

Political Science 41  
The American Constitution I  
The Structure of Rights  
Fall 2010  
Professor Arkes

## I. The Foundations of Law and Polity

- Aristotle, *The Politics*, Bk. I,A (1252a-1253a); Bk. III, C, ch. 9 (ca. 1280-1281a) [Principles of Oligarchy and Democracy, and the Nature of Distributive Justice]  
Hadley Arkes, *The Philosopher in the City*, pp. 3-20  
Harry Jaffa, *Crisis of the House Divided*, pp. 302-62  
Lincoln, Peoria Speech (October 16, 1854), especially pp. 263-66 [Electronic Reserve]  
-Speech on the Dred Scott Decision ("The Declaration of Independence Includes All Men") [June 1857], especially pp. 5-6 [Electronic Reserve]  
-Excerpts from debates with Douglas, pp. 104-111 [On Electronic Reserve]  
Excerpts from Douglas at Jonesboro (September 15, 1858), and Lincoln at Quincy (October 13, 1858)  
Lincoln, First Inaugural Address, especially pp. 4-5  
[Recommended: Arkes, *Constitutional Illusions & Anchoring Truths*, ch. 2 ("The Natural Law--Again, Ever"), pp. 43-78  
From Madison's notes on the Constitutional Convention: Remarks on the problem of slavery and the Constitution--Madison, Rufus King, and Gouverneur Morris (June 30, July 11, August 8, 1787)

## II. The Ends of the American Republic: Natural Rights and the Constitution

### The Framing of the Constitution

- Max Farrand (ed.) *Records of the Federal Convention*, Vol. I, pp. 3-5, 18-23, 33-38
  - The New Jersey Plan (Patterson) [June 15], in Farrand, 242-45; discussion and criticism, 250-56
  - Hamilton weighs in [June 18], 282-93
  - Exchange between Sherman and Madison, 132-37
  
- On the nature and place of the Executive in the constitutional scheme
  - Notes from the Constitutional Convention, edition assembled by Philip Kurland and Ralph Lerner (eds.) *The Founders' Constitution*, Vol. 3, pp. 486-501, 534-50
  - Kurland and Lerner, Vol. 4, pp. 1-5
- The Constitution of the United States--with Amendments

[Recommended: Jack Rakove, "The Concept of Ratification," in Original Meanings, pp. 94-130]

John Locke, *Second Treatise on Civil Government*, chs. I-IV (paragraphs 1-51)

James Wilson, "Of the Natural Rights of Individuals," in *Works*, II, 585-610

Gordon Wood, "The Irrelevance of a Bill of Rights," in *The Creation of the American Republic, 1776-1787*, pp. 536-43

Alexander Hamilton, *The Federalist* #84

Theodore Sedgwick, expressing dubiety about specified "rights," Debates in the First Congress (August 15, 1789)

Madison, on the question of a Bill of Rights

Arkes, "On the Dangers of a Bill of Rights: Restating the Federalist Argument," in *Beyond the Constitution*, pp. 58-80

-*Goldman v. Weinberger*, 89 L Ed 2d 478, 482-88, 497-500 (1986)

-Stephen Halbrook, "The Original Understanding of the Second Amendment," in Eugene Hickock (ed.), *The Bill of Rights*, pp. 117-29

-*District of Columbia v. Heller* (2008) [Electronic Reserve]

[Recommended:

-*McDonald v. Chicago* (2010) [The Court extends the Second Amendment to the States] slip opinion (Electronic Reserve)

-Nelson Lund, "Taking the Second Amendment Seriously," in *The Weekly Standard* (July 24, 2000), pp. 21-26 [Electronic Reserve]

-*Parker v. Fenty* (2007) [Electronic reserve]

-Joyce Malcolm, *The Right to Bear Arms*]

*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)

*Terminiello v. Chicago*, 337 U.S. 1 (1949)

[Recommended: Cox v. Louisiana, 379 U.S. 536 (1965)]

*Cohen v. California*, 403 U.S. 15 (1971)

Arkes, *The Philosopher in the City*, pp. 13-16, 23-91 ("Discourse and Defamation"; and the Philosophic Foundation for the Restriction of Speech")

*Shaare Tefila Congregation v. Cobb*, 95 L Ed 2d 594, 596-98 (1986)

*R.A.V. v. St. Paul* (1992) [the cross-burning case]

[Recommended: *Virginia v. Black* (2003)]

*Madsen v. Women's Health Center* (1994) [demonstrations outside an abortion clinic]

-G. Robert Blakey, "RICO, Civil Disobedience, and Free Speech," Crisis (July/August 1998), pp. 28-29

