

**POLSCI 496 American Constitutional Development**  
**University of Michigan**  
**Fall 2016**

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Hours: Thursdays, 2-4pm, and by appt.

Tues/Th, 10:00-11:30am

7603 Haven Hall

This course explores key periods in American constitutional development—the Reconstruction era, the Lochner/“laissez faire” era, the New Deal, the Civil Rights era, and the Nixon Court era. Constitutional doctrines pertaining to civil rights and civil liberties form the backbone of the course, but we will also examine the myths that mark conventional wisdom about each period. In general we will explore how the study of constitutional development generates unique insights about law and politics, the Supreme Court as an institution, and the Constitution itself. We will also examine the roles played by political parties, social movements, economic development, presidents, and Congress in shaping constitutional politics over time. In general, the course melds the study of constitutional law and American politics while providing a platform for considering various theories of judicial decision-making. Book-length studies of each period form the core of course reading. The course begins by considering the Supreme Court as an institution, and we will return to these readings as we advance through the course.

On Constitutional Development and Constitutional Mythology

The study of American constitutional development often brings us face-to-face with constitutional mythology. In confronting myths that mark conventional wisdom about key periods in American constitutional law, the studies we will read advance *new* accounts of constitutional development. These studies examine long-term processes and cover a large amount of material, transcending standard disciplinary lines. In digging deeply into the puzzles, approaches, and findings of the works covered, we will explore both the myths about these periods and the challenges to them. We will look for patterns in these constitutional myths (e.g., assumptions about judicial appointments; and assumptions about judicial behavior). We will likewise look for common features of the studies that challenge these myths. In this way, students will have the opportunity to weigh the conventional wisdom about these critical periods, as well as the challenges to that standard wisdom.

Materials:

Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

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

Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2007).

Kevin J. McMahon, *Nixon's Court: His Challenge to Judicial Liberalism and its Consequences* (Chicago: University of Chicago Press, 2011).

\* plus materials on Canvas.

## Week 1

Sept. 6 Introduction to Course

### **Conceptualizing the Supreme Court as an Institution**

Sept. 8 Cornell Clayton, "The Supreme Court and Political Jurisprudence: New and Old Institutionalisms," in Clayton and Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago, 1999), 15-41.

## Week 2

Sept. 13 Mark Graber, "Constitutional Law and American Politics," in Caldeira, Kelemen, and Whittington, eds., *Oxford Handbook of Law and Politics* (2015), Oxford Handbooks Online, 1-25.

Sept. 15 Howard Gillman, "Courts and the Politics of Partisan Coalitions," in Caldeira, Kelemen, and Whittington, eds., *Oxford Handbook of Law and Politics* (2015), Oxford Handbooks Online, 1-22.

## Week 3

### **Reconstruction and the Myth of Judicial Abandonment**

Sept. 20 Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 1-59.

Sept. 22 Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 60-128.

## Week 4

Sept. 27 Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 129-183.

Sept. 29 Brandwein, *Rethinking the Judicial Settlement of Reconstruction*, 184-205.

## Week 5

### **The *Lochner* Era and the Myth of "Laissez-Faire" Constitutionalism**

Oct. 4 Gillman, *The Constitution Beseiged*, 1-60

Oct. 6 Gillman, *The Constitution Beseiged*, 61-99

Dorothy Ross, "Historical Consciousness in Nineteenth-Century America," *American Historical Review*, Vol. 89, No. 4 (Oct., 1984), pp. 909-928.

## Week 6

Oct. 11 Gillman, *The Constitution Beseiged*, 101-146.

David Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* (University of Chicago, 2011), 23-39.

Oct. 13 Gillman, *The Constitution Beseiged*, 147-205.

**Week 7**

Oct. 18 Fall Study Break

**The New Deal Era and the Myth of the “Switch-in-Time”**

Oct. 20 Cushman, *Rethinking the New Deal Court*, 3-43.

**Week 8**

Oct. 25 Cushman, *Rethinking the New Deal Court*, 45-105.

Oct. 27 Cushman, *Rethinking the New Deal Court*, 107-155.

**Week 9**

Nov. 1 Cushman, *Rethinking the New Deal Court*, 156-176.

Nov. 3 Cushman, *Rethinking the New Deal Court*, 177-225.

**Week 10**

**Brown v. Board of Education and “Civil Rights” Mythology**

Nov. 8 *Brown v. Board of Education*, 347 U.S. 483 (1954)

*Brown v. Board of Education II*, 349 U.S. 294 (1955)

Goluboff, *Lost Promise of Civil Rights*, 1-80.

Nov. 10 Goluboff, *Lost Promise of Civil Rights*, 81-140.

