THE CONSTITUTION OF THE UNITED STATES
POLITICAL SCIENCE 410

Fall 2022

Room 115, Murphey Hall ***Tuesday & Thursday, 12:30pm - 1:45pm***

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The meaning of the Constitution is the source of both legal and political disagreement in the United States. In Federalist No.10, James Madison recognized that such disagreements would be minimized if all citizens had "the same passions, and the same interests." If citizens, elected officials, and members of the judiciary all shared a common view on both the appropriate direction of public policy and the meaning of specific constitutional principles, then interpreting the text would be an easy task.

Quite obviously, however, the American public and their representatives have quite disparate notions about how the nation should be governed most effectively and how the Constitution promotes or limits the pursuit of various goals. Indeed, as Madison went on to note, "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed." Societal frictions, therefore, have quite frequently stemmed from conflicting views over the meaning of the principles that are contained (and occasionally, those that are not contained) within the body of the Constitution. Thus, a good many political struggles have been inevitable by-products of competing outlooks over the meaning of the law. And the stakes have often been very high indeed.

In drafting the Constitution, the Framers provided the ultimate source of governmental authority in the United States, but a critical question still remains: How should one interpret it? As Madison doubtless recognized, passions pull people in different directions, and as a result the most prominent expositors of the Constitution --- the justices of the U.S. Supreme Court --- have adopted and adapted competing methods of constitutional interpretation that leave substantial room for personal preferences to shape that interpretation. In fact, there is substantial reason to believe that they have long done just that. With that in mind, this course aims to illustrate the variety of lenses through which the Constitution has been viewed and the political consequences of employing one method over another. So, you will explore the Court's consideration of some of the principal provisions of the Constitution relating to the powers of the federal and state governments. At the same time, you will also consider how social, political, and economic circumstance have worked together to shape how the justices have viewed those provisions.

These are critical issues. After all, the questions about the nature and extent of governmental authority are fundamental to the structure and functioning of the American republic: How does the Constitution allocate power among the legislative, executive, and judicial branches?

Can the Supreme Court examine any question of law that arises in the nation's courts? May the Supreme Court declare the actions of democratically elected officials to be invalid? Does Congress possess only those powers explicitly written within the text of the Constitution, or can the legislature legitimately lay claim to additional authority? Is the President's constitutional authority greater in some areas than in others? In what ways does the Constitution limit the power of each of these coordinate branches? What are the connections between the kinds of powers entrusted to the federal government--regulating commerce, collecting revenue, and managing outlays, for example--and the policy objectives for which they are used? What manner of authority do the states possess, and what is their position as policy makers in comparison to the federal government? What values did the Framers seek to protect in drafting the Constitution, and how have they been secured? These are among the most central and consequential concerns for an understanding the meaning of the U.S. Constitution.

Naturally enough, the business of constitutional interpretation is principally the province of the courts. So, most of our attention will be focused upon constitutional law, the voice that the U.S. Supreme Court has given to the document. The main issues that the justices have considered --- the nature and scope of federal governmental power, the relationship of federal to state authority, and so on --- will be examined in this course, and it will be your purpose this term to examine and evaluate the Court's evolving doctrine in these areas. As you do, you should look for the intellectual connections between the ideas about the meaning of the Constitution and the governmental policies that spring from them.

Course requirements:

Books. For most, effective performance in this class will require a substantial investment of time and effort. You should consider carefully whether you wish to make such a commitment. After all, consuming and making sense of a great many Supreme Court opinions can be tedious work, a task complicated by the sometimes competing --- and very plausible --- views of the justices. You will find this required text to be particularly useful in developing your understanding of these various views:

Lee Epstein, Kevin T. McGuire, and Thomas G. Walker. 2023. *Constitutional Law for a Changing America: Institutional Powers and Constraints*. 11th ed. Thousand Oaks, CA: CQ Press.

Grades. Your grade will be a function of your performance on three essay examinations and a series of low-stakes written assignments. Each exam will be worth 28% of your grade. Materials that are covered in class will serve as the principal basis for the examinations, but each exam will also contain some questions from the readings, as well. The written assignments involve participation in an online discussion forum. You will be asked to question and comment upon information related to the lecture and to offer feedback on the written ideas of other members of the class. Topics for discussion will be posted on a weekly basis, and each week that topic will be open for your participation. Taken together, your scores from the discussion forum will constitute the remaining 16% of your grade.