*Hill v. Colorado* (2000), opinions by Stevens, parts I-V; Scalia, in dissent, and Kennedy, parts IA and III

(Recommended:

-Arkes, "Marching Through Skokie," *National Review* [May 12, 1978], pp. 588-92

-Texas v. Johnson (1989) [the burning of the flag])

*Near v. Minnesota*, 283 U.S. 697 (1931)  
*New York Times v. U.S.*, 403 U.S. 713 (1971) [The Pentagon Papers case]  
*Snepp v. U.S.*, 444 U.S. 507 (1980)  
 Arkes, *Constitutional Illusions & Anchoring Truths*, chs. 4-6, pp. 108-224  
 (recommended for purchase)  
 [Recommended:  
 -Harper & Row v. Nation Enterprises, 85 L. Ed. 2d 588 (1985) [Copyright of the  
 Ford Memoirs]  
 -Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,  
 413 U.S. 376 (1973)]

*Widmar v. Vincent*, 70 L. Ed. 440 (1982) [Evangelicals on the campus]  
 [Note: Congress extends the same rule to high schools, and the statute is upheld  
 in *Westside Schools v. Mergens* (1990) See also *Rosenberger v. U. of  
 Virginia*, 132 L Ed 2d 700 (1995) and *Capital Sq. Review Bd. v. Pinette*, 132 L Ed  
 2d 650 (1995)]

Walter Berns, "Religion and the Founding Principle," and Religion and the Court, in  
*The First Amendment and the Future of American Democracy*, pp. 1-55  
 [Recommended: Stephen Presser, *Recapturing the Constitution*, pp. 33-40,  
 225-41]

*Zobrest v. Catalina Foothills School District* (1993) [pp. 1-12]  
*Agostini v. Felton* (1997)  
 [Recommended: *Mitchell v. Helms* (2000), opinion by Thomas, concurrence by  
 O'Connor, dissent by Souter]

*Locke v. Davey* 540 U.S. 712 (2004)  
*Lee v. Weisman* (1992) [opinions of Kennedy and Scalia]  
 [Recommended:  
 -*Santa Fe v. Doe* (2000) (prayers by students at high school football games)]  
 -*Elk Grove School Dist. v. Newdow* (2004) Electronic Reserve  
 [the pledge of allegiance]  
 -*Edwards v. Aguillard*, 96 L Ed 2d 510 (1987) [On the teaching of Creation  
 Science]  
 -*Bowen v. Kendrick* (1988)]  
 [Recommended:  
 -*McCreary County (Kentucky) v. ACLU* (2005) (On the Ten  
 Commandments)  
 -*Van Orden v. Perry* (2005)]

*Bob Jones University v. U.S.*, 76 L. Ed. 2d 157 (1983)  
 --Arkes, "And Yet ...A Good Word on Behalf of the  
 Legal Positivists, *Constitutional Illusions*, pp. 225-53

*Loving v. Virginia*, 388 U.S. 1 (1967)  
*Zablocki v. Redhail*, 434 U.S. 374 (1974)  
 [Recommended:

- Mullinix v. Mullinix*, 278 A. 2d 674 (1971)
- Bateman v. Arizona*, 50 L. Ed. 2d 32 (1976)]
- Arkes, *The Philosopher in the City*, pp. 385-88, 413-19, 427-50
- Barnes v. Glen Theatre*, 115 L Ed 2d 504 (1991)
- Lawrence v. Texas* (2003)
- [Recommended: *Goodridge v. Dept. of Public Health* [Supreme Judicial Court of Massachusetts (2003)] Electronic Reserve
  
- James Madison, *The Federalist* #10 and 51
- First National Bank of Boston v. Bellotti*, 55 L. Ed. 2d 707 (1978)
- Buckley v. Valeo*, 46 L. Ed. 2d 659, Part I, (1976)
- NAACP v. Alabama*, 357 U.S. 449 (1958)
- Bryant v. Zimmerman*, 278 U.S. 63 (1928)
- [Recommended: *Doe v. Reed* (2010) slip opinion (On making public the Signers of a petition for a referendum on marriage) Electronic Reserve]
- Citizens United v. Federal Election Commission* (2010) slip opinion [Electronic Reserve]
- [Recommended:
- McConnell v FEC* (2004) [Electronic Reserve]
- Federal Election Comm'n v. Wisconsin Right to Life* (2007)] [Electronic Reserve]
- Report of the Committee to Consider the Relationship Between Amherst College and the CIA (1978) (Electronic Reserve)]
- Bradley Smith, *Unfree Speech*, pp. 1-13, 41-45, 201-27
- Boy Scouts of America v. Dale* (2000), Rehnquist, and the dissent by Stevens
- [Recommended:
- Christian Legal Society v. Martinez* (2010)
- Adair v. U.S.*, 208 U.S. 61 (1908)
- Coppage v. Kansas*, 236 U.S. 1 (1915)]
  
