

# CONSTITUTIONAL LAW, FALL 2006

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## I. THE CENTRAL TOPICS OF THIS COURSE

Some of you may be under the impression, perhaps from courses you took in undergraduate school, that to learn constitutional law is simply to learn what the Supreme Court has written about various and sundry issues. You may have read, for example, the famous (or, for some, notorious) statement of then-Governor Charles Evans Hughes (who would later become the Chief Justice of the United States), “We are under a Constitution, but the Constitution is what the judges say it is.” A central purpose of this course is to question the second half of Hughes’s assertion and to point out some of the difficulties to which it leads. Another purpose is to offer a not-so-implicit critique of any courses that *do* reduce “constitutional law” to the study of opinions of the Supreme Court and nothing else. I believe that such an approach is not only seriously misleading in terms of understanding American constitutional development, but also exceedingly detrimental to the ultimate project of achieving an American constitutional community of citizens who take real responsibility for preserving the Constitution. (You should know that there is nothing “innocent,” either in my course or in any others, in the design of syllabi, etc. One of my purposes is to be as open as possible with regard to my aims in this course. You are, needless to say, welcome to dispute those aims.)

Perhaps the easiest way to begin the critique of identifying the Constitution with decisions of the Supreme Court is to ask the following question: Do you believe that it is possible for the Supreme Court to make a mistake, i.e., to “get it wrong” as to what the Constitution, correctly interpreted, means? (Some of you may think of cases involving abortion, the use of race or ethnicity in distributing governmental benefits, the infliction of the death penalty, the release of clearly guilty people because of “legal technicalities” in their trials, or the endless incarceration, without trial, of “illegal combatants” in the “war on terrorism,” to name only several controversial issues.) If you do believe this is possible—begin with the possibility that you find the dissent in a given case to be a better construction of the Constitution than the majority opinion—then, as a logical matter, it *cannot* be the case that “the Constitution is [only] what ‘the Court’ [i.e., a majority of the Justices or even, for that matter, *all* of the Justices unanimously] says it is.” To criticize the Court *requires* some Court-independent notion of constitutional meaning. To accept Hughes’s notion as an analytic truth of constitutional meaning, on the other hand, would make criticism of the Court’s ventures in constitutional interpretation literally meaningless. You could, of course, criticize only the *consequences* of some particular decision; you might say, for example, that it is truly unfortunate that the Constitution means X (because the Supreme Court says so). This is obviously different from denying the validity of the Court’s assertion as to constitutional meaning in the first place. (Consider the difference between regretting that

you did not win the lottery and saying that the lottery officials “made a mistake” in not drawing your particular numbers.)

Incidentally, whatever your theory of constitutional meaning, you might well find yourself expressing the wish that the Constitution meant something else than you believe it in fact does mean. I do not view myself as a “cheerleader” for the Constitution. Indeed, the Oxford University Press will publish in October a book of mine, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. You will find the Introduction to that book attached to this syllabus, and we will discuss it during the second hour of the first class. To identify something as a “constitutional error,” even “stupidity”—Bill Eskridge and I have co-edited a book, *Constitutional Stupidities, Constitutional Tragedies*-- requires that there *is* ascertainable meaning to the Constitution and that we can identify it even without judicial assistance. Indeed, with regard to what I believe are the most unfortunate aspects of the Constitution, the Supreme Court has said nothing at all relevant because the issues are not litigated. One problem with reducing the Constitution to “what the Court says” is that it makes mysterious how one ascertains what the “unlitigated Constitution” might mean. Does the lack of relevant “caselaw” make a constitutional provision literally meaningless? Does this mean, for example, that once the White House Counsel tells a President that “courts don’t litigate this kind of case,” then there is no constitutional duty, one way or the other, that limits (or forces) presidential action, that it’s all a question of doing whatever he wishes to do? (This *can’t* be a correct reading of the Presidential Oath of Office, can it, but why precisely not?)

Two questions, then, are at the heart of this course:

1) What precisely is involved in the task of interpreting the Constitution of the United States, assuming that the answer is something else than simply asking (and answering) “what has the Supreme Court said about the matter”? Of course, even if one offers that answer, we would still be forced to ask “what exactly is involved in interpreting an opinion of the United States Supreme Court”; you will discover throughout this course that opinions of the Court are scarcely self-evident in their meaning. With some frequency, especially as we move well into the semester, you will be reading various opinions written in a given case in which the justices offer quite remarkably different readings of prior decisions or, indeed, of the meaning of the very decision you are reading. I will, then, often be asking you what counts as a felicitous example of constitutional interpretation. Or, concomitantly, I will explore how it is you decide that the court (or anyone else) has made a “mistake” in constitutional interpretation.

Incidentally, you should also ask yourselves if these are interestingly different questions from asking how we (ought to) interpret any other document, including, e.g., the Uniform Commercial Code, the Federal Rules of Civil Procedure, a will, the rules of the National Football League or Major League Baseball, *Hamlet*, or Beethoven's Ninth Symphony.

