

Political Science 411
TR, 1:00-2:15
Social Sciences 5206

Instructor:
Howard Schweber
322B North Hall
263-2293
schweber@polisci.wisc.edu
office hours: Wed. 9:00-11:00, Fri. 9:00-11:00

TAs:
Rebecca Anderson - randerson27@wisc.edu
Office hours: Thurs. 10:30-12:30

Parker Conover – mpconover@wisc.edu
Office hours: Tue. and Thurs., 2:25-3:30

Text: Gillman, Graber, and Whittington, *American Constitutionalism* 2d ed. (Oxford 2014) (“GGW”), vol. 1. The text is available at the University Bookstore and should be on reserve.

The approach of this class is dictated by its textbook. GGW is organized by historical period, rather than topic: so where a traditional textbook would have a section on “federalism” and trace that idea through a series of historical stages of development, GGW instead, looks at an historical period and reviews the way was treated as a constitutional question during that period. 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 (“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 state sovereignty 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 as a statement 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 federalism in the late 1800s, we may be better served to compare those understandings with the way Congress’ authority over commerce was understood in the same period, rather than with the way federalism was understood in the 1990s when textualism and “originalism” had become much more important in judicial practice.

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. We study all those things because they all 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 five different themes:

- I. Introduction to Historical Era
- II. Judicial Power and Constitutional Authority
- III. Powers of the National Government
- IV. Federalism
- V. Separation of Powers

One thing that will quickly become apparent is that in different historical periods, different themes receive more or less attention. Why is that? Why were separation of powers or Congressional authority or federalism 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, Congress' direct authority over the States was very limited. As a result, there was very little constitutional "law", in the sense of cases and doctrines, about that relationship prior to the XIVth Amendment—and a huge amount of material thereafter. 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.

EXAMS. There will be two midterm exams and a final exam, each of which will count for 30% of the course grade, with 10% based on your participation in discussion section. 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.**

First Exam:
Second Exam:
Third Exam:

Grading scale:

93-100 A
89-92 AB
82-88 B
79-81 BC
70-78 C
60-69 D
0-59 F

COURSE CREDITS

This is a 4-credit course. In accordance with university policies, that means there are expected to be 4 contact hours per week, and at least 40 pages of written work over the course of the semester. These requirements are satisfied by the scheduled lectures and discussion section meetings, and by the take-home exams and additional written work assigned in section.

LEARNING OBJECTIVES

The goal of this course is to give students a broad knowledge of the historical development of American constitutionalism, familiarity with the terms and vocabulary of both modern and historical constitutional debates, and a knowledge of a substantial body of constitutional law. In the process of conveying this information it is expected that students will enhance their skills of critical reading, legal and constitutional reasoning, and writing in a specialized and technical area.

ACADEMIC INTEGRITY

By enrolling in this course, each student assumes the responsibilities of an active participant in UW-Madison's community of scholars in which everyone's academic work and behavior are held to the highest academic integrity standards. Academic misconduct compromises the integrity of the university. Cheating, fabrication, plagiarism, unauthorized collaboration, and helping others commit these acts are examples of academic misconduct, which can result in disciplinary action. This includes but is not limited to failure on the assignment/course, disciplinary probation, or suspension. Substantial or repeated cases of misconduct will be forwarded to the Office of Student Conduct & Community Standards for additional review. For more information, refer to studentconduct.wiscweb.wisc.edu/academic-integrity/.

ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES

McBurney Disability Resource Center syllabus statement: "The University of Wisconsin-Madison supports the right of all enrolled students to a full and equal educational opportunity. The Americans with Disabilities Act (ADA), Wisconsin State Statute (36.12), and UW-Madison policy (Faculty Document 1071) require that students with disabilities be reasonably accommodated in instruction and

campus life. Reasonable accommodations for students with disabilities is a shared faculty and student responsibility. Students are expected to inform Prof. Schweber and Rebecca Anderson of their need for instructional accommodations by the end of the third week of the semester, or as soon as possible after a disability has been incurred or recognized. We will work either directly with the student [you] or in coordination with the McBurney Center to identify and provide reasonable instructional accommodations. Disability information, including instructional accommodations as part of a student's educational record, is confidential and protected under FERPA

