This seminar explores contemporary approaches to constitutional interpretation in light of their use (or lack of use) in landmark Supreme Court decision-making and their impact on the place of the Supreme Court, compared to more directly politically accountable institutions, as a venue for defining individual rights and the power of government in the United States.

Why study constitutional interpretation and theory at all? Is it because such theories justify or refuse to justify the expansion of individual rights, and thus help us decide whether such rights are legitimate? Is it because conservatives have argued against the expansion of rights and equality, and have used certain constitutional theories to limit such expansion? Is it because members of the left have used different theories to justify rights expansion? Is it because those who support expanded rights, or oppose them, need the intellectual tools to make a case for their differing positions—and we as students of constitutional law and American politics, and actors in law and politics-- need to know these positions? Is it because by understanding constitutional theories, we can better know why the Supreme Court makes its constitutional choices in landmark cases? Or is it because the relationship between practice and theory is quite wide, and we need to know the extent of this width between law and practice to get a better handle on the bases on which the Supreme Court makes its choices? Do we study constitutional theory as a way to see whether the counter-majoritarian problem of the Supreme Court is a valid concern? Perhaps, we study constitutional theory as part of a search for polity and rights principles, and their intersection, to see whether (or to what degree) the Court is principled in its decision-making over time? Do we study constitutional theory to see how views by scholars and the wider society have changed about the role of law and the Supreme Court in our society? At a more basic level, do we study constitutional theory to advance such theory, hoping to expand rights, so we will be effective law students, judges, and lawyers should we choose such a career? That is, by taking this seminar, we will have a leg up on our peers in law school, and thus on our chances of success? I will raise these questions again at the end of the course to see what you think is the reason(s) for studying constitutional theory, whether not such study is needed, and, perhaps, some additional reasons for such a study.

After a discussion of why study constitutional theory and a brief overview of the history of constitutional theory, the first set of approaches we study are institutional or structural-based constitutional theories which are based on the relationship of constitutional theory to the structure of the American government and the role of the Supreme Court compared to more directly politically accountable institutions such as Congress in that government as possible agents of social
change. These include Ely’s political malfunction or representation theory, Sunstein’s theory of judicial minimalism, and theories of popular constitutionalism, such as Tushnet’s theory of taking the Constitution away from the Court.

These institutional approaches emphasize issues of whether the Supreme Court or more directly politically accountable institutions should decide the nature of individual rights. These approaches emphasize issues of judicial activism and restraint, and the justification for judicial review and judicial supremacy in a democracy. Do these scholars make sense about the role of history, Congress, the states, political parties, mass political action, and the Court as actors in our political/legal system, and how do they differ on such views?

The second set of approaches we shall call interpretive theory. By contrast to institutional theories, interpretive theories assume that the most important questions for constitutional scholars, and the Supreme Court, are how the Supreme Court should determine what the Constitution means in concrete cases. Gerhardt, Griffin, and Rowe in *Constitutional Theory: Arguments and Perspectives, Third Edition* (2007, p. 22) write that interpretive theorists seek to “settle the correct, legitimate, or true interpretation of the Constitution. Only if we know what the Constitution commands will we be able to settle the knotty issues that concern institutionalists.” This second set of approaches focus of methods of interpretation, including Bork and Scalia’s textualism (or conservative originalism), the new liberal or progressive originalism of Balkin, Barber and Fleming, Dworkin’s liberal, moral-based interpretation of the Constitution, and, if time permits, Barnett’s Natural Rights Originalism. Which arguments for and against a particular theory are most telling?

We also have time to look briefly at a final set of contemporary constitutional theories. However, we must decide what these are. Should we study Ackerman’s Theory of Constitutional Change or Critical Race/Gender Theory? (See last sections of the syllabus.)

The second half of the semester will be devoted to each student conceptualizing, researching, and writing a 20-25 page seminar paper and making a 25 minute in-class oral presentation in the last month of the semester.