2) To whom, if anyone, should we look for *authoritative* constitutional interpretation? Is this a specialized task, or can *any* lawyer--and, indeed, perhaps any citizen--play the game? Again, think of the examples immediately above. Ought we treat professors of English as "privileged" interpreters of Shakespeare, the conductor of, say, the Vienna Philharmonic, as a privileged interpreter of Beethoven, or, for that matter, Bob Dylan as the last word on interpreting songs written by himself? Or can a non-Ph.D. "amateur" critic or an otherwise obscure musician (or non-musical member of an audience) nonetheless be the source of genuine insight even as the professor or conductor--or composer-- might be dismissed as an arrogant fool?

Consider the fact that George W. Bush, like all other public officials (see U.S. Constitution, Article VI), took an oath to "faithfully execute the Office of President of the United States, and . . . to the best of my ability, preserve, protect, and defend the Constitution of the United States" (see U.S. Constitution, Article II, Section 1, Clause 8). It is, obviously, no mere academic hypothetical to ask how we can determine if a President has in fact been faithful to his oath or, on the contrary, has violated it and therefore (possibly) merits impeachment. You will, as an attorney, take--and no doubt many of you, because of other positions you have held, have undoubtedly already taken—an oath quite similar to that taken by the President. *How* could anyone taking such an oath (or any observer) know when the oath is being violated? What techniques of interpretation are available to a President (or to a law student) committed to upholding the solemn covenant of fidelity to the Constitution?

In trying to figure out what constitutional fidelity means, should Mr. Bush (or you yourself) look at the text itself for guidance? Should he (or you) try to find out what the drafters of the language had in mind in putting it in the Constitution? Should he (or you) read lots of past decisions of the Supreme Court about the topic at hand? Should he (or you) study carefully the acts of those who occupied the White House before him? Should he (or you) study philosophy, in order to figure out exactly what is entailed by the Preamble's goal to "establish Justice"? Should he (or you) engage in the intensive study of "American culture" to try to delineate its "fundamental" presuppositions? (This does not constitute an exhaustive list of possibilities.)

Perhaps he (or you) might think simply of "the good of the country," on the premise that surely the Constitution can't prohibit what would serve the best interests of the United States. If this *is* your view, then would you recommend amending the Constitution to have the President promise "to the best of my ability, to make decisions that will fulfill the aspirations of the Preamble to the Constitution and make the United States a 'more perfect Union'" or, perhaps, simply "to the best of my ability, to make decisions that I believe will best serve the interests of the United States"? If you prefer the current oath, is it because you believe that adhering to the Constitution is necessarily good for the country? (If the Constitution requires stupidity or prohibits good things, how could it be necessarily good to adhere to it?)

Perhaps you think that the President (or any other particular citizen) is ill-equipped to make determinations as to the meaning of constitutional fidelity. Consider, though, that former-President Clinton both graduated from what is often described, especially in New Haven, as the country's leading law school and taught constitutional law at the University of Arkansas. If *he* isn't well equipped to interpret the Constitution, who is? And why shouldn't *you* be confident that by the end of this course you will know how to decide what the Constitution requires of those who have pledged to obey it?

Is it, incidentally, relevant that George W. Bush is not a lawyer? Mr. Bush's status as a non-lawyer was offered as a justification, by one of his spokespersons during his 2000 campaign for the presidency, for his failure ever to criticize any decisions of the Texas Court of Criminal Appeals. Does this mean he is equally estopped from criticizing (or, for that matter, praising) any decisions of the United States Supreme Court, except insofar as he might like (or be dismayed) by their results? After all, on what basis can he claim to *evaluate* them as explicitly *legal* artifacts? But if he, even though a non-lawyer, *is* capable of offering views that should be taken seriously as to the legal adequacy of Supreme Court opinions (or of the opinions of the Supreme Judicial Court of Massachusetts when interpreting the meaning of the Massachusetts Constitution with regard to gay and lesbian marriage), then why should you feel any less empowered, even if you have not yet become a lawyer or even taken a full course in constitutional law?

Does there exist somebody (or some institution) to whom one can turn with confidence for correct answers to any particular constitutional controversy? If so, then the obvious next question is who that person (or institution) would be, and why did you choose him, her, or it rather than some conceivable alternative. Imagine, for example, that this syllabus included the following sentences:

The Constitution, of course, is a hard document to interpret. Fortunately, you are taking a class from a certified expert--after all, I am not only a lawyer, but also the co-editor of the casebook! You can therefore be confident that whatever view I articulate as to constitutional meaning is the correct one. Indeed, you will be graded at the end of the course on your ability to repeat my own views, given that they are the correct ones.

Would you accept without question my assertion of expertise and your duty to accept, without significant question, whatever I tell you? Or would you complain to the Dean? And if you did complain, what precisely would you say: That I am an egomaniac? That I am trying to "indoctrinate" you? That I am not allowing you to have your own opinions? That I don't recognize my "place" within an institutional hierarchy in which the Supreme Court is on top? (What are the differences among these various critiques?)

