PRINCETON UNIVERSITY
Department of Politics

Politics 315
Constitutional Interpretation

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I. General Description of the Course

According to McCormick Professor of Jurisprudence Emeritus Walter F. Murphy, who taught this course, with great distinction, for many years, constitutional interpretation has become an esoteric, if not occult, art. To help make sense of it, our casebook, which Professor Murphy co-edited, is organized around three basic questions: (1) **WHAT** is "the Constitution" that is to be interpreted? **WHAT** is its authority? Its functions? **WHAT** does the term "the Constitution" include? How does it legitimately change? (2) **WHO** are the authoritative interpreters of the Constitution and what are the relations among them? (3) **HOW** should authoritative interpreters go about the task of interpreting that constitution?

Over the decades, constitutional interpretation has come to be thought of as largely the prerogative of the judiciary. As we shall see when we address the question of **WHO**, there are sound, perhaps compelling, reasons for other public officials as well as private citizens to involve themselves deeply in constitutional interpretation. But, the plain fact is that often these people do not do so consciously and carefully; and, even when they do, they frequently defer to past and anticipated judicial rulings. Whether right or wrong, judicial hegemony in constitutional interpretation means that, to give a realistic picture of what happens in the United States, this sort of course must concentrate on what judges say "the Constitution" does and means. Thus one of our intermediate objectives is to learn something about how judges function within the American political process.

An additional intermediate objective of the course is broader: to assist students in reasoning and writing more accurately and precisely. Mastering a language as rich and flexible as English improves one's ability to think clearly. Moving toward such mastery is a vital part of education. Bad grammar and muddy syntax evidence foggy thinking. To encourage clarity, we recommend that you purchase, read, and use, now and forever, Joseph M. Williams, *Style: Toward Clarity and Grace* (Chicago: University of Chicago Press, 1990).

The course will proceed on five different tracks: lectures, seminars, a moot court, required reading during the reading period, and a final examination or exercise. These parts form a coherent whole; missing a significant section of any one part will greatly reduce the value of the course.

The "lectures" — *please note that they preempt a 90 minute period each Tuesday morning* — will concentrate on general problems of and concepts in constitutional interpretation. These lectures will attack, even if they do not conquer, such problems as the nature of a constitution, approaches to constitutional interpretation, some concrete implications of different approaches for public policy, and the development of several theories of constitutional interpretation. These lectures will usually not fall into the normal mode of formal presentation. Rather, they will consist of mini-lectures spliced together with discussions in a form half way between those of a good precept and what law schools like to think is the Socratic method. The lecturer will not only lecture but also pose problems and invite students to offer solutions.

To prepare for the lectures, students should have at least skimmed over the seminar's assignments for the week, carefully read the introductory material in this syllabus, and thought about the problems.

Seminars, the second part of the course, will meet for two hours, once a week. Before their seminars, of course, students will have **carefully, thoughtfully, thoroughly,** and **critically** read the required material and "briefed" the cases, taking into account not only the substantive issues of constitutional law that are involved but the more general problems of constitutional interpretation around which this course centers. Most of the readings assigned

for seminars will be opinions of justices of the U.S. Supreme Court. Students should read these opinions to test the quality of the arguments they present, as well as to modify or reject ideas expressed in lectures, introductions to chapters in *ACI*, and other readings.

The third part of the course is a moot court. It presents a hypothetical situation posing question(s) of constitutional interpretation before the U.S. Supreme Court. Two members of each seminar will function as counsel and present written briefs and oral arguments to the other members of the seminar, who serve as justices. They will read the briefs, assigned materials, question counsel, debate among themselves, vote; then each will write an opinion.

For the Reading Period, we assign John Hart Ely, *Democracy and Distrust* as part of the readings for seminars. The final exercise will allow, perhaps require, you to utilize these analyses just as it will the ideas discussed in lectures, though it may not specifically direct you to do so. This reading is an opportunity to think again about the broad issues of the course, and a test of your ability to read and evaluate a significant piece of constitutional theory on your own.

Readings for each week include required and recommended material. Items listed as required are absolutely required. Recommended readings are for further enlightenment and guidance. They are not required in any formal or informal sense. Besides providing additional analyses relevant to this course, these readings might assist students in further research or simply in satisfying intellectual curiosity.

II. Books to Purchase

A. Required

1. Available at U-Store

Murphy, Fleming, & Barber, *American Constitutional Interpretation* (second edition)
John Hart Ely, *Democracy & Distrust* (paperback edition)

2. Available at Pequod Copy, 6 Nassau Street (near head of University Place) (Also on library reserve)

A packet of photocopied material, including articles and recent Supreme Court opinions.

3. Some cases are not included in the packet, but available over the internet as indicated on the syllabus.

B. A Note on Constitutional History

Politics 315 relies heavily on historical material, and some of the lectures and readings discuss themes in chronological order. Nevertheless, the course focuses on constitutional interpretation, not constitutional history. Students wishing a concise account of constitutional development might read Robert G. McCloskey, *The American Supreme Court* (second edition), though he tended to treat constitutional interpretation as policy-oriented responses to practical problems. No one would doubt that this view is true — as far as it goes. What is controversial is his doubting the possibility of constitutional interpretation's becoming a serious intellectual discipline in its own right. After thorough research and thoughtful analysis, you may accept, reject, or modify McCloskey's thesis; but you should assume neither its truth nor falsity.

Many constitutional interpreters claim to follow "the intent of the framers" or "the original understanding" of the framers. Most of these people, however, are inept historians and confuse the framers' views with their own predilections. Among the better books on the American founding:

Bruce Ackerman, *We the People: Foundations*
Willi Paul Adams, *The First American Constitutions: Republican Ideology & the Making of the State Constitutions in the Revolutionary Era*
George Anastaplo, *The Constitution of 1787: A Commentary*
Richard Beeman, Stephen Botein, and Edward C. Carter, III, eds., *Beyond Confederation: Origins of the Constitution and American National Identity*
Morton J. Horwitz, "Republicanism and Liberalism in American Constitutional Thought," 29 *Wm. & Mary L. Rev.* 57 (1987)
Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture*
Alfred Kelly, Winfred Harbison and Herman Belz, *The American Constitution*
Leonard L. Levy and Dennis J. Mahoney, eds., *The Framing & Ratification of the Constitution*
Michael Allen Gillespie & Michael Lienesch, eds., *Ratifying the Constitution*
Stephen Griffin *American Constitutionalism*
Robert A. Licht, ed., *The Framers and Fundamental Rights*
Donald L. Lutz, *The Origins of American Constitutionalism*
_____, "From Covenant to Constitution in American Political Thought," 10 *Publius* 101 (1980)
Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*
Edmund S. Morgan, *Inventing the People*
Thomas L. Pangle, *The Spirit of Modern Republicanism*
William Peters, *A More Perfect Union*
Jack Rakove *Original Meanings*
John Phillip Reid *A Constitutional History of the American Revolution*
Rozann Rothman, "The Impact of Covenant and Contract Theories on Conceptions of the U.S. Constitution," 10 *Publius* 149 (1980)
Gordon S. Wood, *The Creation of the American Republic, 1776-1787*
_____, *The Radicalism of the American Revolution*

For the bicentennial of the Constitution, Yale University Press reissued in a four-volume paperback a classic, if mistitled, set of documents on the Constitutional Convention: Max Farrand, ed., *The Records of the Federal Convention of 1787*. We say "mistitled" because this collection consists largely of notes that some participants took at the

convention or wrote up after. These do not always agree with each other; and, because we have no "record" beyond some scanty, jumbled, and — so Madison claimed — inaccurate minutes, it is impossible to know which best captured reality. Madison's notes contain the most detail, but he wrote some of them from memory at night during the sessions and continued to revise them after the Convention had adjourned. More than thirty years later, a Frenchman who was not even in America in 1787 heavily edited Robert Yates's material so as to change, as far as we can tell, almost every sentence that Yates put down when he was attending the Convention. For an analysis of the state of the documentary evidence on the founding, see: James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," 65 *Tex. L. Rev.* 1 (1986).

The Federalist remains a classic work of constitutional interpretation, political theory, and political propaganda. It is available in several versions. Among the more popular is the one edited by Jacob E. Cooke and published by Wesleyan University Press in a paperback edition.

C. Recent Works on Constitutional Interpretation

Assignments for each week will contain copious references to scholarly studies of constitutional interpretation. Here we note a few recent books dealing with constitutional interpretation that are worth reading carefully.

Hadley Arkes, *Beyond the Constitution*
Sotirios A. Barber, *On What the Constitution Means*
_____, *The Constitution of Judicial Power*
Cass R. Sunstein, *The Partial Constitution*
Walter F. Berns, *Taking the Constitution Seriously*
Philip Bobbitt, *Constitutional Interpretation*
Sanford V. Levinson, *Constitutional Faith*
Erwin Chemerinsky, *Interpreting the Constitution*
John H. Garvey and T. Alexander Aleinikoff, eds., *Modern Constitutional Theory: A Reader* (2d ed)
Ntnl Legal Center for the Public Interest, *Politics & the Constitution: The Nature and Extent of Interpretation*
Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent*
Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution*
Harry H. Wellington, *Interpreting the Constitution*
Neil L. York, ed., *Toward a More Perfect Union*
H. Jefferson Powell, *The Moral Tradition of American Constitutionalism*
Sanford V. Levinson, *Responding to Imperfection*
Stephen Griffin, American Constitutionalism
William Harris *The Interpretable Constitution*
Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley, ed. *Constitutionalism and Democracy: Transitions in the Contemporary World*

D. Other General Volumes:

The Constitution of the United States of America — a huge tome, often referred to as *The Constitution Annotated*. The current edition came out in 1987, but relies heavily on the work of Edward S.

