Professor Ken I. Kersch  
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This class will survey the development of the American constitutional order, from the Founding to the present. Courses in “constitutional law” typically focus almost exclusively on the main lines and subtleties of legal/constitutional doctrine as expounded by the U.S. Supreme Court. We will take a broader, “developmental,” perspective. While we will study many of the same themes that the Supreme Court addresses in its major constitutional decisions (which we will read) – the powers of the national government, the relationship between the national government to the states and individuals, the separation of powers (including the power of the Article III federal judiciary), and (to a lesser extent) individual rights and liberties [the focus of a separate course on Civil Liberties] – the Supreme Court is just one of many political actors and institutions that address these questions. Sometimes it is not the most influential or profound authority on these matters. And, sometimes when it is, it is availing itself of ideas or practices that were first forged elsewhere, by other political actors.

Our ultimate subject is the American constitutional order – the durable foundational rules that structure the government and define the relationship of its various parts, to each other and towards the groups, institutions, and individuals that comprise civil society. We will study constitutional law as a component of the constitutional order. But our subject is the development of the durable patterns and structures of governance in the United States, as they have been shaped both by the Supreme Court (and other courts) and other constitutional and political actors. The relative power and authority of different agencies and institutions of American government (Congress, the President, courts, administrative agencies), non-governmental political institutions (political parties, interest groups) and non-institutional political and social actors and forces (public opinion, economic and military crises, social and reform movements, legal and political currents and ideas) in shaping the nation’s constitutional order has varied significantly from conflict to conflict, and from era to era. Efforts to shape the constitutional order have often been contentious and hard-fought – in one case, leading to Civil War. We will approach the subject chronologically, surveying the Founding, the Marshall and Taney eras, the Civil War, the rise of corporate capitalism, the emergence of the modern state, the New Deal crisis, new forms of rights and liberties, and the new challenges of the national security state.

Office Hours: I will hold drop-in office hours T/Th 1:30-2:30 PM in my office in McGuinn 515, and also at other times -- in person or via Zoom -- by appointment. To meet by appointment, please email me -- best -- or otherwise speak to me to set up a time to talk.

Restrictions on Computers in Class: To minimize distractions, students are prohibited from using any type of computer or phone into class that is active/turned on (this means laptops, notebooks, smartphones, etc.) for any purpose other than bringing up assigned readings on the screen. Student may not browse the internet, engage in social media, chat, or use their computer for any other purpose than accessing course texts. These restrictions, and this rule, are
mandatory. Exceptions will be made in individual cases for legitimate, dean-approved reasons, including disability (information below) and covid-related issues cleared through the Dean’s or the disability office.

Class Meetings and Preparation/Attendance: This class will meet Tuesdays and Thursdays, 3-4:15 PM. Except in cases of illness or other important life issue, students must attend all classes (for Covid or disability issues affecting attendance, please make arrangements through the disability office (information below) or the Dean’s office). Students are required to complete all required reading assignments in a timely fashion for each class. The class will be conducted as part lecture, and part discussion. I reserve the right to “cold call” on students at any time in class to discuss the assigned readings.

Readings: Students are required to do the readings from the assigned texts -- NOT from what you think are the same thing from Wikipedia and other web sources. While many of those web sources are accurate on the basic (case) facts, and useful for many purposes, they will not place that information in the proper context (both of the course, and historically and politically) in a way that is reliable for this class. The assigned texts are recent work by top scholars reflecting the best, current scholarly understandings of U.S. constitutional development. My purpose in teaching this course, with these texts – as opposed of giving you a list of cases, terms, and events to Google – is to initiate you into these more sophisticated understandings of the subject as taught by the assigned texts.

