

CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THE END OF RECONSTRUCTION
(1877) TO THE PRESENT

512:404

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Frelinghuysen Hall (River Dorm), Room B6
Tuesday & Thursday 5th Period, 3:50-5:10pm

This is a discussion course focusing on Supreme Court cases from the post-Civil War era (and the passage of the 14th Amendment) to the present. It is a history class, not a law course, but students will learn a good deal about constitutional law as well as about the history of Supreme Court decisions.

May 21st, 1954: 17-year-old Nathaniel Steward in class at the Saint-Dominique school in Washington, where the Supreme Court decision in *Brown v. Board of Education of Topeka, Kansas* (1954) was first applied.



Source: <http://i.huffpost.com/gen/1798311/original.jpg>

In addition to daily discussions of specific Supreme Court cases, students will all have an opportunity to participate in a moot court debate of a landmark case. These cases include the *Abrams* case that in the World War I era first raised constitutional issues about free speech and the 1960s *Engel* decision that banned school prayer in the public schools and set off the modern debate on church-state relations. We will also consider *Roe v. Wade*, and the abortion controversy of the 1970s.

The course will unfold this spring 2022 against the backdrop potentially of one of the most eventful terms of the Supreme Court in the 21st century. By the time we begin in January 2022, most of these cases will have been argued; by the time we conclude the semester, the Court will be preparing to announce opinions on the most divisive of these cases. Hopefully, the course will provide you with a background that allows you to put these decisions in a historical perspective.

Through the Civil War, the Supreme Court used the **commerce, contract, and necessary and proper clauses** of the Constitution to strengthen the government and provide a basis for economic development. Constitutionally, the effort failed, and Civil War followed. In this course, we will explore the post-Civil War transformation of constitutional government created by (1) the challenge to federalism and localism by the growth of an integrated national economy: and by (2) the passage of the **14th Amendment**. The 14th amendment has been at the center of a struggle between an ever more powerful national government and those using the judicial process to protect the rights of individuals. We will discuss briefly the revolutionary implications of the 13th and 14th Amendments (especially for African Americans), then look at the subsequent use of the 14th Amendment to limit government regulation of private economic rights ("substantive due process"). This transformation of the 14th Amendment from a narrowly crafted amendment concerned with protecting the newly freed slaves to a broadly constructed provision of the Constitution to protect property interests is one of the most crucial stories in constitutional history. We will then explore the battle over civil liberties during WWI, which again will involve the 14th Amendment (the "extension" of the "Bill of Rights" to protect individuals from the actions of state governments as well as the federal government).

During the Great Depression (1929-1941) and the New Deal (1933-1941), the Federal government took extraordinary steps to revive and reform the economy. These steps challenged older 14th Amendment notions of individual economic freedom ("substantive due process") and extended federal commerce and taxing power (concerns from before the Civil War). We will next look at the extension of the Bill of Rights protections during the post-WWII era (freedom of and from religion, the death penalty, free speech, civil rights, women's rights), and the conservative retrenchment of the court that began in the 1980s. This retrenchment has reasserted "federalism" as a constitutional principle that favors the power of states (localism) over that of the federal government and curtailed many 14th Amendment rights (especially those in the criminal justice system, but has paradoxically also expanded 1st and 2nd Amendment rights).

The course will be graded on two essay exams (there is no final exam), response papers or quizzes on the readings, a modest research paper on a major Supreme Court case, moot court participation and class discussion.



Meet the Professor. I am a colonial historian, who trained as a mathematician (BS) at the University of Maryland, and then got my PhD in history at the University of Wisconsin (so proof that your undergrad degree does not decide your life choices). At Rutgers, I have taught the American Revolution, Constitutional History, Famous Trial, and both halves of the American history survey, Making of America. I have also taught research seminars for undergraduates on Rutgers history while I was writing my book, *Rutgers since 1945*. I am currently on a book project on the Pandemic at Rutgers, and am collaborating in this project with a colleague who works on medical history.

I love teaching and try to integrate it with academic advising (hope to see each of you in person or virtually

beyond the classroom this semester.)

Fun facts: I'm a hiker (the picture comes from Kings Canyon National Park, California – google the Hart Tree Trail if you want to know about one of the great sequoia hikes in the world—but sadly in an area threatened by California wildfires. I have two older children—both work for Sony doing video animation for PlayStation (if you have used a PlayStation game in the last decade or so, my daughter probably worked on the animation).

Readings (Barnes & Noble-University Bookstore). If books are available as ebooks, students may substitute these for the print version. If a quiz or test is open book, the ebook can be used.

Most readings will be on Sakai. There are two required books. Neither is available in e-book format:

Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford University Press, 2008). ISBN: 978-0195341034. (Also available in Kindle e-book edition). Cornell explains both the origins of the 2nd Amendment, and the long-lasting debate over gun control that began several decades after its passage, bringing the story up to the early 21st-century. Along with Mark Tushnet, he is among the leading authorities on the history of the 2nd Amendment, and the like Tushnet his analysis, he states, has made neither side in the current debate happy. Thus in addition to a critically important perspective on the **history** of gun regulation, Cornell gives us a chance to reflect on the difference between the complex and messy way people in specific eras thought about (and differed over) a constitutional right, and the way advocates and lawyers today shape that history into much simpler stories to convince the public and win cases.

Bruce J. Dierenfield, *The Battle over School Prayer: How Engel v. Vitale Changed America* (Kansas, 2007). ISBN: 978-0-7006-1526-1. It has become known to many as the moment when the U.S. Supreme Court kicked God out of the public schools, supposedly paving the way for a decline in educational quality and a dramatic rise in delinquency and immorality. The 6-to-1 decision in *Engel v. Vitale* (1962) not only sparked outrage among a great many religious Americans, it also rallied those who cried out against what they perceived as a dangerously activist Court (from the University of Kansas Press book blurb). This case involved both aspects of religious freedom: the establishment clause and the free exercise clause, and as such, set the ground work for much of the on-going debate on religion and the state (including the current efforts to extend voucher programs to religious schools, etc.)