Corwin,[1] who was in charge of the edition of 1953. It takes up the Constitution, clause by clause and summarizes the leading judicial interpretations of those words.

J. W. Peltason, *Corwin & Peltason's Understanding the Constitution* — Does in a much more abbreviated form what *The Constitution Annotated* does.

Laurence H. Tribe, *American Constitutional Law* (2d ed., 1987) — provides a survey of much of constitutional doctrine.

Alpheus Thomas Mason, *The Supreme Court from Taft to Burger* — An insightful analysis of the Court and the justices' varying constitutional theories by a great scholar.[2]

III. Moot Court

1. 20 October. The moot court exercise is distributed at the lecture this week. Counsel (appointed by the Preceptor) should bring their briefs, if not already duplicated, to the Politics Office, 130 Corwin Hall, by **2 p.m., 5 November**. Counsel may turn in duplicated briefs as late as 4 p.m. *Counsel must contact, several days in advance of actual need, the secretaries in the Department of Politics (258-4760) about duplicating briefs on the Department's photocopying machine.* That machine is heavily used, and one of the secretaries must do the work. There will be no charge for duplicating briefs on this machine. We cannot reimburse counsel for material duplicated elsewhere. Duplicated briefs will be available outside the Politics Office beginning November 6. **Moot Courts will be held during the seminars of the week of 10 November**. **There will be no lecture that week**.

2. **20 November**. Moot court opinions are due in the office of the Department of Politics, 130 Corwin Hall, by **4 p.m.**

IV. Examinations

There will be a final examination or exercise; no mid-term.

V. Short Paper

A short (3-5 pages) paper will be due outside the Politics office on **Oct. 19**. The paper topic is "Should the judiciary have the final say on the meaning of the Constitution?" This paper will be your primary opportunity to do written work for this class and get feedback on it. It will not itself have a tremendous impact on your final grade, but it should serve as an early warning as to how you are approaching the course.

VI. Grading

Constitutional Interpretation is not open to students on a pass-fail basis, nor to first-year students on any basis. We treat students seriously, the highest compliment we can offer. We also believe in "tough love": The most honest way of earning the tuition parents pay is to provide honest evaluations of work. This course is not for students who wish to have their egos massaged.

To obtain a passing grade for the course, a student must fulfill **all** course requirements. Thorough preparation for,

[1] He is the man for whom Corwin Hall is named, and it is he who began this course around 1914.

[2] Mason, the biographer of Justice Louis D. Brandeis and Chief Justices Harlan F. Stone and William Howard Taft, was a student of Corwin and took over this course after Corwin's retirement in 1946.

and faithful attendance at, lectures and seminars is among these requirements.

Our formula:

The moot court opinion counts 30 per cent of the final grade in the course;
The final examination counts 50 per cent;
Performance in seminars counts 15 per cent (please note that each student will be assigned a grade in this category by the Preceptor);
The short paper counts 5 per cent.

You may appeal any written grade within two weeks of receiving it. In order to appeal a grade, submit a clean copy of the paper and a short (500 words) written statement as to what error you think was made in your initial grade. A different preceptor will then grade your paper from scratch. The new grade may be **either higher or lower** than the original, and will be final.

The grading is standardized across precepts. Your final grade will not be affected by which precept you attend, though your preceptor has first responsibility for grading you work.

VII. Schedule of Assignments

(All pages are in *ACI* unless otherwise indicated.)

1. 22 Sept: **Who Rules Here?**

Seminars will not meet this week, but we do require some reading and recommend other materials. Not only will the required items help you immensely in the course, they may also help you decide if you wish to continue in the course.

Required:

ACI: "Introduction: Interpreting a Constitution," ch. 1
ACI: "The Theoretical Context of Constitutional Interpretation," ch. 3
Robert Post, "Theories of Constitutional Interpretation," (course packet)
Richard D. Parker, "'Here, the People Rule': A Constitutional Populist Manifesto" (course packet)
Robert H. Bork, *The Tempting of America* (course packet)

Recommended:

A. Constitutional Interpretation Generally

Benjamin N. Cardozo, *The Nature of the Judicial Process*
Sotirios A. Barber, *On What the Constitution Means*
Hadley Arkes, *Beyond the Constitution*, chs. 1-3
Sanford V. Levinson, *Constitutional Faith*
Robert H. Bork, "Styles in Constitutional Theory," *Yearbook 1984* (Supreme Court Historical Society)
_____, *The Tempting of America*
Erwin Chemerinsky, *Interpreting the Constitution*
Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev*. 1 (1959)
Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution*, chs. 1-2
Harry H. Wellington, *Interpreting the Constitution*, Part I
Ronald Dworkin, *Law's Empire*
Cass R. Sunstein, *The Partial Constitution*
Martin Shapiro, *Law & Politics*, ch. 1
Jan Deutsch, "Neutrality, Legitimacy, & the Supreme Court," 20 *Stan. L. Rev*. 169 (1968)
W. F. Murphy & C. Herman Pritchett, *Courts, Judges, & Politics* (4th ed.), chs. 1, 12, & 14
Richard Wasserstrom, *The Judicial Decision*, pp. 39-83
Philip C. Bobbitt, *Constitutional Fate*, Bks II-III
Edward S. Corwin, *The Higher Law Background of American Constitutional Law*
_____, *Court Over Constitution*
_____, *Constitutional Revolution, Ltd*.
_____, *Liberty Against Government*
Gerald Garvey, *Constitutional Bricolage*

Gary J. Jacobsohn, *The Supreme Court & the Decline of Constitutional Aspiration*

National Legal Center for the Public Interest, *Politics & the Constitution: The Nature & Extent of Interpretation,* esp. the articles by Bork, Easterbrook, Posner, & Rehnquist

Richard A. Posner, *The Problems of Jurisprudence*

B. The Context of Interpretation

W. F. Murphy & C. Herman Pritchett, *Courts, Judges, & Politics* (4th ed.), chs. 1-8 & 13

Walter F. Murphy, *Elements of Judicial Strategy*

David M. O'Brien, *Storm Center: The Supreme Court in American Politics*

Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis*

Donald G. Morgan, *Congress & the Constitution*

Lewis F. Powell, "What Really Goes on at the Supreme Court," 66 *Am.Bar Ass'n J*. 721 (1980)

J. Harvey Wilkinson, III, *Serving Justice: A Supreme Court Clerk's View*

John B. Oakley & Robert S. Thompson, *Law Clerks & the Judicial Process*

Clement E. Vose, "Litigation as a Form of Pressure Group Activity," 319 *The Annals of the Am. Acad. of Pol. & Soc. Sc*. 20 (1958)

Abraham Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harv. L. Rev*. 1281 (1976)

Donald L. Horowitz, *The Courts & Social Policy*

Mark V. Tushnet *The Legal Strategy of the NAACP*

Robert G. McCloskey *The American Supreme Court* (2nd ed.)

Lee Epstein, ed., *Contemplating Courts*

John Gates and Charles Johnson, eds., *The American Courts*

2. 29 Sept: **WHAT Is "the Constitution"?**

"Constitutional interpretation" is a title that sounds wonderfully important, but, according to our casebook editors, it only hints at **WHAT** is to be interpreted, **WHO** are its authoritative interpreters, or **HOW** interpreters should go about the business of interpreting. This week's readings look at the first question, **WHAT** is "the Constitution," while most future weeks' assignments (and some lectures) examine questions of **WHO** and **HOW**. You will note that this syllabus and the casebook put the term "the Constitution" within quotation marks. We do so because it is often unclear what people mean when they speak (or write) of "the Constitution." Sometimes they mean the amended text of 1787-88, but often (usually?) they mean that text plus some other "things," such as putative original understandings, political theories, economic theories, other documents like the Declaration of Independence, and later interpretations of any or all of these.

The interrogative **WHAT** contains several subquestions. The first relates to the authority of "the Constitution." Is it merely pious advice or binding law? A second subquestion addresses the functions of "the Constitution." What is it supposed to do for and in the polity? Operate as a symbol like the British monarchy? Serve as a fig leaf to hide the polity's warts from public view, as Stalin's text did for the Soviet Union? Provide a specific set of procedures for settling disputes and formulating public policy as most constitutional documents in part claim to do? Attempt to sketch a vision of the good society? All of the above? All of the above plus more? What more?

A third subquestion concerns inclusion. What does the term "the Constitution" comprise? Is there a difference between "the Constitution" with a capital "C" and "the constitution" with a small "c"? We have already indicated the sorts of problems that this subquestions raises.

A fourth subquestion relates to change. How does "the Constitution" legitimately change? **WHO** can legitimately change it? **HOW**?
Are there limits to valid change? If so, what are they and who authoritatively proclaims they have been violated?

