The class is framed by a major research question in law and politics: What is the value of extra-judicial constitutional interpretation? What is, and should be, the role of non-legal actors in constructing constitutional meaning? What ethical, legal, and political controversies are generated by non-judicial constitutional politics? A first aim of the course is to expose students with scholarly interests in law to the major controversies in US history whose resolution happened through non-judicial means. For example, you should leave understanding important constitutional transformations such as post-war Reconstruction, the creation of the United Nations, and the 1964 Civil Rights Act. A second aim is to consider what these politics suggest about core themes in public law such as partisanship and constitutional interpretation, the meaning of citizenship, and the establishment of judicial review. Finally, we will use the seminar to engage theoretic research in legal studies about the incidence and value of constitutional interpretation outside the Court.

The cases we will scrutinize include the Constitution’s ratification, the labor movement, judicial confirmations (the Robert Bork hearings), Reconstruction (and impeachment) after the Civil War, the 1964 Civil Rights Act, the Iran-Contra scandal, and the creation of the United Nations. We’ll come to our own assessments about the contested issues of constitutional meaning involved in each episode. We will also examine the reasoning of political actors, especially considering how the conditions of politics -- pluralism, disagreement, political parties, the need to achieve broad consensus, and institutional constraints-- affect the practice of constitutional interpretation in the moment.

Materials:

Please purchase:


This book is also available at the library.

All other listed readings are available on the CTools website.
Requirements:

This seminar strongly emphasizes daily readings and participation. The reading load is heavy, and the seminar format means that participation is noticeable and counts. If you do all of the readings, attend class regularly, and share your responses to the material, you can achieve an A for a full 40% of your grade. In addition are two essay exams, and a constitutional exercise at the end of the semester.

Students may not use laptops in class without special permission.

1. Engagement with reading, as reflected in response paragraphs or daily quizzes. You are responsible for completing all of the reading before the relevant seminar. To help you use the material to prepare for class, there is a list of reading questions posted on CTools. In most classes, I will give a quiz or short writing assignment to assess your knowledge of some dimension of the readings and to elicit an opinion. As an alternative, you may type up a one or two paragraph response to some dimension of the readings, and hand that response to me in class. 20%.

2. In-class participation. Regular attendance, verbal participation in class and/or communication in office hours, and evidence of sustained engagement with course materials. Filling out a course evaluation will count towards your participation grade. After you evaluate the class, CTools will send you a confirmation email, which you should immediately forward to me. 20%.

3. Two take-home essay exams. About a week prior to each exam, I will provide a list of possible exam essay questions. The actual exam will consist of a short answer section, and a reduced selection of essay topics from which students will pick one to answer in a five-page essay. The exam will be due 24 hours after it is distributed. 40%.

4. Essay for in-class exercise. We will conduct a mock constitutional exercise. There are several forms this could take: judicial confirmation; impeachment hearings; meeting of abolitionist reformers; and more. We will discuss some options in class and choose one together. Each student will write a 5-page essay in relation to this exercise. For most students in the class, essays will be due December 12; for a few, essays will be due in the midst of the exercise (December 3). 20%.

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 may be modified to facilitate your participation and progress. As soon as you make me aware of your needs, we can work with the Office of Services for Students with Disabilities (SSD) to help us determine appropriate academic accommodations. SSD (734-763-3000; http://www.umich.edu/sswd) typically recommends accommodations through a Verified Individualized Services and Accommodations (VISA) form. Any information you provide is private and confidential and will be treated as such.
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 on this topic that arise for you.

Readings:

1. **Course Introduction: Who Should Interpret the Constitution?** (Wed., September 5)
   US Constitution
   Virginia Plan

2. **“Political” and “Legal” Approaches to Constitutional Meaning** (Mon., Sept 10)
   *McCullough v. Maryland* (1819), excerpts
   *Baker v. Carr* (1962), excerpts
   *Olmstead v. United States* (1928), Brandeis dissent (excerpted)

3. **Partisanship and Political Justification** (Wed., Sept 12)

   Case 1: Constitutional Ratification and the Early Republic

4. **Constitutional Design and Judicial Review** (Mon, Sept. 17)
   “Letters from Brutus”