But now imagine that the syllabus instead includes the following paragraph:

The Constitution, of course, is a hard document to interpret. Fortunately, there exists an institution called the Supreme Court of the United States that we all know to be composed of especially capable experts, and you can be confident that whatever view a majority of them articulate as to constitutional meaning is the correct one--after all, they (or at least their law clerks) write the opinions! Indeed, you will be graded at the end of the course on your ability to repeat its views, given that they are the correct ones.

If you are (properly) hesitant to accept *me* as the "last word" in constitutional meaning, why is it more plausible to accept the United States Supreme Court self-designated role, as described in a number of recent opinions as the Constitution's "ultimate interpreter"? Is that assertion any less egomaniacal than my own? Or is the response that they are simply better, more competent lawyers than I am? Perhaps that is correct, but how would you persuade somebody who is dubious, either because they have a very high estimation of my own abilities or a very low estimation of the competence of the Supreme Court? Imagine, for example, that the first day of class included a pop quiz, in which you were asked to write three sentences about each (or even three) of the current justices (and, especially, about their legal acuity). How well do you think you would do? If you are like most Americans and in fact know almost nothing about the individual justices, then what, other than sheer faith, supports any assertions as to their competence? Is it that you necessarily trust the President who nominated them and the Senate that confirmed them to select only very competent justices who are, by definition, especially skilled in the enterprise of constitutional interpretation? But why would one believe this, especially since many nominees have spent relatively little of their prior career engaged in the kind of law that calls for close analysis of constitutional meaning? Is there good reason to believe that the President and Senate will necessarily select more competent constitutional interpreters than the Appointments Committee of the Yale or University of Texas law schools? Perhaps the answer turns on what one means by "competence." What, indeed, are the talents required of those who would serve on the Supreme Court, and are these, perhaps, interestingly different from the talents required to serve on what the Constitution calls the "inferior" federal courts or on state courts, let alone the faculty of the Yale Law School?

You might offer the pragmatic, altogether accurate, response that the decisions of the Court are more likely to be followed than are my "decisions." But that simply raises an additional question: Are they followed because they are (thought to be) correct or simply because whatever the Supreme Court says goes, regardless of correctness, persuasiveness, or any similar attribute? Consider the fact that members of the armed forces will follow orders (and policies) enunciated by their civilian superiors, regardless of whether they agree with them. Moreover, a gunman might have a higher rate of compliance with his requests than I—or even the members of the Supreme Court--do; I presume that does not say anything interesting about the "legitimacy" of the gunman's views.

Actually, a major debate among political scientists, see especially Gerald Rosenberg, *The Hollow Hope* (1990), concerns the actual impact of what might be termed "unpopular"

decisions on the behavior of those not predisposed to agree with the Court. Even if the Court definitely has far more effective power than I do, it is not at all clear that it has the power sometimes ascribed to it by persons who believe that the Court in fact exercises great influence over the general political order. So perhaps the sentence above should have begun "Are they followed, *to the extent that they are.....*" And, of course, compliance may be a function of viewing the decision either as "correct" or merely "authoritative," where one ultimately finds it irrelevant whether the person issuing the order was correct or not. I am presuming, for example, that you will follow my orders to read a variety of materials during the semester whether or not you personally agree that this is the "best" syllabus for the course. It is simply a (possibly unfortunate) reality that I have a certain authority—or raw power—to decide what goes on in this course that you do not. (And consider whether it is relevant, in predicting your compliance with my "demands," that you will be graded only on a pass/fail basis at the end of the semester.)

By the end of this course, you will have had opportunity to think reasonably hard about these questions and to begin the process of coming up with your own answers to them.

## II. THE PEDAGOGICAL APPROACH OF THE COURSE

*I teach this course historically.* We will, for example, take much of the first half of our time together getting up to and through the events of 1861-1865. (A key issue in constitutional interpretation is the name that we place on these events: Are they a "Civil War," a "War Between the States," a "War To Suppress Southern Independence," or some other designation of your choice? Does the Constitution supply any hint as to how we should name the struggle?) Not surprisingly, I strongly believe in the desirability of such an approach: The Constitution of the United States has a developmental history or, to use a slightly different metaphor, an archeology. It did not always look the way it does today, and there is no reason whatsoever to believe that your children will see the same things in the Constitution that we do now. Your parents, after all, do not now see an "unchanged" person when they compare the present "you" with the "you" of ten years ago, nor, for better or worse, are they likely to see, after even your first year of law school, the identical person you were before you embarked on this path. It is no doubt true, of course, that for many important purposes, you are (and will be) well described as being the "same" person now that you were then, but it is also the case that on occasion both onlookers and yourselves will want to insist on important developmental changes. In any event, an obvious question, whether discussing constitutions or persons, is to try to account for such changes that can be perceived as having occurred and to discuss what lessons can be learned--or morals drawn--from their existence.

