

PSCI 223 Constitutional Structure and Rights, Fall '21

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This course covers the structure, politics, and changes in the constitutional system from the early Republic to the present day. The central issues we will examine are 1. the relationships between the branches of the federal government and, in particular, the role of the judiciary in a democratic system, 2. the growth of federal power vis à vis the states, 3. conflicts over slavery and the attempts to ameliorate its consequences in education, criminal justice, voting, labor markets, and business, and 4. the federal power to regulate the economy. Along the way, we will think about different theories of constitutional interpretation, the disjunction between the legal understanding of the constitutional order and how it actually operates, and the extent to which Supreme Court jurisprudence is better described as a legal-rational process or ideological mystification.

The following book is required:

Brest, Levinson, Balkin, Amar, and Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials*, 7th edition, 9781454887492

Grades are based on:

Two three-page papers, 10% for the first, and 20% for the second
Midterm, 10%
Final, 30%
Perusall, 20%
Participation, 10%

I expect students to come to class, to have read the material assigned for that day, and to be ready to discuss it. Most of what you will get out of this, or any course, depends on this. Late papers will be penalized a half letter grade a day.

Some points about your papers:

1. Establish a focus. A good paper has a thesis, a central idea or claim that it is making, and it presents an argument supporting that thesis. You should be able to make an outline of your paper, which will at the same time be the skeleton of the argument you are making. It is often helpful to write out the outline – in sentence form, not simply as a list of topics – before writing the paper or, at least, the final draft. A good way to think about your paper is to ask yourself, “What do I want my readers to believe after they have read my paper? What reasons can I offer them to think that?” If you can answer these questions succinctly, you’re off to an excellent start.
2. Title. The title should express the main idea or focus of your paper, preparing your reader to see immediately what you’re going to say, and why it’s interesting.
3. Structure and organization. The paper should have a clear structure, with an introduction presenting the central question or problem you are addressing, a body that sets out a logical development of the reasons and evidence you are offering, and a conclusion that ties the paper together. In the longer paper it is often useful to provide section headings. The introduction should generally state your main thesis, and provide an overview of the structure of the argument, to make it easier for your reader to follow it.
4. Style. I expect your papers to be well-written. Your sentences should be simple and clear. You should avoid obvious errors; use spell check. You should write more than one draft. And you should proofread them before handing them in.
5. Guides. There are a number of excellent guides for good writing. Strunk and White *The Elements of Style* is a

classic, especially for grammar and word usage; it also offers a useful set of “principles of composition.” I especially recommend Joseph Williams, *Style: Toward Grace and Clarity*. His work is particularly helpful in offering examples of how awkward passages can be rewritten, using rules or principles that are fairly concrete and address specific issues such as clarity, cohesion, emphasis, etc. (these are all chapter headings in his book). Anthony Weston, *A Rulebook for Arguments*, offers a helpful discussion of how to develop (and express) an argument in a tight, logical way.

6. Grading. “B” papers will fulfill the foregoing criteria adequately. “A” papers will do more. They will not only be clearly and forcefully written, but they will show evidence of deep engagement with the issues. They will argue something interesting, and thought-provoking.

- Aug 25 Introduction
- Aug 27 **Background to and text of the Constitution**, pp. 1-25
- Aug 30 **Early questions of national authority**, debates over the national bank, pp. 27-32, 37-39
McCulloch v. Maryland and notes, pp. 39-53, 66-74
Louisiana Purchase. 154-159
- Sep 1 **Constitutional Interpretation**, pp. 55-66
Is there anything to be said for one method or another?
Does the role of the judge in a democracy imply that judges ought to be interpreting the Constitution in one way rather than another?
- Sep 3 **Judicial Review**, pp. 108-119
What is the constitutional basis of judicial review? Could we get along without it?
Marbury v. Madison, pp. 120-139
- Sep 6 **Labor Day!**
- Sep 8 Worries about and arguments for judicial review, pp. 139-54
Inter-branch conflict over constitutional adjudication, pp. 76-84
Early struggles over the scope of state power.
- Sep 10 Nullification and early debate over freedom of expression, pp. 85-108
- Sep 13 The commerce clause, pp. 187-216, 835-42
The Jacksonian Era and Slavery
- Sep 15 Note on the natural law tradition, pp. 166-174
Challenges of the Jacksonian era, pp. 217-222
Note on slavery, p. 245
Prigg v. Pennsylvania, pp. 251-60
- Sep 17 Secession, pp. 260-306
Dred Scott v. Sandford, pp. 263-288
Civil War and the War Power
- Sep 20 *Prize Cases*, pp. 308-313
- Sep 22 *Youngstown Sheet and Tube Co. v. Sawyer* (1952), pp. 936-957

