The Constitution
SOCS 612
Wesleyan University
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John E. Finn
PAC 319
Ext 2328
jfinn@wesleyan.edu

Rough Draft: SYLLABUS

I Introduction.

This course is an introductory seminar that explores the nature of American constitutionalism. I assume students have no prior knowledge of the Constitution or of the role of the federal courts in the constitutional order.

Our primary textual materials consist of decisions by the Supreme Court of the United States. Each week we will concentrate primarily on a single decision. In the second week, for example, we will discuss *Marbury v. Madison*. In the ninth week, we will explore *Dred Scott*, and in the tenth week the flag salute cases. In addition to the case or cases accented every week, we will read and discuss additional cases and secondary materials. Again, our focus will be less on doctrine than on the theoretical issues raised by these materials.

My choice of cases is informed in part by their importance and complexity, and in part by their centrality to questions I consider essential to the development of a coherent and comprehensive constitutional jurisprudence. I make no claim that these twelve cases are the single most important cases in American constitutional law or essential for a complete doctrinal understanding of the Constitution. Consequently, I have not thought it necessary to cover every substantive area of constitutional law.

Unlike a typical graduate seminar, this course will focus less on the scholarly literature that addresses constitutional theory--although there is much of this sort of thing that we will read and discuss--and more on the way constitutional theory is articulated and illustrated by a selected few Supreme Court opinions. On the other hand, whether and why the Court should possess some degree of interpretive primacy will be one of the central themes of our study this semester. We shall take up the inquiry largely in the context of recent works in constitutional theory that fall within a loosely defined category called civic or popular constitutionalism.

II Books to Purchase.

<u>Required</u>:

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 Schedule of Papers.

This course requires two papers of approximately 6-8 pages, on assigned topics. The first paper is due on Tuesday, October 25. The second is due on the last day of classes.

In addition, every student must make in class at least one short presentation on a part of the assigned readings and on one of the cases listed in "Other cases."

IV Exams & Grading.

There are no mid-term exams in this course.

There is one final examination, worth 30 per cent of the course grade.

Each paper is worth 25 per cent of the course grade.

The class presentation is worth 10 per cent of the course grade.

Class participation is worth 10 per cent of the course grade.

V 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?

VI Lecture Topics & Assignments.

September 13: Introduction

Assigned: KFJ, chapters 1 & 2.
Finn, "The Civic Constitution" (copy)

September 20: Marbury v. Madison (1803)--Interpretation & Institutional Invention

Like it or not, and there may good reasons for both, American constitutionalism depends in large measure for its substance and evolution on the development of judicial review. The centrality of judicial review to American constitutionalism raises profound questions about the role of the judiciary in a democratic state, as well as fundamental questions about the practice of constitutional interpretation. Perhaps less obviously, judicial review of the Constitution also raises important questions about the nature of citizenship in a constitutional community and the nature of the Constitution itself.

The assignments for this week are designed to raise the fundamental problems of constitutional theory that judicial review poses. The list of cases that follows trace the development of judicial review in the nineteenth and twentieth centuries, especially in light of the theoretical issues we discussed in week one.

Assigned: Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
Alexander Hamilton, Federalist #78

Other Cases: Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)
Eakin v. Raub, 12 Sergeant & Rawle (S.C. Pa. 1825)
Dred Scott v. Sanford,60 U.S. (19 How.) 393 (1857)
Baker v. Carr, 369 U.S. 186 (1962)
Planned Parenthood v. Casey, 120 L.Ed.2d 674 (1992)
Lawrence v. Texas, 539 U.S. 558 (2003)

September 27: McCulloch v. Maryland (1819)--Policing the Boundaries of Federalism

Many of us take for granted that the point of judicial review is, essentially, to protect constitutional liberties and the rights of minorities against majoritarian abuses. As we shall see, even on its own terms this understanding of judicial review is deeply flawed. A no less important and controversial purpose of judicial review is, some argue, to "police the boundaries" between the states and the federal government. Should the Court play the role of constitutional cop, if it can?

Assigned: McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)
National League of Cities v. Usery, 426 U.S. 833 (1976)
United States v. Lopez, 514, U.S. 547 (1995)
United States v. Morrison (2000)

Other Cases: Gibbons v. Odgen, 22 U.S. (9 Wheat.) 1 (1824)
Hammer v. Dagenhart, 247 U.S. 251 (1918)
Wickard v. Filburn, 317 U.S. 111 (1942)
Maine v. Taylor, 477 U.S. 131 (1986)

October 4: Deshaney v. Winnebago County (1989)--Life & Liberty in a Constitutional Order

The Bill of Rights protects our liberties, but how does it do so? Is the state's obligation essentially one of non-interference with (some of) the choices we make in our lives? Or are there times when the state must affirmatively protect our right to liberty by ensuring the existence of conditions favorable to it? This is the question squarely posed by *Deshaney*. What sources beyond the "plain words" of the constitutional text does the Court use to resolve the question?

