

History 316
U.S. Constitutional History since 1865 - Spring 2000

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Office: 305 Clough

Office Hours: Monday and Wednesday, 1:00-3:00 p.m.

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Course Description and Objectives:

This course examines the development of American constitutionalism from the Civil War Era to the 1990s. We will focus on the Supreme Court's interpretation of the constitutional issues surrounding Reconstruction and civil rights, industrialization and economic expansion, the rise of national regulatory power, and the expansion of individual rights. In contrast to a constitutional law course, this class is more concerned with how American constitutionalism both shaped and responded to larger political and social developments, and less concerned with the evolution of constitutional doctrine in an of itself.

This course will be taught as a seminar. That means that each student must complete the assigned readings and come prepared to discuss them. This is not a lecture class, and class participation is vital to the seminar's survival.

After completing this course, students should have a broad understanding of the history of American constitutionalism since 1865, as well as improved oral, written, and critical thinking skills.

Readings:

Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States, vol. 2, since 1865, 1988. (hereafter referred to as "Urofsky")

Melvin I. Urofsky, Documents of American Constitutional and Legal History, vol. 2, 1989. (hereafter referred to as "Documents")

Brook Thomas, ed., Plessy v. Ferguson: A Brief History with Documents, 1997.

Paul Murphy, World War I and the Origins of Civil Liberties in the United States, 1980.

G. Edward White, Earl Warren: A Public Life, 1982.

Supplementary readings packet (available through the History Department, Clough 308).

Assignments and Grading:

Attendance is mandatory; if you must miss class because of illness, please notify me immediately, either by phone or by e-mail. Final grades will reflect attendance. You may

assume that your final grade in this class will be no higher than the percentage of classes you attend. Grades will be determined as follows:

- 15% - Book Review (3-4 pp.)/Oral Presentation
- 20% - Seminar Participation
- 25% - Research Paper (18-20 pp.)
- 20% - Mid-term examination
- 20% - Final examination

Detailed explanations of all these assignments will follow. Copies of this syllabus as well as all handouts and assignments will be available on the Academic Volume in the file marked "Huebner."

Make-up examinations will not be given without a verifiable medical excuse. All excuses are subject to the approval of the instructor. Late papers will be accepted one **day** (not one class period) after the due date, with a one letter-grade penalty. Papers will not be accepted more than one day after the due date. All work, unless otherwise indicated, is pledged under the Rhodes College Honor Code.

Topics and Reading Assignments:

1. Civil War, Reconstruction, and Civil Rights, 1861-1896

Jan. 13 - Introduction to course

Jan. 18 - Lincoln and Liberty
(U.S. Constitution; McPherson, "Lincoln and Liberty")

[Jan. 19 - Students are required to attend the lecture by Julian Bond, "2000: A Race Odyssey," 7 p.m., Bryan Campus Life Center]

Jan. 20 - Presidential and Congressional Reconstruction
(Urofsky, 447-476, "Articles of Impeachment")

*Jan. 25 - Supreme Court and Civil Rights
(Thomas, 1-29; Documents, 4-9, 237-240, 391-394)

*Jan. 27 - Supreme Court and Segregation
(Thomas, 29-60, 127-139, 164-167; Huebner, "Recalling Truths."))

Report Reading:

Lou Williams, The Great South Carolina Ku Klux Klan Trials, 1870-1871.

C. Vann Woodward, The Strange Career of Jim Crow (prefaces-chapter three).

Discussion Questions:

What was the significance of the Civil War for American constitutional history? How did the war change the definition of liberty? What was Lincoln's role in this transformation? How committed was the Republican party to civil rights for the former slaves? Were Republican efforts on behalf of freedmen motivated by humanitarian concern or crass political calculation? What were the final results of the Reconstruction period? Were the 13th, 14th, and 15th Amendments revolutionary changes in American constitutional history, or were they really insignificant during their time? Did the Supreme Court have a reasonable constitutional basis for their interpretations of the Reconstruction Amendments, or were the justices all hopelessly racist?

2. Liberty and Economic Regulation, 1870-1923

Feb. 1 - Substantive Due Process
(Urofsky, 494-514; Documents, 4-13, 32-34)

Feb. 3 - Crisis of the 1890s
(Urofsky, 516-540; Documents, 17-32)

*Feb. 8 - State Regulation and the Liberty to Contract
(Urofsky, 542-565; Documents, 56-59, 64-74, 121-129)

*Feb. 10 - National Regulation
(Urofsky, 567-574; Documents, 34-37, 60-64; Champion v Ames)

*Feb. 15 - Limits of National Regulation
(Documents, 40-43, 74-79; "Roscoe Pound on Liberty of Contract")

Feb. 17 - No class.

Report Reading:

Paul Kens, Lochner v. New York: Economic Regulation on Trial.

Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence.

Loren Beth, John Marshall Harlan: The Last Whig Justice.

Discussion Questions:

What was substantive due process? Did the Supreme Court spin this doctrine out of thin air, or did it have a legitimate constitutional basis? How successful was the Congress in dealing with the pressing social and economic questions of the late nineteenth century? Was the Court faithful to legislative intent in its interpretation of Congressional economic regulation? What grievances did working people and farmers have against the national government during this time? Was the system really stacked against them? Was the Supreme Court simply the lackey of big business during this era, or was the Court just trying to protect liberty? Who were the

progressives and what were they trying to do? How did debates over protective legislation and the liberty to contract fit with competing views of the law at this time? Did progressive reform measures help women, or did such laws simply embody and confirm the sexist attitudes of the time?

3. World War I and the Origin of Civil Liberties

Feb. 22 - Wilson and the Progressives
(Murphy, 9-178)

*Feb. 24 - Wartime Dissent and the Legal Community
(Murphy, 179-272; Documents, 91-98, 100-104)

*Feb. 29 - Incorporation and Civil Liberties
(Documents, 140-146; Gitlow v. N.Y.)

