

Spring 1986

## American Constitutional History Syllabus

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## AMERICAN CONSTITUTIONAL HISTORY

History 410

Spring 1986

Dr. Samson

Description

A study of the origin and development of the Constitution with an emphasis on leading Supreme Court decisions. The course objectives are as follows:

1. To help students develop a conceptual framework for interpreting and evaluating our historical legal tradition.
2. To promote the exercise of critical thinking and research skills.
3. To encourage students to affirm and apply Christian precepts by developing a consciously biblical understanding of history as the outworking of God's eternal purpose.

Requirements

1. Each student is responsible for all assigned readings as well as special individual or group assignments.
2. Each student is required to write a short (9-12 page) term paper on a topic approved by the professor. The topic must be selected and an outline approved by March 19. The first draft is due on April 16. The final draft is due on April 30, including a detachable 1-2 page abstract for distribution to other members of the class. Papers will be presented in class during the last week.
3. Term papers must be typewritten, double-spaced, and kept in conformity with standard grammar, spelling, and punctuation. Kate Turabian's Manual for Writers should be consulted.
4. Students will be tested on class lectures, material covered in reading assignments, and Supreme Court case briefs.
5. Each of the three short-answer and essay exams represents a quarter of the grade. The term paper is worth an additional quarter.
6. Attendance at the special lecture series by Herbert Schlossberg is worth five points extra credit per lecture for a maximum of ten points.
7. Regular attendance and participation in class discussions is expected. Students who miss more than nine hours lose a full grade. Students who miss more than twelve hours fail the course.

Reading

## Recommended Purchases:

Eidsmoe, John. Christian Legal Advisor.  
 Hamilton, Madison, Jay. The Federalist Papers.  
 Kutler, Stanley. Supreme Court and the Constitution, 3rd ed.  
 McDonald, Forrest. Constitutional History of the United States.  
 Murphy, Edward. In Your Justice.

## Packet of Handouts:

- ✓ Bahnsen, Greg. "Introduction to John Cotton's Abstract."
- Blackstone, William. Commentaries on the Laws of England.
- Connecticut. "Fundamental Orders of Connecticut."
- ✓ Corwin, Edward S. "The Postwar Constitution."
- England. "Magna Carta."
- Massachusetts Bay. "Oath of a Free Man."

- ✓ Rushdoony, Rousas. Institutes of Biblical Law. "Introduction."
- ✓ Schlossberg, Herbert. "Khadi Law and the End of Justice."
- ✓ Silving, Helen. "Jurisprudence in the Old Testament."
- ✓ \_\_\_\_\_ . "Origins of the Magnae Cartae."
- ✓ Swanson, Mary-Elaine. "How Supreme Is the Supreme Court?"
- Titus, Herbert. "The Christian Legacy of America's Declaration of Independence."

## Reserve Desk:

- Anderson, David. "The Jurisprudence of Justice Rehnquist," Intercollegiate Review, Fall/Winter 1981.
- Bahnsen, Greg. Theonomy in Christian Ethics.
- \* ✓ Bancroft, George. A Plea for the Constitution of the United States, Wounded in the House of Its Guardians.
- Berman, Harold. Law and Revolution.
- Burgess, John. Recent Changes in American Constitutional Theory
- Goodman, Walter. "The Rights Game," Harpers, March 1985.
- Kirk, Russell. Roots of American Order.
- Kurland, Philip, and Gerhard Casper. Landmark Briefs and Arguments of the Supreme Court, vol. 18.
- \* ✓ Mason, Alpheus. Free Government in the Making
- \* Morley, Felix. Freedom and Federalism.
- Rose, Tom. "On Reconstruction and the American Republic," Journal of Christian Reconstruction, 5 (Summer 1978).
- Rushdoony, Rousas. This Independent Republic.
- Sowell, Thomas. Knowledge and Decisions.
- Titus, Herbert. "God, Evolution, Legal Education and Law," Journal of Christian Jurisprudence.
- \_\_\_\_\_. "Religious Freedom: The War Between Two Faiths."
- Wines, E. C. The Hebrew Republic.

