POLITICAL SCIENCE 271

AMERICAN CONSTITUTIONAL LAW I:

THE FOUNDING TO SECESSION

Prof. Kimberly Smith

Fall 2009

Office: Willis 418

Office Hours: Monday & Wednesday, 9-11; Friday 1-2 *or by appointment*

Phone: 4123

E-mail: ksmith@carleton.edu

This course explores the development of American constitutional law from the founding era to the secession crisis. We’ll focus not only on constitutional doctrine but also on the broader intellectual and political context in which it evolved. Topics will include the intellectual origins of the Constitution, the Constitutional Convention and ratification, the development of the judiciary and centralization of federal power, the role of natural law in constitutional adjudication, the constitutional issues revolving around slavery, and the constitutional conflict that led to the nullification and secession crises.

Texts: Kelly, Harbison and Belz, The American Constitution, Vol. I (7th ed.)

 Amar, The Bill of Rights

 Additional readings in coursepack and on reserve

Course requirements: The course will consist of lecture and discussion. You are expected to complete the readings before class so that you can come to class prepared to listen attentively and engage in a lively and thoughtful discussion.

Your grade will be computed as follows:

Bill of rights presentation: 15%

Midterm: 20%

Final: 30%

Research Paper: 20%

Participation 15%

Participation and Attendance:

I will use the socratic method in this class. Each student should be prepared to answer searching questions about the assigned case every day. Students should be able to summarize the facts of the assigned case(s), explain the Court’s reasoning and the holding, explain the reasoning of the dissenting opinions, if any, and critique the Court’s decision.

Because this in-class discussion is a critical part of learning to read and analyze cases, attendance is very important and missing classes may affect your grade substantially. **However, if you suspect you have the flu, please do not come to class!** Call Health Services for a phone-triage.

Group project: The Bill of Rights

Each group will be assigned one question. The group’s task is to research and develop two opposing views of how the Framers would have answered the question. You should keep your arguments confined to the *original intent* of the Framers; for this project, you do not need to consider other kinds of arguments. Proceed as though the original intent is relevant to deciding the issue.

Each group will prepare a brief presentation that will involve debating both sides of the issue. Your presentation should be no more than 15 minutes. Your group will receive a collective grade.

* Everyone in the group does not have to present material! It may be more efficient for two or three people to present the information that the whole group gathered. You can also have some members do the formal presentation and the others field questions from the audience.
* You should practice your presentation to make sure it is no more 15 minutes, so there is ample time for questions and discussion from the audience.
* It is useful to provide an outline of the presentation for the audience’s reference. You may use PowerPoint, but it isn’t expected or required.
* You should draw on scholarly sources such as Amar, Levy, and law review articles, but you **must** also use historical documents such as the records of the Constitutional Convention, the Federalist Papers and Antifederalist Papers, and other documents providing evidence of the Framers’ intent. (Evidence concerning historical practices may also be relevant.)
* In developing your arguments, you should give some thought to who is included in “the Framers” and how specific their intent must be to count (for example, you might argue that they intended to outlaw cruel punishments even if they didn’t intend to outlaw a particular practice that they didn’t consider cruel, but we do).
* In addition to your presentation, your group should turn in a bibliography of the sources it relied on. Please follow *The Chicago Manual of Style* in documenting your sources. (*The Chicago Manual of Style* is available in the reference section of the library).

Questions:

1. Does the establishment clause prevent states from encouraging religion, for example by allowing school prayer?
2. Does the Second Amendment prevent the states from banning guns?
3. Should jurors be allowed to acquit a defendant when they believe the law under which the defendant is charged is unconstitutional or unjust (“jury nullification” or “jury review”)?
4. Does the Eighth Amendment prohibit the death penalty?
5. Is there a constitutional right to privacy?

Resources: The Kelly, Harbison and Belz text and Amar’s The Bill of Rights will be useful. The following sources will also be helpful. However, you should seek out additional sources. You will be evaluated in part on the depth and breadth of your research.

On reserve:

Hickok, ed., The Bill of Rights: Original Meaning and Current Understanding

Levy, Origins of the Bill of Rights

Kramnick, ed., The Federalist

Storing, ed. The Complete Antifederalist

Levy, The Origins of the Fifth Amendment (1986)

In Reference section:

Cogan, The Complete Bill of Rights

Kurland & Lerner, The Founders’ Constitution

Research Paper: Case Note

Your assignment is to research a significant constitutional case and explain why it’s important to the development of constitutional law, to constitutional politics, and to the development of the Court as a political institution. Your paper may be **no more than 15 pages** (12-pt font, 1 inch margins). Case notes are designed to explain the facts, reasoning and holding in a case in a concise and simple fashion. They are usually read by legal professionals, but they should be easily understood by an intelligent layperson. They follow a standard format:

##### I. Introduction: This should be brief and to the point. It should state your thesis.

##### II. Background: This section will discuss the specific facts of the case as well as any political, social, legal, or cultural contextual factors that you think will help to illuminate the case. It should conclude by telling us how the case got to the Supreme Court and what the major legal issues were.

##### III. Analysis of the Decision: This section will take us carefully, in a step-by-step analysis, through the reasoning in the Court’s opinion and the concurring and dissenting opinions. You may ignore or only touch on the minor or technical issues; focus on the important ones.

##### IV. Significance: This section should discuss the important impacts of the decision, which may be social, economic, political or legal. Your research should alert you to a range of important consequences; this section should demonstrate your deep engagement with the scholarly literature.