While this seminar is on Constitutional Interpretation and Individual Rights, and I would hope an issue of constitutional theory would inform your paper, your paper may center on any issue or doctrine in constitutional law and theory, or on the Court as an institution in American politics and American political development. Papers could be critiques of a particular constitutional theory, a comparison of two theories, the consideration of whether there is a counter-majoritarian problem for the Supreme Court, the study of a particular theory with regard to its influence in case opinions, such as Scalia’s textualism, Sunstein’s minimalism, or some other theory. Or papers can be on the implications of several theories on the legitimacy of the right to abortion choice or gays’ rights to sexual intimacy, expansions or limitations of state and national power in federalism cases, or “inherent” powers of the president as commander in chief, foreign policy, and citizen rights in peace and war. Papers might be on the implications of institutional and interpretive theories for whether rights will expand or not. For example, what are the implications of institutional and/or interpretive theories for supporting/opposing the expansion of affirmative action, gender rights,
more complex social constructions of equality/inequality? A student may wish to view the implications of institutional and/or interpretive theories in an important landmark case(s).

This listing of possible directions in seminar papers is not in any way to be viewed as complete or exhaustive. However, it is important that students begin to explore and identify the subject of inquiry for their seminar paper as early as possible in the semester, but clearly prior to Spring Recess. By doing so, you can be doing the required reading, with some thought as to how it might inform what you are interested in studying for your seminar paper. In class meetings from time to time I will ask you about your progress in identifying a paper topic.

On the afternoon and evening of the first Tuesday after Spring break, April 6, 2010, I will meet with you individually to discuss your seminar paper topic. These meetings will be held in my office, Rice 232. You should have chosen a paper topic by the time we meet and supply me with a substantial bibliography of sources for your research, and perhaps an outline or a first draft of your seminar paper prospectus. The prospectus is four to eight double-spaced pages; it describes the topic of your paper, the primary questions that you seek to research based on your reading of some sources, and a full bibliography. We will not meet on April 13, 2010, the second Tuesday after spring break.

On Tuesday, April 20, 2010, we shall meet as a class to discuss drafts of student prospectuses. Before that class each student will read and comment on the draft prospectuses of half the class. Therefore, by Friday, April 16, 2010 send to each member of your group and me a copy of your full draft prospectus by electronic means. By Sunday, April 18, 2010 send your critiques of the prospectuses of students in your group to ALL members of the seminar. In class, on Tuesday, April 20, each seminar member will speak five minutes to the class, at which time all members of the seminar will discuss your draft prospectus. Your completed prospectus must be sent to me by April 25, 2010. April 27, May, 4, and May 11 will be devoted to 25 minute class presentations of your papers.

Your project prospectus and comments on student prospectuses count 20%, class participation 20%, and final paper presentation and written paper counts 60% of your grade.

The following required readings have been ordered by the Oberlin bookstore for your purchase.

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (Lexis-Nexis Publishers, 2007)


For a new and comprehensive listing of links from the Clough Center at Boston College to document collections, research and instructional centers, news sites and blogs whose primary focus is constitutional democracy or constitutionalism more generally see [http://www.bc.edu/centers/cloughcenter/links.html](http://www.bc.edu/centers/cloughcenter/links.html).
Schedule of Classes and Required Readings

I. Organization Meeting (February 9, 2010)


A. Why Study Constitutional Theory?


Chapter 15, Theory and Its Discontents 690-703

§ 15.03 The Scope of Constitutional Theory
Keith Whittington, Constitutional Theory as Political Science
§ 15.04 Conclusion

Are constitutional theorists bad political scientists? Should they change the questions they ask and how they go about answering them?


Chapter 8, Dethroning Grand Theory, 140-168 (OE)

Why do Farber and Sherry want to dethrone grand theory?

Do you agree with Whittington, Farber, and Sherry about the limitations of grand constitutional theory?

Do you like some constitutional theories better than others? Do they perform different tasks?

Review a Reading from American Constitutional Law

You may wish to reread (from American Constitutional Law) my book chapter on the Supreme Court Decision-Making as a “Social Construction” Process. Does this offer any insights as to what the study of constitutional theory should be?

**What is the relationship between constitutional theory and constitutional practice? - One person’s view.**

B. The Counter-Majoritarian Difficulty as a Core Concern In Constitutional Theory

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (Lexis-Nexis Publishers, 2007)

Chapter 1 A Brief Historical Overview of the Development of American Constitutional Theory, 1-27.

