

UNIVERSITY OF MICHIGAN  
DEPARTMENT OF POLITICAL SCIENCE

**PS 318 American Constitutional Politics  
Winter 2014**

Tues. and Thurs., 10-11:30 a.m.  
414 Dennison

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**I. Introduction**

What is the American Constitution? Is it a good constitution? How should we interpret it? What duties does the Constitution confer onto political officials and citizens? This course seeks to support students in understanding, evaluating, and advancing your own claims about American constitutional politics. The emphasis is upon the powers, limits, and ethics of the multiple offices that the Constitution establishes. The syllabus seeks some fidelity to the constitutional vision of politics by roughly mirroring the Constitution's own structural divisions. We do not proceed historically. Instead we study the politics of constitutional interpretation as each branch encounters them.

The Supreme Court has a special place in our curriculum because of its special legal and constitutional duties. But the course as a whole rejects judicial supremacy: the idea that the Constitution is whatever the Court says it is. Instead, the course seeks to explore the role that all political participants play in giving meaning to this governing document. The ultimate aim of the course is to help you come to your own judgments of constitutional meaning through which to evaluate the activities of Supreme Court Justices and other officials. You should leave the class with a deeper insight into the nature and significance of the American Constitution; a capacity to evaluate its success as a governing instrument; a disposition towards sharp evaluation of the constitutional arguments of both elected and Supreme Court officials; and a developed perspective on the classical methods of constitutional interpretation.

An additional objective of the course is to help you learn to write with care, accuracy, and elegance. I recommend that you purchase, read, and use Joseph M. Williams, *Style: Toward Clarity and Grace* (Chicago: University of Chicago Press, 1990). This class meets the ULWR and we will spend a great deal of time writing, revising, and rewriting essays.

The "lectures" will concentrate on general problems in constitutional interpretation spliced together with discussions. Students come to these discussions with very different background knowledge about American constitutional politics. Discussion tends to move fast and at a high level. It can be

intimidating at first but things do settle down. If you don't understand some of the core terms being used in class discussion, please help any other student who may be in your position and speak up. Even very basic questions, like about the politics of the major parties or basic processes of lawmaking, can be interesting and important in the context of the materials we are looking at. This is a difficult course, but students – even those with very limited background—generally end up doing well. If you are registered for this class, then you belong in this class.

To prepare for class, students should do the readings first and *think about the problems the readings raise*. If you are pressed for time, here is a minimalist way to prepare: choose one to read carefully, and take time to *think about what you have read*. You will be better prepared for class with that technique than if you read everything quickly and superficially. Obviously, the normal expectation is that students will do all readings carefully, thinking about them individually and in relationship to each other.

Students may not use laptops in class without special permission.

## **II. Evaluation**

It can be exciting to encounter a class that seriously challenges you. Constitutional Politics is designed to help you test and stretch your own capacities. This course meets the upper-level writing requirement. Here are the components of your grade:

1. Two short papers. You will prepare two short papers of 6-7 pages each. The first set of questions will be distributed on Thursday, February 6. You will pick one question to answer and turn in your essay on Thursday, February 13 (before midnight, on CTools). The second paper, on a topic of your choosing, is due Thursday, March 20 (before midnight, on CTools). (20% each)
2. One substantial revision. An additional assignment consists of a substantial revision of your first submitted paper. You will receive extensive feedback on that paper, and on that basis you will complete a substantial revision, as well as a brief commentary on your revision process, due Tuesday, April 8 (before midnight). The revised paper will receive its own independent grade (20%). The paper will be graded on the basis of the strength of the revisions. There is absolutely no connection between the grade for the first paper grade and that for the revision.
3. One substantial evaluation. Your fourth grade arises from your substantial evaluation of the work of a peer. Students will be paired together in commentator relationships. Each of you will submit your second paper to your commentator by Monday, March 10. Your commentator will give you written feedback by Friday, March 14. This gives you a bit less than a week to revise your second paper and turn it in Thursday, March 20. (Students turning in their second papers should submit the original paper, the commentary, and the revision, all together as one packet.) The quality of your commentary will be a fourth grade for you. The expectation is that the commentary would fill about 1.5 pages, single-spaced—a true engagement with the ideas of your peer. We will discuss in class how to give substantial and useful feedback to your peers (10%).
4. One final essay. A 6-page final essay will be due on Tues., April 29 (before midnight) in response to questions I distribute (20%).