OVERVIEW OF THE COURSE:

1. Constitutional Context
(August 16 – 18)

Any understanding of the U.S. Constitution must take into account the nature of its precursor. That is, to understand the structure, provisions, and protections of the document framed by the Founding Fathers in 1787, one must be aware of the problems facing the nation prior to the Constitutional Convention and the extent to which the existing government alleviated --- or exacerbated --- those problems. What values were reflected subsequently in the newly-written Constitution?

Required reading:
Epstein, McGuire, and Walker, pp. 3-11, 51-55

Suggested reading:
Robert Dahl. 2002. *How Democratic Is The American Constitution?* New Haven: Yale University Press.
Alexander Hamilton, James Madison, and John Jay. 2003. *The Federalist Papers.* New York: Penguin Putnam.
Michael Kammen. 2006. *A Machine That Would Go of Itself: The Constitution in American Culture.* Piscataway, NJ: Transaction Publishers.
Michael J. Klarman. 2016. *The Framers' Coup: The Making of the United States Constitution.* New York: Oxford University Press.
Forrest McDonald. 1987. *Novus Ordo Seclorum: The Intellectual Origin of the Constitution.* Lawrence: University Press of Kansas.
Jack N. Rakove. 1997. *Original Meanings: Politics and Ideas in the Making of the Constitution.* New York: Knopf.
David Brian Robertson. 2013. *The Original Compromise: What the Constitution's Framers Were Really Thinking.* New York: Oxford University Press.
John R. Vile. 2012. *The Writing and Ratification of the U.S. Constitution: Practical Virtue in Action.* Lanham, MD: Rowman & Littlefield.

"What can explain such a cluster of men of first-rate abilities in the period of the Revolution, Constitution, and new nation? Were they called out by perilous times, or did they create noble projects? They were both products and makers of history....The Founding Fathers in America were symptoms or tokens of a development. They were vigorous shoots from a plant of deep and spreading roots....Granted that the curtain was about to be lifted on new play, how to account for the excellence of our actors in the momentous drama?"

--- Broadus Mitchell and Louis Pearson Mitchell
A Biography of the Constitution of the United States

"As to my sentiments with respect to the merits of the new Constitution, I will disclose them without reserve (although by passing through the Post offices they should become known to all the world) for, in truth, I have nothing to conceal on that subject. It appears to me, then, little short of a miracle, that the Delegates from so many different States (which States you

know are also different from each other in their manners, circumstances and prejudices) should unite in forming a system of national Government, so little liable to well founded objections....With regard to the two great points (the pivots on which the whole machine must move) my Creed is simply:

"1st That the general Government is not invested with more Powers than are indispensably necessary to perform [the] functions of a good Government; and, consequently, that no objection ought to be made against the quantity of Power delegated to it. That these Powers (as the appointment of all Rulers will forever arise from, and, at short stated intervals, recur to the free suffrage of the People) are so distributed among the Legislative, Executive, and Judicial Branches, into which the general Government is arranged, that it can never be in danger of degenerating into a monarchy, an oligarchy, an aristocracy, or any other despotic or oppressive form; so long as there shall remain any virtue in the body of the People."

--- George Washington
Letter to Lafayette, February 7, 1788

SEPARATION OF POWERS

2. Judicial Power

(August 23 – 30)

There is little doubt that the Supreme Court is a political institution. Presidents face considerable pressures in nominating its members. In the Senate, its selection process mobilizes countless constituent and group forces. Likewise, on the Court, the justices annually slate a plenary agenda that touches upon some of the most pressing issues of public concern. In addition, the members of the Court find their decision making carefully scrutinized by organized interests, while their policies are often lauded and condemned in public opinion polls. Although not originally envisioned as such, the high court clearly has become an important element of national policy making. At the same time, because the Court *is* a court, there are real and persistent limits on its power that make it less like the other branches. So, even though the justices are enmeshed in issues of American politics, their authority is bounded in very important ways. How?

Required reading:
Epstein, McGuire, and Walker, pp. 57-115

Suggested reading:

Robert Lowry Clinton. 1994. *Marbury v. Madison and Judicial Review*. Lawrence: University Press of Kansas.

Justin Crowe. 2012. *Building the Judiciary: Law, Courts, and the Politics of Institutional Development*. Princeton, NJ: Princeton University Press.

