

**American Constitutionalism I:
Structures of Power**
Political Science 216
Williams College

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W 10-11:30, F 1-2:30, and by appointment

Fall 2018
M(W)F 8:30-9:45
Griffin 4

Description.

How has the American Constitution been debated and understood over time? What is the relationship between constitutional and political change? This course examines the historical development of constitutional law and politics from the Founding to the present. Our focus is on *structures of power*—the limits on congressional lawmaking, growth of presidential authority, establishment of judicial review, conflicts among the three branches of the federal government, and boundaries between the federal and state and local governments—but, to the extent that these concerns implicate substantive debates about issues such as equality or privacy, we will touch on individual rights as well. (Those issues, along with freedom of religion and speech, property, criminal process, and much more, are covered extensively in American Constitutionalism II: Rights and Liberties.) The specific disputes range from secession to impeachment, gun control to child labor, waging war to spurring commerce; the historical periods to be covered include the Marshall and Taney Court years, the Civil War and Reconstruction, the Progressive Era, the New Deal, the Warren Court, and the conservative ascendancy of the late twentieth century. Throughout the semester, our goal will be less to remember elaborate doctrinal rules and multi-part constitutional “tests” than to understand the changing nature of, and changing relationship between, constitutional power and constitutional meaning in American history.

Objectives.

Thinking Contextually. Contrary to popular (and even much academic) belief, the Constitution exists outside the marble temple of the Supreme Court. In fact, rather than solely the province of “law,” constitutional disputes and resolutions are the products of executive, legislative, bureaucratic, partisan, and mass politics. Thus, while we will pay close attention to the Supreme Court, we will also strive to make sense of constitutional struggles not as exclusively judicial or peculiarly apolitical occurrences but as one (perhaps unique) type of politics that is inextricably woven into the fabric of American government. In other words, we will attempt to imagine the Constitution not in isolation but within the broader context of the American socio-polity.

Thinking Dynamically. The Constitution shapes politics, but, as we shall see, it is also shaped by politics—and, indeed, by many other forces as well. Our challenge, therefore, is two-fold: first, to think about both the ways in which the Constitution responds to political, social, economic, and intellectual currents and crises; and, second, to think about the ways in which such phenomena are a function of the structure and substance of the Constitution itself. As a result, we will consider the readings not as static cases or documents but as parts of broader trajectories and narratives of legal, political, and constitutional evolution.

Format.

Class will combine elements of lecture, discussion, and what is traditionally considered the “Socratic method” (targeted questioning of students). In order to facilitate broad participation, I will

both accept volunteers and call on students directly. In either case, there will be ample opportunity for you to ask questions, share your views, and interrogate the course material.

Materials.

- The Constitution of the United States of America (handout) (Const)
- McCloskey (and Levinson), *The American Supreme Court*, 6th ed. (2016) (McC)*
- PSCI 216 course packet (in four volumes) (CP)**

Contributions.***

Essays (20% each for a total of 60%). Three 5-7 page analytic essays due on dates of your own choosing, with the stipulation that you hand in at least one essay for or before session 14 (“The Four Horsemen” – October 26) and at least one essay after that session. (Failure to do so will result in a zero for one of your essay grades.) You may, if you wish, submit a fourth essay, in which case I will drop the lowest of the four—provided it is not a zero—when calculating your course grade. Each essay will answer a question from the attached list and is due at the beginning of the class for which that particular question is posed. Your challenge in these essays is neither to embark upon outside research nor to summarize the views of others but, rather, to analyze the material (both primary and secondary), reflect on the issues at hand, and articulate your own argument in the form of a well-reasoned and well-supported answer to the assigned question.

Final Exam (25%). A cumulative two-part endeavor combining an abbreviated (one hour) scheduled exam of identifications and notable quotations with a 24-hour take home essay exam. Provided sufficient interest, I will be glad to hold a review session at the conclusion of the semester.

Class Participation (15%). A process of *active engagement* that entails more than simply showing up. Accordingly, participation grades are not a “free 15%” but, rather, a reflection of my holistic assessment of your performance in class.

Evaluation.

