

MODULE 1A

Constitutional Interpretation; The Power of Political Control over the Supreme Court

Constitutional Law · Fall 2026 · Tuesday / Thursday, Central Islip

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And over the state courts too

Marbury reviewed Congress. These two made review uniform — and Cohens is Marbury again.

MARTIN — 1816

**§ 25 stands. Federal questions
end here, wherever they start.**

Story writes. Marshall recuses — the Fairfax lands were partly his. He did not recuse in Marbury.

COHENS — 1821

**And in a criminal case
the State itself brought.**

Marshall takes the jurisdiction — then rules for Virginia on the merits. No order to defy.

Story's argument is structural, not textual: a federal law that means one thing in Virginia is not a federal law.

Which is a constitutional holding with no text behind it. Keep it — in an hour you will be asked whether that is allowed.

Three questions, one problem

Tuesday decided that somebody has to be the ultimate interpreter. Now the hard part.

MOVEMENT ONE

**Why must anyone
interpret at all?**

The text is short, vague and full of
voids — by necessity, not by accident.

MOVEMENT TWO

**What may the
interpreter
consult?**

Calder v. Bull. Federalist 78.
The nine sources. Barbara.

MOVEMENT THREE

**Can Congress take the
question away?**

The Exceptions Clause. McCardle,
Yerger, Klein, Patchak — and Johnson.

A power that another branch can withdraw is not a check on that branch. Test that sentence all day.

How many times does the word appear?

In the original text of the Constitution. Guess before you look.

Privacy

0

Democracy

0

Republic

1

art. IV, § 4

Liberty

1

Preamble

Pursuit of happiness

0

(that's Jefferson)

Equality

0

“equal” × 6, on voting

If the text were self-executing, most of American constitutional law would not exist.

Four reasons the text runs out

Not a drafting failure. A property of the thing.

1

Brevity

About 4,500 words to govern a continental republic for centuries.

2

Vagueness

Due process? Privileges and immunities? Cruel and unusual? Natural born citizen?

3

Voids

The removal power. Discrimination by the federal government — hence *Bolling v. Sharpe*.

4

No right is absolute

“Congress shall make no law...” — and yet.

None of the four is fixable by better drafting.

So what gives?

If the text does not decide the case, something has to. What are the candidates?

CANDIDATE ONE

Amend it.

27 amendments in 237 years — ten of them at once, in 1791. The 27th took 202 years to ratify.

CANDIDATE TWO

Do nothing.

No text, no rule. Then explain *Bolling v. Sharpe*.

CANDIDATE THREE

Interpret it.

Which is what actually happens — and why this course exists.

“Judicial activism” and “living document” are the public names for this fight. Both are epithets, not methods — when either appears in a brief, the writer has stopped arguing.

The gap is structural

My argument, and I will defend it: no written charter can complete itself.

A charter short enough to be ratified is too short to decide the cases it will govern — and no amount of drafting care closes the gap.

1

Strong originalism

treats the document as a closed system with an answer already inside it.

2

But the document counts

apportionment, terms, thresholds.
Counting and succession are enough.

3

So it cannot close

Gaps are structural. The question is not whether you go outside, but where.

This is my position, and it is contestable — the strongest objection to it is in the notes. Press me on it.

The textualist's own problem

The clearest textual warrant for reading rights in — and the Court has spent two centuries avoiding it.

AMENDMENT IX

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

WHAT IT COMMITS YOU TO

A reader faithful to the text is committed by the text to rights the text does not name.

WHAT THE COURT DID INSTEAD

Routed them through due process instead — and has defended the phrase ever since.

If the document tells you the list is incomplete, why build the doctrine somewhere else?

Text versus intent

The two candidates that promise constraint. Watch them come apart.

TEXT

leaks through time.

Whose understanding of the words, and at what date?
Press it and textualism becomes originalism.

INTENT

leaks through altitude.

Specific intent points away from Brown. Abstract
intent points toward it. Nothing in the method picks
the altitude.

THE INTERNAL INCONSISTENCY

If the Framers intended a Constitution that would evolve, an originalist who freezes it defies original intent in the name of original intent.

And the Ninth Amendment is a textual instruction not to read the text as exhaustive. Any theory with nothing to say about it has a hole.