Consider also: Is *Deshaney* about the right to liberty, or is simply a state action case?

Assigned: Deshaney v. Winnebago County, 489 U.S. 189 (1989)

Other Cases: Shelley v. Kraemer, 334 U.S. 1 (1948)
Youngberg v. Romeo, 457 U.S. 307 (1982)
Cruzan v. Missouri, 497 U.S. 261 (1990)

October 11: Slaughter-House (1872)--The Bill of Rights & Constitutional Reach

In the *Slaughter-House Cases* the Supreme Court killed off the privileges and immunities clause of the Fourteenth Amendment. *Slaughter-House* is important to constitutional theory for a number of other reasons as well. Does *Slaughter-House* stand for the proposition that only minorities are entitled to the protection of the Amendment? Does it stand for the proposition that an amendment's meaning is forever fixed by the intentions of its founders, or by the historical context that gave rise to it?

What are the implications of *Slaughter-House* for the future of federalism as a cardinal constitutional value? What does the case imply about the role of the Supreme Court in protecting some constitutional values, such as federalism, against others, such as democracy?

Assigned: Slaughter-House, 83 U.S. (16 Wall.) 36 (1873)
The SouthWest Case, 1 BVerfGE 14 (1951) (FRG)
Leser v. Garnet, 258 U.S. 130 (1922)

Other cases: Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)
Duncan v. Louisiana, 391 U.S. 145 (1968)

October 18: Lochner v. New York (1905)--Property & Substantive Due Process

The very word *"Lochner"* evokes images of controversy and infamy, perhaps justly so. This week, however, we want to approach *Lochner* as fairly as we can. What, if anything, was so unusual about Justice Peckham's majority opinion for the Court? That it protected property, or the right to contract, from unreasonable state interference? Wasn't there ample precedent for such protection? Or is the opinion unacceptable because it protected an implied, rather than explicit right? Are the dissents, in contrast, models of constitutional interpretation?

We want, this week, to understand just what substantive due process is and why some of us think it is objectionable. Both inquiries again raise issues central to any full constitutional jurisprudence. Indeed, those questions are so fundamental that many scholars think the dominant question in constitutional law, for at least the past half-century, is whether we can reconcile cases like *Lochner* with cases like *Brown v. Board of Education* and *Roe v. Wade*. Why is this a problem?

Assigned: Lochner v. New York, 198 U.S. 45 (1905)

Other cases: Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)
Munn v. Illinois, 94 U.S. (4 Otto) 113 (1877)
West Coast Hotel v. Parrish, 300 U.S. 379 (1937)
Brown v. Board of Education, 347 U.S. 483 (1954)
Roe v. Wade, 410 U.S. 113 (1973)
Ferguson v. Skrupa, 372 U.S. 726 (1963)

November 1: United States v. Carolene Products (1938)--The Role of the Court in Protecting (some) Liberties

Largely insignificant for its actual holding, footnote 4 of *Carolene Products* is fantastically significant as a work of constitutional theory and for its continuing influence on constitutional practice. Indeed, the whole of contemporary constitutional law in areas as important substantive due process and equal protection is largely a consequence of Stone's vision for the Court in *Carolene* Products.

What warrant had Justice Stone for picking out certain areas of constitutional law for more exacting judicial scrutiny? Did Stone anticipate the judicial and academic controversy that came to surround the footnote? What exactly is that controversy all about?

Assigned: United States v. Carolene Products, 304 U.S. 144 (1938)

Other cases: Palko v. Connecticut, 302 U.S. 319 (1937)
West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) (Frankfurter, J., dissenting)
Dennis v.United States, 341 U.S. 494 (1951) (Frankfurter, J., concurring).
Kovacs v. Cooper, 336 U.S. 77 (1949)

November 8: Roe v. Wade (1973)--Privacy & Substantive Due Process

Dred Scott, *Plessy*, *Lochner* and *Korematsu* stand as four of the "infamous five" in American constitutional law. (One wonders if there are really only five.) *Roe v. Wade* is the fifth. In some circles, of course, *Roe's* infamy is all about its pro-choice holding and its refusal to conclude that a fetus is a person for purposes of constitutional law.