Sep 24

On the power to wage war, pp. 957-966

Lincoln and the Suspension of *Habeas Corpus*, pp. 313-318

Emancipation Proclamation, pp. 318-324

Reconstruction Amendments and retreat

Sep 27

Read the 13th, 14th, and 15th amendments, pp. 11-12, and the history of their adoption, pp. 331-357

Sep 29

The Slaughterhouse Cases, 359-376

United States v. Cruikshank, pp. 376-377

Privileges and Immunities – what are the privilege and immunities of citizens of the United States? Neutering the 14th amendment.

Oct 1

Women's Citizenship in the Antebellum Era, pp. 182-186

Bradwell v. Illinois and Notes, pp. 377-380

Note on “The New Departure” and *Minor v. Happersett*, pp. 380-386

James C. Ho, "Defining American"

Equal Protection and Congressional enforcement

Oct 4

Strauder v. West Virginia and Notes, pp. 391-398

The Civil Rights Cases and Notes, pp. 398-412

Notes on the meaning of "slavery," pp. 485-487

Race

Oct 6

Plessy v. Ferguson and Notes, pp. 412-426

Charles Black, the Lawfulness of the Segregation Decisions, pp. 426-427

Note on The Spirit of *Plessy* and *Giles v. Harris*, pp. 427-431

The Insular Cases and Notes, pp. 431-444

Oct 8

Midterm

Oct 11

Fall break!

The Lochner Era

Police Powers Jurisprudence

Oct 13

Notes on the Rise of Due Process Protection Against State Economic Regulation, pp. 456-460

Note on the Application of the Bill of Rights to the States, pp. 460-463

Lochner v. State of New York and Notes, pp. 463-469

Notes on the Jurisprudence of the Lochner Era, pp. 469-481 (note
Coppage v. Kansas, pp. 472-473 and *Muller v. Oregon*, pp. 473-474)

The Decline of Police Powers Jurisprudence

Oct 15

Nebbia v. New York, pp. 541-543

Home Building & Loan Association v. Blaisdell and Notes, pp. 543-552

West Coast Hotel v. Parrish, pp. 552-555

The New Deal and the Emergence of the Modern Paradigm of Judicial Scrutiny

U.S. v. Carolene Products Co. and Notes, pp. 555-562

Williamson v. Lee Optical Co. and Notes, pp. 562-569

Oct 18

Note on Constitutional Modernity, pp. 531-532

Note on Incorporation of the Bill of Rights Against the States, pp. 532-540

The New Deal Struggle over National Power and the Emergence of the Modern Regulatory State