- U.S. v. Lovett*, 328 U.S. 303 (1946)
- Cummings v. Missouri*, 71 U.S. 277 (1867)
- Ex parte Garland*, 71 U.S. 333 (1867)
- Leonard Levy, *Jefferson and Civil Liberties*, pp. 25-41
- Jefferson, Defense of the Bill of Attainder, in *Writings*, Vol. XIV, pp. 271-78
- Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)
- Arkes, "On the Novelties of an Old Constitution," in *Constitutional Illusions*, pp. 13-42
- [Recommended:
- Bernard Siegan, *Economic Liberties and the Constitution*, ch. 3, pp. 60-82 (The puzzle of ex post facto laws)
- California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)]

## II. On the Constitutional Discipline of Legislating: Delegations of Authority, Takings of Property, "Substantive Due Process"

*Nollan v. California Coastal Commission*, 97 L Ed 2d 677, 683-706

[Recommended:

*First Lutheran Church v. Los Angeles*, 96 L Ed 2d 250 (1987)

*Panama Refining Co. v. Ryan* (1935)

*Schechter v. U.S.*, 295 U.S. 495 (1935)

*Lucas v. So. Carolina Coastal Council*, 120 L Ed 2d 798 (1992)

*Dolan v. City of Tigard*, 129 L Ed 2d 304 (1994)]

*Kelo v City of New London* (2005)

*Truax v. Raich*, 239 U.S. 33, 35-44 (1915)

Arkes, *The Return of George Sutherland*, ch. III, pp. 51-82. [Electronic Reserve]

[Recommended:

-*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932)

-*Nebbia v. New York*, 291 U.S. 502 (1934)]

*Ferguson v. Skrupa*, 372 U.S. 726-33 (1963)

[Recommended: *Moore v. East Cleveland*, 431 U.S. 494, 495-506, 521-23, 541-51 (1977) Electronic Reserve]

Arkes, "*Lochner* and the Cast of our Law," in *Constitutional Illusions*...pp. 79-107

[Recommended: Siegan, *Economic Liberties and the Constitution*, pp. 24-59, 110-55]

*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)

*Skinner v. Oklahoma*, 316 U.S. 535 (1942)

Daniel Robinson, "Persons: Their Nature and Their Rights," in his *Psychology and Law*, pp. 177-87

[Recommended:

-*Akron v. Akron Center for Reproductive Health*, 76 L. Ed. 2d 687, pp. 696-703, 708-717 (of the majority opinion), 717-21, 728-32 (in the dissenting opinion) (1983)

[Informed consent in abortions]

-*Casey v. Planned Parenthood* (1992)]

## IV. The Structure of Rights: The Imperial Judiciary and the Erosion of the Separation of Powers

Lino Graglia, *Disaster by Decree*, pp. 46-66

[Recommend:

-Arkes, "Segregation, Busing and the Idea of Law," *The Philosopher in the City*, pp. 223-55

-Symposium on "The Judicial Usurpation of Politics," First Things (November 1996), pp. 18-42]

Antonin Scalia, *A Matter of Interpretation*, pp. 3-47

-Comment by Gordon Wood, pp. 49-63

[Recommended: Comment by Laurence Tribe, pp. 65-94]

-Rejoinder by Scalia, pp. 129-49

[Recommended: Arkes, "Scalia Contra Mundum," Harvard Journal of Law & Public Policy (Fall '97), pp. 231-50]

Basil Uddo, "Perverting the Power of the Purse," Human Life Review (Spring 1980), pp. 49-58

[Recommended:

-Arkes, "On the Public Funding of Abortions," Human Life Review (Winter 1980), pp. 86-107

-Missouri v. Jenkins, 109 L Ed 2d 31 (1990)

-Spallone v. U.S., 107 L Ed 2d 644 (1990) ]

Report on the Human Life Bill, Senate Committee on the Judiciary (December 1981), Sections on the constitutionality of challenging Roe v. Wade and altering the jurisdiction of the federal courts

[Recommended:

-John Noonan, "In Re the 'Human Life Bill,'" Human Life Review (1981), pp. 65-79

-Stephen Galebach, "A Human Life Statute," Human Life Review (Winter 1981), pp. 5-33]