DIVERSITY & INCLUSION

The UW has adopted the following institutional statement on the subject of diversity: "Diversity is a source of strength, creativity, and innovation for UW-Madison. We value the contributions of each person and respect the profound ways their identity, culture, background, experience, status, abilities, and opinion enrich the university community. We commit ourselves to the pursuit of excellence in teaching, research, outreach, and diversity as inextricably linked goals. The University of Wisconsin-Madison fulfills its public mission by creating a welcoming and inclusive community for people from every background – people who as students, faculty, and staff serve Wisconsin and the world."

1/21 Theoretical Discussion

- What is a Constitution for?
- Who should interpret the Constitution?
- How should the Constitution be interpreted?
- What are the moving parts of this particular constitution?
- What were the first major constitutional issues?

I. Founding Era: Philosophical, Historical, and Political Background

We are with some 17th century English materials that provide an introduction to early constitutional debates; pay attention to the extent to which the concerns that motivated governmental actors in the 1600s remain current issues today! From there, we are skipping the chapter on the colonial era. This is unfortunate, because there are some interesting things to say about that period and particularly the way

colonies (and future states) conceived of themselves. It is more important, however, to ensure that we have established a strong basis for examining the theoretical principles of American constitutionalism going forward, and toward that end I have chosen to provide some outside readings. After that, we move straight into the debates between Federalists and Antifederalists and the final text that emerged as a result.

1/23 Readings: *Ship Money Case*, “Nineteen Propositions of Parliament” (canvas)

1/28 Early views: constitutional politics at the time of the framing

Isaac Kramnick, “The Great National Conversation” (canvas)

John Adams, “Thoughts on Government” (canvas)

Thomas Paine, “Of the Origin and Design of Government” (canvas)

1/30 Early Experiments – 49-52

Articles of Association (1774) (canvas)

Articles of Confederation, 1777)canvas)

Mass. Const. of 1780 and *Quock Walker Cases* jury instruction (1783)

(canvas)

Madison, “Vices of the Political System of the United States” (1787) (canvas)

2/4 Federalists and Antifederalists – 52-56

I. Federal Judiciary – 56-61

A. “Brutus” (Robert Yates) Letter No. 11

B. “Brutus” (Robert Yates) Letter No. 12

C. Federalist No. 78

II. Powers of National Government – 65-68, 70-79

A. Madison: Virginia Plan

B. New Jersey Plan

C. Debates
Samuel Adams, letter to Lee
Federalist1
Federalist 10

Federalist 23

- III. Federalism – 79-83
 - Debates in the convention
 - Melancton Smith, speech to NY ratifying convention

- IV. Separation of Powers – 83-92
 - Debates on the Executive
 - Federalist 51
 - Federalist 70
 - Federalist 71
 - “Centinel” Letter No.1

- 2/6 The Constitutional Text – 695-707
 - Also: for discussion section read Kerr, “How to Read a Case” (canvas)*

II. Early National Era: 1789-1828

Here we move out of the wide-open founding era into the first period of real constitutional debates, meaning debates that took place against a backdrop of relatively settled institutional arrangements and an existing background of precedents and prior agreements. A lot of the familiar features of American constitutional and democratic politics appear in this period for the first time: political parties, limitations on federal courts' jurisdiction, and serious discussions of separation of powers.