These questions take on added meaning at this particular time, given the seeming willingness of the current majority of the Supreme Court to reconsider some quite basic issues in constitutional interpretation and thus call into question what had been taught even a decade ago as "settled," or "black-letter," law. And if President Bush, with the acquiescence

of a presumptively Republican Senate, has the opportunity to appoint some new justices—perhaps because the 86-year-old John Paul Stevens retires or dies in office—even more of what was taught even fifteen years ago as "settled doctrine" may indeed be consigned to the junk heap, just as occurred after 1937 during the New Deal and in the 1960s with the so-called Warren Court. One purpose of this course is to ask, "so what?" Is there any reason to believe that such repudiation of past doctrine is automatically a terrible thing and, if you believe so, precisely why would that be the case?

The possibility that the current doctrines of the Supreme Court have a shelf-life considerably less than that of a Hostess cupcake is an additional reason for structuring this course as I do. I am absolutely confident that the issues we will be discussing will be relevant to you throughout your lifetime as American citizens and lawyers. I think there is no reason to believe that that would be true if we concentrated on the elaboration of contemporary doctrines.

### III. THE ASSIGNED MATERIALS

The readings below come almost entirely from Paul Brest, Sanford Levinson, Jack Balkin, Akhil Reed Amar, and Reva Siegel, *Processes of Constitutional Decisionmaking*, 5<sup>th</sup> ed. (2006). In addition, I am assigning Robert G. McCloskey, *The American Supreme Court* (4<sup>th</sup> ed., University of Chicago Press, 2004), which provides a useful overview and particular perspective on the role of the Supreme Court. Not surprisingly, my own ideas also pervade the course; some of you might therefore benefit from reading my book, *Constitutional Faith*, available at the bookstore. I have indicated in the syllabus what chapters might be particularly relevant to given assignments. The book is, however, not required.

THE ASSIGNMENTS ARE SOMETIMES QUITE HEAVY, ESPECIALLY, UNFORTUNATELY, THOSE TOWARD THE VERY END OF THE CLASS (A RESULT NOT OF MY MALEVOLENCE BUT, RATHER, THE PROPENSITY OF THE CONTEMPORARY SUPREME COURT TO WRITE INORDINATELY LONG DECISIONS, WITH CONCURRING AND DISSENTING OPINIONS). You are well advised, then, to plan in advance for those (relatively infrequent) times when you will be asked to read an inordinate number of pages of material for one class. IN ANY EVENT, I WILL ASSUME THAT EACH OF YOU WILL HAVE DONE ALL OF THE REQUIRED READING BEFORE EACH CLASS. YOU WILL BE AT A SIGNIFICANT DISADVANTAGE IN TERMS OF FOLLOWING THE DISCUSSION IF YOU HAVE NOT DONE SO.

I will try to be available every Wednesday from (around) 11-12 and then from 4-6 after class. I also encourage you to get in touch with me by email, preferably at my UT address listed above, as that is the account I check most frequently (almost compulsively). I have two great hopes: First, that you will direct questions you have about the course to me, and I will answer them, usually to the class at large. (Should you wish your identity to remain anonymous, you can send it to me by regular email, and I will make sure that it is not

disclosed to the class when I distribute your questions and/or comments.) Secondly, I also hope that you will use Blackboard as a forum in which you can discuss issues raised by the course among yourselves, so that the necessarily limited in-class time will be supplemented by the electronic discussions. I might well participate, but only as one discussant among many.

#### IV. GRADES

Your grade (which of course is simply pas-fail during this semester) will be the result of your performance on the final examination. It is my standard practice to make the final examination available on the last day of the regularly scheduled class. You will be given four *questions*, two of which will be chosen entirely at random at the time of the scheduled examination.

**A special note on an unassigned case:** Some of you may be perturbed with the absence of *Marbury v. Madison* from the syllabus. It is in fact the subject of a chapter in Robert McCloskey's book, so those of you completely unfamiliar with the case will get an introduction to it. I do not teach the case more extensively, however, because I have become convinced, over many years, that the importance of the case is greatly, almost grotesquely, exaggerated and that it is not worth taking the time—at least a week—that is necessary to teach that extremely complex case in a way that makes it comprehensible. Indeed, I have published an article, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST LAW REVIEW 553-578 (2003). It is NOT assigned.

**V. Classes.** We will not meet on the Wednesday afternoon before Thanksgiving. We will engage in an “anticipatory makeup” of that class on FRIDAY, SEPTEMBER 8, not least because the assignments for the early classes are quite short.

SYLLABUS OF CLASSES

1. Wednesday, September 6

1. Introduction: Out with the old constitution, in with the new (Or, why, if at all, should we care what the Articles of Confederation said, anyway?)

Reading: Preface to Brest, Levinson, Balkin, and Amar, and Siegel (hereafter BLBAS), pp. xxxi-xxxvi; Constitution of the United States, Article VII (p. 8), "Background to the Constitution," pp. 19-26

2. Constitutional rigidities (and stupidities?) A brief (and inadequate) look at the unlitigated (and, possibly, most important parts of the) Constitution

Levinson, *Our Undemocratic Constitution*, introduction (attached at conclusion of syllabus)

2. Thursday, September 7

James Madison as constitutional interpreter: The Bank of the United States (Or, who precisely was James Madison, and should we care what he thought the Constitution meant?)

