

Race and Federalism

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Wednesday, 5:00-7:00pm

WCC-3034

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Office Hours: Tuesday, 2-4pm (Walk-in Only) Areeda 230

Course Description

This seminar examines two American legal obsessions, federalism, “the oldest question in constitutional law” and race. Federalism is generally our shorthand way of referring to how we in the United States divide power and authority between the states and the national government. We will examine the historical foundations and normative underpinnings of our federalism, and will explore how these understandings have evolved throughout American history. We will also examine how the U.S. Supreme Court has understood and analyzed our federalism through time. Specific topics include: what is the value of a federal system? What were the views of the framers of the US Constitution about our federalism, and how does their constitutional framework reflect those views? How has this vision of our federalism changed throughout American history, and why? Which institution should be responsible for safeguarding our federalism? I am particularly interested in the relationship among federalism, race, and individual rights. What impact does our federalism have on the status of minority groups? We will look with particular care at four moments in our constitutional history; the Founding; Reconstruction; the Civil Rights Era; and the modern federalism revival.

Course Format and Basic Requirements, and Evaluation

In order for the class to work, everyone must come to class prepared and ready to engage in classroom discussions. I expect you to move through the readings sensibly. Some of the articles and cases are long. Please use your judgment on how to read them and how closely you must read them. I do expect you to come to class prepared to share your observations about the readings. These are difficult and important issues, and the class will be much more fruitful if all of us share our reactions to the topics of the day. Read with an eye towards nuance, interesting angles, or places where things might not make sense. For each class, starting with the second class, each of you will be responsible for and will take turns leading class discussion. I’ll say more about this on the first day of class.

There will not be an exam in this seminar. Your grade in this class will depend upon your final paper. The final paper can either be (a) a 20-page research (social science or law review) paper that explores a research question within the ambit of the seminar or (b) two or three reflection papers totaling 20 pages that examine issues within the subject matter of the seminar.

READINGS

We do not have a casebook for this seminar. I have selected the following readings. There is a lot to cover. Some of the assignments aim for depth and are therefore more thematic. Other assignments aim for breadth and are therefore more discrete. The assignments, I think, are self-explanatory.

1. Federalism at the Founding— Theory and Practice

1/30

- JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996), chapter 7
- Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66 (2001)
- Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987)
- Michael P. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 48 REV. POL. 166 (1986)
- Federalist 39 & 51
- *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)

2. Slavery, the Constitution, and Federalism

2/6

- Mark DeWolfe Howe, *Federalism and Civil Rights*, 77 PRO. MASS. HIST. SOC. 15 (1965)
- Howard A. Ohline, *Republicanism and Slavery: Origins of the Three Fifths Clause in the United States*, 28 WM. & MARY Q. 563 (1971)
- Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015 (1997)
- Earl M. Malz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. L. HIST. 466 (1992)
- *Prigg v. Pennsylvania*, 41 U.S. 539 (1842)
- *Ableman v. Booth*, 62 U.S. 506 (1859)
- U.S. Const. art. IV, section 2, cl. 3
- Fugitive Slave Act of 1793; Fugitive Slave Act of 1850

3. Dred Scott and the Civil War

2/13

- Barry J. Balleck, *When the Ends Justify the Means: Thomas Jefferson and the Louisiana Purchase*, 22 PRES. STUD. Q. 679 (1992)
- Sean Wilentz, *Jeffersonian Democracy and the Origins of Political Antislavery in the United States: The Missouri Crisis Revisited*, 4 J. HIST. SOC. 375 (2004)
- John S. Vishneski III, *What the Court Decided in Dred Scott v. Sandford*, 32 AM. J. L. HIST. 373 (1988)
- Louise Weisberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97 (2007)
- Gerald Leonard, *Law and Politics Reconsidered: A New Constitutional History of Dred Scott*, 34 L. & Soc. Inquiry, 747 (2009)
- *Dred Scott v. Sandford*, 60 U.S. 393 (1857)

