

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era – Foundations

Introduction to 2012–2013

The constitutional politics of the Contemporary Era chugged along largely as usual in the period between July 1, 2012, and July 1, 2013. Republicans in the summer of 2012 confidently expected to regain control of the Senate and possibly secure the presidency. Democrats in the fall celebrated an election in which President Obama was reelected more easily than many expected and they gained several seats in the upper chamber of the national legislature. Liberals were pleased by the more progressive tone of the president's second inaugural address. Nevertheless, by the summer of 2013, little had changed. Politics remained as polarized and as gridlocked as ever. Both parties maintained control of two branches of the national government with little sign the Contemporary Era was transforming into something else.

The two most important Supreme Court decisions of the 2013, *United States v. Windsor* (2013) and *Shelby County v. Holder* (2013), reflected several ongoing patterns in recent constitutional politics. Liberals won one, conservatives won the other. Justice Anthony Kennedy, who cast the deciding vote in each 5–4 decision, and a handful of libertarians are the only persons who favored declaring unconstitutional both Section 3 of the Defense of Marriage Act and the formula Congress had insisted on since 1965 for determining when states and counties had to preclear voting changes with federal authorities. The significance of both decisions is unclear. Gay rights activists cheered when the Supreme Court required the federal government to treat as married all same-sex couples who are legally married where they reside, but the real prize remains a constitutional right to same-sex marriage, which the justices pointedly avoided. For the first time since the passage of the Voting Rights Act of 1965, the Supreme Court liberated states and localities from preclearance supervision, but the duration of that freedom depends on whether a polarized Congress can pass an adjusted preclearance formula that a judicial majority thinks meets constitutional standards.

Developments. *Windsor* and *Shelby* aside, constitutional politics seems stuck in a rut. The cultural wars are continuing to tilt in a slightly leftward direction, particularly with respect to LGBT rights. The Obama administration in the war against terror is adopting many politics that progressives condemned when employed by the Bush administration, most notably the use of drones to assassinate alleged terrorists and intensive surveillance of private communications. Republicans and Democrats, liberals and conservatives, members of Move-On and the Tea Party, continue to engage in a decades-long constitutional trench warfare in which, as we observed in the main text, all parties expend a great deal of effort and resources to gain a few feet of constitutional turf.

The LGBT movement is the most successful participant in recent constitutional politics. In the fall of 2012, President Obama endorsed same-sex marriage, the number of states in which same-sex couples may lawfully marry increased from six to thirteen (California, Delaware, Maine, Maryland, Minnesota, Rhode Island, Washington), and the Supreme Court of the United States in *United States v. Windsor* (2013) declared that same-sex couples who are legally married in their state of residence have the right to all federal benefits enjoyed by opposite-sex married couples. Conservative cultural warriors fought back, with more than a third of all state legislatures passing new restrictions on abortion. Republicans in the House of Representatives were particularly aggressive, passing the Pain-Capable Unborn Child Act, which would ban all abortions after twenty weeks. Unsurprisingly, that measure is unlikely to pass or even be seriously considered by the Democratic-controlled Senate.

Parties. Divided government remains the norm. Democrats control the White House and the Senate. Republicans control the House. Five of the nine justices on the Supreme Court were appointed by Republican presidents. Republicans are making some gains in state and local elections, although no strong trend has yet emerged. Geography matters. Republicans are struggling to remain competitive on the northeast and on the Pacific Coast. Virginia, Florida, and, perhaps, North Carolina are the only former Confederate states in which Democrats regularly win some statewide elections.

Both parties remain animated by different constitutional visions. Democrats champion the Constitution of the New Deal and Great Society, a Constitution that gives the federal government the power to pass any economic regulation that liberals think serves the national interest, provides substantial protections for persons suspected of criminal offenses, and sharply curbs state power to regulate same-sex marriage and abortion. The Constitution championed by the Republican Party places far greater emphasis on federalism and a more limited national government. Their preferred constitutional rights include the right to bear arms, the right to race-neutral admissions and employment decisions, and various property rights.