This week's readings focus on the subquestion of inclusion, but the other subquestions are also present. And, in the weeks to come, we shall continue to wrestle with these sorts of problems, for until we know what it is we are interpreting, intelligent interpretation is not possible. We shall also be confronting an equally vexing query: On what evidence do we solve such problems? What are the standards for deciding what is included and excluded from the constitutional canon?

Required:

A. General:

ACI, "Constitutional Literacy," ch. 2
___, "What is the Constitution? Problems of Inclusion," ch. 5

B. The Document:

Preamble; amend. 1-10 & 14, §1

C. More Than the Document?

Calder v. Bull (1798), p. 121
Dred Scott v. Sandford (1857), p. 195
Lochner v. New York (1905), p. 1110
Griswold v. Connecticut (1965), p. 147
Palko v. Connecticut (1937), p. 128
A Note on Incorporation, p. 133 (Skim this note for general information and mark it for future use; there is no need to keep all the details in mind, but you should know the general story and where to find the details.)
Michael H. v. Gerald D. (1989), p. 158
Romer v. Evans (1996) (course packet)
The VMI case (1996) (course packet)

Recommended:

Bruce A. Ackerman, "Discovering the Constitution," 93 *Yale L. J*. 1013 (1984)
Daniel J. Elazar, *The Declaration of Independence as a Covenant*
Daniel J. Elazar and John Kinkaid, eds., *Covenant, Polity and Constitutionalism*
Donald L. Lutz, *The Origins of American Constitutionalism*
William Van Alstyne, "Notes on a Bicentennial Constitution: Part I, Processes of Change," 1984 *U. of Ill. L. Rev.* 933
John R. Vile, *The Constitutional Amending Process in American Political Thought*
Terence Ball & J. G. A. Pocock, eds., *Conceptual Change & the Constitution*
C. Herman Pritchett, *The Constitutional Law of the Federal System*, ch. 3
Sotirios A. Barber, *On What the Constitution Means*, chs. 2-3
_____, *The Constitution of Judicial Power*
Hadley Arkes, *Beyond the Constitution*
W. F. Murphy, "The Nature of the American Constitution," The James Lecture, University of Illinois (1989)
_____, "Slaughter-House, Civil Rights, and Limits on Constitutional Change," 32 *Am. J. of Jurisp*. 1 (1987)
_____, "The Right to Privacy," in Shlomo Slonim, ed., *The Constitutional Bases of Political & Social Change in the US*
_____, "Consent and Constitutional Change," in James O'Reilly, ed., *Human Rights and Constitutional Law*
Erwin Chemerinsky, *Interpreting the Constitution*, chs. 3-4
Fletcher v. Peck (1810)
Jacobson v. Massachusetts (1905)
Rochin v. California (1952)
Barron v. Baltimore (1833)
Adamson v. California (1947)
Brown v. Board of Education I (1955)
Bolling v. Sharpe (1954)
Duncan v. Louisiana (1968)
Burnham v. Superior Court of California, Marin County (1990)
S. R. Munzer & J. W. Nickel, "Does the Constitution Mean What it Always Meant?" 77 *Col. L. Rev*. 1029 (1977)
Paul Brest, "The Misconceived Quest for the Original Understanding," 60 *Bost. U. L. Rev*. 204 (1980)
H. Jefferson Powell, "The Original Understanding of Original Intent," 98 *Harv. L. Rev*. 885 (1985)

Ralph Lerner, "The Supreme Court as Republican School Master," *1967 Supreme Court Review* 127
James H. Hutson, "The Creation of the Constitution: The Integrity of the Documentary Record," 65 *Tex. L. Rev*. 1 (1986)
Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent*
Herman Belz, "History, Theory, and the Constitution," 11 *Con'l Commentary* 45 (1994).
James E. Fleming, "Constructing the Substantive Constitution," 72 *Tex.L.Rev*. 211 (1993).
William F. Harris II, *The Interpretable Constitution*
Stephen M. Griffin, *American Constitutionalism*
Karl Llewellyn, "The Constitution as an Institution," 34 *Columbia Law Review* 7 (1934).
Grey, Thomas, "Do We Have an Unwritten Constitution?" 27 *Stanford Law Review* 703 (1975).

3. 6 Oct: **WHO Has Authority to Interpret "the Constitution"?**

Most Americans who have thought about constitutional interpretation at all — and the number of such people may be very small — probably think of it as exclusively a judicial function. To what extent is that association 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?

Assuming constitutional interpretation is more complex than the justices' always having the ultimate word (or penultimate if a formal amendment to the constitutional document is possible), under what circumstances, if any, should one branch of the federal government defer to the interpretation of another branch? What gradations of deference should one branch give to another's constitutional interpretations? These questions also recur throughout the course. At this point, students should at least begin to formulate answers they can test as their understanding develops.

This week's readings narrow the question of **WHO** to disputes within the three branches of the national government. A related question concerns **WHO** shall interpret between the nation and the states. We should never forget that quarrels over that issue began in 1787 during the campaign for ratification and it took a civil war to settle them. But, because that question is largely resolved, we read only one relevant selection, Cooper v. Aaron (1958). We say "largely" rather than "completely" resolved because problems continue to arise within the general principle of national supremacy.

Required:

A. General:

ACI, "The Political and Institutional Contexts of Constitutional Interpretation," ch. 4
___, "Who May Authoritatively Interpret the Constitution for the National Government?," ch. 7

B. The Document:

Arts. I, §8; II, last ¶ of §1, §3; III; IV, VI; 9th and lOth Amendts; 14th Amendt., §§1 & 5

C. Within the Federal Government:

Madison on Judicial Review & Judicial Supremacy, p. 277
Letters of *Brutus*, No. 11 (1788), p. 281
Hamilton, *Federalist* #78, p. 285
The Great Debate of 1802-1803: p. 289-298
Marbury v. Madison (1803), p. 298
Jefferson Instructs a Federal Prosecutor, p. 306
Eakin v. Raub (Supreme Court of Pennsylvania, 1825), p. 308
The Debate of 1798-1799, p. 353-359
Andrew Jackson's Veto, p. 313
Daniel Webster, Hugh Lawson White, “The Senate Debates Jackson’s Veto Message” (course packet)
Abraham Lincoln's First Inaugural, p. 314
United States v. Nixon (1974), p. 323

Katzenbach v. Morgan (1966), p. 327
Abortion, the Supreme Court, etc., pp. 339-343
Edwin Meese, “The Law of the Constitution” (course packet)
Arlen Specter, Anthony Kennedy, “The Finality of Supreme Court Decisions: Senate Hearings” (course packet)

Recommended:

James Madison, *The Federalist*, Nos. 39 & 44
Franklin D. Roosevelt, "Reorganizing the Federal Judiciary,"(1937), *ACI*, p. 318
Sotirios A. Barber, *On What the Constitution Means*, chs. 3, 5
_____, *The Constitution of Judicial Power*
Erwin Chemerinsky, *Interpreting the Constitution*, ch. 5
Harry H. Wellington, *Interpreting the Constitution*, ch. 8
Laurence H. Tribe, *American Constitutional Law*, pp. 23-42, 330-50
C. Herman Pritchett, *The Constitutional Law of the Federal System*, ch. 8
Jefferson to Jarvis (1820), in W. F. Murphy & C. H. Pritchett, *Courts, Judges, & Politics* (4th ed.), p. 305
Report of Senate Committee on the Judiciary, "The Omnibus Crime Control Act of 1968," in W. F. Murphy & M. N. Danielson, eds., *Modern American Democracy*, pp. 645ff
Little v. Barreme (1804)
Ex parte McCardle (1869)
Youngstown Sheet & Tube Co. v. Sawyer (1952)
United States v. Curtiss-Wright (1936)
South Carolina v. Katzenbach, 383 U.S. 301 (1966)
Powell v. McCormack, 395 U.S. 486 (1969)
Oregon v. Mitchell, 400 U.S. 112 (1970)
Justice Joseph Story, *Commentaries on the Constitution of the United States*, Book III, ch. 4
James Bradley Thayer, "The Origin & Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129 (1893); reprinted in *ACI*, p. 142
Justice David J. Brewer, "The Movement of Coercion," 16 *Proc. of the NY State Bar Assoc.* 37 (1893); reprinted in Alpheus Mason & Gordon E. Baker, eds., *Free Government in the Making* (4th ed.), p. 602
Louis Fisher, *Constitutional Dialogues*
Donald G. Morgan, *Congress & the Constitution*
W. W. Crosskey, *Politics & the Constitution*, chs. 23-29
Alexander M. Bickel, *The Least Dangerous Branch*, chs. 1-2
John Hart Ely, "Legislative & Administrative Motivation in Constitutional Law," 79 *Yale L. J.* 1207 (1970)
Bob Eckhardt & Charles L. Black, Jr., *The Tides of Power*, chs. 1-3, 5
W. F. Murphy, "Who Shall Interpret?" 48 *Rev. of Pol.* 401 (1986)
Robert F. Nagel, *Constitutional Cultures: The Mentality & Consequences of Judicial Review*
Susan Burgess, *Contest for Constitutional Authority*
Wayne Moore, *Constitutional Rights and Powers of the People*
Edward S. Corwin, *Court Over Constitution*
Robert H. Jackson, *The Struggle for Judicial Supremacy*

4. 13 Oct.: **HOW to Interpret "the Constitution"? Textually Based Structuralism and Separation of Powers**

The parts of the constitutional text laying out the separation of powers include some of the most specific and detailed components of the Constitution and some of the most vague components of the Constitution. The Constitution details the powers possessed by Congress, for example, but it lists relatively few powers possessed by the president. Article II begins by vesting the "executive power" in the president, but the Constitution does not specifically define what is meant by the "executive power." Some powers are shared by the various branches of the federal government, while others powers are exercised exclusively by one branch. Some powers are specifically delegated to government institutions; others are specifically removed from the federal sphere; others are not mentioned at all.

