

HIST 341

"Life, Liberty, and the pursuit of Happiness":

American Constitutional History

Fall 2018

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642 Oldfather Hall

office hours: T and TR 9:30-11:30

Burnett 203

Course Description:

In 1776 Americans proclaimed a set of self-evident truths: that all people are created equal and that they have unalienable rights to "Life, Liberty, and the pursuit of Happiness." This is a course about the formation and development of a government designed "to secure these rights" -- the United States Constitution -- and how Americans have interpreted the Constitution from 1787 to today. How does the Constitution secure these rights? What do these rights mean? This course is designed to introduce students to the main themes and events of American constitutional history from 1787 to the present. The focus of the class is on historical change and takes an explicitly historical approach to the law. Three recurring themes -- "Life, Liberty, and the pursuit of Happiness" -- guide our inquiry into how American law and constitutional understanding changed over time. In this class we consider constitutional history broadly to include the experience of the Constitution in the daily lives of Americans, the interplay of the legislative, executive, and judiciary branches of American government, and the role of political, economic, social, and cultural change in shaping American ideas about rights and government.

Course Objectives:

- to give students the experience and opportunity to do history for themselves and participate in it through gathering evidence, communicating ideas, and engaging with historical and legal scholarship.
- to improve fluency and proficiency in and historical thinking, legal analysis, primary source analysis, essay writing, and critical analysis.
- to learn to read judicial opinions and legislative enactments to use them as evidence for legal and historical arguments.
- to develop comprehensive and deep knowledge of the history of the United States Constitution, including the Revolutionary context of its framing in the 1780s, the two

major historical periods of its transformation during Reconstruction and the 1960s, and the effects of those transformations up to the present.

What will I be able to do at the end of the semester?

Narrative: Write complex historical narratives that answer a question or solve a problem using a sophisticated understanding of causation, continuity, and change.

Inquiry: Support and revise claims about the past using critical approaches to the available evidence.

Knowledge and Analysis: Perform historical analysis on constitutional concepts such as judiciability, the commerce power, federalism, due process, and equal protection.

Empathy: Look for the strengths and insights offered by alternative points of view, especially if they conflict with your own or conventional understandings.

Style: Communicate clearly and concisely in writing, with appropriate detail and awareness of audience.

Self-reflection: Show you can think reflexively and critically about yourself as a student of history.

Course Readings:

Books:

Kermit Hall, Timothy S. Huebner, eds. *Major Problems in American Constitutional History: Documents and Essays* (Boston: Wadsworth Cengage Learning, 2010) ISBN 978-0-618-54333-5

Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2015) ISBN 978-0465064908

J. Douglas Smith, *On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought 'One Person, One Vote' to the United States* (New York: Hill & Wang, 2014) ISBN 978-0809074242

Selected Films and Media:

Amistad (1997)

NBC "The Nation's Future" (1960 Martin Luther King and James J. Kilpatrick, debate "Are the Sit-In Strikes Justifiable?")

Anna (2018)

Digital and Edition Projects:

[NBER/Maryland State Constitutions Project](#)

[Founders Online](#)

[A Century of Lawmaking, Library of Congress](#)

[Slaves and the Courts, Library of Congress](#)

[American State Papers, Library of Congress](#)

[Oyez, Oyez](#)

[O Say Can You See: Early Washington D. C. Law and Family](#)

Proquest Historical Newspapers (UNL Libraries)

Nineteenth-century American Newspapers (UNL Libraries)

A Documentary History of the First Federal Congress of the U.S. (20 vol., UNL Libraries)

Grading Scale:

A+ 97-100	C+ 77-79
A 94-96	C 74-76
A- 90-93	C- 70-73
B+ 87-89	D+ 67-69
B 84-86	D 64-66
B- 80-83	D- 60-63

F below 60

Grading:

First Essay (4-5 pages)	100 points
Second Essay (4-5 pages)	200 points

Third Essay (5-7 pages)	300 points
Final Exam (take home)	200 points
Posts (5)	200 points
Attendance/Participation	200 points
	=====
	1000 points
Extra Credit	100 points

Extra Credit/Honors Credit: On November 15, 2018 we will hold a Constitution Night presentation in conjunction with the Honors Program. This event will be open to the public and will feature student presentations on core constitutional questions. Each presenter will have 5-7 minutes. You will research a constitutional matter of your choosing (in consultation with me), turn in a three page annotated outline, and present at Constitution Night an analysis of its historical and contemporary significance. Students may use the third paper in this course for this presentation.