Howard Gillman. 2001. *The Votes That Counted: How the Court Decided the 2000 Presidential Election*. Chicago: University of Chicago Press.

Charles Grove Haines. 1914. *The American Doctrine of Judicial Supremacy*. New York: Macmillan.

Larry D. Kramer. 2005. *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press.
Robert G. McCloskey. 1994. *The American Supreme Court.* 2nd ed. Chicago: University of Chicago Press.
William E. Nelson. 2018. *Marbury v. Madison: The Origins and Legacy of Judicial Review*, 2nd ed. Lawrence, KS: University of Kansas Press.
Mark Tushnet. 1999. *Taking the Constitution Away from the Courts.* Princeton: Princeton University Press.
Keith E. Whittington. 2009. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton, NJ: Princeton University Press.

"The Judiciary is beyond comparison the weakest of the three departments of power."

--- Alexander Hamilton
Federalist No. 78

"Courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society."

--- Alexander Bickel
The Least Dangerous Branch

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

"Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action."

--- Chief Justice Earl Warren
Flast v. Cohen (1968)

3. The Congress: Institutional Protections and Powers
(September 1 – 13)

The Framers envisioned the legislature as the leading branch within the national government. Indeed, they entrusted a wide array of authority to the Congress, even providing for broad discretionary power. The constitutional language regarding the scope of congressional influence is both specific and vague, and it has given rise to legal conflicts. Even with this considerable range of power, congressional prerogatives have expanded considerably over time, as well. Why has this occurred and with what consequences? How does the Constitution limit a growing legislative power?

Required reading:
Epstein, McGuire, and Walker, pp. 117-176, 247-265

Suggested reading:
Michael A. Bamberger. 2000. *Reckless Legislation: How Lawmakers Ignore the Constitution*. New Brunswick: Rutgers University Press.
Michael J. Berry. 2016. *The Modern Legislative Veto: Macropolitical Conflict and the Legacy of Chadha*. Ann Arbor, MI: University of Michigan Press.
David P Currie. 1998. *The Constitution in Congress: The Federalist Period, 1789-1801*. Chicago: University of Chicago Press.
Neil Devins and Keith E. Whittington. 2005. *Congress and the Constitution*. Durham, NC: Duke University Press.
Louis Fisher. 1997. *Constitutional Conflicts Between Congress and the President*, 4th ed. Lawrence: University Press of Kansas.
Jessica Korn. 1996. *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*. Princeton: Princeton University Press.
Mark Killenbeck. 2006. *McCulloch v. Maryland: Securing a Nation*. Lawrence, KS: University Press of Kansas

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."

--- James Madison
Federalist No. 57

"The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the

Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a 'more perfect Union.'"

--- Justice John Paul Stevens
U.S. Term Limits v. Thornton (1995)

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

--- Chief Justice John Marshall
McCulloch v. Maryland (1803)

"The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited."

--- Chief Justice Earl Warren
Watkins v. United States (1957)

First Examination
September 15

4. Executive Power in Domestic Affairs
(September 20 – 22)

What does the Constitution have to say about the president's power over domestic concerns? Is it purely to see to it that the laws passed by Congress are put into effect? Can a domestic emergency justify the exercise of extraordinary power? Can presidents legitimately exercise a broader scope of authority, and if so when?

Required reading:
Epstein, McGuire, and Walker, pp. 177-243, 283-288 (*Youngstown Sheet & Tube v. Sawyer)*

Suggested reading:
Steven G. Calabresi. 2008. *The Unitary Executive: Presidential Power from Washington to Bush.* New Haven, CT: Yale University Press.
Maeva Marcus and Louis Fisher. 1994. *Truman and the Steel Seizure Case: The Limits of*

Presidential Power. Durham: Duke University Press.
Richard E. Neustadt. 1997. *Presidential Power and the Modern Presidents*. New York: Simon & Schuster.
Clinton Rossiter. 1990. *The American Presidency*. Baltimore: Johns Hopkins University Press.
Robert Y. Shapiro, Martha Joynt Kumar, Lawrence R. Jacobs. 2000. *Presidential Power: Forging the Presidency for the Twenty-First Century*. New York: Columbia University Press.

"The Constitution declares that the President 'shall take care that the laws be faithfully executed.' Is this duty limited to the enforcement of acts of Congress according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself and all the protection implied by the nature of the government under the Constitution?"