Politics remains badly fragmented. Even institutions controlled by the same party often do not act in unison. Democrats in the Senate sharply criticize President Obama's policies on the war on terror. All five Republican judicial appointees on the Supreme Court voted to strike down portions of the Voting Rights Act that in 2006 were supported by strong Republican majorities in Congress and signed into law by President George W. Bush.

Courts. The Supreme Court handed down several major decisions, although not as many as observers expected at the beginning of the year. In *Shelby County v. Holder* (2013) a 5-4 majority declared unconstitutional the formula Congress had used for nearly forty years when determining what states and counties needed to submit voting rights changes for preclearance to the Attorney General or federal courts. A 5-4 majority in *United States v. Windsor* (2013) declared unconstitutional Section 3 of the Defense against Marriage Act, the provision that denied federal benefits to same-sex couples who were legally married in their state of residence. The justices ducked explosive constitutional issues when deciding the other two high-profile cases of the term. A 5-4 majority in *Hollingsworth v. Perry* (2013) relied on (dubious) standing grounds for not determining whether California's ban on same-sex marriage violated the equal protection clause of the Fourteenth Amendment. Rather than strike down or sustain affirmative action, the justices in *Fisher v. University of Texas* (2013) insisted only that the Court of Appeals for the Fifth Circuit make clear whether Texas had any race-neutral alternative to its race-conscious admissions program.

The big cases aside, the more conservative justices on the Supreme Court seemed less united than in previous years. Liberals in the recent past have typically been successful only when Justice Kennedy and, occasionally, Chief Justice Roberts voted for the more progressive outcome. 2012-2013 witnessed a greater variety of judicial line-ups. In *Alleyne v. United States* (2013), Justice Thomas joined with the four more liberal justices to form a majority in favor of a constitutional rule requiring juries to find beyond a reasonable doubt any fact that increased the statutory minimum sentence for a crime. Chief Justice Roberts and Justice Alito joined the more liberal justices in *Agency for International Development v. Alliance for Open Society International, Inc.* (2013), a decision holding that Congress could not require agencies to adopt general policy positions as a condition for receiving public funds. Justices Scalia and Thomas cast the deciding votes in *Florida v. Jardines* (2013), a case holding that police officers may not physically enter a person's front porch for the purpose of conducting a dog sniff search without first obtaining a warrant. Justice Breyer joined the other three conservatives in the dissent. Turnabout was fair play. Breyer cast the crucial vote in *Maryland v. King* (2013) upholding the constitutionality of taking DNA swabs after an arrest. Justice Scalia joined the other three members of the Court's liberal bloc in dissent.

Constitutional Thought and Legacies. The past year witnessed the continued development of Chief Justice Robert's constitutional vision, one that, in sharp contrast to that of the New Deal/Great Society regime, places the Tenth Amendment at the center of American constitutionalism. The chief justice first developed his constitutional vision at some length in *National Federation of Independent Business v. Sebelius* (2012), when he began his opinions by asserting, "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." Roberts frequently

articulated this federalist vision during the 2012–2013 judicial term. Relying heavily on the Tenth Amendment, his opinion in *Shelby County v. Holder* asserted that “the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. This allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” The chief justice and his more conservative brethren sometimes asserted narrow conceptions of federal power when voting to sustain federal authority. Roberts in *United States v. Kebodeaux* (2013) voted to sustain a federal law requiring persons to register in local communities if they had been convicted of sexual offenses while in the military, but his concurring opinion pointedly denied that the federal government possessed general police powers. Justice Scalia’s majority opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.* (2013), when declaring that U.S. law preempted an Arizona requirement that persons eligible to vote prove their citizenship, made clear that the federal government could merely provide the forms for registration and not establish qualifications for state voters. Justice Kennedy invoked federalism for progressive causes when his majority opinion striking down Section 3 of the Defense against Marriage Act insisted that states traditionally enjoyed the power to determine who could marry who.

The status of federalism and the Tenth Amendment nevertheless remains unclear in the summer of 2013. President Obama’s second inaugural spoke of using federal power to resolve numerous national powers and his judicial appointees are committed to the New Deal/Great Society vision of a national government with the authority to resolve all national problems. The survival of that vision remains for the future to determine, even as the more conservative potential replacement is coming into sharper focus.



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