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**Constitutionalism, Law & Politics I:
Constitutional Government and Public Policy
POLS 30661/CNST 50001**

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Fr. Justin Brophy, O.P.

Department of Political Science
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Spring 2017

“To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor, and judgment; . . . To form the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend. . . . To expound the principles and structure of government, the laws which regulate the intercourse of nations, those formed municipally for our own government, and a sound spirit of legislation, which, banishing all arbitrary and unnecessary restraint on individual action, shall leave us free to do whatever does not violate the equal rights of another.”

- Thomas Jefferson on the objects of university education
- Rockfish Gap Report (1818)

“The conviction that there is a Creator God is what gave rise to the idea of human rights, the idea of the equality of all people before the law, the recognition of the inviolability of human dignity in every single person and the awareness of people’s responsibility for their actions. Our cultural memory is shaped by these rational insights. To ignore it or dismiss it as a thing of the past would be to dismember our culture totally and to rob it of its completeness.”

- Pope Benedict XVI (2011)

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

- James Madison, Letter to W. T. Barry (1822)

“Every government degenerates when trusted to the rulers of the people alone. The people themselves, therefore, are its only safe depositories. And to render them safe, their minds must be improved to a certain degree.”

- Thomas Jefferson, *Notes on the State of Virginia* (1782)

"If a nation expects to be ignorant & free, in a state of civilisation, it expects what never was & never will be."
- Thomas Jefferson, Letter to Charles Yancey (1816)

"Conservative or liberal, we are all constitutionalists."
- Barack Obama, *The Audacity of Hope* (2006)

In the Gettysburg Address, Abraham Lincoln famously spoke of "government of the people, by the people, for the people." Why should government be so constituted? And how should the people govern? What ends should they pursue and what means should they employ? In "Constitutionalism, Law & Politics I" we shall address these fundamental questions of political life by examining the idea and practice of constitutionalism as it manifests itself in matters of constitutional government and public affairs. Through readings on classical and contemporary political ideologies and discussions about leading issues of public policy, this class aims to present competing understandings of: the role of government, the meaning of justice, the possibilities of politics, and the demands of liberty and equality.

Despite being a relatively large class, "Constitutionalism, Law & Politics I" will be conducted as a seminar with frequent class discussion. You should come to every class prepared to participate in and contribute to a conversation. The course is designed to help you think more clearly and deeply about the purposes and limits of political authority, participate more thoughtfully and effectively in the democratic political process, better understand competing visions of constitutional norms and political ideals, and more thoroughly develop and deepen your own political principles while also exploring ideals and viewpoints that are different from your own. Specifically, the course is designed to enable you to:

- Carefully read a few profound thinkers on matters of politics and constitutional government
- Compare competing conceptions of constitutionalism, liberty, and equality
- Explore how the Founders designed the American Constitution to promote ordered liberty
- Understand, analyze, and evaluate America's founding constitutional ideals and subsequent criticisms and alterations to those ideals
- Engage your classmates in civil conversation about contentious legal and political issues
- Present your ideas orally in a large group setting

"Constitutionalism, Law & Politics" serves as the introductory gateway class for Notre Dame's Minor in [Constitutional Studies](#). You are encouraged and invited to attend all events sponsored by the Constitutional Studies minor as they are designed to compliment our class.

Class: Tuesday & Thursday 12:30-1:45PM, DeBartolo Hall 208
Office: Decio 447
Office Phone: 574-631-0489
Emails: vmunoz@nd.edu, cbrophy@nd.edu
Office Hours: Prof. Muñoz: Wednesday 2:45-4:45pm and Thursday 2:00-3:00pm and at all hours by appointment. I am frequently in my office. You are welcome to drop by anytime, and I will meet with you if my schedule allows.
Fr. Brophy: Monday 1:00-2:00pm and Tuesday 2:00-3:00pm, Decio 440

Required Texts

Course Readers available at DCL – Purchase vol. 1 immediately
Ryan Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015)
Mark Blitz, *Conserving Liberty* (Hoover, 2011)
Harry G. Frankfurt, *On Inequality* (Princeton, 2015)
Charles Murray, *Coming Apart* (Crown Forum, 2012)
Andrew Sullivan, *Virtually Normal* (Vintage Books, 1995)

Course Requirements

Constitutionalism, Law & Politics I will be a participatory class. Some classes will consist primarily of lecture, but I anticipate most class time to be devoted to discussion. Lectures and discussion will be based on the assigned readings. When I do lecture, I encourage participation in the form of questions and comments. In order to participate effectively, you must read, take notes, and think about all assigned readings before class. I cannot overemphasize this point. You will learn more, enjoy class more, and be able to participate more when you have read the assigned materials before class. As a good and informed citizen, you should also read a daily newspaper. We will often begin class with a short discussion of current events, especially those that pertain to subjects discussed in class.

