

Required books:

John H. Garvey and Alexander Aleinikoff, Modern Constitutional Theory: A Reader [5th edition]

Edward Corwin, The “Higher Law” Background of American Constitutional Law (Copies will be provided in class.)

Cass Sunstein, Designing Democracy: What Constitutions Do

Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror

A packet of required readings will be available for purchase in class.

As noted on the syllabus, there will also be readings assigned from an online course reserve list.

Class Participation. Students will be required to e-mail me a one page “thought paper” each week on Monday, the day before class *no later than 5 P.M.* [My e-mail address is shalpern@buffalo.edu] *I will not read papers received after 5 PM.*

The thought paper should focus on an idea or theme advanced in the readings that merits being discussed in class. Your paper should (1) identify that theme or idea, (2) explain and analyze what the reading says about that idea and (3) explain why you think the idea is important or provocative and merits discussion in class. Try to find a theme or idea that is raised in more than one reading.

My objective is to encourage students to think critically about important themes in the reading, engage in the discipline of *briefly* reducing their thoughts to writing, and prepare the way for a rich and robust class discussion. The thought papers should be no longer than 1000 words. They should be written carefully so that they are literate, coherent and pointed.

Paper Proposals. Proposals for the paper are due in class on Tuesday, October 7. They should contain a concise statement of the question that the paper will analyze, a discussion of why the subject is important, and a brief discussion of what you have found in the preliminary reading that you have done. A short bibliography should be included. Thereafter, I will meet with students individually to discuss their papers with them. In class on November 18, students will make a 20 minute presentation discussing the work they are doing for their paper.

Course Materials. I am producing a reader for the course that will be available for sale. We will provide that to students for the cost of reproducing those materials. Where the syllabus indicates “online course reserve” those materials will be available on line. Since the Corwin book is out of print we have reproduced it in the course packet.

Week 2: Sept 2: Historical and Philosophical Foundations of the Constitution

Edward Corwin, The “Higher Law” Background of American Constitutional Law

Carl Friedrich, “*Constitutions and Constitutionalism*,” in the International Encyclopedia of Social Sciences, vol. 3, pp. 318-325 (online course reserve).

Robert G. McCloskey, “Civil Liberties,” International Encyclopedia of the Social Sciences, Vol. III, pp. 307-12. (online course reserve)

Charles Howard McIlwain, Constitutionalism, Ancient & Modern, Ch.1 “*Some Modern Definitions of Constitutionalism*” (online course reserve)

Blackstone, “*Commentaries on the Laws of England*,” p. 21 (handout)

Week 3: September 9: Early American Experience & Writings

Declaration of Independence (in reader)

Locke, Second Treatise, excerpt in Terrence Ball and Richard Dagger’s, Ideals and Ideologies (in reader)

Hobbes, The Leviathan, excerpt in Terrence Ball and Richard Dagger’s, Ideals and Ideologies (in reader)

McCloskey & Friedrich, From the Declaration of Independence to the Constitution, pp. vii-lxviii (in reader)

Federalist Papers #10, 47, 51, 78 (in reader)

Charles Beard, An Economic Interpretation of the Constitution of the U.S., vii-xxix, 1-30, 52-63 (in reader)

Page Smith, The Constitution: A Documentary and Narrative History, pp. 11-47 (on line course reserve)

Carl Becker, The Declaration of Independence, Ch. 6, The Philosophy of the Declaration in the Nineteenth Century.”