For all assignments, unexcused late essays will be marked down 1/3 grade per day late.

5. Your last grade is a participation component (10%). Attendance in class and/or office hours is counted in your participation grade. Filling out a course evaluation will count towards your participation grade. After you evaluate the class, CTools will send a confirmation email to you, which you should immediately forward to Amanda.

### **III. Accommodations for Students with Disabilities**

If you need an accommodation for a disability, please let me know at least two weeks prior to the time when the accommodation will be needed. Some aspects of this course, the assignments, the in-class activities, and the way the course is usually taught can be modified to facilitate your participation and progress. Any information you provide is private and confidential and will be treated as such.

### **IV. Policy on Academic Integrity**

I expect all students to uphold the standards outlined in the College's statement, *LSA Community Standards of Academic Integrity*. For this class, any violation of academic integrity— i.e., submitting someone else's work, submitting work you completed in another class (double-submission), or failing to credit sources – results in an F for the class as a whole. I also report any suspected incidences of academic dishonesty to the Assistant Dean for Undergraduate Education. Academic integrity is an interesting and occasionally complex topic, and we will discuss appropriate practices for crediting sources in class. I encourage you to ask me any questions you have.

### **V. Reading Materials**

CTools readings (also available in a course packet by request)  
William Shakespeare, *The Merchant of Venice*

## **VI. Reading Schedule**

### **1. What Is the Constitution?**

It is often unclear what people mean when they speak (or write) of “the Constitution.” Some people seem to mean only the Bill of Rights. Others mean the amended text of 1787-88, but often (usually?) they mean that text plus some other “things,” like putative original understandings, political theories, economic theories, other documents like the Declaration of Independence, and later interpretations of any or all of these. What do we mean by the Constitution?

Related to this “what” question is a “who” question— who is granted authority to speak on behalf of constitutional meaning? Most Americans who have thought about constitutional interpretation at all probably think of it as only a judicial function. To what extent is judicial control over constitutional interpretation justified by: The logic of the "constitutional document"? The historical practices of the American republic? The demands of the political theories that underpin constitutional democracy? Simple political necessity?

### **1. Thursday, January 9. Class introduction**

In class, read and discuss: The US Constitution and Amendments  
The Declaration of Independence

### **2. Tuesday, January 14. Powers, Rights, and Duties**

Constitution of Pennsylvania (Sept. 28, 1776)

The Virginia Plan

US Constitution: Art. I, sec 8; Art. II, last paragraph of sec 1, and sec 3; Art. III; Art. IV, VI; 9th and 10th Amends; 14th Amendt., Secs 1 & 5

Herbert Storing, “Bill of Rights” from *What the Anti-Federalists Were For*

Antifederalist Paper 61, “Questions and Comments on the Constitutional Provisions Regarding the Election of Congressmen”

### **3. Thursday, January 16. Interpretation and Offices**

US Constitution: Art. II, last paragraph of sec 1, sec 3; Art. III, sec 1 and 2; Art. VI

Hannah Arendt, *Eichmann in Jerusalem* (excerpt)

Andrew Sabl, *Ruling Passions* (excerpt)

## **2. The Legislature: House and Senate**

The most basic defense of the Constitution's democratic pedigree rests on the democratic credentials of Congress, the national legislature. What do we make of this legislature? Does it effectively achieve representation of the popular will? Is the Constitution democratic? If so, is it democratic because of, or in spite of, the powers, limits, and structures of the legislative branch?

