**U.S. Constitutional Law**

**790: 401, Fall 2014**

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Mondays and Thursdays, 11:30am-12:50pm

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Office hours: Monday 11:30-12:30, Thursday 10:30-11:30

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*The Constitution does not say, “Read me broadly,” or “Read me narrowly.” That decision must be made as a matter of political theory.*

Judge Richard A. Posner, Seventh Circuit Court of Appeals, *The New Republic*, 1987

*…the Constitution embodies the desire of the American people, like most people, to have it both ways. We want security and order, and we want liberty. Not only do we want liberty, but equality as well.*

Retired Associate Supreme Court Justice, David Souter

*There never did, there never will, and there never can, exist a Parliament, or any description of men, or any generation of men, in any country, possessed of the right or the power of binding and controlling posterity to the "end of time," or of commanding forever how the world shall be governed, or who shall govern it; and therefore all such clauses, acts or declarations by which the makers of them attempt to do what they have neither the right nor the power to do, nor the power to execute, are in themselves null and void. Every age and generation must be as free to act for itself in all cases as the age and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man.*

Thomas Paine, *Rights of Man*, 1791

*I look forward to seeing my plays staged so I can find out what they mean.*

Tom Stoppard, playwright

This course introduces students to constitutionalism, constitutional law and legal decision-making in the United States. During the course of the semester, we will examine the logic of constitutional decisions, the role of courts in the political development of the United States, and the role of the judiciary in our political system. The course focuses on three major substantive areas of law: separation of powers; federalism; property. However, because the political, economic and social context is so important for understanding legal decision-making, we will explore these themes historically. That is, each of these areas of law have a long history in U.S. politics and viewing them through the historical lens sheds light on how constitutional questions have always reflected underlying political debates, and continue to do so today. It will also allow us to better understand how court decisions have both shaped and been shaped by social, political and economic circumstance. In addition to these topics, we will also discuss and debate the concept of judicial review and the role of the Supreme Court as a decision-making branch of government in a democratic society. Should the least accountable, entirely unelected branch of government decide important political questions?

This is a *political science* course and I am a political science scholar, not a lawyer. Thus, I do not view law as separate from politics, or as embodying some natural or divine purpose, which is transmitted through judges. Rather, I understand legal decision-making to be a part of our political system - albeit in different form than the other branches of government – and am mindful of the fact that no reading of the Constitution is neutral. As Judge Posner notes in the quote above, the Constitution itself offers precious few guidelines on how to read it. Thus, we will discuss how *every* reading of the Constitution, no matter how narrow or broad, is an *interpretation* and, in addition to understanding the motivations of different historical actors in their reading of the Constitution, we will endeavor to recognize and move beyond our own interpretive lens.

Furthermore, Justice Souter’s comments should remind us that it is not always easy to determine which values we should privilege, when they come into conflict. Thus, we will seek to understand how legal interpretations usually reflect larger political debates that are taking place in other branches of government and in the public sphere. The playwright Tom Stoppard’s wry observation that he must wait to see his plays staged before he knows what they mean is an apt way of approaching constitutional decision-making. If the Supreme Court is the final interpreter of the Constitution (and as we shall see, this has not always been the case), in a practical sense then, must wait until the court rules to really know what the Constitution means? What does it mean for democratic self-governance when some of the most important political issues of the day (including, recently, the outcome of presidential elections, the role of money in political campaigns and the availability of health care) are ultimately decided by nine unelected individuals?

Finally, consider Thomas Paine’s words. Paine was deeply concerned about the ability of elites to entrench their political and economic interests into law by regarding historic precedents and rules as sacrosanct and non-amendable. Concerned about the *Rights of Man* – about ordinary people – Paine argued that no document should bind future generations. Though Americans tend to disagree as to *which* portions of the Constitution should be held inviolable, they tend to agree that at least *some* should. Do you agree? Should your 21st century generation of Americans be held to the views, concerns and interests of 18th century Englishmen?