The relationship between the different branches of government has been subject to continuing political controversy. Occasionally, the judiciary intervenes when the Congress and the President are in dispute over some particular point of institutional prerogative, but often the two elected branches are left to their own devices to work out their problems between themselves. Over American history, institutional powers have varied widely. Presidential power has expanded and shrunk , both between specific administrations and across decades. Institutional powers have been denied, recognized, and modified again in different circumstances and under the influence of different ideas.

Debates over the power of the different branches of government have been unusually connected to outside considerations. The extent of presidential power, for example, has real consequences for America's place in the international arena, and perhaps at times even for national survival. The rearrangement of the mechanisms of government can have important implications for what policies the government pursues and how effective government is in enforcing its will. The structure of government helps determine who will set government policy, and whose interests will be most protected. The arrangement of government power can determine the shape of political life and the extent of civil liberties.

Despite its importance, however, we have few signposts for interpreting the federal separation of powers. What factors should enter into our deliberations in interpreting these powers? Should we be bound to the text, even when it is clear? Or should we feel free to alter the details of the mechanisms of government to better pursue our political goals? What is the value of the separation of powers, and why should we preserve it? **HOW** should we go about interpreting the separation of powers? **WHO** should have primary responsibility for determining the shape of the separation of powers? Can the judiciary decide these issues? If it cannot, then how "constitutional" are these decisions? Is it "merely a matter of politics"? Are there larger values at stake in these debates, or is this just a matter of mechanical details?

Required:

A. The Document:

Art. I, § 1, 3, 5-9; Art. II; Art. III, § 1-2.

B. General:

ACI, "Structural Analysis: Sharing Power at the National Level," ch. 10, pp. 424-430

James Madison, *The Federalist*, # 51, p. 432

C. Congress and the President

The Prize Cases (1863), p. 438
United States v. Curtiss-Wright Export Corp. (1936), p. 441
Youngstown Sheet & Tube Co. v. Sawyer (1952), p. 443
The War Powers Resolution (1973), p. 455
Immigration and Nationalization Service v. Chadha (1983), p. 485
Bowsher v. Synar (1986), p. 499

D. The President and the Courts

Attorney General William Wirt on Ministerial Duties (course packet)
Morrison v. Olson (1988) (course packet)
Mississippi v. Johnson (1867), p. 462
Truman Refuses to Obey a Subpoena (1953), p. 465
Nixon Refuses to Testify (1977), p. 467
Ex Parte McCardle (1869), p. 467
U.S. v. Nixon (1974), p. 323
Clinton v. Jones (1997) (course packet)
Charles L. Black, Jr., *Impeachment: A Handbook*, ch. 4 (course packet)

Recommended:

Clinton v. New York (1998)
Humphrey's Executor v. U.S. (1935)
Myers v. U.S. (1926)
Hampton & Co. v. U.S. (1928)
Schecter Corp. v. U.S. (1935)
Goldwater v. Carter (1979)
Chevron v. National Resources Defense Council (1984)
Sotirios Barber, *The Constitution and the Delegation of Congressional Power*
Richard Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy," *Political Studies* 44 (1996): 436
Raoul Berger, *Impeachment*
Joseph M. Bessette and Jeffrey K. Tulis, eds., *The Presidency in the Constitutional Order*
Charles Black, *Impeachment: A Handbook*
Jesse H. Choper, *Judicial Review and the National Political Process*
Edward S. Corwin, *The President: Office and Powers*
Barbara Hinkson Craig, *Chadha*
William Eskridge and John Ferejohn, "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State," *J. of Law, Econ., & Org*. 8 (1992): 165
Louis Fisher, *Constitutional Conflicts Between Congress and the President*
Louis Fisher, "Separation of Powers: Interpretation Outside the Court," *Pepperdine L. Rev*. 18 (1990): 57
Louis Fisher, *Presidential War Power*

David B. Frohnmayer, "The Separation of Powers: An Essay on the Vitality of a Constitutional Idea," *Oregon L. Rev.* 52 (1973): 226

Michael J. Gerhardt, *The Federal Impeachment Process*

Michael J. Glennon, "The Use of Custom in Resolving Separation of Powers Disputes," *Boston U. L. Rev*. 64 (1984): 109

Michael J. Glennon, *Constitutional Diplomacy*

Robert Goldwin and Art Kaufman, eds., *Separation of Powers—Does It Still Work?*

Louis Henkin, *Foreign Affairs and the Constitution*

Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard L. Rev*. 107 (1994): 1231

Harold Koh, *The National Security Constitution*

Samantha Korn, *The Power of Separation*

Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power*

Walter F. Murphy, *Congress and the Court*

Herman C. Pritchett, *Congress versus the Supreme Court, 1957-1960*

Arthur M. Schlesinger, Jr., *The Imperial Presidency*

Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*

M.J.C. Vile, *Constitutionalism and the Separation of Powers*

George Winterton, "The Concept of Extra-Constitutional Executive Power in Domestic Affairs," *Hastings Con. L. Q.* 7 (1979): 1

Woodrow Wilson, *Constitutional Government in the United States*

5. 20 Oct: **HOW to Interpret "the Constitution"? Textually Based Structuralism and Federalism**

From this point on in the course, discussions will emphasize general problems of **HOW** to interpret. These complex concepts are central to this course. Thus we ask that students read Chapter 9 of *ACI*, which discusses approaches to constitutional interpretation. One of its points — which might get lost in the details — is that it is difficult for intelligent interpreters to restrict themselves to a single approach. As long as we claim that the document of 1787-88, as amended, is authoritative, a textual approach will be essential. Often, however, it will be insufficient. Because, for example, the American legal system is a product of the Common Law, most interpreters, not merely judges, will feel an obligation to link their constructions to those of previous interpreters. Thus a doctrinal approach will usually be appealing. Moreover, the meanings of many terms in the document, such as "liberty," "property," or "just compensation," are far from self-evident. Thus some interpreters endorse use a philosophic approach. One might make similar comments about other approaches such as prudence, for only a fool would deliberately interpret "the Constitution" foolishly.

Let us (re)emphasize a crucially important point: Whatever approach to constitutional interpretation we choose — after careful thought and equally careful justification — will depend in large part on our conception of **WHAT** "the Constitution" is that we must interpret.

The American constitutional document contains seven articles and twenty-seven amendments, one of which repeals another and the last of which was proposed in 1789 but not ratified until 1992. It is not necessary to agree completely with John Hart Ely's *Democracy and Distrust* to see that, even if "the Constitution" pertains only to that document, one cannot intelligently interpret it by treating its clauses as isolated instructions. They form a whole, an instrument of governance.

A structural approach focuses on what Justice William O. Douglas called the "architectural scheme" of "the Constitution." At the lowest level is textual structuralism, which looks at the constitutional document as a unit and from that scheme attempts to rank rights, duties, and powers. Only from that totality, that wholeness, structuralists argue, do individual clauses take on meaning. The Constitutional Court of West Germany has given a straightforward explanation of that version of a structural approach:

> An individual constitutional provision cannot be considered alone as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual decisions are subordinate. (Southwest Case [1951]; reprinted in W. F. Murphy and J. Tanenhaus, *Comparative Constitutional Law*, p. 208.)

A structural approach need not lead only to textual analysis. A document that calls itself "the Constitution" may be only part of a larger constitution, the political system created by the text's interactions with interpretations, practices, and customs. We may still use a structural approach when the unit of analysis broadens to include the entire political system. We might refer to this sort of approach as systemic structuralism.

Beyond the interworkings of the text and political system — or perhaps below them — hover general political theor(y)(ies) that inform both document and practice. Some commentators refer to an approach that treated text, system,

and theories as the unit of analysis as transcendent structuralism.[3]

At first glance, this week's readings seem to be largely examples of the approach we would call textual structuralism. Yet some of the cases show how quickly and easily analysis shades into systemic structuralism by referring to the larger political world or even to transcendental structuralism by referring to political theories. That broadening may be inevitable when dealing with problems as difficult as those of federalism or "fundamental rights" on the one hand, and, on the other, instructions as general as those in the American constitutional document.

Does a structural approach have more to offer constitutional interpretation than what Ely calls "clause bound interpretivism?" If yes, in what ways? Do structuralists pretend to provide a clear-cut solution to problems of the real world? To what extent do structuralists, in fact, do so? Why do judges not agree on structuralism's implications even when they agree that it is the proper interpretative approach? To what extent does a structural approach require interpreters to utilize other approaches as well?

