

Government 66  
Constitutional Law, Development, and Theory

Sonu Bedi  
Winter 2013

218 Silsby Hall  
Office Hours: Tuesday, 4-6pm.

Overview:

This course covers some of the main themes of the American Constitution with a particular emphasis on constitutional history, structure, interpretation, development and theory. Areas covered include: constitutional structure and theory, American constitutional development, federalism, judicial review, executive prerogative, slavery and Reconstruction. This course is not designed specifically for students contemplating law school. It is aimed at students who want a general introduction to the United States Constitution.

Texts:

*Processes of Constitutional Decisionmaking*, (PCD) 5<sup>th</sup> Edition (eds. Brest, Levinson, Balkin, Amar) (2006) (casebook) (available at Bookstore or Wheelock Books)  
Pocket Constitution (Distributed the first day of class)  
Course packet (available at Wheelock Books) (All materials on reserve at Baker Berry)  
Federalist Papers (FP): online at: <http://www.yale.edu/lawweb/avalon/federal/fed.htm>  
Various Materials on Blackboard (under Documents link)

Requirements:

Attendance/Participation: 10%  
Take Home Midterm: 40%  
Take Home Final: 50%

Take Home Midterm and Final:

The midterm will be available on Blackboard on February 12<sup>th</sup> before class. It will be due February 19<sup>th</sup> in class. A late midterm will result in a full letter grade deduction. I will hand out the final exam the last day of class. It will be due on March 14<sup>th</sup> by 3pm. I will not accept a late final. Students with disabilities should self-identify at the Office of Student Accessibility Services to request support services. (<http://www.dartmouth.edu/~accessibility/>).

Attendance/Participation:

I expect everyone to come to class having done the reading and ready to participate. I intend to lecture for an hour leaving the rest of the time for discussion. During this discussion component, I'll ask two students to take an active part in it. They should come with questions and/or comments about that day's reading. They do not need to hand anything out. But I do expect that they talk for a few minutes laying out some critical questions, and how they would respond to them.

Reference Letters:

I aim to write reference letters that are thorough and meaningful. To do so, my general policy is that students complete at least two courses with me, if they seek such a letter.

## ASSIGNMENTS:

Note: each number on the syllabus represents one day. Below each assignment are questions to consider in doing the readings.

Introduction. 1/8

### Basics

#### American Constitutional Development

1. PCD: pp. 1-26; Wood *The Creation of the American Republic*, Chs. 2, 5 (packet). 1/10

Wood contends that the American Founding is republican in character. What does Wood mean by republicanism? Is this a persuasive account of our constitutional ethos? How does republicanism compare with liberalism? (I will discuss these concepts in class). What was the problem with virtual representation? Why did the Revolutionaries object to it? What is actual representation? Why did the practice of "instructions" break down?

2. Wood, *The Creation of the American Republic*, Chs. 9, 13 (packet). 1/14

What kind of government existed before the Revolution? Why did Whigs object to it? What kind of government was established in 1781 under the Articles of Confederation? According to Wood how did the structure of government change from 1781 (Articles) to 1787 (Constitution)? Why did it change? How did the Federalists justify this change?

3. Ackerman, *We the People* I, Chs. 1, 2 (packet 1); Basic Law of Germany (Articles 1, 20, 79)  
<http://www.iuscomp.org/gla/statutes/GG.htm#Preamble>. 1/17

According to Ackerman, why isn't the Constitution monist? why isn't it Foundational? why isn't it Burkean? Why is the Basic Laws (the German Constitution) foundational? What is dualism? What are the characteristics of a 'constitutional moment'? For Ackerman, must these moments arise via Article V amendment procedures? Why or why not?

#### Basic Structure of the Constitution and Amendments

4. Constitution. (re-read PCD: pp. 1-26); Articles of Confederation (1781). 1/21  
(<http://www.yale.edu/lawweb/avalon/artconf.htm>) FP: #1-5, 10, 15, 39, 40, 51, 84. PCD: pp. 89-95. 10/6

What are the differences between the Articles and the Constitution? (I will ask each student to articulate at least one difference.) In reading the selected *Federalist Papers*, think about how they illuminate or justify such differences.