Posts: You will complete five two-page reflection posts spread out through the semester. These posts interpreting secondary readings (Amar, Smith, et al.) and the primary source documents from Hall and Huebner, *Major Problems*, are meant for you to try out ideas, gain fluency in historical thinking, and to demonstrate use of primary source evidence in the service of larger argument. These regular, brief writings are an essential aspect of the practice of scholarly engagement. Each will be assessed on a 10-point scale based on: clarity of analysis, quality of historical thinking, and the effectiveness of the use of primary source evidence. The five two-page hand-in assignments count 200 points total (20 %). Participation in class discussion will count 200 points total (20 %). Posts are due Friday 5 p.m. of the week you select.

Citation: You may use any citation system that you wish (MLA parenthetical reference style, *Chicago Manual of Style*, legal citation), as long as your references are clear, complete, and consistent.

First Essay: Write a case brief for one of the five cases we studied in Unit I (Foundations) using at least three other documents assigned in the course. You should write this as a narrative summary of the case, including the legal and constitutional issues at stake, the Court's holding, and its rationale. In addition, you should include your own argument assessing the legal reasoning behind the decision and the how the broader social and historical context may have shaped the decision.

Second Essay:

Option 1: Select a historical state constitution to investigate using the digital projects for assigned in this class and examine relevant newspaper coverage of the state constitutional

convention. Explain one or two specific ways that the state's constitution attempted to break new ground (for good or bad) or alter the state's previous constitution and how these changes were justified as constitutional.

Option 2: Did the Supreme Court misinterpret the 14th Amendment in the cases from the *Slaughterhouse Cases* to *Plessy v. Ferguson*? Why or why not? Use the digital projects for assigned in this class to support a historical argument.

Option 3: Was *Muller v. Oregon* (1908) a victory for women? Why or why not? Use the digital projects for assigned in this class to support a historical argument.

Third Essay: Research a contested aspect of the American Constitution using the digital projects assigned in this class or other approved digital projects. Consult with me on your topic by no later than the beginning of the third unit. How did historical change shape that issue over time? What alternatives were possible and why? And what contemporary significance does that history have for this issue? Examples include: free speech rights, the rights of religious minorities, immigration and the plenary power doctrine, tensions between the rights of the accused and victims' rights, affirmative action, civil liberties after Sept. 11th.

Final Exam: The final exam will be take home short answer format.

Academic Policies

Attendance: Attendance at all lectures and class periods is required. More than three (3) unexcused absences may result in an F in the course.

Participation: Students will be assessed based on the quality of their contributions to and participation in the discussion of readings in class. Participation will be graded on completion of occasional in-class writing assignments and hand-ins. Please remember to post these to Canvas the day they are due for discussion.

Use of Electronic Devices: Students may only use electronic devices for supervised class projects. Note taking in this class is strongly encouraged using pen and paper in a standard notebook. All note-taking in this class should be by hand unless an accommodation is requested and approved.

Timely Completion of Work: Essays and assignments will not be accepted in email format or as attachments, unless otherwise specified. Hard copy should be handed in at the class session they are due or posted on Canvas as directed. Assignments will not be accepted after the due dates except in cases where students can document an illness, family emergency, or university-related responsibility that prevented them from completing the assignment on time. Late assignments will result in half letter grade penalty each day that they are overdue.

Communication: Students are expected to use Canvas in this course and to follow their email correspondence regularly during the semester to stay informed on any changes in the course syllabus.