Some people today—elected officials among them—understand Congress' role in exercising independent constitutional judgment as quite limited. In other times, Congress has asserted a strong role for itself in making interpretive decisions about war, rights, and commerce. Yet the *value* of Congressional involvement in constitutional decisionmaking is contested. Advocates of Congressional constitutional interpretation point to the status of that body as a great representative institution; for others, Congress' representative nature is a good reason to *distrust* its capacity to engage in responsible constitutional interpretation. What is Congress' appropriate role in constitutional interpretation? Should Congress ever feel free to resist the Supreme Court, or does such behavior undermine the legal supremacy of the Constitution guaranteed by Article VI and the Supreme Court?

### **4. Tuesday, January 21. Participation**

US Constitution: Article I, Amendments 13-15, 19, 23, 24, 26.

Federalist #10

Michael Parenti, "The Constitution As Elitist Document," from *How Democratic Is the Constitution?*

Jeremy Waldron, "The Core of the Case Against Judicial Review" (omit some sections)

Optional: Charles Beard, *Framing the Constitution* (excerpt)

### **5. Thursday, January 23. Sizing Up the Senate – Student group work**

Frances E. Lee and Bruce Oppenheimer, *Sizing Up the Senate*: "Senate Apportionment in Theoretical and Historical Perspective"

Readings from one special topic – Either filibuster, or direct elections (student choice).

### **6. Tuesday, January 28. Snow day**

### **7. Thursday, January 30. Congressional Governance On Civil Rights: The ADA and Religious Liberty**

US Constitution: Amendments 1, 13 - 15

*Employment Division v. Smith* (1990), Scalia opinion only

Religious Freedom Restoration Act

*Boerne v. Flores* (1997), Kennedy opinion only

The Americans With Disabilities Act (1990), skim

George H.W. Bush at the signing of the Americans With Disabilities Act (1990)

<http://whitehouse.c-span.org/Video/ByPresident/George-H-W-Bush-Signs-ADA.aspx>

### **8. Tuesday, February 4. Continued from Thursday.**

### **3. The President**

One scholar has characterized the history of constitutional development as the “taming of the prince”—the effort to subdue and control the executive power which is at the heart of modern governance. Executives may be necessary to political self-preservation: because the office is always in session, the executive is always available to respond to attacks; because the office is hierarchical, it is comparatively well-suited to military command and other forms of political initiative. But for these same reasons, the executive is classically regarded as a most dangerous branch, one whose unruly power threatens to undermine the political restraint upon which justified self-government depends.

War powers are one of the most ill-defined aspects of the president’s role-- and yet war is the arena within which presidents exercise the most power. What is the scope and nature of the president’s constitutional war powers? What are the proper limits of the office, and what are the president’s constitutional obligations as regards war? Does the office of the executive contain enough power to do its job? How can that power be regulated for the public good?

#### **9. Thursday, February 6. Executive Power**

US Constitution: Article II; Amendments 12, 22.

Federalist Papers 23

Joseph Ellis, *Founding Brothers: The Revolutionary Generation*

Grover Cleveland, “The Independence of the Executive” (1904)

*Morrison v. Olson* (1988)

#### **10. Tues., February 11. The President in War**

“Introduction,” *The U.S. War With Mexico: A Brief History With Documents*, ed. Ernesto Chavez (p10-16)

James Polk, “War Message to Congress,” (May 11, 1846)

"House Debate on the Constitutionality of the Mexican War"

Lincoln, “Speech in the U.S. House of Representatives on the War with Mexico, January 12 1848”

Abraham Lincoln to William Herndon (15 February 1848)

Abraham Lincoln, “Fourth of July Message to Congress,” (1861)

War Powers Act (1973)

Robert Bork, “Erosion of the President’s Power in Foreign Affairs”

#### **11. Thurs., February 13. The President and the Law**

US Constitution: Article I, Section 8; Article II, Section 2, 3; Article IV, Section 4

*Ex parte Merryman* (1861)

*Ex parte Milligan* (1866)

*Korematsu v. United States* (1944) (spend time on Jackson’s dissent)

