

Constitutional Law

Summer 2018

Professor: Miranda Yaver

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Office Hours: Wednesdays, 3:30-5:30 or by appointment, Max Caffe

Course Description:

“It is emphatically the province and the duty of the judicial department to say what the law is.” – John Marshall, *Marbury v. Madison* (1803)

This course is designed to provide a broad introduction to U.S. constitutional law and its role in the separation-of-powers system, focusing on civil liberties and civil rights. After a brief introduction to the U.S. founding and constitutional interpretation, students will be introduced to the following areas of constitutional law: religion, speech, privacy, equal protection, and the Commerce Clause. We will discuss such questions as, What is an impermissible infringement on freedom of religion? What are the limits of free speech? What, if any, affirmative action policies does the Equal Protection Clause preclude? What is the proper scope of federal vs. state policy regulation? Landmark case excerpts will be supplemented with secondary analysis and current constitutional debates. Class discussions and response papers will help students to sharpen their understanding of legal controversies and develop persuasive policy arguments. Students are expected to participate actively in class discussions and activities, which serve to help students apply significant Court cases to current or hypothetical controversies. Readings are subject to change, and students will be alerted to which readings become recommended instead of required.

I reserve the right to prohibit the use of laptops in class if they prove to be an impediment to active class participation.

Course Requirements:

- Attendance and participation in class: 40%
- Three short (4-page, double-spaced, 12 point font) papers (submitted on Courseworks): 30%
 - Fact pattern 1: Religious freedom
 - Fact pattern 2: Freedom of speech
 - Fact pattern 3: Affirmative action
- Participation in moot court (search and seizure case): 30%
 - Students will be randomly assigned in the beginning of Week 2 to one of three groups: Supreme Court justice (9 members), defense, and prosecution.
 - Each side – defense and prosecution – will have 30 minutes in which to present their argument to the Court, throughout which the justices may interrupt with questions. Students may divide their argument time among the members of the group. At the

conclusion of the 1-hour oral argument, the justices will convene to render a decision, which they will announce to the class along with with a justification for their outcome. Any/all dissents and accompanying rationales will be announced at this time as well.

Readings

- Most readings will be drawn from *Constitutional Law and Politics: Civil Rights and Liberties*, by David O'Brien. The textbook is available for purchase at Book Culture (112th Street between Broadway and Amsterdam) as well as on Amazon. Other readings will be available on Courseworks.

– Page numbers on syllabus correspond to the 10th ed., but earlier editions are acceptable.

- If you have difficulty accessing Columbia's Courseworks, you must talk to me ASAP, as this is where readings will be posted, assignments submitted, and class announcements made.

Useful resources on law and the Supreme Court:

- Case summaries, opinions, and oral arguments: <https://www.oyez.org/>
- <https://www.supremecourt.gov/>
- <http://www.billofrightsinsitute.org/>
- <http://www.scotusblog.com>
- <https://www.lawfareblog.com/>
- <http://electionlawblog.org/>
- <https://abovethelaw.com/>

Course Outline:

Week 1

1. Monday: Course introduction: What is constitutional law, how does the Supreme Court work, and how is the separation-of-powers system organized?
 - United States Constitution
 - Introduction to Separation of Powers
 - *Federalist 10*
 - *Federalist 51*
 - *Federalist 78*
 - *Marbury v. Madison* (1803)
2. Tuesday: Theories of constitutional interpretation
 - Reid, Brad. 2016. "Fourteen Ways to Interpret the Constitution." *Huffington Post*.

- Roosevelt, Kermit. 2007. “Originalism and the Living Constitution: Reconciliation.” *American Constitution Society for Law and Policy*. (Skim)
 - Segall, Eric. 2017. “Judicial Originalism as a Myth.” *Vox*.
 - CLASS ACTIVITY: Which theory of constitutional interpretation?
3. Wednesday: First Amendment: Introduction to Religion Clauses
- Madison, James. “Memorial and Remonstrance” (1785)
 - Feldman, Noah. 2005. “A Church-State Solution.” *New York Magazine*. (skim)
 - Travel ban Executive Order
 - O’Brien, pp 698-717, “The (Dis)Establishment of Religion”
 - CLASS ACTIVITY: Debate pending SCOTUS case over travel ban (*Trump v. Hawaii*)
4. Thursday: Establishment Clause:
- O’Brien, pp. 723-727: *Engel v. Vitale* (1962)
 - O’Brien, pp. 727-730: *Abington School District v. Schempp* (1963)
 - O’Brien, pp. 730-735: *Lemon v. Kurtzman* (1971)
 - O’Brien, pp. 745-749: *Lee v. Weissman* (1984)
 - “Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations.” 2009. *Pew Research Center*.
5. Friday: Free Exercise Clause
- O’Brien, pp. 787-797, 801-804, “Free Exercise of Religion”
 - O’Brien, pp. 804-807: *Wisconsin v. Yoder* (1972)
 - O’Brien, pp. 808-815: *Employment Division v. Smith* (1990)
 - Religious Freedom and Restoration Act
 - *Burwell v. Hobby Lobby Stores, Inc.* (2014)
 - *Masterpiece Cakeshop v. CO Civil Rights Commission* (2018) (discuss, not reading)

Week 2

1. Monday: Speech
- O’Brien, pp. 634-638, 662-663, “Symbolic Speech and Speech-Plus-Contact”
 - O’Brien, pp. 454-460, “Obscenity, Pornography, and Offensive Speech”
 - O’Brien, pp. 426-428: *Schenck v. United States* (1919) (optional)
 - O’Brien, pp. 645-649: *Tinker v. Des Moines* (1969)
 - O’Brien, pp. 468-472: *Miller v. California* (1973) (optional)
 - O’Brien, pp. 653-659: *Texas v. Johnson* (1989)
 - Lewis, Nicole. “The NFL and the First Amendment: A Guide to the Debate.” *The Washington Post*.