Academic Resources: The University of Nebraska-Lincoln Writing Center can provide you with meaningful support as you write for this class as well as for every course in which you enroll. Trained peer consultants are available to talk with you as you plan, draft, and revise your writing. Please check the Writing Center website for locations, hours, and information about scheduling appointments. (<http://www.unl.edu/writing/>)

Academic Accommodation: Students with disabilities or in need of academic accommodation are encouraged to contact the instructor for a confidential discussion of their individual needs for academic accommodation. It is the policy of the University of Nebraska-Lincoln to provide flexible and individualized accommodation to students with documented disabilities that may affect their ability to fully participate in course activities or to meet course requirements. To receive accommodation services, students must be registered with the Services for Students with Disabilities (SSD) office, 132 Canfield Administration, 472-3787 voice or TTY.

Academic Integrity: All students are expected to adhere to the University policies regarding academic honesty set forth in the Undergraduate Bulletin. Cases of academic dishonesty (plagiarism, cheating, misrepresentation) will be handled in strict accordance with the guidelines of the University. A violation of academic integrity may result in an F for the course and referral to the Dean of Students.

Academic Freedom: Academic freedom of expression is essential to reasoned discourse, learning, and scholarship. Students will be expected at all times to engage in analysis and discussion in an atmosphere of cordiality, respect, honor, and dignity. Students will be expected to consider complex issues and controversial topics with respect for views that may differ from their own. Students should be familiar with and consult the following important resources in the Office of Student Affairs at the University of Nebraska, describing the rights and responsibilities of both students and faculty in the classroom:

1. The Student Code of Conduct-- <http://stuafs.unl.edu/ja/code/>
2. The Student in the Academic Community--Classroom Rights and Responsibilities <http://stuafs.unl.edu/ja/community/two.shtml>

Grading Options: Students taking this course P/NP option must earn an 80 or above to pass the course.

Office Hours:

Students are welcome to come by regular office hours to discuss the course, the history major, assignments, or other academic issues. Students are also welcome to schedule a meeting outside of office hours. The best way to reach me is always by email, and I encourage all students to communicate questions directly.

Schedule of Assignments:

(note: all assignments and due dates are subject to change as necessary in the semester)

All readings are to be read for the days they are assigned.

UNIT I: FOUNDATIONS

Week 1: WHAT IS CONSTITUTIONAL HISTORY?

Aug. 21: Introduction

Read the following for class and prepare to discuss--pick one concept or phrase you think is open to interpretation and explain why.

The Constitution of the United States (Hall and Huebner, *Major Problems*, pp. 557-573)

Aug. 23: Read the following for class and prepare to discuss

Amar, *America's Unwritten Constitution*, chapter 1, pp. 1-49.

Week 2: HOW AND WHY WAS THE CONSTITUTION CREATED?

Aug. 28: Read the following for class and prepare to discuss

Documents from Hall and Huebner, *Major Problems*, chapter 2

Political Theorist John Locke Describes the Ends of Political Society and Government, 1690

American Colonists Declare Their Independence, 1776

The American Colonies Form a Confederation, 1777

Delegates Debate the Creation of a National Legislature, May-June, 1787

Delegates Debate Slavery and Representation, June-July, 1787

Delegate James Madison Advocates an Extended Republic, 1788

Essay from Hall and Huebner, *Major Problems*, chapter 2

Jan Lewis, "Representation of Women in the Constitution"

Aug. 30: Read the following for class and prepare to discuss:

Amar, *America's Unwritten Constitution*, chapter 2, pp. 49-94

Two-page reflection post on due Aug. 31 5 p.m.

Week 3: WHERE DO RIGHTS COME FROM?