--- Justice Samuel F. Miller
In re Neagle (1890)

"The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

--- Justice David J. Brewer
In re Debs (1895)

"The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

--- Justice Robert H. Jackson
Youngstown Sheet & Tube v. Sawyer (1952)

5. Executive Power in War and Foreign Affairs
(September 27 – 29)

Scholars of the presidency agree that the executive has a wider range of latitude when acting in the arena of foreign relations than when trying to solve domestic problems. Why? Does the Constitution specifically envision greater authority for the president in developing international policies? Or have presidents simply exercised savvy and strategically claimed power during times of war and international crises? The answer may derive from constitutional text as well as practical politics. More important, the latter may have a continuing effect on the former and thus change how, over time, the Court views presidential authority.

Required reading:
Epstein, McGuire, and Walker, pp. 243-245, 265-282, 288-307

Suggested reading:
David Gray Adler and Larry N. George. 1996. *The Constitution and the Conduct of American Foreign Policy: Essays in Law and History*. Lawrence, KS: University Press of Kansas.
Roger Daniels. 2013. *The Japanese American Cases: The Rule of Law in Time of War*. Lawrence, KS: University Press of Kansas.
Daniel Farber. 2004. *Lincoln's Constitution*. Chicago: University of Chicago Press.
Louis Fisher. 2005. *Nazi Saboteurs on Trial: A Military Tribunal and American Law*. Lawrence, KS: University Press of Kansas.
Louis Fisher. 2013. *Presidential War Power*, 3rd ed. Lawrence, KS: University Press of Kansas.
Michael A. Genovese. 2000. *The Power of the American Presidency: 1789-2000*. New York: Oxford University Press.
Brien Hallett. 2012. *Declaring War: Congress, the President, and What the Constitution Does Not Say*. New York: Cambridge University Press.
H. Jefferson Powell. 2014. *The President as Commander-in-Chief: An Essay in Constitutional Vision*. Durham, NC: Duke University Press.
William H. Rehnquist. 1998. *All the Laws but One: Civil Liberties in Wartime*. New York: Knopf.
Gordon Silverstein. 1996. *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press.

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

--- John Marshall
Speech in the U.S. House of Representatives (1800)

"By the Constitution, Congress alone has the power to declare a national or foreign war....The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare war either against a foreign nation or a domestic State."

--- Justice Robert Grier
The Prize Cases (1863)

"The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to

make such compromises has existed from the earliest times and been exercised by the foreign offices of all civilized nations."

--- Judge Learned Hand
Ozanic v. United States (1951)

"When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. When the President acts in the absence of congressional authorization he may enter a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including congressional inertia, indifference or quiescence. Finally, when the President acts in contravention of the will of Congress, his power is at its lowest ebb, and the Court can sustain his actions only by disabling the Congress from acting upon the subject."

--- Justice William H. Rehnquist
Dames & Moore v. Regan (1981)

NATIONAL AND STATES POWERS

6. American Federalism

(October 4 – 11)

Although it may seem unlikely, most controversies in modern American politics are a function of federalism. Citizens increasingly look to the national government for solutions to problems that are ostensibly local in nature. Similarly, states sometimes undertake to legislate in domains that are the province of the national government. Naturally, this gives rise to political conflict. Often, however, these questions over federal v. state authority are constitutional in nature, and the members of the Supreme Court are called upon to help clarify this complicated relationship.

Required reading:
Epstein, McGuire, and Walker, pp. 311-359

Suggested reading:

Christopher P. Banks and John C. Blakeman. 2012. *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Courts*. Lanham, MD: Rowman & Littlefield.

Raoul Berger. 1987. *Federalism: The Founders' Design.* Norman: University of Oklahoma Press.

Martha Derthick. 2001. *Keeping the Compound Republic: Essays on American Federalism*. Washington: Brookings Institution Press.

Kermit L. Hall. 2000. *A Nation of States: Federalism at the Bar of the Supreme Court*. Oxford: Routledge Press.
Alison L. LaCroix. 2011. *The Ideological Origins of American Federalism*. Cambridge, MA: Harvard University Press.
Laurence J. O'Toole. 2006. *American Intergovernmental Relations: Foundations, Perspectives, and Issues*. Washington: CQ Press.
Joseph F. Zimmerman. 2005. *Congressional Preemption: Regulatory Federalism*. Albany, NY: State University of New York Press.
Forrest McDonald. 2000. *States' Rights and the Union: Imperium in Imperio, 1776-1876*. Lawrence, KS: University Press of Kansas.
John T. Noonan, Jr. 2002. *Narrowing the Nation's Power: The Supreme Court Sides with the States*. Berkeley: University of California Press.

