

**POLITICAL SCIENCE 5321
SEMINAR IN PUBLIC LAW
FALL 2008**

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The American constitution is one of history's most remarkable documents. Drafted over 200 years ago, it has been amended only 27 times and still has enormous political import.

Like all works, political and otherwise, however, it must be interpreted. Consequently, two questions present themselves immediately: 1) Who should do the interpreting? 2) What criteria should whoever this person or body of persons is employ? Although the Supreme Court is usually taken to be the legitimate locale for most interpretive acts, we will read at least one observer who thinks that question has not been settled definitively. It is the second matter, though, that will consume most of our energies. On this issue, there has always been, and probably always will be, profound disagreement.

For political scientists, the significance of constitutional interpretation is twofold. On the one hand, any method of constitutional interpretation is ultimately rooted in a political theory. This fact makes for a convenient link to an important subfield in our discipline. At the same time, constitutional interpretation has important practical consequences for the polity. There are clear winners and losers, both in the short run and in the long run, when the constitution is interpreted one way rather than another. Put simply, constitutional interpretation is about political power.

As political scientists, therefore, we must keep both of these factors in mind. This means not only thinking about each one carefully, but also guarding against two equally beguiling traps: making constitutional interpretation purely an exercise in political theory or making it purely a case of raw politics. It is both but neither completely.

Requirements:

Seminar participants will write a major research paper in addition to taking a final exam and contributing regularly to seminar deliberations. The paper and the final will be weighted 40% each and participation 20%.

Books:

The following books were ordered for the bookstore.

Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*

John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*

Lawrence Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice*

Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*

Sotirios Barber, *Welfare and the Constitution*

Stephen Griffin, *American Constitutionalism: From Theory to Politics*

All reserve items have been placed in one of three places: the Moody Library (M), the Political Science department (D), the law school library (L), or the library of the Dawson Institute for Church-State Studies (CS).

Calendar:

- August 26 Introduction: Constitutions and Constitutionalism
- September 2 Should judges interpret the Constitution?
Larry Kramer, *The People Themselves*. (M & L)
- September 9 Original intent
Robert Bork, *The Tempting of America*, chaps. 7-13. (M & D)
- September 16 The Constitution as a procedural document
John Hart Ely, *Democracy and Distrust*. (M & L)
- September 23 Moral philosophy for judges
Ronald Dworkin, *Freedom's Law*, Introduction. (M & CS)
- September 30 Aspirational justice
Lawrence Sager, *Justice in Plain Clothes*. (M & L)
- October 7 Neoclassical liberalism
Randy Barnett, *Restoring the Lost Constitution*, all except chaps. 8 & 12. (M & L)
- October 14 Active liberty
Stephen Breyer, *Active Liberty*, all except pp. 85-108. (L)
- October 21 The public welfare
Sotirios Barber, *Welfare and the Constitution*. (M)