<u>Assignments</u>	<u>Grading Scale</u>				
In-class & Online Participation	200 points	A	1000-930	C	784-730
Pre-class Discussion Board Posts	50 points	A-	929-900	C-	729-700
Paper	100 points	B+	899-885	D+	699-685
Two Midterms	400 points	B	884-830	D	684-630
Final	250 points	B-	829-800	D-	629-600
		C+	799-785	F	599-000

<u>Grade</u>	<u>Description</u>	<u>Explanatory Comments</u>
A	Truly Exceptional	<i>All</i> work meets or exceeds the highest expectations for the course
A-	Outstanding	Superior work in <i>all</i> areas of the course
B+	Very Good	Superior work in <i>most</i> areas of the course
B	Good	Solid work across the board
B-	More than Acceptable	More than acceptable, but falls short of solid work
C+	Acceptable	Meets <i>all</i> the basic requirements and standards for the course
C	Acceptable	Meets <i>most</i> of the basic requirements and standards in several areas
C-	Acceptable	Work falls short of meeting basic standards in several areas
D	Minimally Passing	Work just over the threshold of acceptability
F	Failing	Unacceptable performance

No Extra Credit will be given. No exceptions.

No Incomplete Grades will be granted without remarkable circumstances.

Class Attendance is expected. No hats in class, unless for religious reasons.

Class Participation will be based both on the quality and quantity of your in-class and online discussion board participation. Good questions count for class participation. If you don't understand something, find something confusing, want more clarification on a point, or just want to talk about something more in class, speak up and voice your concern.

Classroom Decorum: Our class will cover contentious subjects that can evoke passionate feelings. I expect all in-class comments to be expressed in a civil manner. You are certainly allowed and encouraged to disagree with the professor and your classmates, but you are expected to disagree in an agreeable manner.

Pre-Class Discussion Board Posts: Every student will be required to post approximately 5 pre-class posts on the class Sakai discussion board. These posts and post-responses, which will be discussed further in class, will be assigned and due before class.

Examinations: Success on examinations will require the ability to understand, compare and contrast, criticize, and analyze the concepts and details of the assigned reading, as well as the concepts and details of the class lectures and discussions. Knowledge of the assigned reading is necessary, but not sufficient

for success. Class lectures and discussions will often address issues beyond the scope of the assigned reading for which students are responsible. Missed exams will be calculated as a zero. Make-up exams will not be given without prior permission of the instructor.

Laptop Computers, Tablets, Phones and Recording Devices are not to be used in the classroom without prior approval of the professor.

Academic Integrity: Academic dishonesty will not be tolerated. I shall follow and enforce strictly the university's policies regarding academic integrity.

Honor Code: Class members are expected to understand the principles and procedures set forth in the University of Notre Dame Academic Code of Honor (<http://www.nd.edu/~hnr/code/>) and abide by its pledge: "*As a member of the Notre Dame community, I will not participate in or tolerate academic dishonesty.*"

Students with Disabilities will be accommodated as extensively as possible. Please talk directly with the instructor regarding any necessary arrangements.

Please Note. If you cannot make class for an important medical or family reason, please let me know ahead of time. Likewise, if you are having difficulties with an assignment, please come talk to me and/or Fr. Brophy.

Tentative Class/Readings Schedule

Specific assignments will be given in class. This is a tentative schedule. It is likely to change.