Written Work. Good writing is good thinking—that is to say, writing well first requires thinking well. The manner in which and the depth with which you approach writing and thinking will be the determining factors in your grade. More specifically, I base grades for written work on the following three factors: the extent to which you make a clear, compelling, and original *argument*; the extent to which you support that argument through close analysis and consideration of primary and secondary source *evidence*; and the extent to which you organize and articulate your thoughts in a logical and sophisticated *structure*. Needless to say, proper mechanics of writing—including features such as grammar, capitalization, punctuation, spelling, and so forth—are assumed; be sure to proofread your work in order to catch any errors along these lines.

Written work in the **A** range is characterized by a strikingly creative, perceptive, and persuasive argument; comprehensive synthesis and trenchant analysis of an abundance of course material; straightforward yet sophisticated organization of thoughts; and clear, cogent, fluid, and error-free prose. Written work in the **B** range is characterized by a sound, original, and reasonably thoughtful argument; competent analysis of various course material; logical and intelligible organization; and clear, cogent, and error-free prose. Written work in the **C** range is characterized

* Available for purchase at The Williams Bookstore.

** The first volume is available for pickup at the Class of '37 House (51 Park Street) from 9am to 3:30pm M-F; the subsequent volumes will be distributed in due course.

*** I reserve the right to fail any student who fails any element—essays, final exam, class participation—of the course.

by a relatively underdeveloped, simplistic, or derivative argument; partial, inconsistent, or faulty analysis of course material; convoluted organization; and awkward, stilted, or otherwise distracting prose. Written work in the **D** range is characterized by an incoherent or extremely confusing argument; superficial or fleeting engagement with the course material; chaotic or irrational organization; and distorted, error-riddled prose. Written work that lacks any argument or analysis, fails to engage the course material, or is any way incomprehensible earns an **F**.*

Participation. Three factors contribute to class participation grades: the degree to which you demonstrate analytic or critical understanding of the course material, the degree to which you articulate thoughtful or original questions and arguments in response to the course material, and the degree to which you succeed in advancing discussion by responding meaningfully to what others have said. The emphasis here is on *quality*, not *quantity*. Select insightful offerings are infinitely more valuable than a multitude of derivative or mediocre ones. Worry not: provided you attend class, complete the reading, and think carefully about the themes of the course, you will be in an excellent position to contribute thoughtfully to discussion.

Participation grades in the **A** range are reserved for those students who consistently come to class with questions and comments, engage others in a respectful manner, and generally elevate the level of discussion. Participation grades in the **B** range are earned by those students who participate but do not stimulate discussion, adequately listen to their classmates, or relate their comments to the direction of the conversation. Participation grades in the **C** range are for those students who are infrequent or unwilling contributors to discussion. Participation grades of **D** and **F**, respectively, are for those students who do not arrive adequately prepared for class and for those who disrupt and detract from the overall quality of the course.

Responsibilities.

Attendance. To the extent that class only works if you are all there—engaged in a common enterprise, building the intellectual and interpersonal connections (with both me and one another) that are necessary for sustained and robust debate about weighty and contested issues—I expect you to be in class *each and every day*. I do not formally call roll, but do not mistake my distaste for that tedious ritual for indifference to your company: I notice—and make a mental note!—when you are absent. Besides avoiding my undying wrath, you should plan on full attendance for three reasons. First, participation, which counts for 15% of your final grade, is impossible if you are not present. Second, the lectures and discussions that occur in class will be crucial elements of your learning in this course. Third, and most importantly, by choosing to take this class, you are making a commitment to me, to your classmates, and to yourself that you will be an active and engaged participant in our academic community. Class will go on without you, but everyone’s learning will suffer as a consequence of your absence. Thus, you should treat attendance as a firm requirement, not some fungible quasi-commitment that can be trumped by other desires or conveniences as you see fit.**

Punctuality and Preparedness. As part of your aforementioned commitment to me, your classmates, and yourself, you are expected to arrive in class on time, prepared, and *without technological*

* The following adjectives capture the essence of what individual grades mean in this course: truly exceptional (A+), outstanding (A), excellent (A-), very good (B+), good (B), satisfactory (B-), fair (C+), sub-par (C), poor (C-), seriously deficient (D+), minimally acceptable (D), borderline unacceptable (D-), completely unacceptable (F).