*This period involved working out so many of the understandings that we take for granted—either because we accept them or because we view their rejection as markers of modernity—that we are going to give it three full days of discussion. Today our subject is the powers of Congress, guided by Chief John Marshall's singularly unhelpful comment "we must never forget that it is a constitution we are expounding" (*McCulloch v. Maryland*). What did he mean by that, and what does his gnomic utterance signify in the particular context of congressional powers? The various specific topics listed above should be understood as different expressions of debates over a constellation of principles and values*

2/11

- I. Introduction to Historical Era – 93-101, 158-62
Earliest cases: sovereignty and supremacy
Chisholm v. Georgia (1793) (canvas)
Ware v. Hylton (1796) (canvas)

2/13

- II. Judicial Power and Constitutional Authority – 101-18
Calder v Bull (1798)
Marbury v. Madison (1803)
Martin v Hunter's Lessee (1816)

2/18

- III. Powers of the National Government – 118-53
McCulloch v. Maryland (1819)
and Roane, Marshall reactions
Gibbons v. Ogden (1824)
- IV. Federalism – 156-58, 162-65
State Resolutions

III. Jacksonian Era: 1829-1860

Through the Jacksonian Era the existence of slavery shaped (or distorted) every discussion of constitutional principle. This was a surprise to no one: starting with the adoption of the Declaration of Independence the price for American unity was what William Lloyd Garrison called “the bargain with Hell.” Southern overrepresentation (secured by the Three Fifths Clause, the federalist designs of the Senate and the system of presidential selection) ensured that there would be no political attempt at a national solution—that would require the bloodiest war in our history. But suppressing the political conflict did not come close to working out all the problems involved. Issues of war powers and the presidential veto, Congress’ authority in the territories and the obligations of state courts to comply with federal laws all played out under the umbrella of slavery as a core national institution

2/20

- I. Introduction to Historical Era – 181-89
- II. Judicial Power and Constitutional Authority – 189-99
 - Luther v. Borden* (1849)
 - Barron v. Baltimore* (1833)

2/25

- I. Powers of the national government – 199-210
 - Jackson Bank Veto
 - Prigg v. Pennsylvania* (1842)
 - Texas Annexation Debate
 - Dred Scott v. Sandford* (1857)
 - Dred Scott* additional excerpt (canvas)

2/27

- II. Federalism – 220-26
 - A. States and the Commerce Clause
 - Cooley v. Board of Wardens* (1852)
 - B. Nullification Controversy (1831-32)
- V. Separation of Powers – 227-41
 - A. Presidential Power to Faithfully Execute the Laws, removal debate
 - B. Presidential War Powers – Mexican War
 - C. Presidential Veto Powers debate

IV. Secession, Civil War, and Reconstruction: 1861-1876

A great deal of what we think of as modern constitutional law is born in this period, but the circumstances of its birth are anything but simple. American politics to this day reflects resistance to the changes to the constitutional order that were implemented during Reconstruction. And where there is not resistance, there is genuine uncertainty: what does this all mean? People of good will and intelligence wrestle with the implications of the Reconstruction Amendments every day. The role of the national government, meanwhile, was transformed by the experience of the world's first mass war.

3/3

- I. Introduction to Historical Era – 243-46
- II. Constitutional Authority and Judicial Power – 246-54
Ex Parte McCardle
- III. Powers of the National Government – 254-69
Hepburn v. Griswold,
Legal Tender Cases
Civil Rights Act of 1866
42 U.S.C. §§ 1981, 1982, 1982 (Canvas)

*****Fri., Feb 28: First Midterm Distributed*****

V. The Republican Era: 1877-1932

Confronted by the grant of sweeping new powers to Congress, a fundamental reshaping of the system of federalism, the announcement of new “rights” and an immense expansion of the role of the Executive Branch, the Supreme Court stepped in as a conservative force holding back the tide of change. For a long time, this history was taught in schools in terms of the heroic forces of progress confronting conservative villains intent on preserving old privileges. Today there is a revisionist school of historiography that tries to make essentially the opposite argument; that the conservative justices were guardians of a version of principled liberalism and the progressives (including but not to the Progressives) were trying to wreck the constitutional order for their own purposes.