A note on reading legal cases: I view the study of constitutional decision-making as an opportunity to develop analytic thinking skills. In order to understand and argue case law, one must be willing to set aside one’s own assumptions and preferences and to articulate opposing points of view. The sooner you learn to do this, the better you will perform in this class and the more you will hone the critical thinking skills that will serve you well in life and will contribute to your capacity to be an active, involved citizen in our democratic process. One way to do this is to consider this course an immersion class. Just as language immersion is aimed at disrupting the default to your native language, this class is designed as an intensive immersion in critical legal thinking, designed to challenge our tendency to default to standard assumptions and cultural norms about law, politics and the meaning of the Constitution. Learn to set aside your political ideologies and try to think analytically about important questions of constitutionalism, democracy, judicial review, executive and legislative power, property and liberty. Thinking analytically about these topics does not require being any less passionate about them but rather, requires you to be *informed* about them.

**Please be aware that this course requires a lot of work**. You will brief 20-25 cases throughout the semester; take an in-class analytic exam and two case-law exams. In addition, I expect to see you in class regularly, to be prepared (that is, do the readings!) and participate in discussions. If you are not prepared to commit to this active learning experience, please opt for a different course.

**Academic Integrity**

“Academic freedom is a fundamental right in any institution of higher learning. Honesty and integrity are necessary preconditions of this freedom. *Academic integrity requires that all* *academic work be wholly the product of an identified individual or individuals*. *Joint efforts are* *legitimate only when the assistance of others is explicitly acknowledged.* Ethical conduct is the obligation of every member of the University community, and breaches of academic integrity constitute serious offenses.” http://teachx.rutgers.edu/integrity/policy.html#Integrity (emphasis added)

I expect that all of the work you hand in to me is work that you have produced on your own and that any information you obtain from other sources will be properly cited. While I encourage students to study together, *when you submit work for this class, it must be wholly your own*. If you have any questions or concerns about plagiarism, please see the university policy on academic integrity at the URL above or see me. Plagiarizing someone else’s work or other suspected violations of academic integrity will be referred to the appropriate Dean for investigation. If you have any questions or concerns about my expectations, please do not hesitate to ask me.

A note on on-line case summaries: It is very easy to find on-line summaries of the cases we read in this class. I do not care if you read them – I expect many of you will, especially early on when the language of the cases is confusing. However, reading the case opinions in our textbook is an important requirement for this class and your case briefs must be in your own words. There are two dangers of reading on-line summaries in lieu of the cases themselves. First, often, summaries use legal terms and other language that is not in the original case. This is a dead give-away to me that you did not read the case itself and are plagiarizing someone else’s legal summaries. Second, you will need to use the language of case opinions in the case law exams. If you are reading summaries instead of the judicial opinions themselves that are in the textbook, you will not learn the proper language and will perform poorly on the exams. In addition, when you have to read whole cases on-line later in the semester (those that are not in the textbook), you will be completely at sea.

So, do not rely on google to do your work for you! You can read as many summaries as you like to better understand what the cases are about but you must do the heavy lifting of this class yourself: read the legal opinions and write your own summaries.

**PLEASE NOTE**: I consider selling or buying lecture notes for this class to be a violation of the University policy on academic integrity.

**Disability Accommodation**

“Rutgers University is committed to providing an environment where all students can equally participate in the academic experience. The accommodation of students with disabilities who meet admissions requirements is mandated by both federal and state law. Rutgers University supports these laws by pledging to comply with their requirements.”

http://www.rci.rutgers.edu/~polcomp/fachand.shtml#sec1

If you anticipate needing any type of reasonable accommodation in this course or have questions about accessibility, please contact me immediately.

**Required texts**

The following textbook is available at the Rutgers Bookstore:

Gillman, Howard, Mark Graber, and Keith Whittington. *American Constitutionalism, Volume I.* Oxford University Press. 2013. [referred to as GGW on the syllabus]

There are also readings on the Sakai site and case readings on-line.

**Course requirements**

*Briefs (20%)*: Your first brief is due on September 15th and is credit/no credit. You will not be penalized if you receive a “no credit” on the brief but you will be penalized one brief point if you do not turn it in at all. You then have several classes where one or two briefs are due each class. After that, all cases from must be briefed and handed in on the appropriate due date, usually Monday (see attached Case Briefing handout – there are a few days where you don’t have to brief all the cases). I will grade one brief each week; each brief is worth two points. I will count 8 briefs in all. You will have the opportunity to hand in an additional brief during the semester. Please note, optional briefing does NOT mean optional reading! All cases are required reading and you will be expected to know them for the case law exams. **Late briefs will not be accepted under any circumstances (early is OK).** There is ample opportunity for acquiring full brief credit. If you miss a week, remember to do the optional briefs when they arise. There will also be an opportunity for acquiring an additional brief point or two later in the semester. See attached page on Case Briefing.