** Note well: if you are a member of an athletic team or some other extracurricular organization that travels for competitions or performances, I suggest you check your schedule—and/or consult your coach, captain, or advisor—now. If you have a conflict with our class time and are not willing, as I assure you is your right, to choose class over whatever activity is compelling you to miss it, you should drop this course.

distractions. This means, first, that you have thoroughly and carefully read the material before class and, second, that you have thought about that material and are willing and ready to contribute your thoughts to discussion. Of course, I recognize that students lead busy lives, have commitments (both academic and otherwise) in addition to this course, and may occasionally be affected by unforeseen events and unpredictable circumstances that make adequate preparation difficult. Even in those instances, I still urge you to come to class and encourage you to let me know—either through an email in advance of class or a quick comment upon entering class—that you were unable to prepare as fully as you had hoped. Not only will you not be penalized for your disclosure, but I agree not to call on you for that period. I trust you not to abuse my generosity by availing yourself of this option more than twice.

Discourse and Decorum. You are responsible for conducting yourself appropriately—both in your own comments and in your responses (verbal or otherwise) to the comments of your peers. As respectful discourse is the norm, criticism should be reserved for ideas, arguments, and opinions rather than for people; ad hominem comments will not be tolerated.

Submitting Work. Since there is already considerable flexibility built into the schedule of course assignments (*twenty* distinct dates for which, and subjects on which, to write an essay!), I expect you to hand in work on time. Because the assignments are intended to provoke critical thinking about particular issues *before* we discuss them in class, I will neither grant extensions nor accept late work. Moreover, since class discussions will often (though not always) be geared around the essay questions and thus reliant on students who have answered them to offer opinions and insights, I only accept essays submitted *in class and in person*. These policies are not meant to be punitive but, rather, to help enrich learning by enabling each of you to develop ideas independently and then share those ideas with the rest of us in the appropriate class session.

Academic Honesty. I hope—frankly, I *expect*—this will not be an issue, but it is worth repeating that all work you do in this course is governed by the College’s Honor Code. (If you have any questions about how the Honor Code applies, do not hesitate to ask!) I take scholarly integrity very seriously, and any suspected violations will be pursued to the fullest extent. *No exceptions.*

Contact Information.

Email. The most efficient way to reach me is via email. Email received before 9pm will usually receive a reply that day; email received after 9pm will likely receive a reply the following day.

Office Hours. For my regularly scheduled office hours, no sign-up or prior notice is necessary, nor is a specific course-related question or concern. (If you wish to schedule an appointment for another time, you should let me know a few days in advance.) Although I am obviously available to discuss any issues that may arise in class or in the reading, you are also more than welcome to stop by and join me for some friendly conversation. Indeed, I encourage you to do so; really—come see me. I am interested in learning about you and your thoughts, and I never (well, ok, hardly ever) tire of talking about American constitutionalism.

Some Final Thoughts.

I take teaching seriously, and I hope you will reciprocate by taking learning seriously. That said, I intend for our classes to be enjoyable—both for you and for me. This course revolves around rich, interesting, and controversial debates, many (if not all) with direct connection to current events and contemporary American politics. So expect to teach each other and to learn from each other, but also expect to enjoy yourself; for my part, I promise to do the same.

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Introduction

1. Blago, Burris, and Constitutional Fill-in-the-Blank (September 7)

I. In the Beginning...*

2. From Colonies to Confederation to the Miracle at Philadelphia (September 10)
 - CP: The Declaration of Independence
 - Paine, from *Common Sense* and *The Crisis*
 - The Articles of Confederation
 - Madison, “Vices of the Political System of the United States”
 - Virginia Plan
 - New Jersey Plan
 - Wood, “Introduction” from *The Radicalism of the American Revolution*
 - Ellis, “The Generation” from *Founding Brothers*
 - Rakove, “The Politics of Constitution-Making” from *Original Meanings*
3. We the People (September 12)**
 - CP: Epps, “How to Read a Constitution” from *American Epic*
 - Const: Preamble and Articles I-VII (a general sense)
 - Preamble and Articles I-VII (a fine-toothed comb)
 - Preamble and Articles I-VII (a critical eye)
4. The American Science of Politics (September 14)
 - CP: Adams, Letter to Richard Henry Lee
 - Centinel and Brutus, *The Anti-Federalist I*
 - Brutus, *The Anti-Federalist II*
 - Publius, selections from *The Federalist*
 - Dry, “The Constitutional Thought of the Anti-Federalists”
 - Hofstadter, “The Founding Fathers”

