican Party.

All of this political and social ferment meant that there was a great deal of discussion of constitutional issues outside the courts, but for the most part did not result in any wholesale reconsideration of rights and liberties that had been established in the 1950s and 1960s. Instead, the discussion turned to how those principles should be realized in particular cases. (The authors also make the interesting argument that there was an intellectual shift away from democratic rights toward substantive rights: do you agree?) Privacy in the form of abortion (Roe), freedom of the press (Sullivan), and free exercise
(Yoder) as well as the continuing efforts of Congress to respond to this history of racial segregation and disenfranchisement in the South were the focal points of debates about “judicial activism” and a new theory of constitutional interpretation called “originalism,” but at the same time the Court refused to expand substantive rights to welfare or education and exercise caution in its expansion of procedural protections.

***NOVEMBER 14-15, SECOND MIDTERM MOOT COURT EXERCISE***


Nov. 17


II. Foundations: Scope
DeShaney v. Winnebago County (1989) state action

IIIa. Individual Rights: Property
Lucas v. South Carolina Coastal Comm’n. (1992) regulatory takings

Nov. 19

III, Individual Rights (other): 760-94

IIIB. Religion
Lee v. Wiseman (1992) establishment - endorsement
Employment Division v. Smith (1990) free exercise – accommodation
City of Boerne v. Flores (1996) (course moodle)

III.D Personal Freedom and Public Morality: Abortion and Homosexuality
Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

Nov. 24

IV., Democratic Rights: 794-806, 812-29

IV.A. Free Speech – general approaches
Texas v. Johnson (1989) flag burning
Doe v. University of Michigan (1989) university speech codes
It is remarkable, in retrospect, how much of what we take for granted about the American political and constitutional landscape is an artifact of the 1980s. The move of southern states from the Democratic to the Republican Party, the introduction of overt religious appeals into electoral politics, the rise of the “Christian Right” (the Moral Majority and the Christian Coalition), the intellectual respectability of economic libertarianism or neoliberalism, the central importance of originalism as a theory of constitutional interpretation, all are artifacts of this period. Originalism, in particular, was the project of Attorney General William Meese, who made sure that judicial appointees and even government lawyers satisfied an ideological litmus test that started with a commitment to this favored view of how the Constitution should be read. Inevitably, as originalism became important and even dominant, it also became more complicated, branching into the several different versions that we discussed at our first meeting.

In the Court, this was also the period that saw a strong shift toward more conservative principles and a rejection of elements of the Warren and Burger Courts’ general liberalism, particularly with respect to the Religion Clauses. The justices also tightened requirements for finding Equal Protection violations (the timing is not quite right, here, as this really begins with Washington v. Davis in 1976), and displayed a new-found skepticism about both the scope of congressional authority under XIV(5) and the role of what the 1984 Republican platform called “elitist and unresponsive” judges. This period saw essentially a conservative capture of the judiciary: as the authors point out, by 1993 Republican presidents had appointed ten consecutive Supreme Court justices and the vast majority of lower court federal judges (p. 740). Much of the conservative shift in constitutional doctrine focuses on criminal procedure, particularly the hated “exclusionary rule” (the rule that evidence that is unconstitutionally obtained may not be introduced at trial). On issues such as abortion, religious observance in schools, race-based affirmative action, and promotion of equality for women, however, the record was much more mixed, to the evident frustration of justices such as Scalia, Thomas, and Rehnquist.
Contemporary Era (1994-present)

Dec. 3  Religion

Zelman v. Simmons-Harris (2002) support for religious schools - 910-14
City of Boerne v. Flores (1997) accommodation - 919-21
Burwell v. Hobby Lobby Stores (2014) accommodation - course moodle

Dec. 8  Property, Equal Protection and Affirmative Action

Property

EP and Affirmative Action
Adarand v Pena (1995) affirmative action, contracting set-asides - 996
Grutter v Bollinger (2003) affirmative action, education - 998-1003

Dec. 10  Free Speech and Voting Rights

Free Speech
Reed v Gilbert (2014) (course moodle)

Voting Rights
Shelby County v. Holder (2013) voting rights - moodle

Dec. 15  The Case of Same-Sex Marriage

Obergefell v. Hodges (2015) same sex marriage (course moodle)

The past twenty years have been a reminder, if one was needed, that in America no basic question about constitutional principles is ever truly settled. Today’s discussions are filled with arguments that would have been considered outlandish in 1975, offered in service of both conservative and liberal principles. Rights of gun ownership are a particularly clear example: in 1980, say, any law student would tell you that the Second
Amendment was a nullity and of no constitutional significance. Issues such as abortion, religion in schools, affirmative action continue to be central, but courts have also added discussions of the rights of homosexuals, new ways of thinking about campaign finance, and the implications of the national security apparatus that has developed since September 11, 2001. The backdrop of these discussions is a national politics that is polarized to an historically unprecedented degree and an intensive focus on judicial appointments and judicial decision-making as an element of partisan political debate. It remains the case that the system of constitutional rights and liberties protections is the one that was developed in the New Deal and Great Society eras, just as it remains the case that the basic system of national government remains the one that emerged in that period. But a great deal has changed. What will change next?

***Final exam distributed Friday, Dec. 16th; due in Prof. Schweber's mailbox at 4:00 p.m. Friday, Dec. 20th***