Constitution, Article I, § 8; BLBAS, pp. 27-32

3. FRIDAY, SEPTEMBER 8

1. Competitive constitutional interpreters: Randolph, Jefferson, Hamilton, Washington  
Who should prevail, and why?

BLBAS, pp. 32-37

2. John Marshall as constitutional interpreter (Or, who precisely was John Marshall, and why, if at all, should we care what he (or his successors) thought the Constitution meant?)

Constitution, Article III, § 1; BLBAS, pp. 37-51, 96-103 (The discussion will focus on ¶¶ 1-6, though I will presuppose your having read the entire assignment)

4. Wednesday, September 13

1. The metaphysics of Union; the Tenth Amendment, the “necessary and proper clause,” and constitutional “adaptation”

BLBAS, pp. 40-62

2. Do “inherent powers” supplement “assigned powers”?

BLBAS, pp. 62-67

5. Thursday, September 14

1. An introduction to structural argument: Why can't Maryland tax the U.S. Bank? (Does the Constitution explicitly prohibit Maryland from doing so? Does the answer to this question really matter?)

BLBAS, pp. 67-74

2. Andrew Jackson as an independent constitutional interpreter; herein also an introduction to the notion of precedent and the responsibility of presidents to veto or refuse to enforce unconstitutional legislation

Constitution, Article II, § 1, Clause 8; Article VI, Clauses 2-3; BLBAS, pp. 74-84

(Chapter 1 of *Constitutional Faith* is relevant to this discussion)

6. Wednesday, September 20

Marshall on property rights (Being an introduction also to natural rights, natural law, the “ethos” of American political culture, “unenumerated rights,” and slavery)

Constitution, Article I, §§ 9-10, Article V, Amendments IX, XIV (§1); BLBAS, pp. 140-156, 161-164 (Chapter 2 of *Constitutional Faith* is especially relevant to this and the next class)

7. Thursday, September 21

Marshall on interstate commerce

Constitution, Article I, §8, Clause 3; BLBAS, pp. 168-186

8. Wednesday, September 27

1. State "police power" and the regulation of matters touching on interstate commerce

BLBAS, pp. 187-212

2. A nation of states (with special emphasis on duties to pay due heed to ours being a "slave-holding republic")

Constitution, Article IV, § 2, Clauses 1, 3;  
BLBAS, pp. 212-226, 1673

9. Thursday, September 28

1. Slavery and freedom of speech

Constitution, Article IV, § 4; Amendment I;  
BLBAS, pp. 215-217, 84-89, 460-471

2. Dred Scott (I) (Are Blacks part of the American political community)

BLBAS, pp. 226-243

10. Wednesday, October 4

1. Dred Scott (II) (Does the Constitution protect slavery in the territories?)

Constitution, Article IV, § 3; BLBAS, pp. 243-253

2. Frederick Douglass, Stephen A. Douglas, and Abraham Lincoln as constitutional interpreters

Constitution, Article I, § 8 (Clause 11), § 9, Clause 2; Article II ; BLBAS, pp. 253-260

11. Thursday, October 5

1. Secession

BLBAS, pp. 261-271

2. More on Abraham Lincoln as constitutional interpreter (Herein also of separation of powers)

BLBAS, pp. 271-287

Chapter 4 of *Constitutional Faith* is particularly relevant to this discussion

12.. Wednesday, October 11

1. What precedent did Lincoln set? Jumping forward to the *Steel Seizure Case*

BLBAS, pp. 819-841

2. Is the Civil War an apt precedent for the War on Terrorism?

BLBAS, pp. 287-291, 841-880,

13. Thursday, October 12

1. *Hamdan*

Supplement to BLBAS, pp. \_\_\_\_\_

2. Constitutional consequences of war: the addition of the Thirteenth and Fourteenth Amendments

Constitution, Amendments XIV; BLBAS, pp. 301-319, 350-351

14. Wednesday, October 18

Initial interpretations of the Fourteenth Amendment

1. Economic rights

BLBAS, pp. 319-346

2. Race, gender, and the Constitution:

Constitution, Amendments XV, XIX, XXIV, XXVI, BLBAS, pp. 351-357

15. Thursday, October 19

Can "Separate" be "Equal"?

BLBA, pp. 357-373, 893-928, 1228-1255

FALL VACATION

16. Wednesday, November 1                      Our “color- blind” Constitution?  
  
BLBAS, pp.958-979, 990-999, 1071-1077, 1120-1151
17. Thursday, November 2                      Continued (and, by the way, how do we decide who is in what racial or ethnic group or, for that matter, who is “male” or “female”?)  
  