--*City of Boerne v. Flores* (1997) [striking down the Religious Freedom Restoration Act]

--compare: *Katzenbach v. Morgan*, 384 U.S. 641 (1966)]

--Russell Hittinger, "Government by the 'Thoughtful Part,'" in *The End of Democracy II*, pp. 22-43]

Hamilton, *The Federalist* #78

*Marbury v. Madison*, 1 Cranch 137; 2 L. Ed. 60 (1803)

Lincoln, On the limits to the authority of the Supreme Court in deciding the Dred Scott case

--Arkes, *First Things*, pp. 416-422

Arkes, "On the Moral Standing of the President as an Interpreter of the Constitution," PS [Political Science] (Summer 1987), pp. 637-42

[Recommended: Arkes, *Natural Rights & the Right to Choose*, pp. 215-29 (From "Finding Home Ground")]

V. The Completion of Republican Government: The President as a Source of Stability and Energy

Hamilton, *The Federalist* #70-72

*Curtiss-Wright v. U.S.*, 299 U.S. 304 (1936)

*Youngstown Sheet and Tube v. Sawyer* (1952) [The seizure of the steel mills]

Papers from the Founding: Debates on the Executive in the Constitutional Convention  
(Morris, Wilson, Madison, Gerry, Mason et al.)

[Recommended: Arkes, "In This Vast External Realm," in *The Return of George Sutherland*, pp. 196-241 (Electronic Reserve)]

John Yoo, *The Powers of War and Peace*, pp. 143-79

[Recommended:

- Joseph Bishop, "The War Power," in *Justice Under Fire*, pp. 175-223  
[Electronic Reserve]

-Ex parte Quirin, 317 U.S. 1 (1942)]

*Rasul v. Bush* (2004)

*Hamdan v. Rumsfeld* (U.S. Court of Appeals, DC, 2005) [with John Roberts in the majority]

*Hamdan v Rumsfeld* (2006), 165 L. Ed. 2d 723 [Electronic reserve]

[With Roberts recusing himself, his decision in the lower court was reversed, but then Congress went on in turn to undo the main lines of the decision, and confirm to the Executive and the military the authority to try unlawful combatants. See the Military Commissions Act of 2006.]

*Boumediene v. Bush* (2008), especially the opinions by Kennedy for the majority, pp. 9-52, and Roberts in dissent, 54-84 [Electronic Reserve]

-Michael Mukasey, *Aftermath of Boumediene*, Speech at AEI, July 21, 2008

-“Reason and Wiretaps,” *Wall Street Journal* (August 8, 2007)

-Robert Jackson, *That Man*, pp. 46-50, 81-103 [FDR, working out the exchange of destroyers for British bases—the legal and political complications ] [Electronic Reserve]

[Recommended:

-*Medellin v. Texas* (2008) (Sup Ct denies that the President has Authority to override the laws on capital punishment by adhering to an international convention)

-*Immigration and Naturalization Service v. Chadha* (1983)

-Louis Fischer, "Veto: Presidential and Legislative," in *Constitutional Conflicts Between Congress and the President*, pp. 140-83]

-*Bush v. Gore* (2000)

-Nelson Lund, "The Unbearable Rightness of *Bush v. Gore*" ]

## VI. At the Limits of the Regime: The President and a "Government of Laws"

On the powers of Impeachment: *The Federalist* #65-66

[Recommended:

-Richard Posner, *An Affair of State* [on the impeachment of Bill Clinton], pp. 95-169, 225-48, 262-66 (Electronic Reserve)

-Christopher Hitchens, *No One Left to Lie To*, pp. 87-113 (Electronic Reserve)

-*Morrison v. Olson* (1988) (the Independent Counsel case)]

Victoria Toensing, "Trial in Error" Washington Post, February 2007 [On the adventures of Patrick Fitzgerald and an Executive backing away from responsibility to directing prosecutions]

Hamilton, *The Federalist* #9, 17

Lincoln, "The Perpetuation of Our Political Institutions" (1838), in *Current* (ed.), pp. 11-21

Letter to Erastus Corning (1863), pp. 248-59

Lincoln, On Suspending the Writ of Habeas Corpus

[Recommended:

-Luther v. Borden, 48 U.S. 1 (1849)

-The Prize Cases, 67 U.S. 635 (1862)]

-Arkes, "In This Vast External Realm," The Return of George Sutherland, ch. 7]

- *Hamdi v. Rumsfeld III*, 316 F.3d 450 (2003) ]

- Harvey Mansfield, "Machiavelli and The Modern Executive," *Taming the Prince*, pp. 121-49]