Schedule

## I. Sources of the American Constitutional Tradition (January 29-February 10)

- Required: Bible: Rushdoony, Institutes, "Introduction;" Silving, "Jurisprudence;" Eidsmoe, chs. 1-3; Middle Ages: Silving, "Origins;" "Magna Carta;" Puritan Tradition: Bahnsen, "Introduction;" "Fundamental Orders of Connecticut;" "Oath of a Free Man;" Law of Nature: Eidsmoe, chs. 4-5; Mason, pp. 22-38 (Locke); Blackstone.
- Optional: Bible: Bahnsen, chs. 16-17; Wines, ch. 1; Middle Ages: Berman, ch. 3; Kirk, ch. 6; Puritan Tradition: Mason, pp. 60-68.

## II. Forging a New Constitutional System (February 12-19)

- Required: Declaration of Independence: Titus, "Christian Legacy;" Constitution: McDonald, ch. 1; Constitution of the United States; Hamilton, Madison, Jay, nos. 2, 9, 10, 15, 22, 28, 33, 37, 39, 44, 47-51, 78; Mason, pp. 253-67, 277-83.
- Optional: Rushdoony, Republic, chs. 1-2, 13.

## III. Constitutional Development, 1789-1801 (February 21-26)

Required: Bill of Rights: Eidsmoe, chs. 7-10; Early Cases: McDonald, pp. 35-55; Kutler, pp. 3-6, 13-22.  
 Optional: Rose

First Exam: Friday, February 28

IV. Marshall and Taney Courts, 1801-1864 (March 3-10)

Required: McDonald, pp. 55-131; Kutler, pp. 25-35, 41-78, 87-96, 114-19, 135-38, 150-157; Swanson.

V. Civil War and Reconstruction (March 12-14)

Required: McDonald, pp. 131-45; Morley, pp. 59-71; Eidsmoe, ch. 11; Kutler, pp. 164-69, 179-82.

VI. Age of Industrialization (March 17-April 2)

Required: McDonald, ch. 6; Kutler, pp. 183-96, 200-08, 216-46, 277-90, 304-08; Bancroft, pp. 67-88.

VII. Foundations of a Constitutional Revolution, 1910-1937 (April 4-9)

Required: McDonald, ch. 7; Kutler, pp. 321-33, 347-58, 373-77, 382-86, Eidsmoe, ch. 6; Schlossberg.

Optional: Titus, "God, Evolution, and Law;" Burgess, Recent Changes, pp. 42-64; Kurland.

Second Exam: Friday, April 11

VIII. Constitutional Revolution, 1937-1957 (April 14-16)

Required: McDonald, ch. 8; Kutler, pp. 394-412, 429-35, 511-24, 548-552, 703-12; Corwin.

IX. Warren Court (April 18-25)

Required: McDonald, ch. 9; Kutler, pp. 422-25, 472-80, 493-503, 528-32, 572-77, 599-617, 622-35.

Optional: Goodman; Sowell, "Trends in Law."

X. Burger Court (April 28-May 2)

Required: Kutler, pp. 504-10, 533-47, 645-61, 688-702; Eidsmoe, ch. 12; Recent Cases.

Optional: Murphy; Titus, "Religious Freedom;" Anderson.