BLBAS, pp. 999-1010, 1224-1226
18. Wednesday, November 8                      Whose conduct is controlled by the Fourteenth Amendment? (Herein of “state action”)  
  
BLBAS, pp. 373-385, 1652-1667
19. Thursday, November 9                      Congress confronts multiculturalism: Chinese immigration, the Mormon Church and the Constitution; the constitutional status of the American Indian, and the location of Puerto Rico  
  
BLBAS, pp. 346-350, 383-411
20. Wednesday, November 15                      1. *Lochner* and the triumph of "freedom of contract"  
  
BLBAS, pp. 412-431  
  
2. Congress and the national economy prior to 1937  
  
BLBAS, pp. 435-449, 450-456
21. Thursday, November 16                      The Great Depression and the Constitution "1937" and the transformation of legislative power to define "public interests" and "public purposes"  
  
BLBAS, pp. 499--527, 546-547 (“8”)

WEDNESDAY, NOVEMBER 22  
THURSDAY, NOVEMBER 23

NO CLASS  
THANKSGIVING

22. Wednesday, November 29

What (if anything) limits Congress when it "regulates commerce"?

1. The New Deal through the Great Society

BLBAS, pp. 549-567, 591-594

2. The counterattack of the Rehnquist Court (Or, how unstable is the New Deal "settlement"?)

Constitution, Amendment XVII; BLBAS, 600-629

23. Thursday, November 30

What (if anything) limits Congress when it acts under Section 5 of the Fourteenth Amendment?

1, The Great Society

BLBAS, pp. 570-600

2. The counterattack of the Rehnquist court

BLBAS, pp. 629-649

24. Wednesday, December 6

On "Structural Federalism"

BLBAS, pp. 649-710

25. Thursday, December 7

Conditional spending, state autonomy, and individual liberty

BLBAS, pp. 564-570, 627-629, 1688-1702, 1723-1730, 1737-1741, Supplement, pp. \_\_

26. Wednesday, December 13

Religion in the modern welfare state

BLBAS, pp. 1741-1786

27. Thursday, December 14                      A brief and highly truncated introduction to the modern debate about “unenumerated rights”

BLBAS, pp. 1339-1370, 1482-1505

28. Tuesday, December 19                      Conclusion  
(This is a virtual Thursday under the Law School calendar)

Note: The final examination will be passed out at the conclusion of today’s class.

**FROM SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford, 2006)**

Introduction

A Tale of Two Signings

In 1987, I went to a marvelous exhibit in Philadelphia commemorating the bicentennial of the drafting there of the U.S. Constitution. The visitor’s journey through the exhibit concluded with two scrolls, each with the same two questions: First, “Will You Sign This Constitution?” And then, “If you had been in Independence Hall on September 17, 1787, would you have endorsed the Constitution?” The second question clarifies the antecedent for “this” in the first: It emphasizes that we are being asked to assess the 1787 Constitution. This is no small matter inasmuch, for example, it did not include *any* of the subsequent amendments, including the Bill of Rights. Moreover, the viewer had been made aware in the course of the exhibit that the 1787 Constitution included several terrible compromises with slavery.

Even in 1987, I tended to regard the original Constitution as what William Lloyd Garrison so memorably called “A Covenant with Death and an Agreement With Hell”<sup>1</sup> because of those compromises. So why did I choose to sign the scroll? As I explained in the final chapter of a 1988 book, *Constitutional Faith*,<sup>2</sup> I was impressed that Frederick Douglass, the great black abolitionist, after an initial flirtation with Garrison’s rejectionism, endorsed even the antebellum Constitution. He argued that the Constitution, correctly understood, was deeply antislavery at its core.<sup>3</sup> The language of the Constitution—including, most important, its magnificent Preamble—allows us to mount a critique of slavery, and much else, from within. I was convinced by Douglass—and many other later writers—that the Constitution offers us a language by which we can protect those rights that we deem to be important. We need not reject the Constitution in order to carry on such a conversation. If the Constitution at the present time is viewed as insufficiently protective of such rights, that is because of the limited imagination of those interpreters with the most political power, including members of the Supreme Court. So I was willing in effect to honor the memory of Douglass and the potential that was—and is—available in our Constitution, and I added my signature to the scroll endorsing the 1787 Constitution.

On July 3, 2004, I was back in Philadelphia, this time to participate in the grand opening of the National Constitution Center. The exhibit culminates in “Signers’ Hall,” which features life-sized (and life-like) statues of each of the delegates to the convention. Many of the delegates appear to be holding animated conversations or, as in the case of Alexander Hamilton, striding forcefully toward George Washington—who quite literally, because of his height, towers over the room. As one walks through the hall and brushes

against James Madison, Hamilton, and other giants of our history, one can almost feel the remarkable energy that must have impressed itself on those actually in Independence Hall.

As was true in 1987, the visitor is invited to join the signers by adding his or her own signature to the Constitution. Indeed, the center organized a major project during September 2004, cosponsored with the Annenberg Center for Education and Outreach, called “I Signed the Constitution.” Fifty sites in all of the states were available for such a signing. Both the temporary 1987 exhibit and the permanent one at the National Constitution Center leave little doubt about the proper stance that a citizen should take toward our founding document.

