

The Founders' Constitution

Sec. 131-004
CRN 16747
Professor Claeys
Spring 2009

Welcome to the Founders' Constitution.

Overview

This course has three purposes. They are slightly in tension with one another, but they are all important.

First, before you take further constitutional law courses specializing in particular doctrines, I hope to get you thinking about what a constitution is, how it is supposed to work, and how it is supposed to be read and interpreted.

Second, I hope to give you general familiarity with this country's early history with constitutionalism. All lawyers recognize that text and history are relevant guides to constitutional interpretation. Some rely on these sources virtually exclusively, while others depart from them when changed circumstances seem to require it—but all give at least some weight to text and history. I hope to give you enough of an independent knowledge base about the United States' founding and the early efforts to implement the Constitution that you can judge for yourself later how lawyers and judges use history.

Finally, I hope to expose you to some points of contact between constitutionalism as understood at the Founding and constitutional interpretation as practiced today. In many areas of constitutional law, modern authorities debate whether one interpretation or another is consistent with the original meaning of the Constitution. In some cases, it seems fairly clear that modern practice does depart from that of the original Constitution; in others, the evidence is mixed or inconclusive. Some of you may decide that modern practices are sound, politically and interpretively; others may reject one or both of those conclusions. Before you take specialized doctrinal courses, I want to give you some familiarity, for some important lines of doctrine, with the arguments contenders make: whether one or the other interpretation accords with original meaning; and, if not, what reasons are often given for departing from original meaning.

Office hours and whereabouts

My office is on the fourth floor, in the faculty suite, Room 420. My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu.

The course also has a TWEN site. I will post announcements, run a discussion board, and post reading updates on that site. Please get familiar with it.

This semester, I will hold office hours Tuesday, 4 – 5 p.m. This is a “walk-by” hour, meaning that I do not have any other appointments during them and you are free to come in to my office without appointment.

However, I prefer to schedule appointments to discuss in-class issues -- and I suspect a 4-5 office hour will not be convenient for all of you. So I encourage you please to e-mail me to schedule appointments.

Class times, cancellations, and make-up classes

We meet in Hazel Room 221, on Wednesdays, 8 p.m. - 9:50 p.m. We'll break for 10 minutes as close as we can to the middle of class without disrupting the discussion.

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of 221, and I will send an email to the class.

Class reading

I will assign around 40 pages of reading per class hour (or 80 pages of reading per class). To help you read ahead, I will post large blocs of class reading on the class TWEN page, significantly in advance. However, these postings are not promises, but projections. I reserve the right to change the projected reading schedule depending on how fast or slow we are going. If you read more than a class ahead, you assume the risk of reading material I decide to leave on the cutting room floor.

To help you do the reading, I will try as best I can to post with the reading questions around which I expect class discussion to center. In general, however:

When the readings focus on constitutional provisions, I expect you to have read them and thought about what they mean and how they might work. When the readings provide speeches or letters like *The Federalist Papers* or Anti-Federalist responses, I expect you to be able to restate the main points of argument. When the readings provide cases, I expect you to state the facts and holding and explain how the principle of law fits into the constitutional issues that are the larger subject of class.

Class expectations

I expect you to attend class on a regular basis, and the ABA makes it a general condition of accreditation that students not miss more than 2 weeks of class. I keep attendance by having you sign in each day.

If you miss more than 4 class hours (the equivalent of 2 classes), I will not seat you for the examination and to give you a “forced withdraw” grade for the course. This is what you will learn to be a “strict liability” policy: I do not waive this requirement because you are sick, have a job interview, personal emergency, &c. I do not enforce the attendance policy when I need to

reschedule class because I am canceling class due to non-GMU commitments. But I expect you to self-regulate interviews, personal emergencies, illnesses, religious observances and other such commitments, so that you do not miss more than 4 classes' worth of time.

I expect you to prepare for class. I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If I call on you and you are unprepared, that counts as an absence for that hour (i.e., 1 but not 2 of your not-to-exceed 4 hours). If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class and I will mark you for a 1/2 absence for the 2-hour class.

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

Because this is a general standard, I cannot predict all the situations in which it will apply—or how I will correct breaches of it. But let me give a few ~~pet peeves~~ illustrations.

Please do not walk into class after it has begun; I reserve the right to deny a student who has done so a seat and deem him not to have attended for the hour.