XI. Wrap-Up (May 5-9)

Discussion of Papers; Topics of Current Interest

Third Exam: Wednesday, May 14

## AMERICAN CONSTITUTIONAL LAW: STUDY QUESTIONS

1. Rushdoony, Institutes of Biblical Law, Introduction: "The Importance of the Law."
  - a. What is the antinomian position regarding "law"? What are the three uses of the law in restoring man to a position of covenant-keeping? What accounts for the breakdown of law and order?
  - b. What does Rushdoony mean by saying that "law is inescapably religious" and how does society manifest this fact? What are the characteristics of biblical law? What is wrong with positive law and natural law?
  - c. What characteristics of biblical law reveal its purpose and direction? Why is restitution so important? How is it demonstrated biblically?
2. Silving, "Jurisprudence of the Old Testament."
  - a. How is the concept of a state contract set forth in the Old Testament? What are some of its underlying assumptions and practical effects? What is the biblical concept of citizenship?
  - b. How does the covenant form the basis of biblical law? What are the different varieties and purposes of law?
  - c. Identify at least six constitutional concepts expressed in the Old Testament.
  - d. What are some of the rules of evidence and psychological factors that are employed in biblical law?
3. Wines, The Hebrew Republic, pp. 1-64.
  - a. Identify the fundamental principles of the organic law of the Hebrew State. Why was the influence of polytheism "pernicious"? How was national unity established? How were liberty and equality understood?
  - b. How did the procedural rules and structure of the Hebrew polity resemble those of the modern era? What safeguards restrained a natural tendency toward military adventurism? What was the character of property ownership? Slavery? What was the role of commerce?
  - c. Discuss the importance of the family tie, the treatment of women, and the role of education. How was national unity fostered? How was a separation of powers with checks and balances accomplished?
4. Blackstone, The Commentaries on the Laws of England, Introduction, sec. I; Book IV, sec. II.
  - a. What is the law of nature? What is municipal law and discuss its four parts.
  - b. Who is not capable of committing a crime? Identify examples of three cases in which the will does not join with the act.

5. Fuller, Anatomy of the Law

- a. What is the character of law for a legal positivist? Compare legal positivism to scientific positivism. What disadvantages does the former suffer? What problems of judgment does it fail to address?
- b. How is natural law commonly caricatured? What are the fundamental tenets of a modest form of the theory?

6. Berman, Law and Revolution, Introduction

- a. What circumstances and events of the eleventh century helped define western civilization from pre-western and non-western cultures? What are the distinguishing characteristics of the western legal tradition?
- b. Why is the prevailing theory of law -- legal positivism -- inadequate and its alternatives -- natural law theory and historical jurisprudence -- incomplete? How do various theories of history create obstacles to an understanding of the western legal tradition?
- c. Identify the six great revolutions that have transformed the western legal tradition. What made them "total" revolutions? Why did they happen? What did they have in common? How was their millennial character manifested? How did they transform the tradition even while remaining within it?
- d. Why is the current crisis of law "unprecedented?" Which four characteristics remain? What has replaced the other six?
- e. What are the tasks of a social theory of law today?

7. Kirk, Roots of the American Order, pp. 183-200.

- a. What is the nature of common law and its central features? Equity?
- b. What were some of the sources and applications of this legal tradition?

8. Silving, "Origins of the Magnae Cartae."

- a. What is the basic source of the expressions of freedom contained in the greater charters of Spain and England?
- b. How does the concept of the covenant promote liberty? How is power limited?

9. Boettner, "Calvinism in History," The Reformed Doctrine of Predestination.

- a. What role was played by Calvinism in the "revolutionary struggle" and the development of republican government?
- b. Identify the four principles of "the spiritual republic." What accounts for the Calvinist emphasis on education?

10. Bahnsen, "Abstract of the Laws of New England."

- a. What was the goal of the Puritan leaders in establishing Biblical law? What were its implications in practice?
- b. What are some of the strengths and weaknesses of John Cotton's Abstract?

11. Lutz, "Origins of American Constitutionalism: The Colonial Heritage"
  - a. What does Lutz mean by saying we operate under "an interlocking set of constitutions?" What are the early sources of our constitutional tradition? What is meant by the "whig theory?"
  - b. Discuss the influence of the early Calvinist church covenants. Identify their five foundation elements. Compare the Mayflower Compact and the Pilgrim Code of Law. What makes the latter the first modern constitution?
  - c. How did the contractual emphasis of charters contribute to the development of modern constitutions? Identify the types of documents that have shaped the constitutional hybrid.
  - d. Identify the political principles contained in the four earliest constitutions. How were they similar or different? What principles governed constitution writing during the 1770s-1780s?
  