II. The Early Years

5. Baby Steps (September 17)
 - CP: Judiciary Act of 1789
 - Hayburn’s Case* (1792)
 - Chisholm v. Georgia* (1793)
 - Const: 11th Amendment
 - CP: *Hylton v. US* (1796)
 - Calder v. Bull* (1798)
 - Alien and Sedition Acts

* Quite remarkably, the College owns *original* copies of the nation’s founding documents, including the Declaration of Independence, the Articles of Confederation, the Constitution, *The Federalist*, and the Bill of Rights—all housed in the Chapin Library (on the fourth floor of Sawyer Library). While I will not require you to visit, I cannot recommend strongly enough that you choose to do so at some point during this first unit.

** Since we will lose one of our class sessions in October for Mountain Day—a function solely of meeting MF rather than MW—we are adding a Wednesday session here.

- Virginia and Kentucky Resolutions
 McC: pp. 1-23
 CP: Freeman, “Explaining the Unexplainable”
6. Politics and (in?) the Judiciary (September 21)
 Const: Articles III and VI
 CP: Brutus, *The Anti-Federalist* XI and XII
 Publius, *The Federalist* 78 and 81
 The Constitution and the Election of 1800
 Jefferson, First Inaugural Address
 Judiciary Act of 1801
 Judiciary Act of 1789, Section 13 [from session 5]
Marbury v. Madison (1803)
Stuart v. Laird (1803)
 Thomas Jefferson on Departmentalism
Eakin v. Raub (1825)
 McC: pp. 23-30
 CP: Graber, “The Problematic Establishment of Judicial Review”
 Budzisz, “*Marbury v. Madison*”
7. The Project of Nation-Building (September 24)
 Const: Article I, Section 8, Clause 18 (the last one – beginning with “--And To make”)
 Article VI, Clause 2
 CP: Publius, *The Federalist* 82
 Const: 1st-10th Amendments
 CP: *Fletcher v. Peck* (1810)
 Jefferson, Opinion on the Constitutionality of the Bank
 Hamilton, Opinion on the Constitutionality of the Bank
McCulloch v. Maryland (1819)
 Spencer Roane and John Marshall on *McCulloch v. Maryland*
 Judiciary Act of 1789, Section 25 [from session 5]
Martin v. Hunter’s Lessee (1816)
Cohens v. Virginia (1821)
 Sidney, “On the Lottery Decision”
 Jefferson, Letter to William Johnson
 The Battle to Repeal Section 25 of the Judiciary Act of 1789
Barron v. Baltimore (1833)
 McC: pp. 30-44 (until “Much the same...”)
8. Contracts, Commerce, and the Roots of American Political Economy (September 28)
 Const: Article I, Section 8, Clause 3
 Article I, Section 10, Clause 1
 CP: *Fletcher v. Peck* (1810) [from session 7]
New Jersey v. Wilson (1812)
Dartmouth College v. Woodward (1819)
Gibbons v. Ogden (1824)
Willson v. Blackbird Creek Marsh (1829)
 McC: pp. 44-52 (from “Much the same...”)

CP: Newmyer, “Capitalism and the Marshall Court” from *The Supreme Court Under Marshall and Taney*

III. A Nation Divided

9. The Jacksonians Come to Court (October 1)

Const: Article I, Section 8, Clause 3
Article I, Section 10, Clause 1
Article IV, Section 4

CP: Introductory Statement of the Democratic Principle

Jackson, Maysville Road Bill Veto
Clay, Speech on the Maysville Road Veto
Calhoun, “Fort Hill Address”
Webster, Speech on Nullification
South Carolina Ordinance of Nullification
Jackson, Proclamation on Nullification
Jackson, Veto Message Regarding the Bank of the United States
Webster, Speech on the Bank Veto
Charles River Bridge v. Warren Bridge (1837)
Mayor of New York v. Miln (1837)
Luther v. Borden (1849)
Cooley v. Board of Wardens (1852)