3/5

- I. Introduction to Historical Era – 311-22
- II. Judicial Power and Constitutional Authority – 322-25

Slaughterhouse Cases (1873) (canvas)
United States v. Cruikshank (1876) (canvas)

*****Fri., March 6, First Midterm Due in Prof. Schweber's mailbox, first floor of North Hall, by 4:00 p.m.*****

3/10

- III. Powers of Federal Government – 337-58, 366-68
 - A. Federal power to enforce civil rights
Civil Rights Cases (1883)
Debate on Lynching (1921)
 - B. Commerce –
Debate on Sherman Act (1890)
United States v. E.C. Knight Co. (1895),
Champion v. Ames (1903)
Hammer v. Dagenhart (1918)
 - C. Taxation – *Bailey v. Drexel Furniture Co.* (1922)

3/12

- IV. Federalism – 373-85
 - A. States and Dormant Commerce Clause –
Wabash, St. Louis and Pac. Ry. Co. v. Ill. (1886)
 - B. States and Police Powers –
Cooley “Constitutional Limitations”
Munn v. St. of Ill., (1877)
Plessy v. Ferguson (canvas)
Lochner v. New York (1937)
- V. Separation of Powers – 387-97
 - A. Appointment and removal – *Myers v. United States* (1926)
 - B. Inherent Presidential Power, debates

- C. Nondelegation principle – *J.W. Hampton, Jr. v. United States* (1928)

*****SPRING BREAK*****

V. New Deal and Great Society 1933-1968

*The period of the New Deal and the Great Society also saw a few other things: World War II, McCarthyism, the rise of organized labor, the emergence of the American working class, highways, television, the Korean War, JFK, the Cold War, Civil Rights...there was a lot going on. This was also the period that saw the emergence of the modern federal government. By the end of this period the Court had established itself as a staunchly liberal defender of individual rights and federal authority, and constitutional doctrines were clearly oriented toward preventing States from preventing progress (as the justices and Congress understood that term). To take one example, *Brown v. Bd. of Education* declared the segregation of public schools unconstitutional, but it was the decisions granting Congress and federal judges the power to enforce that principle that mattered on the ground. Conversely, decisions granting Congress broad authority to regulate the economy would not have mattered if there had not been a Congress eager to take on that role. One lesson of the New Deal and the Great Society eras is that constitutional law is given effect by constitutional politics.*

3/24

- I. Introduction to Historical Era – 401-09
- II. Judicial Power and Constitutional Authority – 410-41, 336-37
 - A. Judicial review
Carolene Products (1938)
 - B. Judicial supremacy
Roosevelt undelivered speech (1935,) Fireside Chat (1937)
Sen. Judiciary Comm. Report on Court-Packing Plan (1937)
Southern Manifesto (1956),
Eisenhower Address on Little Rock (1957)
Cooper v. Aaron (1968)
 - C. Jurisdiction: Standing and Political Question
Frothingham v. Mellon (1923)
Coleman v. Miller (1939) (canvas)
Baker v. Carr (1962)
Flast v. Cohen (1968)

3/26

III. Powers of the National Government – 441-63

A. Article I/Commerce Clause

Schechter Poultry (1935)

NLRB v. Jones & Laughlin (1937)

Wickard v. Filburn (1942)

B. Federal power to enforce civil rights

CRA of 1964

Heart of Atlanta Motel v. United States (1964)

South Carolina v. Katzenbach (1966)

IV. Federalism, implications for, discussed - 470-71

3/31

V. Separation of Powers – 471-82, 487-91

A. Non-delegation – *Schechter Poultry*, revisited (1935)

B. Executive Emergency Powers

United States v. Curtiss-Wright (1936)

Korematsu v United States (1944) (canvas)

Youngstown Sheet & Tube v. Sawyer (1952)

VI. Liberalism Divided 1969-1980

The authors' choice of the name for this period is debatable. A better descriptor might have been something like "liberalism and resistance". Either name, however, applies more clearly to some areas of constitutional development than to others. Certainly it is true that through this period of the Warren and Burger Courts ideas of strong and expansive rights protections held sway. On the subjects of our course, however, the pattern is much less clear, raising interesting and important questions about the meaning of "liberalism" or "conservatism" in the context of constitutional politics.

