

PSCI 223 Constitutional Structure and Rights, Fall '23

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Office hours: M, 9:30-10:30 and 4:30-5:30; W, 1-2:00
By appointment, in person and zoom

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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 whether 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:

Case brief, 10%
3-4 page paper, 20%
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.

Readings:

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. I will supply all of the readings for this class. They will all be posted on a social e-reader called Perusall. There is a link to Perusall at the bottom of the course homepage on Blackboard. Once in Perusall, you will see a list of the reading assignments for the course. Most of the work for this course will involve reading the assignments, reflecting upon them, and discussing them with your classmates (on Perusall and in class). I’ve given more details about how Perusall works below.

How Perusall Works

I have not placed any book orders with the bookstore. I will be supplying the books for this course (with a few exceptions – in some courses, there will be one or two books you need to buy) through an online reading software package called “Perusall.” All of the reading assignments for the semester must be completed through this online software package, which you can access by clicking on the Perusall link on the bottom of the course’s Blackboard homepage.

Reasons I am doing this: *Perusall* helps you master readings faster, understand the material better, and get more out of the class. To achieve this goal, you will be collaboratively annotating the readings with others in the class. The help you’ll get and provide your classmates (even if you don’t know anyone personally) will get you past confusions quickly and will make the process more fun. While you read, you’ll receive rapid answers to your questions, help others resolve their questions (which also helps you learn), and advise me, the instructor, how to make class time most productive. You can start a new annotation thread in *Perusall* by highlighting text, asking a question, or posting a comment; you can also add a reply or comment to an existing thread. Each thread is like a chat with one or more members of your class, and it happens in real time. Your **goals** in annotating each reading assignment are 1. to stimulate discussion by posting good questions or comments, 2. to help others by answering their questions, and 3. to identify and evaluate the main claims in the piece.

Rubric: Research shows that by annotating thoughtfully, you’ll learn more and get better grades, so here’s what “annotating thoughtfully” means: *Effective annotations deeply engage points/arguments in the readings, stimulate discussion, offer informative questions or comments, and help others by addressing their questions or confusions.* To help you connect with classmates, you can “mention” a classmate in a comment or question to have them notified by email (they’ll also see a notification immediately if online), and you’ll also be notified when your classmates respond to your questions. For each assignment I will evaluate the annotations you submit on time (see below). Based on the overall body of your annotations, you will receive a score for each assignment as follows

10 = demonstrates **exceptionally thoughtful and thorough reading of the entire** assignment; student has engaged with others, asked questions others want answered, answers questions, and made important insights.

7-9 = **demonstrates thoughtful and thorough reading of the entire assignment**; occasionally engages with others, asks questions, and so forth. Some comments state the obvious or are the equivalent of saying

“amen” or just free associating, as when someone says, “based off of what he said, I think” and then goes on to talk about something only tangentially related to the question or issue at hand.

4-6 = demonstrates superficial reading of the entire assignment Or thoughtful reading of only part of the assignment; comments state the obvious, are trivial, often irrelevant.

<4 = demonstrates superficial reading of only part of the assignment; comments state the obvious, are trivial, often irrelevant.

How many annotations do I need to enter?

When I look at your annotations I want them to reflect the effort you put in your study of the text. It is unlikely that that effort will be reflected by just a few thoughtful annotations per assignment. At the other extreme, 30 per assignment is too many, unless a number of them are superficial or short comments or questions (which is fine, because it is OK to engage in chat with your peers). Somewhere in between these two extremes is about right and, thoughtful questions or comments that stimulate discussion or thoughtful and helpful answers to other students’ questions will earn you a higher score for the assignment. Note, also, that to lay the foundation for understanding the in-class activities, you must familiarize yourself with each assignment *in its entirety*. Failing to read and annotate across the entire assignment will result in a lower score.

What does “on time” mean?

The work done in class depends on you having done the reading in advance, so it is necessary to complete the reading and post your annotations before the deadline to receive credit. I allow a late annotation period of two days during which the credit for your annotations linearly decreases from 100% at the deadline to 0% at the end of the late annotation period. Similarly, to encourage you to talk to each other, there is a reply window after each deadline during which you can continue to reply, for full credit, to questions posted by others. However, the number of additional points you can earn after the deadline is capped at the credit you receive for annotations made on that assignment before the deadline.

