

## CONSTITUTIONAL INTERPRETATION

The University of Texas at Austin  
Government 357M 5 (Unique # 38750)  
Core Texts and Ideas 326 (33940)  
Fall, 2012

T.A.: Mr. Sean Fern  
Office Hours: TBA

Professor H.W. Perry, Jr.  
3.130 Mezes  
[hwperry@mail.utexas.edu](mailto:hwperry@mail.utexas.edu)  
(512) 232-7228  
Office Hours: Tues. 1:30-3:00 p.m.

### **General Description of the Course**

Politics is often defined as "the authoritative allocation of values." In the American political system, the Constitution is an important source of authority, and it gives preference to certain values. The Constitution is a document of law, politics, and political theory. Determining what the Constitution means, determining how to determine what it means, and determining who should determine what it means are fundamental tasks for participants in the American political process and for students of it. This course may be of interest to those thinking about attending law school, but it is equally valuable to those who have no such interest. Given the nature of our society, understanding the Constitution and constitutional law is part of a liberal arts education. The course does not focus on many of the "civil liberties" provisions in the Constitution; those important subjects are left to other courses.

One objective of the course is for the student to become a constitutional interpreter who contributes intelligently to this ongoing process. Constitutional interpretation is a prerogative of the judiciary, but it is not its preserve. Judges have never been, nor should be, the only ones engaging in constitutional interpretation. Presidents, members of Congress, and many others engage in constitutional interpretation. A more complete course would examine their statements and actions in greater detail. Judges, however, play a very important role in constitutional interpretation. As such, it is important to learn what judges have said the Constitution means and to understand how they came to such conclusions. This necessitates learning how to read and analyze judicial opinions. The student should develop a sufficient comfort level with legal analysis so that she or he can evaluate intelligently important interpretations of the justices and ask the questions that a student of politics should ask. Prominent among such questions are those concerned with the proper role of courts and judges in the American political system. Though we read some scholarly commentary on interpretation and judicial behavior, we concentrate on the primary material--the Constitution and cases--so that the student can begin to develop his or her own ideas.

Another objective of this course is to improve reasoning and communication skills. Engaging in constitutional reasoning can assist in developing intellectual precision and political persuasiveness. As in most courses, good writing is demanded, but it is also important to develop the capacity to think and speak on one's feet. Mastering the use of language, orally and in writing, increases the ability to think and communicate clearly. Moving toward such mastery is a vital part of education.

The course requires a substantial time commitment. The time required varies greatly over the course of the semester, and as described below, it is hard to plan ahead.

## Format of the Course

Constitutional interpretation lends itself to dialog between professor and student and among students. There are few lectures. I use a combination of the case and Socratic methods. This requires students to come to class prepared and to listen to one another. Too often, students do not benefit from this style of teaching because they ignore the comments of fellow students. The method assumes that, instead of lecturing, I am making points through discussion with students. When your colleagues are making important points, I do not have to. It is also an important skill to be able to learn to separate the wheat from the chaff.

Students are expected to attend class and participate. I call on students and expect them to be well-prepared. Lack of preparation or repeated absences will hurt one's grade. The method of teaching presumes that students heard prior discussions. When a student did not hear prior discussions and then participates, it generally wastes the time of others. If a student is not prepared, he or she must put a note on the lectern before class. *Being prepared means that one has read and thought about the material; it does not mean that one must fully understand the material or have the "right" answers.* It is also in one's long-term interest to prepare thoroughly for each class because the material is cumulative, and the workload in this course increases dramatically as the semester proceeds.

***Computers or other electronic devices may not be used in the classroom.*** Their use is not compatible with the teaching method. Any exceptions must be approved by the professor.

## Prerequisites

- Set by the Government Department: 6 hours lower division government courses.
- Also see opening paragraph for who should consider taking the course.

## Readings

See Reading List. Assignments will be given each class period. You must bring your casebook to class. The next day's assignment depends upon how far we get in any given day; therefore, it is impossible to know specific daily assignments in advance. If you have to miss class, it is your responsibility to find out what was covered and what has been assigned *from a classmate*. **Do not contact the professor or the teaching assistant for the assignment. Get to know your fellow students.**

- *Constitutional Law, 17th ed.*, Kathleen Sullivan and Gerald Gunther, eds., Foundation Press
- *Deciding to Decide*, by H. W. Perry, Jr., Harvard University Press
- Additional reserve readings will be required.

