

# CONSTITUTIONAL LAW: BASIC ISSUES

## Spring 2011

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*(This is last year's syllabus; the Spring '12 course will be substantially similar)*

### Syllabus

The principal text for this introductory constitutional law course is Brest, Levinson, Balkin, Amar & Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials*, 5th Ed.

Class meets on Tuesdays, Thursdays, and Fridays from 10:00 until 11:10 a.m., in Boalt 105.

There will be no class or office hours on Friday March 4 and Friday March 18. Instead, there will be make-up classes on Friday January 28 and Friday February 4, from 1:00 to 2:10 p.m., in Boalt 105.

Office hours typically will be each Friday from 1:00 to 3:00 p.m. at Café Zeb.

The final exam will consist of two parts: an in-class, one-hour true/false component that will count for 30 percent of the course grade; and a forty-eight hour take-home essay worth 70 percent of the course grade. Students may schedule the take-home portion at their convenience during the exam period. The schedule for the in-class exam will be announced later.

### Interpreting the Constitution

#### 1. Introduction to the Course

Background to the Constitution, 19-26

The Constitution of the United States, 1-15

#### 2. The Supreme Court as Expositor of the Constitution

The Supreme Court in Its Initial Years: 1789-1801, 97-99

The Election of 1800, 99-103

*Marbury v. Madison*, 108-21

The Marshall Court, 136-38

#### 3. Theories of Judicial Review

Discussion, 121-24

Precedents for Judicial Review, 124-25

Judicial Review in a Democratic Polity, 126-36

## Constitutional Crisis

### Race and Reconstruction

#### 4. Slavery

The Taney Court, 187-91  
Slavery (the Missouri Compromise), 212-13  
Prelude to Secession, 226-28  
*Dred Scott v. Sandford*, 229-45  
Discussion, 245-53

#### 5. The Reconstruction Amendments

Reread the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments  
History of the Adoption of the Fourteenth Amendment and notes, 301-14  
The Fourteenth Amendment Limited, 319-20  
*The Slaughter-House Cases*, 320-36

#### 6. Early Application of the Fourteenth Amendment to Women

Women's Citizenship in the Antebellum Period, 164-68  
*Bradwell v. Illinois*, 337-39  
The "New Departure" and Women's Place in the Constitutional Order, 340-43  
*Minor v. Happersett*, 343-46

#### 7. The Private Sphere and State Action

*Strauder v. West Virginia*, 351-57  
Reread pages 301-09  
Establishment of the "Separate but Equal" Doctrine, 357-58  
*The Civil Rights Cases*, 373-85

#### 8. "Separate but Equal"

*Plessy v. Ferguson*, 359-69  
The Spirit of *Plessy*, 370-73

## The Modern Constitution

### Economic Rights and Structural Concerns

#### 9. The Lochner Era: Substantive Due Process

Pressures for Intervention and the Rise of Substantive Due Process, 1874-1890, 412-15  
*Lochner v. New York* and notes, 417-31

10. The Commerce Clause
  - Congressional Regulation of Interstate Commerce, 435-37
  - Champion v. Ames*, 437-41
  - Hammer v. Dagenhart*, 441-45
  - Prisoner's Dilemmas, 445-47
11. The New Deal and Economic Due Process (Rational Review)
  - Constitutional Adjudication in the Modern World ("Incorporation"), 485-93
  - The Decline of Judicial Intervention Against Economic Regulation, 499-501
  - 1935-1937, 510-11
  - United States v. Carolene Products*, 513-20
  - Williamson v. Lee Optical*, 520-27
  - Reread Judicial Review in a Democratic Polity, 126-36
12. The Commerce Clause
  - Relaxation of Judicial Constraints on Congressional Power, 549-51
  - United States v. Darby*, 551-58

#### The Modern Equal Protection Clause: Race

13. Racial Discrimination and National Security
  - Ethnic Diversity and the Constitution (*Chae Chan Ping v. United States*), 398-405
  - Korematsu v. United States* and note, 967-81
14. Brown
  - Background, 893-98
  - Brown v. Board of Education* and notes, 898-904
  - Brown* and Constitutional Interpretation, 904-23
  - Reflections on the Opinion in *Brown*, 923-24
15. Brown II and School Desegregation
  - The Enduring Significance of Brown, 925-27
  - Four Decades of School Desegregation (*Brown II*, *Green*, *Swann*), 928-36
16. Retrenchment
  - School Segregation in the North (*Keyes*), 936-41
  - The Turning Point—Interdistrict Relief (*Milliken v. Bradley*), 941-43
  - An Era of Retrenchment (*Missouri v. Jenkins*), 943-50
17. Race, Wealth, and Education (Substantive Equal Protection)
  - San Antonio v. Rodriguez*, 1623-41

