

AMERICAN CONSTITUTIONAL LAW I:  
THE FOUNDING TO SECESSION

Prof. Kimberly Smith  
Fall 2017  
Willis 114  
Class meets at 3a  
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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 (7<sup>th</sup> ed.)  
Amar, *The Bill of Rights*  
Additional readings in coursepack and posted on moodle

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 Debate:	15%
Judicial Opinion	5%
Midterm:	20%
Final:	30%
Research Paper:	25%
Participation	5%

Participation and Attendance:

This class emphasizes oral presentation skills. Each student should be prepared to explain the assigned reading and answer searching questions about it every day. Students may be asked 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

### The Basic Task:

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. The presentation will take the form of an oral argument: one student should serve as "lead counsel" for the affirmative side, a second student should serve as "lead counsel" for the negative side. A third student should be prepared to offer a rebuttal for the affirmative side and the fourth student should do the rebuttal for the negative side. The rest of the class will listen attentively in preparation for writing an opinion deciding the question (see judicial opinion assignment).

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.

Consultation with Historians: Serena Zabin's Age of Hamilton course will be collaborating with us on this project:

By Sept. 20: Each group (the Lawyers) will meet with a group of students from Zabin's class (the Historians) and give them a specific historical question to research.

By Sept. 27: The Historians will give the Lawyers their research. The Lawyers will figure out how to use that research in their debate.

The Debates: The Historians will serve as an audience for the debates.

You will receive 10 minutes to present each side, and 5 minute for each rebuttal (30 minutes total). **Be prepared for the judge to interrupt your presentation with questions.**

We will hold three debates each night, reserving 30 min. for discussion each night.

Your group will receive a collective grade.

- The rest of the class will be expected to write up opinions based on your oral argument, so it's useful to provide a handout with your main points.
- In addition to the research provided by the Historians, you should conduct your own research, drawing 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).

Final Reflection: The Historians will be reflecting on how you used history, including their historical research, in your arguments. On Wed. Nov. 8, Prof. Zabin and some of her students will share with us their insights on this use of history in legal argument.

Debate Questions:

1. The Establishment Clause prevents states from encouraging religion, for example by allowing school prayer.
2. The First Amendment prevents states from regulating seditious speech
3. The Second Amendment prevents the states from banning guns.
4. Jurors should 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”).
5. The Eighth Amendment prohibits the death penalty.
6. There is 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

On Lexis:

Higginson, A Short History of the Right to Petition Government, 96 Yale LJ 142 (1986)  
Schauer, Role of the People in First Amendment Theory, 74 CLR 761 (1986)  
Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986)  
Mayton, Seditious Libel and the Lost Guarantee of Freedom of Expression, 84 Columbia LR 91 (1984)  
Kates, Handgun Prohibition and the Original Meaning of the 2<sup>nd</sup> Amendment, 82 Mich LR 204 (1983)  
McConnell, The Origins and Historical Understanding of the Free Exercise of Religion, 103 Harv. L.R. 1409 (1990)  
Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. LR 915 (1992)  
Halbrook, What the Framers Intended: A Linguistic Analysis of the Right to Bear Arms, Law & Contemp Prob (Winter 1986)  
Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale LJ 393 (1995)  
Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn LR 639 (1973)

### Judicial Opinion

In addition to the debate, you will choose one of the other questions debated (you can decide which one) and write a short opinion explaining how you would rule on the question and why. The goal of this exercise is to help you master the art of legal writing and analysis. You should adopt the voice of a judge; your paper should be clear, concise, and polished.

A good judicial opinion states the question briefly, announces the ruling, and then explains the judge’s reasoning. The aim is to make the reasoning supporting the conclusion crystal clear. The judge should also carefully and respectfully explain and respond to counterarguments. Legal writing always aims for concision, so your paper should be no longer than 1000 words (about two pages, single-spaced).

Peer Evaluation:

Your grade for the group project will be based in part on peer evaluation. I'll calculate it thus:

$$(\text{Project grade} * \text{your peer evaluation score})/100$$

For example, if your project grade is 22 (out of 25) and your peer evaluation score is 110, your grade is 24.2.