Recommended:

John F. Manley, “*Class & Pluralism in America: The Constitution Reconsidered*”, in Manley & Dolbeare, The Case Against the Constitution, p. 101-119 (online course reserve)

Walter Murphy, et al., American Constitutional Interpretation, 3rd ed., “*Context of*

Constitutional Interpretation,” pp. 48 – 78 (online course reserve)

Gordon Schochet, “*Introduction: Constitutionalism, Liberalism, and the Study of Politics*”, in J. Roland Pennock & John W. Chapman, Constitutionalism, pp. 1-15 (online course reserve)

Week 4: * September 16: Reflections on Constitutional Politics, Adjudication and the Rule of Law

* *Will need to re-schedule class time this week as I will be unable to be here.*

Garvey & Aleinikoff, Modern Constitutional Theory: A Reader p. 1 - 90

Archibald Cox, The Role of the Supreme Court in American Government, pp. 1- 118 (in reader)

Recommended:

Alexander Bickel, The Least Dangerous Branch, Ch. 4, “*The Passive Virtues*”, pp. 111-199 (online course reserve)

Week 5: September 23: The Rule of Law: Is Apolitical Objectivity Possible in the Legal Process?

Robert Bork, “*Neutral Principles*” in Garvey & Aleinikoff Constitutionalism Reader pp. 91-100

Wechsler, “*Toward Neutral Principles of Constitutional Law*” (online course reserve)

Sidney Hook (ed.) Law and Philosophy pp. 263-309 (in reader)

Andrew Altman, Critical Legal Studies, “*Critical Legal Studies vs. Liberalism*” pp.7-21, pp. 79-90 (online course reserve and reader)

George Kateb, “*Remarks On the Procedures of Constitutional Democracy,*” in J. Roland Pennock, Chapman, Constitutionalism pp. 215-237 (online course reserve)

Edgar Friedenberg, “*Side Effects of the Legal Process*” in Robert Paul Wolff’s Rule of Law, pp. 37-53 (in reader)

Jules Lobel (ed.), A Less than Perfect Union, “*Constitution, Mythology, & Progressive Response,*” pp.1-15 (in reader)

Recommended:

Ingo Muller, Hitler's Justice: "The Courts of the 3rd Reich," Ch. 4-9, pp. 27 – 81

Week 6: October 7: Reflections on Legal Rights

Mark Tushnet, "An Essay on Rights," 62 Texas Law Review, pp. 1363-1403 (online reserve)

Staughton Lynd, "Communal Rights," 62 Texas Law Review, 1417-41 (online reserve)

Peter Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves," 62 Texas Law Review, pp. 1563-1599 (online reserve)

Randy Barnett, "Symposium on Interpreting the Ninth Amendment: Foreword: The Ninth Amendment and Constitutional Legitimacy," 64 Chi-Kent L. Rev. 37 (online reserve)

Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, ix-xiii, 1-18 (online course reserve)

Week 7: October 14: Further Reflections on Rights

Your paper prospectus is due. Please e-mail and give me a hard copy in class.

Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" in Jules Lobel's A Less Than Perfect Union pp. 56 – 72 (in reader)

Stuart Scheingold, Preface to the new edition of The Politics of Rights (in reader)

Marc Gallanter, "*Why the Haves Come Out Ahead*" in Before the Law p. 76-83 (online course reader)

New York Times, December 13, 2003, page 1, column 1 "U.S. Suits Multiply, But Fewer Ever Get to Trial."

Yves Dezalay & Bryant Garth, "*Constructing Law Out of Power*", in Stuart Scheingold's Cause Lawyering in the State and Global Era (online course reader)

Peter Singer, "*Animal Liberation*" in Terrence Ball and Richard Dagger's Ideals and Ideologies (online course reserve)

Harriet McBryde Johnston, "Should I Have Been Killed at Birth: The Case for My Life," The New York Times Magazine, February 16, 2003. (in reader)

Cleveland v. United States (1946), as edited in Richard Schwartz and Jerome Skolnick, (ed.), Society and the Legal Order, 1970, pp. 57-62 (online reserve)

Edson Jessop, "Why I Have Five Wives," in Society and the Legal Order, pp. 65-72
(online reserve)

Recommended:

Douglas Greenberg Constitutions, Constitutionalism, & Democracy, excerpts TBA
(online course reserve)

