

CONSTITUTIONAL LAW

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SYLLABUS

A constitution, in the legal sense, is “a body of fundamental principles according to which a State or other organization is governed” (*Oxford English Dictionary*). This course examines the Constitution of the United States, the written legal document that defines the powers of the U.S. government as well as certain rights and liberties that limit the U.S. and state governments. Much but not all of the time, we examine how the Constitution has been interpreted by courts in litigation, exercising the power of judicial review to determine whether actions of other federal or state officials violate the Constitution.

COURSE OBJECTIVES

1. To learn fundamental principles of the U.S. Constitution and the case law interpreting it, and learn to apply the principles to new problems.
2. To learn methods of interpreting the Constitution, and how to apply those methods to new problems.
3. To learn something about the historical, social, and civic contexts of major constitutional provisions and issues, which are important as you prepare to be servant leaders in society.

READINGS AND CLASS DISCUSSION

Assigned Readings are listed at the end of the syllabus. Most are from casebook, Calvin Massey, *American Constitutional Law: Powers and Liberties* (Aspen Publishers, 3d ed. 2009). Occasional additional readings will be posted on Blackboard. They will supplement the casebook with historical, moral, political, social, or religious issues related to the constitutional topic in the assignment. I will sometimes post study questions on Blackboard a day or two before class to help your preparation, so keep an eye out for those.

Class Meetings, Discussion, and Preparation. Brief the leading cases in the book as you learned last semester. I expect you to be prepared with the facts, holding, and rationale of the cases. I will assign panels of 5-6 students to take the lead in discussion each day; but **I will call on others too**. If you are unprepared when I call on you—not just missing some insights, but truly unprepared—I reserve the right to lower your grade (see below). You can also expect me to call on you again very soon. If you have a strong excuse for being unprepared, **leave a note on the podium before class** so that I do not call on you. You may use this excuse procedure only within reason.

GRADES

The grade in the class will be based on:

- Final Exam: 80 percent.
- Midterm Exam: 20 percent.
The exams will have essay-type questions and may have multiple-choice questions. They will be “limited open book”: you will be able to use your casebook and other readings, notes, and outlines, but not commercial study aids.
- Attendance and Class Participation: I reserve the right to lower your grade one increment (e.g. B to B-) for each time you are absent more than 8 class meetings (20 percent of the time). I also reserve the right to lower your grade one increment for each time you are unprepared in class without giving me notice of a good excuse as described above. On the other hand, very high-quality class participation can serve to raise a grade by an increment at the margin.

SUGGESTIONS FOR OTHER READING

The best supplement for studying the Constitution is *The Federalist Papers*, excerpts of which we will read during the course. These anonymous pamphlets by Alexander Hamilton, James Madison, and John Jay, written in 1788 to support New York’s ratification of the Constitution, provide the best explanation of its nature and purposes. Some other interesting and readable books on the Constitution and the Court’s constitutional decisions include:

- Akhil Amar, *America’s Constitution* (2005) and *The Bill of Rights* (1998)
- Alexander Bickel, *The Least Dangerous Branch* (1962)
- (Justice) Stephen Breyer, *Active Liberty* (2005)
- Joseph Ellis, *Founding Brothers* (2000) and *American Creation* (2007)
- John Hart Ely, *Democracy and Distrust* (1980)
- Sanford Levinson, *Constitutional Faith* (1988)
- (Justice) Antonin Scalia, *A Matter of Interpretation* (1997)

All of these are very readable although some are intellectually challenging content. Amar gives brilliant readings of the text and structure of the Constitution. Bickel and Ely give different answers to the concern about unelected judges exercising too much power in striking down democratically enacted laws. Ellis’s books are very enjoyable narratives about the framers and their personalities, ideas, and interactions. Breyer’s and Scalia’s books set out their diametrically opposed theories of constitutional interpretation. Finally, Levinson’s book explores the idea that the Constitution plays the role of “Scripture” in the “civil religion” of American democracy.

To help you review judicial doctrine and analyze practice questions, you might consider Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Aspen Publishers); the two volumes of May and Ideas’s *Examples and Explanations* (Foundation Press); or the CALI exercises available at <http://www.cali.org/category/cali-topics/constitutional-law>.

PERSONS WITH DISABILITIES

The University of St. Thomas offers services to qualified students with disabilities and provides reasonable and appropriate accommodations necessary for physical, academic, and social accessibility. Support services are provided to enrolled students based on assessed needs. These services may include counseling, identification and referral services, accommodation and academic assistance, interagency coordination, and advocacy services. For more information, contact the Enhancement Program – Disability Services, (651) 962-6315.

