

DRAFT 1/9/87

### THE AMERICAN CONSTITUTION: A BICENTENNIAL VIEW

This is a "one time only" course designed to celebrate the bicentennial of the American Constitution. It is a survey of American constitutional development combined with evaluation and discussion of leading constitutional issues. The course is open to all undergraduate students with sophomore standing or above, and to all graduate and law students. Non-traditional students are also encouraged to enroll, and members of the community are invited to attend particular lectures and/or the special programs which are described below. The course has been organized by Professors Joel Grossman (Political Science) and Stanley Kutler (History), and will be taught by them, other members of the UW faculty, and several visiting scholars

**Examinations:** There will be mid-term and final examinations, both of the essay type. The mid-term exam is scheduled for Monday evening, March 9th, at 8PM, in a room to be announced in class. The final examination will be at the scheduled summary block time.

Term Papers are not required.

Honors Credit is not available.

**Discussion Sections:** Each undergraduate must enroll in and regularly attend a scheduled discussion section. Discussion sections will be taught by Professor Grossman and teaching assistants ----- and ----- . Their office hours are listed at the end of this syllabus.

**Special Programs:** The course includes a series of lectures and colloquia by distinguished visiting speakers. These are open to the public, and students are urged to attend.

**Readings:** The following items are available for purchase at Brown's Book Shop and the University Book Store:

- Laurence H. Tribe, GOD SAVE THIS HONORABLE COURT (1985, paper)
- Kermit Hall, THE SUPREME COURT AND JUDICIAL REVIEW IN AMERICAN HISTORY (1986, paper)
- Paul L. Murphy, THE CONSTITUTION IN THE TWENTIETH CENTURY (1986, paper)
- William M. Wiecek, CONSTITUTIONAL DEVELOPMENT IN A MODERNIZING SOCIETY: THE UNITED STATES, 1803-1917 (1986, paper)
- Harold M. Hyman, QUIET PAST AND STORMY PRESENT? (1986, paper)
- Robert Goldwin and William Schambra (eds.), HOW DOES THE CONSTITUTION SECURE RIGHTS? (1986, paper)
- "Materials for Political Science/History 576" [Available only at Kinko's]

[NOTE: Items in the reading list below which are marked with an asterisk (\*) are included in the Kinko's materials]

## LECTURE TOPICS AND READING ASSIGNMENTS

GENERAL READING ASSIGNMENTS: Laurence Tribe, GOD SAVE THIS HONORABLE COURT  
U.S. Constitution \*

1/21 Introduction: Great Constitutional Issues (Grossman)

Reading: James MacGregor Burns and Richard B. Morris, "The  
Constitution: Thirteen Crucial Questions" \*  
Jack N. Rakove, "Mr. Meese, Meet Mr. Madison" \*  
Irving M. Kaufman, "What Did the Founding Fathers Intend?" \*  
The Great Debate (Essays by Meese, Brennan, Stevens, and  
Bork) [distributed free of charge]

1/26 Constitutionalism (Hartog)

Reading: Hendrik Hartog, "Pigs and Positivism" \*  
William E. Forbath, "The Ambiguities of Free Labor: Labor  
and the Law in the Guilded Age" \*

1/28 The Articles of Confederation and the Road to Philadelphia (Cohen)

Reading: Merrill Jensen, "The Articles of Confederation" \*  
Jack Rakove, "The Legacy of the Articles of Confederation"\*

2/2 The Philadelphia Convention (Kutler)

Reading: Forrest MacDonald, "Intellectual Origins of the  
Constitution" \*

2/4 Ratifying the Constitution (Kaminski)

Reading: Merrill Jensen, "The Major Issues in the Public Debate" \*

2/9 The Bill of Rights (Leffler)

Reading: Bernard Schwartz, "Revolutionary Declarations and  
Constitutions" \*  
\_\_\_\_\_, "The Great Rights Secured" \*

2/11 Judicial Review (Grossman)

Reading: Marbury v. Madison (1803) \*  
Kermit L. Hall, The Supreme Court and Judicial Review  
in American History

2/16 John Marshall's Court (Grossman)

Reading: William M. Wiecek, Constitutional Development - - - (begin reading  
now, complete by mid-term examination)