Sept. 4 Read the following for class and prepare to discuss

Documents from Hall and Huebner, *Major Problems*, chapter 3

Virginian James Madison Champions Religious Liberty, 1785

Anti-Federalist George Mason Outlines his Objections to the Proposed Constitution,
1787

Madison Advocates a Bill of Rights, 1789

The Sedition Act Limits Criticism of the National Government, 1798

The Virginia and Kentucky Resolutions Decry the Abuse of National Power, 1798-1799
Lyon's Case, 1798

Sept. 6 Read the following for class and prepare to discuss

Amar, *America's Unwritten Constitution*, chapter 3, pp. 95-138

Two-page reflection post on due Sept. 7 5 p.m.

WEEK 4: WHAT IS JUDICIAL REVIEW?

Sept. 11 Documents from Hall and Huebner, *Major Problems*, chapter 4

Federalist Alexander Hamilton Defends Judicial Review, 1788

Kemper v. Hawkins, 1793

Republican John Breckenridge Advocates the Repeal of the Federalist's Judiciary Act,
1802

Marbury v. Madison, 1803

Martin v. Hunter's Lessee, 1816

McCulloch v. Maryland, 1819

Sept. 13 Essays --select one-- from Hall and Huebner, *Major Problems*, chapter 4

Larry D. Kramer, "Marshall, *Marbury*, and the Defense of Judicial Review"

Sylvia Snowiss, "Judicial Review and the Law of the Constitution"

Timothy S. Huebner, "Spencer Roane, Judicial Power, and State Sovereignty"

FIRST ESSAY DUE SEPT. 17th 5 p.m.

Write an analysis of one of the five cases we studied in Unit I (Foundations) using at least three other documents assigned in the course. You should write this as a narrative summary of the case, the legal and constitutional issues at stake, the Court's holding, and its rationale. In addition, you should include your own argument assessing the legal reasoning behind the decision and the how the broader social and historical context may have shaped the decision.

UNIT II: TRANSFORMATIONS

WEEK 5: THE STATES

Sept. 18 Documents from Hall and Huebner, *Major Problems*, chapter 5

South Carolinian John C. Calhoun Proposes Nullification, 1828

President Andrew Jackson Advocates Indian Removal, 1829

Cherokee Nation v. Georgia, 1831

Worcester v. Georgia, 1832

South Carolina Nullifies the Tariff, 1832

Sept. 20 Amar, *America's Unwritten Constitution*, chapter 5, pp. 201-241

WEEK 6: WAR

Sept. 25 Documents from Hall and Huebner, *Major Problems*, chapter 6

Abolitionist Frederick Douglass Describes the Constitution as Anti-Slavery, 1852

Dred Scott v. Sanford, 1857

President Abraham Lincoln Rejects Secession and Criticizes the Supreme Court, 1861

Ex parte Merryman, 1861

Lincoln Emancipates Slaves in the Confederacy, 1863

Lincoln Defends His Suspension of the Writ of Habeas Corpus, 1863

Sept. 27 Amar, *America's Unwritten Constitution*, chapter 6 pp. 243-275

WEEK 7: THE FOURTEENTH AMENDMENT

Oct. 1-2 [Nebraska Supreme Court attendance](#) 9:00 a.m. or later -- NO CLASS

Attend a session of the Nebraska Supreme Court--write a two-page post on a.) the constitutional issues at stake in the case and b.) what you observed about the manner in which Americans enact the constitution. Due Friday 5 p. m.

Oct. 4 Documents from Hall and Huebner, *Major Problems*, chapter 7

Congress Debates the Fourteenth Amendment, 1866

The Slaughterhouse Cases, 1873

Bradwell v. Illinois, 1873

Minor v. Happersett, 1875

The Civil Rights Cases, 1883

Plessy v. Ferguson, 1896

Essays -- select one from Hall and Huebner, *Major Problems*, chapter 7

Michael Les Benedict, "The Conservative Basis of Radical Reconstruction"

Joan Hoff, "The Supreme Court's Denial of the Rights of Women"

Two-page reflection post on due October 5 5 p.m.