Locke, “Of Prerogative” from *Second Treatise of Government*

#### **4. Citizens**

Quarrels over federalism began in 1787 during the campaign for ratification, and it took a civil war to largely resolve them. (They have been “largely” rather than “completely” resolved because problems continue to arise within the general principle of national supremacy.) This week considers the obligations of the national government to the states, and considers how the states’ powers fit into the larger constitutional scheme after the Civil War. We will also consider in this week the American citizens. What are their duties to constitutional government? How can they fulfill those duties? How does the Constitution imagine them—as active governors, or as passive subjects? Are citizens ethically or politically bound to act in the ways that the Constitution seems to imagine, or are they obliged instead by their own moral sense? Can these two be combined?

#### **12. Tuesday, February 18. The Citizen**

Declaration of Independence preamble

US Constitution: Amendments 1-10, 13, 14, 15, 19, 24

Martin Luther King, “Letter from a Birmingham Jail”

Henry David Thoreau, “Resistance to Civil Government”

Alert: Thursday is a heavy reading day – start early!

## **5. The Judiciary: Legalism and Rights**

The Constitution has remarkably little to say about the judicial branch. But many people treat constitutional interpretation as a synonym for legal interpretation. What is legal interpretation? What does legalistic interpretation contribute to a political order?

Because so little is written in the Constitution about the Supreme Court, we are left to infer a great deal about its powers and proper relationships to the other branches. What is the proper function of the judiciary? What are its specific powers and limits? Should judges protect rights, and if so, which ones? How vigorously? Is the Supreme Court a strong or weak branch? What is the relationship of judicial review to democratic government?

### **13. Thursday, February 20. Legalism**

(heavy reading day)

Shakespeare, *The Merchant of Venice*

*Marbury v. Madison* (1803)

Judiciary Act of 1789 (selected portions)

Robert Yates, "Brutus"

The Federalist No. 78

### **14. Tuesday, February 25. Methods of Judicial Constitutional Interpretation**

(heavy reading day)

US Constitution: Article III

Antonin Scalia, "Originalism: The Lesser Evil"

William Brennan, "The Constitution of the United States: Contemporary Ratification" (AC, 574)

John Hart Ely, "Policing the Process of Representation: The Court as Referee," from *Democracy and Distrust*

### **15. Thursday, Feb 27. Due Process**

Due process is a core guarantee of legality and of constitutionalism more generally. Due process is the guarantee that state coercion will only be used against citizens after proper procedures have been followed. But what counts as coercion? And, what procedures are proper ones? Finally, is there anything which may never be done to citizens, no matter what procedures are followed? (We will return to that question when we explore fundamental rights jurisprudence).

Kafka, "Initial Inquiry," *The Trial*

*Gideon v. Wainwright* -- skim, just to get the basic idea

*Miranda v. Arizona* (excerpted) (skim this case as well)

*DeShaney v. Winnebago County* (1989)

Optional: *Fletcher v. Peck* (1810) (read Marshall's opinion only)

Eric Holder, Remarks at Northwestern University School of Law (March 5, 2012)

### **16. Tues, March 4 and Thurs., March 6-- Winter Break**

### **17. Tues., March 11. Private Property**

Many of the founders believed protection for private property to be one of the most fundamental purposes for which government was established. Were they correct? What does the Constitution mean by property? Is the Constitution's protection of private property qualified, or unqualified? Does the Constitution protect private property as an end in itself, or as a means to some other end? What counts as private property, and what role does it play as an institution in the constitutional scheme? What is the link between rights of private property, and the Supreme Court's supervision of Congress' commerce clause powers?

US Constitution—Article I Sections 8, 9, 10; Amendments 4, 5, 7, 9, 14

John Locke, "Of Property," (1690)

Woodrow Wilson, "The Meaning of Democracy," (1912) (AC, p. 327)

*Lochner v. New York* (1905)

*Williamson v. Lee Optical Co.* (1955)

*Dandridge v. Williams* (1969)

Review Federalist #10

### **18. Thurs., March 13. Equal Protection I**

It is clear that democracy requires a set of procedural guarantees (to vote, to run for office, to speech) – but it is also thought, by some, to include guarantees on the nature of the laws themselves. The equal protection guarantee is that laws will apply equally and impartially to all citizens. Equality before the law is also a core rule of law value.

