This is a seminar on constitutional interpretation. The central question is how should or may a constitution be interpreted? Answering that question implicates at least two additional questions: What is a constitution? And who has (primary) authority to interpret or apply the provisions of a constitution? We’ll focus on the Constitution of the United States, but you are welcome to draw on comparisons with the texts and experiences of other nations and of the several states of the United States.

Readings: Readings for the seminar come from three texts, plus additional materials that I’ll make available as the course unfolds. The first two texts are available for purchase. The third is on reserve in the Bounds Law Library.

* Murphy, Fleming, Barber, & Macedo, American Constitutional Interpretation, 5th edition (West, 2014)
* Philip Bobbitt, Constitutional Fate: Theory of the Constitution (Oxford Univ. Press, 1982) [Reserve]
* Selected sources as noted in the Schedule below

Many of the cases we’ll be reading in the seminar will be familiar to you from other courses in constitutional law. A few cases may be new to you. Either way, we’ll be reading for a purpose that’s slightly different from the ways you’ve read cases in other courses. We won’t be asking merely whether the various opinions got the doctrine (or the result) right. Instead, we’ll be mining them for approaches to constitutional interpretation. Given this approach, you may read familiar opinions in a different light.

Attendance and Participation: When you come to class, you should have read, have thought about, and be prepared to discuss the readings assigned. I do not expect to cover every part of every required source in the Syllabus. As we move through the semester, I’ll try to identify the materials we’ll be emphasizing.

Laptops: Laptops are prohibited in the classroom. In my experience, this policy improves engagement and performance. I realize the policy isn’t costless. I also realize that not all of you will celebrate it. But I believe the potential benefits justify it. If you have thoughts as the semester unfolds, I invite you to share them with me.

Cell Phones: Please turn off cell phones. If you have a compelling reason to remain available by phone, please set it to “vibrate.” Using cell phones for access to email, IM, or internet during class is prohibited.
Evaluation: Each of you will be responsible for: (1) a brief written memorandum (1-2 pp., single spaced) and oral presentation on issues suggested by the week’s readings (10% of grade); (2) a written prospectus describing a proposal for your final paper for the seminar (5% of grade); (3) an oral presentation, during one of the final two weeks, on a written draft of your final paper for the seminar (5% of grade); (4) written and oral comments on a draft of a final paper of one of your fellow students (10% of grade); and (5) a final paper, approximately 30-40 pages in length, on a topic chosen in collaboration with the instructor (70% of grade). Your final grade may also include an adjustment upward for valuable participation in discussions of the seminar or downward for repeated absence from or silence in class.

Prospectus of Final Paper: By January 31, you should submit a formal prospectus for the paper you expect to write for the seminar. The prospectus should be approximately one page, single-spaced. It should include: (1) a provisional title; (2) a statement (1-2 sentences) of the topic or question you’re addressing or answering; (3) a statement (1-3 sentences) of why the topic or question is significant; (4) a summary of the sources and methods you expect to rely on in research and writing; and (5) a provisional précis of your analysis and argument. The prospectus is not the equivalent of a binding contract. If, after submitting it, you get stuck or identify a more engaging topic or question, you may alter course. If you do change course, you should submit a new prospectus for the new or revised project.

Schedule: Reading assignments and topics appear below. I may alter content as we proceed. You’ll notice that the reading list includes a number of judicial decisions. For the most part, the cases are not organized in the manner to which you’ve become accustomed in law school. Instead they’re arranged to speak to distinctive aspects of – or approaches to – constitutional interpretation.

January 10: Introduction
* Interpreting a Constitution, ACI, pp.1-17
* A Typology of Constitutional Arguments, Bobbitt, pp.3-8 [Reserve]
* Textual Argument, Bobbitt, pp.25-38 [Reserve]
* Interpretivism and Non-Interpretivism, Ely, pp.1-9
* Calder v. Bull (1798), ACI, pp.114-118
* Jacobson v. Massachusetts (1905), ACI, pp.119-122
* Palko v. Connecticut (1937), ACI, pp.122-128 (Including Note on Incorporation of Bill of Rights)
* Impossibility of Interpretivism?, Ely, pp.10-41

January 17: HOW to Interpret: Text, Original Meaning, and Change
* Antonin Scalia, Originalism: The Lesser Evil, ACI, pp.231-236
* William J. Brennan, Contemporary Ratification, ACI, pp.236-241
* Historical Argument, Bobbitt, pp.9-24 [Reserve]
* Dred Scott v. Sandford (1856), ACI, pp.181-191
* Home Building & Loan Assn v. Blaisdell (1934), ACI, pp.192-199
* Trop v. Dulles (1958), ACI, pp.200-205
* Lee v. Weisman (1992), ACI, pp.157-167
January 24: WHO May Interpret: Activism and Restraint
* Ronald Dworkin, Constitutional Cases, ACI, pp.248-257
* Discovering Fundamental Values, Ely, pp.43-72
* Poe v. Ullman (1961), ACI, pp.129-137
* Griswold v. Connecticut (1965), ACI, pp.137-147
* Roe v. Wade (1973), ACI, pp.1433-1444
* Planned Parenthood v. Casey (1992), ACI, pp.1453-1480