5. Levinson "How Many Times Has the US Constitution Been Amended?" Murphy "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity" Schauer "Amending the Presuppositions of a Constitution." (packet). 1/24

Both Levinson and Schauer reach the same conclusion, namely that we can amend the Constitution without Article V. That is, Article V is neither necessary nor sufficient to amend the "Constitution"? But they get there in different ways. What are the moves they make in their respective arguments? According to Murphy, what are the kinds of constraints on constitutional change? How does he justify the use of such constraints—that is, how is it possible for the people to bind themselves?

Case Study: *McCulloch v. Maryland* (1819)

6. PCD: pp. 27-67. 1/29

Make sure to bring your casebooks to class. My lecture will go through *McCulloch* paragraph by paragraph to give you a sense of how to read a case. In reading *McCulloch*, pay attention to how Justice Marshall makes appeals to text, history, structure, prudence, precedence, and national ethos.

7. PCD: pp. 67-84; 89-95. 1/31

What vision of federalism does Marshall endorse in the second part of *McCulloch*? (Please make sure to bring your casebooks to class). Do you find it persuasive? Is this vision consistent with the principle of nullification? Jackson's veto message discusses the role of non-judicial actors in interpreting the Constitution. Do you find it persuasive? Must a President execute a statute she believes is unconstitutional?

No Class. 2/5

8. PCD: 712-727. Lecture Handout (Blackboard). 2/7

Read the *Term Limits* case carefully. What do the majority and the dissent disagree about? Pay attention to the varying arguments they make concerning text, structure/theory, and history. Is there a constitutional right to vote?

## Separation of Powers

### Judicial Review

9. FP: #78, 81; PCD: 97-136 (Judicial Review). 2/12

What is the political background surrounding *Marbury*? What is strange about the way Marshall approaches the issues in *Marbury*? What arguments does Marshall make regarding judicial review? Are these the same arguments made in Federalist 78 and 81? Do you find them persuasive? Is life tenure under Article III problematic? Think about the distinct justifications for judicial review.

\*Midterm review. Midterm will be available before class. I will answer any questions about it or about the readings in general.

10. Bickel, *The Least Dangerous Branch*, Ch. 1 (packet 2); Scalia *A Matter of Interpretation*, pp. 3-14; 37-47 (packet); Breyer, *Active Liberty*, pp. 15-34 (packet); Ely, *Democracy and Distrust*, Chs. 3-4 (packet). 2/14

Is judicial review counter-majoritarian? (i.e. How would Bickel, Ely, and Justice Scalia answer this question?) If judicial review is counter-majoritarian, is that a bad thing? (i.e. How would Bickel, Ely, Scalia, and Justice Breyer answer this question?)

## Executive Prerogative

11. FP: #69-70; Locke, Second Treatise of Gov't (Ch. XIV, On Prerogative). (<http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-c.html#Sect.%20158>) Fatovic (packet). 2/19.

What is Locke's notion of prerogative? And why is it important? (the Locke reading is only Ch. XIV entitled Prerogative--it's only a few pages). According to Fatovic, how do Jefferson and Hamilton conceptualize this notion of prerogative? What is the role of the Court in these theories?

\*Midterms due in class.

12. PCD: 271-291; 819-841. Lecture Handout (Blackboard). 2/21.

Why does Lincoln win in the *Prize Cases* but lose in *Ex Parte Merryman* and *Ex Parte Milligan*? In all the executive prerogative cases consider the following: What has Congress said? What are the features (circumstances) of the emergency or war? What specific power (prerogative) is the President exercising? (seizing property, deeming folks enemy combatants, conducting military tribunals, etc.) Who is being harmed? (citizen, non-citizen)? In *Youngstown* what is the statutory issue and what is the constitutional issue? How do the justices resolve them?

13. PCD: 841-863; 872-878; *Boumediene v. Bush* (2008) (excerpt on Blackboard); Lecture Handout (Blackboard). Letter to Rep. Kirk (on Blackboard) (read Topics A and B); Presidential Memo re: Guantanamo (on Blackboard). 2/26.