McC: pp. 53-59

10. Law, Courts, and the Peculiar Institution (October 5 or 12)*

Const: Article I, Section 9, Clause 1
Article IV, Section 2

CP: *The Antelope* (1825)

Garrison, “On the Constitution and Union”
Jacksonians Reorganize the Federal Judiciary
Prigg v. Pennsylvania (1842)
Douglass, “The Constitution and Slavery”
Fugitive Slave Act of 1850
Emerson, Address to the Citizens of Concord on the Fugitive Slave Law
Douglass, “What to the Slave is the Fourth of July?”
Dred Scott v. Sandford (1857)
Lincoln, Speech on the *Dred Scott* Decision
Ableman v. Booth (1859)

McC: pp. 59-64, 65-66 (from “But like Marshall...”)

CP: Graber, from *Dred Scott and the Problem of Constitutional Evil*
Wilentz, “Constitutionally, Slavery Is No National Institution”
Rael, “Racist Principles”

* The dates of the next three sessions—Law, Courts, and the Peculiar Institution; Forged in the Crucible of War; From the Ashes of War, the Seeds of Discord—will depend upon which Friday class is cancelled for Mountain Day. Whenever Mountain Day is announced, we will simply postpone consideration of the scheduled material until the next session, adjusting—but maintaining the order of—the subsequent classes accordingly.

11. Forged in the Crucible of War (October 12 or 15)
 Const: Article I, Section 9, Clause 2
 Article II, Section 2, Clause 1
 CP: South Carolina Ordinance of Secession
 Davis, “The Right of Secession”
 Lincoln, First Inaugural Address
 Ex parte Merryman (1861)
 Lincoln, Fourth of July Message to Congress
 Bates, Opinion on the Suspension of Habeas Corpus
 Lincoln, Proclamation Suspending Habeas Corpus
 Curtis, from *Executive Power*
 Lincoln, Second Annual Message to Congress
 The Prize Cases (1863)
 Lincoln, Emancipation Proclamation
 Lincoln, Gettysburg Address
 Lincoln, Second Inaugural Address
 Ex parte Milligan (1866)
 McC: pp. 64-65 (until “But like Marshall...”), 70-73 (until “The enemies of...”)
 CP: Vermeule, “Lawfare from the Bench”
 Kleinerman, “Lincoln’s Example”
 Bradford, “Abraham Lincoln Reconsidered”

IV. Anatomy of a Constitutional Revolution

12. From the Ashes of War, the Seeds of Discord (October 15 or 19)
 Const: 13th Amendment
 CP: The Republicans Reorganize the Federal Judiciary
 Johnson, First Annual Message to Congress
 Civil Rights Act of 1866
 Johnson, Veto of the Civil Rights Act of 1866
 Johnson, Repealer Act Veto Message
 Const: 14th and 15th Amendments
 CP: *The Slaughterhouse Cases* (1873)
 Civil Rights Act of 1875
 The Civil Rights Cases (1883)
 Const: Article I, Sections 8 and 9
 10th Amendment
 CP: Resolutions of a Meeting of the Illinois State Farmers’ Association
 Munn v. Illinois (1877)
 Wabash, St. Louis & Pacific Railway v. Illinois (1886)
 Brewer, “The Nation’s Safeguard”
 Ely, “The Doctrine of Laissez Faire is Unsafe in Politics and Unsound in Morals”
 Sumner, “The Absurd Effort to Make the World Over”
 Field, “The Centenary of the Supreme Court of the United States”
 Thayer, “Origin and Scope of the American Doctrine of Constitutional Law”
 Populist Party Platform of 1892
 US v. E.C. Knight (1895)
 Pollock v. Farmers’ Loan & Trust (1895)

Bryan, "A Cross of Gold"
McC: pp. 67-70, 73-90 (from "The enemies of...")
CP: Vorenberg, "Bringing the Constitution Back In"