4/2

I. Intro. To Historical Era – 495-500

II. Judicial Power and Constitutional Authority

Williamson v. Lee Optical (canvas)

Laird v. Tatum (canvas)

- IV. Federalism – 512-17
 - A. State Immunity from Federal Regulation –
National League of Cities v. Usery (1976)
- V. Separation of Powers – 518-24
 - A. Presidential War and Foreign Affairs powers
War Powers Act of 1973
Nixon Veto Message
National Emergency Act of 1976 (canvas)

VII. Reagan Era: 1981-1993

The Reagan Era saw a genuine effort to reshape constitutional doctrine in a self-consciously “conservative” direction. Attorney General Edwin Meese led the effort to promote a theory of constitutional interpretation called “originalism,” the creation of the Federalist Society and the efforts of conservative think tanks produced a steady crop of ideologically like-minded future judges and government officials, and a highly popular President who was openly skeptical about the gains of the New Deal and Great Society produced a shift in the constitutional discourse that remains with us to this day. The consequences have been monumental in some areas— notably the First Amendment and the Equal Protection Clause—but how much actually changed in terms of the powers and structures of government is a difficult question to answer.

4/7

- I. Introduction to Historical Era – 537-42
- II. Judicial Power and Constitutional Authority – 542-56
 - A. The Turn to Originalism
Meese, “The Law of the Constitution”
Rehnquist, “The Notion of a Living Constitution”
Brennan, “The Constitution of the United States: Contemporary Ratification”
Bork nomination – Reagan Address, Committee hearing excerpts
 - B. Standing and the Establishment Clause, revisited

Valley Forge Christian College v. Americans United for Separation of Church and State (1982) (canvas)

- III. Powers of National Government – 556-561
Reagan, “Remarks at the National Conference of State Legislatures”
Taxing and Spending: *South Dakota v. Dole* (1987)

4/9

- IV. Federalism – 561-68
Commerce Clause – *Garcia v. San Antonio Metro Transit Authority* (1985)

- IV. Separation of Powers
Background, *Dames and Moore*
Dames and Moore v. Regan (1981)
United States v. Alvarez-Machain (1992)
Sale v Haitian Centers Council (1993) (all on canvas)

*****Friday, April 10th, Second Midterm Distributed*****

VIII. Contemporary Era: 1994-present

Contemporary discussions of constitutional law only make sense if you have the background to see where they come from. With a semester’s worth of grounding in constitutional doctrine, theory, and historical development under our belts...let’s have some arguments! In these cases and discussions do you see Congress, the Court, and the Executive playing their proper roles? Are federal-state relations and separation of powers principles rightly understood in today’s constitutional debates?

4/14 Judicial Power and Constitutional Authority: Standing and Legislative Standing

Friends of the Earth v. Laidlaw (2000)
Raines v. Byrd (1997)

4/16 Commerce Clause and Taxing and Spending

United States v. Lopez (1995) (610-17)
Gonzales v. Raich (2005) (canvas)

Nat'l. Federation of Independent Business v. Sibelius (2012) (in two parts, 617-29)
Tenn. Wine and Spirits (2018) (canvas)

*****Friday, April 17th, Second Midterm Due in Prof. Schweber's mailbox in North Hall by 4:00 p.m.*****

- 4/21 Separation of powers
Clinton v New York (1998) (659-62)
INS v. Chadha (1983) (571-76)
Morrison v. Olsen (1988) (special prosecutor) (577-84)
- 4/23 The New Federalism: commandeering and sovereign immunity
New York v. United States (1992) (canvas)
Printz v. United States (1997) (641-47)
Alden v. Maine (1999) (648-53)
College Savings Bank v. Florida Prepaid (1999) (Canvas)
- 4/28 Civil rights enforcement (XIV(5))
City of Boerne v. Flores (1997) (591-94)
United States v. Morrison (2000) (630-34)
Vieth v. Jubelirer (2004) (canvas)
Shelby County v. Holder (2013) (canvas)
- 4/30 TBD

*****Fri., May 1st, Final Exam Distributed*****

*****Fri., May 8th, Final Exam Due in Prof. Schweber's mailbox in North Hall*****