The syllabus list rough “ballpark” dates for the readings. We will proceed with the readings in the order of the syllabus. But I want to allow for flexibility in light of the nature of the discussions, level of student interest, student questions, real-world events etc. that actually take place as we move forward. If you are reasonably sentient and physically present in class, it should be obvious where we are in the syllabus. I will tell you each class how far you should read for the next class. If I forget to do that, ask me. The final exam date and time is set by the University registrar (and thus completely out of my control). Please refer to the University exam schedule for specifics. The other assignments (including the midterm) will be held when I feel we have reached a natural point for it, depending on how the class actually unfolds. I will give you sufficient advance notice of that – at least a full week, and likely somewhat more (and I will likely hint that we are ‘getting to that point’ well before). That said, the midterm is usually takes place midway through the semester, or a little after. That is because this course takes time to build up a sufficient knowledge base to serve as a foundation for a midterm exam. If you are up-to-date on your readings and prepared for each class meeting (required), you should be all set for this.

For exam purposes, you are responsible for all the assigned reading, whether we discuss it in class or not.

Canvas: We will make use of the course Canvas page. Most significantly, many of the readings in this class are posted on the course Canvas page: you will find any reading in the class listed that is not in a required-for-purchase book posted in the Modules section of the course Canvas page.

Teaching Assistant: X will be the Teaching Assistant for the course. Ethan will be grading all course assignments. He will be available for office hours, and to otherwise speak with students.
Grading: Your grade will be determined as follows: A midterm exam (30%); A final exam during the time scheduled for it by Students Services (40%); Discussion Board Participation (each student will discuss two (2) topics of your choice over the course of the semester) (10%); Class Participation (includes attendance and participation, both in the class itself, and in associated (ungraded) assignments and exercises) (20%).

All grades will be calculated by me, on my personal course Excel sheet -- and not using (idiosyncratic) numbers auto-generated by Canvas.

Academic Integrity: Academic integrity is violated by any dishonest act committed in an academic context, including but not limited to cheating, plagiarism (attempting to pass the work of others off as your own, in any way in any part of an assignment), and submitting for credit in this class work done for another class.

The University’s policy on Academic Integrity may be found at www.bc.edu/integrity. Ask me if you have any questions about academic integrity; the Political Science Department also offers a quiz and discussion at http://www.bc.edu/content/bc/schools/cas/polisci/integrity/quiz.html.

All suspected violations will be reported to the Dean in accordance with University policy. A final grade of “F” for the course will be given in the event of a violation of academic integrity.”

Disability Accommodations: If you have a disability and will be requesting accommodations for this course, please register with either the Connors Family Learning Center (learning disabilities or AHD) or the Assistant Dean for students with disabilities, (all other disabilities).

Advance notice and appropriate documentation are required for accommodations.

ESL Assistance: Boston College welcomes students from around the world and recognizes the unique perspectives international students bring enrich the campus community. To empower students whose first language is not English, Boston Colleges makes ESL specific resources available on campus, including ESL writing support and conversation appointments through the Connors Family Learning Center. To schedule an appointment call 617-552-0611. A curated list of web resources is also available through the CFLC website.

Required Books:

- Howard Gillman, Mark A. Graber, and Keith E. Whittington, American Constitutionalism, Volume 1: Structures of Government (Oxford University Press, 2017)(Second Edition) (GGW)[also, GGW web sources, which I have posted on Canvas (CV)].
• Additional readings [posted on Canvas – noted below as “CV”].

Readings:

Note: *The assignment of weeks to the readings is approximate. Please keep up with where we are in reality in the actual class.*

WEEK ONE:

Introduction to the Study of American Constitutionalism

Charlie Savage, “Experts Debate Reducing the Supreme Court’s Power” (CV)

GGW: Preface; Ch. 1. – What is a constitution? What purposes does a constitution serve? How should a constitution be interpreted? How are constitutions enforced? How do they change? What are the best frameworks for understanding and answering these questions?

Arnold, iii-6 [introductory material on “Purpose” and the Constitution’s “Structure and Preamble”].

List of/Links for Useful Websites on the Constitution and Constitutionalism (CV)(browse)

**DISCUSSION BOARD EXERCISE OPTIONS:**

1)  
https://constitutioncenter.org/debate/podcasts/the-history-of-supreme-court-confirmation-hearings

2)  

WEEK TWO:

The Beginnings of the American Constitutional Order (1776-1789)

Prelude -- Colonial Constitutionalism (Before 1776)

GGW, Ch. 2 – Common law background; emergence of a British constitutional dispute between London and the American colonies
The New Nation: Independence and the First Constitution(s)

GGW, Ch. 3: 49-83 – the first constitutions (state constitutions; Articles of Confederation); debating the national (1787) constitution; ratification

Arnold, 7-53 [material on “Three Branches of Government, Article I (Congress)”].

