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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? **WHAT** does the term "the Constitution" include? **WHAT** 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, often 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 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" preempt a 90 minute period each Tuesday morning. They 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. 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, students must carefully, thoughtfully, thoroughly, and critically read the required material, 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. Two members of each seminar will function as counsel and present written briefs and oral arguments to the other members of the seminar. 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.

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)
Robert P. George, ed., Great Cases in Constitutional Law (paperback edition)
2. Available at Pequod Copy (Also on library reserve)

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

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.

Books and articles on the American founding include:

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
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
Leonard L. Levy and Dennis J. Mahoney, eds., The Framing & Ratification of the Constitution
Michael Allen Gillespie & Michael Lienesch, eds., Ratifying the Constitution
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
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 scantly, 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 (paperback)
——, 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)
Jack N. Rakove, ed., Interpreting the Constitution: The Debate Over Original Intent — contains some excellent articles, but the subtitle describes the limited scope of the volume's coverage
Laurence H. Tribe and Michael C. Dorf, On Reading the Constitution
Harry H. Wellington, Interpreting the Constitution

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Keith Whittington, *Constitutional Construction*

Neil L. York, ed., *Toward a More Perfect Union*


Sanford V. Levinson, *Coping with Imperfection*

Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Steven C. Wheatley have edited a set of essays on constitutions and constitutionalism, written by scholars from Africa, Asia, Europe, and North and South America that should be of great use and interest: *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, 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.


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.

III. Moot Court

1. 22 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. Moot

1 The most eminent constitutional scholar of his time, Corwin was McCormick Professor of Jurisprudence at Princeton from 1918-1946. It is he for whom Corwin Hall is named. He 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 his successor as McCormick Professor. He took over this course after Corwin's retirement, and taught it until retiring when he handed it on to his distinguished successor, Walter F Murphy.
Courts will be held during the seminars of the week of 12 November.

2. **20 November.** Moot court opinions are due in the office of the Department of Politics, 130 Corwin Hall, by 3 p.m.

**IV. Examinations**

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

**V. 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. Professors Corwin, Mason, and Murphy have taught us to believe in "tough love": The most honest way of earning the tuition parents pay is to provide honest evaluations of work.

To obtain a passing grade for the course, a student must fulfill all course requirements. Thorough preparation for, and faithful attendance at, lectures and seminars is among these requirements.

Grading 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 20 per cent (please note that each student will be assigned a grade in this category by the Preceptor).
VI. Schedule of Assignments

(All pages are in ACI unless otherwise indicated.)

1. 17 Sept: Problems of Constitutional Interpretation

Seminars will not meet this week. Prof. George will introduce some key issues in the course.

2. 24 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 prob-
Constitutional Interpretation

What are the standards for deciding what is included and excluded from the constitutional canon?

Required:

A. General:

ACI: "Introduction: Interpreting a Constitution," ch. 1
___: "The Theoretical Context of Constitutional Interpretation," ch. 3
___, "Constitutional Literacy," ch. 2
___, "What is the Constitution? Problems of Inclusion," ch. 5

B. The Document:

Preamble; amendts. 1-10 & 14, §1

C. More Than the Document?

Madison, Federalist #45 (course packet)
Calder v. Bull (1798), p. 121
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.)

Recommended:

Bruce A. Ackerman, "Discovering the Constitution," 93 Yale L. J. 1013 (1984)
Daniel J. Elazar, The Declaration of Independence as a Covenant
_____ , and John Kinkaid, eds., Covenant, Polity and Constitutionalism
Donald L. Lutz, The Origins of American Constitutionalism
John R. Vile, The Constitutional Amending Process in American Political Thought
Terence Ball & J. G. A. Pocock, eds., Conceptual Change & the Constitution
Sotirios A. Barber, On What the Constitution Means, chs. 2-3
_____ , The Constitution of Judicial Power
Hadley Arkes, Beyond the Constitution
_____ , "Slaughter-House, Civil Rights, and Limits on Constitutional Change,"

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_____, "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)
S. R. Munzer & J. W. Nickel, "Does the Constitution Mean What it Always Meant?" 77 Col. L. Rev. 1029 (1977)
Ralph Lerner, "The Supreme Court as Republican School Master," 1967 Supreme Court Review 127
Jack N. Rakove, ed., Interpreting the Constitution: The Debate Over Original Intent
William F. Harris II, The Interpretable Constitution
Stephen M. Griffin, American Constitutionalism
Grey, Thomas, "Do We Have an Unwritten Constitution?" 27 Stanford Law Review 703 (1975).
3. 1 Oct: **WHO Has Authority to Interpret "the Constitution"?**

This week we are honored to have a guest lecture by Professor Hadley Arkes.