## Evaluation

- Midterm examination (≈25%). October 30. Multiple Choice and Essay
- Group Project (≈25%). Students will participate in moot courts. A hypothetical situation will be given and each group will prepare a brief and participate in an oral argument. This will occur late in the semester and most of the courts will be held **outside of regular class hours** the week of Nov. 12<sup>th</sup>. The exact dates depend upon the number of students in the class and accommodating students' schedules. More details will be given in class.
- Final examination (≈50%). Wed. December 12<sup>th</sup> 7-10PM. Location: TBA. Multiple Choice and Essay. Early or late exam given only with approval from the Dean.
- Class attendance and participation are required and may affect a grade positively or negatively. (See attendance statement below)
- Plus and minus grades will be used.

## **Miscellaneous**

### *Communications*

I encourage students to come by my office and the TA's. Students should **not** use e-mail as a way of having a conversation with me about substantive issues; that is what office hours and class discussion are for. E-mail may be used for administrative reasons, but when possible, I prefer that you speak to me rather than e-mail me. I like getting to know you, though sometimes e-mail nicknames *are* informative. *Make sure you have access to Blackboard. The email address listed there will be the one we use.*

### *Academic Dishonesty*

Academic dishonesty will lead to failure of the course and other University disciplinary action. See *General Information Catalog*:

Scholastic or academic dishonesty includes, but is not limited to, cheating, plagiarism, collusion, falsifying academic records, and misrepresenting facts. More information about **academic dishonesty** is given in Appendix C.: Sec 11. Note particularly: **(d)** "Plagiarism" includes, but is not limited to, the appropriation of, buying, receiving as a gift, or obtaining by any means material that is attributable in whole or in part to another source, including words, ideas, illustrations, structure, computer code, and other expression or media, and presenting that material as one's own academic work being offered for credit.

The U.T. Honor code is as follows: The core values of the University of Texas at Austin are learning, discovery, freedom, leadership, individual opportunity, and responsibility. Each member of the University is expected to uphold these values through integrity, honesty, trust, fairness, and respect toward peers and community.

### *Accommodation for Religious Holidays*

By UT Austin policy, you must notify me of your pending absence at least fourteen days prior to the date of observance of a religious holy day. If you must miss a class, an examination, a work assignment, or a project in order to observe a religious holy day, you will be given an opportunity to complete the missed work within a reasonable time after the absence

### *Disabilities*

The University of Texas at Austin provides upon request appropriate academic accommodations for qualified students with disabilities. For more information, contact the Division of Diversity and Community Engagement, Services for Students with Disabilities, 471-6259; <http://www.utexas.edu/diversity/ddce/ssd/>.

*Reading Assignments***I. INTRODUCTION**

- a) Griswold v. Connecticut, pp. 429-434 (skim)
- b) Levinson, "On Interpretation: The Adultery Clause of the Ten Commandments" (assigned later)

**II. THE CONSTITUTION AS A DOCUMENT OF STRUCTURE AND POWERS****A. The Supreme Court's Authority**

- a) Introduction, pp. 1-2
- b) 1, pp. 9-10
- c) Marbury v. Madison, pp. 2-9
- d) Declaration of Independence (any unedited version)
- e) Federalist #10 (any unedited version)
- f) Federalist #51 (any unedited version)
- g) 5, Federalist #78, pp. 12-14
- h) 2,3,4, pp. 10-12
- i) 6, pp.14-15
- j) Introduction, pp. 15-16
- k) Martin v. Hunter's Lessee, pp. 16-18
- l) 1, Cohens v. Virginia, p 18
- m) 2, 3, Interposition and Nullification, pp. 18-19
- n) 4,4a , Thomas Jefferson letter to Abigail Adams, pp. 22-23
- o) 4b, Andrew Jackson Veto Message, p. 23
- p) 4c, Lincoln, pp. Senatorial Campaign Speech and First Inaugural Address, p. 23-24
- q) 4d, F.D.R. letter to Congressman Hill; proposed Speech on the Gold Clause Cases, p 24-25
- r) Intro., p. 19
- s) Cooper v. Aaron, pp. 19-20
- t) 1,2, pp. 20-21
- u) 3, Dickerson v. U.S., pp. 21-22
- v) 5, 6 pp. 25-27
- w) 1,2,3,4 ExParte McCardle, 5 pp. 27-30

**B. The Federal Relationship****1. General Issues**

- a) McCulloch v. Maryland, pp. 63-71
- b) 1, Jefferson-Hamilton Debate on the First Bank, pp. 71-73
- c) 2, The Second Bank, p. 73
- d) Introduction, p. pp. 60-62
- e) 3,4,5, pp. 74-76

