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**THE CONSTITUTION OF THE UNITED STATES  
POLITICAL SCIENCE 410**

*Fall 2009*

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Office hours: Tuesday, 11:00-12:30, Thursday 12:30-2:00*

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, the majority of our attention will be focused upon constitutional law, the voice that the U.S. Supreme Court has given to the document. The principal 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:***

Like any course, this class demands an investment of time and energy for effective performance. Perhaps more so than others, however, this course requires one to consume a large body of materials dealing with competing, abstract principles that are often difficult to reconcile. One should, therefore, carefully consider whether this is a class to which one is willing to make such a commitment. Your specific responsibilities for this course are outlined below:

**Examinations.** There will be three essay examinations. Two of these are scheduled during the semester, and the third --- which is **not** comprehensive ---- will take place on Thursday, December 17, at 8:00am. Your two highest scores on these exams will constitute 30% of your grade, and the lowest score will be worth 20%.

**Readings.** Your examinations will include questions from two required textbooks. The first is an edited casebook, entitled *American Constitutional Law* (2009, 8<sup>th</sup> edition, Durham, NC: Carolina Academic Press), edited by Louis Fisher and Katy J. Harriger. The second is an edited collection of essays that explore a smaller number of important constitutional decisions in greater depth. This book is *Creating Constitutional Change: Clashes over Power and Liberty in the Supreme Court* (2004, Charlottesville: University of Virginia Press), edited by Gregg Ivers and Kevin T. McGuire.

**Written assignment.** Your performance on a 10-page analytic paper will contribute the remaining 20% of your grade. The details of this assignment will presented later in the semester, but it will require you to address one of the significant issues discussed in class.

## ***OVERVIEW OF THE COURSE:***

### **1. *Constitutional Context***

(August 25-27)

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?

#### *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. 1987. *A Machine That Would Go of Itself: The Constitution in American Culture*. New York: Knopf.

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.

“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. “2ly 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

## 2. ***Methods of Interpretation*** (September 1-3)

Is the meaning of the Constitution self-evident? If it were, then the business of constitutional interpretation would be a quite simple matter --- and a considerably less interesting one. There are a variety of perspectives that the justices have brought to their reading the text of the Constitution, and members of the Court have disagreed --- often vehemently --- about the proper meaning of the document. It is not hard to understand why; different interpretive methods will often produce competing policy results.

*Required reading:*  
Fisher and Adler, pp. 62-75

*Suggested reading:*  
Bruce Ackerman. 1993. *We the People*. Cambridge: Harvard University Press.  
Daniel A. Farber and Suzanna Sherry. 2002. *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*. Chicago: University of Chicago Press.  
Keith Whittington. 2001. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review*. Lawrence: University Press of Kansas.

“What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? In no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life. There, before us, is the brew. Not a judge on the bench but had a hand in the making.”

--- Judge Benjamin N. Cardozo  
*The Nature of the Judicial Process*

“Stare decisis provides some moorings so that men may trade and arrange their affairs with confidence. Stare decisis serves to take the capricious element out of law and to give stability

to a society. It is a strong tie which the future has to the past.”

--- Justice William O. Douglas  
*Stare Decisis*

“The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are: The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

--- Justice Louis D. Brandeis  
*Ashwander v. Tennessee Valley Authority* (1936)

### **3. *The Judicial Power*** (September 8-17)

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:*

Fisher and Adler, pp. 33-62, 77-115

Ivers and McGuire, pp. 9-21, 35-63

*Suggested reading:*

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

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.

Robert G. McCloskey. 1994. *The American Supreme Court*. 2<sup>nd</sup> ed. Chicago: University of Chicago Press.

Mark Tushnet. 1999. *Taking the Constitution Away from the Courts*. Princeton: 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)

**First Examination  
September 22**

4. ***The Legislative Power***  
(September 24 – October 6)

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:*

Fisher and Adler, pp. 202-246  
Ivers and McGuire, pp. 93-105

*Suggested reading:*

Michael A. Bamberger. 2000. *Reckless Legislation: How Lawmakers Ignore the Constitution*. New Brunswick: Rutgers University Press.  
David P Currie. 1998. *The Constitution in Congress: The Federalist Period, 1789-1801*. Chicago: University of Chicago Press.  
Louis Fisher. 1997. *Constitutional Conflicts Between Congress and the President*, 4<sup>th</sup> 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.

“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)

## 5. *Executive Power* (October 8-20)

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:*

Fisher and Adler, pp. 176-202  
Ivers and McGuire, pp. 65-79

### *Suggested reading:*

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 COURT: So you contend the Executive has unlimited power in time of an emergency?”