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 10th 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. 286
The Great Debate of 1802-1803: p. 289

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The Senate Debates, p. 291
Marbury v. Madison (1803), p. 298
Jefferson Instructs a Federal Prosecutor, p. 306
Eakin v. Raub (Supreme Court of Pennsylvania, 1825), p. 308
Andrew Jackson's Veto, p. 313
Abraham Lincoln's First Inaugural, p. 314
in Robert P. George, ed., Great Cases in Constitutional Law (ch. 1)
Jeremy Waldron, "'Despotism in Some Form': Marbury v. Madison,” in Robert P.
George, ed., Great Cases in Constitutional Law (ch. 2)

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
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), reprinted 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
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)
Oregon v. Mitchell, 400 U.S. 112 (1970), & Twenty-sixth Amendment
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 Proceedings of
the New York State Bar Association 37 (1893); reprinted in Alpheus
Thomas 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
Bob Eckhardt & Charles L. Black, Jr., *The Tides of Power*, chs. 1-3, 5
W. F. Murphy, "Who Shall Interpret?" 48 Rev. of Pols. 401 (1986)
Robert F. Nagel, *Constitutional Cultures: The Mentality & Consequences of Judicial Review*
4. 8 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; & 9th & 10th Amendts.

B. General:

ACI, "Who May Authoritatively Interpret the Constitution for the Federal System," ch. 8
John Hart Ely, Democracy & Distrust, chs. 1-2
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:

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

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ACI, "Sharing Powers: The Nature of the Union," ch. 11, pp. 514-525
McCulloch v. Maryland (1819), p. 530
The Slaughter-House Cases (1873), p. 550
Garcia v. SAMTA (1985), p. 576

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)
W. F. Murphy & J. Tanenhaus, eds., Comparative Constitutional Law, ch. 8
5. 15 Oct: 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 polygyny and allowing everyone, Mormons as well as nonMormons, 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?

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

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Employment Division v. Smith (1990), p. 1200

Recommended:

Church of Lukumi v. Hialeah (1993)
Wooley v. Maynard (1977)
Tony and Susan Alamo Foundation v. Secretary of Labor (1985)
Bowen v. Roy (1986)
Goldman v. Weinberger (1986)
O'Lone v. Estate of Shabazz (1987)
Laurence H. Tribe, American Constitutional Law, 2d ed., ch. 14
6. 22 Oct: **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 doesconstitutionally 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; amendts. 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)
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

Recommended:
Wisconsin v. Mitchell (1993)
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)
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*
Gooding v. Wilson (1972), ACI, p. 539
Kunz v. New York, 340 U.S. 290 (1951)
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*
7. 5 Nov: 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. 871-881
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
Bolling v. Sharpe (1956), p. 917

C. Sex

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

D. Rational Basis Review

Cleburne v. Cleburne Living Center (1985), p. 1048

E. Sexual Orientation

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Romer v. Evans (1996) course packet
Boy Scouts of America v. Dale (2000) course packet
8. 12 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.
9. 19 Nov: **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, 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."

*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

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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
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 un-Marshallian 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 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. Approaches:

ACI, ch. 9 (review)

C. 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
Robert H. Bork, "The Original Understanding" (course packet)

Service or Labour" or "those bound to Service."

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D. Laissez Faire & the Constitution:

Munn v. Illinois (1877), p. 1101  
Lochner v. New York (1905), p. 1110  
Adkins v. Children's Hospital (1923), p. 1116  

E. The New Dispensation:

West Coast Hotel v. Parrish (1937), p. 1123  
Hawaii Housing Authority v. Midkiff (1984), p. 1131  
Lucas v. South Carolina Coastal Comm'n (1992), p. 1135

Recommended:

A. Historical Studies
   Edward S. Corwin, "The Basic Doctrine of American Constitutional Law," (1-914); 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  
   Clyde E. Jacobs, Law Writers & the Courts  
   Jennifer Nedelsky, Private Property and the Limits of American Constitutionalism  

B. Analytical Studies
   C. Herman Pritchett, Constitutional Civil Liberties, ch. 11  
   Richard A. Epstein, Takings: Private Property & the Power of Eminent Domain  
   ______, 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. 8-9  
   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

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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)

Bruce Ackerman, Private Property and the Constitution
10. 26 Nov: 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; amendts.: 1-10; 13; & 14, §1

B. The Concept of Fundamental Rights:

John Hart Ely, Democracy and Distrust, ch. 3
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

Recommended:

Laurence H. Tribe and Michael H. Dorf, On Reading the Constitution, ch. 3
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
Barrington Moore, Jr., Privacy: Studies in Cultural History
Richard A. Posner, Essays on Privacy in his The Economics of Justice
Charles Fried, An Anatomy of Values, Part I & ch. 9
______, Order and Law, chs. 2-3
Hollenbaugh v. Carnegie Free Library (1978)
James S. Fishkin, Justice, Equality, & the Family
11. 3 Dec: How to Interpret? Abortion

Required:

Roe v. Wade (1973), p. 1258
Gerard V. Bradley, "The New Constitutional Covenant" (course packet)

Recommended:

Laurence H. Tribe, American Constitutional Law, pp. 1414-1435
____, Abortion: The Clash of Absolutes
Charles Fried, Order and Law, ch. 3
Marian Faux, Roe v. Wade
Mary Ann Glendon, Abortion and Divorce in Western Law

12. 10 Dec: Morality, Democracy, and Judicial Review

Required:

Ronald Dworkin, “Introduction: The Moral Reading and the Majoritarian Premise” (course packet)
Jeremy Waldron, “The Constitutional Conception of Democracy” (course packet)
Thomas Mann, “Mario and the Magician” (course packet)
Richard D. Parker, “Here, the People Rule: A Constitutional Populist Manifesto” (course packet)