Our class follows the historical outline dictated by the GGW textbook. Most constitutional law caselaw books follow a thematic approach where the text takes a single theme, for example ‘freedom of expression’ and then follows that bundle of ideas through a series of historical stages of development. GGW, on the other hand, takes each historical period as totality and reviews all the significant constitutional developments that arose during that time.

The goal of this approach is to highlight the shifting approaches to interpreting and applying the Constitution—different time periods had different theories and practices dominate constitutional law and these approaches often cut across subject areas of constitutional law. For example, ‘textualism,’ or the idea that the only proper way of interpreting the Constitution is to focus purely on the specific words of the text (this is separate though related to ‘originalism’) was completely unknown as a theory of constitutional interpretation throughout the 19th century. During the constitutional debates of that time, most of which revolved around property rights and the limits of government authority, the general consensus was the Constitution ought to be read for broad philosophical principles rather than hone in on particular words or phrases. This ‘interpretivist’ approach dominated constitutional law and thus if we want to understand the case law that emerges from the late 1800s we are better served comparing constitutional cases on freedom of expression or religion during the same time period than current constitutional law on property rights.

GGW and the structure of the class that emerges from this text, endeavors to ensure that we continue to compare apples to apples by studying constitutional law through a historical framework. If you go on to law school you will find that this approach is atypical, but this approach allows us to consider how social, economic, and political developments impacted and directed the development of constitutional interpretation. In a sense, this course is a class on American history, social and economic development, political theory and law in a great big ball as all of these elements are necessary to understand the debates on the meaning of the U.S. Constitution.
In practical terms, the GGW text is divided into ten historical periods and then each period is further divided 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 the last third of this semester, we will divert from the GGW outline and leave the historical approach to engage in a thematic review of the current state of constitutional law.

You note as you go through the syllabus that not all themes are treated equally depending upon the historical period. During some periods questions of religious freedom or property rights dominated discussions of constitutional law, in others, racial or gender equality were the central constitutional questions. We will explore what prompted these shifts in constitutional focus. You will also note that in some periods the discussion revolved more tightly around what we might consider ‘legalistic’ approaches to the Constitution opposed to more philosophical or politically driven discussions. As an example, until the passage of the 14th Amendment the Bill of Rights
was not held to apply to state governments in any form; thus, most constitutional law—meaning cases and doctrines—on those rights only applied to the scope of power of the *federal* government and the extent to which those powers were constrained. However, as we will see during the course, that did not mean there was not extraordinarily heated debates on those constitutional principles.

Although it pains me, there are a number of thematic areas that we will be largely or entirely omitting from the course—namely, topic area VI Criminal Justice in GGW, election and campaign finance, 2nd Amendment debates, and constitutional issues applying to Native Americans. There simply is not enough time to cover all constitutional issues and these topics are covered elsewhere in other courses offered by the Department of Political Science, the Legal Studies Program, American-Indian Studies, and in other departments. I am, of course, delighted to speak with you during office hours on these issues, but we will not be covering them during the semester.

There are also weekly discussion sections as part of this course to give you an opportunity ask questions and further discuss the course materials in a smaller group setting. While we will not have discussion sections during the first week of the semester, these meetings are 15% of your grade.

There will be two (2) midterm exams and a final exam that will account for 20%, 30% and 35% of your grade respectively. As mentioned above, work in discussions section is 15% of your grade. Exams are all take-home with ample time to write them. Therefore, **unless you make specific arrangements with either myself or your TA prior to the due date, any exam that is turned in late will suffer a reduction of grade by 10% per day.**
Introduction to the Course

January 22\textsuperscript{th} Introduction

“How to Read a Case” (course website)
Syllabus (course website)
On Interpretation: The Adultery Clause of the Ten Commandments (course website)
Massachusetts Body of Liberties (1641) (course website)
Fundamental Orders of Connecticut 1639 (course website)

What do we mean by “constitutionalism,” “constitutional law,” “constitutional politics,” “and the Constitution”? What have these terms meant during other historical periods? What are the major modes of constitutional interpretation? This lecture provides an introduction to the vocabulary of constitutional law that we will be using throughout the semester.