This time, however, I rejected the invitation to re-sign the Constitution. I have not changed my mind that the Constitution in many ways offers a rich, even inspiring, language by which to envision and defend a desirable political order. Nor does my decision not to sign the scroll at the National Constitution Center necessarily mean that I would have preferred that the Constitution go down to defeat in the ratification votes of 1787–1788. Rather, I treated the center as asking me about my level of support for the Constitution *today* and, just as important, whether I wish to encourage my fellow citizens to reaffirm it in a relatively thoughtless manner. As to the first, I realized that I had, between 1987 and 2004, become far more concerned about the inadequacies of the Constitution. As to the second, I think that it is vitally important to engage in a national conversation about its adequacy rather than automatically to assume its fitness for our own times. Why I believe this is in a real sense the topic of this book.

My concern is only minimally related to the formal rights protected by the Constitution. Even if, as a practical matter, the Supreme Court reads the Constitution less

protectively, with regard to certain rights, than I do, the proper response is not to reject the Constitution but to work within it by trying to persuade fellow Americans to share our views of constitutional possibility and by supporting presidential candidates who will appoint (and get through the Senate) judges who will be more open to better interpretations. Given that much “constitutional interpretation occurs outside the courts, one also wants public officials at all levels to share one’s own visions of constitutional possibility—as well, of course, as of constitutional constraints. And this is true even for readers who disagree with me on what specific rights are most important. It is always the case that courts are perpetually open to new arguments about rights—whether those of gays and lesbians or of property owners—that reflect the dominant public opinion of the day. Indeed, liberals should acknowledge that even a Supreme Court composed of a majority of political conservatives—a total of seven justices were appointed by Republican presidents—nonetheless broke new ground in protecting gays and lesbians by overturning Texas’s prohibition of “homosexual sodomy.”<sup>4</sup> I applauded that decision; more important is the fact that the public at large, by 2003, also seemed more than willing to accept the Court’s views. The country may be clearly divided about gay and lesbian marriage, but relatively few people any longer seem to endorse a constitutional vision that allows the criminalization of such sexual practices as such.

So, what accounts for my change of views since 1987? The brief answer—to be spelled out in the remainder of the book—is that I have become ever more despondent about many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy. I put it this way to acknowledge that “democracy” is most certainly what political theorists call an “essentially contested concept.”

It would be tendentious to claim that there is only one understanding—such as “numerical majorities always prevail”—that is consistent with “democracy.” Liberal constitutionalists, for example, would correctly place certain constraints on what majorities can do to vulnerable minorities.

That being said, I believe that it is increasingly difficult to construct a theory of democratic constitutionalism, *applying our own twenty-first-century norms*, that vindicates the Constitution under which we are governed today. Our eighteenth-century ancestors had little trouble integrating slavery and the rank subordination of women into their conception of a “republican” political order. *That* vision of politics is blessedly long behind us, but the Constitution is not. It does not deserve rote support from Americans who properly believe that majority rule, even if tempered by the recognition of minority rights, is integral to “consent of the governed.”

I invite you to ask the following questions by way of preparing yourself to scrutinize the adequacy of today’s Constitution:

- <NL>1. Even if you support having a Senate in addition to the House of Representatives, do you support as well giving Wyoming the same number of votes as California, which has roughly seventy times the population?
2. Are you comfortable with an Electoral College that, among other things, has regularly placed in the White House candidates who did not get a majority of the popular vote and, in at least two cases over the past fifty years, who did not even come in first in that vote?

3. Are you concerned that the president might have too much power, whether to spy on Americans without any congressional or judicial authorization or to frustrate the will of a majority of both houses of Congress by vetoing legislation with which he disagrees on political grounds?
4. Do you really want justices on the Supreme Court to serve up to four decades and, among other things, to be able to time their resignations to mesh with their own political preferences as to their successors?
5. Do you support the ability of thirteen legislative houses in as many states to block constitutional amendments desired by the overwhelming majority of Americans as well as, possibly, eighty-six out of the ninety-nine legislative houses in the American states?

One might regard these questions as raising only theoretical, perhaps even “aesthetic,” objections to our basic institutional structures *if* we felt truly satisfied by the outcomes generated by our national political institutions. But this is patently not the case. Polling data offer some insights, even as we must recognize both that they measure support for particular officials and that support levels go up as well as down. That being said, consider that, as I write these lines in May 2006, a *USA Today*-Gallup poll taken between April 28-30 finds that 34 percent of the respondents approve of George Bush’s conduct as President (though 39 percent still have a “favorable” view of him overall, as contrasted with the 60 percent who regard him unfavorably). Only 41 percent find him “honest and

trustworthy;”<sup>1</sup> Yet President Bush has a *higher* approval rating than Congress. A slightly earlier CBS-*Washington Post* poll found that only 36 percent of those polled “approve” of the current Congress, while 62 percent “disapprove.”<sup>5</sup> Yet another poll found that Republican congressional leaders were approved by only 33 percent of the respondents, one point less than their Democratic counterparts (34 percent).<sup>6</sup>