DISCUSSION BOARD EXERCISE OPTIONS:

3)  
https://constitutioncenter.org/debate/podcasts/the-federalists-vs-the-anti-federalists

Government Powers, Separated

GGW: 83-92; Arnold, 74-78 [on “Limitations on State Sovereignty”] – Constitutional Convention Debates; Ratification Debates; Constitutional Convention Debates; Ratification Debates; John Adams, Thoughts on Government (CV); The Federalist, No. 49, 57 and 62 (CV)

The Judiciary and the Bill of Rights

GGW: Ch. 3, 56-65; Arnold, 67-73 [on “Article III – The Judiciary”], 79-120 [on the Amendments, up-to and including the 13th Amendment]; Rosen, Introduction – Federalists and (“antifederalist” opposition).

Arnold, 53-67 [on Article II – The Executive], 74-80 [on Limitations on State Sovereignty and the Article Five Amendment Process] (skim).

WEEKS THREE/FOUR:

Constitutionalism in the Early Republic (1789-1828)

The Politics of the Early National Era

GGW, Ch. 4, 93-101; Powe, Preface, Ch. 1.

Establishing the Power of Judicial Review

GGW, Ch. 4, 101-114 (Calder v. Bull; Marbury v. Madison; Jefferson on Departmentalism)

Rosen, Ch. 1 (“The Virginia Aristocrats: John Marshall and Thomas Jefferson”)


Kersch, “A Friend to the Union” (CV)
Supervising the States through Judicial Review

GGW, Ch. 4, 113-118:  Martin v. Hunter’s Lessee; Fletcher v. Peck (CV); Algernon Sidney [Spencer Roane], “On the Lottery Decisions” (CV)

Consolidating National Power

GGW, Ch. 4, 118-146 – Strict construction v. broad construction; Jefferson and Hamilton debate the Bank; McCulloch v. Maryland (1819), and the Spencer Roane-John Marshall debate McCulloch; James Monroe and Daniel Webster debate the draft; territorial expansion

The States Push Back: Powers/Sovereignty of the States

GGW, Ch. 4, 153-165 – Chisholm v. Georgia; Virginia and Kentucky Resolutions; Debates over internal improvements.

The Power to Regulate Commerce

GGW, Ch. 4, 146-153 (Gibbons v. Ogden)

And the police powers…

GGW, Ch. 5, 220-223 (Willson v. Blackbird Creek Marsh Co; City of New York v. Miln (CV); Cooley v. Board of Wardens)

Executive Power in the Early Republic

GGW, Ch. 4, 166-179 – Appointment and Removal Power; Treaty Power; Executive Privilege


WEEKS FIVE/SIX:

Jacksonian/Antebellum Constitutionalism (1829-1860)

Political Context

GGW, Ch. 5, 185-189.

Powe, Ch. 4 (“The Sectional Crisis and the Jacksonian Court”)
Contentious Constitutional Politics and Courts

GGW, Ch. 5, 189-199, 223-226; Luther v. Borden; John C. Calhoun, Fort Hill Address; Andrew Jackson, Proclamation on Nullification (CV)


The President v. Congress: Whigs v. Jacksonian Democrats

GGW, Ch. 5, 199-204, 227-234, 238-241– Necessary and Proper; Andrew Jackson Bank Veto; Bank Deposit Removal Debate; Veto Power Debate.

Slavery

GGW, Ch. 3, 65-68; Ch. 5, 204-219; Ch. 6, 251-252; slavery and the Constitution; fugitive slave issue; slavery and western expansion; Prigg v. Pennsylvania; Dred Scott v. Sanford; Lincoln on Dred Scott.

WEEKS SEVEN/EIGHT:

Secession, Civil War and Reconstruction (1861-1876)

Secession

GGW, 269-274 – Lincoln’s First Inaugural Address.


