

American Constitutional Interpretation
Government 203
Wesleyan University
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Syllabus

I Introduction

This course introduces students to a uniquely American, and to some ways of thinking, an especially naive, contribution to politics: The idea that we can make political practice conform to the written word. As some critics have said, the Constitution rests on the belief that saying a thing makes it so. Stripped to essentials, it is this assumption above all others that informs constitutional law. The undeniable implausibility of the claim, however, means that what we call constitutional law is really constitutional interpretation.

During the semester, we shall see that most of the serious issues in constitutional interpretation arise from conflicts between our commitment to two or more positive values. There are, for example, inevitable and recurrent conflicts (despite our attempts to ignore them), between the values of order and liberty. In Justice Frankfurter's words, these conflicts illustrate "what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs." In this course, we examine these clashes by considering the broader philosophical and institutional problems of the American constitutional order. I hope to show that constitutional answers to problems concerning separation of powers, federalism, and individual liberties require a coherent and comprehensive understanding of the Constitution, and of the assumptions it makes about human nature and the proper ends of government.

So although we will examine the doctrinal development of specific areas of constitutional law, such as separation of powers, federalism, judicial review, and others, we shall do so in a broader theoretical context. Our efforts at constitutional literacy shall center upon three questions: What is the Constitution? Who Should Interpret the Constitution? How should we interpret the Constitution?

We shall see that two centuries of accumulated legal muck notwithstanding, even these most basic of questions continue to provoke sharp disagreement. Legal scholars and Supreme Court justices alike, for example, appear unable even to agree on what the Constitution is. Is the "Constitution" a register of rules, a blueprint for the allocation of public power, as Chief Justice Rehnquist has consistently argued? Or is it a political creed, a secular bible in which we make public our deepest aspirations and fears as a people, as Justice Brennan has insisted?

Profound disagreement over the "true meaning" of the Constitution extends to more discrete questions as well. A question about "what the Constitution is" shades easily into a question about "what the Constitution includes." The obvious answer--the text, the whole text, and nothing but the text--is also the least satisfactory, both as a description of American constitutional history and as a matter of political theory. Strict adherence to this position, for example, would preclude an appeal to the intentions of the founders to give meaning to the vague clauses (are there any other sorts of clauses?) in the text proper. It would also disqualify judicial appeals to "implicit" or new rights, such as privacy.

Consequently, questions about "what" necessarily lead us to questions about "how to interpret the Constitution." When should we rely upon the intentions of the framers? And when should we refuse to be governed by the dead hand of the past? When, if ever, is history a legitimate source of constitutional instruction? Questions about "what" lead also to questions of "who," as shall be clear when we examine questions concerning the proper role of the judiciary in a constitutional democracy.

II Books to Purchase

Required:

Kommers, Finn, & Jacobsohn, *American Constitutional Law: Essays, Cases, and Comparative Notes*. 3rd edition; hardcover.

Van Geel, *Understanding Supreme Court Opinions*.

Optional:

Barber & Fleming, *Constitutional Interpretation: The Basic Questions*.

Rossiter, ed., *The Federalist Papers*.

III Reading Cases in Constitutional Law

Reading court cases is, for most of you, a new experience. Unfortunately, it is not often (at least initially) a very pleasant experience. You may find the reading a bit easier if you bear in mind the following inquiries:

a. **SUBSTANCE.** What is the "law" after the case was decided? What is the holding of the judges in the case? Is it consistent with prior cases? How does the case fit into the "doctrine" on this subject matter?

b. **ASSUMPTIONS.** What assumptions does the opinion make to support its argument? What does it assume, for example, about the Constitution? About human nature? About the framers? Are these assumptions consistent with the rest of the argument? Where is the reasoning deficient, unsupported, or implausible?

c. **HISTORY.** It is quite possible to see judicial opinions as political artifacts, as "period pieces" that value ideas quaintly idealistic or long since tarnished. Is history a relevant source of constitutional meaning?

d. **JUDICIAL ROLES.** Almost every significant case in civil liberties must come to terms with questions about the proper role of the judiciary in a constitutional democracy. As we shall see throughout the course, questions about relative institutional competencies are central to a complete understanding of the constitutional order.

e. **POLITICAL THEORY.** Serious controversies in civil liberties require of judges that they possess a conception of the nature of the American political system and the importance of civil liberties to that system. Is that conception--whether explicit or implicit--consistent with the result in the case? Is it coherent? Is it desirable?

III Schedule of Papers

- a) On Thursday, September 10, I will describe in class how to brief a case. Every student must submit a case brief on Tuesday, Sept. 15.
- b) On Thursday, Sept. 17, I will distribute a "bench memorandum" written exercise. Every student must submit a memorandum on Thursday, Oct. 1.
- c) On Tuesday, October 6, I will hand out a moot court problem, assign students to court, and choose counsel for the proceedings. Briefs of counsel must be completed and distributed to all members of the Court by 4:00, Thursday, Oct 22.
- d) The moot courts will meet during the week of November 3-5. Exact times and locations will be determined at a later date. Attendance at one of these meetings is mandatory. Opinions of the Court are due on Monday, November 23.

To avoid the problems engendered by late papers, I will strictly enforce the following regulations:

1. Students have "three days of grace" that they may use to shift submission deadlines for the case briefs, bench memoranda, and moot court opinions. Days of grace may not be used for Briefs of Counsel or examinations.
2. Papers and other assignments submitted after the days of grace have expired will be penalized one full grade per day.

IV Grades and Examinations

Graded work in this course consists of one case brief, a bench memorandum, a moot court exercise, class participation, and a final examination. There will not be a mid-term examination or any quizzes. Students must take and pass the final examination, at the time and place determined by the Registrar's Office, to pass the course.