The Court Enforces Dual Federalism

Hammer v. Dagenhart and Notes, pp. 494-502

Bailey v. Drexel Furniture Co. and Notes, pp. 502-504

The Court Strikes Down Early New Deal Programs

Schechter Poultry Corp. v. United States and Notes, pp. 591-593

Carter v. Carter Coal Co. and Notes, pp. 593-598

United States v. Butler and Notes, pp. 598-602

The Revolution of 1937

Oct 20

Franklin D. Roosevelt, Fireside Chat on the Court Packing Plan, pp. 603-607

NLRB v. Jones and Laughlin Steel Corp. and Notes, pp. 607-608

Franklin D. Roosevelt, Speech on Constitution Day, pp. 608-610

United States v. Darby and Notes, pp. 610-613

Wickard v. Filburn and Notes, pp. 613-616

Note on Constitutional Revolution, pp. 616-618

Notes on the Taxing and Spending Powers, pp. 618-621

The Warren Court and the Civil Rights Movement

The Civil Rights Act of 1964

Notes on The Civil Rights Movement and the Civil Rights Act of 1964, pp. 621-627

Note on Congressional Power to Pass the Civil Rights Bill, pp. 627-629

Oct 22

Heart of Atlanta Motel and *Katzenbach v. McClung*, pp. 629-633

Jones v. Alfred Mayer Co. and Notes, pp. 651-654

The Voting Rights Act of 1965

Note on the Reconstruction Power in the Civil Rights Era, pp. 633-634

Note on the Voting Rights Act of 1965, pp. 634-639

Notes and *South Carolina v. Katzenbach*, pp. 639-643

Katzenbach v. Morgan and Notes, pp. 643-651

The Roberts Court and the Voting Rights Act

Oct 25

Shelby County, Alabama v. Holder, pp. 759-783

The Contemporary Debate over National Power

The Commerce Power

Oct 27

Introduction, pp. 659-660

United States v. Lopez and Notes, pp. 660-678

U.S. v. Morrison, pp. 678-680

Oct 29

Scarborough v. United States, pp. 680-686

NFIB v. Sebelius (2012) and Notes, pp. 686-699

United States v. Comstock (2010), pp. 699-704

The Taxing Power

Nov 1

NFIB v. Sebelius (2012), part 2, and Notes, pp. 704-712

The Spending Power

Note on the Spending Clause and *South Dakota v. Dole*, pp. 712-714

NFIB v. Sebelius (2012), part 3, and Notes, pp. 714-727

The Contemporary Debate over National Power II

Implied Limits on Federal Regulation of the States

Nov 3 *New York v. United States* (1992) and Notes, pp. 797-811

Printz v. United States (1997) and Notes 1-6, pp. 811-824

Note on Cooperative (and Uncooperative) Federalism, pp. 830-835

Nov 5 *Hans v. Louisiana* (1890) and Notes, pp. 511-513

Note on State Sovereign Immunity, pp. 824-829

Congressional Power to Enforce the Civil War Amendments

City of Boerne v. Flores (1997) and Notes, pp. 731-746

United States v. Morrison (2000), pp. 746-752

Nov 8 *Board of Trustees of the University of Alabama v. Garrett* (2001), pp. 752-759

The Modern Debate over Racial Equality

Brown and Its Legacy

Notes on the Background to the School Desegregation Case, pp. 1017-1022

Brown v. Board of Education, *Bolling v. Sharpe*, and Notes, pp. 1023-1030

The Southern Manifesto and Notes, pp. 1030-1032

Brown and the Original Understanding, pp. 1032-1038

Nov 10 Four Decades of School Desegregation, pp. 1038-1053 (skim)

Parents Involved in Community Schools v. Seattle School District No. 1 (2007) and Notes, pp. 1186-1216

The Antidiscrimination Principle

Anticlassification and Antisubordination

Nov 12 *Korematsu v. United States* (1944) and Notes, pp. 1054-1060

Loving v. Virginia (1967) and Notes, pp. 1061-1073

The Reach of the Suspect Classification Doctrine

Johnson v. California (2005) and Notes, pp. 1073-1074

Note on Child Custody and Placement Policies, pp. 1074-1076

Note on Government Collection and Use of Racial Data, pp. 1076-1079

Note on Four Concepts of Race, pp. 1079-1081

What Constitutes Discrimination “based on” Race?

Discriminatory Intention

Nov 15

Early Cases on Racial Discrimination, pp. 1081-1085

Griggs v. Duke Power Co. (1971) and Notes, pp. 1085-1089

Washington v. Davis (1976) and Notes, pp. 1089-1094

Village of Arlington Heights v. Metro Housing Development Corp. (1977), pp. 1094-1095

Personnel Administrator of Massachusetts v. Feeney (1979) and Notes, pp. 1095-1101

Race and the Criminal Process

United States v. Clary (1994) and notes, pp. 1112-1116

Nov 17

McCleskey v. Kemp (1987) and Notes, pp. 1116-1123

Brown v. Oneonta (1999) and Notes, pp. 1123-1125

Racial Profiling and the Equal Protection Clause, pp. 1125-1128

Affirmative Action (11/05/2018)

Notes and *Bakke v. Regents of the University of California* (1978), pp. 1128-1137

Nov 19

Richmond v. J.A. Croson Co. (1989), and Notes, pp. 1137-1152

Adarand Constructors v. Peña (1995) and Notes, pp. 1152-1154

Note on Originalism and Affirmative Action, pp. 1154-1159

Nov 22

Grutter v. Bollinger and *Gratz v. Bollinger* (2003), pp. 1159-1186

Fisher v. University of Texas at Austin (Fisher II) (2016), pp. 1216-1226

Nov 24-28

Happy Thanksgiving!