GGW, Ch. 6, 274-288 – Federalism during the Civil War; the status of the former Confederate states during Reconstruction

Powe, Ch. 5 (“Civil War and Reconstruction”)

Arnold, 118-140 [Civil War Amendments]

Presidential War Powers

GGW, Ch. 5, 234-238 – Mexican War issues (Texas)

GGW, 288-306 – Martial Law; Habeas Corpus; Foreign Affairs and War Powers; Emancipation; The Prize Cases; Ex Parte Merryman

Congressional Powers: War and Reconstruction

GGW, 254-264 -- Legal Tender debate (Hepburn v. Griswold; Legal Tender Cases).
GGW, Ch. 6, 248-251, 253-254, 306-309 – Congress and the judiciary; Congress and the President (Andrew Johnson Impeachment).


**DISCUSSION BOARD EXERCISE OPTIONS:**

4)  
https://constitutioncenter.org/debate/podcasts/history-of-impeachment-from-andrew-johnson-to-today

**WEEKS NINE/TEN:**

**Republican Party Dominance (1877-1932)**

Political Context

GGW, Ch. 7, 311-319

Courts and Judges Versus Democracy

GGW, Ch. 7, 319-337 – Populists, Progressives and Conservatives: Democracy/Majority Rule, foundational law, and fundamental rights; judicial review as a problem *(Slaughterhouse Cases; Lochner v. New York (CV); Frothingham v. Mellon)*

GGW, Ch. 7, 373-385 – Commerce Clause and the police power revisited; *Wabash, St. Louis, and Pacific RR; Munn v. Illinois*.

Rosen, Ch. 2 (“The Legacy of the Civil War: John Marshall Harlan and Oliver Wendell Holmes, Jr.”)


Powe, Chs. 6 & 7 (“Industrializing America”; “Progressivism, Normalcy, and Depression”).

Arnold, 141-145 [Progressive Era Amendments]
Congress Moves to Regulate and Tax Corporations


Congress and Civil Rights after Reconstruction

GGW, Ch. 7, 338-346 (Civil Rights Cases; Dyer Anti-Lynching Bill (CV))


Presidents and the Establishment and Direction of the Bureaucratic/Administrative State

Non-Delegation Doctrine

Presidential Appointment Power in the Age of Congressional Government (CV)

GGW, Ch. 7, 386-397 – Appointment and Removal Power revisited (Myers v. United States; Humphrey’s Executor v. U.S.; Hampton v. U.S.); New theories of executive power (Cleveland, TR; Taft; Wilson)

DISCUSSION BOARD EXERCISE OPTIONS:

5)

https://constitutioncenter.org/debate/podcasts/william-howard-taft-and-the-constitution

WEEKS ELEVEN/TWELVE:

Democratic Party Dominance: The New Deal and the Great Society (1933-1968)

Political Context

GGW, Ch. 8, 401-409

Arnold, 145-156 [New Deal/Postwar Amendments]

Taming the Courts

GGW, Ch. 8, 410-423 (U.S. v Carolene Products; Gold Clause Dispute; Court-packing plan)

Unleashing the Congress (Economics and Social Welfare)

GGW, Ch. 8, 441-454, 463-470 – Commerce power; taxing and spending power (Schecter Poultry v. U.S.; U.S. v. Butler; Morehead v. Tipaldo; U.S. v. Darby; NLRB v. Jones and Laughlin Steel; Wickard v. Filburn; Steward Machine v. Davis)
Empowering – and Limiting -- the Modern President

GGW, Ch. 8, 471-494 (Youngstown Sheet and Tube v. Sawyer; Humphrey’s Executor v. U.S.; Schecter Poultry v. U.S.; U.S. v. Curtiss-Wright; Ex parte Quirin (CV); Ex parte Endo (CV); Administrative Procedure Act (1946); U.S. Department of Justice/U.S. Department of Education “Dear Colleague Letter on Transgender Students” (May 13, 2016) (CV)).

The Re-emergence of Judicial Power (and Resistance)

GGW, Ch. 8, 423-441 – Brown and the Little Rock (Southern Manifesto; Eisenhower Address on Little Rock Schools Crisis; Cooper v. Aaron; Flast v. Cohen; Baker v. Carr; Incorporation).

