

History 352
U.S. Constitutional History since 1865 - Spring 2008
TR, 9:30–10:45 a.m.

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Office Hours: Mondays, 1:00-3:00 p.m.; Thursdays, 2:00-3:00 p.m.

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Course Description and Objectives:

This course examines American constitutionalism from the Reconstruction period to the 1990s. In particular, we will focus on the Supreme Court's interpretation of the constitutional issues surrounding Reconstruction and civil rights, industrialization and economic expansion, the rise of national regulatory power, and the expansion of individual rights. In contrast to a constitutional law course, this class is more concerned with how American constitutionalism both shaped and responded to larger political and social developments, and less concerned with the evolution of constitutional doctrine in an of itself.

Because this course is a seminar, it is vital that students attend class, complete the assigned readings, and come prepared to discuss them. This is not a lecture course, and class participation is essential to the seminar's survival. By the end of the semester, students should have a broad understanding of the history of American constitutionalism since 1865, as well as improved oral, written, and critical thinking skills.

Readings:

- Melvin I. Urofsky and Paul Finkelman, A March of Liberty: A Constitutional History of the United States, vol. 2, from 1877 to the Present, 2002. (hereafter referred to as "Text").
- Melvin I. Urofsky and Paul Finkelman, eds., Documents of American Constitutional and Legal History, vol. 2, From the Age of Industrialization to the Present, 3rd edition, 2008. (hereafter referred to as "Documents")
- David Ray Papke, The Pullman Case: The Clash of Labor and Capital in Industrial America, 1999.
- Willima E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt, 1995.
- G. Edward White, Earl Warren: A Public Life, 1982.
- Supplementary readings – available either in my folder on the Academic Departments/Programs Volume or as *handouts*.

Assignments and Grading:

Final grades will be determined as follows:

- Constitution quiz – 5%
- Article review – 10%
- Book review – 10% (either Papke or White)
- Case note – 15%
- Seminar participation/Quizzes – 20%
- Mid-term examination – 20%
- Final examination – 20%

Attendance is mandatory at all class meetings. More than two absences will adversely affect your grade in this course.

All reading assignments indicated below with a regular bullet point are required of all students. These readings will serve as the basis for discussions, and you will be responsible for these readings on quizzes, your mid-term examination, and your final examination.

All readings indicated with a diamond are recommended. Each student must read and submit a critique of one of the recommended assignments. This critique must be distributed electronically to the class by 5 p.m. of the day before the seminar. Critiques should be read by all students prior to class. You will be responsible for the information in these student critiques on your mid-term and final examinations.

Make-up examinations will not be given without a verifiable medical excuse. All excuses are subject to the approval of the instructor. All quizzes, with the exception of the Constitution quiz, will be unscheduled. There will be no make-ups on the quizzes, and no late papers will be accepted. All work, unless otherwise indicated, is pledged under the Rhodes College Honor Code.

Topics and Reading Assignments:

1. Reconstruction and Civil Rights

(Text, chapter 22)

Jan. 10 – Introduction to course

Jan. 15 – Reconstruction

- *Handout:* Emancipation Proclamation
- Thirteenth, Fourteenth, and Fifteenth Amendments
- *Handout:* James McPherson, “Liberty and Power in the Second American Revolution,” in Abraham Lincoln and the Second American Revolution (1991).

Jan. 17 – Civil Rights [**Constitution Quiz**]

- *Handout:* Slaughterhouse Cases
- *Handout:* Bradwell v. Illinois
- *Handout:* Civil Rights Cases

Jan. 22 – Segregation

- Plessy v. Ferguson (Documents, 593-596)
 - ❖ Michael Les Benedict, “Preserving the Constitution: The Conservative Basis of Radical Reconstruction,” in Preserving the Constitution: Essays on Politics and the Constitution in the Reconstruction Era, 3-22.
 - ❖ C. Van Woodward, “Capitulation to Racism,” in The Strange Career of Jim Crow.
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Questions to consider:

What was the significance of the Civil War and Reconstruction for American constitutional history? How committed was the Republican Party to civil rights for the former slaves? Were Republican efforts on behalf of freedmen motivated by humanitarian concern or crass political calculation? What were the final results of the Reconstruction period? Were the 13th, 14th, and 15th Amendments revolutionary changes in American constitutional history, or were they really insignificant during their time? Did the Supreme Court have a reasonable constitutional basis for their interpretations of the Reconstruction Amendments, or were the Court’s decision simply a “capitulation to racism?”