Unless otherwise noted, all page numbers refer to the text *Processes of Constitutional Decisionmaking*.

- Aug 30 Introduction
- Sep 1 **Background to and text of the Constitution; background on the court as institution**, pp. 1-25, and
Ch. 1, Lawrence Baum, *The Supreme Court*, 13th ed., CQ Press, 2019.
- Sep 6 Chs. 2-3, Baum

Constitutional Interpretation

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?

- Sept 8 Ch. 1, Lief Carter and Thomas Burke, *Reason in Law*
- Sept 11 Ch. 2, *Reason in Law*
- Sept 13 Pp. 55-66, *Processes of Constitutional Decisionmaking*
Ch. 5, *Reason in Law*

Sept 15 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

Sept 18 Judicial Review, pp. 108-139

Marbury v. Madison

What is the constitutional basis of judicial review? Could we get along without it?

Sept 20 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.

Sept 22 Nullification and early debate over freedom of expression, pp. 85-108

Sept 25 The commerce clause, pp. 187-216, 835-42

Case brief due! *Gibbons v. Ogden*

- Sept 27 **The Jacksonian Era and Slavery**
- Note on the natural law tradition, pp. 166-174
- Challenges of the Jacksonian era, pp. 217-222
- Note on slavery, p. 245
- Sept 29 *Prigg v. Pennsylvania*, pp. 251-60
- Secession, pp. 260-306
- Dred Scott v. Sandford*
- Oct 2 **Reconstruction Amendments and retreat**
- Oct 4 Read the 13th, 14th, and 15th amendments, pp. 11-12, and the history of their adoption, pp. 331-357
- The Slaughterhouse Cases*, 359-376
- United States v. Cruikshank*, pp. 376-377
- Oct 6 Privileges and Immunities – what are the privilege and immunities of citizens of the United States? Neutering the 14th amendment.
- 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
- Oct 9 Equal Protection and Congressional enforcement
- 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. 481-487
- Oct 11 Race
- 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 13 **Midterm**
- Fall Break!**

The Lochner Era

Oct 18

Police Powers Jurisprudence

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)

Oct 20

The Decline of Police Powers Jurisprudence

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

Oct 23

Note on Constitutional Modernity, pp. 531-532

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

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

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

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

Oct 25

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

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

Oct 27

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

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

Oct 30

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

The Roberts Court and the Voting Rights Act

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

The Contemporary Debate over National Power

Nov 1

The Commerce Power

Introduction, pp. 659-660

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

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

Nov 3

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 6

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 Modern Debate over Racial Equality

Nov 8

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 13

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 20

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

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

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

Nov 23-26

Happy Thanksgiving!

Nov 27

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

Students for Fair Admissions, Inc. V. President and Fellows of Harvard College

Gender Classifications and Gender Equality

Nov 29

Frontiero v. Richardson (1973) and Notes, pp. 1257-1266

United States v. Virginia (1996) and Notes, pp. 1287-1306

Paper due!

Dec 1

Personnel Administrator of Massachusetts v. Feeney (1979) and Notes, pp. 1327-1335

Geduldig v. Aiello (1974) and Notes, pp. 1335-1339

Note on Pregnancy as a Justification for Sex-Differentiated Treatment of Men and Women, pp. 1315-1317

Note on the Equal Rights Amendment, pp. 1266-1273

Dec 4

Other (arguably) Suspect Classifications; Due Process

Romer v. Evans, pp. 1525-35

Lawrence v. Texas, 1535-66

Dec 6

Note on Same Sex Marriage and *United States v. Windsor*, pp. 1566-74

Obergefell v. Hodges, pp. 1575-1607

Concluding thoughts – is our constitutional system dysfunctional?

Dec 8

Chs. 1-2, Levinson and Balkin, *Democracy and Dysfunction*

Dec 11

Chs. 3-4, *Democracy and Dysfunction*

Dec 13

Chs. 5-6, *Democracy and Dysfunction*