- CLASS ACTIVITY: Watch “A Conversation on the Constitution: Freedom of Speech” (Annenberg Center)
2. Tuesday: Speech (continued)
- Citizens United v. FEC, in Plain English. *SCOTUSblog*
 - CLASS ACTIVITY: Is money speech that can be regulated?
 - O’Brien, pp. 443-453: *Brandenburg v. Ohio* (1969)
 - Lind, Dara. 2017. “Why the ACLU is adjusting its approach to ‘free speech’ after Charlottesville.” *Vox*.
 - CLASS ACTIVITY: Debate constitutionality of suspensions for gun violence walkouts.
3. Wednesday: Privacy: Search and Seizure
- O’Brien, pp. 832-841, “The Fourth Amendment Guarantee”
 - O’Brien, pp. 972-976, “The USA Patriot Act”
 - O’Brien, pp. 978-983, “The Exclusionary Rule”
 - O’Brien, pp. 983-991: *Mapp v. Ohio* (1961)
 - O’Brien, pp. 929-933: *Pottawatomie v. Earls* (2002)
 - *New Jersey v. T.L.O.* (1985) (excerpt on Courseworks)
 - “Surveillance Under the USA/Patriot Act.” *American Civil Liberties Union*.
 - Napolitano, Andrew. 2015. “Saving the Fourth Amendment.” *Washington Times*.
4. Thursday: Privacy and Reproductive Rights
- O’Brien, pp. 1228-1239, 1254-1258, “Privacy and Reproductive Freedom”
 - O’Brien pp. 341-352: *Griswold v. Connecticut* (1965)
 - O’Brien, pp. 1242-1250: *Roe v. Wade* (1973)
 - O’Brien, pp. 1261-1273: *Planned Parenthood v. Casey* (1992)
 - CLASS ACTIVITY: Watch American Law Journal documentary “Roe v. Wade: 40 Years On: The Legal History & Future of Reproductive Rights.”
5. Friday: Equal Protection and Desegregation
- O’Brien, pp. 1322-1331, “Equal Protection of the Laws”
 - O’Brien, pp. 1332-1346, “Racial Discrimination and State Action”
 - O’Brien, pp. 1368-1372: *Plessy v. Ferguson* (1896)
 - O’Brien, pp. 1378-1389, “Racial Discrimination in Education”
 - O’Brien, pp. 1391-1402: *Brown v. Board of Education* (1954)
 - Chen, Michelle. “Millennials Have Lived Through a Doubling of School Segregation.” *The Nation* (June 15, 2016)

Week 3

1. Monday: Equal Protection and Affirmative Action
 - O'Brien, pp. 1434-1442, "Affirmative Action and Reverse Discrimination."
 - O'Brien, pp. 1443-1455: *Regents of the University of California v. Bakke* (1978)
 - O'Brien, pp. 1472-1480: *Grutter v. Bollinger* (2003)
 - O'Brien, pp. 1492-1496: *Fisher v. Texas* (2016)
 - CLASS ACTIVITY: Who should be admitted?

2. Tuesday: Moot Court and Continuing Equal Protection (Voting Rights)
 - MOOT COURT (morning session)
 - *Shelby County v. Holder* (2012)
 - "Shelby County One Year Later." The Brennan Center. 2014.
 - CLASS ACTIVITY: Watch PBS Documentary on Voting Rights and *Shelby County*

3. Wednesday: Wrapping Up Equal Protection, Introduction to Federalism
 - O'Brien, pp. 1496-1501: "Gender-Based Discrimination."
 - O'Brien, pp. 1502-1506: *Frontiero v. Richardson* (1973)
 - O'Brien, pp. United States v. Virginia: *United States v. Virginia* (1996)
 - "How Ruth Bader Ginsburg Became a Trailblazer for Gender Equality." *The Economist*
 - O'Brien, pp. 1525-1527: "Discrimination Against the LGBTQ Community."
 - "Intro to Federalism and Commerce" file in Courseworks

4. Thursday: Federalism and the Commerce Clause, Part I
 - "Civil Rights Act of 1964: Enduring and Revolutionary." *American Bar Foundation*.
 - *Heart of Atlanta Motel, Inc. v. United States* (1964)
 - *Katzenbach v. McClung* (1964)
 - *United States v. Lopez* (1995)

5. Friday: Federalism and the Commerce Clause, Part II
 - *United States v. Morrison* (2000)
 - *Gonzales v. Raich* (2005)
 - *National Federation of Independent Business v. Sebelius* (2012)
 - Resource: <http://kff.org/king-v-burwell-resources-on-the-u-s-supreme-court-case/>
 - FINAL CLASS ACTIVITY: CONSTITUTIONAL LAW JEOPARDY!