Required:

A. The Document:

Preamble; Art. I, §§8 & 10; Arts. IV & VI; Amends. 9 & 10

B. General:

ACI, "Who May Authoritatively Interpret the Constitution for the Federal System," ch. 8
ACI, "How to Interpret the Constitution, an Overview," ch. 9
Madison, *The Federalist* #10, p. 1087
_____, *The Federalist*, #39, p. 526

C. Structuralism in Action: Federalism:

ACI, "Sharing Powers: The Nature of the Union," ch. 11, pp. 514-525
McCulloch v. Maryland (1819), p. 530
Gibbons v. Ogden (1824) (course packet)
U.S. v. E.C. Knight (1895) (course packet)
Hammer v. Dagenhart (1918) (course packet)
NLRB v. Jones & Laughlin (1937) (course packet)
Wickard v. Filburn (1942) (course packet)
National League of Cities v. Usery (1976), p. 565
Garcia v. SAMTA (1985), p. 576
U.S. v. Lopez (1995) (in course packet)

[3] William F. Harris II, *The Interpretable Constitution, ch*. 3, calls this version "ultra-structuralism."

Recommended:

New York v. United States (1992)
Texas v. White (1869)
Missouri v. Holland (1920)
United States v. Darby Lumber Co. (1941)
William F. Harris II, *The Interpretable Constitution*, ch. 3.
Jesse H. Choper, *Judicial Review & the National Political Process*
J. W. Peltason, *Understanding the Constitution*, pp. 216-220
Laurence H. Tribe, *American Constitutional Law* (2d ed.), chs. 5-6
The License Cases (1847)
Ableman v. Booth (1859)
Rizzo v. Goode (1976)
Dombrowski v. Pfister (1965)
Younger v. Harris (1971)
City of Greenwood v. Peacock (1966)
A.E. Dick Howard, "State Courts & Constitutional Rights in the Day of the Burger Court," 62 *Va. L. Rev.* 873 (1976)
William Brennon, "The Bill of Rights and the States," *NYU Law Review* 36 (1961): 761
Morton Grodzins, "The Federal System," in *Report of the President's Commission on National Goals: Goals for Americans* (1960)
Edward S. Corwin, "The Passing of Dual Federalism," *Va. L. Rev.* 36 (1950): 1
Robert F. Nagel, *Constitutional Cultures*, ch. 4
W. F. Murphy & J. Tanenhaus, eds., *Comparative Constitutional Law*, ch. 8
Daniel Elazar, *Exploring Federalism*
David Elazar, *Constitutionalizing Globalization*
Samuel Beer, *To Make a Nation*
Harry N. Scheiber, "Federalism and the American Economic Order, 1789-1910," *Law & Soc. Rev.* 10 (1975): 1
Larry Kramer, "Understanding Federalism," *Vanderbilt Law Review* 47 (1994): 1485
Martin Redish, *The Constitution as a Political Structure*
Leslie Friedman Goldstein, "State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-1994)," *Studies in Am. Pol. Development* 11 (1997): 149
Ellis Katz and Alan Tarr, *Federalism and Rights*

6. 27 Oct: **HOW to Interpret? Property and Contract**

One way of trying to unlock "the Constitution's" protections of property is to look at what the founding generation was trying to accomplish. Thus we might use an approach called originalism and seek the "intent" or "understanding" those men had in mind. It seems clear that most of the delegates who met at Philadelphia in 1787 and many of those who met in the ratifying conventions during 1787-88 were deeply concerned about what they viewed as "levelling" attacks against property. They therefore labored to create a new constitutional order that would directly and indirectly protect private property.

Although the founders were of several minds about the nature of the threat, they apparently agreed it was perilous for government to be under the control of the propertyless. Some founders thought such people could not be autonomous,[4] but rather would be economically dependent and thus politically subservient to the unscrupulous among the wealthy. Hence these founders foresaw oligarchy if the principal limitation on the exercise political power were to be popular election of public officials. (One must keep in mind that in those days voting in many states was both public and oral.) Other founders saw the number of the propertyless as likely to increase until they became a majority who would exercise power for what they believed to be, however shortsightedly, their own interests. Greed and envy would drive them to act unjustly toward the propertied, that is, to take from those who already had property. Thus, Madison claimed in Federalist #10, one of the principal aims of government was to protect inequalities of wealth and to do so by limiting governmental capacity to interfere with rights of property.

Despite the deep concern of the early Federalists, the only time the word "property" occurred in the original constitutional text was to describe congressional power over "Property belonging to the United States." The first explicit protection of private property appeared in the Fifth Amendment, ratified in 1791, and in the Fourteenth Amendment, ratified in 1868. And even those two amendments only forbid government to take private property "without due process of law."[5]

Originalism raises other problems. We can be sure that the founders, at least the Federalist founders, wanted to protect property against democratic state legislatures. What more can we say with certainty? Even if we could say more, would it be prudent to abide by the understandings of an earlier era if the forms and roles of property had changed? What other routes can interpreters take to construe the right to own, use, and dispose of private property as a "fundamental right"? Textualism does not seem to help a great deal. Do we return to the now familiar approaches of protecting fundamental rights or philosophy? Or do these approaches raise as many problems as they solve?

What about doctrinalism? Or historical development? We read about the efforts of the Court under Marshall to protect property by a constitutional wall and the breaches in that wall during Marshall's last years and under Roger Brooke Taney's chief justiceship. We also read about the resurgence, albeit it as part of a quite unMarshallian ideology of laissez faire, of constitutional protection of certain kinds of property rights during the period 1890-1937. (That resurgence also brought a narrowing of the concept of property from a "property in rights" that included but was not

[4] A century and a half later, Franklin D. Roosevelt agreed: "Necessitous men are not free men."

[5] One can make a strong case that the Third Amendment, in prohibiting the quartering of troops in civilian homes in peace time, and the Fourth, in asserting the security of people's "houses, papers, and effects," also protected private property. But, as with the Fifth and Fourteenth amendments, these shields are porous. The Third Amendment implicitly allows quartering of troops in civilian homes in time of war and the Fourth allows governmental officials to search and seize private property if they have valid warrants. One might also read the original constitutional text as recognizing a right to property in slaves through such euphemistic phrases as a "person held to Service or Labour" or "those bound to Service."

restricted to rights to tangible goods, to a more limited "right to property," that is, to own, use, and dispose of tangible goods and to contract for the use of one's own labor.)

What sort of answers to our basic question of property as a fundamental right do the justices offer? Are any fully convincing? Why are some more convincing than others? Would the reasoning the justices offer be more convincing if they were more open about their philosophic assumptions and approaches to constitutional interpretation?

To what extent can one say that property remains a fundamental value in the American constitutional system? In making the autonomous individual the centerpiece of the political system, does constitutional theory logically require government to guarantee everyone a minimal income? Or, conversely, does constitutionalism forbid the welfare state and command laissez faire?

Required:

A. The Document:

Art. I, §§9-10; Art. IV, §§1-2, 4; 5th Amendt.; 14th Amendt., §1

B. Efforts Toward (or Away from) a General Theory:

ACI, introductory essay, pp. 1070-1082
John Locke, "Property & the Ends of Political Order," p. 1083
James Madison, *Federalist* #10, p. 1087
Fletcher v. Peck (1810), p. 1091
Dartmouth College v. Woodward (1819) (course packet)

C. Laissez Faire, Substantive Due Process, & the Constitution:

Slaughter-House Cases (1873), p. 550
Munn v. Illinois (1877), p. 1101
Lochner v. New York (1905), p. 1110
Adkins v. Children's Hospital (1923), p. 1116

D. Out with the Old and in with the New (Property)?:

Home Bldg. & Loan Assn. v. Blaisdell (1934) (course packet)
West Coast Hotel v. Parrish (1937), p. 1123
Williamson v. Lee Optical (1955), p. 908
Ferguson v. Skrupa (1963), p. 1129
Goldberg v. Kelly (1970) (course packet)
Bishop v. Wood (1976) (course packet)
Allied Structural Steel v. Spannaus (1978) (course packet)
DeShaney v. Winnebago Co. Dept. of Social Services (1989), p. 1350

Recommended:

A. Historical Studies

Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," (1914); in A. T. Mason & G. Garvey, eds., *American Constitutional History*

_____, *The "Higher Law" Background of American Constitutional Law*

_____, *Court over Constitution*

Benjamin Twiss, *Lawyers & the Constitution*

Frank Bourgin, *The Myth of Laissez-Faire in the Early Republic*

Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, esp. chs. 10-13

Clyde E. Jacobs, *Law Writers & the Courts*

Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism*

Morton J. Horwitz, *The Transformation of American Law, 1870-1960*

Howard Gillman, *The Constitution Besieged*

Harry N. Scheiber, "Property Law, Expropriations, and Resource Allocation by Government," *J. of Econ. Hist*. 33 (1973): 232

Geoffrey P. Miller, "The True Story of Caroline Products," *1987 Supreme Court Review*

Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," *1962 Supreme Ct. Rev*.