**2. Review of State Court Judgments**

- a) Reconsider *Martin* and *Cohens* (above)

**3. Slavery and the Civil War****4. Regulation of Interstate Commerce**

- a) Gibbons v. Ogden, pp. 83-84 and 176-178
- b) 1, pp. 178-179
- c) 2, Willson v. Black Bird Creek Marsh Co., pp. 179-180
- d) 1, U.S. v. E. C. Knight Co., pp. 84-86

- e) 2, Houston E&W Tex. R.R. Co. v. U.S. (Shreveport Rate Case), pp. 86-87
- f) 3, Swift & Co. v. U.S., p. 87
- g) 4, Champion v. Ames; Hippolite Egg Co. v. U.S., Hoke v. U.S. p. 87-89
- h) Hammer v. Dagenhart, pp. 89-91
- i) 1, Railroad Retirement Bd. v. Alton R.R. Co., p. 91
- j) 1, Schechter Poultry Corp. v. U.S., pp. 91-93
- k) Reconsider F.D.R. material p. 24-25
- l) 1, Carter v. Carter Coal Co., pp. 93-94
- m) 2, The Court-Packing Plan, pp. 94-96
- n) N.L.R.B. v. Jones & Laughlin Steel Corp., pp. 96-98
- o) U.S. v. Darby, pp. 98-101
- p) 1,2,3, Wickard v. Filburn, pp. 101-103
- q) 4, Heart of Atlanta Motel v. U.S.; Katzenbach v. McClung., pp. 103-106
- r) Eyes on the Prize
- s) Reconsider Cooper v. Aaron pp. 19-20
- t) 5, Perez v. U. S. p. 106
- u) 1, U.S. v. Calif; N.Y. v. U.S.(1946); N.L.C. v. Usery; Garcia v. San Antonio MTA, pp. 127-130
- v) 2, 3, pp. 132-134
- w) 4, South Carolina v. Baker, p. 134
- x) Intro., pp. 106-107
- y) U.S. v. Lopez pp. 107-113
- z) 1,2,3,4, pp 113-116
- aa) U.S. v. Morrison, pp. 116-119
- bb) 1,2, p. 119
- cc) Gonzales v. Raich pp. 119-125
- dd) 1,2,3,4, pp.125-126
- ee) United States v. Comstock (Blackboard)
- ff) National Federation of Independent Business v. Sebelius (BB)
- gg) New York v. United States, pp. 135-139
- hh) 1, p. 139 (138-139)
- ii) 2, Printz v. U.S. pp. 139-142
- jj) 3, Reno v. Condon, pp. 142-143

## 5. Dormant Commerce Clause

## 6. Preemption and Consent

## 7. Taxing and Spending Powers

- a) Intro. p. 151
- b) Bailey v. Drexel Furniture Co. pp. 152-153
- c) 1,2, pp. 153-154
- d) 3, U.S. v. Kahriger pp. 154-155
- e) 4, pp. 155-156
- f) National Federation of Independent Business v. Sebelius (BB)
- g) Intro., p. 156
- h) U.S. v. Butler, pp. 157-159
- i) 1 Steward Machine Co. v. Davis, Helvering v. Davis pp. 159-162
- j) 2,3,4, pp. 162-163
- k) South Dakota v. Dole, pp. 163-166
- l) 1, 2 pp.166-167
- m) National Federation of Independent Business v. Sebelius (BB)

## C. Limits on Constitutional Adjudication

### 1. Advisory Opinions

### 2. Standing, Mootness, Ripeness

### 3. Certiorari

- a) Perry, *Deciding to Decide*  
Ch.1, pp. 1-7  
Ch. 2, pp. 22-29; 32-40  
Ch. 3 pp. 41-91  
Ch. 4, pp. 92-97; 102-104  
Ch. 6, pp. 140-179  
Ch. 7, pp. 198-215  
Ch. 8, pp. 216-270  
Ch. 9, pp. 271-284  
Ch. 10, pp. 285-290

