

American Constitutional Interpretation  
Government 203  
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## Syllabus

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### 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

Most of the required readings are in a photocopy packet; it may be purchased at Atticus. At least one copy of these photocopied materials will also be on reserve at Olin.

### 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 Schedule of Papers

- a) On Thursday, September 7, I will describe in class how to brief a case. Every student must submit a case brief on Tuesday, Sept. 12.
- b) On Thursday, September 14, I will distribute a "bench memorandum" written exercise. Every student must submit a memorandum on Thursday, Sept. 28.
- c) On Tuesday, October 3, 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 duplicated for all members of the court by 4:00, Thursday, Oct 19.
- d) The moot courts will meet during the week of October 24-26. 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 Thursday, November 16.

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. Failure to take the final at the assigned time will result in a failing grade for 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%.

#### V 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  
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: CONGRESSIONAL POWERS

Assigned: KFJ, chapter seven

#### TOPIC SIX: 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 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  
Stamp, "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  
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 NINE: A CONSTITUTION OF LIBERTIES--PRIVACY

Assigned: KFJ, chapter eleven

Recommended:

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

Dec 7: Conclusion--Toward Constitutional Literacy

Assigned: KFJ, Appendices A & C

Levinson, Constitutional Faith, chap. 6, photocopy

Recommended:

The Constitution of the United States  
Barber, On What the Constitution Means