Please do not engage in disturbing side conversations during class; I reserve the right to break up such conversations by calling on the participants and, if they cannot answer, to deem them unprepared for the day.

Please do not use personal computers during class for any form of entertainment besides taking notes and referring materials directly related to class; I reserve the right to deem students using their computers for non-class purposes not in attendance.

Please mute or turn off cell phones and other noise-making devices before class. If a cell phone rings during class, I reserve the right to make the owner stand and answer it in front of the rest of the class. For repeat offenders, I reserve the right to answer the phone myself.

Grading

The grade for this class will be based solely on an essay examination. Reserving the right to change the format, I expect I will assign you a take-home examination asking you to write 2 10- to 12-page essays on themes important to the class.

Reading materials

Please purchase the following books:

William Blackstone, *Commentaries on the Laws of England*, vol. 1 (1st ed. 1765) (U. Chicago 1979) (ISBN 0-226-05538-8)

The Anti-Federalist: Writings by the Opponents of the Constitution, edited by Herbert J. Storing and selected by Murray Dry from *The Complete Anti-Federalist* (U. Chicago 1985) (ISBN 0-226-77565-8)

The Federalist, Gideon Edition, George W. Carey & James McClellan, eds. (Liberty Fund 2001) (ISBN 0-86597-289-3)

Alexander Hamilton and James Madison, *The Pacificus-Helvidius Debates of 1793-1794*, Morton J. Frisch, ed. (Liberty Fund 2007) (ISBN 978-0-86597-689-4) and

Creating the Bill of Rights: The Documentary Record from the First Federal Congress, Helen E. Veit et al., eds. (ISBN 0-8018-4100-3)

This course will also refer copiously to materials available on line.

Some may be found at the Founders' website available on the GMU Law School webpage for this course: <http://www.law.gmu.edu/academics/founders/readings>.

Other readings will be posted later, specifically on the TWEN website associated with this course. Below, those readings will be referred to as "(available on TWEN website)."

Please read all of the material assigned unless the assignment specifically limits the reading somehow, e.g. by asking you to read as relevant to answer only a single question.

First class's reading

For class Wednesday, January 5, please read:

Discussion unit 1: Overview

Please read the excerpts from *District of Columbia v. Heller*, on this course's TWEN website.

NOTE: Expect me to lecture about *Heller*. I want to spend no more than the first half-hour on *Heller*, to save time to discuss units 2 and 3 in greater depth. Feel free to concentrate your reading accordingly.

Discussion unit 2: English constitutional practice

Petition of Right (available at <http://www.law.gmu.edu/academics/founders/readings>)

English Bill of Rights (available at <http://www.law.gmu.edu/academics/founders/readings>)

What kinds of practices were the English Parliament declaring off-limits in these documents? What was going on in contemporaneous politics such that the Parliament

needed to declare these practices off-limits? (If you don't know this period and want to learn more, you might skim Hume's history of England, the pages indicated at <http://www.law.gmu.edu/academics/founders/readings/>).

American founders assumed these documents were "constitutions" or "constitutional" documents. If so, what is a "constitution"?

Blackstone's *Commentaries*, vol. 1, pp. *63-*92, *117-*25, *156-*61. Skim also pp. *125-*41.

In these passages, what does Blackstone mean by a "constitution"?

To some extent, Blackstone holds that a constitution consists of laws and practices that secure absolute moral rights. What does Blackstone mean by an "absolute right" in pp. *117-*25? Skim pp. *125-*41 to get a flavor of examples.

To some extent, Blackstone holds that the English constitution consists of a collection of unwritten English laws, customs, and practices. What passages support this view? What happens if English unwritten laws et al. conflict with absolute moral rights?

Discussion unit 3: American colonists' appeal to English constitutional practice

Thomas Jefferson, "Summary View of the Rights of British America" (available at <http://www.law.gmu.edu/academics/founders/readings/>). Start on p. 63 of vol. 2 of Jefferson's works in the *.pdf document on the website.

NOTE: We will almost certainly start but not finish discussion of the *Summary View* on the 7th.

What claims is Jefferson making on behalf of American colonists against English government officials?

Jefferson appeals to the English "constitution." How does he do so? What assumptions is Jefferson making about that constitution's meaning? What assumptions is Jefferson making about the relationship between American colonial subjects and subjects of the King of Great Britain living in England and franchised to vote for members of Parliament?