- 2/18 Slavery, Sectionalism, and the Constitution (Sewell)  
 Reading: Staughton Lynd, "The Abolitionist Critique of the United States Constitution" \*  
 Richard H. Brown, "The Missouri Crisis, Slavery, and the Politics of Jacksonianism" \*
- 2/23 Reconstructing the Constitution: The Civil War Amendments and Judicial Power (Kutler)  
 Reading: William M. Wiecek, "The Reconstruction of Federal Judicial Power, 1863-1876" \*
- 2/25 Private Property, Citizenship, and the Constitution (Hartog)  
 Reading: Edward S. Corwin, "The Basic Doctrine of American Constitutional Law" \*  
 Harry Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: the United States, 1789-1910" \*  
Johnson v. McIntosh (1825) \*  
Shelley v. Kraemer (1948) \*  
 Charles Reich, "The New Property" (excerpts) \*  
Poletown Neighborhood Council v. Detroit (1981) \*
- 3/2 Approaching the New Deal: The Limits of Economic Regulation (Conkin)  
 Reading: Paul L. Murphy, The Constitution in the Twentieth Century"  
 (Begin reading now, complete by final examination)  
 TBA \*
- 3/4 The New Deal Revolution and the Roosevelt Court (Conkin)  
 Reading: TBA \*
- 3/9 "Jim Crow" vs. the Equal Protection Clause (Kutler)  
 Reading: "Separate-But-Equal: A Study of the Career of a Constitutional Concept" \*

[MID-TERM EXAMINATION: Monday, March 9th, at 8:00PM, room to be announced]

- 3/11 The Bill of Rights and the 14th Amendment (Fellman)  
 Reading: David Fellman, "The Nationalization of American Civil Liberties" \*

[SPRING RECESS, March 14th - 22nd]

- 3/23 Brown v. Board of Education of Topeka: The Revolution for Racial Equality (Grossman)
- Reading: Brown v. Board of Education of Topeka (1954,55) \*  
TBA \*
- 3/25 The Legacy of Brown: Employment Discrimination and the 14th Amendment (Hill)
- Reading: Herbert Hill, "National Policy in Employment Discrimination"\*
- 3/30 The Continuing Affirmative Action Debate (Jones)
- Reading: James E. Jones, Jr., "The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities" \*
- 4/1 The Constitution and the Modern Presidency (Baldwin)
- Reading: Youngstown Sheet & Tube Company v. Sawyer (1952) \*  
Bowsher v. Synar (1986) \*  
Harold M. Hyman, Quiet Past and Stormy Present
- 4/6 The Supreme Court and the Regulatory State (Komesar)
- Reading: Neil Komesar, "Taking Institutions Seriously . . ." \*
- 4/8 The Rights of Criminal Defendants and the Due Process Revolution (Grossman)
- Reading: TBA \*  
Mapp v. Ohio (1961) \*  
Miranda v. Arizona (1966) \*
- 4/13 Gender Equality Under the 14th Amendment (Weisberger)
- Reading: Ruth Bader Ginsburg, "The Burger Court's Grapplings with Sex Discrimination" \*  
Mississippi University for Women v. Hogan (1982) \*
- 4/15 Roe v. Wade and Bowers v. Hardwick: Privacy, Personal Autonomy, and Judicial Activism (Grossman)
- Reading: Roe v. Wade (1973) \*  
Thornburgh v. American College of Obstetricians and Gynecologists (1986) \*  
Bowers v. Hardwick (1986) \*
- 4/20 Limits of Free Expression: The Nazis in Skokie (Downs)
- Reading: Donald A. Downs, "Skokie Revisited: Hate Group Speech and the First Amendment" \*  
TBA \*