13. Progressive Protections and Laissez-Faire Limitations (October 22)

Const: 10th Amendment
CP: *Champion v. Ames* (1901)
McCray v. US (1904)
Smith, *The Spirit of American Government*
Croly, *The Promise of American Life*
Roosevelt, "A Charter of Democracy"
Wilson, "The Meaning of Democracy"
Progressive Party Platform of 1912
Hoke and Economides v. US (1913)
Hill, "The Crisis in Constitutionalism"
Const: 16th-18th Amendments
CP: *Hammer v. Dagenheart* (1918)
Bailey v. Drexel Furniture (1922)
Progressive Party Platform of 1924
Const: 14th Amendment
CP: *Lochner v. New York* (1905)
Muller v. Oregon (1908)
Const: 19th Amendment
CP: *Adkins v. Children's Hospital* (1923)
Nebbia v. New York (1934)
McC: pp. 91-108

14. The Four Horsemen (October 26)

Const: Article I, Section 8, Clauses 1 and 3
10th Amendment
CP: Hoover, "Rugged Individualism"
Roosevelt, Commonwealth Club Address
Schechter Poultry v. US (1935)
Roosevelt, Undelivered Speech on the Gold-Clause Cases
US v. Butler (1936)
Carter v. Carter Coal (1936)
Morehead v. Tipaldo (1936)
Roosevelt, Fireside Chat on Court-Packing Plan
McC: pp. 108-113
CP: Irons, "Boys With Their Hair Ablaze" from *The New Deal Lawyers*

15. You Say You Want a (Constitutional) Revolution... (October 29)

Const: Article I, Section 8, Clause 3
10th Amendment
CP: *West Coast Hotel v. Parrish* (1937)
NLRB v. Jones & Laughlin Steel (1937)
Steward Machine v. Davis (1937)
Senate Judiciary Committee Report on President Roosevelt's Court-Packing Plan

- Mencken, “A Constitution for the New Deal”
US v. Darby (1941)
 McC: pp. 116-119
 CP: Cushman, from *Rethinking the New Deal Court*
 Leuchtenburg, from *The Supreme Court Reborn*
16. Between Clerkship and Despotism (November 2)
 Const: Article II
 CP: Publius, *The Federalist* 70 and 71
 Presidents on Presidential Power
Myers v. US (1926)
Humphrey’s Executor v. US (1935)
J.W. Hampton v. US (1928)
US v. Curtiss-Wright Export (1936)
 Japanese Relocation Order
Korematsu v. US (1944)
Youngstown Sheet & Tube v. Sawyer (1952)
 McC: pp. 125-128
 CP: Bernstein, “Once Upon a Time, There Was a President...”
 Schuck, “Trump’s Bureaucratic Showdown”
 Kysar, “Is Trump’s Tariff Plan Constitutional?”
 Primus, “No, the Supreme Court Won’t Stop a Runaway President”
17. The Search for Standards (November 5)
 Const: Article I, Section 8, Clause 3
 10th, 14th, and 15th Amendments
 CP: *US v. Carolene Products* (1938)
Wickard v. Filburn (1942)
 Jackson, Memo on *Wickard*
Southern Pacific v. Arizona (1945)
Dean Milk v. Madison (1951)
 Eisenhower, Letter to Edgar Newton Eisenhower
Williamson v. Lee Optical of Oklahoma (1955)
Ferguson v. Skrupa (1963)
 McC: pp. 120-125
 CP: McCloskey, “Economic Due Process and the Supreme Court”
- V. The “Great” Society**
18. When Jim Crow Met Uncle Sam (November 9)
 Const: Article VI, Clause 2
 CP: Publius, *The Federalist* 78 [from session 6]
 Const: 5th and 14th Amendments
 CP: *US v. Carolene Products* – Footnote Four, Paragraph 3 (1938) [from session 17]
Brown v. Board of Education (1954)
Bolling v. Sharpe (1954)
Brown v. Board of Education II (1955)
 The Southern Manifesto

Eisenhower, Address to the Nation on the Introduction of Troops in Little Rock
Cooper v. Aaron (1958)
McC: pp. 138-146, 150-152 (until “Should one look...”), 255-257 (until “This outpouring of...”)
CP: Klarman, “*Brown v. Board of Education*”
Sunstein, “Did *Brown* Matter?”