Why didn't the original Constitution include an explicit equality guarantee? Is the 14<sup>th</sup> Amendment in harmony with the deepest Constitutional values, or does it represent a fundamental shift in American constitutional understandings? How demanding is the 14<sup>th</sup> Amendment's promise? How much power does it grant Congress and the Supreme Court? How should we understand equal protection—as a narrow protection for African Americans, or as a general principle of equality, or as an anti-caste principle? If it is a general principle of equality, does it apply equally to procedural and substantive matters?

Article I Sec 9; Amendment 14

*Plessy v. Ferguson* (1896)

*Brown v. Board of Education* (1954)

*Loving v. Virginia* (1967)

Optional: *Bolling v. Sharpe* (1954)

### **20. Thurs., March 20 Equal Protection II: Gender and Class**

*Frontiero v. Richardson* (1973)

*Craig v. Boren* (1976)

*Harper v. Virginia State Board of Elections* (1966) Douglas opinion only

*San Antonio Independent School District v. Rodriguez* (1973)

Robin West, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment"

### **19. Tuesday, March 18 Fundamental Rights**

If the purpose of constitutionalism is the protection of individual "autonomy," constitutional government must respect, and even promote, the individual's right to a "zone of personal privacy." But in a complex, interdependent, urban, industrial society, much of what every person does affects the rights of others. Being members of a community means that we incur certain obligations to one another. What are these obligations? And how should a constitutional democracy decide what matters are best left as matters of conscience, and what matters are subject to political control? Many democratic theorists would answer: "By the decision of the people or their representatives elected after open debate and a fair vote." Others, however, would argue that this answer is incomplete; it leaves the door wide open to the tyranny of the majority. Democrats would reply that giving authority over such questions to federal judges would leave the door equally wide open to the tyranny of nine or even five people.

The concept of fundamental rights requires recourse to some moral conception of humans and of their rights—but our society faces deep disagreement over these background moral theories. We have to decide not only whose morality applies, but also what makes a right "fundamental." The constitutional text provides a starting rather than an ending point; it does not speak of "fundamental rights," "balancing interests," or "strict scrutiny." The terms are products of interpreters.

Preamble; Article I Sec 9; Amendments 1-10, 13, 14  
*Palko v. Connecticut* (1937)  
*Buck v. Bell* (1927)  
*Rochin v. California* (1952)  
Reconsider *Loving v. Virginia* (1967)

Optional:

Dorothy Roberts, *Killing the Black Body* (excerpts)  
John Hart Ely, "Discovering Fundamental Values," *Democracy and Distrust*, ch. 3

### **21. Tues., March 25 Sex and Family**

*Griswold v. Connecticut* (1965)  
*Roe v. Wade* (1973)  
*Harris v. McRae* (1980)  
*Planned Parenthood v. Casey* (1992)  
*Bowers v. Hardwick* (1986)  
*Lawrence v. Texas* (2003) (Kennedy and Scalia only)

Optional: *Perry v. Schwarzenegger*

### **22. Thurs March 27. Voting and Participation**

US Constitution, Article I Section 2, Section 4; First Amendment; Fourteenth Amendment  
*South Carolina v. Katzenbach* (1966)  
*Shelby County v. Holder* (2013)  
*Citizens United v. Federal Election Commission* (2010)

## **6. Slavery and Desegregation**

You should now be equipped to understand some of the distinctive contributions that political participants in the different branches can bring to difficult constitutionalist problems. In this section we step back to look at a single, crucial moral and constitutionalist issue from the perspective of multiple institutions. Slavery is the moral outrage which has most profoundly tested the governing capacity of constitutional institutions. Later, the problem of racial subordination became a central paradigm for thinking about the dynamics of American constitutional interpretation. Few issues—property, due process, criminal procedure, equal protection, free speech, and more—can be fully understood without taking into account the extent to which the experience of slavery has radiated out to affect all areas of American law. The political efforts required to develop a national politics that is free from the moral distortions created by a slaveholding and apartheid past are enormous. What were the obligations of constitutional officials in dealing with slavery? How can liberty be guaranteed while the social and political basis for the experience of liberty is reworked? How effective can the Court be in contributing to the massive political and social change necessary for non-dominating political relationships?