4. Reconstruction: Amendments

2/20

- Lea S. VanderVelde, *Labor Vision of the 13th Amendment*, 138 U Pa. L. Rev. 437 (1987)
- Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 Duke L.J. 1609 (2001).
- John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997)
- Richard L. Aynes, *The 39th Congress (1865-1867) and the 14th Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1019 (2009)
- Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. S. Hist. 202 (1962)
- Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012)

5. Reconstruction: Enforcement

2/27

- Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 30 MICH. L. REV. 1323 (1952)
- Michael P. O'Connor, *Time Out of Mind: Our Collective Amnesia About the History of the Privileges or Immunities Clause*, 93 Ky. L.J. 659 (2005)
- Randall Kennedy, *Reconstruction and the Politics of Scholarship*, 98 YALE L.J. 521 (1989)
- Civil Rights Act of 1866, ch. 31, 14 Stat. 27

- Enforcement Act of 1870 (Act of May 31, 1870), ch. 114, 16 Stat. 140, amended by Act of Feb. 28, 1871, ch. 99, 16 Stat. 433
- Ku Klux Klan (Anti-lynching) Act, ch. 22, 17 Stat. 13 (1871)
- Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875)

6. Reconstruction, the Court, and Federalism

3/6

- Eric Foner, *The Supreme Court and the History of Reconstruction -- and Vice-Versa*, 112 COLUM. L. REV. 1585 (2012)
- Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003)
- Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39
- Michael Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303
- *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872)
- *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873)
- *United States v. Cruikshank*, 92 U.S. 542 (1876)
- *Civil Rights Cases*, 109 U.S. 3 (1883)
- *Plessy v. Ferguson*, 163 U.S. 537 (1896)

7. The Civil Rights Era

3/13

- Derrick Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980)
- Justin Driver, *Rethinking the Interest Convergence Thesis*, 105 NW. L. REV. 149 (2011)
- *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)
- *United States v. Classic*, 313 U.S. 299 (1941)
- *Screws v. United States*, 325 U.S. 91 (1945)
- *Brown v. Board of Education*, 347 U.S. 483 (1954)
- *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)
- *Katzenbach v. McClung*, 379 U.S. 294 (1964)

8. The Federalism Revolution

3/27

- John F. Manning, *Federalism and the Generality Problem*, 122 HARV. L. REV. 2003 (2009)
- Gillian E. Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98 (2009)
- Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEM. PROB. 147 (1992)
- *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)
- *New York v. United States*, 505 U.S. 144 (1992)
- *United States v. Lopez*, 514 U.S. 549 (1995)

4/3

- Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009)
- Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013)
- Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005)
- *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)
- *City of Boerne v. Flores*, 521 U.S. 507 (1997)
- *Printz v. United States*, 521 U.S. 898 (1997)

4/10

- Neil S. Siegel & Robert D. Cooter, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010)
- Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91 (2004)
- Richard H. Fallon Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961 (2017)
- Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001)
- *Alden v. Maine*, 527 U.S. 706 (1999)
- *United States v. Morrison*, 529 U.S. 598 (2000)
- *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 731 (2003)
- *Tennessee v. Lane*, 541 U.S. 509 (2004)

9. Race, Voting, & Federalism

4/17

- Heather K. Gerken, *Federalism as the new Nationalism*, 123 YALE L.J. 1889 (2014)
- Judith Resnik, Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations
- Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175 (2013)
- South Carolina v. Katzenbach, 383 U.S. 301 (1966)
- Northwest Austin Municipal Utility District No 1 v. Holder, 557 U.S. 193 (2009)
- Shelby County v. Holder, 570 U.S. 529 (2013)

4/24

- Heather K. Gerken, Dissenting by Deciding, 57 Stan. L. Rev. 1745 (2005)
- Ilya Somin, *Taking Dissenting by Deciding All the Way Down*, 48 TULSA L. REV. 523, 530-32 (2013)
- Guy-Uriel Charles, *Dissent, Diversity, and Democracy, Heather Gerken and the Contingent Imperative of Majority Rule*, 48 TULSA L. REV. 493 (2013)
- Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *States Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481 (2014)
- Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism and Voting Rights*, 2015 U. CHI. L. FORUM 113