January 31: WHO: Interpretive Supremacy I
* Approaches to Interpretive Authority, ACI, pp.261-276
  A. Early Developments
* James Madison on Judicial Review (1787), ACI, pp.277-280
* Letters of Brutus, No. 11 (1788), ACI, pp.281-284
* Alexander Hamilton, Federalist No. 78 (1788), pp.284-287
* Senate Debates over Judicial Review (1801-1802), ACI, pp.289-296
* Marbury v. Madison (1803), ACI, pp.296-303
  B. Presidential Actions
* Thomas Jefferson, Instructions to a Federal Prosecutor (1807), ACI, pp.304-306
* Eakin v. Raub (Supreme Court of Pennsylvania, 1825), ACI, pp.306-310
* Andrew Jackson, Veto of the Bank Bill (1832), ACI, pp.310-311
* Abraham Lincoln, First Inaugural Address (1861), ACI, pp.311-315
* Franklin D. Roosevelt, Speech on Reorganizing the Judiciary (1937), ACI, pp.315-319

February 7: WHO: Interpretive Supremacy II
  C. Congressional Power
* Katzenbach v. Morgan (1966), ACI, pp.324-330
* Congressional Authority to Define “Person”, ACI, pp.331-338
* City of Boerne v. Flores (1997), ACI, pp.1344-1352
* Shelby County v. Holder (2013), ACI, pp.850-864
  D. Presidential Signing Statements
* Presidential Signing Statements, ACI, pp.340-349
  E. Nation and States
* Intro to Interpretive Authority between Nation and States, ACI, pp.351-356
* Judiciary Act of 1789, Section 25, ACI, pp.356-357
* Debates over Nullification and Interposition (1798-1799), ACI, pp.357-363
* Martin v. Hunter’s Lessee (1816), ACI, pp.363-364
* John C. Calhoun, Discourse on the Constitution and Government (1851), ACI, pp.364-366
* Nullification and Interposition after Brown v. Board (1956), ACI, pp.367-370
* Cooper v. Aaron (1958), ACI, pp.370-374
February 14: HOW: Structuralism
* Overview of How to Interpret, ACI, pp.379-424 [skim this essay]
* Structural Argument, Bobbitt, pp.74-92
* Intro to Structuralism, ACI, pp.425-432
A. Within the National Government
* James Madison, Federalist No. 51 (1788), ACI, pp.432-435
* Little v. Barreme (The Flying Fish) (1804), ACI, pp.435-437
* The Prize Cases (1862), ACI, pp.437-440
* U.S. v. Curtiss-Wright Export Corp. (1936), ACI, pp.440-442
* Youngstown Sheet & Tube v. Sawyer (1952), ACI, pp.443-453
B. Nation and States
* Intro to the Structure of Federalism, ACI, pp.541-551
* James Madison, Federalist No. 39 (1788), ACI, pp.552-555
* McCulloch v. Maryland (1819), ACI, pp.555-567
* Texas v. White (1868), ACI, pp.567-568
* Slaughter-House Cases (1872), ACI, pp.568-581

February 21: HOW: Doctrinalism – Property and Economic Activity
* Doctrinal Argument, Bobbitt, pp.39-58 [Reserve]
* Intro to the Right to Property, ACI, pp.1195-1206
* James Madison, Federalist No. 10 (1787), ACI, pp.1210-1213
* Lochner v. New York (1905), ACI, pp.1230-1236
* Adkins v. Children’s Hospital (1923), ACI, pp.1236-1242
* West Coast Hotel v. Parrish (1937), ACI, pp.1243-1250
* Williamson v. Lee Optical (1955), ACI, pp.963-966
* Ferguson v. Skrupa (1963), ACI, pp.1250-1252