19. The New Bill of Rights (November 12)

CP: Publius, *The Federalist* 84 [from session 4]
Const: 1st-10th Amendments
CP: *Barron v. Baltimore* (1833) [from session 7]
Const: 14th Amendment
CP: *Palko v. Connecticut* (1937)
Adamson v. California (1947)
Cortner, from *The Nationalization of the Bill of Rights in Perspective*
US v. Carolene Products – Footnote Four, Paragraph 1 (1938) [from session 17]
Engel v. Vitale (1962)
Griswold v. Connecticut (1965)
Miranda v. Arizona (1966)
Brandenburg v. Ohio (1969)
Roe v. Wade (1973)
Goldwater, “Speech Accepting the Republican Presidential Nomination”
McC: pp. 113-114 (until “The force of...”), 115-116 (from “Meanwhile a somewhat...” to “As for the problem...”), 133-138, 147-150, 154-157 (until “Similar latitude...”), 171-176 (until “None of the...”), 200-202 (until “In fact...”)
CP: Glazer, “Towards an Imperial Judiciary”
Powe, “What Was the Warren Court?” from *The Warren Court and American Politics*

VI. The Conservative Ascendancy

20. Publius Revisited (November 16)

Const: Article I, Section 2, Clauses 1 and 2
Article I, Section 5, Clauses 1 and 2
Article I, Section 7, Clauses 2 and 3
Article II, Section 2, Clause 3
CP: Publius, *The Federalist* 51 [from session 4]
Powell v. McCormack (1969)
US v. Nixon (1974)
Morrison v. Olson (1988)
Clinton v. Jones (1997)
INS v. Chadha (1983)
Clinton v. City of New York (1998)
National Labor Relations Board v. Noel Canning (2014)
Zivotofsky v. Kerry (2015)
McC: pp. 239-240 (from “In any event...” to “The period between...”), 221-223, 250-251 (from “Similar questions...” to “Some of the most...”)
CP: Amar, “The Unimperial Presidency”
Liptak, “A Constitutional Puzzle: Can the President Be Indicted?”

Savage, “Trump and His Lawyers Embrace a Vision of Vast Executive Power”
 Calabresi, “Mueller’s Investigation Crosses the Legal Line”
 Lubet and Koppelman, “Why the Mueller Investigation Is Constitutional”
 Fisher, “Legislative Vetoes After *Chadha*”
 Winkler, “Active Liberty Lives!”
 Posner, “Obama Is Legally Allowed to Enforce—Or Not Enforce—the Law”
 Salam, “Gridlock Is Good”

21. The Federalism (In?)Offensive (November 19)

Const: Article I, Section 8
 Article VI, Clause 2
 CP: Publius, *The Federalist* 39 and 46 [from session 4]
 Const: 10th Amendment
 CP: *Chisholm v. Georgia* (1793) [from session 5]
 Const: 11th Amendment
 CP: Reagan, Remarks at the National Conference of State Legislatures
 Reagan, First Inaugural Address
US v. Lopez (1995)
 Clinton, Fourth State of the Union Address
Printz v. US (1997)
Alden v. Maine (1999)
 Ginsburg, “Fidelity to the Written Constitution”
Granholm v. Heald (2005)
Gonzales v. Raich (2005)
US v. Comstock (2010)
Arizona v. US (2012)
National Federation of Independent Business v. Sebelius (2012)
 McC: pp. 224-232, 212-213 (from “A 2007 case...”)
 CP: Rosen, “The Unregulated Offensive”
 Pickerill and Clayton, “The Rehnquist Court and the Political Dynamics of Federalism”
 Brettschneider, “Local and State Government Can Protect the Constitution From Trump”
 Feldman, “Sanctuary Cities Are Safe, Thanks to Conservatives”
 Rivkin and Foley, “Can Trump Cut Off Funds for Sanctuary Cities?”