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State."

--- James Madison
Federalist No. 45

"I see, as you do, the rapid strides with which the Federal branch of our Government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that too by constructions which, if legitimate, leave no limits to their power. Under the power to regulate commerce, they assume indefinitely that also over agriculture and manufacturers. Under the authority to establish postroads, they claim that of cutting down mountains for the construction of roads, of digging canals, and, aided by a little sophistry on the words 'general welfare,' a right to do, not only the acts to effect that which are sufficiently enumerated and permitted, but whatsoever they shall think or pretend will be for the general welfare."

--- President Thomas Jefferson
Letter to William B. Giles, December 1825

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. In the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds by bold."

--- Justice Louis Brandeis
New State Ice Company v. Liebman (1932)

NATIONAL POWER

7. The Commerce Power, Part 1

(October 13 – 25)

One of the principal weaknesses of the Articles of Confederation was the national government's inability to regulate commercial activity that crossed state lines. As individual states jealously guarded their native advantages, the national economy suffered. Thus, by granting Congress the power to regulate interstate commerce, the Framers both deprived the states of the ability to interfere with the free flow of commerce and invested the national government with the capacity to impose its own rules on economic activity. Perhaps not surprisingly, clashes between the national and state governments, as well as conflicts between Congress and business interests have required the justices to determine the meaning of the interstate commerce clause. Since the early part of the twentieth century, the commerce power has frequently been at the center of American constitutional law.

Required reading:
Epstein, McGuire, and Walker, pp. 375-423

Suggested reading:

Herbert A. Johnson. 2010. *Gibbons v. Ogden: John Marshall, Steamboats, and the Commerce Clause*. Lawrence: University Press of Kansas.

William E. Leuchtenburg. 1996. *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt*. New York: Oxford University Press.

Robert McCloskey. 1951. *American Conservatism in the Age of Enterprise, 1865-1910*. Cambridge, MA: Harvard University Press.

Marian C. McKenna. 2002. *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937*. Fordham: Fordham University Press.

Jeff Shesol. 2010. *Supreme Power: Franklin Roosevelt v. the Supreme Court*. New York: W.W. Norton.

Joseph F. Zimmerman. 2004. *Interstate Economic Relations*. Albany, NY: State University of New York Press.

"February 4, 1824, was the first of five days of arguments. Justice James Wayne later said that *Gibbons v. Ogden* was not surpassed by any other case for 'the extent and variety of learning and...the acuteness of distinction by which it was argued by counsel.' After hearing the arguments, Story wrote that 'whoever...shall sit down to the task of perusing this argument, will find that it is equally remarkable for profoundness and sagacity, for the choice and comprehensiveness of the topics, and for the delicacy and tact with which they were handled.'"

--- G. Edward White
The Marshall Court and Cultural Change, 1815-1835

"Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

"What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

--- Chief Justice John Marshall
Brown v. Maryland (1827)

Second Examination
October 27

8. The Commerce Power, Part 2
(November 1)

The power to promote the health, safety, and welfare of citizens --- typically referred to as "the police power" --- has long been understood to be the domain of the states. At the same time, Congress has recognized that, in exercising the commerce power, it might also be able to pursue some of the same policy ambitions as the states; so, not only has the commerce clause been utilized to achieve regulatory ends, it has also been used to achieve a variety of lawmaking goals that seemingly have little connection to economic activities that cross state lines. For that reason, it remains one of the most important and most controversial provisions in the Constitution. What social ends may Congress seek under its commerce power? What limits, if any, are there on that power?

Required reading:
Epstein, McGuire, and Walker, pp. 423-476, 359-373

Suggested reading:

Richard C. Cortner. 2001. *Civil Rights and Public Accommodations: The Heat of Atlanta Motel and McClung Cases.* Lawrence: University Press of Kansas.

Barry Cushman. 1998. *Rethinking the New Deal Court: The Structure of a Constitutional Revolution.* New York: Oxford University Press.

Thomas M. Keck. 2004. *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism.* Chicago: University of Chicago Press.