*Analytic quiz (25%), October 9th:* This in-class quiz involves two sections. The first is an excerpt from a federal court case (one we have not read), which you will need to read and brief. The second involves short answer questions to some of the key discussions we have had about the political underpinnings of constitutional decision-making.

*Case law exam I* (25%), *November 10th*: The first case law exam involves issues up to and including the New Deal. This exam will involve two hypothetical cases on two separate legal questions, which you will receive in advance. Your job is to write legal arguments on both sides of both cases. When you arrive in class for the exam, I will flip a coin to determine which case you will actually write about for the exam. You will be permitted to bring one sheet of notes to class with you. I will explain this exam further throughout the beginning of the course.

*Case law exam II* (30%), *(take home) due December 15th*: This is the same format as the first exam but is a take-home exam. It will focus heavily on cases and issues since the first case law exam but will expect you to draw on previous cases and precedent as necessary.

*Class attendance***:** Attendance is essential. You cannot learn the material in this class without being present during the class period. If you absolutely must miss class, please ask one of your

classmates for notes. You should make a friend or two early on the class so you know whom to

contact if you miss class. You can also use the chat room of the Sakai site to ask for assistance.

Please do not come to me after you have missed class and ask me what, if anything, you missed.

This is an action-packed class and you will always miss a lot of material if you are not in class, which I cannot possibly summarize it for you in a short period of time, even if I were inclined to do

so (and I am not). If you have any conflicts with this class time, I suggest you opt for a different course.

*Keeping up with the news:* There will be no doubt numerous stories relating to the Supreme Court, the

constitution and other important legal issues in the news this fall. In order to strengthen and hone

your critical thinking skills, you should make a habit of skimming through, on a regular basis, at

least one of the following sites a few times a week:

*New York Times*: www.nytimes.com

*Wall Street Journal*: www.wallstreetjournal.com

Supreme Court blog: www.scotusblog.com

**Schedule of readings (changes may be made with a week’s notice)**

Readings from the **textbook** are labeled **GGW** in **bold,** followed by a page number.

Readings on the Sakai site have an asterisk (\*) and can be found under the Resources

Section.

On-line cases have a URL and a case citation (XX U.S. YY). You must locate these cases using Lexis-Nexis (I will show you how to do this)

**When specific cases are listed on a given day, they can be found within the page numbers**

**that are listed on the syllabus (unless they have an asterisk, in which case they are on-line).**

**You do not need to look up the cases in the index to find them. Just read the page numbers**

**that are listed and you will come across the cases.**

**I. Introduction, Legal Reasoning, Constitutional Interpretation and Judicial Review**

Thursday, Sept 4th: Course Introduction

Monday, 8 Sept: Introduction to American Constitutionalism in the Colonial Era

What is a constitution? What are constitutions for? Do they require rigidity? Can or should they evolve over time? What were the primary points of conflict between the colonists and Britain that were articulated in constitutional terms?

**GGW, ch. 1, pgs 1-10; ch. 2, pgs 31-47; Appendix 1 (Constitution of the United States)**

**\*Loughlin, Martin, “What is a constitution?” (From *The British Constitution: A Very Short Introduction,* Oxford University Press 2013)**

**Read this syllabus!**

Thursday, 11 Sept: Constitution-making, Part I

What were the key constitutional conflicts at the founding of the Republic? How did state constitutions shape national constitutional reform? How did the political interests of the various groups involved affect the debates about the Constitution? What role was considered for the judiciary? Imagine you are framing a *democratic* constitution today. What issues would you take out of the political realm and place in the hands of a non-elected branch of government and why?