2. Liberty and Economic Regulation

(Text, chapters 23-25)

Jan. 24 – Substantive Due Process

- Slaughterhouse Cases (re-read)
- Munn v. Illinois (folder)
- Allgeyer v. Louisiana (Documents, 601-602)

Jan. 29 – The Debs Case – **Reviews of Papke Due**

- David Papke, The Pullman Case, *all*
- In re Debs (folder)

Jan. 31 – The Crisis of the 1890s

- U.S. v. E.C. Knight Co. (folder)
- Pollock v. Farmers’ Loan and Trust, Co. (folder)
- People’s Party Platform (Documents, 597-600)

Feb. 5 – Progressive Regulation and the Liberty to Contract

- Holden v. Hardy (Documents, 603-605)
- Lochner v. New York (Documents, 624-627)
- Muller v. Oregon (Documents, 628-629)
- ❖ Paul Kens, “The Final Forum,” in Lochner v. New York: Economic Regulation on Trial, 129-142.

- ❖ Melvin Urofsky, “State Courts and Protective Legislation during the Progressive Era: A Reevaluation,” Journal of American History 72 (1985):63-91.
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Questions to consider:

What was substantive due process? Did the Supreme Court spin this doctrine out of thin air, or did it have a legitimate constitutional basis? What grievances did working people and farmers have against the national government during this time? Was the system really stacked against them? Was the Supreme Court simply the lackey of big business during this era, or was the Court just trying to protect liberty? Who were the progressives and what were they trying to do? How did debates over protective legislation and the liberty to contract fit with competing views of the law at this time? Did progressive reform measures help women, or did such laws simply embody and confirm the sexist attitudes of the time?

3. National Regulation and Civil Liberties in the Progressive Era (Text, chapters 26-27)

Feb. 7 – National Economic Regulation

- Northern Securities Co. v. United States (Documents, 617-620)
- McCray v. United States (Documents, 621-623)
- Standard Oil Co. v. United States (Documents, 632-634)
- Hammer v. Dagenhart (Documents, 652-655)

Feb. 12 – The Progressive Amendments and the Wartime State

- Sixteenth, Seventeenth, Eighteenth, Nineteenth Amendments
 - Lever Food Control Act (Documents, 645-647)
 - ❖ Robert Zieger, “Mobilizing for War, 1917-1918,” in America’s Great War: World War I and the American Experience, 57-84.
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Feb. 14 – Free Speech and the Great War

- Chafee, Freedom of Speech (Documents, 656-659)
 - Schenck v. United States (Documents, 660-661)
 - Abrams v. United States (Documents, 663-666)
 - ❖ Samuel Walker, “Roger Baldwin and the Founding of the ACLU,” in In Defense of American Liberties: A History of the ACLU, 30-47.
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Feb. 19 - Incorporation and Civil Liberties

- Whitney v. California (Documents, 697-701)

- Near v. Minnesota (Documents, 706-708)
- *Handout*: Gitlow v. New York

Feb. 21 – MID-TERM EXAMINATION

Questions to consider:

Who were the progressives? What was their conception of national power? Why did they think so many activities needed to be regulated? How effective was Congressional regulation in dealing with the social upheaval of the late nineteenth and early twentieth century? Was the Supreme Court's interpretation of these regulations faithful to the intent of those who enacted them? In general, were the progressives forward-thinking, or were they narrow-minded? What was the progressives' conception of civil liberties? Did they believe in free speech? What are we to make of the attitudes and behavior of Chafee and Holmes during this period?

4. The Court and the Constitution in the New Deal Era

(Text, chapters 29-32)

Feb. 26 – The New Deal Rejected

- Schechter v. United States (Documents, 722-725)
- Butler v. United States (Documents, 726-730)
- Leuchtenburg, Supreme Court Reborn, 52-81

Feb. 28 – The Court-Packing Plan

- Court Packing Documents (Documents, 739-747)
- Leuchtenburg, Supreme Court Reborn, 82-162

(SPRING BREAK: March 3-7)

Mar. 11 – The New Deal Affirmed

- West Coast Hotel v. Parrish (Documents, 750-751)
- United States v. Carolene Products Co. (Documents, 762)
- United States v. Darby (Documents, 763-766)
- Wickard v. Filburn (Documents, 767-769)
- Leuchtenburg, Supreme Court Reborn, 163-212, 237-258

March 13 – Interpreting the New Deal

- Leuchtenburg, Supreme Court Reborn, 213-236
- ❖ Bruce Ackerman, "Rethinking the New Deal," in We the People: Transformations, 279-311.

Questions to consider:

What was the New Deal all about? Why was it so controversial in its day? Was the Supreme Court justified in striking down many of its provisions, or were the justices acting from purely political motives? What about FDR? Was his Court-packing plan an attempt to preserve the rule of law or to undermine his political opponents? What was the "Constitutional Revolution" of 1937? How revolutionary was it? What message in particular did the Court send in the area of civil liberties? How politicized was the work of the Court before the New Deal era? Did the controversies surround the Court during the New Deal period make the Court more political than it previously had been?