**Week 11**

Nov. 15 Goluboff, *Lost Promise of Civil Rights*, 141-216.

Nov. 17 Goluboff, *Lost Promise of Civil Rights*, 217-270.

**Week 12**

Nov. 22 No Class; Happy Thanksgiving!

**Week 13**                      **The Nixon Court Era and the “The Counter-Revolution-That-Wasn’t”**

Nov. 29                      McMahon, *Nixon’s Court*, 1-62.

Dec. 1                        McMahon, *Nixon’s Court*, 66-145.

**Week 14**

Dec. 6                        McMahon, *Nixon’s Court*, 146-211.

Dec. 8                        McMahon, *Nixon’s Court*, 212-256.

**Week 15**

Dec. 13                      **The Supreme Court as an Institution, Redux.**

Review Clayton, Gillman, and Graber

Course Policies

Attendance at seminar sessions is mandatory and all students are expected to come to seminar sessions having completed the assigned reading for that day, i.e., fully prepared to be active participants.

Laptops and tablets are not permitted; phones must be silenced and stowed.

After one unexcused absence, each unexcused absence thereafter will result in a 1/3 grade reduction of your final grade.

Late Policy on Assignments: Papers will reduced 1/3 of a grade for every 24 hours the paper is late.

Requests for extensions must be made 48 hours in advance of the due date/time.

Grading

- Three papers, ~6 pp. each (20%, 25%, 25%), on three books of your choosing. One choice must be prior to the Fall Break, which means writing on either Reconstruction or the *Lochner* era.
  - Topics will be distributed the Friday before the *first* class meeting on that book.
  - Papers are due the Monday (at 10am) that follows the *last* class meeting on that book.
  - No additional research is expected or permitted for the papers.
  - Given that two weeks are allotted for each book, there is a lot of time for you to discuss your paper in office hours. I encourage you to come talk with me about your paper!
- Weekly Responses (15%) that address a question in the “Note on the Readings,” below. I will also circulate study questions specific to each book, which should help organize your reading/thinking. Responses are graded on a 10-point scale. Eleven (11) responses will be

submitted during the semester and the lowest score will be dropped (Total points available: 10 x 10 = 100)

### A Note on the Readings

You will not be responsible for knowing every detail of every book. However, you will be responsible for learning the general puzzles, approaches, and findings of the works covered. You should approach each book with the following set of questions in mind. These questions will form the basis for class discussion and written assignments:

What is the author's main argument and what are the "sub-arguments"? How do the sub-arguments combine to form the main argument?

What scholarly question/debate is the author engaging? Describe the different "camps" in that debate. What do each of the chapters contribute toward supporting (or not) the author's argument(s)? What do you consider to be the strengths and weaknesses of the chapter? What questions emerge for you?

How does the author conceptualize Supreme Court decision-making? (The author may explicitly engage that question, or it may be implicit.) How can you tell?

How might you apply material from Clayton (Sept. 8), Graber (Sept. 13), or Gillman (Sept. 15) to the week's reading?

- Class participation (15%)

Here is where the quality of your contributions to class discussion counts. Contributions come in many forms: response to instructor queries; engagement with the readings; asking questions (and knowing that you don't know is as important as knowing an answer); and responsiveness to others (helpfulness, question-posing, elaborations upon others' comments, listening, etc.).

The following sketch offers the rough principles on which papers will be graded:

**A/A-** Paper offers a clearly stated, interesting thesis that is supported with a sound argument and valid evidence. The paper shows that the writer has thought about the assignment and developed his/her ideas about it, instead of just offering minimal responses to the different components of the assignment. Extensive evidence is provided. Organization and writing are clear; grammar is flawless.

**B/B+** Paper offers a clearly stated thesis that is supported, for the most part, with a sound argument and valid evidence. The paper stays on topic, considering all the relevant aspects of the assignment. Multiple sources of evidence are provided. Organization and writing are clear; grammar is solid.

**B-** Paper offers a thesis and attempts to support it with argument and evidence. However, the thesis is simplistic and/or the argument and evidence are weak. Paper uses only one source of evidence. Organization and writing are weak.

**"C" range** Paper offers a minimal thesis and argument. Little evidence is provided. Organization and writing are seriously flawed.

**"D" range** No Thesis, no argument, and/or no evidence. Organization is lacking; writing is very awkward, bordering on incoherent.

E Paper displays a fundamental lack of understanding of the material or a basic failure to address the assignment.

A Word on Grammar: Students often ask whether they will be “graded on grammar.” The answer is both no and yes. “No” in the sense that grammar alone is not a grading criterion. But “yes” in the sense that bad grammar and awkward style detract from the argument and presentation. Errors in grammar make it difficult for a reader to follow an argument and go through the text. You are responsible for understanding the rules governing Standard Written English.