12. Wright, "The Early History of Written Constitutions in America."
  - a. How were the limitations on the various colonies enforced? How effectively were colonial laws reviewed? How did the concern with "fundamental law" manifest itself in the years preceding the War for Independence?
  - b. Identify some of the novel provisions made by various state constitutions.
  
13. Titus, "The Christian Legacy of America's Declaration of Independence."
  - a. Did the founders adopt a natural law position or were they impressed with the validity and need for revealed or divine law? In the main, were they deists or Christians?
  - b. Identify four key ideas in the Declaration of Independence. What evidence is there that they took a Christian view of these ideas?
  
14. Locke, Second Treatise on Civil Government.
  - a. What is the state of nature? How does a state of war differ?
  - b. What is the basis of property? How does money expand the concept of property?
  - c. Why are political societies established? What are the disadvantages of the state of nature? What are the chief advantages of a commonwealth? What does a man give up in order to enjoy the commonwealth?
  - d. How is the legislative power limited? When may governments be resisted or dissolved?
  
15. Riker, "Birth of a Nation."
  - a. Describe the scenario Riker sketches for a United States of America which had never known the Constitution of 1787?
  - b. What were the great political issues of 1786? How did they influence a desire to strengthen the central government?
  - c. What sort of system did Madison desire? What were some of the rejected proposals? How were the supporters of the new Constitution able to get it ratified?

16. Bacon, Crossed Swords, pp. 162-182.

- a. How was religious liberty impeded in the colonies? How did the clergy exercise political influence? Under what conditions was resistance considered proper? How do our founding documents reflect this belief?
- b. What relationship between church and state was generally accepted?

17. Kammen, 1.

- a. What role should be played by the jury? Which is the superior form of jury? How may the Constitution be preserved?

18. Federalist, No. 1.

- a. From what quarter did Hamilton expect opposition to the new Constitution? Why are moderation and tolerance important? How does Hamilton attempt to neutralize the arguments of opponents? What is the chief issue in the debate?

19. Federalist, No. 6

- a. How does Hamilton's view of human nature fit with his view of the dangers of disunion? What are some of the causes of hostility among nations? Illustrate how public motives are often merely a pretext for seeking personal advantage or gratification.
- b. How does Hamilton answer the contention that commercial republics are inherently peaceful? What does history show? What is the remedy for the natural enmity neighboring nations have for each other?

20. Federalist, No. 9.

- a. How can we lessen the disadvantages of republicanism (as seen in ancient times) and keep its advantages?
- b. Are the states too large for confederacy to work? What are the advantages of such a union?
- c. How does Hamilton differ with Madison on the subject of confederacy and consolidation? (See Federalist No. 39)

21. Federalist, No. 10.

- a. What are the factions and why do they pose a danger? Identify the two methods of curing the mischiefs of faction? Of removing its causes? Of controlling its effects? How does Madison evaluate each proposal? What are some issues that lend themselves to factional disputes?
- b. Why is a republic better than a pure democracy? What are the advantages of a large republic?



22. Federalist, No. 15.

- a. What evidence is there that the union was advancing toward dissolution?
- b. What was the great and radical vice in the construction of the Confederation?
- c. Identify some ways a centrifugal tendency may be manifested.

23. Federalist, No. 39.

- a. How does Madison distinguish the federal and national elements of the government? Give examples of each.

24. Federalist, No. 47.

- a. Does the separation of powers principle as expressed by Montesquieu forbid an overlap of powers giving each department or branch some control over the others?