* indicates that the reading is available on Sakai

I. THINKING ABOUT THE PROPER ROLE OF GOVERNMENT

Pornography (Jan. 17)

Andrea Dworkin, "[Pornography Happens to Women](#)"**

Irving Kristol, "Liberal Censorship and the Common Culture," *Society* (Sept./Oct. 1999), pp. 5-10*

Recommended

- *Roth v. United States*, 354 US 476 (1957)*

- Walter Berns, "[Pornography v. Democracy: The Case for Censorship](#)," *The Public Interest* 22 (1971)

Euthanasia (Jan. 19)

Derek Humphry, "The Case for Rational Suicide," in *Last Rights? Assisted Suicide and Euthanasia Debate*, ed. Michael Uhlmann (Washington, D.C.: Ethics & Public Policy Center, 1998), pp. 307-316

Leon R. Kass, "Death With Dignity & The Sanctity of Life," in *Last Rights?*, pp. 199-222

USCCB [Statement on Euthanasia](#) (1991)

Recommended

- Ryan Anderson, "[Always Care, Never Kill](#): How Physician-Assisted Suicide Endangers the Weak, Corrupts Medicine, Compromises the Family, and Violates Human Dignity and Equality," (2015)

- Michael Gill, "[A Moral Defense of Oregon's Physician-Assisted Suicide Law](#)," *Morality* 10 (2005)

Income Inequality (Jan. 24)

President Barack Obama, "[Remarks on the Economy in Osawatomie, Kansas](#)," December 6, 2011

President Barack Obama, "[Remarks on Economic Mobility](#)," December 4, 2013

Bernie Sanders, [Speech Announcing Bid for Democratic Party Presidential Nomination](#), May 26, 2015

Harry G. Frankfurt, *On Inequality* (entire book but you may skip pages 16-34)

January 24, 2017

Paper Due

February 3, Noon Constitutional Studies Panel on “The Future of Liberalism in the Age of Trump”
Attendance Expected. Oak Room, South Dining Hall

II. PHILOSOPHIC APPROACHES TO THE PROPER ROLE OF GOVERNMENT

The Founders’ Natural Rights Classical Liberalism (Jan. 26, 31)

The Declaration of Independence, in *The Portable Thomas Jefferson*, pp. 235-241

Thomas Jefferson, [Letter to Roger C. Weightman](#), June 24, 1826, in *The Portable Thomas Jefferson*, pp. 584-85

John Locke, *Second Treatise of Government*, §4, 6, 25-34

Alexander Hamilton, “[The Farmer Refuted](#),” Feb. 23, 1775

James Wilson, *Lectures on Law* (1790-92), Part I, Chapter VII, “Of Man, as a Member of Society,” in

Collected Works of James Wilson (Liberty Fund, 2007) vol. 1, pp. 634-44

Theophilus Parsons, “[The Essex Result](#)” (1778)

1784 [New Hampshire Bill of Rights](#) (1784)

James Madison, “[Property](#)”

Recommended

- Benedict XVI, “The Listening Heart: Reflections on the Foundations of Law,” September 22, 2011*
- John Locke, *Second Treatise of Government*

Modern Liberalism (Feb. 2, 7)

Woodrow Wilson, *The New Freedom* (excerpt)

Franklin D. Roosevelt

- [Commonwealth Club Address](#), September 23, 1932

- [1944 State of Union Address](#), January 11, 1944

Ronald Dworkin, “Why Liberals Should Believe in Equality,” *New York Review of Books*, February 3, 1983

Charles Taylor, “The Politics of Recognition,” sections I and II only, in *Multiculturalism*, ed. Amy

Gutman (Princeton University Press, 1994), pp. 25-44

Richard Rorty, “A Cultural Left,” in *Achieving Our Country: Leftist Thought in Twentieth-Century America*

(Harvard University Press, 1998), pp. 73-107, 147-49

Recommended

- Herbert Croly, “Reconstruction; It’s Conditions and Purposes,” from *The Promise of American Life**

Modern Conservatism (Feb. 9, 14)

Mark Blitz, *Conserving Liberty*, Introduction, Chapter 2 and 3

Milton Friedman, “[On the Distribution of Income](#),” Chapter X in *Capitalism and Freedom* (Chicago, 2002) pp. 161-76

Ross Douthat, “[The Wild Ideas of Social Conservatives](#),” *New York Times*, April 28, 2015*

Robert Kraynak, “[Conservative Critics of Modernity: Can They Turn Back the Clock?](#)” *Intercollegiate Review*, Fall 2001, p. 31-39

February 16, 2017 First Midterm Examination

III. CONSTITUTIONAL GOVERNMENT & PUBLIC POLICY

Slavery (Feb. 21, 23)

A Reader's Companion to the Lincoln-Douglas Debates

Stephen Douglas, Speech at Chicago, July 9, 1858, in *The Lincoln-Douglas Debates of 1858*, ed. Robert W. Johannsen (Oxford University Press, 1965), p. 22-36