READING ASSIGNMENTS

CLASS MTG.	TOPIC	PAGES ¹
Jan 11	INTRODUCTION	1-5 U.S. Const. BB reading
<u>(FIRST HALF. CONSTITUTIONAL STRUCTURE AND POWERS)</u>		
I. CONSTITUTION AND COURTS: JUDICIAL REVIEW		
Jan 13	1. Judicial Review: <i>Marbury v. Madison</i>	5-18
Jan 15	2. Judicial Supremacy? <i>Cooper v. Aaron</i>	18-21,35-38 BB readings
Jan 20	3. Methods of Constitutional Interpretation 4. Political Controls on Courts	39-45 49-55 ²
II. FEDERALISM AND FEDERAL LEGISLATIVE POWER		
A. Overview of Federalism and Federal/State Powers		
Jan 22	1. Purposes of federalism (background) 2. General scope of Congress's power: <i>McCulloch v. MD</i>	127-32 133-45
B. Power to "Regulate Commerce Among the States"		
Jan 25	1. Historical review	153-54,172-91
Jan 27	2. Current approach I: <i>Lopez, Morrison</i>	154-72
Jan 29	Current approach II: <i>Gonzales v. Raich</i> 3. Federalism and subsidiarity	191-204 204-10 review 119-24 BB readings
Feb 1	4. State autonomy: "no commandeering"	211-26
Feb 3	C. Power to Spend for "the General Welfare"	232-42

¹ "S" = Massey supplement; "BB readings" = extra readings posted on Blackboard.

² Up to (not including) *Ex parte McCardle*.

III. SEPARATION/DISTRIBUTION OF FEDERAL POWERS

Feb5	A. Basics: <i>Youngstown Steel Case</i>	333-46
	B. Foreign Affairs and War Powers	
Feb8	1. Foreign affairs: general principles	355-65,379-83
Feb10	2. War powers I <i>(I will be away on Feb. 12; make-up class to be scheduled)</i>	363-68 ³ BB readings
Feb15	War powers II: “War on terror”	368-79 BB readings
	C. Domestic Affairs: The Administrative State	
Feb17	1. Nondelegation of legislative power 2. Legislative veto: <i>INS v. Chadha</i>	397-99 397-407
Feb19	3. President’s appointment/removal of officials	346-55,392-97
Feb22	<i>MIDTERM EXAM</i>	

³ Through note 3.

(SECOND HALF. RIGHTS)

(Dates to be filled in)

IV. EQUAL PROTECTION OF THE LAWS

A. The Core Case: Racial Classifications

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|----------------------------------------------------------|-----------------------|
| 1. Slavery, <i>Dred Scott</i> , and the 14th Amendment | BB readings
607-12 |
| 2. Official segregation: <i>Brown v. Bd. of Ed.</i> etc. | 640-42,649-58 |
| 3. Disparate racial impact: <i>Washington v. Davis</i> | 612-19 |
| 4. Affirmative action I: <i>Bakke</i> | 654-73
BB readings |
| Affirmative action II: U. Michigan cases | 679-98 |
| Affirmative action and school desegregation | 698-708 |

B. Rational-Basis Scrutiny

614-24,629-34

C. Sex Classifications: Intermediate Scrutiny

720-32

Sex classifications II

732-43

D. Homosexuality and Equal Protection

620-29
BB readings

V. INTERLUDE: THE BILL OF RIGHTS, INCORPORATION, AND CONGRESSIONAL ENFORCEMENT

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| 1. Privileges & immunities; incorporation of Bill of Rights | 443-58 |
| 2. Free exercise of religion and general laws: <i>Smith</i> | 1065-77 |
| 3. Congressional protection of religious freedom
and other rights | 1165-66
1170-91
BB readings |

VI. IMPLIED FUNDAMENTAL RIGHTS

A. Substantive Due Process

1. Economic liberty: <i>Lochner v. New York</i>	458-70
2. Modern privacy decisions	
a. Introduction: <i>Griswold v. CT</i>	470-83
b. Abortion I: <i>Roe v. Wade</i>	483-90 BB readings
Abortion II: <i>Casey</i> and public funding	490-507
Abortion III: “Partial birth” cases	507-16
c. The “right to die”	523-35 BB readings
d. Sexual relations (<i>Lawrence v. TX</i>); marriage	535-49 522-23 BB readings

B. Fundamental-Rights Equal-Protection and Rights of the Poor

1. The right to vote: denial, dilution, and <i>Bush v. Gore</i>	743-44,749-65
2. Education: <i>San Antonio v. Rodriguez, Plyler</i>	744-49,634-40 BB readings

**VII. A NEWLY-RECOGNIZED INDIVIDUAL RIGHT:
THE RIGHT TO BEAR ARMS (*D.C. v. Heller*)** 1193-1214

TBA

FINAL EXAM