

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. 2d edition; hardcover  
Rossiter, ed., The Federalist Papers  
Van Geel, Understanding Supreme Court Opinions

## 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?

## IV Schedule of Papers and Examinations.

There are four required pieces of work in this class—one short paper, two in-semester examinations, and one final examination.

- a) On Tuesday, Sept 11, I will describe in class how to brief a case. Every student must submit a case brief on Tuesday, Sept 18.
- b) On Tuesday, Oct 9, there will be an in-class examination.
- c) On Tuesday, Nov 13, there will be an in-class examination.
- d) There will also be a final examination at on a date to be determined by the Registrar's Office.

#### V Grading.

The first examination is worth 25% of the course grade;

The second examination is worth 25% of the course grade; and

The final examination is worth 40% of the course grade.

Class participation is worth 10% of the course grade.

Students must take the two midterm examinations, and must take and pass the final examination, at the time and place determined by the Registrar's Office, to pass the course.

#### 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 & Appendix D.  
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

Bush v. Gore (2000), <http://supreme.justia.com/us/531/98/case.html>  
Federalist 78

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: 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  
Nishimoto, Inside an American Concentration Camp

## TOPIC SIX: CONGRESSIONAL POWERS

Assigned: KFJ, chapter seven

## TOPIC SEVEN: HOW TO INTERPRET--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 EIGHT: A CONSTITUTION OF LIBERTIES--PROPERTY

Assigned: KFJ, chapter ten

Recommended:

Beard, An Economic Interpretation of the Constitution

Paul & Dickman, Liberty, Property, and the Foundations of the American Constitution

Siegan, 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 NINE: A CONSTITUTION OF LIBERTIES--PRIVACY

Assigned: KFJ, chapter eleven

Gonzales v. Carhart (2007)(Carhart II)

<http://www.supremecourtus.gov/opinions/06pdf/05-380.pdf>

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

Hamden v. Rumsfeld (2005)

<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>

Recommended: Finn, Constitutions in Crisis

Rossiter, Constitutional Dictatorship

Becker, The Declaration of Independence

Irons, Justice at War

Smith, Democracy on Trial