Opening Remarks 2016

Class hours 5-8, 9-5, and 9-1. Fifteen min. breaks; one hr. Sat

Class suite opens about 30 mins before class.

Beverages OK in class, but no food please.

Stay at tables you’re in now – write name on placards.

Papers due January 24, not 22 as originally set. But I would welcome early submissions.

No exam – so no need to write down everything I say. Better to sit back and think, and take the occasional notes.

Please contribute to the class discussion by asking questions and making contributions.

This is a first time course. Cover half a semester in 48 hours.

May or may not have time for discussion on Sunday – we’ll see.

What is this course about? What is the point of this course?

The importance of the Constitution is obvious. It creates and directs our government and defines the rights of our people. It shows the Congress, the courts, the President, the state governments and all government offices what the powers of the government are, and what rights the people have that prevail over government action.

It is often invoked inaccurately. Just this week, two instances. The leader of the group that took over the federal wildlife refuge in Oregon said that the refuge’s creation in 1908 was “an unconstitutional act.”

The retired judge who calls himself the “senior judicial analyst at Fox News Channel” called Obama’s executive actions on gun control unconstitutional.

Last year, an opponent of firearms regulation criticized a legislator who supported regulation, and called the legislator’s actions unconstitutional. “Let me remind you. Going against the Constitution is treason. And treason is punishable by death.”

But if he’d actually read the Constitution, he’d see that treason is defined as waging war against the US, not advocating unconstitutional legislation, and that the Constitution doesn’t mention the death penalty anywhere.

But there’s more to a study of the Constitution than a greater understanding of what it allows or forbids, as significant as that understanding can be sometimes. The Constitution not only defines our system of governance; it also defines, in important ways, who we are as a people. When I took an oath as a military officer many years ago, I swore to preserve and protect – not a president, not a government – but the Constitution of the United States, and the unspoken part of the bargain was that I would defend it with my life if it came to that.

So what is this Constitution that has claims on our loyalties and our life? Many members of the Mormon Church believe that the Constitution is divinely inspired. One look at the electoral college system of choosing a president should dispel that thought, and recently a senior official of the Church said that not every word, but the essential structure of the Constitution is indeed divinely inspired: the separation of powers into three branches, the bill of rights; the federal system of a national and state governments; and the application of popular sovereignty, and the rule of laws and not of men.

But the Constitution didn’t establish popular sovereignty at all. Women couldn’t vote, slaves and most free blacks, could not vote, and even the white males, advantaged as they were, did not elect Senators or the president. And the system of state and federal governments, as we shall see, has been a rocky marriage throughout our history.

A contrary view of the Constitution was given by Supreme Court Justice Thurgood Marshall in 1987, the bicentennial of the Constitution, a descendant of slaves and the first African American appointed to the Supreme Court. He characterized the Constitution as a politically expedient compromise that preserved slavery until the Civil War, and the subjugation of blacks for many decades after that, well into the 20th century. Purely as a historical matter, he’s right.

So we need to look at the Constitution with a clear eye. What does it actually say? What are its great accomplishments? What are its continued shortcomings?

And when we speak of the Constitution, we have to keep in mind that it is not just the document that was written with a quill pen in Philadelphia in 1787, it is also the bill of rights that was added in 1791, the three Civil War amendments that so radically changed the Constitution’s focus in the years right after the Civil War, and the 20th century amendments that expanded its popular sovereignty, by ensuring political power for women, young people, minorities – and oh yes, abolished the manufacture and sale of alcoholic beverages for 14 years.

So what we’ll do here over the next 40 hours is look at every word of the Constitution, and consider its context, and hopefully think about how it can be preserved, and improved.

We won’t become experts in a weekend, but at least we will know what the Constitution says – and what it does not say. And that’s the first step in being an expert….

The objective of all this is simple: to allow you to develop informed and thoughtful judgments on the nature of our government, and particularly on the application and possible amendment of the Constitution that defines that government. You will be able to say, in any discussion or argument, “I’ve read every word of the Constitution, and here’s what I think.” (You may not *want* to say that, but you’ll be able to.)