Unleashing the Congress (Civil Rights)

GGW, Ch. 8, 454-463 (Heart of Atlanta Motel v. U.S.; Katzenbach v. McClung; South Carolina v. Katzenbach; Katzenbach v. Morgan (CV)).

WEEK THIRTEEN/FOURTEEN:

The Conservative Ascendancy/Divided Government/Constitutional Contention (1968-Present)

Political Context: Liberal or Conservative?

GGW, Ch. 9, 495-501, Ch. 10, 537-542, Ch. 11, 585-589 (Nixon, Carter, Reagan, Clinton, Obama)

Liberals and Conservatives on Judicial Power

GGW, Ch. 10, 542-556; Ch. 11, 589-597, 603-607 (originalism v. living constitutionalism; judicial activism and judicial restraint; the Bork hearings); The Nomination of Merrick Garland to the U.S. Supreme Court (CV).

A Federalism Revolution?


Congress: Too Weak, or Un-Cabined?

GGW, Ch. 10, 568-570, Ch. 11, 635-641 – Federal regulation of elections (U.S. Term Limits v. Thornton)
GGW, Ch. 10, 570-576; Ch. 11, 657-662 – Separation of powers; commerce power (INS v. Chadha; Bowsher v. Synar; Lucia v. SEC; Morrison v. Olson; Clinton v. New York; NFIB v. Sebelius (CV)).

Presidential Powers

Executing the Laws

GGW, Ch. 10, 576-584, Ch. 11, 662-664 (Bowsher v. Synar; Morrison v. Olson); Walter Dellinger, “The Legal Significance of Presidential Signing Statements” (CV);

Presidential Constitutional Duty Hearings (the “lawless” Obama Presidency) (CV)

Department of Justice/Department of Education “Dear Colleague Letter on Transgender Students” (May 13, 2016) (CV)


DISCUSSION BOARD EXERCISE OPTIONS:

6)
https://constitutioncenter.org/debate/podcasts/deconstructing-the-administrative-state

7)
https://constitutioncenter.org/debate/podcasts/is-the-presidency-too-powerful

Executive Privilege, Immunity, and the Possibility of Self-Pardon

GGW, Ch. 9, 527-553, Ch. 11, 687-689, Ch. 11, 689-693 (U.S. v. Nixon; Cheney v. District Court; Clinton v. Jones; Zervos v. Trump) (CV).

Holder, “Assertion of Executive Privilege Over Documents [“Fast and Furious Program”]); Thompson, “Immunity of the Assistant to the President from Congressional Subpoena” (CV).

Dixon, “Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution while in Office;” Randolph Moss, “A Sitting President’s Amenability to Indictment and Criminal Prosecution” (CV)

Dowd, Request for Testimony Regarding a Trump Self-Pardon (CV)
Bazelon, “Check and Imbalances: What Happens When a President Defies Congress?” *NY Times* (CV)

**DISCUSSION BOARD EXERCISE OPTIONS:**

8)

https://constitutioncenter.org/debate/podcasts/when-can-the-president-claim-executive-privilege

**DISCUSSION BOARD EXERCISE OPTIONS:**

9)

https://constitutioncenter.org/debate/podcasts/the-emoluments-clause-in-court

War Powers, National Security, and Court Supervision of the Executive Branch

GGW, Ch. 9, 518-527; Ch. 11, 597-599, 664-679 – Vietnam and the War Powers Resolution; *Doe v. Bush*; John Yoo Memo on President’s authority to conduct military operations; Bybee, “Authority of the President to Use Military Force Against Iraq”; Bybee “Torture” Memo; *Boumediene v. Bush*; Engel, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities; Letter from Scholars and Former NSA Officials on Surveillance (CV).


*Trump v. Hawaii* (CV)


**DISCUSSION BOARD EXERCISE OPTIONS:**

10)


11)

https://constitutioncenter.org/debate/podcasts/is-there-a-supreme-court-legitimacy-crisis

12)

13)

https://constitutioncenter.org/debate/podcasts/what-would-madison-think-today

Conclusion: Which Way Backwards?

Arnold, 159-164 [The American Creed]