##### V. Conclusion: A separate conclusion is optional.

You will turn in sections of the case note for me to comment on as indicated on the syllabus. You will then revise these sections and turn in a complete, polished case note on November 11.

Documenting sources: I expect you to do a significant amount of research on your case. A thoroughly researched paper will rely on many sources, drawing on both books and periodicals. Your bibliography should demonstrate that you’ve explored the best scholarship on the subject (which will typically mean that you should not rely on Internet sources, unless you can make the case that they’re reliable and respected.) You should cite your sources; the conventions of legal scholarship demand that you carefully document your factual assertions. *PLEASE NOTE*: You should carefully document your sources on all drafts that you turn in.

Suggested cases: (You may choose a case not on this list; just clear it with me first.)

Chisholm v Georgia, 2 Dallas 419 (1793)

United States v Peters, 5 U.S. 115 (1809)

Marbury v. Madison, 5 US 137 (1803)

Martin v Hunter’s Lessee, 14 US 304 (1816)

Cohens v Virginia, 19 US 264 (1821)

McCulloch v Maryland, 17 US 316 (1819)

Fletcher v Peck, 10 US 87 (1810)

U.S. v Hudson and Goodwin, 11 U.S. 32 (1812)

Dartmouth College v Woodward, 4 Wheaton 518 (1819)

Gibbons v Ogden, 22 US 1 (1824)

Barron v Baltimore, 5 U.S. 243 (1833)

Charles River Bridge v Warren Bridge, 36 US 420 (1837)

Worcester v Georgia, 6 Peters 515 (1832) & Cherokee Nation v Georgia, 5 Peters 1 (1831)

Prigg v Pennsylvania, 41 US 539 (1842)

Luther v Borden, 7 U.S. 1 (1849)

Ableman v Booth, 21 Howard 506 (1856)

Dred Scott v Sanford, 60 US 393 (1857)

**COURSE OUTLINE**

Class 1: Introduction

Foundations

Class 2: Intellectual Origins of the American Constitution

Kelly, Harbison & Belz (KHB), Ch. 3

Locke, Second Treatise; Blackstone, Commentaries [CP]

Class 3: What is a “Constitution”?

KHB, Ch. 4

Waldron, Precommitment and Disagreement [R]

Class 4: The Founding: Interpretations

KHB Ch. 5

Beard, Framing the Constitution; Roche, The Founding Fathers [R]

Class 5: The Founding: Structure and Controversies

KHB Ch. 6

Articles of Confederation; Constitution (in KHB)

Class 6: Political Theory of the Constitution

 KHB Ch. 7

Federalist Papers #10, #39, #51 [CP]

Antifederalist essays (Centinel I, Federal Farmer I) [CP]

Class 7: Political Theory of the Constitution cont.

Federalist Papers #78, #80, #81 [CP]

Class 8: Does the Founding Matter?

Paul Brest, The Misconceived Quest for Original Understanding [R]

\*Paper topics due in class

The Bill of Rights

Class 9: The Bill of Rights

Federalist #84 [CP]

Madison’s Remarks on the Bill of Rights (Congressional Debates) [CP]

Barron v Baltimore, 5 U.S. 243 (1833) [CP]

Class 10: The Bill of Rights

 Amar, Ch. 1-6

Class 11: Continued

Class 12: \*\*\*No class on Friday, Oct. 9!\*\*\*

Work on your presentations!

Class 13: The Bill of Rights cont.

\*Student presentations

Class 14: The Bill of Rights cont.

 \*Student presentations

Class 15: Seditious Libel and Freedom of Speech

KHB Ch. 8

Zenger’s Case (Hamilton’s summation) [CP]

Class 16: MIDTERM EXAM

Class 17: Federalism, Parties and the Constitution

Sedition Act & Congressional debate on repeal [CP]

Virginia and Kentucky Resolutions [CP]

Judicial Review

Class 18: Building the Federal Judiciary

KHB Ch. 9, 10

Judiciary Act of 1789 [CP]

Antifederalist essay (Brutus 11) [CP]

Class 19: Establishing Judicial Review

Calder v Bull [CP]

Marbury v Madison [CP]

Eakin v Raub [CP]

\*Research paper: Background section due, *properly documented* and with preliminary

 bibliography, in class.

Federalism

Class 20: Establishing Federal Judicial Supremacy

 KHB Ch. 11

Cohens v Virginia, Martin v Hunter’s Lessee [CP]

Fletcher v Peck [CP]

Class 21: Nullification

Nullification Proclamation

Jackson’s Response

Calhoun, Disquisition on Government [CP]

Commerce Power

Class 22: The Extent of Federal Power

KHB Ch. 12

McCulloch v Maryland [CP]

Jackson’s Veto Message [CP]

\*Research paper: Analysis section and revised background section, *both sections properly documented*, due Thursday Nov. 5 at noon, in my office

Class 23: Commerce Power

 Gibbons v Ogden [CP]

Cooley v Bd. Of Wardens

Class 24: The Taney Court: Commerce Power, Police Power

 KHB Ch. 13

Charles River Bridge v Warren Bridge [CP]

Slavery

Class 25: The Law of Slavery

 KHB, Ch. 14

 Prigg v Pennsylvania [CP]

Class 26: KHB Ch. 15

 Ableman v Booth [CP]

Class 27: Dred Scott v Sanford [CP]

Class 28: Review for Exam

\*Final draft of research paper due

Final Exam: Self-scheduled