In 14 or 15 hours we won’t be able to go deeply into the many issues and interpretations of the Constitution. We could spend an entire semester’s course on the Commerce Clause alone, or on the notion of due process, or on federal courts’ jurisdiction. What we’ll do here is not quite that.

Think of this weekend as a walking tour through the Constitution. I’ll be your guide, and we’ll see everything along the way. Some sights will be more interesting than others, and we’ll pause here and there to spend time on the more important or more interesting sights, but a walking tour is more fun if we see the eccentric or weird along the route too, so we won’t overlook those things. And like any good walking tour, you can ask questions or make comments along the way – all I ask is that you raise your hand and let me call on you.

I asked you to read Joseph Ellis’s account of the drafting and ratification of the Constitution. I’m not going to go through that in class, but it is necessary for an understanding of what the Constitution is, because it makes clear three important points:

1. There was no particular consensus that a new Constitution was needed in the first place. Many delegates went off to Philadelphia on the assumption that they’d be amending the Articles of Confederation, not completely and fundamentally restructuring the government of the United States. That radical idea, as Ellis demonstrates, was led by Madison, Hamilton, an initially reluctant George Washington, and John Jay. That clash of expectations explains some of the conflict in reaching agreement on what the Constitution should actually do.
2. A second and more substantial roadblock to agreement was the conflict between the slaves states of the south and the so-called free states of the north. The South believed its economy, which depended on cotton and other crops, could not prosper without slave labor. The North had no particular use for slavery but realized that no Constitution worthy of the name could be agreed on if half the states were in and half were out. So in order to secure agreement, the delegates from New Hampshire and Massachusetts and other Northern states were willing to meet the interests of South Carolina and Georgia and the other slaveholding states halfway in protecting their property, and several provisions of the Constitution reflect that.
3. There was also fundamental disagreement over the nature of the national government. Everybody understood that the lack of an executive under the Articles of Confederation was a fatal flaw in that scheme, but there was considerable disagreement over whether the Executive in the new scheme – the President – should be a strong leader or one dependent on Congress and to some degree the states. The framers had all lived through the colonial years leading to the Declaration of Independence and had rebelled against the tyranny of a strong royal head of state, but they had also lived through the Revolutionary War, when a weak and decentralized national government under the Articles of Confederation had been unable to adequately feed and clothe George Washington’s army that was fighting for the very existence of the country.

How were they resolve this dichotomy – how much power should the president have, and how should it be checked by other branches?

Indeed, how were they to resolve the dichotomy of federalism – the coexistence of two systems of government, one federal and one state. Or, to be accurate, 14 systems of government, one federal and 13 states.

How were they to resolve the conundrum of democracy – a word, by the way, that never appears in the Constitution. The Declaration of Independence had grandly declared that governments derive their just powers from the consent of the governed, but how are the governed to give their consent?

And while we’re on the Declaration of Independence, how do the framers of the Constitution make real the Declaration’s bold assertion that all men are endowed by their Creator with the inalienable rights of life, liberty and the pursuit of happiness. Or was that just chauvinistic bravado to justify a war?

So let me state my bias. I part company with my Mormon friends who believe that the Constitution was written with participation, or at least inspiration, from God. The writing of the Constitution was an intensely political process, carried out by three or four dozen delegates who were, to a remarkable degree, impressive intellects, fervent patriots, opinionated thinkers, accomplished debaters, committed to the creation of a government unprecedented in the world, but at the same time loyal representatives of their own states and the economic and political and social interests of those states.

So of course the drafting of the Constitution in Philadelphia in the hot and sticky summer of 1787 was a political process. It couldn’t help but be.

And so to understand the Constitution, we need to accept that the miracle was not that it created a perfect government, but that it created any government at all, and a government that has endured for 228 years in a form that the framers would readily recognize if they could see it today.

When we read the Constitution, we shouldn’t approach each section with awe: “Isn’t this wonderful? Isn’t this brilliant?” We should approach it pragmatically: “What were they trying to accomplish here? Was that a worthy goal? How well or poorly did they succeed? Was there are a better way to do this in 1787? More importantly, is there a better way to do this today?

We won’t be able to answer all those questions in a weekend, but let’s start.