§ 1.01 Introduction
§ 1.02 The Relationship Between Theory and Constitutional Structure
§ 1.03 Theory and the Countermajoritarian Difficulty in Early American History
§ 1.04 Theory in the Twentieth Century
§ 1.05 An Overview of Contemporary Constitutional Theory
§ 1.06 Approaches to Constitutional Theory and the Organization of this Book
Keith E. Whittington, Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory

Non- Required Readings


C. Representation-Reinforcing Constitutional Theories of Bases for Court Activism Given Counter-Majoritarian Difficulty-The First Wave—John Hart Ely’s Democracy and Distrust (Yes, says Ely if the Court decides questions on moral grounds, not related to structural defects of the pluralist political system)

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (Lexis-Nexis Publishers, 2007), 89-127

Chapter 4 The New Critique of Judicial Review

§ 4.01 Introduction: Alexander Bickel's Countermajoritarian Complaint
Alexander Bickel, *The Least Dangerous Branch*
Rebecca L. Brown, *Accountability, Liberty, And The Constitution*
§ 4.02 John Hart Ely And Representation-Reinforcement
John Hart Ely, Democracy And Distrust A Theory Of Judicial Review
Laurence Tribe, The Puzzling Persistence of Process-Based Constitutional Theories

§4:03 The Nonmajoritarian Difficulty?
Mark A. Graber, The Nonmajoritarian Difficulty: Legislative Deferecence to the Judiciary

Non-Required Reading


III. Is Judicial Supremacy Necessary? Tushnet’s Taking the Constitution Away from the Courts and Sunstein’s Theory of Judicial Minimalism (No Says Tushnet and Less of a Role for the Supreme Court Says Sunstein) (February 23, 2010)

A. Is Judicial Supremacy Necessary?: An Overview of Issues

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007)

Chapter 4 The New Critique of Judicial Review: Is Judicial Supremacy Necessary?, 127-148

§ 4.04 The New Critique of Judicial Review
Jeremy Waldron, The Core of the Case Against Judicial Review
Mark V. Tushnet, Taking the Constitution Away From the Courts

B. Tushnet’s Taking the Constitution Away from the Courts: Trust Politics Not the Court


Chapter 1, “Against Judicial Supremacy,” 6-32. (OE)
Chapter 8, “Populist Constitutional Law,” 177-194. (OE)


Non-Required Readings


Chapter 7, “Grand Theories and Ambiguous Republican Critique: Mark Tushnet on Contemporary Law,” 149-174. (OE)


Kahn, Ronald, “The Supreme Court and Path Dependence in Mark Tushnet’s The New Constitutional Order,” Panel on The Supreme Court in the New Constitutional Order,
C. Cass Sunstein’s Theory of Judicial Minimalism

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007), 71-79

Chapter 3 Judicial Activism and Restraint: The Contemporary Debate

§ 3.01 Introduction
§ 3.02 Judicial Minimalism
Cass R. Sunstein, Burkean Minimalism


Chapter 1, Leaving Things Undecided, 3-23
Chapter 2, Democracy-Promoting Minimalism, 24-45.
Chapter 7, Sex and Sexual Orientation, 137-171.

What is judicial minimalism and maximalism?

What landmark cases does he not like historically, and in the area of abortion/sexual orientation? What do you think?

Do you think the Court should be minimalist? Has it been minimalist?


Non-Required Readings


In what sense is judicial minimalism a continuation of Bickel’s concerns about the “counter-majoritarian” Supreme Court?

James Fleming, “The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution,” 2885-2920. (OE)
IV. Interpretive Approaches to Constitutional Theory I: Textualism and Contemporary Conservative Originalism (March 2, 2010)

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007)

Chapter 5. Textualism and Constitutional Interpretation, 175-209.

§5.01 Introduction
§5.02 What is Textualism?
  Antonin Scalia, A Matter Of Interpretation: Federal Courts And The Law
§5.03 Some Critiques of Textualism
  John Hart Ely, Democracy And Distrust: A Theory Of Judicial Review 185
  Richard Posner, What Am I? A Plotted Plant? The Case Against Strict Constructionism
  David A. Strauss, Common Law Constitutional Interpretation 195
§5.04 Conclusion


§ 6.01 Introduction and Overview
§ 6.02 The "New Originalism"
  Keith E. Whittington, The New Originalism
§ 6.03 The Appropriate Levels of Generality
§ 6.04 Contemporary Originalist Debates
  Antonin Scalia, Originalism: The Lesser Evil


Chapter 3, “The Authority of Originalism and the Nature of a Written Constitution,” 47-76. (OE)

What are the positive arguments by Whittington for the importance of a written Constitution in making constitutional choices? What are the limits of text as a basis for making constitutional choices?

What are the ultimate limits of originalism? What do you think?