5. **Popular Ratification** (Wed., Sept. 19)
   US Constitution Article V, Article VII
6. Emergence of Judicial Review (Mon., Sept. 24)
Kramer, “Courts, as well as other departments, are bound by that instrument: Accepting Judicial Review”
Mark Tushnet, “Against Judicial Review,” ch. 7 of Taking the Constitution Away from the Courts
(Princeton University Press, 2000)

David R. Dow, “The Plain Meaning of Article V” from Responding to Imperfection

Case 2: Reconstruction

8. Congress and the Presidency (Mon., Oct. 1)

US Constitution Article I

10. President Johnson versus the US Congress (Mon., Oct. 8)
Johnson, Speech to the Citizens of Washington (February 22 1866)
Johnson Veto of the Freedman’s Bureau
Johnson Veto of the Reconstruction Act of 1867
Andrew Johnson articles of impeachment, March 1868
Myers v. United States (1926)


12. Mon., Oct. 15—no class, fall study break. First essay exam study questions distributed on CTools.
Case 3: Labor

US Constitution, Article II, Amendments 1-10, Amendment 13, 14
Roosevelt’s 1944 State of the Union Address
Richard Epstein, “Sunstein’s Second Bill of Rights?” *Forbes Magazine*

Robert Caro, *The Path To Power: The Years of Lyndon Johnson* (excerpts)


Or:


And


*Thursday, October 25. First essay exams due. Please submit through CTools.*

Case 4: The United Nations

US Constitution, Article I Section 6, Article VI
Arthur H. Vandenberg, “American Foreign Policy” (January 10, 1945)
17. The UN Charter and domestic War Powers (Wed., Oct. 31)
David Golove, “From Versailles to San Francisco: The Revolutionary Transformation of the War Powers,” *University of Colorado Law Review*

Case 5: The 1964 Civil Rights Act

18. Origins (Mon., Nov. 5)

The Civil Rights Act of March 1, 1875
Civil Rights Cases of 1883, excerpts from Bradley and Harlan decisions.
“Major Features of the Civil Rights Act of 1964”
Portrait of Johnson and Russell
Reading Questions, due in class (no in-class writing assignment)

Optional:
Hubert H. Humphrey, ch. 3 “Memorandum on Senate Consideration of the Civil Rights Act of 1964,” and

20. The Commerce Clause and Civil Rights (Mon., Nov. 12)
Rebecca Zietlow, “Democratic Constitutionalism and the Affordable Care Act,” 72 Ohio St L.J. 1367 (2011)

Case 6: Iran-Contra

Theodore Draper, *A Very Thin Line* ch. 1 & 2
Ronald Reagan, *Address to the Nation on the Iran Arms and Contra Aid Controversy*
Oliver North, *Under Fire* (ch. 1 & 2)

*Thurs., Nov. 15. Second essay exams due. Please submit through CTools.*

22. **Institutional Responses (Mon., Nov. 19)**
“Report of the Congressional Committees Investigating the Iran-Contra Affair.” Please read:
   - Table of contents
   - Part I, "Executive Summary"
   - Chapter 25
   - Chapter 27 -- skim
   - Headings of Chapter 28 -- skim, to get a sense of the recommendations Congress made
   - Table of contents of the minority report (p. 432)
   - Chapter 1 of the minority report
   - optional: Skim any of the Iran or Nicaraguan content if you are interested


Optional: From the report of the Independent Counsel (the legal investigation), optional readings include the "Executive Summary," and the section on "Political Oversight and the Rule of Law"

23. **Presidential War Powers (Weds., Nov. 21)**
Eugene Rostow, “President, Prime Minister, or Constitutional Monarch?” *The American Journal of International Law*

Case 7: Judicial Nominations and Confirmations

24. **Judges as Agents of the President and Congress (Mon., Nov. 26)**
US Constitution, Article I Section 8; Article II Section 2
Consider again the Virginia Plan
Jeffrey Tulis, “Constitutional Abdication: The Senate, the President, and Appointments to the Supreme Court,” 47 *Case Western Law Review* 1331 (1996)

Robert Bork, Opening Statement (September 15, 1987)
Robert Bork, Refusal to Withdraw Nomination (October 9, 1987)
Confirmation Hearings, excerpted (September 1987)
26. Group Work (Mon., Dec 3).


December 12—Final essays due.