22. Gush v. Bore—Or, How the Court Learned to Stop Worrying and Embrace the First Rule of Politics (November 26)

Const: Article II, Section 1, Clause 2
 14th Amendment
 CP: Chronology of the Deadlock
Bush v. Gore (2000)
 McC: pp. 192-198
 CP: Margolick, Peretz, and Shnayerson, “The Path to Florida”
 podcast: *This American Life*, “Two Nations, One President” – Prologue, Acts I and IV
 CP: Greenhouse, “Learning to Live with *Bush v. Gore*”
 Turow, “A Brand New Game”
 Greve, “The *Real* Division in the Court”
 Yoo, “In Defense of the Court’s Legitimacy”

Calabresi, “In Partial (but not Partisan) Defense of Principle”
Tushnet, “The Conservatism in *Bush v. Gore*”
Cohen, “Has *Bush v. Gore* Become the Case That Must Not Be Named?”
Liptak, “*Bush v. Gore* Set to Outlive Its Beneficiary”

23. The Perpetual Threat and the Emergency Constitution (November 30)

Const: Preamble

Article II

CP: Publius, *The Federalist* 23

Home Building & Loan Association v. Blaisdell (1934)

Hamdi v. Rumsfeld (2004)

Hamdan v. Rumsfeld (2006)

Yoo, “The President’s Constitutional Authority to Conduct Military Operations”

Memoranda on Standards of Conduct of Interrogation

Boumediene v. Bush (2008)

Obama, Remarks on Drone and Counterterrorism Policy

Obama, Remarks on Changes to National Security Agency Programs

McC: pp. 213-220

CP: Mahler, “Why This Court Keeps Rebuking This President”

Deeks, “Courts Can Influence National Security Without Doing a Single Thing”

podcast: *This American Life*, “Secret Government” – Act III

CP: Lichtblau, “In Secret, Court Vastly Broadens Power of N.S.A”

Epps, “Can the Courts Make Congress Declare War?”

Williams, “From Torture to Drone Strikes”

Ackerman, “Trump Must Get Congress’s O.K. on Syria”

24. Democracy Divided (December 3)

Const: Article IV, Section 4

1st, 5th, 10th, 14th, and 15th Amendments

CP: *US v. Carolene Products* – Footnote Four, Paragraph 2 (1938) [from session 17]

Crawford v. Marion County Election Board (2008)

Arizona State Legislature v. Arizona Independent Redistricting Commission (2015)

Evenwel v. Abbott (2016)

Citizens United v. Federal Election Commission (2010)

McCutcheon v. Federal Election Commission (2014)

Shelby County v. Holder (2013)

McC: pp. 162-169, 182-192

CP: Cooper, “After Ruling, States Rush to Enact Voting Laws”

Liptak, “Supreme Court Upholds Ohio’s Purge of Voter Rolls”

Wines, “Is Partisan Gerrymandering Legal? Why the Courts Are Divided”

Dworkin, “The Decision That Threatens Democracy”

Smith, “*Citizens United* We Stand”

podcast: *This American Life*, “Take the Money and Run for Office” – Act III

CP: Bennet, “The New Price of American Politics”

Potter, “The Supreme Court Needs to Get Smarter About Politics”

La Raja, “The *McCutcheon* Decision Could Be Good News After All”

Purdy, “The Roberts Court Protects the Powerful for a New Gilded Age”

Davis and Tumulty, “D.C. and Maryland AGs: Trump ‘Flagrantly Violating’

Emoluments Clause”

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25. Of Institutions and Authority: Structures of Power and the Future of American Constitutionalism (December 7)
- Const: Article III
 - CP: *Boerne v. Flores* (1997)
 - McC: pp. 289-317
 - CP: Lasser, from *The Limits of Judicial Power*
 - Murphy, “Who Shall Interpret?”
 - Graber, “The Nonmajoritarian Difficulty”
 - Whittington, “The Political Foundations of Judicial Supremacy”
 - Sunstein, “Leaving Things Undecided” from *One Case at a Time*
 - Jones, “Trust in U.S. Judicial Branch Sinks to New Low of 53%”
 - Liptak, “Roberts Pulls Supreme Court to the Right Step by Step”
 - Rosen, “John Roberts, the Umpire in Chief”
 - Liptak, “A Polarized Supreme Court, Growing More So”
 - Hulse, “Political Polarization Takes Hold of the Supreme Court”
 - Liptak, “How Brett Kavanaugh Would Transform the Supreme Court”