B. Analytical Studies

C. Herman Pritchett, *Constitutional Civil Liberties*, ch. 11

Richard A. Epstein, *Takings: Private Property & the Power of Eminent Domain*

_____, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 *Harv. L. Rev*. 5 (1988)

_____, *Forbidden Grounds: The Case Against Employment Discrimination Laws*

Robert A. Dahl, *A Preface to Economic Democracy*

Laurence H. Tribe, *American Constitutional Law*, 2d ed., chs. 8-10

Cass R. Sunstein, *The Partial Constitution*, ch. 2

J. W. Peltason, *Understanding the Constitution*, pp. 146-70

Sotirios A. Barber, *On What the Constitution Means*, ch. 4

George E. & Gerald J. Garvey, *Economic Law & Economic Growth*

Stephen Macedo, "Economic Liberty and the Future of Constitutional Self Government," in E. F. Paul, ed., *The Constitution and Economic Rights*

George M. Armstrong, "The Reification of Celebrity: Persona as Property," 51 *LSU L. Rev*. 443 (1991)

Frank I. Michelman, "Welfare Rights in a Constitutional Democracy," *Wash. U. L. Q*. 1979 (1979): 659

Charles Reich, "The New Property," *Yale L. J*. 73 (1964): 733

Martin Shapiro, "The Constitution & Economic Rights," in M. Judd Harmon, ed., *Essays on the Constitution of the US*

_____, "The Constitution, Economic Rights, & Social Justice," in Shlomo Slonim, ed., *The Constitutional Bases of Political & Social Change in the US*

_____, "The Supreme Court's `Return' to Economic Regulation," in Karren Oren and Stephen Skowronek, eds., *Studies in American Political Development*, vol. I

W. F. Murphy & J. Tanenhaus, eds., *Comparative Constitutional Law*, ch. 10
Ronald Dworkin, *A Matter of Principle*, ch. 12
Euclid v. Ambler (1926)
Michael N. Danielson, *The Politics of Exclusion*
Lynch v. Household Finance (1972)
Bernard Siegan, *Economic Liberties and the Constitution*
Edward Keynes, *Liberty, Property and Privacy*

7. 3 Nov: **HOW to Interpret? Property and Takings**

Property rights were among the central values that the founders were seeking to protect, but as we have seen, the scope and nature of property rights have been deeply contested throughout American history. Property is one substantive value among many, and property rights have often come into conflict with other potential values. How should those competing interests be balanced? Should they be "balanced" at all, or should rights be regarded as "side constraints" on other political pursuits – hedging the boundaries of permissible political activity?

The constitutional text makes its most explicit reference to property in the Fifth Amendment, where private property is protected from public taking unless "just compensation" is provided. This provision of the Constitution places a restriction on the traditional government power of "eminent domain." The power of eminent domain allows the government to transfer specific bundles of private property to the public sector for the sake of the common good. The classic example of eminent domain is the case of the government building a road. The road itself serves the public interest and will be public property, but the land that the road will be built on is in private hands. Once the path of the road is set, private property owners along that path have an interest in artificially raising their selling price for the land. A single property holder can obstruct a public road, holding the government "hostage" until it pays an inflated price for a single necessary parcel of land. To avoid such private "rent seeking" behavior (the exploitation of the public arena for private gain), governments have claimed the right to simply take the land in the name of the public good. The Fifth Amendment recognizes that right, but insists that the government pay a "just" amount for the property and that the taking be for the "public use."

HOW should we interpret that restriction on federal power? When has property been "taken"? What is a "public use"? What is "just compensation"? What, indeed, is "property"? Should we regard property rights as "fundamental," requiring strong protection? Or should property rights be regarded as less "fundamental" than other interests? How would a philosophical approach construe the takings clause? How helpful is a textual approach? How would we apply an originalist approach to the takings clause in the context of a modern, regulatory state? Should we expand our notion of "takings" to include modern government activities that devalue private property, even if individuals retain physical possession of their property? How much guidance is provided by the classical analogy of government road construction? Is that just one example of a taking, or must all real "takings" be closely analogous to that case?

Required:

A. The Document:

Amend. V; Amend. XIV

B. The Decline and Resurgence of the Takings Clause:

Pennsylvania Coal v. Mahon (1922) (course packet)
Miller v. Schoene (1928) (course packet)
U.S. v. Causby (1946) (course packet)
Penn Central Transport Co. v. New York City (1978) (course packet)
Poletown Neighborhood Council v. City of Detroit (Michigan Supreme Court, 1981) (304 N.W.2d 455, 1981 Mich. LEXIS 250) find this case on internet
Hawaii Housing Authority v. Midkiff (1984), p. 1131
First English Evangelical Lutheran Church v. Co. of Los Angeles (1987) (course packet)

Nollan v. Calf. Coastal Comm. (1987), p. 582
Lucas v. South Carolina Coastal Council (1992), p. 1135

Recommended:

Bruce Ackerman, *Private Property and the Constitution*
Richard A. Epstein, *Takings: Private Property & the Power of Eminent Domain*
_____, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 *Harv. L. Rev*. 5 (1988)
_____, *Forbidden Grounds: The Case Against Employment Discrimination Laws*
Louis Michael Seidman and Mark V. Tushnet, Remnants of Belief, ch. 3-4
Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Q*. 38 (1920): 476
William Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," *Harv. L. Rev*. 81 (1968): 1439
Seth Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State," *U. of Penn. L. Rev*. 132 (1984): 1293
Kathleen Sullivan, "Unconstitutional Conditions," *Harv. L. Rev*. 102 (1989): 1413
Larry Alexander, "Understanding Constitutional Rights in a World of Optional Baselines," *San Diego L. Rev*. 26 (1989): 175

8. 10 Nov: **Moot Court**

Counsel must bring their briefs, if they are not already duplicated, to the Politics Office, 130 Corwin Hall, by 2 p.m., 5 November. If briefs are already duplicated, counsel need not bring them to the Politics Office until 4 p.m. on that date. There will be no charge for duplicating briefs in the Department, but counsel must make arrangements with the secretaries a few days in advance (258-4760). That machine is heavily used. We cannot reimburse counsel for expenses of duplicating briefs elsewhere. Duplicated briefs will be made available outside the Politics Office beginning November 6. There will be *no lecture* during this week in order to allow you to concentrate on your moot court.

9. 17 Nov: **HOW to Interpret "the Constitution"? Democracy and Political Speech**

It is obvious that one of the requisites for a representative democracy is freedom of political communication. To the extent that government (i.e., officials already holding public office) can determine who can debate which political issues, people are not self-governing, even though they may formally elect representatives. Thus, it might seem logically necessary for public officials, especially those charged with interpreting "the Constitution," to oppose all restrictions on political communication. But, would democratic theories not impose limits on political communication? Should a person have a right to urge fellow citizens to bomb public buildings and assassinate public officials instead of voting them out of office? Or to incite fellow citizens to join together to rid the world of "social undesirables"? Or to publish military secrets in time of war? Or to advocate political objectives in vile and/or insulting language?

Do physical conditions justify governmental regulation of access to certain channels of political communication, such as radio or television? Or should the operative rule be "first come, first served"? Or should the right to broadcast be auctioned off to the highest bidder? Are there constitutionally relevant differences between governmental regulation of broadcasting and of other forms of journalism?

At what stage does constitutionally protected communication go beyond the spoken or written word and include symbolic public acts, such as wearing black arm bands, burning flags, draft cards, or crosses, or dancing in the nude?

To what extent does one person have a right to libel or slander another? Does a journalist's right to write about a pending criminal case take precedence over the accused's right to a trial by an unprejudiced jury? Are the rights to express oneself and to participate in choosing among political candidates and their proposed policies integral parts of autonomy?

Would constitutional interpretation be best served, as some argue, by a different approach, a subcategory of purposive approaches that we might label "protecting fundamental rights?" The putative "fundamental right" in this context would be political participation. To what extent do structural and philosophical approaches preclude such an approach? To what extent are they compatible with it?

Required:

A. The Document:

Preamble; Art. I, §2; Art. II, §1, ¶2; amend. 14 §1; 15; 17; 19; & 26

B. Efforts at General Theory:

John Hart Ely, *Democracy & Distrust*, ch. 4
Hadley Arkes, *Beyond the Constitution*, ch. 4 (course packet)
James Bradley Thayer, "Origin & Scope of the American Doctrine of Constitutional Law," (1893), p. 602
Concur. op. of Brandeis in Whitney v. California (1927), p. 651
United States v. Carolene Products (1938), p. 609

C. Symbolic & Hurtful Expression:

United States v. Eichman (1990), p. 727
New York Times v. Sullivan (1964), p. 634
American Booksellers Ass'n v. Hudnut (1985) (course packet)
R.A.V. v. St. Paul (1992), p. 686
Cohen v. California (1971), p. 705
Buckley v. Valeo (1976), p. 828

Recommended:

Wisconsin v. Mitchell (1993)
The Pentagon Papers Case (New York Times v. United States)(1971)
A Note on the History of Footnote 4, *ACI*, p. 618
Dennis v. United States (1951)
Yates v. United States (1957)
Barenblatt v. United States (1959)
New York ex rel. Bryant v. Zimmerman (1928)
Roberts v. Jaycees (1984)
Philadelphia Newspapers v. Hepps (1986)
Kent Greenawalt, *Speech, Crime, and the Uses of Language*
J. W. Peltason, *Understanding the Constitution*, pp. 146-170
Walter F. Murphy, "Excluding Political Parties: Problems for Democratic and Constitutional Theory," in Paul Kirchhof and Donald P. Kommers, eds., *Germany and Its Basic Law*
Cass R. Sunstein, *Democracy and the Problem of Free Speech*
R. George Wright, "A Rationale from J. S. Mill for the Free Speech Clause," *1985 Sup. Ct. Rev*. 149
Robert H. Bork, "Neutral Principles & Some First Amendment Problems," 47 *Indiana L. J*. 1 (1971).
Laurence H. Tribe, *American Constitutional Law* (2d ed.) ch. 12
Chaplinsky v. New Hampshire (1942), *ACI*, p. 537
Gooding v. Wilson (1972), *ACI*, p. 539
Kunz v. New York, 340 U.S. 290 (1951)
Street v. New York, 394 U.S. 576 (1969)
Near v. Minnesota (1931), *ACI*, p. 570
Rodney A. Smolla, *Free Speech in an Open Society*
Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism*
Walter F. Berns, *Freedom, Virtue, & the First Amendment*
Learned Hand, *The Bill of Rights*
Martin Shapiro, *Freedom of Speech, the Supreme Court, & Judicial Review*
David A. J. Richards, *Toleration & the Constitution*
Donald A. Downs, *Nazis in Skokie: Freedom, Community, & the First Amendment*
Donald A. Downs, *The New Politics of Pornography*

10. 24 Nov: **HOW to Interpret? Freedom of Religion**

Last week we saw that textual support for private property as a fundamental right was thin. Absolutist language, however, guarantees freedom of religion. Article VI bans religious tests for federal office, and the First Amendment is equally direct: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The Fourteenth Amendment, so the Supreme Court has ruled, "incorporates" those categorical provisions and applies them against the states. "No law," Justice Hugo L. Black used to insist, "meant no law at all". Yet.... What would we do about religious groups whose principles include killing nonbelievers? About those sects who refuse to pay taxes or to educate their children or have group marriages or use mind-altering drugs for religious ceremonies?

Few of us would blanche at forbidding Neo-Aztecs to engage in human sacrifice. But that is not the type of case that is likely to arise. Suppose, then, a state in which the Ku Klux Klan was active enacted a law that allowed Jews to believe what they want but forbade them to wear yarmulkes in public because that symbolic clothing might generate violence? Why not require Quakers to serve in the armed forces and tell them to take comfort that, when they fire deadly weapons at the enemy, they can still believe it is wrong to kill?

How do we constitutionally distinguish allowing Catholics to use alcoholic beverages as part of their religious rituals and forbid Indians to use peyote at theirs? From forcing Catholics to fight in wars they consider unjust and allowing Quakers to opt out of all wars? From forbidding Mormons to practice what they believe to be a divine command to engage in polygamy and allowing everyone, Mormons as well as non-Mormons, to engage in serial polygamy? What approaches to constitutional interpretation offer hope for resolving these and other very real problems of religious freedom in a pluralistic society? Do we merely say "Let's balance the interests?" If so, what are the interests at stake and what constitutional weight do we give each? How do we justify assigning different weights to those interests? Is there a principled solution to this problem?

Please note that precepts will not meet this week due to the Thanksgiving break.

Required:

A. Approaches

ACI, introductory essay, pp. 1149-1157

B. The Problems

Davis v. Beason (1890), p. 1159
Cantwell v. Connecticut (1940), p. 1161
Minersville v. Gobitis (1940), p. 1165
West Virginia v. Barnette (1943), p. 1174
Wisconsin v. Yoder (1972), p. 1187
Gillette v. United States (1971), p. 1216
Goldman v. Weinberger (1986) (course packet)
Congress Reversed *Goldman* (course packet)
Bob Jones University v. United States (1983), p. 1230
Employment Division v. Smith (1990), p. 1200

Religious Freedom Restoration Act (1991), p. 1212
Lee v. Weisman (1992), p. 167
Rosenberger v. University of Virginia (1995) (course packet)

Recommended:

Church of Lukumi v. Hialeah (1993)
Wooley v. Maynard (1977)
United States v. Lee (1982)
Tony and Susan Alamo Foundation v. Secretary of Labor (1985)
Bowen v. Roy (1986)
O'Lone v. Estate of Shabazz (1987)
Lyng v. Northwest Indian Cemetery (1988)
Richard A. Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 *Harv. L. Rev*. 5, 5-17, 79-104 (1988)
Robert P. George and William Porth, "Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause," 90 *West Va. L. Rev*. 109 (1987)
Laurence H. Tribe, *American Constitutional Law*, 2d ed., ch. 14
Michael W. McConnell, "The Origins of the Historical Under-standing of Free Exercise of Religion," 103 *Harv. L. Rev*. 1409 (1990)
_____, "Free Exercise, Revisionism, and the Smith Decision," 57 *U. Chi. L. Rev*. 1109 (1990)
Mary Ann Glendon and R. Yanes, "Structural Free Exercise," 90 *Mich. L. Rev*. 477 (1991)
Gerard V. Bradley, "Beguiled: The Free Exercise Exemptions and the Siren Song of Liberalism," 20 *Hofstra L. Rev*. 245 (1991)
Ira C. Lupu, "Where Rights Begin: The Problems of Burdens on the Free Exercise of Religion," 102 *Harv. L. Rev*. 993 (1989)
Bette Novit Evans, *Interpreting the Free Exercise of Religion*

11. 1 Dec: **HOW to Interpret "the Constitution? Equal Protection**

This week we continue exploring the sort of structure that democratic theories might impose on the American political system. Again we try to discern how constitutional interpretation does and should cope with the demands of democratic theories.

Among the many issues the cases for this week raise is whether it is necessary for a democracy to recognize not merely rights to political participation but other rights — to a degree of privacy, for example — if those rights to participate are to have real meaning. Again we are necessarily following a philosophic approach.

Running throughout these cases, as well as those of many other weeks, is the question of the proper role of federal judges. They are neither elected by nor responsible to the public; yet they claim authority to impose democratic standards on officials who are chosen by and responsible to the people. Is judge-made democracy a contradiction in terms? Again we return to the question of **WHO** interprets.

Required:

A. General

ACI, Treating Equals Equally, pp. 872-881
ACI, The Problems of Equal Protection I, pp. 884-894
ACI, The Problems of Equal Protection II, pp. 971-984

B. Race

Plessy v. Ferguson (1896), p. 902
Brown v. Board of Education I (1955), p. 912
Bolling v. Sharpe (1956), p. 917
City of Richmond v. J.A. Croson Co. (1989), p. 954
Hopwood v. Texas (1996) (course packet)

C. Gender

Frontiero v. Richardson (1973), p. 986
Craig v. Boren (1976), p. 992

D. Rational Basis Review

Plyler v. Doe (1982), p. 1040
Cleburne v. Cleburne Living Center (1985), p. 1048

E. Sexual Orientation

Romer v. Evans (1996) (course packet)

Recommended:

John Hart Ely, *Democracy and Distrust*
Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution*
Terrence Sandalow, "Judicial Protections of Minorities," *Mich. L. Rev*. 75 (1979): 1162
Cass Sunstein, *The Partial Constitution*
Harold M. Hyman and William M. Weicek, *Equal Justice Under the Law*
Jacobus tenBroek, *Equal Under Law*
Raoul Berger, *Government by Judiciary: The Transformation of Fourteenth Amendment*
William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*
Robert Kaczorowski, "Revolutionary Constituitonalism in the Era of the Civil War and Reconstruction," *NYU L. Rev*. 61 (1986): 863
Alexander M. Bickel, "The Original Understanding of the Segregation Decision," *Harv. L. Rev*. 69 (1955): 1
Michael W. McConnell, "Originalism and the Desegregation Decisions," Va. L. Rev. 81 (1995): 947
Derrick A. Bell, Jr., *Are We Not Saved*
Ronald Dworkin, *A Matter of Principle*, ch. 14-16
Owen M. Fiss, "Groups and the Equal Protection Clause," *Phil. & Public Affairs* 5 (1976): 107
Gerald Gunther, "In Search of Evolving Doctrine on a Changing Court," *Harv. L. Rev*. 86 (1972): 1
Richard Kluger, *Simple Justice*
Harvie J. Wilkinson, III, *From Brown to Bakke*
Judith A. Baer, *Equality Under the Fourteenth Amendment*
Ira Lupu, "Untangling the Strands of the Fourteenth Amendment," *Mich. L. Rev*. 77 (1979): 981
Catherine A. MacKinnon, "Reflections on Sex Equality Under Law," *Yale L. J*. 100 (1991): 1281
Martha Minow, *Making All the Difference*
Deborah L. Rhode, *Justice and Gender*
Ruth Bader Ginsburg, "The Burger Court's Grappling with Sex Discrimination," in Vincent Blasi, ed. *The Burger Court*
Frank I. Michelman, "On Protecting the Poor Through the Fourteenth Amendment," *Harv. L. Rev*. 83 (1969): 7
Frank I. Michelman, "Welfare Rights in a Constitutional Democracy," *Wash. U. L. Q*. 1979 (1979): 659
Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972*
Lino A. Graglia, *Disaster by Decree: The Supreme Court's Decisions on Race and the Schools*
Nathan Glazer, *Affirmative Discrimination*
Mark A. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court*
Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America*
Robert Cover, "The Origin of Judicial Activism in the Protection of Minorities," *Yale L.J*. 91 (1982): 1287
Andrew Koppelman, *Antidiscrimination Law and Social Equality*
H.N. Hirsch, *A Theory of Liberty: The Constitution and Minorities*

12. 8 Dec: **HOW to Interpret? Bodily Integrity, Procreation, Sex, and Marriage**

If the purpose of what our casebook editors label "constitutionalism" is the protection of individual "autonomy," constitutional government must respect, indeed promote, the individual's right to a "zone of personal privacy." Thus, one might argue, protecting "fundamental rights" provides a necessary if not always sufficient means for constitutional understanding. But that same government must also protect that same individual against depredations by other citizens; and, in so doing, government might find itself restricting the autonomy of other citizens. Indeed, some scholars contend that government must restrict an individual's autonomy in some spheres of life in order to enhance autonomy in other spheres. "The vigor of government," Alexander Hamilton claimed in *Federalist* No. 9, "is essential to the security of liberty."

