

CONSTITUTIONAL INTERPRETATION

PSC 4273

Fall 2008

TR 9:00-10:15

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Course Overview

From an analytical perspective, this course presupposes an important distinction: While the United States is said to have the first and oldest written constitution in the world, the more general notion of “constitutionalism” can be isolated from the American experience and treated as a subject of study in its own right. This distinction is important because it allows us to view the American Constitution from an exterior, or outsider’s perspective at the same time that we live within its interior boundaries. When we isolate the assumptions and ideas that animate notions of “constitutionalism” more generally, we will then have a normative framework from which we can examine American Constitutionalism as a sub-set of constitutional ideas more generally.

Substantively, though, this is a course in constitutional interpretation. We will approach the interpretive enterprise from three different perspectives, or *interrogatives*: **WHAT** is the constitution? **WHO** is to interpret it? And, **HOW** is it to be interpreted? These three fundamental questions will frame our inquiry into various interpretive modes in this course. Building on these interrogatives, we will then examine substantive problems and questions in American constitutional law more generally, including questions of equal protection, due process, the application or incorporation of the Bill of Rights to the states, federalism, separation of powers, and theories of wartime constitutionalism.

Course Requirements

Because we will treat this course like a seminar, participation is essential. The questions addressed in this course do not yield easy answers and will require you to think seriously about the ideas presented and the cases and readings assigned. The success of this class rests equally on everyone’s informed and thoughtful participation. Participation is more than regurgitation of the arguments of individual authors or the recitation of the facts of particular cases. Participation is a collective endeavor of *answering* and *asking* questions honestly and logically. Aside from the intellectual necessity of meaningful participation, it is also important because it is worth **20% of your final grade**.

As this course is both a heavily *abstract* inquiry into interpretive modes and a *concrete* analysis of actual Constitutional development, you will be required to write a significant research paper (approx. 20 pages). This paper will count as **40% of your final grade**. It is due on the day of our scheduled final exam (Dec. 16), you will be working on it (and thinking about it) well before the deadline. You will also be required to take a blue book mid-term examination (**Nov. 23**)

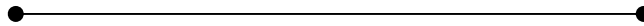
which will be worth **20% of your final grade**. Finally, you will also write a 5-6 page critical analysis of one week's worth of readings and cases from one of the interrogatives, due **November 6**, which will be worth **20% of your final grade**.

Texts

- ❖ Murphy, Fleming, Barber & Macedo, American Constitutional Interpretation (ACI)
- ❖ John Hart Ely, Democracy and Distrust: A Theory of Judicial Review
- There will also be readings available in .pdf format on our course website (<https://learn.ou.edu>)

Reasonable Accommodation

Any student in this course who has a disability that may prevent him or her from fully demonstrating his or her abilities should contact me as soon as possible so we can discuss accommodations necessary to ensure full participation and facilitate your educational opportunities.



Course Schedule

Week 1 (Aug. 26 & Aug. 28)

Introduction

Brown v. Board of Education of Topeka (ACI, pp. 936-939)

Week 2 (Sept. 2 & Sept. 4)

Interpretation and Constitutional Literacy

ACI, Ch. 1 “Interpreting a Constitution”

ACI, Ch. 2 “Constitutional Literacy”

Week 3 (Sept. 9 & Sept. 11)

Political & Theoretical Context

ACI, Ch. 3 “Theoretical Context of Interpretation”

ACI, Ch. 4 “The Political and Institutional Contexts of Constitutional Interpretation”

Robert M. Cover, “The Origins of Judicial Activism in the Protection of Minorities” (D2L)

Week 4 (Sept. 16 & Sept. 18)

WHAT is the Constitution? Questions of “Inclusion”

ACI, Ch. 5

Cases:

Calder v. Bull

Jacobson v. Massachusetts

Palko v. Connecticut (Read the not on “Incorporation” following this case)

Griswold v. Connecticut

Michael H. v. Gerald D.