The bench memorandum is worth 10% of the course grade;

The moot court is worth 40%;

The final exam is worth 40%;

Class participation is worth 10%.

VI Lecture Topics and Assignments

I have organized the readings around a series of distinct but interrelated topics. I intend to follow the chronology listed below, but experience has taught me that it is impractical to assign specific dates to specific topics. Different classes want and sometimes need to spend more or less time with different subjects--this framework gives us the flexibility we need to make adjustments as we go along. Please note also that my list of topics bears little resemblance to those one might

expect to see in a typical constitutional law course; hence, there is no week dedicated to the commerce clause, or to foreign affairs, or to the taxing and spending powers of Congress. We will cover those topics, but I prefer to subsume them under larger and more analytically rigorous categories that emphasize the interpretative, rather than the doctrinal, aspects of constitutional inquiry.

Introduction

Assigned: Read the Syllabus
KFJ, Introduction

Recommended:

Grinde, The Iroquois and the Founding of the American Nation
Jensen, The Articles of Confederation
Kammen, The Origins of the American Constitution
Wood, The Creation of the American Republic

TOPIC ONE: COURT AND CONSTITUTION

Assigned: KFJ, chapter 1 & Appendixes B & E.
Federalist Papers, #1

Recommended:

Cooper & Ball, The United States Supreme Court: Inside Out
Bloch & Krattenmaker, Supreme Court Politics
Schwartz, A History of the Supreme Court
McCloskey, The American Supreme Court
Rehnquist, The Supreme Court: How it Was, How it Is

TOPIC TWO: CONSTITUTIONAL INTERPRETATION--SCIENCE, ART, OR PERFORMANCE?

Assigned: KFJ, chapter two

Recommended:

Carter, Contemporary Constitutional Lawmaking
Bobbitt, Constitutional Interpretation
Arkes, Beyond the Constitution
Barber, On What the Constitution Means
LaRue, Constitutional Law as Fiction

TOPIC THREE: WHO INTERPRETS--JUDICIAL REVIEW OR JUDICIAL SUPREMACY?

Assigned: KFJ, chapter three; Appendix C; Appendix D.
Federalist 78 (Appendix I)

Recommended:

Burt, The Constitution in Conflict
Nagel, Constitutional Cultures
Snowiss, Judicial Review and the Law of the Constitution
Fisher, Constitutional Dialogues
Brigham, The Cult of the Robe
Ackerman, We the People
Wolfe, The Rise of Modern Judicial Review
Bickel, The Least Dangerous Branch
Ely, Democracy and Distrust
Barber, On What the Constitution Means
Murphy, Who Shall Interpret

TOPIC FOUR: SEPARATE INSTITUTIONS, SHARED POWERS

Assigned: KFJ, chapter four

Federalist Papers, 47-51

Recommended:

Fisher, Constitutional Dialogues
Craig, Chadha
Jones, Separate But Equal Branches
Choper, Judicial Review and the National Political Process
Fisher, The Politics of Shared Power
Corwin, The President: Office and Powers
Pyle, The President, Congress, and the Constitution
Vile, Constitutionalism and the Separation of Powers
Henkin, Foreign Affairs and the Constitution

TOPIC FIVE: CONGRESSIONAL POWERS

Assigned: KFJ, chapter seven

TOPIC SIX: FEDERALISM & STATES RIGHTS

Assigned: KFJ, chapter six

Federalist Papers, 6-7, 15-20

Recommended:

Elazar, American Federalism
Choper, Judicial Review and the National Political Process
Berns, "On the Meaning of the Tenth Amendment"
Goldwin, A Nation of States
Storing, What the Anti-federalist Were For
Stampp, "The Concept of Perpetual Union"
Mason, "The Nature of Our Federal Union Reconsidered"

TOPIC SEVEN: VOTING & POLITICAL REPRESENTATION

Assigned: KFJ, chapter eight

TOPIC EIGHT: FOREIGN AFFAIRS & CONSTITUTIONAL CRISES

Assigned: KFJ, chapter five

Recommended:

Finn, Constitutions in Crisis
Rossiter, Constitutional Dictatorship
Fisher, Presidential War Power
Ely, War and Responsibility
Franklin, Extraordinary Measures
Irons, Justice at War
Smith, Democracy on Trial

TOPIC NINE: A CONSTITUTION OF LIBERTIES--PROPERTY

Assigned: KFJ, chapter ten
Federalist Papers, 9-10

Recommended:

Beard, An Economic Interpretation of the Constitution
Paul & Dickman, Liberty, Property, and the Foundations of the American Constitution
Siegman, Economic Liberties and the Constitution
Ackerman, Property and the Constitution
Barber, On What the Constitution Means
Brest, Paul, "The Fundamental Rights Controversy"
Ely, Democracy and Distrust
Perry, The Court, The Constitution, and Human Rights
Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?"
Henkin, "Selective Incorporation & the Fourteenth Amendment"
Nelson, The Fourteenth Amendment

TOPIC TEN: A CONSTITUTION OF LIBERTIES--PRIVACY

Assigned: KFJ, chapter eleven

Recommended:

Sager, "Fair Measure"
Vose, Caucasians Only
Weschler, "Toward Neutral Principles of Constitutional Law"
Tribe, Constitutional Choices

TOPIC TEN: THE CONSTITUTION IN CRISIS

Assigned: KFJ, chapter 5
Federalist Papers, #1; 23-29

Recommended: Finn, Constitutions in Crisis
Rossiter, Constitutional Dictatorship
Becker, The Declaration of Independence
Irons, Justice at War
Smith, Democracy on Trial