**GGW, ch 3 (49-90)**

**GGW, pgs 733-34, Briefing a Case**

Monday, 15 Sept: Constitution-making, Part II: Judicial Review

Why do you think Chief Justice John Marshall makes the decision he does in *Marbury v. Madison*? What are its implications? How does it reflect his views as a Federalist?

**GGW, ch. 4, 93-118**

→*Calder v. Bull* brief due today (credit/no credit)

Thursday, 18 Sept: Constitutional Interpretation, Part I

How was the Constitution interpreted differently on the most important issue of conflict in the 19th century, slavery? What merits are there to reading the Constitution the way Douglass reads it? Do you agree that this is a plausible interpretation of the Constitution or do you think this is wishful thinking on Douglass’ part? Can we separate Calhoun’s defense of slavery from his reading of the Constitution as a compact between states? Is there a philosophical argument for such a view, independent of his defense of slavery? How would we know the difference?

**GGW, ch 1., pgs 10-26**

**\*Frederick Douglass**, **“The Constitution of the United States: Is It Pro-slavery or Anti-slavery?”** Glasgow, Scotland, March 26, 1860.

**\*John C. Calhoun, Speech on slavery resolutions, U.S. Senate, 1847**

**II. Early National Era (1789-1828) and Jacksonian Era (1829-1860)**

Monday, 22Sept: Congressional power, early national era

Notice how, in the early 19th century, debates about how much power the Constitution affords Congress are already occurring. Why do you think this is? How do the conflicts over the national bank reflect existing cleavages between different political and economic interests? What political context underlies Marshall’s legal reasoning in *McCullogh and Gibbons?* Is the judiciary the appropriate institutional venue for deciding these issues? Note: the section on the military draft and territorial acquisition, though not involving case law, helps us understand the key interests at stake in debates about congressional power. How?

**GGW ch. 4 pgs 118-166**

*McCullogh v. Maryland, Gibbons v. Ogden, Chisolm v. Georgia*

**→Case briefs due today**

Thursday, 25 Sept: Executive power, early national era

What is the executive for? What is the source of its power? How much power does it have or should have? Which side of the debate on the Jay Treaty do you find more compelling and why?

**GGW, ch. 4, 167-182**

Monday, 29 Sept: Judicial power, Jacksonian era

How are the federal courts implicated in larger political battles over citizenship, slavery and economic development in the antebellum period? What is at stake and why do these conflicts become constitutional questions?

**GGW, ch. 5, 185-220**

*Pennsylvania v. Prigg*, *Dred Scott v. Sanford*

***Cherokee Nation v. GA*, 30 U.S. 1**

→Case brief due today, *Cherokee Nation v. Georgia*

Thursday, 2 Oct: Federalism, Jacksonian era

How much power does the Constitution afford Congress, relative to the states? What, if anything, is reserved for the states? How do we determine the answers to these questions? What political interests are at stake in these debates?

**GGW, ch. 5, pgs 221-233**

*City of NY v. Miln, Cooley v. Board of Wardens, Worcester v. Georgia*

→Case brief due today, *City of NY v. Miln*

Monday, 6 Oct: Presidential power and foreign affairs, Jacksonian era

What are the limits of executive power? What issues were at stake during the Jacksonian era and what constitutional arguments were made in favor of one side or another?

**GGW, ch. 5, pgs. 233-247**

Thursday, 9 Oct: Analytic Exam. Arrive on time!

**III. Civil War and Reconstruction (1861-1876)**

Monday, 13 Oct – Thursday, 16 Oct: Federalism and separation of powers.

→NOTE: beginning today, ALL briefs for the week are due on MONDAY.

What is the impact of the Civil War, Reconstruction and new territories on federalism, congressional and presidential power, and the judiciary? How do the issues raised in the legal tender cases reflect these debates?

**GGW, chapter 6, pgs 249-313**

*Mississippi v. Johnson, Legal Tender Cases, Texas v. White, Ex parte Merryman, The Prize Cases*

→Case briefs due Monday

IV. **The Republican Era, New Deal and Great Society**

Monday, 20 Oct – Thursday, 23 Oct: Congressional commerce power, due process.

Issues of federalism, separation of powers and judicial power gradually become more about economic development than about war, military exigency, currency, presidential authority and the preservation of the Union. Why? What is happening during this time and what is at stake in these debates? How does the civil war and congressional efforts to eliminate the vestiges of slavery (like lynching) affect these issues?