5. World War II, the Cold War, and the Constitution

(Text, chapters 33-34)

Mar. 18 – Liberty in Wartime

- West Virginia Board of Education v. Barnette (Documents, 770-775)
- Korematsu v. United States (Documents, 776-779)
- White, Earl Warren, vii-83

Mar. 20 – Easter Recess

Mar. 25 – Dissent and Presidential Powers – **Case Note Due**

- Dennis v. United States (Documents, 790-794)
- Youngstown Sheet & Tube Co. v. Sawyer (Documents, 795-796)
- Yates v. United States (Documents, 805-809)

Questions to consider:

Why did the U.S. government imprison Japanese-Americans during World War II? How did the government attempt to justify this on constitutional grounds? What was young Earl Warren's role in all of this? Were the federal government's efforts to suppress free speech during the Cold War outrageous, or did it make some sense to quell the internal voices of opposition? What happened to presidential power during this period? Was the steel seizure case a victory for constitutional government, or a hindrance to legitimate presidential authority?

6. The Warren Court and American Liberalism

(Text, chapters 36-38)

Mar. 27 – Brown and Judicial Activism

- White, Earl Warren, 84-172
- Brown v. Board of Education (Documents, 797-800)
- Brown v. Board of Education, II (Documents, 801-802)

Apr. 1 – Desegregation

- “Southern Manifesto on Integration” (Documents, 803-804)
- Cooper v. Aaron (Documents, 810-812)

- ❖ Derrick Bell, “Bell, J., Dissenting,” in Balkin, ed., What Brown v. Board of Education Should Have Said, 185-200.
 - ❖ Michael J. Klarman, “How Brown Changed Race Relations: The Backlash Thesis,” Journal of American History, 81 (1994): 81-118.
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April 3 – Civil Rights

- Title II, Civil Rights Act of 1964 (Documents, 834-835)
- Heart of Atlanta Motel v. United States (Documents, 836-837)
- *Handout*: Katzenbach v. McClung

Apr. 8 – Reapportionment and Privacy

- White, Earl Warren, 173-190, 217-230
- Baker v. Carr (Document, 816-819)
- Griswold v. United States (Documents, 838-840)

Apr. 10 – Religion, Criminal Justice, and the Backlash – **White reviews due**

- White, Earl Warren, 263-278, 305-369
- Engel v. Vitale (Documents, 820-823)
- Mapp v. Ohio (Documents, 813-815)
- Miranda v. Arizona (Documents, 846-852)

Questions to consider:

What was the constitutional basis for the Brown decision? How did it reflect Warren’s theory of judging? Did southern conservatives have any valid constitutional reasons for opposing desegregation? What do Brown and subsequent cases like Heart of Atlanta tell us about the Warren’s Court’s method of decision making? What were the respective roles of the executive and legislative branches in the Second Reconstruction? How did the Warren Court go about expanding the civil liberties of Americans? Why did Warren consider Baker v. Carr the most significant of his Court’s decisions? Why were the Court’s criminal procedure decisions so significant? What was the role of interest groups such as the NAACP and the ACLU in all of this? Did the Warren Court usher in a dangerous period of “government by judiciary,” or was it simply attempting to correct long-standing social injustices through adhering to a principled, results-oriented jurisprudence?

7. Constitutional Conflict in the Late Twentieth Century

(Text, chapters 39-43)

Apr. 15 – The Presidency in Crisis

- Gulf of Tonkin Resolution (Documents, 830)
- War Powers Act (Documents, 896-898)
- *Handout*: U.S. v. Nixon

Apr. 17 – Women’s Rights and Abortion

- Proposed Equal Rights Amendment (Documents, 884)
- Roe v. Wade (Documents, 889-895)
- Frontiero v. Richardson (Documents, 899-901)

Apr. 22 - The Rehnquist Court and Conservative Constitutionalism

- Brennan v. Meese on Construing the Constitution (Documents, 948-955)
- Planned Parenthood v. Casey (Documents, 997-1004)
- United States v. Lopez (Documents, 1023-1027)
- ❖ Jeffrey Toobin, “The Federalist War of Ideas,” in The Nine: Inside the Secret World of the Supreme Court, 11-22.

Apr. 24 – Recent Developments/Summary and Review

Questions to consider:

What was the impact of Vietnam and Watergate on the modern presidency? How successful has the Court been in resolving such controversial issues as abortion? Did the Court overstep its bounds in Roe, for example, by “legislating” when it should have exercised restraint? What are the components of conservative constitutionalism? Is original intent a reasonable basis for constitutional interpretation, or is it all just bunk? Can we really know the intent of the framers? Even if we could know it, should we care what they thought? What is the future shape of the Supreme Court and the Constitution?

FINAL EXAMINATION: Saturday, May 3, 8:30 a.m.