Week 5 (Sept. 23 & Sept. 25)

WHAT is the Constitution? Issues of Continuity and Change

ACI, Ch. 6

Cases:

Dred Scott v. Sanford

Missouri v. Holland

Home Building & Loan Association v. Blaisdell

Scalia, "Originalism: The Lesser Evil" p. 243

Brennan, "The Constitution of the United States: Contemporary Ratification" p. 249

Rehnquist, "The Notion of a Living Constitution" p. 256

Dworkin, "Taking Rights Seriously: Constitutional Cases" p. 261

Week 6 (Sept. 30 & Oct. 2)
WHO May Authoritatively Interpret the Constitution?

ACI, Chapter 7

Cases:

Marbury v. Madison

Eakin v. Raub

United States v. Nixon

Madison on Judicial Review and Supremacy, p. 291
Letters of Brutus, No. 11, p.295
Senate Debates of 1802-1803, p. 303
Jackson's Bank Bill Veto, p. 326
Lincoln's First Inaugural, p. 328
Roosevelt's Speech on Reorganizing the Judiciary, p. 332

Week 7 (Oct. 7 & Oct. 9)
WHO May Authoritatively Interpret the Constitution for the Federal System?

ACI, Ch. 8

CASES:

Martin v. Hunter's Lessee

Ableman v. Booth

Cooper v. Aaron

The Debate of 1789-99
The Kentucky Resolutions of 1798
Calhoun, "A Discourse on the Constitution and Government of the United States"
The Southern Manifesto: A Declaration of Constitutional Principles
Alabama's Nullification Resolution

Week 8 (Oct. 14 & Oct. 16)
HOW to Interpret the Constitution: Approaches (readings on D2L)

ACI, Ch. 9

Philip Bobbit, Constitutional Fate chs. 1-7
Robert Bork, "Styles of Constitutional Theory"
Edwin Meese, "Interpreting the Constitution"
William I. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification"
Antonin Scalia, "Originalism: The Lesser Evil"
Lino Graglia, "How the Constitution Disappeared"
Robert Bork, "Neutral Principles and Some First Amendment Problems"
Thomas C. Grey, "Do We Have an Unwritten Constitution?"

Week 9 (Oct. 21 & Oct. 23) *Midterm Examination*

Tuesday: Review

Thursday: Exam (bring blue books)

Week 10 (Oct. 28 & Oct. 30)

HOW to Interpret the Constitution: Sharing Powers at the National Level

ACI, Ch. 10

Cases:

United States v. Curtiss-Wright Export Corp.

Youngstown Sheet & Tube v. Sawyer

Ex parte McCardle

Boumediene v. Bush (D2L)

Week 11 (Nov. 4 & Nov. 6) *Short Papers Due Nov. 6*

HOW to Interpret the Constitution: Federalism

ACI, Ch. 11

Federalist #39, p. 559

Cases:

McCulloch v. Maryland

Texas v. White

Gibbons v. Ogden

United States v. Lopez

United States v. Morrison

Week 12 (Nov. 11 & Nov. 13)

HOW to Interpret: The 1st Amendment

ACI, Ch. 12

Cases:

Whitney v. California

Dennis v. United States

Brandenburg v. Ohio

Cohen v. California

Week 13 (Nov. 18 & Nov. 20)

Political Participation

ACI, Ch. 13

John Hart Ely, Democracy and Distrust (begin reading)

Cases:

Baker v. Carr

Reynolds v. Sims

Shaw v. Reno

Week 14 (NO CLASS Thanksgiving Break)

Week 15 (Dec. 2 & Dec. 4)

Individual Autonomy & the Right to Privacy

ACI, Ch. 18

Democracy and Distrust (finish)

Cases:

Griswold v. Connecticut (again)

Roe v. Wade

Planned Parenthood v. Casey

Bowers v. Hardwick

Lawrence v. Texas

Week 16 (Dec. 9 & Dec. 11)

Inter aems silent leges?

ACI, Ch. 19

Cases:

Ex parte Merryman

Ex parte Milligan

Korematsu v. United States

Youngstown Sheet & Tube v. Sawyer (again)

Hamdi v. Rumsfeld

Boumediene v. Bush (again)