Among constitutional law scholars, however, the concern is less about abortion and more about politics and principle. The Court's decision in *Roe*, some argue, is little more than a raw, unprincipled exercise of judicial power, deeply undemocratic and dangerously independent of any fair reading of the constitutional text. For these scholars, *Roe* is flawed in the same way that *Lochner* is flawed. The culprit again is that doctrine known as substantive due process. But consider: Are there no differences of constitutional import between *Lochner* and *Roe*? Are there no reasons to accept some sorts of substantive due process and not others? Much of contemporary constitutional law scholarship wrestles with this question, and we shall consider some of the ways proposed to deal with the *Lochner-Roe* conundrum. On the other, might we have yet another case where the wrong questions leads inevitably to the wrong answer?

Roe is important also for what it tells us about the right to privacy. How does the Court ground the right? Is its answer more or less persuasive than the Court's approach in *Griswold v. Connecticut*? Does *Roe* imply limits on the right?

Assigned: Roe v. Wade, 410 U.S. 113 (1973)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Lawrence v. Texas, 539 U.S. 558 (2003)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)

November 15: Dred Scott v. Sandford (1857)—Slavery & Equal Protection

As one scholar has noted, there are few absolutes in American constitutional law, but here is one*: Dred Scott* was wrongly decided, and by any constitutional calculus we can envision. (One equally well known scholar argues precisely the opposite…that *Dred Scott* was correctly decided, and by any constitutional calculus we can envision.)As we shall see, that conclusion might give us false comfort, and *Dred Scott* raises issues of judicial power and civic engagement that continue to resonate in contemporary constitutional theory.

Brown also raises issues of judicial power. Was it a usurpation of congressional or state authority to end school segregation? Was it simply unwise because it was doomed to failure? Whatever it's other consequences, segregation in the nation's public schools is a stubborn fact of life. Should this influence our reading of *Brown*?

Assigned: Dred Scott v. Sandford, 60 U.S. 393 (1857)
Brown v. Board of Education, 347 U.S. 483 (1954)
Cooper v. Aaron, 358 U.S. 1 (1958)

Other cases: Strauder v. West Virginia, 100 U.S. (10 Otto) 303 (1880)
Plessy v. Ferguson, 163 U.S. 537 (1896)
Brown II, 349 U.S. 294 (1955)
Bakke v. Regents, UCD, 438 U.S. 265 (1978)
Plyler v. Doe, 462 U.S. 725 (1982)

November 29: Minersville v. Gobitis (1940)--Political Speech and the Constitution

Freedom of speech and expression obviously raise issues of undeniable importance in a constitutional democracy. To what extent does democracy itself demand protection for speech? Are there values other than our commitment to democracy that necessitate freedom of speech? How should the Court decide cases when speech rights collide with other constitutional values, such as a fair trial, or the public's right to protect itself? Does the Constitution imply a hierarchy of values, or that some values have a "preferred position"?

The Flag Salute cases raise all of these issues, as well as issues of judicial power and the status of civil liberties in times of crisis or emergency. As you read *Minersville* and *Barnette*, consider also the extent to which the debates between Justices Frankfurter and Jackson are really a debate about *Carolene* Products.

Assigned: Minersville v. Gobitis, 310 U.S. 586 (1940)
West Virginia v. Barnette, 319 U.S. 624 (1943)

Other cases: Wooley v. Maynard, 430 U.S. 705 (1977)
Rust v. Sullivan, 114 L.Ed.2d 657 (1991)

December 6: Korematsu v. United States (1944)--Inter Armes Silent Leges?

Just how far does our obligation to abide by the strictures of the Constitution reach? Are there ever times when observance of the Constitution, although a "high value," cannot be the "highest value"? Questions about the Constitution's authority in times of crisis or emergency are an indispensable part of any constitutional theory. Emergencies raise the possibility that there may be times when the Constitution cannot be authoritative, because it pinches too tightly.

What are we to do when the Constitution requires us to act--or prohibits us from acting--in ways necessary to our continued survival as a community? In some cases, we may be able to resolve conflicts between contingency and constitution through constitutional interpretation. But as we shall see, "flexible" interpretation raises as many problems as it purports to solve. Alternatively, it may be possible to suspend the Constitution, or parts of it. What are the problems with this course of action? Should we draw a distinction between physical integrity and constitutional integrity?

Such issues, of course, are disturbingly live, both in the obvious sense as raised by the Court's jurisprudence on the Iraqi war, and insofar as the return us to the issues about institutional power, interpretive autonomy, and civic engagement we raised in week one.

Assigned: Korematsu v. United States, 323 U.S. 214 (1944)
Hamden v. Rumsfeld (2005)
Hamdi v. Rumsfeld, 542 U.S. 547 (2004)
Rasul v. Bush, 542 U.S. 466 (2004)

Other cases: Duncan v. Kahanamoku, 327 U.S. 304 (1968)
Ex Parte Quirin, 317 U.S. 1 (1942)