- 4/22 Limits of Free Expression: Pornography and the Constitution (Downs)  
 Reading: American Booksellers Association, Inc. v. Hudnut (1984) \*
- 4/27 School Prayers and Aid to Parochial Schools: The "Accommodationists"  
 vs. the "Separatists" (Fowler)  
 Reading: Wallace v. Jaffree (1985) \*  
 Leonard Levy, "The Original Meaning of the Establishment  
 Clause" \*
- 4/28 The Future of the Constitution: The Constitution and the  
 Future (Abrahamson) [SPECIAL TUESDAY SESSION]  
 Reading: William J. Brennan, "State Constitutions and the Protections  
 of Individual Rights" \*
- 4/29 The American Constitution: A Critique from the Left (Tushnet)  
 Reading: Mark Tushnet, "The U.S. Constitution and the Intent of the  
 Framers"  
 Peter Gabel, "Founding Father Knows Best"  
 Mark Tushnet, "Darkness on the Edge of Town"
- 5/4 Taking the Constitution Seriously (Berns)  
 Reading: Robert Goldwin and William Schambra (eds.), How Does  
 the Constitution Secure Rights?
- 5/6 Conclusions and Final Thoughts (Grossman and Kutler)

#### FACULTY

JOEL B. GROSSMAN, co-director of the course, is Professor of Political  
 Science at the University of Wisconsin, Madison.

STANLEY I. KUTLER, co-director of the course, is E. Gordon Fox Professor  
 of American Institutions, and Professor of History, at the University  
 of Wisconsin, Madison.

SHIRLEY ABRAHAMSON is a Justice of the Wisconsin Supreme Court  
 and Professor of Law at the University of Wisconsin, Madison.

GORDON BALDWIN is Professor of Law at the University of Wisconsin,  
 Madison

WALTER BERNS is John M. Olin University Professor at Georgetown  
 University and an Adjunct Scholar at the American Enterprise Institute.

CHARLES L. COHEN is Assistant Professor of History at the University of  
 Wisconsin, Madison.

PAUL CONKIN is Professor of History at Vanderbilt University

DONALD A. DOWNS is Assistant Professor of Political Science at the University of Wisconsin, Madison.

DAVID FELLMAN is Vilas Professor of Political Science (Emeritus) at the University of Wisconsin, Madison.

ROBERT BOOTH FOWLER is Professor of Political Science at the University of Wisconsin, Madison.

DIRK HARTOG is Professor of Law at the University of Wisconsin, Madison.

HERBERT M. HILL is Professor of Afro-American Studies and Industrial Relations at the University of Wisconsin, Madison.

JAMES E. JONES, JR. is Bascom Professor of Law and Industrial Relations at the University of Wisconsin, Madison.

JOHN P. KAMINSKI is Coordinator of the Constitution Ratification Project at the University of Wisconsin, Madison.

NEIL K. KOMESAR is Doyle-Bascom Professor of Law at the University of Wisconsin, Madison.

RICHARD L. LEFFLER is Associate Director of the Constitution Ratification Project at the University of Wisconsin, Madison.

RICHARD H. SEWELL is Professor of History at the University of Wisconsin, Madison.

MARK TUSHNET is Professor of Law at Georgetown University Law Center.

JUNE WEISBERGER is Professor of Law at the University of Wisconsin, Madison.

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Office Hours of Coordinators and Teaching Assistants

Joel Grossman: 221 North Hall/263-2414 or 274-0739  
Tuesdays, 1:00-4:00PM, or by appointment

Stanley Kutler: 4243 Humanities/263-1835 or 263-1800  
By appointment only

TA #1

TA #2

PROGRAMS

I INTERPRETING THE CONSTITUTION

February 24th: The Hilldale Lecture  
[7:30PM in Old Music Hall Auditorium]

Walter F. Murphy, McCormick Professor of Jurisprudence at  
Princeton University

Title: "The Art of Constitutional Interpretation"

February 25th: Colloquium on "Judicial Activism  
vs. Strict Construction" [7:30PM, Room to be announced]

Bruce Fein, Heritage Foundation

Title: "Employing 'Original Intent' To Expound the  
Constitution"

Commentators: Walter F. Murphy  
Neil Komesar  
Donald W. Downs

II INDEPENDENT REGULATORY AGENCIES AND THE CONSTITUTION

February 25th [1:20PM, Room to be announced]

Bruce Fein, "Independent Regulatory Agencies: Why Do We Have  
Them?"

III THE PRESIDENCY AND THE CONSTITUTION

April 8th (evening)

Theodore Lowi, John M. Senior Professor of American  
Institutions, Cornell University

Title: TBA

Commentators: Gordon Baldwin  
Leon D. Epstein  
Barbara Hinckley