**GGW, chaper 7, pgs 319- 367, 389-402**

*Slaughterhouse cases, The Civil Rights Cases, US v. EC Knight, Champion v. Ames, Hammer v. Dagenhart, Munn v. Illinois*

→Case briefs due Monday

Monday, 27 Oct – Thursday, 30 Oct: Congressional commerce power and judicial review.

How does the Great Depression affect powers of government in terms of Supreme Court decisions? What do you think of the changes to court opinions? How do the ongoing efforts of southern states to restrict racial progress influence these debates? Is the judiciary the appropriate place to decide these conflicts?

**GGW, ch. 8, pgs 417-442, 458-480,**

*Schechter Poultry v. US, NLRB v. Jones & Loughlin Steel, Wickard v. Filburn, Heart of Atlanta Motel v. US, South Carolina v. Katzenbach*

→Case briefs due Monday

Monday, 3 Nov – Thursday, 6 Nov: Presidential power

Do foreign and domestic powers of the presidency differ? On what basis should we make such a distinction, if at all?

**GGW, ch. 8,** **pgs. 488-502, 507-509**

*Youngstown v. Sawyer, US v. Curtiss-Wright*

Monday, 10 Nov: CASE LAW EXAM #1. Arrive on time!

**V. Liberalism divided (1969-1980) and the Contemporary Era (1981-present)**

Thursday, 13 Nov: Constitutional Interpretation, Part II; Substantive and Procedural Due Process.

How do different views of constitutional interpretation through the second half of the 20th century reflect underlying political and economic views of the Constitution? How do you read the Constitution? Can you make the case for this reading, independent of your political views?

**GGW ch. 9, pgs 513-543, 569-582**

\*Posner, “What am I, a potted plant?

*Shapiro v. Thompson, Laird v. U.S.*

\**Lawrence v. Texas* (you may with to re-read *Slaughterhouse cases* to get the most out of *Lawrence)*

Monday, 17 Nov – Thursday 20 Nov: Executive power

How did changing international and domestic politics after World War II shape judicial decisions about executive power? Do all military conflicts necessarily expand presidential power? What about Congress’ role? When Congress authorizes military action does or should this confer the same degree of power on the Executive as when Congress declares war? Why or why not? Again, where should these debates take place – Congress, the judiciary, the states?

**GGW ch. 9, 543-558, ch 10, pgs 563-568, ch. 11, 676-708**

*Korematsu v. U.S.*

*Boumediene v. Bush* (128 S. Ct. 2229)

\**Ahmed Adnan Ajam v. Obama****,*** brief

*Korematsu v. U.S., U.S. v. U.S. District Court, U.S. v. Nixon, Hamdi v. Rumsfeld,*

→Case briefs due Monday

Monday, 24 Nov – Tuesday, 25 Nov: Congressional power, federalism

More commerce clause! What fun! What are the key questions about Congress’ power under the commerce clause at the turn of the 21st century? How and why do they differ from those at the turn of the last century? What is at stake in these debates? What interests are represented on each side?

**GGW, ch. 11, pgs. 615-621, 637-657, 664-670**

*U.S. v. Lopez, Gonzalez v. Raich, U.S. v. Morrison, Printz v. U.S.*

\**National Federation of Independent Business v. Sebelius* 562 U.S.

→Optional case brief due today: *U.S. v. Lopez*

Thursday 27 Nov: NO CLASS. HAPPY THANKSGIVING!

Monday, 1 Dec - Thursday, 4 Dec: Takings clause of the 5th Amendment.

What are the core constitutional questions at the heart of the ‘takings’ clause? How do the legal debates about its meaning reflect some of the political interests and constitutional interpretations we have explored in this class? Should the judicial branch be resolved in deciding these disputes?