The Founding Period

January 24\textsuperscript{th} Constitutional Debates, Individual Rights, Democratic Rights 69-108

Constitutional Debates (major players & ideas) 69-95
Property Rights & Franchise – 95-97
Religious Establishment & Free Religious Exercise 97-103
Free Speech & Franchise - 103-108

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)

January 29\textsuperscript{th} I-II Introduction, Foundation – 119-131

\textit{Marbury v. Madison}, 5 U.S. 137 (1803) (course website)

January 31\textsuperscript{th} III-V Individual Rights, Democratic Rights, Equality

III. Individual Rights
Intro -131-134
Property Rights – Fletcher v. Peck – 134-136
Religion – 136-140
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

February 5th I-II Intro, Foundations and Individual Rights 169-186

I. Introduction 169-173
II. Foundations 173 -175
III. Individual Rights 175- 186
   a. Property Cases
      Charles River Bridge 36 U.S. 420 (1837)
      Beekman v. Saratoga & Schenectady Railroad Company 3 Paige Ch. 45 (NY 1831)
      Taylor v. Porter & Ford, 4 Hill 140 (NY 1843)
      Wynehamer v. People, 2 Parker Crim. Rep. 490 (NY 1856)
   b. Religion 186

February 7th IV – V Democratic Rights, Equality - 190-209

IV. Democratic Rights: Free Speech, Voting 190-198
V. Equality
   a. Class Legislation
   b. Race/Slavery
      Dred Scott v. Sanford, 60 U.S. 393 (1857)
      Roberts v. City of Boston, 59 Mass. 198 (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 & the Reconstruction (1861-1876)**

February 12th Introduction, Equality 223-237, 251-264

I. Introductions & Foundations 223-228
II. Debates over the Civil War/Reconstruction Amendments: 13th, 14th and 15th 228-237
III. Equality
   a. Equality Under the Law 251-256
   b. Race & Legislation 256-264
      i. Legislation
         1. Civil Rights Act of 1866, Freedman’s Bureau Act (1866)
         2. Second Freedman’s Bureau Act (second attempt during 1866)
         3. Civil Rights Act of 1875
      ii. Courts’ Response (not in book & optional reading. We’ll cover in lecture)
          United States v. Hall (1871)
          United States v. Reese (1876)
          United States v. Cruikshank (1876)

February 14th (Happy Valentines Day!) “Privileges and Immunities” 237 -241

*The Slaughterhouse Cases* (1873) 237 -241 & course website

The XIXth 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 XIXth 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**

February 19th Introductions & Foundations 279-295, 296-300

I. Introduction 279-285
II. Foundations
   a. Women’s Suffrage & the Prohibition Debates
b. XIX Amendment Debates
   * Twining v. New Jersey* (1908) 290-294
   * Civil Rights Cases* (1883) – 296-300
   * Santa Clara County v. S. Pac. RR* (course website)

**February 21**th **Individual Rights (Property) 301-312**
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) (course website)

**February 26th** Individual Rights (Property) Continued 313-325
   * Lochner v. New York* (1905) (working hours: men) (text and course website)
   * Muller v. Oregon* (1908) (working hours: women)
   * Adkins v. Children’s Hospital* (1925) (minimum wage: women & children)

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First Midterm Distributed Friday, March 1**nd** by email
Due Friday, March 8**th** by 5:00pm in Instructor Delaney’s Mailbox, First Floor of North Hall

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**February 28th** Individual Rights, Public Morality 322-325, 326-329, 329-339
   * Reynolds v. United States* (1878)
   * Meyer v. Nebraska* (1923) (education of children)
   * Piece v. Society of Sisters* (1925) (course website) (education of children)

Democratic Rights – Free Speech & the Press 329-339
   * Schenck v. United States* (1919)
   * Abrams v. United States* (1919)
   * Gitlow v. New York* (1925)
   * Whitney v. California* (1927)
   * Near v. Minnesota* (1931)

**March 5**th Equality: Race & Gender 342-358
   * Yick Wo v. Hopkins* (1886)
   * Plessy v. Ferguson* (1896)
   * Buchanan v. Worley* (1917)
   * United States v. Bhagat Sing Thind* (1923) (course website)
The ‘Blanket Amendment’ (ERA) and Women’s Suffrage
“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?