Week 8: October 21: The Black Struggle for Inclusion

W.E.B. Dubois, beginning of the Souls of Black Folk (reader)

Langston Hughes, "*Let America be America*" (reader)

Frederick Douglass, "*Fourth of July Oration, 1852*" (online reserve)

Martin Luther King Jr., "*Letters from a Birmingham Jail*" in Ball and Dagger (ed)
Ideals and Ideologies p. 360-370. (online reserve)

Paul Finkelman, Dred Scott v. Sanford, Ch. 1, "Opinions of the Justices"
Ch. 3, "Political Debate in the North" (online course reserve)

Garvey & Aleinikoff Constitutional Theory Reader p. 435-522

Derrick Bell, And We Are Not Saved, pp. 3 – 6 (online course reserve)

Glenn Loury, Inside Out, Chapter on Social Capital, pp. 93 – 116, (online course reserve)

Recommended:

Howard Zinn, People's History of the United States Ch. 2, 9, 17

Derrick Bell, Faces at the Bottom of the Well, pp. 1 – 31 (online course reserve)

Lani Guinier The Tyranny of the Majority, pp. 1 – 20 (online course reserve)

Week 9: October 28: Women's Struggle for Inclusion

Garvey & Aleinikoff Constitutionalism Reader, pp. 523-571 top, 577-83

Sarah Grimke, "*Letters on the Equality of the Sexes*", in Terrence Ball and Richard
Dagger's Ideals and Ideologies p. 385 – 88 (online course reserve)

Marilyn Frye, "*Oppression,*" in Terrence Ball and Richard Dagger's Ideals and

Ideologies, 389-97 (online course reserve)

Ellen Carol Dubois “*Outgrowing the Compact of the Fathers*” in A Less than Perfect Union pp. 104-134 (in reader)

Elizabeth Schneider, “*The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*” pp. 507 - 525 (in reader)

Recommended:

Howard Zinn, People’s History of the United States, Ch. 6, 19

Cynthia Harrison, Ch. 6, “*Constitutional Equality for Women: Losing the Battle but Winning the War*”, in Sandra VanBurkleo et. al., Constitutionalism and American Culture pp. 174 – 210 (online course reserve)

Week 10: November 4: Liberty & Privacy: Economic Rights, Abortion, Homosexuality, & Right to Die

Garvey & Aleinikoff Reader p. 683-779

Bowers v. Hardwick, 478 U.S. 186 (1986) (available online)

Lawrence v. Texas, 123 S. Ct. 2472 (2003) (available online)

Recommended:

Laurence Tribe, “Essay: Lawrence v. Texas: The ‘Fundamental Right’ that Dare Not Speak its Name,” 117 Harvard Law Review 1893 (2003)

Week 11: November 18:

Sunstein, Designing Democracy, Chapter 1-3, 6-10

Student presentations of papers.

Week 12: November 25: Constitutional Crises in our History

Richard Hofstadter, “*The Paranoid Style of American Politics*” (reader)

Corey Robbin, Fear: The History of an Idea, [To be assigned]

Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror, pp. 1-130.

Week 13: December 2: Constitutionalism in Times of Crisis

Wittes, pp. 131-end

Walter Murphy, et. al, American Constitutional Interpretation, 4th edition, pp. 1618-27
(on line course reserve)

Recommended Readings: The Constitutional State and National Security

Kelly & Harbison, The American Constitution Its Origins and Development Ch. 27, 28
(online course reserve)

Greg Robinson, By Order of the President, pp. 240 – 258 (online course reserve)

Murray Levin, Political Hysteria in America, pp. 28 – 90, 220-253 (online course reserve
& reader)

Albert Fried, McCarthyism, The Great American Red Scare, pp. 1-14, 22-27, 45-57,
64-75, 102-103, 110-114 (online course reserve & reader)

Howard Zinn, People's History of the United States, Ch. 16