Approaches, and where each one gets its meaning

Every approach is really a claim about which source counts.

Textualism

The plain words of the document.

Consensualism

Current social consensus on what the words mean.

Originalism (narrow / broad)

Intentions or original meanings of the ratifying generation.

Structuralism

The document's arrangement of offices, powers and relationships.

Doctrinalism

The accumulated doctrines of courts.

Minimalism

Decide one case at a time, as narrowly as possible.

Philosophic

The best understanding of the concepts the words refer to.

Pragmatism

Law as instrument — and scepticism about “meaning” itself.

A theory of interpretation is a ranking of sources. Name the source and you have named the approach.

Sotirios A. Barber & James E. Fleming, Constitutional Interpretation: The Basic Questions chs. 4–11 (Oxford Univ. Press 2007).

Static or dynamic

The real trade is flexibility against certainty. Everything else is branding.

STATIC

buys certainty.

- Knowable in advance — people can plan.
- Constrains unelected judges.
- Makes Article V's difficulty mean something.

DYNAMIC

buys longevity.

- The oldest written national constitution still in force.
- Governs technologies two centuries younger than itself.
- A charter that produces absurd answers gets ignored.

Each side claims the other's virtue. Originalists say fixity is what makes it durable; living constitutionalists say adaptation is what makes it certain.

Nobody is a thoroughgoing anything. The real question is which clauses are of which kind — and no method tells you how to sort them.

U.S. Const. (ratified 1788; in force since 1789).

The second axis

Originalism and its rivals are one dichotomy. This is the other, and it cuts across it.

FORMALIST

What kind of thing is this?

Fix the category and the result follows. Buys predictability — you can advise a client.

FUNCTIONALIST

What does it actually do?

Labels are evidence, not answers. Reaches the case nobody drafted for.

The contract said non-exclusive. For years the parties behaved as though it were exclusive.

One of them reads the title. One of them reads the conduct. Neither is cheating — and they lose and win the same case.

Hold on to the formalist move. You will need it in the third movement.

Compare *INS v. Chadha*, 462 U.S. 919 (1983), with *Morrison v. Olson*, 487 U.S. 654 (1988).

Originalism's democratic claim

The strongest argument for it is not about history. It is about who gets to decide.

“Contestable moral questions should be settled by people who can be voted out.” Take that seriously — then explain Marbury.

The real question

Not democracy versus tyranny. Which decisions belong to 50% + 1, and which are withdrawn from majorities.

Formalism / functionalism

Fixed categories, or ask whether the balance is actually threatened.
Predictability against sense.

And consensualism's cost

If meaning tracks consensus, rights are secure exactly as long as they are popular.

Iredell made the objection to consensualism in 1798. That is the next slide.

Calder v. Bull — the founding argument

1798. Five years before Marbury, two Justices disagree about what a court may invoke.

CHASE, J. — AT 387-88

“An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”

Guards against a legislature that stays inside its powers and still does monstrous things.

IREDELL, J. — AT 399

“The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject.”

Guards against judges who dress preference as principle. Both fears are correct — which is why the argument never ends.

When you read Dobbs or Obergefell, you are reading Calder. Substantive due process is Chase with a clause attached.

Where does natural law get its authority?

Three answers, in rough historical order — and a warning about tidy histories.

REVELATION

Blackstone, 1765

*“...dictated by God himself...
no human laws are of any
validity, if contrary to this.”*

Claims everything. Objective because it
is not ours.

REASON

Grotius, 1625

*“...even if we should concede...
that there is no God.”*

Gives up the theological warrant. Keeps
the objectivity.

CONSENSUS

Trop v. Dulles, 1958

*“...the evolving standards of
decency that mark the progress
of a maturing society.”*

Gives up objectivity. A standard society
cannot be measured against.

A WARNING ABOUT THIS SLIDE

This three-step march is my teaching ladder, not a finding. No standard history of natural law periodizes it this way. What scholars actually argue about is the secularization thesis — and Haakonssen, Tierney and Hunter all doubt that Grotius marks a clean break.

Judgment versus will

Hamilton's defence of the whole arrangement — and the sentence that gives the game away.