*Hamdi*: Why do O'Connor, Rehnquist, Kennedy, Breyer, and Thomas reach a different answer to the Congressional authorization issue than the others? May the United States hold suspected terrorists indefinitely?

*Boumediene*: Kennedy's majority opinion: pp. 1-5; pp. 22-25 (of Part IV); 35-36 (of Part B); 68-70 (Conclusion); Scalia's dissenting opinion: pp. 1-6 (Part I); 17-18 (of Part C). According to Kennedy, permitting the President to refuse habeas upsets the separation of powers. How? Why is this problematic? Why is this not problematic for Scalia? What box would Scalia put the President's actions in? Consider that after *Boumediene* some detentions have been deemed invalid (these individuals however still remain in custody). What do you make of Obama's decision in March 2011 to resume military commissions at Guantanamo given his earlier executive order of 2009 to close down the facility within one year, moving detainees to federal court or to a facility in the United States? Why do we have military tribunals at all? Why not try all suspected terrorists in federal, civilian court?

## Federalism

14. *Bailey v. Drexel Furniture* (1922) (Blackboard). *National Federation of Independent Business v. Sebelius* (2012) (excerpt) (Blackboard). 2/27. X Hour (Wednesday).

Questions: TBA

15. PCD: 549-556, 600-627 (commerce); PCD: 558-564 (Civil Rights Legislation). 2/28.

We will be discussing *Lopez*, *Morrison*, *Heart of Atlanta/McClung*, and *Reich*. What activity does Congress seek to regulate in each case? In each case how does the Court determine whether the activity is interstate commerce? Under interstate commerce is Congress able to do almost anything? What is the difference b/w a federal problem and a national one?

## Slavery and Reconstruction

16. PCD: 212-257. 3/5

What was the reasoning in *Prigg*? According to the dissent, why doesn't the PA law conflict with the Fugitive Slave Act? What are Justice Taney's arguments in *Dred Scott*? (Consider the scope of his decision). Do you think the dissent does a good job of refuting them? Why does Douglas contend that the 1787 Constitution is an anti-slavery document?

17. PCD: 301-319; 350-351; 373-385. 3/7

Assume that the 14th Amendment was not passed properly. Does it matter? Do you think that the Civil Rights Cases were decided correctly? What do you make of Harlan's dissent? How does it respond to *Dred Scott*?

\* Final review. Final will be available before class. I will answer any questions about it or about the readings in general

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Course Packet  
All readings including the casebook are on reserve at Baker Berry  
Winter 2013

1. Wood, Gordon, *The Creation of the American Republic, 1776-1787* (Norton: 1969). Ch. 2, 5, 9, 13.
2. Ackerman, Bruce. *We the People: Foundations* (Vol. 1) (Harvard Press: 1991), Chs. 1-2, pp. 3-57.
3. Levinson, Sanford, "How Many Times Has the United States Constitution Been Amended?" in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (ed. Sanford Levinson) (Princeton Press: 1995). Ch. 2, pp. 13-36.
4. Murphy, Walter F., "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (ed. Sanford Levinson) (Princeton Press: 1995). Ch. 8, pp. 163-190.
5. Schauer, Frederick, "Amending the Presuppositions of a Constitution," in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (ed. Sanford Levinson) (Princeton Press: 1995). Ch. 7, pp. 145-161.
6. Bickel, Alexander M., *The Least Dangerous Branch* (Yale Press: 1962), Ch. 1, pp. 1-33.
7. Scalia, Antonin Justice, *A Matter of Interpretation: Federal Courts and the Law* (Princeton Press: 1997), pp. 3-14; 37-47.
8. Breyer, Stephen Justice, *Active Liberty: Interpreting our Democratic Constitution* (Knopf: 2005), pp. 15-34.
9. Ely, John Hart, *Democracy and Distrust: A Theory of Judicial Review* (Harvard Press: 1980), Chs. 3-4, pp. 43-104.
10. Fatovic, Clement, "Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives," *American Journal of Political Science*, Vol. 48, No. 3. (July 2004), pp. 429-444.