

Institute for Constitutional History
Spring 2010
6:00-8:00 pm, GWU Law School

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Politics and History of Judicial Review in the United States

This seminar will focus on the history of judicial review in the United States from the founding period to the present. The course will give particular attention to the U.S. Supreme Court and federal law, but will also take note of federal review of state statutes and judicial review by state courts. We will explore how courts have used and justified the power of judicial review over time, how the practice of judicial review has changed, and how "activist" courts have been. We will examine the growth in the significance of the power of judicial review over time and the supports for, and opposition to, judicial review in the political sphere. The seminar will make use of both primary and secondary readings.

All participants will be expected to complete the assigned readings and participate in seminar discussions. Participants are expected to acquire the materials on their own. Published articles can be found in a variety of paid electronic archives, including JSTOR, Lexis and Westlaw. Copies of some can be found freely available on the Internet. State and federal cases can likewise be found on Lexis and Westlaw. Many can also be found on free services such as FindLaw and the Legal Information Institute. Edited versions of some of the cases can be found in casebooks, and they can all be found in Graber, Gillman, and Whittington's *American Constitutionalism* (forthcoming). Email me for accessing draft materials on the web. I would recommend reading edited versions of the cases.

Week 1 (February 25): Some Theoretical Perspectives

- Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," *Journal of Public Law* 6 (1957): 279
- Mark Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35
- Matthew Stephenson, "When the Devil Turns . . . : Political Foundations of Independent Judicial Review," *Journal of Legal Studies* 32 (2003): 59
- Georg Vanberg, "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review," *American Journal of Political Science* 45 (2001): 346
- Bradley Canon, "Defining the Dimensions of Judicial Activism," *Judicature* 66 (1983): 237
- Larry Kramer, "Popular Constitutionalism, Circa 2004," *California Law Review* 92 (2004): 959

Week 2 (March 4): Pre-Civil War

- Keith Whittington, "Judicial Review of Congress before the Civil War," *Georgetown Law Journal* 97 (2009): 1315
- Mark Graber, "The Jacksonian Makings of the Taney Court," http://digitalcommons.law.umaryland.edu/fac_pubs/5
- Marbury v. Madison, 5 U.S. 1 (1803)
- Fletcher v. Peck, 10 U.S. 87 (1810)
- McCulloch v. Maryland, 17 U.S. 316 (1819)
- Gibbons v. Ogden, 22 U.S. 1 (1824)
- Donahue v. Richards, 38 Maine 376 (1854)
- Wynehamer v. The People, 13 N.Y. 378 (1856)
- Dred Scott v. Sanford, 60 U.S. 393 (1857)

Week 3 (March 11): Civil War and Reconstruction

- Lincoln on Departmentalism (in Gillman, Graber & Whittington)

Ex parte Merryman, 17 F. Cas. 144 (1861)
The Prize Cases, 67 U.S. 635 (1863)
Crandall v. Nevada, 73 U.S. 35 (1867)
Ex parte McCordle, 74 U.S. 506 (1869)
Legal Tender Cases, 79 U.S. 457 (1871)
Burns v. State, 48 Ala. 196 (1872)
Slaughterhouse Cases, 83 U.S. 36 (1873)
United States v. Cruikshank, 92 U.S. 542 (1875)

Week 4 (March 18): Gilded Age and Progressive Era

Howard Gillman, *The Constitution Besieged*, 61-193
Munn v. Illinois, 94 U.S. 113 (1877)
Boyd v. United States, 116 U.S. 616 (1886)
In re Jacobs, 98 NY 98 (1885)
Ah Lim v. Territory of Washington, 24 P. 588 (Wash. 1890)
Pollack v. Farmers Loan & Trust, 157 U.S. 429 (1894)
United States v. E.C. Knight, 156 U.S. 1 (1895)
Lochner v. New York, 198 U.S. 412 (1908)
Abrams v. United States, 250 U.S. 616 (1919)

Week 5 (March 25): New Deal and Postwar

Schechter Poultry v. United States, 295 U.S. 495 (1935)
Franklin Roosevelt, Undelivered Gold-Clause Cases Speech (in Gillman, Graber & Whittington)
Franklin Roosevelt, Court-Packing Plan Speech (in Gillman, Graber & Whittington)
Senate Report on Court-Packing Plan (in Gillman, Graber & Whittington)
United States v. Carolene Products, 304 U.S. 144 (1938)
Wickard v. Filburn, 317 U.S. 111 (1942)
Robert Jackson, Memo on *Wickard* (in Gillman, Graber & Whittington)
Korematsu v. United States, 323 U.S. 214 (1944)
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Week 6 (April 1): Modern

Brown v. Board of Education, 347 U.S. 483 (1954)
Dwight Eisenhower, Comments on Little Rock (in Gillman, Graber & Whittington)
Cooper v. Aaron, 358 U.S. 1 (1958)
Engle v. Vitale, 370 U.S. 421 (1962)
Roe v. Wade, 410 U.S. 113 (1973)
INS v. Chadha, 463 U.S. 919 (1983)
City of Boerne v. Flores, 521 U.S. 507 (1997)
Reno v. ACLU, 521 U.S. 844 (1997)
Lawrence v. Texas, 539 U.S. 558 (2003)
Tom Keck, "Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes,"
American Political Science Review 101 (2007): 321