Compared to the president and Congress, members of the Supreme Court might feel considerably better. Yet even there, the data are mixed. For example, a May 2005 poll conducted by Quinnipiac University found that only 44 percent of voters approved of the decisions of the Supreme Court, down from 56 percent approval in a March 5, 2003, poll.<sup>7</sup> An analysis of public opinion and the Court during the period of William Rehnquist’s chief justiceship—1986–2005—found a general diminution of support for the Court over those years, though several polls continue to show that the majority of the public retains “confidence” in the Court. Still, according to Wisconsin political science professor Herbert Kritzer, a June 2005 poll by the Pew Research Center for the People and the Press finding that 57 percent of its respondents are favorable to the Court “is at the lowest level since it began, falling under 60 percent for the first time.”<sup>8</sup> As John Roberts took the helm of the Supreme Court in September 2005, almost a third of the population (31 percent) expressed “not very much” confidence (25 percent) or “none at all” (6 percent) in the judiciary, even if this was offset by the 55 percent who expressed a “fair amount” of confidence. Only 13

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B. Gallup Poll, “Bush No Longer Seen as Effective Manager:

**Record lows seen in his personal image and job performance scores,” available at <http://poll.gallup.com/content/?ci=22663>**

percent had a “great deal” of confidence.<sup>9</sup> Interestingly, Kritzer relates the general drop in support for the Court to “the general demonization of government, particularly the federal government, that took place over the past 25 years.”<sup>10</sup>

A different sort of discontent is measured when one asks people if they believe that the country is generally headed in the right direction. In April 2005, a full 62 percent of the respondents to a CBS poll indicated that they believed that the country was headed in “the wrong direction.”<sup>11</sup> One doubts that the country is any more optimistic a year later, given further setbacks in Iraq and the disasters generated by Hurricanes Katrina and Rita, not to mention more general issues of national security, global warming, and the ever higher cost of gas. One might feel that the country is headed in the wrong direction even if Congress were perceived to be on top of all such issues if one thought we were at the mercy of events—like an oncoming asteroid—simply beyond any human intervention. But surely the sense of dissatisfaction is related for most Americans to a belief that our political institutions are not adequately responding to the issues at hand. Any reader can certainly construct her own list of issues that are not seriously confronted at all—or, if confronted, resolved in totally inadequate ways—by the national government. Serious liberals and conservatives would likely disagree on the particular failings, but both, increasingly, would share an attitude of profound disquiet about the capacity of our institutions to meet the problems confronting us as a society.

To be sure, most Americans seem to approve of their particular members of Congress. The reason for such approval, alas, may be the representatives’ success in bringing home federally funded pork, which scarcely relates to the great national and international issues

that we might hope that Congress could confront effectively. In any event, we should resist the temptation simply to criticize specific inhabitants of national offices, however easy that is for most of us to do, regardless of political party. An emphasis on the deficiencies of particular officeholders suggests that the cure for what ails us is simply to win some elections and replace those officeholders with presumptively more virtuous officials. But we are deluding ourselves if we believe that winning elections is enough to overcome the deficiencies of the American political system.

*We must recognize that a substantial responsibility for the defects of our polity lies in the Constitution itself.* A number of wrong turns were taken at the time of the initial drafting of the Constitution, even if for the best of reasons given the political realities of 1787. Even the most skilled and admirable leaders may not be able to overcome the barriers to effective government constructed by the Constitution. No less a founder than Alexander Hamilton emphasized that “[a]ll observations” critical of certain tendencies in the Constitution “ought to be referred to the composition and structure of the government, not to the nature or extent of its powers.”<sup>12</sup> He is correct. In many ways, we are like the police officer in Poe’s classic *The Purloined Letter*, unable to comprehend the true importance of what is clearly in front of us.

If I am correct that the Constitution is both insufficiently democratic, in a country that professes to believe in democracy, *and* significantly dysfunctional, in terms of the quality of government that we receive, then it follows that we should no longer express our blind devotion to it. It is not, as Jefferson properly suggested, the equivalent of the Ark of the Covenant. It is a human creation open to criticism and even to rejection. To convince you

that you should join me in supporting the call for a new constitutional convention is what this book is about.

1. Walter Merrill, *Against Wind and Tide: A Biography of William Lloyd Garrison* (Harvard University Press, 1963), p. 205.
2. Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1988).
3. See Frederick Douglass, "The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery," in *Life and Writings of Frederick Douglass*, vol. 2, edited by P. Foner (International Publishers, 1975), pp. 467–480.
4. See *Lawrence v. Texas*, 539 U.S. 558 (2003).
5. Gallup Poll, "Bush No Longer Seen as Effective Manager: Record lows seen in his personal image and job performance scores," available at <http://poll.gallup.com/content/?ci=22663>
6. See <http://www.sciencedaily.com/upi/?feed=TopNews&article=UPI-1-20060111-19144800-bc-us-pew.xml>.
7. See <http://www.quinnipiac.edu/x11385.xml?ReleaseID=738>.
8. "The American Public's Assessment of the Rehnquist Court," 89 *Judicature* 168, 170 (November–December 2005).
9. *Id.* at 174.
10. *Id.* at 175.
11. See [http://www.cbsnews.com/htdocs/CBSNews\\_polls/poll\\_0418.pdf](http://www.cbsnews.com/htdocs/CBSNews_polls/poll_0418.pdf).
12. Alexander Hamilton, *Federalist*, No. 31.