Your peer evaluation score: Everyone in the group will be given 100 points to distribute among the other group members. You may not give everyone the same number of points! You must make some discriminations among them. I'll add up the number of points you get, and that will be your peer evaluation score.

Appeals: You may appeal your peer evaluation to me. I'll listen to your complaint and ask each group member to explain their reasoning. I'll affirm reasonable scores and modify scores that don't seem to be supported by good reasons.

## 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 15.

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)

Environmental cases:

Corfield v Coryell, 6 F. Cas. 546 (E.D. Penn. 1823)  
Martin v Waddell, 41 U.S. 367 (1842)  
McCready v Virginia, 94 US 391 (1876)

## 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

*\*\* Friday, Sept 15, 7:00-8:00 pm: Legal Research lab: Meet in Weitz 138*

Class 4: The Founding: Interpretations  
KHB Ch. 5  
Beard, Framing the Constitution; Roche, The Founding Fathers

Class 5: The Founding: Structure and Controversies  
KHB Ch. 6  
Articles of Confederation; Constitution (in KHB)

\*Your group should meet with Historians by today

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  
**\*Paper topics due in class**

\*Your group should receive research from Historians by today

### 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]

Kim will meet with groups over the weekend to rehearse debates

*\*\*Convo: David Fathi, Director of the ACLU National Prison Project*

Class 10: The Bill of Rights  
Amar, Ch. 1-6

Classes 11, 12: Thursday Oct 5 and Friday Oct 6: Class will meet from 6:30 to 8:30 pm in Leighton 305 for the Bill of Rights Debates

Class 13: Seditious Libel and Freedom of Speech

KHB Ch. 8  
Zenger's Case (Hamilton's summation) [CP]

Class 14: Review session

**\*Judicial opinion due in class**  
**\*Peer evaluations due**

Class 15: MIDTERM EXAM

\*\*\*BREAK\*\*\*

Class 16: Federalism, Parties and the Constitution  
Sedition Act & Congressional debate on repeal [CP]  
Virginia and Kentucky Resolutions [CP]

#### Judicial Review

Class 17: Building the Federal Judiciary  
KHB Ch. 9, 10  
Judiciary Act of 1789 [CP]  
Antifederalist essay (Brutus 11) [CP]

Class 18: 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 19: Establishing Federal Judicial Supremacy  
KHB Ch. 11  
Cohens v Virginia, Martin v Hunter's Lessee [CP]  
Fletcher v Peck [CP]

Class 20: Indian Removal  
KHB Ch. 12  
Cherokee Nation v Georgia [CP]  
Worcester v Georgia [CP]  
Extract from Jackson's 7<sup>th</sup> Annual Message [CP]

Class 21: Nullification  
South Carolina Ordinance of Nullification [CP]  
Jackson's Proclamation Regarding Nullification [CP]  
Calhoun, Disquisition on Government [CP]

### Commerce Power

Class 22: The Extent of Federal Power  
McCulloch v Maryland [CP]  
Jackson's Veto Message [CP]

Class 23: Commerce Power  
Gibbons v Ogden [CP]  
Elkison v Deliesseline [CP]  
Cooley v Bd. Of Wardens [CP]  
NFIB v Sebelius [CP]

**\*Research paper: Analysis section and revised background section, *both sections properly documented*, due in class**

Class 24: The Taney Court: Commerce Power, Police Power  
KHB Ch. 13  
Charles River Bridge v Warren Bridge [CP]

Class 25: History and the Constitution (w/guest speaker Serena Zabin)

### Slavery

Class 26: The Law of Slavery  
KHB, Ch. 14  
Prigg v Pennsylvania [CP]

Class 27: KHB Ch. 15  
Ableman v Booth [CP]

Class 28: Dred Scott v Sanford [CP]  
Lincoln's First Inaugural Address [CP]  
**\*Final draft of research paper due in class**

Final Exam: Self-scheduled