Chapter 5, “Scalia Textualism Applied to Substantive Rights.” 127-165.(OE)
Chapter 7, “The Impact of Scalia’s Textualism on His Colleagues,” 198-208. (OE)

What are the implications of Scalia’s textualism for the nature of individual rights under the religion and free speech clauses of the First Amendment and the equal protection clause of the 14th Amendment?

What has been the impact of Scalia’s textualism on his colleagues on the Court?


Chapter 2, “History’s Dead Hand,” 53-78. (OE)
Chapter 3, “Is There a Right to Privacy,” 81-109.(OE)

Does Sunstein’s rejection of textualism make sense to you? Is this rejection a good argument for his judicial minimalism? Do non-originalist progressive judges, who also are maximalists in Sunstein’s terms, have the same drawbacks as Sunstein finds with maximalist/fundamental originalists?

Non-Required Readings


Chapter 1, “Constitutional Interpretation,” 1-16. (OE)
Chapter 2, “The Dilemmas of Contemporary Constitutional Theory,” 17-46. (OE)
“Conclusion, Interpretation and the Constitution as Law,” 213-219.

The History of Originalism


Chapter 1, “From Textual Originalism to Modern Judicial Power,” 12-42.(OE)


Chapter 2, In the Beginning: Robert Bork and the Other Originalists: 10-28. (OE)


Scalia as Textualist


Chapter 1, “Introduction,” 1-26. (OE)
Chapter 2, “Text and Tradition”: Scalia’s Understanding of the Interpretive Enterprise,” 27-51. (OE)


Chapter 3, The Formalist Crusade of Antonin Scalia: 29-54. (OE)


Sunstein’s Minimalist Critique of Originalism


Chapter 1, “Fundamentalists and Minimalists, Perfectionists and Majoritarians,” 23-31. (OE)
Chapter 4, “Who May Marry?,” 111-129. (OE)
Chapter 10, “Fundamentals,” 243-252. (OE)
Can There Be Fidelity to the Constitution Under Textual Originalism?


Chapter 6, “Narrow Originalism/Intentionalism,” 79-98.


Chapter 5, “Neo-Originalist Defenses of Judicial Interventionism,” 50-73. (OE)
Chapter 6, “Functional Defenses on Non-Originalist Interventionism,” 74-107. (OE)
Conclusion, 108

Federalism Under Textual Originalism


Chapter 1, “American Constitutional Federalism as a Normative Problem,” 3-14.

H. Jefferson Powell: Originalism and History


Do Justices Base Their Decisions on the Meaning of Text and the Intent of the Framers?:


Chapter 8, “Originalism in the 1990s,” 190-216. (OE)


V. Interpretive Approaches to Constitutional Theory II: The New-Different (Progressive) Originalists: Barnett and Balkan (March 9, 2010)

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007)


§ 6.04 Contemporary Originalist Debates 249
Antonin Scalia, Originalism: The Lesser Evil 250
Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism 261
Caleb Nelson, Originalism and Interpretive Conventions 275

§ 6.05 Contemporary Critiques of Originalism 282
Michael J. Klarman Antifidelity 283
Christopher L. Eisgruber, Constitutional Self-Government 295

§ 6.06 The Continuing Argument: A New Departure? 306
Jack M. Balkin, Abortion and Original Meaning 306

§ 6.07 Conclusion 315

Randy Barnett


Chapter 3, “Natural Rights as Liberty Rights: Retained Rights, Privileges, or Immunities,” 53-86. (OE)
Chapter 13, “Showing Necessity: Judicial Doctrines and the Application of Cases,” 335-353.(OE)

How is Barnett’s “Lost Constitution” different from the Constitution of Scalia and other conservative textualists?
Is a naturalist rights Constitution more open to the expansion of individual liberties and other rights?

What problems do Klarman and Eisgruber have with conservative originalism?
What would a constitutional theory have to have that conservative originalism does not have?

Jack Balkin


How is Balkin’s definition of original meaning of constitutional text different from “its original application” of conservative originalists?

Why does the debate between conservative originalism and living constitutionalism rest on false dichotomy for Balkin?

How does Balkin’s fidelity to the Constitution differ from those of Scalia, Barnett, Klarman and Eisgruber? What are the implications of these differences for the legitimacy of Roe v. Wade (1973), the right abortion choice and implied rights under the 14th Amendment?

Non-Required Readings

Barnett’s Natural Rights Originalism


Chapter 9, “The Mandate of the Ninth Amendment,” 223-252.(OE)
“Conclusion, Restoring the Lost Constitution,” 354-357.