Report Reading:

Ronald Schaffer, America in the Great War: The Rise of the War Welfare State.

Richard Polenberg, Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech.

Discussion Questions:

What was the Progressives' conception of civil liberties? With no body of precedents to direct them, how did the Supreme Court and the legal community respond to Wilson's wartime measures? What is Murphy's view of the legal community's behavior during World War I? Does he come down too hard on them? What are we to make of the attitudes and behavior of Chafee and Holmes during this period? How did the community-oriented view of civil liberties differ from the individual-oriented view? Which perspective is more compelling?

Mar. 2 - MID-TERM EXAMINATION (SPRING BREAK: MAR. 6-10)

4. The New Deal and the Constitutional Revolution

Mar. 14 - Stalemate
(Urofsky, 616-631; Documents, 161-171)

*Mar. 16 - Court-Packing
(Urofsky, 654-679; Documents, 178-188)

*Mar. 21 - Revolution
(Urofsky, 681-702; Documents, 188-190, 198-201, 248-250, 296-299)

Report Reading:

William Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt.

Richard C. Cortner, The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of Modern Press Freedom in America.

Discussion Questions:

What was the New Deal all about? Why was it so controversial in its day? Was the Supreme Court justified in striking down many of its provisions, or were the justices acting from purely political motives? What about FDR? Was his Court-packing plan an attempt to preserve the rule of law or to undermine his political opponents? What was the "Constitutional Revolution" of 1937?

What message in particular did the Court send in the area of civil liberties?

5. World War II, the Cold War, and the Constitution

*Mar. 23 - Internment of Japanese-Americans
(Urofsky, 718-729; Documents, 218-221)

*Mar. 28 - Dissent and Presidential Powers
(Urofsky, 731-744, 746-761; Documents, 221-234)

Report Reading:

Roger Daniels, Prisoners Without Trial: Japanese Americans in World War II.

Stanley I. Kutler, The American Inquisition: Justice and Injustice in the Cold War.

Discussion Questions:

Why did the U.S. government imprison Japanese-Americans during World War II? How did the government attempt to justify this on constitutional grounds? Were the federal government's efforts to suppress free speech during the Cold War equally outrageous, or did it make some sense to quell the internal voices of opposition? What do these cases tell us about the community- versus the individual-oriented view of civil liberties? What happened to presidential power during this period? Was the steel seizure case a victory for constitutional government, or a hindrance to legitimate presidential authority?

6. The Warren Court

*Mar. 30 - Brown and Judicial Activism
(Urofsky, 763-779; Documents, 250-252, 255-264)

*Apr. 4 - Desegregation and Civil Rights
(Urofsky, 781-799; Documents, 264-273; transcripts of Cooper, Heart of Atlanta)

*Apr. 6 - Reapportionment, Privacy, Freedom of the Press

(Urofsky, 803-806, 821-824, 830-835; Documents, 394-397, 439-443, 310-313; transcript of Baker)

Apr. 11 - Church and State

(Urofsky, 809-815; Documents, 306-310; Abington School District v. Schempp, transcript of Abington)

*Apr. 13 - Rights of the Accused

(Urofsky, 815-821; Documents, 359-370; transcripts of Gideon and Miranda)

Report Reading:

Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961.

J. Harvie Wilkinson, From Brown to Bakke: The Supreme Court and School Integration, 1954- 1978.

Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment.

Samuel Walker, In Defense of American Liberties: A History of the ACLU.

Discussion Questions:

What was the constitutional basis for the Brown decision? Did southern conservatives have any valid constitutional reasons for opposing desegregation? What do Brown and subsequent cases like Heart of Atlanta tell us about the Warren's Court's method of decision making? Did subsequent decisions on equality and school desegregation fit with the Brown decision, or did they represent a departure from the true spirit of Brown? What were the respective roles of the executive and legislative branches in the Second Reconstruction? How did the Warren Court go about expanding the civil liberties of Americans? What constitutional provisions or judicial innovations helped carry out this revolution? Why did Warren consider Baker v. Carr the most significant of his Court's decisions? What was the constitutional basis for the Warren Court's decisions in the religion cases? What about the criminal procedure decisions? What was the role of interest groups like the ACLU in all of this? Did the Warren Court usher in a dangerous period of "government by judiciary," or was it simply attempting to correct long-standing social injustices through adhering to a principled, results-oriented jurisprudence?

7. Constitutional Conflict in the Late Twentieth Century

Apr. 18 - The Presidency in Crisis - **Research Papers Due**

(Urofsky, 837-883; Documents, 446-456; transcript of U.S. v. Nixon)

Apr. 20 - Easter Recess

*Apr. 25 - Women, Abortion, Privacy

(Urofsky, 885-937; Documents, 397-404, 408-419, 430-436; transcripts of Roe and Bowers)

Apr. 27 - Interpreting the Constitution/Summary and Review

(Documents, 469-479; Marshall, "Commemorating the Wrong Document"; U.S. v. Lopez)

Report Reading:

Donald P. Judges, Hard Choices, Lost Voices: How the Abortion Conflict has Divided America, Distorted Cons

Discussion Questions:

What was the impact of Watergate on the modern presidency? What did U.S. v. Nixon reveal about the relationship between law and politics in modern America? How successful has the Court been in mediating conflicts over such explosive issues as abortion and homosexual rights? How have changes on the Court affected its record over the past decade? Did the Burger/Rehnquist Court differ substantially from the Warren Court? What competing visions for American constitutionalism emerged during the 1980s and 1990s?

FINAL EXAMINATION: TUESDAY, MAY 2, 1:00-3:30 P.M.