### 4. Congressional Control of Jurisdiction

### 5. Political Questions

## D. Separation of Powers

### 1. Executive, Legislative, Judicial Powers and Foreign Affairs

- a) Introduction, pp. 248-249
- b) Youngstown Sheet & Tube Co. v. Sawyer, pp. 249-256
- c) 1,2,3,4, pp. 256-258
- d) 1,2, U.S. v. Belmont pp. 258-260
- e) Dames and Moore v. Regan, pp. 260-263
- f) 1,2 pp. 263-264 (259-260)
- g) The President, Congress and War Powers, pp. 264-266
- h) Emergency Constitutionalism, 1, 2, pp.266-268
- i) 3, Ex Parte Milligan, pp. 268-270 (264-265)
- j) Executive Detention and Trial of "Enemy Combatants," pp. 270-272
- k) Ex Parte Quirin, pp. 272-274 (268-270)
- l) Executive Detention and Trial After 9/11, Johnson v. Eisenstrager, Rasul v. Bush pp. 275-277
- m) Hamdi v. Rumsfeld, pp. 277-284
- n) 1, 2, Rumsfeld v. Padilla, 3, pp. 284-286
- o) Hamdan v. Rumsfeld pp. 286-292
- p) 1,2,, pp. 292-293
- q) Boumediene v. Bush pp. 293-297
- r) 1,2,3 pp. 297-300

### 2. Executive, Legislative, Judicial Powers and Domestic Affairs

- a) Intro., U.S. v. Curtiss-Wright Export Corp. pp. 300-302
- b) I.N.S. v. Chada, pp. 302-308
- c) 1,2,3, pp. 308-310
- d) Intro. pp. 329-330
- e) United States v. Nixon, pp. 330-332
- f) 4, pp. 343-347

### III. THE CONSTITUTION AS A DOCUMENT OF RIGHTS AND LIBERTIES

#### A. Natural Law

- a) Calder v. Bull, pp. 375-377 (through 1<sup>st</sup> incomplete paragraph)

#### B. Pre-Civil War Rights and Privileges and Immunities

- a) Intro., p.349
- b) Baron v. Mayor and City Council of Baltimore, pp. 349-351
- c) Intro., pp. 350-351
- d) Slaughter-House Cases, pp. 351-355
- e) 1, 2, pp. 356-357

#### C. Substantive Due Process

- a) Last 2 paragraphs, pp. 377-378
- b) Munn v. Illinois; Mugler v. Kansas; Allgeyer v. Louisiana, pp. 378-379
- c) Lochner v. New York, pp. 379-384
- d) 1, 2, 3, pp. 384-385
- e) 4, Adair v. U.S.; Coppage v. Kansas; New State Ice Co. v. Liebmann; Muller v. Oregon; Bunting v. Oregon; Adkins v. Children's Hospital, pp. 386-388
- f) Nebbia v. New York, pp. 388-389
- g) 1, 2, West Coast Hotel Co. v. Parrish, pp. 389-390
- h) 3, U.S. v. Carolene Products Co., pp. 390-392
- i) Williamson v. Lee Optical, pp. 392-393
- j) 1, Ferguson v. Skrupa, pp. 393-394

#### D. Equal Protection

#### E. Incorporation of the Bill of Rights

- a) Intros., pp. 348-349 (354-355)
- b) Reconsider Barron v. Baltimore pp. 349-351
- c) Palko v. Connecticut, Adamson v. California p. 363-367
- d) 1,2,3, pp. 369-370
- e) 4, U.S. v. Cruikshank, U.S. v. Miller, D.C. v. Heller, pp. 370-374

#### F. Revival of Substantive Due Process

- a) Intro., Meyer v. Neb.; Pierce v. Society of Sisters; Skinner v. Ok., pp. 427-428
- b) Griswold v. Connecticut (again), pp. 429-434
- c) 1, 2 pp. 435-436
- d) 3, Eisenstadt v. Baird, p. 436
- e) 4, Carey v. Population Services, pp. 436-437
- f) 5, 6, pp. 437-438
- g) Roe v. Wade; pp. 438-441
- h) 1, 2, 3, 4, 5, 6 (1<sup>st</sup> paragraph only) , pp. 441-443
- i) 1, Loving v. Va.; Zablocki v. Redhail; Turner v. Safely; pp. 464-466
- j) 2, Moore v. East Cleveland, Belle Terre v. Boraas, Troxel v. Granville, pp. 466-468
- k) 3, Michael H. v. Gerald D., pp. 468-470
- l) Bowers v. Hardwick, pp.470-472
- m) Lawrence v. Texas, pp. 472-479
- n) 1, 2, 3, 4, 5, 6, 7, pp.479-484
- o) Cruzan v. Director, Mo. Dept. of Health, pp. 484-486
- p) Washington v. Glucksberg, pp. 486-493
- q) 1, p. 493
- r) 2, Vacco v. Quill pp. 493-494

s) 3, pp. 494-495