WEEK 8: THE LOCHNER ERA

Oct. 9 Documents from Hall and Huebner, *Major Problems*, chapter 8

Legal Scholar Christopher G. Tiedeman Advocates a Limited Police Power, 1886

The People's Party Announces Its Agenda for Reform, 1896

Lochner v. New York, 1905

Reformers Louis D. Brandeis and Josephine Goldmark Document the Hardships Faced
by Women Industrial Workers, 1908

Muller v. Oregon, 1908

Legal Scholar Roscoe Pound Criticizes the Liberty to Contract, 1909

Adkins v. Children's Hospital, 1923

Oct. 11 Essays from Hall and Huebner, *Major Problems*, chapter 8

Paul Kens, "The Lochner Court and Judicial Conservatism"

Julie Novkov, "Gender, Law, and Labor in the Progressive Era"

WEEK: THE WARREN COURT

Oct. 16 NO CLASS/FALL BREAK

Oct. 18 Amar, *America's Unwritten Constitution*, chapter 4, pp. 139-200.

SECOND ESSAY DUE OCT. 22nd 5 p.m.

Option 1: Select a historical state constitution to investigate (using the digital projects for assigned in this class) and examine relevant newspaper coverage of the state constitutional convention. Explain one or two specific ways that the state's constitution attempted to break new ground (for good or bad) or alter the state's previous constitution and how these changes were justified as constitutional.

Option 2: Did the Supreme Court misinterpret the 14th Amendment in the cases from the *Slaughterhouse Cases* to *Plessy v. Ferguson*? Why or why not? Use the digital projects for assigned in this class to support a historical argument.

Option 3: Was *Muller v. Oregon* (1908) a victory for women? Why or why not? Use the digital projects for assigned in this class to support a historical argument.

UNIT III: CONTEST

WEEK 9: PARTIES AND VOTING

Oct. 23 Amar, *America's Unwritten Constitution*, chapter 10, pp. 389-416.

Oct. 25 J. Douglas Smith, *On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought 'One Person, One Vote' to the United States* (New York: Hill & Wang, 2014), pp. 1-99.

WEEK 10: CIVIL RIGHTS

Oct. 30 Documents from Hall and Huebner, *Major Problems*, chapter 11

Sweatt v. Painter, 1950

An Amicus Brief Filed by the U.S. Government Urges an End to Racial Segregation,
1953

Brown v. Board of Education, I, 1954

Brown v. Board of Education, II, 1955

White Southern Members of Congress Declare Their Opposition to Brown, 1956

The Civil Rights Act Forbids Discrimination in Public Education and Employment, 1964

Nov. 1 Smith, *On Democracy's Doorstep: The Inside Story of How the Supreme Court Brought 'One Person, One Vote' to the United States*, pp. 99-287.

Two-page reflection post on due Nov. 2 5 p.m.

WEEK 11: EQUALITY

Nov. 6 Documents from Hall and Huebner, *Major Problems*, chapter 12

Griswold v. Connecticut, 1965

A Proposed Constitutional Amendment Promises Equal Rights for Women, 1972

Fundamentalist Pastor Jerry Falwell Denounces the ERA, 1980

Planned Parenthood of Southeastern Pennsylvania v. Casey, 1992

Nov. 8 Amar, *America's Unwritten Constitution*, chapter 7, pp. 277-305

Two-page reflection post on due Aug. Nov. 7 5 p.m.

WEEK 12: RELIGION

Nov. 13 Documents from Hall and Huebner, *Major Problems*, chapter 13

Engel v. Vitale, 1962

President John F. Kennedy Comments on the School Prayer Decision, 1962

Lemon v. Kurtzman, 1971

Wallace v. Jaffree, 1985

Employment Division, Department of Human Resources of Oregon v. Smith, 1990

Congress Overturns Smith in the Religious Freedom Restoration Act, 1993

Zelman v. Simmons-Harris, 2002

Nov. 15 NO CLASS / CONSTITUTION NIGHT PRESENTATIONS

WEEK 13: PRESIDENTIAL POWER

Nov. 20 Documents from Hall and Huebner, *Major Problems*, chapter 15

Youngstown Sheet & Tube Co. v. Sawyer, 1952

United States v. Nixon, 1974

Congress Authorizes President George W. Bush to Fight International Terrorism, 2001

The Justice Department Asserts that Enforcement of Federal Anti-Torture Laws Would Violate the President's Powers as Commander-in-Chief, 2002

Hamdi v. Rumsfeld, 2004

Amar, *America's Unwritten Constitution*, chapter 8, pp. 307-332.