18. Strict Scrutiny
  - The Antidiscrimination Principle, 956-59
  - Loving v. Virginia*, 959-66
  - Hernandez v. Texas*, 1010-14
  - What Justifies the Suspect Classification Standard? 981-90
19. The Intent Standard
  - What is a Race-Dependent Decision? (*Yick Wo*, *Queue Ordinance Case*, *Gomillion*, *Gaston County*, *Griggs*) 1020-24
  - Griggs v. Duke Power*, 1024-26
  - Washington v. Davis*, 1026-35
20. Disproportionate Impact
  - Commentaries on the Intent Standard, 1035-39
  - Judicial Review of Motivation (*Arlington Heights*), 1039-42
  - McCleskey v. Kemp*, 1055-63
  - Clary v. United States*, 1045-48
21. Affirmative Action
  - University of California v. Bakke*, 1071-77
  - Affirmative Action from *Bakke* to *Croson*, 1077-81
  - Richmond v. Croson*, 1081-1109
  - Adarand v. Peña*, 1109-13 (skim)
22. Grutter and Gratz
  - Grutter v. Bollinger*, 1120-42 (skim)
  - Gratz v. Bollinger*, 1142-51 (skim)
  - Affirmative Action and the Original Understanding, 1114-20
  - Parents Involved in Community Schools v. Seattle School District No. 1* (handout)
  - Reread pages 362-65

## The Modern Equal Protection Clause: Gender

23. Intermediate Scrutiny
  - Reread pages 337-39
  - Social Movements, 1179-87
  - Frontiero v. Richardson*, 1188-95
  - The Equal Rights Amendment, 1195-1202
24. Relevant Differences or Stereotypes
  - What Justifies Special Constitutional Scrutiny, 1202-13
  - What Does Intermediate Scrutiny Prohibit? (*Craig v. Boren*), 1213-19
  - On Sex, Gender, and Sexual Orientation, 1224-26
  - Jury Service (*J.E.B. v. Alabama*), 1226-28

25. Not Sex-Based Differences
  - Personnel Administrator of Massachusetts v. Feeney*, 1262-71
  - Domestic Violence and Marital Rape, 1271-76
  - Geduldig v. Aiello* and notes, 1276-81
26. Permissible Sex-Based Differences
  - Michael M. v. Superior Court of Sonoma*, 1282-95
27. Separate Facilities
  - United States v. Virginia (The VMI Case)*, 1229-55
28. Affirmative Action, Intersectionality, and Marriage
  - Affirmative Action, 1323-27
  - Discrimination against Women of Color, 1258-59
  - Intermediate Scrutiny and Same-Sex Marriage, 1219-24

#### Modern Substantive Due Process

29. Implied Fundamental Rights: Contraception
  - The Ninth Amendment, 151-53
  - Antecedents of Fundamental Rights Adjudication, 1339-42
  - Griswold v. Connecticut*, 1342-55
  - Theories of Fundamental Rights Adjudication, 1355-65
30. Implied Fundamental Rights: Abortion
  - Roe v. Wade*, discussion and note, 1387-1409
  - Reread Abortion and Equal Protection, 1279-81
  - Abortion and the Equal Protection Clause, 1409-19
31. Decisions After *Roe*, 1419-24
  - Planned Parenthood v. Casey*, 1424-65
32. Sexual Orientation and Due Process
  - Sexuality and Sexual Orientation, 1465-66
  - Bowers v. Hardwick*, 1466-82
33. Sexual Orientation and Equal Protection
  - Romer v. Evans*, 1505-1518
  - Expressive Association (*Dale*), 1532-36
34. Sexual Orientation and Due Process, Take 2
  - Lawrence v. Texas*, 1482-1505
  - Sexual Orientation as a Suspect Classification, 1518-32

35. Same-Sex Marriage  
*Goodridge v. Department of Public Health*, 1545-68

Other Suspect Classifications and Fundamental Rights

36. Alienage  
Citizenship and Alienage Under the Equal Protection Clause, 1156-60  
*Graham v. Richardson*, 1160-63  
*Bernal v. Fainter*, 1163-1172  
Regulation of Resident Aliens, 1172-77  
*Plyler v. Doe* and note, 1641-52
37. Disability  
*City of Cleburne v. Cleburne Living Center*, 1327-38

The Contemporary Debate over National Power

38. Federalism: Limits on the Commerce Clause  
Review pages 554-64  
The Rehnquist Court: Finding Limits on Federal Power, 600-01  
*United States v. Lopez*, 601-27
39. Limits on the Fourteenth Amendment, Section 5  
The 1960s Civil Rights Legislation: Commerce or Reconstruction? (*Heart of Atlanta Motel* and *Katzenbach v. McClung*), 558-64  
Mapping the Middle Ground: *Jones v. Mayer* and *Oregon v. Mitchell*, 591-600  
The Reconstruction Power, 629  
*City of Boerne v. Flores*, 629-49
40. The Fourteenth Amendment Unbound  
*Bush v. Gore* (handout)