Brian K. Landsberg. 1997. *Enforcing Civil Rights: Race Discrimination and the Department of Justice.* Lawrence, KS: University Press of Kansas.

Rebecca E. Zietlow. 2006. *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights.* New York: New York University Press.

"The record demonstrates that a substantial portion of the food served by the Lake Nixon Club snack bar has moved in interstate commerce. The snack bar serves a limited fare --- hot dogs and hamburgers on buns, soft drinks, and milk. The principal ingredients going into the bread were produced and processed in other States and certain ingredients of the soft drinks were probably obtained from out-of-State sources. Thus, at the very least, three of the four food items sold at the snack bar contain ingredients originating outside of the State. There can be no serious doubt that a 'substantial portion of the food' served at the snack bar has moved in interstate commerce. The remaining question is whether the operations of the Lake Nixon Club 'affect commerce' within the meaning of the law. We conclude that they do. Lake Nixon's customary sources of entertainment move in commerce. The Club leases 15 paddle boats on a royalty basis from an Oklahoma company. Another boat was purchased from the same company. The Club's juke box was manufactured outside Arkansas and plays records manufactured outside the State. The legislative history indicates that mechanical sources of entertainment such as these were considered by Congress to be 'sources of entertainment' within the meaning of' 201(c)(3)."

--- Justice William J. Brennan
Daniel v. Paul (1969)

"The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States…To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local."

--- Chief Justice William H. Rehnquist
U.S. v. Lopez (1995)

9. The Power of the Purse

(November 3)

Aside from the commerce power, the power of the purse has also been a vital tool of the national government. To be sure, how the state collects revenue, the programs it funds, and the amounts of money expended upon them are all interesting issues of public concern. It is imperative to recognize, however, that the expenditure of public monies reflects an expression of governmental will; as such, the power of the purse is an important means by which the government makes public policy. Not surprisingly, the commerce and fiscal powers of Congress have been the source for a great many constitutional conflicts before the Court.

Required reading:
Epstein, McGuire, and Walker, pp. 477-521

Suggested reading:

Jeffrey H. Birnbaum and Alan S. Murray. 1988. *Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform*. New York: Vintage.

Ajay K. Mehrota. 2013. *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877-1929*. New York: Cambridge University Press.

Thomas Frederick Wilson. 1992. *The Power "To Coin" Money: The Exercise of Monetary Powers by the Congress*. Armonk: M.E. Sharpe.

Steven R. Weisman. 2004. *The Great Tax Wars: Lincoln, Teddy Roosevelt, Wilson, How the Income Tax Transformed America.* New York: Simon & Schuster.

Julian E. Zelizer. 2000. *Taxing America: Wilbur D. Mills, Congress and the State, 1945-1975*. Cambridge: Cambridge University Press.

"Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subject of taxes cannot invalidate Congressional action."

-- Chief Justice William Howard Taft
J.W. Hampton Jr. & Co. v. U.S. (1928)

"Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action..."

--- Justice Owen Roberts
United States v. Butler (1936)

"Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective....When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds

otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact."

-- Chief Justice William H. Rehnquist
South Dakota v. Dole (1987)

STATES AND THEIR POLICE POWERS

10. Economic Liberty and the Contracts Clause
(November 8 – 10)

The Framers of the Constitution were perhaps more concerned with establishing a strong central government than they were with limiting the powers of states. Still, one explicit limitation that they did place upon the power of states was to deny states the ability to interfere with the obligations of private contracts. Despite protecting the ability to make private agreements without governmental interference, the justices have not always seen this protection as a serious restriction on state power. Why?

Required reading:
Epstein, McGuire, and Walker, pp. 541-572

Suggested reading:
Bruce Ackerman. 1977. *Private Property and the Constitution.* New Haven: Yale University Press.
James W. Ely. 1992. *The Guardian of Every Other Right: A Constitutional History of Property Rights.* New York: Oxford University Press.
John A. Fliter and Derek S. Hoff. 2012. *Fighting Foreclosure: The Blaisdell Case, the Contract Clause, and the Great Depression.* Lawrence, KS: University Press of Kansas.
Charles F. Hobson. 2016. *The Great Yazoo Lands Sale: The Case of Fletcher v. Peck.* Lawrence, KS: University Press of Kansas.
David N. Mayer. 2011. *Liberty of Contract: Rediscovering a Lost Constitutional Right.* Washington: Cato Institute.
Ellen F. Paul and Howard Dickman. 1989. *Liberty, Property, and Government: Constitutional Interpretation before the New Deal.* Albany: State University of New York Press.
Francis N. Stites. 1972. *Private Interest and Public Gain: The Dartmouth College Case.* Amherst: University of Massachusetts Press.