“It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”

The Executive

holds the sword.

The Legislature

commands the purse.

The Judiciary

has neither — and depends on the first for its judgments.

He wrote “least dangerous to the political rights of the Constitution.” “The least dangerous branch” is Bickel — and Bickel meant it ironically.

Nine sources. Which are law?

You have the approaches. Now rank the sources — and defend the ranking.

1 Text CONVENTIONAL	2 Structure and purpose CONVENTIONAL	3 Natural law and natural rights CONTESTED
4 Tradition and history CONVENTIONAL	5 Precedent CONVENTIONAL	6 Public policy CONVENTIONAL
7 Contemporary morality CONTESTED	8 Intent CONVENTIONAL	9 International norms CONTESTED

Sort them into three piles: legitimate, contested, illegitimate. Then defend where you drew the lines.

Nobody uses one. The ranking usually decides the case before the merits are reached.

Every case in this course is an argument about which of these wins.

Marshall the pluralist

Read Marbury again with the list in hand. Watch what he does.

Text

Structure

Purpose

History

Consequences

The oath

all six arrive at ↓

One conclusion

This is how to write a brief: not your best argument alone, but every road that arrives where you want.

And the objection: if you know the destination, you can build a road from anywhere. Six reasons, or one conclusion in six costumes?

Trump v. Barbara — the demonstration

Six opinions. Shared method, different destinations.

THE JUDGMENT

6 – 3

THE FOURTEENTH AMENDMENT HOLDING

5 – 4

WHY THE TWO NUMBERS DIFFER

Kavanaugh, J., concurs in the judgment and DISSENTS IN PART — he rests on 8 U.S.C. § 1401(a), not the Constitution.

Four opinions argue from founding-era and Reconstruction history — and land in different places.

Shared method is not shared outcome. Naming your methodology does not constrain you.

The personal element

The part of the syllabus nobody wants to teach, and students already believe.

WHAT IS TRUE

Judges have priors, and in the aggregate you can see them.

Iredell said the honest version in 1798.

WHAT IS FALSE

That the doctrine does no work.

Briefs change outcomes. Most decisions are unanimous. And reasoning binds the writer next time.

You cannot argue “you are biased” to a court. You can argue to the ranking.

Which is why the composition of the Court is a constitutional question and not only a political one.

Six ways to control the Court

Stone and Seidman give five. The sixth is the one with teeth.

1

Constitutional amendment

ARTICLE V

Deliberately hard. Four have overturned decisions: XI, XIV, XVI, XXVI.

2

The power to appoint

ARTICLE II, § 2

Real but unreliable. Eisenhower called appointing Warren his worst mistake.

3

Impeachment

ARTICLE III, § 1

Never once removed a Justice. Chase acquitted; Fortas resigned first.

4

Life tenure

THE DESIGN CHOICE

Not a lever — the absence of one. Other systems cap the age.

5

Informal control

NO LEGAL FORM

Mr. Dooley: the Court follows th' election returns. It budgets capital.

6

Jurisdiction-stripping

ARTICLE III, § 2, CL. 2

Congress decides what the Court may hear. We go there next.

Four of the five are slow, rare or informal. Only the sixth works tomorrow.

Congress's lever

Read literally, this clause lets the legislature decide what the Court may hear.

*“...the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, **with such Exceptions, and under such Regulations as the Congress shall make.**”*

Essential functions

Exceptions, yes. Destroying the Court's constitutional role, no.

External limits

The clause is a power like any other — bounded by the rest of the Constitution.

Klein

Congress may not use jurisdiction to dictate the result.

Politics

Nothing in the text stops it. Voters would.

The fourth is the honest answer. It is also “no one decides,” which is where Tuesday ended.

Ex parte McCardle

Congress repealed the jurisdiction after argument, while the case was under advisement.

1

Argued

March 1868. Held under advisement.

2

Congress acts

March 27, 1868 — repeals the 1867 Act's appellate jurisdiction. Veto overridden.

3

Dismissed

For want of jurisdiction. The Court does not reach Reconstruction.

“The appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred ‘with such exceptions and under such regulations as Congress shall make.’”

How far does McCardle go?

Three answers, a century and a half apart. None is a rule you can apply cleanly.