\*O’Brien, “The Takings Clause and Just Compensation”

*Penn Central v. NY* 438 U.S. 104 (1978)

*Hawaii Housing Authority v. Midkiff* 467 U.S. 229 (1984)

*Kelo v. New London* 545 U.S. 469 (2005)

*Dolan v. Tigard* 512 U.S. 374, 512 U.S. 374 (1994)

*Koontz v. St. Johns River Water Management District* 570 U.S. \_\_\_ (2013)

→Optional case brief due today: *Kelo v. New London*

Monday, 8 December: Finish Takings Clause and case law exam REVIEW

**CASE LAW EXAM #2 DUE: Monday, DECEMBER 15, NOON.**

**Case Briefing**

Case briefs are handed in through the Assignments link on the sakai site. There are folders for each due date. PLEASE NOTE: You must save your documents as WORD files in order for them to be readable by me. Also, please put all of your briefs in ONE file and label it with your name and the brief number (listed below). Do NOT upload different files for each case brief. If you are having problems with uploading at any time, you MUST bring a hard copy of the briefs to class on the day that they are due. **Briefs will not be accepted after they are due under any** **circumstances.** The reason for this policy is that we will discuss cases on the day they are due and it would be wrong for me to accept briefs from some students *after* we have discussed the cases when other students handed them in beforehand.

How to brief a case: See pages 733-34, GGW. We will also discuss case briefing in class

on September 11th and 15th.

Due dates for briefs:

For the first few weeks that you brief cases, you will hand in the briefs on the day that they are assigned (see syllabus). Beginning on Monday, Oct. 5th, you will hand in all the briefs for the whole week on Monday.

1. Mon., 15 Sept: *Calder v. Bull* (credit/no credit)
2. Mon., 22 Sept: *McCullogh v. Maryland, Gibbons v. Ogden*
3. Mon., 29 Sept: *Pennsylvania v. Prigg*
4. Thurs., 2 Oct: *Cooley v. Board of Wardens*
5. Mon., 13 Oct: *Mississippi v. Johnson, Legal Tender Cases, Texas v. White, Ex parte Merryman, Prize Cases*
6. Mon., 20 Oct: *Slaughterhouse cases, The Civil Rights Cases, Champion v. Ames, US v. EC Knight, Hammer v. Dagenhart, Munn v. Illinois*
7. Mon., 27 Oct: *Schechter Poultry v. US, NLRB v. Jones & Loughlin Steel, Wickard v. Filburn, Heart of Atlanta Motel v. US, South Carolina v. Katzenbach*
8. Mon, 3 Nov: *Youngstown v. Sawyer, US v. Curtiss-Wright*
9. Mon., 17 Nov: *Korematsu v. U.S. v. U.S. District Court, U.S. v. Nixon, Hamdi v. Rumsfeld*
10. Optional case brief, Mon., 24 Nov: *U.S. v. Lopez*
11. Optional case brief, Mon., 1 Dec: *Kelo v. New London*

**Format for Case Briefs**

YOUR name, date and case brief number.

*Case name and citation*

Facts: A brief (2-4 sentences) summary of the facts of the case. Focus on facts that lead you to the question of law.

Legal question (s): The specific constitutional/legal question(s) that the court is addressing.

Opinion (opinion writer): A summary, in your own words, of the court’s majority opinion, written **as though you are the court**. You can quote briefly from the actual text of the opinion if you think it is pertinent but the bulk of the summary should be your own understanding of the court’s legal reasoning. If you use language directly from the opinion, you must use quotation marks. Do not use anyone else’s words but your own. If you are completely stuck and do not understand the can, do the best you can and hand it in. You may at least earn partial credit whereas if you plagiarize someone else’s summary, you risk failing the class and disciplinary action.

Dissent (writer): You must summarize at least one dissent, if there is one.

You will notice I have offered optional briefs on Nov. 24th and Dec 2rd. These provide you with the opportunity to make up for some points you may have lost early on as you were learning to brief the cases and will also serve as make-up briefs. If you miss the briefs for a week, you may make-up for the brief grade you missed by doing an optional brief later in the semester. Please take note that I will not accept briefs after the sakai site has closed unless you bring a hard copy to me at the **start** of class.

FYI, you cannot earn more than 16 points on the briefs (8 briefs, 2 points each) but you can keep turning briefs in until you reach the total.

Brief grades on the 100-point scale

16 = 100

15 = 94

14 = 88

13 = 81

12 = 75

11 = 69

10 = 63

9 = 56

8 = 50

7 = 44

6 = 38