February 28: HOW: Political Processes – Political Communication
* James Bradley Thayer, Origin and Scope of the American Doctrine (1893), ACI, pp.680-686
* U.S. v. Carolene Products (1938), ACI, pp.687-695
* Policing the Process of Representation, Ely, pp.73-104
* Intro to Freedom of Political Communication, ACI, pp.697-705
* Whitney v. California (1927), ACI, pp.713-719
* Dennis v. U.S. (1951), ACI, pp.720-727
* Chaplinsky v. New Hampshire (1942), ACI, pp.732-735
* Beauharnais v. Illinois (1952), ACI, pp.735-740
* Cohen v. California (1971), ACI, pp.759-763
March 7: HOW: Political Processes – Political Participation
* Intro to Political Participation, ACI, pp.811-820
* Clearing the Channels of Political Change, Ely, pp.105-134
  A. Voting
  * Baker v. Carr (1962), ACI, pp.820-826
  * Reynolds v. Sims (1964), ACI, pp.826-835
  B. Districting
  * Davis v. Bandemer (1986) [available at www.princeton.edu/aci]
  * Shaw v. Reno (1993), ACI, pp.837-849
  * Shelby County v. Holder (2013), ACI, pp.850-864 [again]
  C. Integrity of Elections
  * Buckley v. Valeo (1976), ACI, pp.900-907

March 10-18: Spring Break

March 21: HOW: Constitutional Equality
  A. General Considerations
  * Intro to Problem of Equal Protection, ACI, pp.941-950
  * Facilitating the Representation of Minorities, Ely, pp.135-179
  B. Race and Ethnicity
  * Strauder v. West Virginia (1879), ACI, pp.951-954
  * Yick Wo v. Hopkins (1886), ACI, pp.955-957
  * Plessy v. Ferguson (1896), ACI, pp.957-963
  * Korematsu v. U.S. (1944), ACI, pp.1606-1613
  * Brown v. Board of Education I (1954), ACI, pp.967-972
  * Bolling v. Sharpe (1954), ACI, pp.972-974
  * Brown v. Board of Education II (1955), ACI, pp.974-978
  * Loving v. Virginia (1967), ACI, pp.978-982
  * Regents of the University of California v. Bakke (1978) [available at www.princeton.edu/aci]
  C. Sexuality
  * Bowers v. Hardwick (1986), ACI, pp.1489-1501
  * Romer v. Evans (1996), ACI, pp.1090-1102
March 28: HOW: Fundamental Rights – Personhood, Bodily Integrity, Family
* Intro to Fundamental Rights, ACI, pp.1187-1193
* Intro to Individual Autonomy, ACI, pp.1413-1422
A. Individual and Family
* Meyer v. Nebraska (1923), ACI, pp.1422-1426
* Pierce v. Society of Sisters (1925), ACI, pp.1426-1428
B. Bodily Integrity and Family
* Jacobson v. Massachusetts (1905), ACI, pp.119-122 [again]
* Buck v. Bell (1927), ACI, pp.1429-1431
* Skinner v. Oklahoma (1942), ACI, pp.1135-1140
* Rochin v. California (1952) [available at www.princeton.edu/aci]
* Griswold v. Connecticut (1965), ACI, pp.137-147 [again]
C. Family
* Moore v. East Cleveland (1977), ACI, pp.1482-1488
* Obergefell v. Hodges (2015) [to be provided]
D. Negative Liberty / Positive Rights

April 4: HOW: Religious Exercise
* Intro to Religious Liberty, ACI, pp.1283
* Davis v. Beason (1890), ACI, pp.1295-1297
* Minersville School District v. Gobitis (1940), ACI, pp.1298-1306
* West Virginia v. Barnette (1943), ACI, pp.1307-1313
* Wisconsin v. Yoder (1972), ACI, pp.1314-1322
* Employment Division v. Smith (1990), ACI, pp.1328-1340
* Locke v. Davey (2004), ACI, pp.1353-1355
* Ethical Argument, Bobbitt, pp.93-119 [Reserve]
Optional:
* Mark E. Brandon, Originalism and Purpose: A Précis [to be provided]

April 11: Presentations

April 18: Presentations
APPENDIX:
REFERENCE OR PLEASURE

For the business of writing your paper for the seminar, for investigating more deeply the issues of a particular week’s reading, or simply for pleasure, you may find the following texts to be of interest. We’ll be reading excerpts from a few of these in seminar. This is obviously not a list of required readings. Nor is it a comprehensive list of the literature on constitutional interpretation. For example, all of these are book, not essays or articles. Also, the list is thin on historical works, works that focus on particular doctrinal areas, studies of comparative constitutional theory, and works in jurisprudence or philosophy. I offer the list to give you a sense of the scope of scholarship in this field and to suggest resources for your own research.

* Bruce Ackerman, *We the People: Foundations* (1991)
* Bruce Ackerman, *We the People: Transformations* (1998)
* Hadley Arkes, *Beyond the Constitution* (1990)
* Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913, 1935)
* Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962)
* Sanford Levinson, *Constitutional Faith* (1988)
* Charles Howard McIwain, *Constitutionalism: Ancient and Modern* (1947)
Before (2009)