

CONSTITUTIONAL LAW

Spring 2013

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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.

The class meets on Monday, Tuesday, and Wednesday of each week from 2:15 to 3:25 p.m., in Boalt 110.

Office hours are on Wednesdays from 3:45 to 6:00 p.m. in Simon 494.

The final exam consists of two parts: an in-class, one-hour true/false component that counts for 30 percent of the course grade; and a nine-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.

Each numbered reading assignment typically corresponds to one class meeting. This syllabus is subject to revision.

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, 108-20

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 Crises

Reconstruction

4. The Reconstruction Amendments

Reread the 13th, 14th, and 15th Amendments

History of the Adoption of the Fourteenth Amendment and notes, 301-10

The Fourteenth Amendment Limited, 319-20

The Slaughter-House Cases, 320-36

5. 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

6. The Private Sphere and State Action

Reread pages 301-09

Establishment of the "Separate but Equal" Doctrine, 357-58

The Civil Rights Cases, 373-85

7. "Separate but Equal"

Plessy v. Ferguson, 359-69

The Spirit of *Plessy*, 370-73

Economic Rights and Structural Concerns

8. 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

9. 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

The Modern Constitution

10. 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

11. The Commerce Clause

Relaxation of Judicial Constraints on Congressional Power, 549-51

United States v. Darby, 551-58

The Modern Equal Protection Clause: Race

12. 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

13. Brown

Background, 893-98

Brown v. Board of Education, 898-902

Parents Involved in Community Schools v. Seattle School District No. 1 (excerpt)

Note: A “Dissent” From *Brown*, 902-04

Note: Originalism in Antidiscrimination Law, 912-15

Beyond Originalism? 920-23

14. Brown II and Hernandez

Reflections on the Opinion in *Brown*, 923-24

The Enduring Significance of *Brown*, 925-27

Four Decades of School Desegregation (*Brown II*, *Green*, *Swann*), 928-36

The Turning Point—Interdistrict Relief (*Milliken v. Bradley*), 941-43

An Era of Retrenchment, 943-45

15. Strict Scrutiny (Anticlassification vs. Antisubordination)

Hernandez v. Texas and discussion, 1010-14

The Antidiscrimination Principle, 956-59

Loving v. Virginia, 959-66

What Justifies the Suspect Classification Standard? 984-90

16. The Intent Standard, Version 1

What is a Race-Dependent Decision? (*Yick Wo, Queue Ordinance Case, Gomillion, Gaston County*) 1020-24
Griggs v. Duke Power, 1024-26
Washington v. Davis, 1026-31
Griggs as a Constitutional Principle and *Griggs* versus *Davis*, 1033-34
The *Arlington Heights* Factors, 1039-40

17. Colorblindness

United Jewish Organizations (UJO) (handout)
University of California v. Bakke, Part I (handout)
Richmond v. Croson, 1081-1109
Adarand v. Peña, 1109-13 (skim)

18. The Intent Standard, Version 2: *Feeney* and After

Discussion following *Washington v. Davis*, 1031-33
Commentaries on the Intent Standard, 1035-39
McCleskey v. Kemp, 1055-63
Memo from Justice Scalia on *McCleskey* Draft Opinion (handout)

19. Affirmative Action in Higher Education (Diversity)

University of California v. Bakke, Part II (handout)
Grutter v. Bollinger, 1120-42
Gratz v. Bollinger, 1142-51 (skim)

20. Race and Public Policy

Parents Involved in Community Schools v. Seattle School District No. 1 (handout)
Ricci v. DeStefano (handout from Brest et al. 2011 supplement)

The Modern Equal Protection Clause: Gender

21. Intermediate Scrutiny

Reread pages 337-39
Social Movements, 1179-87
Frontiero v. Richardson, 1188-95
The Equal Rights Amendment, 1195-1202

22. 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

23. 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

24. Permissible Sex-Based Differences

Michael M. v. Superior Court of Sonoma, 1282-95

25. Separate Facilities

United States v. Virginia (The VMI Case), 1229-55

26. 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

27. 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

28. 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

29. Decisions After *Roe*, 1419-24

Planned Parenthood v. Casey, 1424-57

Gonzales v. Carhart (handout from Brest et al. 2011 supplement)

30. Sexual Orientation and Due Process

Sexuality and Sexual Orientation, 1465-66

Bowers v. Hardwick, 1466-82

31. Sexual Orientation and Equal Protection

Romer v. Evans, 1505-1515

32. Sexual Orientation and Due Process, Take 2

Lawrence v. Texas, 1482-1505

- Sexual Orientation as a Suspect Classification, 1518-32
33. Same-Sex Marriage
California Marriage Cases (handout)

Other Suspect Classifications and Fundamental Rights

34. Wealth and Education (Substantive Equal Protection)
San Antonio v. Rodriguez, 1623-41
35. Alienage
Citizenship and Alienage Under the Equal Protection Clause, 1156-60
Graham v. Richardson, 1160-63
Bernal v. Fainter, 1163-72
Regulation of Resident Aliens, 1172-77
Plyler v. Doe and note, 1641-47
36. *Arizona v. United States* (handout)

The Contemporary Debate over National Power

37. Federalism: Limits on the Commerce Clause
Review pages 554-58
The 1960s Civil Rights Legislation: Commerce or Reconstruction? (*Heart of Atlanta Motel* and *Katzenbach v. McClung*), 558-64
The Rehnquist Court: Finding Limits on Federal Power, 600-01
United States v. Lopez, 601-27
38. Health Care Reform
The Constitutionality of Health Care Reform (handout from Brest et al. 2011 supplement)
39. Limits on the Fourteenth Amendment, Section 5
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. *Northwest Austin Municipal Utility District Number One (NAMUDNO)* (handout from Brest et al. 2011 supplement)