Barnett, Randy E., “Who’s Afraid of Unenumerated Rights?,” (OE)

The Declaration of Independence and Originalism (Is this the Gerber View?)


Eisgruber’s Constitutional Self-Government

Christopher Eisgruber: Constitutional Self-Government: Legislatures and Elections as an Incomplete Representation of the People—The Democratic Qualities of Judicial Activism and Review


Chapter 1, “The Democratic Functions of Inflexible Constitutions,” 10-45. (OE)
Chapter 2, “Judicial Review and Democratic Legitimacy,” 46-78. (OE)
Chapter 4, “Text and Hard Cases,” 109-135. (against originalism)
Chapter 6, “Judicial Maintenance of Political Institutions,” 168-204. (OE)
Conclusion, 205-211.


Jack Balkin: Rights Expansive Originalism


Barnett, Randy E., “Underlying Principles,” (Response to Balkin) (OE)


VI. The Problem with Both Conservative and Liberal Originalism (Goldford) & Dworkin’s Moral Reading of the Constitution (March 16, 2010)

A. The Problem with Both (Conservative and Rights Expansive) Originalism


- Introduction, 1-19. (Handout)
- Chapter 9, “The Ontology of Constitutional Discourse (II),” 263-280. (Handout)
- Chapter 10, “Conclusion: The Political Character of Constitutional Discourse,” 281-300. (OE)

**Why does Goldford think (both conservative and rights expansive) originalism is an invalid approach to interpreting the Constitution?**


**Do the nature of Supreme Court decision-making and the Supreme Court as an institution in legal and political time raise questions about the feasibility/validation of conservative and rights expansive originalism as well Dworkin’s moral theory of constitutional theory and any grand theory of how the Supreme Court makes constitutional choices?**

B. Dworkin’s Constitutional Interpretation as Moral Reasoning: Does Dworkin Do a Better Job at Constitutional Interpretation than the Originalists?

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., *Constitutional Theory: Arguments and Perspectives* (Lexis-Nexis Publishers, 2007)

- Chapter 8 Moral Reasoning, 347-382.
§ 8.01 Introduction
§ 8.02 The Use of Moral Philosophy to Discover the Right Answers to Constitutional Questions
   Ronald Dworkin, Freedom's Law: The Moral Reading Of The American Constitution
   Michael J. Perry, Morality, Politics, And Law: A Bicentennial Essay
§ 8.03 The Critique of Moral Reasoning
   Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution
§ 8.04 Conclusion

What are the core elements of Dworkin’s moral theory of constitutional interpretation and core critiques of it?


Chapter 1, “Introduction: The Moral Reading and the Majoritarian Premise,” 1-38. (OE)

How does Dworkin square his moral reading of the Constitution with the counter-majoritarian difficulty, a concern that plagues both originalist and non-originalist constitutional theorists?


Chapter 7, “Ronald Dworkin and the City on the Hill,” 122-139. (OE)

What are the major elements of the Farber/Sherry critique of Dworkin’s constitutional theory?

Non-Required Readings on the Critique of Conservative (and Rights Expansive) Originalism


Chapter 1, “The Politics of Originalism,” 20-54. (OE)
Chapter 4, “The Paradox of Originalism,” 122-153. (OE)
Chapter 6, “The Epistemology of Constitutional Discourse (I),” 176-207.
Chapter 8, “The Ontology of Constitutional Discourse (I),” 235-262. (OE)


Non-Required Readings on Dworkin’s Moral Reading of the Constitution


Chapter 3, “What the Constitution Says,” 72-116.(OE)
Chapter 4, “Roe Was Saved,” 117-127.(OE)


VII. Critical Race and Gender Theory (March 23, 2010) (or Ackerman’s Theory of Constitutional Revolution)

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007)

Chapter 13, Critical Race Theory, 575-620.

§ 13.01 Introduction and Overview
Mari J. Matsuda et al., Introduction

§ 13.02 Critique of Liberalism
Kimberle Crenshaw et al., Introduction

§ 13.03 Social Construction

§ 13.04 Narrative
Patricia J. Williams, The Brass Ring and the Deep Blue Sea
§ 13.05  Identity Politics
  John 0. Calmore, Random Notes of an Integration
  Warrior
  Daniel A. Farber & Suzanna Sherry, Introduction

§ 13.06  Conclusion

What problems do critical race theorists find with contemporary liberal theories of constitutional analysis and interpretation?