Yerger, 1869

The repealer reached only the 1867 Act. Habeas jurisdiction under the Judiciary Act of 1789 survives — so McCardle is narrow, and its own author said so.

Klein, 1872

Congress may not withhold jurisdiction “except as a means to an end.” It “passed the limit which separates the legislative from the judicial power.”

Patchak, 2018

Congress violates Article III when it compels results under old law — but not when it changes the law. Plurality of four; judgment 6–3.

Roberts, dissenting: “the court lacks jurisdiction over Jones’s suit” — or “in Smith v. Jones, Smith wins”?

Yerger and Klein — the aftershocks

Two cases decided within three years of McCardle, and they pull in opposite directions.

YERGER — 1869

The 1789 habeas route survived.

McCardle lost a route, not a forum. Which is what its own last paragraph says.

KLEIN — 1872

Withdraw the forum, yes. Dictate the outcome, no.

Congress made a pardon into proof of disloyalty, then ordered dismissal.

IN CLASS — DRAFT IT

Write the statute that gets Congress what it wanted in Klein and stays on the McCardle side of the line.

If it takes you three sentences, what is left of Klein — and what was the line ever protecting?

And it is live

You are reading the best available statement of the law — not the law.

May a channelling statute foreclose a district court from hearing a constitutional challenge to an Act of Congress?

WHAT SURVIVES

The right. Formally intact.

WHAT DOES NOT

The forum where it was worth something.

Argument is October 5. You will find out whether that distinction matters while you are still in this course.

The enforcement arithmetic

Every check in this system is somebody's ability to withhold something.

What you are separating is not the branches. What you are separating is the powers.

The Executive

has the tanks.

The Legislature

can stop paying him.

The Judiciary

has legitimacy — a stock, and depletable.

Judicial supremacy is not a mechanism. It is an equilibrium — and it holds while compliance is cheaper than defiance.

The functional counterweight

Klein: a formal device, caught. Trump: a formal category whose functional reach is larger than the category announces.

KLEIN — CAUGHT

A formal device, used to reach a substantive result.

Congress → the Court. Struck down.

TRUMP — NOT CAUGHT

A formal category, whose effects exceed its label.

The Court → itself. Nobody to catch it.

1 Three tiers

Core: absolute. Other official acts: presumptive. Unofficial: none.

2 No motive inquiry

Courts may not ask why, in deciding whether an act was official.

3 Part III–C

Official conduct is inadmissible as evidence in an unofficial-act prosecution. Barrett declined to join.

The rule sounds modest. Holdings two and three are what carry the weight.

MY ARGUMENT, AND IT IS AN ARGUMENT — not a holding: bar the motive inquiry and bar the evidence, and “no immunity for unofficial acts” survives on paper while the proof that would make it work is gone. Argue back.

Trump v. United States, 603 U.S. 593 (2024) (Part III–C; Barrett, J., declining to join) · United States v. Klein, 80 U.S. 128 (1872).

What we have not settled

Carry these. They come back — and one of them comes back in October.

1 Chase or Iredell — may a court refuse to apply a statute it cannot point to a clause against?

2 If the gaps are structural, what is left for a theory of interpretation to do?

3 Nothing in originalism picks the level of generality. So what is doing the work?

4 Is Marshall's pluralism rigour, or one conclusion in six costumes?

5 Where is the line between Congress changing the law and Congress dictating a result?

6 Is a right without a competent forum still a right?

7 If the last check on jurisdiction-stripping is the voters, is it a check at all?

What Chase started

The fight you did not finish this morning is the whole of next week.

CHASE — 1798

There are things a legislature cannot do.

A law that takes from A and gives to B is against the first principles of the social compact.

IREDELL — 1798

Then show me the clause.

Natural justice is regulated by no fixed standard. A court that voids on that ground cannot be corrected.

LOCHNER — 1905

Chase's principle, with a clause attached.

Due process, read substantively.
The intuition finds a text — and the objection survives intact.

Nobody won the argument. Chase's principle just found a clause to live in.

Module 2 is the record of the Court filling the gap with a text instead of with first principles — which may be Chase's answer in Iredell's clothes. Decide next week whether that solves the problem or hides it.