“Mr. BALDRIDGE: He has the power to take such action as is necessary to meet the emergency.”

“The COURT: If the emergency is great, it is unlimited, is it?”

“Mr. BALDRIDGE: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.”

--- Judge David A. Pine and Assistant Attorney General Holmes Baldrige  
Trial transcript from *Youngstown Sheet & Tube v. Sawyer*

“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)

### Written Assignment Due October 15

#### 6. *War Power and Foreign Affairs* (October 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:*  
Fisher and Adler, pp. 247-302

*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: University Press of Kansas.  
Louis Fisher. 1995. *Presidential War Power*. Lawrence: University Press of Kansas.  
Michael A. Genovese. 2000. *The Power of the American Presidency: 1789-2000*. New York: Oxford University Press.  
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)

## Second Examination November 3

### 7. *American Federalism* (November 5-12)

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:*

Fisher and Adler, pp. 303-314, 342-347, 374-380

Ivers and McGuire, pp. 153-164

*Suggested reading:*

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

Kermit L. Hall. 2000. *A Nation of States: Federalism at the Bar of the Supreme Court*. Oxford: Routledge 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*.

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 be bold.”

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

## **8. *The Exercise of National Power*** (November 17-24)

Of all the powers possessed by Congress, none has been exercised more sweepingly and with greater effect than the power to regulate interstate commerce. Not only has it been utilized to achieve regulatory ends, it has been used to achieve a variety of lawmaking goals that seemingly have little connection to economic activities that cross state lines. Since the early part of the twentieth century, the commerce power has frequently been at the center of constitutional law. It remains one of the most important and most controversial provisions in the Constitution. 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:*

Fisher and Adler, pp. 314-342, 347-374

Ivers and McGuire, pp. 119-133

### *Suggested reading:*

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

- Marian C. McKenna. 2002. *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937*. Fordham: Fordham University Press.
- Steven R. Weisman. 2002. *The Great Tax Wars: From Lincoln to T.R. to 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.

“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)

“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)

“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)

“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)

**9. States and Their Police Powers**  
(December 1-8)

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 Constitution 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. In exercising those powers, states have generated important cases in at least three main areas of constitutional law. One concerns the ability of states to alter the terms of contracts. A second relates to whether states have interfered with economic liberties under the 14<sup>th</sup> Amendment’s Due Process Clause. And the third pertains to the ability of states to take private property for various public uses.

*Required reading:*

Fisher and Adler, pp. 389-433

Ivers and McGuire, pp. 133-153

*Suggested reading:*

James W. Ely. 1994. *The Chief Justiceship of Melville W. Fuller, 1888-1910*. Columbia, SC: University of South Carolina Press.

Richard Epstein. 2004. *Takings: Private Property and the Power of Eminent Domain*. Cambridge, MA: Harvard University Press.

Don E. Fehrenbacher. 2001. *The Dred Scott Case: Its Significance in American Law and Politics*. New York: Oxford University Press.

Howard Gillman. 1993. *The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham, NC: Duke University Press.

“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)

“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)

“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**  
**Thursday, December 17, 8:00am**

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## 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?***

Confer with another member of the class and copy that student's notes. If you then have questions about any of the material that you missed, please stop by my office to discuss those questions.

### ***Can I take notes on my laptop?***

Yes, if that is what you really do with your laptop. I strongly encourage you to take handwritten notes, because a laptop in a classroom with wireless capability is what tort law refers to as an attractive nuisance --- 'a condition that is both attractive and dangerous to curious children.' During class, the internet is an almost irresistible lure that can distract the computer user and those around that user. If you insist on typing your notes, please sit in the back of the room, where your computer screen will minimize the likelihood of distracting others. Please note that, if you opt for laptop use during class, I will presume that you are not giving the class your full attention.

### ***Is the third exam cumulative?***

The third exam itself is *not* a comprehensive exam. This means that the final will resemble the previous exams by covering only new material on which you have not been previously tested.

### ***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. So, for example, an overall course score of 91 is an A-, and a score of 79 is a C+. No letter grades are assigned to any individual exam or paper.

### ***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.

**What 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 grading system requires.

Of course, it is always possible that, for one reason or another, someone will do less well on a particular exam than that person expected. (And for most students, this ends up being the first exam.) For that reason, the lowest of your three exam scores counts for 20%, while the other exam scores count for 30% each.

***Can 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.”