### **23. Tuesday, April 1. Slavery**

US Constitution (which are the slavery-related portions of this document?)  
Paul Angle, *The Complete Lincoln-Douglas Debates of 1858*, Introduction  
“Basic Overview of the Missouri Compromise”  
*Dred Scott v. Sanford* (1857)  
Nicholas Kristof, “The Face of Modern Slavery”  
(start in with Thursday’s readings—Thurs. is a heavy reading day)

### **24. Thursday, April 3 The Senate: Lincoln Douglas Debates**

Review Sabl’s piece from class 3  
Stephen Douglas: Paul Angle, *The Complete Lincoln-Douglas Debates of 1858*, pp 43-66, 109-112, 362-375  
Abraham Lincoln: P. Angle, *The Complete Lincoln-Douglas Debates of 1858*, pp 32-42, 128-129, 140-144, 308-311, 325-335

### **25. Tuesday, April 8 What Were the Obligations of Abolitionist Judges?**

The Fugitive Slave Act (1850)  
*Prigg v. Pennsylvania* (1842)  
Antonin Scalia, “God’s Justice and Ours: the Morality of Judicial Participation in the Death Penalty”  
John Crittendon, “Opinion on the Constitutionality of the Fugitive Slave Bill”

### **26. Thursday, April 10. The President? The States? The Public?**

James Buchanan, “Inaugural Address, March 4 1857”  
Jeremiah Black, “Opinion on the Power of the President in Executing the Laws” (1860)  
Abraham Lincoln, “First Inaugural Address,” (1861)  
South Carolina Ordinance of Secession (1860)  
Jefferson Davis, “The Right of Secession,” (1861)  
William Lloyd Garrison, “On the Constitution and the Union”

**27. Tues., April 15. Desegregation I**

*Brown v. Board of Education* (1954)

The Southern Manifesto (1956)

*Cooper v. Aaron* (1958)

*Swann v. Charlotte-Mecklenburg Board of Education* (1971)

*Milliken v. Bradley* (1974)

**Extra Credit Opportunity:**

**Students who wish can do the following, *additional* reading to present to peers. Students to who this reading and come prepared to present the material to your peers will receive a 1/3 letter grade bump onto one essay grade.**

**Can Courts Be the Instruments for Social Change?**

Gerald Rosenberg, *The Hollow Hope* pp 9 – 36, 42 – 63, 72 – 156

**28. Thursday, April 17 Desegregation II (Amanda Tillotson Lecture)**

**29. Tuesday, April 22. Constitutional Amendment.**

Constitutional amendment is the final refuge of the dissatisfied constitutional populist. It is the holy grail held out to the discontent, the ultimate weapon of the people against intransigent politicians and officials. Yet the US Constitution is one of the hardest to amend in the world. The tight reins that operate on the public's ability to explicitly amend the Constitution means that judges and other officials with interpretive authority have more interpretive power than they would otherwise. Has the rigidity of Article V amending procedures kept the Constitution from keeping up with the times? Or has it been a crucial contribution to the stable protection of rights and democracy over time? Are there any limits on the people's power of constitutional amendment? Article V does guarantee that no state may be removed from the Senate without its own consent. Does this imply that there are other entrenched constitutional provisions – or that everything else is up for grabs?

US Constitution Article V

Gary Jacobsohn, "An unconstitutional constitution? A comparative perspective"

Akhil Reed Amar, "Popular Sovereignty and Constitutional Amendment"

**Final Essays Due Tuesday, April 29 (before midnight, on CTools)**