THANKSGIVING

WEEK 14: MAJORITY RULE

Nov. 27 Amar, *America's Unwritten Constitution*, chapter 9, pp. 334-387.

Nov. 29 NO CLASS / RESEARCH

THIRD ESSAY DUE Nov. 30th 5 p.m.

Research a contested aspect of the American Constitution or a particular court case using the digital projects assigned in this class or other approved digital projects. Consult with me on your topic by no later than the beginning of the third unit. How did historical change shape that issue over time? What alternatives were possible and why? And what contemporary significance does that history have for this issue? Examples include: free speech rights, the rights of religious minorities, immigration and the plenary power doctrine, tensions between the rights of the accused and victims' rights, affirmative action, civil liberties after Sept. 11th.

WEEK 15: WRAP UP

Dec. 4 Amar, *America's Unwritten Constitution*, chapter 11, pp. 417-448.

TAKE HOME EXAM ASSIGNMENT

Dec. 6 Final Discussion

EXAM WEEK DEC 10th - DEC 14th

TAKE HOME EXAM DUE DEC 13th 5 p.m.

HIST 341

Brief Guidelines on Essay Writing:

--Do not use the 1st person

--Avoid generalizations and qualifiers (such as, very, pretty much, sort of)

--Use only the past tense

Essay Grading Guidelines:

What is an "A" paper?

Follows assignment criteria and addresses questions

Contains a well-written, clearly presented thesis statement

Contains clearly organized and fully developed arguments in every area of the paper--balanced with evidence for each major argument

Includes a range and depth of sources and evidence to support arguments

Ideas demonstrate thought beyond the obvious

Very few or no grammar mistakes, superior style, polished prose

"A+" grade: the paper demonstrates exceptional thought beyond the obvious

"A-" grade: the paper demonstrates all of the criteria for an A grade, but with some deficiency in one area.

What is a "B" paper?

Follows assignment criteria and addresses questions

Contains a thesis statement

Contains clearly organized arguments

Slightly underdeveloped arguments

Includes necessary sources and evidence to support the argument, but without the range and breadth of an A paper

Avoids summarizing and repetition

Some grammar or spelling errors

"B+" grade: the paper demonstrates all of the criteria for an "A" paper, but is deficient in two areas

"B-" grade: the paper demonstrates all of the criteria for a "B" paper, but with some additional deficiency in one area.

What is a "C" paper?

Follows assignment criteria and attempts to address questions

Thesis statement is unclear

Arguments are identifiable, but not clearly organized

Arguments are too brief and underdeveloped

Few (minimum required) sources and evidence to support the main points

Unnecessary summarization and repetition

Several grammar and spelling mistakes

"C+" grade: the paper demonstrates all of the criteria for a "B" paper, but is deficient in two areas

"C-" grade: the paper demonstrates all of the criteria for a "C" paper, but with some additional deficiency in one area.

What is a "D" paper?

Does not follow assignment criteria and does not address questions

Arguments are not identifiable

Arguments are not developed

Sources are few (at minimum or below) and/or improperly used

Several grammar and spelling mistakes

"D+" grade: the paper demonstrates all of the criteria for an "C" paper, but is deficient in two areas

"D-" grade: the paper demonstrates all of the criteria for a "D" paper, but with some additional deficiency in one area.

What is an "F" paper?

Does not follow assignment criteria and does not address questions

There are no arguments

Few or no sources identified

Severe grammar and spelling mistakes

Evidence of plagiarism is an automatic failing grade, regardless of paper quality