Grade-to-Points Conversion Scale:

A+	97	B+	87	C+	77	D+	67
A	93	B	83	C	73	D	63
A-	90	B-	80	C-	70	D-	60

### **Grade Grievances**

If you believe you have been unfairly graded, you must follow this procedure:

1. Wait 24 hours after receiving the grade before approaching your instructor.
2. Provide a written statement, explaining why you believe the grade was unfair.
3. Meet with your instructor to discuss your paper and statement.
4. If that meeting does not resolve your concerns, departmental grade grievance procedures are outlined here: <http://www.polisci.lsa.umich.edu/undergrad/grievance.html>.

### **Academic Integrity**

Academic dishonesty may be understood as any action or attempted action that may result in creating an unfair academic advantage for oneself or an unfair academic advantage or disadvantage for any other member or members of the academic community. Conduct, without regard to motive, that violates the academic integrity and ethical standards of the College community cannot be tolerated.

Plagiarism and cheating are violations of academic integrity and violations of the LSA Academic Conduct Code. Scholastic dishonesty includes, but is not limited to, the submission of a piece of work that is, in part or whole, not one’s own. Dishonesty also includes submitting work in this course that you have submitted in another course. When writing papers, sources must be cited! Quotation marks must be used! *Acts of academic dishonesty will automatically result in failure in the course.* The LSA Academic Judiciary Manual of Procedures specifies that a student may be expelled from the university for academic misconduct.

#### **Examples of academic misconduct**

Students are responsible for familiarizing themselves with what counts as plagiarism and academic dishonesty. To learn more about U-M policies regarding scholarly dishonesty and its consequences, go to the [LSA Academic Integrity website](#). Students with any questions or concerns are encouraged to contact the professor.

### **Accommodations for Students with Disabilities**

If you think you need an accommodation for a disability, please let me know at your earliest convenience. Some aspects of this course, the assignments, the in-class activities, and the way the course is usually taught

may be modified to facilitate your participation and progress. As soon as you make me aware of your needs, we can work with the Services for Students with Disabilities (SSD) office to help us determine appropriate academic accommodations. SSD (734-763-3000; <http://ssd.umich.edu>) typically recommends accommodations through a Verified Individualized Services and Accommodations (VISA) form. Any information you provide is private and confidential and will be treated as such.

### **Religious and Academic Conflicts**

Although the University of Michigan, as an institution, does not observe religious holidays, it has long been the University's policy that every reasonable effort should be made to help students avoid negative academic consequences when their religious obligations conflict with academic requirements. Absence from classes or examinations for religious reasons does not relieve students from responsibility for any part of the course work required during the period of absence. Students who expect to miss classes, examinations, or other assignments as a consequence of their religious observance shall be provided with a reasonable alternative opportunity to complete such academic responsibilities.

It is the obligation of students to provide faculty with reasonable notice of the dates of religious holidays on which they will be absent. Such notice must be given by the drop/add deadline of the given term. Students who are absent on days of examinations or class assignments shall be offered an opportunity to make up the work, without penalty, unless it can be demonstrated that a make-up opportunity would interfere unreasonably with the delivery of the course. Should disagreement arise over any aspect of this policy, the parties involved should contact the Director of Undergraduate Studies/Director of Graduate Studies. Final appeals will be resolved by the Provost.

### **Students Representing the University of Michigan**

There may be instances when students must miss class due to their commitment to officially represent the University. These students may be involved in the performing arts, scientific or artistic endeavors, or intercollegiate athletics. Absence from classes while representing the University does not relieve students from responsibility for any part of the course missed during the period of absence. Students should provide reasonable notice for dates of anticipated absences and submit **an individualized class excuse form**.

### **Student Mental Health and Wellbeing**

University of Michigan is committed to advancing the mental health and wellbeing of its students. If you or someone you know is feeling overwhelmed, depressed, and/or in need of support, services are available. For help, contact **Counseling and Psychological Services (CAPS)** at (734) 764-8312 and <https://caps.umich.edu/> during and after hours, on weekends and holidays, or through its counselors physically located in schools on both North and Central Campus. You may also consult **University Health Service (UHS)** at (734) 764-8320 and <https://www.uhs.umich.edu/mentalhealthsvcs>, or for alcohol or drug concerns, see [www.uhs.umich.edu/aodresources](http://www.uhs.umich.edu/aodresources).

For a listing of other mental health resources available on and off campus, visit: <http://umich.edu/~mhealth/>.