"The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property."

-- John Locke
The Second Treatise of Civil Government

"The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own

exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."

-- Chief Justice John Marshall
Ogden v. Saunders (1827)

"Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile --- a government which retains adequate authority to secure the peace and good order of society."

--- Chief Justice Charles Evans Hughes
Home Building and Loan Association v. Blaisdell (1934)

11. Substantive Due Process
(November 15 – 17)

As Alexander Hamilton explained in Federalist No.32, "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by the ratification of the Constitutional exclusively delegated to the United States." According to this view, unless the Constitution placed a power solely into the hands of the national government, states were free to exercise the remaining authority as they saw fit. That residuum is a collection of powers typically referred to as the states' police powers --- their authority to promote the health, safety, and welfare of their citizens. Most would agree that, in exercising those powers, states should follow the norms of democratic policy making by treating their citizens in a fair, consistent fashion. Indeed, the Constitution provides that government may not deprive a person of "life, liberty, or property without due process of law." Are there times, however, when the state makes legislative decisions that follow fair *procedures* and yet produce *policies* that are, in some sense, fundamentally unfair? Does the Constitution forbid such activity?

Required reading:
Epstein. McGuire, and Walker, pp. 573-620

Suggested reading:
Randy E. Barnett. 2003. *Restoring the Lost Constitution: The Presumption of Liberty*. Princeton,

NJ: Princeton University Press.
David E. Bernstein. 2011. *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform*. Chicago: University of Chicago Press.
Don E. Fehrenbacher. 2001. *The Dred Scott Case: Its Significance in American Law and Politics*. New York: Oxford University Press.
Tony A. Freyer. 1994. *Producers versus Capitalists: Constitutional Conflict in Antebellum America.* Charlottesville: University of Virginia Press.
Howard Gillman. 1993. *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham: Duke University Press.
Edward Keynes. 1996. *Liberty, Property and Privacy: Toward a Jurisprudence of Substantive Due Process*. University Park: Pennsylvania State University Press.

"Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons....The equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States."

-- Justice Stephen J. Field
The Slaughterhouse Cases (1873)

"The mandate of the statute that 'no employee shall be required or permitted to work,' is the substantial equivalent of an enactment that 'no employee shall contract or agree to work,' more than ten hours per day. It is…an absolute prohibition upon the employer's permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it.

"The statute necessarily interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision, no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, [that]…relate to the safety, health, morals and general welfare of the public.

"We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there

would seem to be no length to which legislation of this nature might not go."

--- Justice Rufus Peckham
Lochner v. New York (1905)

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"

-- Justice William O. Douglas
Williamson v. Lee Optical (1955)

"Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.' The controlling word in the cases before us is 'liberty.' Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, the Clause has been understood to contain a substantive component as well, one barring certain government actions regardless of the fairness of the procedures used to implement them. Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."

-- Justice Sandra Day O'Connor
Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

"The shift from judicial supervision of procedure *in the courts* to control of *legislative* policymaking constitutes a truly extraordinary transformation. For judicial review was conceived in narrow terms--as a means of policing the constitutional boundaries, the 'limits' of a given power. Little did the Framers dream that judicial power would be construed as a license to supersede the exercise of power by the other branches within those boundaries."

-- Raoul Berger
Government by Judiciary

12. Private Property
(November 22 – 29)

Governments undertake all manner of public works -- constructing roads, building bridges, establishing airports, developing public parks, and so on. In most cases, such projects require the use of lands that are held privately. How does one balance the rights of individual property owners against the community's need to provide for the public good? How does the government acquire private property, and what obligations does the government have to property owners when it does undertake such activities?