25. Federalist, No. 51.

- a. Why should each agency have a will of its own and its members be as independent of other agencies as possible?
- b. What Madison mean by "auxiliary precautions"? Identify some of these so-called checks and balances.
- c. What is the nature of the double security to the rights of the people in a compound republic?
- d. Why is it important to encourage different interests?

26. Federalist, Nos. 62-63

- a. What are the advantages of the appointment of senators by state legislatures? Of equality of representation?
- b. What are the advantages of having a stable institution like the senate in a government? What are some of the "mischievous effects of a mutable government?"
- c. How does a senate help secure a sense of national character? How does it promote responsibility? How may corruption be guarded against? Why did the ancient republics fail?

27. Federalist, No. 70

- a. Why are unity and energy in the executive important? Why is a council to the executive dangerous?

28. Federalist, No. 78.

- a. Why is the judiciary the "least dangerous" branch?
- b. What is Hamilton's view of judicial review?
- c. Regarding contradictory laws, what is the role of judicial construction?
- d. Why is an independent judiciary an important safeguard against oppression?
- e. What will protect against arbitrary discretion in the courts?

1. Compare the views of supporters and opponents of the Constitution regarding the following issues:
  - the ability of states to protect their rights and interests;
  - the advantages (or disadvantages) of a large republic;
  - the necessity (or dangers) of judicial review.
2. Identify specific provisions in the Constitution that supporters believed acted as safeguards; That opponents believed potentially mischievous.
3. What are the implications for Rushdoony of the dependence of law on an underlying system of religion? What does history suggest about the possibility of religious tolerance?
4. How does Helen Silving show the influence of the biblical tradition on modern social (or state) contract theory? Where do these traditions differ?
5. What are the advantages for John Locke of the social contract and civil government over the state of nature? When is the contract no longer binding?
6. How does William Blackstone view the relationship between the law of nature and municipal law? What are the essential elements of law?
7. Identify specific political covenants within the Western legal tradition. What were the sources of higher law, the value premises, and the sociological criteria of legal science as developed by medieval schoolmen?
8. Identify specific elements in the common prescribed pattern of ancient (or modern) covenants.
9. Compare the views of John Locke, Thomas Jefferson, James Mason, and James Madison on religious freedom.
10. Identify specific weaknesses (and strengths) of the federal and state governments under the Articles of Confederation

AMERICAN CONSTITUTIONAL HISTORY:

FINAL EXAM

Between 1929 and 1937, according to Edward Corwin, a change took place in the views of "a dominant section of the American people" that was "nothing short of revolutionary" and that was accompanied by a "change of attitude toward constitutional values." The result is that the old Constitution of Rights was transformed into a Constitution of Powers. Evaluate this assertion in light of any two of the following three questions:

1. Speaking of the "wall of separation" metaphor, Justice Robert Jackson remarked in *Zorach v. Clausen* that it "has become even more warped and twisted than I expected." Illustrate this by comparing the key ideas of any three of the following cases: *Everson v. Board of Education*, *Zorach v. Clausen*, *Wisconsin v. Yoder*, or *Mueller v. Allen*.
2. Justice Jackson remarked in *Wickard v. Filburn* that "it is not a lack of due process for the government to regulate that which it subsidizes." Discuss the Court's understanding and application of the Commerce Clause in *Schechter v. United States*, *Wickard v. Filburn*, and *Heart of Atlanta Motel v. United States* (or *Katzenbach v. McClung*). Did the Court rely on Jackson's perception in any of these cases?
3. Justice McReynolds states in *Meyer v. Nebraska* that "a desirable end cannot be promoted by prohibited means." Yet Justice Holmes in *Abrams v. United States* and Chief Justice Vinson in *Dennis v. United States* took a skeptical view of absolutes such as "truth" and "ultimate good." Discuss how this philosophical relativism with regard to ends and means contributes to the growth of the power of the state or the judiciary to define reality in any three of the following: *Schenck v. United States*, *Miller v. California*, *Welsh v. United States*, or *Roe v. Wade*.