In a complex, interdependent, urban, industrial society, much of what every person does affects the rights of others. By becoming members of a community, individuals have incurred certain obligations toward their fellow human beings — and more specific juridical obligations toward fellow citizens — including the obligation not to trample on others' rights to enjoy autonomy and dignity.

But how or where should a constitutional democracy draw the lines? 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 not wrong, only 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.

Those who are more trusting of the judiciary might insist on the people and/or their representatives' being tied down by substantive restrictions on their range of choice. In this context, use of the passive voice conceals a great deal. "Being tied down" does not tell us who does the tying and how that person or institution goes about that work. What approaches to constitutional interpretation offer the straightest paths for "the pursuit of happiness"? The interrogative **WHO** as well as the omnipresent **WHAT** come into play.

Echoing the democratic response, Jefferson and Madison thought that voters would be protective of their own, and therefore usually protective of others', rights. But each also realized that the people were neither infallible nor impervious to temptations to abuse power. In Federalist Nos. 10, 39, and 51 Madison suggested social, geographic, and structural restraints on majorities. Jefferson was more taken with a bill of rights, judicially enforced. Eventually Madison agreed to such a bill but as an addition to rather than a substitute for other checks. And even then he added that such a listing of rights could help curtail what the people would think was valid governmental policy. How much he ever believed in judges as legitimate or even effective protectors of individual rights against government is unclear.

But important as this debate was, it did not speak to the extent to which independent judges who had taken oaths to support "the Constitution" should defer to the judgment of popularly elected officials in drawing lines between permissible and impermissible governmental restrictions on fundamental rights. Nor did the debate speak to the extent to which popularly elected officials should defer to the wishes of their own constituents in drawing such lines, although it is worth noting that the First Congress rejected a constitutional amendment that would have allowed constituencies to issue legally binding instructions to their representatives.

There are larger and deeper problems here. What role should theories of morality, either the interpreter's or others', play in decisions about fundamental rights? Perhaps against their will, interpreters find themselves using a philosophic

approach, for they 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. The most they may argue is that such concepts are somehow immanent in the text, required by the text's structure, demanded by the political theories that underlie the text, understood by the founders to have been there, or embedded by tradition and doctrine. What does such an argument tell us about **WHAT** "the Constitution" is, how it legitimately changes, **WHO** has responsibility for making such changes, and **HOW** to interpret it (whatever "it" might be)?

If a constitutional interpreter answers these questions, at least to his own satisfaction, and holds that some rights are fundamental, how does he decide that certain rights are more fundamental than other rights or governmental powers? How does that interpreter justify those choices? By general jurisprudential principles? By ad hoc and probably idiosyncratic considerations? By "balancing of interests"? By structural and/or philosophic analyses?

Suppose, however, that interpreters refuse to follow Br'er Rabbit into this briar patch. To what extent are they then true to the text, to its plain words or its structure? To what is immanent in the text? To its underlying political theories? To the founders' understanding? To the history that has built a tradition of what the country supposedly stands for?

Required:

A. The Document

Preamble; Art. I, §9, ¶2; amend.: 1-10; 13; & 14, §1

B. The Concept of Fundamental Rights:

ACI, introductory essay, pp. 1236-1245
Meyer v. Nebraska (1923), p. 1247
Palko v. Connecticut (1937), p. 128
United States v. Carolene Products (1938), p. 609

C. Bodily Integrity and Procreation:

Jacobson v. Massachusetts (1905), p. 125
Buck v. Bell (1927), p. 1254
Skinner v. Oklahoma (1942), p. 1014
Rochin v. California (1952), p. 135

D. Sex, Love, and Marriage:

Griswold v. Connecticut (1965), p. 147
Loving v. Virginia (1967), p. 926
Bowers v. Hardwick (1986), p. 1322

E. Abortion

Roe v. Wade (1973), p. 1258
Planned Parenthood v. Casey (1992), p. 1281

Recommended:

Michael H. & Victoria D. v. Gerald D. (1989)
Cruzan v. Director, Missouri Dept. of Health (1990)
Carey v. Population Services International (1977)
Moore v. East Cleveland (1977)
Pierce v. Society of Sisters (1925)
Laurence H. Tribe and Michael H. Dorf, *On Reading the Constitution*, ch. 3
Laurence H. Tribe, *Abortion: The Clash of Absolutes*
Harry H. Wellington, *Interpreting the Constitution*, chs. 5-6
C. Herman Pritchett, *Constitutional Civil Liberties*, chs. 11-12
J. W. Peltason, *Understanding the Constitution*, pp. 215-16
Charles L. Black, *Decision According to Law*
Crandall v. Nevada (1868)
W. F. Murphy, "The Right to Privacy," in Shlomo Slonim, ed., *The Constitutional Bases of Political & Social Change in the US*
_____, "Staggering Toward the New Jerusalem of Constitutional Theory," 37 *Am. Jo. of Jurisp*. 337 (1992)
_____, "The Art of Constitutional Interpretation," in M. Judd Harmon, ed., *Essays on the Constitution of the US*
_____, "An Ordering of Constitutional Values," 53 *So. Cal. L. Rev*. 1601 (1980)
_____, "Constitutional Interpretation: Text, Values, & Processes," 9 *Revs. in Am. Hist*. 7 (1980)
_____, & J. Tanenhaus, eds., *Comparative Constitutional Law*, ch. 12 & pp. 542-546
Barrington Moore, Jr., *Privacy: Studies in Cultural History*
Richard A. Posner, *The Economics of Justice*, ch. 9-11
Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev*. 1 (1959)
Charles Fried, *An Anatomy of Values*, Part I & ch. 9
_____, *Order and Law*, chs. 2-3
Concur. Op. of Brennan in Furman v. Georgia (1972)
Hollenbaugh v. Carnegie Free Library (1978)
H. L. v. Matheson (1981)
James S. Fishkin, *Justice, Equality, & the Family*
Robert A. Burt, "The Constitution of the Family," *1979 Sup. Ct. Rev*. 329
Marian Faux, *Roe v. Wade*
Mary Ann Glendon, *Abortion and Divorce in Western Law*
Christopher Wolfe, "Abortion and Liberal Democracy," *Political Science Reviewer* 19 (1990): 291
Mark A. Graber, *Rethinking Abortion: Equal Choice, the Constitution, and Reproductive Politics*
Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate*
David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*
John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale L. J*. 82 (1973): 920
Richard Epstein, "Substantive Due Process by any Other Name: The Abortion Cases," *1973 Supreme Ct. Rev*.
Eva Rubin, *Abortion, Politics and the Courts: Roe v. Wade and its Aftermath*
Edward Keynes, *Liberty, Property and Privacy*

Ruth B. Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *N. Carolina L. Rev.* 63 (1985): 375

VIII. Reading Period

The purpose of this assignment is to raise once more those issues of constitutional interpretation on which the course has focused. By this point in the semester, you should be able to read and analyze a substantial work of constitutional theory on your own. Read Ely thoroughly and carefully. Think carefully about his theory, its implications and its consistency with what you've learned about constitutional interpretation.

Required:

John Hart Ely, *Democracy and Distrust*

Recommended:

Sotirios A. Barber, *On What the Constitution Means*
_____, *The Constitution of Judicial Power*
Philip Bobbitt, *Constitutional Interpretation*
Benjamin N. Cardozo, *The Nature of the Judicial Process*
Paul Brest, "The Substance of Process," 42 *Ohio St. L. J*. 131 (1981)
John Agresto, *The Supreme Court & Constitutional Democracy*
Alpheus Thomas Mason, *The Supreme Court from Taft to Burger*
W. F. Murphy, *Elements of Judicial Strategy*, esp. chs. 2, 3, 7, & 8
_____, "Staggering Toward the New Jerusalem of Constitutional Theory," 37 *Am. Jo. of Jurisp*. 337 (1992)
Mark Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory," 89 *Yale L. J.* 1037 (1980)
Laurence Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," *Yale L.J*. 80 (1980): 1063
Ronald Dworkin, "The Forum of Principle," *NYU L. Rev*. 56 (1981)
Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 *Harv. L. Rev*. 1 (1959)
Cass R. Sunstein, *The Partial Constitution*
James E. Fleming, "Constructing the Substantive Constitution," 72 *Tex. L. Rev*. 211 (1993)
Michael J. Klarman, "The Puzzling Resistance to Political Process Theory," 77 *Va. L. Rev*. 747 (1991)
John Hart Ely, "Another Such Victory: Constitutional Theory and Practice in a World Where Courts are no Different from Legislatures," *Virginia Law Review* 77 (1991): 833