Required reading:
Epstein, McGuire, and Walker, pp. 621-655

Suggested reading:
Bruce L. Benson. 2010. *Property Rights: Eminent Domain and Regulatory Takings Re-Examined.* New York: Palgrave Macmillan.
James. W. Ely, Jr. 1992. *The Guardian of Every Other Right: A Constitutional History of Property Rights.* New York: Oxford University Press.
Richard A. Epstein. 1985. *Takings: Private Property and the Power of Eminent Domain.* Chicago: University of Chicago Press.
William Fischel. 1995. *Regulatory Takings: Law, Economics, and Politics.* Cambridge: Harvard University Press.
Leonard Levy. 1996. *A License to Steal: Forfeiture of Property.* Chapel Hill: University of North Carolina Press.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

-- Justice Oliver Wendell Holmes
Pennsylvania Coal Co. v. Mahon (1922)

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

-- Justice Hugo Black
Armstrong v. United States (1960)

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine [and] the means...are for Congress and Congress alone to determine, once the public purpose has been established."

-- Justice William O. Douglas
Berman v. Parker (1954)

"Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question; in *Berman*, we endorsed the purpose of transforming a blighted area into a 'well-balanced' community through redevelopment; in *Midkiff*, we upheld the interest in breaking up a land oligopoly that 'created artificial deterrents to the normal functioning of the State's residential land market,'; and in *Monsanto*, we accepted Congress' purpose of eliminating a 'significant barrier to entry in the pesticide market.' It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

--- Justice John Paul Stevens
Kelo v .City of New London (2005)

Third Examination
Friday, December 2, 12:00pm

Frequently Asked Questions

Is class participation required?
I encourage participation and frequently call on people at random during class, but your contributions to class discussions have no bearing on your grade.

Do I have to do the suggested reading?
No.

Do I have to do the required reading before class?
No, the required readings will not be discussed in class. You will probably find it easier to do the required reading *after* class, since materials that are covered in class may make it easier for you to make sense of the readings.

What should I do if I miss class?
Attendance is not required, but the University emphasizes that it is your obligation. You are responsible for any material you may miss. If you have missed a class and have questions, please visit me during my office hours.

Will PowerPoint slides be available before the test?
Yes, a pdf copy of the slides will be posted on Sakai.

Is the final exam cumulative?
The final exam is *not* a comprehensive exam. It could more properly be termed a "third exam," since it will cover only new material on which you have not been previously tested. Therefore, you will have the same amount of time to complete this exam as you would if the exam were given during a class period in the semester.

How are final grades determined?
The numerical score (ranging from 0 to 100%) of each assignment is weighted, and those weighted scores are added together for an overall course score. Your overall course score is the basis for your final grade, which will be assigned according to the standard grading scale (A = 90-100, B = 80-89, C = 70-79, D = 60-69, F= <=59), with pluses and minuses. No letter grades are assigned to any individual exam or in-class assignment.

Is there a curve?
Yes, but only if the grade distribution suggests that a curve is necessary. In some classes, there has been a considerable curve, while in others there has been none at all. I cannot say whether and to what degree there will be a curve until all assignments have been graded.

Is there any extra-credit that I can do to improve my grade?
No. Grades should be and are based on achievement, not effort.

If my grades improve over the course of the semester, will that improvement be reflected in my final grade?
No. The weights assigned to each assignment are specified at the outset of the course. Giving greater emphasis to work done later in the semester requires changing those weights for some students (i.e., those who have improved) but not others (i.e., those who have not improved). Such a system does not treat all students equally, which is something that a fair system requires.

May I take the third exam on some day other than the required date?
The circumstances under which you may reschedule the final are described in detail in the undergraduate bulletin. In relevant passage, it states:

"A student who has three final examinations scheduled by the Registrar's Office within a 24-hour period may petition his or her dean for permission to have one of the scheduled examinations rescheduled. In the event that one of the scheduled examinations is a common final examination for a multiple-section course, that examination is the one to be rescheduled. Students who have secured an 'examination excuse' or an 'official permit,' and who transmit the document to the instructor or the instructor's departmental chair or dean, must be granted permission to take the exam at an alternate time, although students will need to arrange a mutually convenient time with the instructor. Except when the provost has provided an exception in writing, the exam will be taken at a time subsequent to the regularly scheduled exam, though no later than the end of the following semester."

Is the syllabus subject to change?

I will make every effort to stay on schedule throughout the semester, but this syllabus is not a contract. I therefore reserve the right to make changes to the syllabus. These changes will be announced as early as possible.

Of what University policies and services should I be aware?

(1) Face masks are optional inside the classroom.
(2) You must abide by the Honor Code.
(3) The University provides accommodations for those with special needs.
(4) Counseling services are available to address students' mental health concerns.
(5) You should report acts of discrimination, harassment, and sexual violence to the Title IX coordinator.