Abraham Lincoln, "Speech on the Kansas-Nebraska Act," Peoria, Illinois, October 16, 1854

Recommended

- Harry V. Jaffa, *Crisis of the House Divided*

Abortion (Feb. 28, March 2)

Mary Anne Warren, "On the Moral and Legal Status of Abortion," *The Monist* 57 (1973), pp. 43-61

Peter Singer, "Rethinking Life and Death: A New Ethical Approach," in *Last Rights?*, pp. 171-198

Mario Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective" (1984)

Robert George, "[When Life Begins](#)," *National Review Online*, Nov. 2, 2008

Robert George, "God's Reasons: Science, Reason, and the Right to Life" in *The Clash of Orthodoxies* (Intercollegiate Studies Institute, 2001)

Roe v. Wade (1973)

Planned Parenthood v. Casey (1992)

Recommended

- Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971), 47-66*
- Giubilini and Minerva, "[After-birth Abortion: Why Should the Baby Live?](#)" *Journal of Medical Ethics* (2012)
- Christopher Kozor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice*, 2nd edition (Routledge 2014)
- George McKenna, "[On Abortion: A Lincolnian Position](#)," *The Atlantic Monthly* (Sept. 1995)*
- Ryan Lizza, "[The Abortion Capital of America](#)," *New York Magazine*, Dec. 4, 2005
- Debbie Nathan, "[The New Underground Railroad](#)," *New York Magazine*, Dec. 4, 2005

Same-Sex Marriage (March 7, 9)

Ryan Anderson, "Men, Women, Children: The Truth About Marriage," in *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015), pp. 13-36

Ryan Anderson, "The Consequences of Redefining Marriage" in *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015), pp. 37-57

Robert Reilly, "Order in the Universe: Aristotle's Law of Nature," in *Making Gay Okay* (2014) pp. 15-27

Michael Hannon, "[Against Heterosexuality](#)," *First Things* (March 2014)

Andrew Sullivan, "What is a Homosexual?" and "A Politics of Homosexuality," in *Virtually Normal* (Knopf, 1995), pp. 3-18, 169-205

Donald Sensing, "[Save Marriage? It's Too Late](#)," *Wall Street Journal*, March 15, 2004

Recommended

- Robert Sokolowski, "On Same-Sex Marriage"*
- S. Bear Bergman, "[I Have Come to Indoctrinate Your Children Into My LGBTQ Agenda \(And I'm Not a Bit Sorry\)](#)," *Huffingtonpost.com*, March 7, 2015
- "[After Obergefell: The Future of Marriage, Gay Rights, and Religious Freedom](#)," Tocqueville Program debate between Stephen Macedo and Ryan Anderson
- "[What is Marriage?](#)" Constitutional Studies debate between John Corvino and Sherif Girgis, University of Notre Dame, January 27, 2015
- *Obergefell v. Hodges* (2015)
- Stephen Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton, 2015)

March 14 & 16 Spring Break

Inequality, Opportunity, and the American Family (March 21, 23, 28)

Robert D. Putnam, [Lecture on Our Kids](#) (starts at approximately minute 29:00)

Robert D. Putnam, “Families” and “What is to be Done?” in *Our Kids: The American Dream in Crisis* (Simon & Schuster, 2015), pp. 46-79, 227-61

Charles Murray, “[The New American Divide](#),” *Wall Street Journal*, January 21, 2012

Charles Murray, “One Nation, Divisible,” and “Alternative Futures,” in *Coming Apart* (Crown Forum, 2012), pp. 269-306

Charles Murray, Lecture, March 28, 2017, Oak Room, South Dining Hall

Freedom of Association & Antidiscrimination Law (March 30, April 4)

Robert Bork, “Civil Rights—A Challenge,” *The New Republic*, August 31, 1963, pp. 21-24

“Civil Rights—A Reply,” editors, *The New Republic*, August 31, 1963, p. 24

Richard A. Epstein, “[Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation](#),” 2016

Andrew Koppleman, “[Richard Epstein’s Imperfect Understanding of Antidiscrimination Law](#),” (2016)

Richard Epstein, “[How Classical Liberal Principles Address Cultural, Social, and Economic Issues: Richard Epstein’s Reply](#)” (2016)

Boy Scouts v. Dale (2000)

“Conflict on Campus: Religious Liberty v. Gay Rights”