Should we come up with less “neutral” concepts of constitutional interpretation and the core elements of the rule of law when dealing with racial equality?


Chapter 12, Feminist Legal Theory, 521-539; 550-571.

§ 12.01  Introduction and Overview
  Nancy Levit, The Gender Line: Men, Women and the Law

§ 12.02  Liberal Feminism
  Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate

§ 12.04  Radical Feminism
  Catharine A. MacKinnon, Difference and Dominance: on Sex Discrimination

§ 12.05  Postmodern Feminism
  Angela P. Harris, Race and Essentialism in Feminist Legal Theory

What problems do critical feminist scholars find with contemporary liberal theories of constitutional analysis and interpretation?

Should we come up with less “neutral” concepts of constitutional interpretation and the core elements of the rule of law when dealing with gender equality?

Fall Recess (March 30, 2010) (No Class)

VIII.  On Tu. April 6, 2010 meet individually with Prof. Kahn to discuss paper topics.

IX.  No class meeting on Tu. April 13, 2010. Work on prospectuses and research for seminar paper and email a draft of your prospectus to teacher and class members by Friday, April 16, 2010.

X.  Sunday, April 18, 2010 send comments on draft student prospectuses to me and all class members. We shall meet Tuesday, April 20, 2010 to discuss draft prospectuses
and student critiques. Each student will briefly discuss their project before class discussion. The completed prospectus it to be sent to Mr. Kahn by Sunday, April 25.

XI. Tuesday, April 27, 2010 (Presentations)

X11. Tuesday, May 4, 2010 (Presentations)

XIII Tuesday Evening, May 11, 2010) (Presentations and Pizza Dinner at Ron Kahn’s Home, 45 King Street)

Would you rather read Ackerman or the Critical Race and Gender Theory)?

Acknowledgment’s theory of constitutional revolutions which argues that the New Deal Revolution, like that of the historical periods of the founding and creation of the Civil War Amendments (13th, 14th, and 15th Amendments justifies) justify the Supreme Court defining new individual rights.

Ackerman’s Theory of Constitutional Revolutions

Is there a “Counter-Majoritarian Difficulty” for the Supreme Court?
No Says Bruce Ackerman in his Theory of Constitutional Revolutions -- As Justification for Rights Creation by the Supreme Court; Yes, Says Griffin, Balkin, and Levinson.

Michael Gerhardt, Stephen M. Griffin, and Thomas D. Rowe, Jr., Constitutional Theory: Arguments and Perspectives (Lexis-Nexis Publishers, 2007), 31-60.

Chapter 2 Theories of Constitutional Change

§ 2.01 Introduction
§ 2.02 Ackerman’s Theory: Transformative Moments of Change
   Bruce A. Ackerman, Revolution on a Human Scale
   Bruce A. Ackerman 2 We The People: Transformations
§ 2.03 The Idea of Constitutional Construction
§ 2.04 The New Deal and Constitutional Transformation
   Stephen M. Griffin, Constitutional Theory Transformed
§ 2.05 Partisan Entrenchment as a Theory of Constitutional Change
   Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution

Non-Required Reading


Chapter 6, Bruce Ackerman’s Magic Amendment Machine: 97-121. (OE)

Why do Farber and Sherry call Ackerman’s theory, sarcastically, “a Magic Amendment Machine”? What problems do they have with it?

Does it pay to study both the Supreme Court and History/American Political Development?


James Fleming, “The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution,” 2885-2920. (OE)

Why do you think Ackerman wrote this theory of constitutional change? What type of constitutional law does he seek to justify? And what counter theories of interpretation does he seek to oppose?

In what ways do the other scholars in Gerhardt book oppose/support the thesis in Ackerman’s theory of constitutional revolution? (i.e.: Griffin, Balkin & Levinson, Wood)

What is Ackerman’s vision of the relationship of the Supreme Court to politics, people, elections, and other political institutions?


Griffin, Stephen M., “Constitutional Theory Transformed,” 2115-2163. (OE)

Is it good to use history to make arguments about constitutional law, and in so doing did Ackerman get it right? Is theory/history as justification good?

Burnham, Walter Dean, “Constitutional Moments and Punctuated Equilibrium: A Political Scientist Confronts Bruce Ackerman’s We the People,” 2237-2277. (OE)

Did Ackerman get is political science about elections, politics, and political change right? If he did not what does it say about Ackerman’s theory in support of progressive constitutional decisions by the Supreme Court?