The New Deal & Great Society 1933-1968

March 7th Introductions and Foundations 373-393

I. Tiers of Scrutiny –
   a. United States v. Carolene Products (1938) (course website)

II. Incorporation
   a. Palko v. Connecticut (1937) (course website)
   b. Duncan v. Louisiana (1968)

III. State Action
   a. Primary cases
      i. Grove v. Townsend (1935)
      ii. Smith v. Allwright (1944)
   b. Property
      i. Shelley v. Kraemer (1948)
   c. ‘appropriate legislation’
      i. Jones v. Alfred H. Mayer

March 12th Individual Rights 393-409
I. Property
   a. *West Coast Hotel v. Parrish* (1937) (minimum wage reconsidered)

II. Religion: Establishment and Free Exercise

III. Personal Freedom & Public Morality
   b. *Perez v. Sharp* (Cal. 1948) (interracial marriage)

March 14th  Democratic Rights – Freedom of Speech and Press 418-432

I. Speech
   b. *Dennis v. United States* (1951) (sedition, advocacy)
   d. *Chaplinsky v. New Hampshire* (1940) (the categorial approach)
   e. *Beauharnais v. Illinois* (1954) (group libel) (course website)

II. Press

March 26th  Equality: Race 450-468

*Korematsu v. United States* (1944) (Japanese-American internment)
*Brown v. Board of Education* (1954) (school segregation)
*Brown II* (1955) (“all deliberate speed”)
*Green v. County School Board of New Kent Country* (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.

March 16th –March 24th Spring Break


March 28th Introduction, Foundations, Individual Rights 491- 507
   Individual Rights
   *Dandridge v. Williams* (1970) (SDP and welfare)
   *Wisconsin v. Yoder* (1972) (free exercise of religion)
   *Moose Lodge No. 107 v. Irvis* (1970) (state action & the equal protection clause)
   *Moore v. East Cleveland* (1977) (course website)
   *Paul v. Davis* (1976) (course website)

April 2nd Individual Rights Continued 508-526

   *Roe v. Wade* (1973) (privacy rights, abortion)
   Democratic Rights: 516-526
   *Buckley v. Valeo* (1976)
   *Brandenburg v. Ohio* (1969) (incitement review)

April 4th Equal Protection: 529-554

   *Washington v. Davis* (1976)
   *Frontiero v. Richardson* (1973)

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 social deviancy 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 after the Democratic Party became identified with the Civil Rights Act of 1964 and the Voting Rights Act of 1964 (when he signed the latter act, President Johnson said “this will cost the Democratic Party the South for a generation”, a statement that is widely regarded as an understatement.). In the North working class white voters in the Midwest gravitated toward the GOP’s social conservatism and strong pro-war stance; the result was that in 1972 Nixon was re-elected in one of the greatest landslide victories in history. 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 today’s 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.

Second Midterm Distributed April 12th via email
Due Friday April 19th by 5pm in Instructor Delaney’s mailbox, first floor of North Hall
Material covered: from March 5th up to and including April 11th


April 9th Intro, Foundations, Individual Rights (Property & Religion): 571-590, 590-604
Narrowing the Scope: Deshaney v. Winnebago County (1989) (state action)
I. Religion
   a. Establishment
      Lee v. Weisman (1992) (endorsement)
April 11th Individual Rights (other) & Democratic Rights: 607-621, 621-629

I. Personal Freedom & Public Morality

II. Free Speech – general approaches
   Texas v. Johnson (1989) (flag burning)

April 16th Democratic Rights, Continued & Equality 629-657


Equality Under the Law
   Freeman v. Pitts (1992) (school desegregation)
   City of Richmond v. Croson (1989) (affirmative action)

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)**

**April 18**th **Religion & Free Speech 706-721**

I. Establishment

II. Free Exercise
   - *City of Boerne v. Flores* (1997) (accommodation)

**April 23**rd **Speech – Modern Issues 740-745, 748-757**

- *Snyder v. Phelps* (2011)

**April 25**th **Property, Equal Protection 701-706, 757-775**

I. Property (Takings)

II. Equal Protection and Affirmative Action

**April 30**th **Voting 778-799**

I. Voting Rights
   - *Shelby County v. Holder* (2013)
   - *Crawford v. Marion County Election Board* (2008)

**May 2**nd **LGBT Rights & Same-Sex Marriage 728-739, 775-778**


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 LGBT+ rights, new ways of thinking about campaign finance, and the implications of the national security apparatus that has developed since September 11, 2001. The backdrop to 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 and will, invariable, continue to change.

Final exam distributed Wednesday 3th;
Due in Instructor Delaney’s mailbox at 4pm on May 10th