Shelby Steele, “Selma to San Francisco? Same-Sex Marriage is Not a Civil Rights Issue,” *Wall Street Journal*, March 20, 2004

Ryan Anderson, “Anti-Discrimination Law: Why Sexual Orientation is Not Like Race,” in *Truth Overruled: The Future of Marriage and Religious Freedom*, pp. 123-46

Recommended

- Andrew Sullivan, “Civil Rites,” *The New Republic Online*, March 30, 2004*
- Shelby Steele, “Married with Children?” *The New Republic Online*, April 14, 2004*
- Mark DeGirolami, “[Classical Liberalism: Teaching Its Own Undoing](#),” (2016)
- Paul Moreno, “[Government Intervention Springs Eternal for Antidiscrimination Laws](#),” (2016)
- Richard Epstein, “[The Problem with Anti-Discrimination Laws](#),” April 13, 2015
- Richard Garnett, “[Confusion about Discrimination](#),” April 5, 2012

March 31, 12:15pm Epstein-Coles Debate on Freedom of Association and Antidiscrimination
Attendance Expected

Immigration (April 6)

Rusty Reno-Peter Casarella Debate – Oak Room, South Dining Hall, 12:15pm

April 11, 2017 Second Midterm Examination

Religious Freedom & Religious Exemptions (April 13, 18)

Reynolds v. United States (1879)

Sherbert v. Verner (1963)

Employment Division of Oregon v. Smith (1990)

Religious Freedom Restoration Act (1993)

Ross Douthat, “[Defining Religious Liberty Down](#),” *The New York Times*, July 28, 2012*

Tim Cook, “[Pro-discrimination ‘Religious Freedom’ Laws are Dangerous](#),” *The Washington Post*, March 29, 2015

Ross Douthat, "[Questions for Indiana's Critics](#)," *The New York Times*, March 30, 2015*
Frank Bruni, "[Bigotry, the Bible and the Lessons of Indiana](#)," *The New York Times*, April 3, 2015*
Ross Douthat, "[Interview with a Christian](#)," *The New York Times*, April 4, 2015*

Recommended

- Vincent Phillip Muñoz, "[Justice Scalia Was Right About Religious Free Exercise](#)," St. John's Law and Religion Forum (2016)
- Ryan Anderson, "Religious Freedom: A Basic Human Right," in *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015), pp. 105-22
- Eugene Volokh, "[Religious exemptions — A Guide For the Confused](#)," *The Washington Post*, March 24, 2014

Death Penalty (April 20)

John Paul II, Excerpts from *Evangelium Vitae* and Statements on the Death Penalty

Mario Cuomo, "Why I Oppose Capital Punishment," in *Religion and the Death Penalty: A Call for Reckoning* (Grand Rapids, MI: Eerdmans, 2004), 240-247

Frank Keating, "The Death Penalty: What's All the Debate About?" in *Religion and the Death Penalty*, 213-220

Antonin Scalia, "God's Justice and Ours: The Morality of Judicial Participation in the Death Penalty," in *Religion and the Death Penalty*, 231-239

Recommended

- The Catechism on Punishment in *Catholic Dossier* 4 (Sept. – Oct, 1998), 37-41*
- Avery Cardinal Dulles, "[Catholicism & Capital Punishment](#)," *First Things* 112 (April 2001), 30-35*
- Charles Rice, "Showdown in Texas: The Pope vs. the Culture of Death," *Catholic Dossier* 4 (Sept. – Oct, 1998), 16-23*

Constitutional Interpretation (April 25)

Edwin Meese III, Federalist Society Speech Defending a Jurisprudence of Original Intent, November 15, 1985

William J. Brennan, Georgetown University Speech on Living Constitutionalism, October 12, 1985

Free Speech (April 27)

Charles Lawrence, "[Cross Burning and the Sound of Silence: Antisubordination Theory and the First Amendment](#)," *Villanova Law Review* 37 (1992), pp. 787-804

Stanley Fish, "[There's No Such Thing as Free Speech and It's a Good Thing, Too](#)," in *There's No Such Thing as Free Speech and It's a Good Thing, Too* (Oxford, 1994), pp. 102-19

University of Chicago [Report by the Committee on Free Expression](#) (2014)

Recommended

"[The Battle Over Free Speech on College Campuses](#)," Panel at the University of Chicago, March 9, 2016

May 2 – Open

FINAL EXAMINATION