

Politics 287: Constitutional Law: Civil Rights and Civil Liberties Fall 2021

Professor: Miranda Yaver
Email: myaver@oberlin.edu
Class Time: Monday/Wednesday/Friday 10:00-10:50am
Class Location: King 101
Office Hours: Wednesday 1-3 or by appointment
Office Location: Rice Hall 209

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 American constitutional law and how it functions in the separation-of-powers system. After a brief introduction to the nation’s founding principles and the role of the Supreme Court, students will be introduced to the following dimensions of constitutional law jurisprudence: speech, religion, privacy, equal protection, Commerce Clause, and presidential powers. We will discuss such questions as, What are the limits of free speech? What constitutes an impermissible encroachment on free exercise of religion? Does the Constitution prohibit de facto segregation? Does the Equal Protection Clause imply a preclusion of affirmative action policies? Landmark Supreme Court case excerpts will be supplemented with contemporary examples of case application and constitutional debates. Class debates and fact pattern response papers will help students to sharpen their understanding of the complex jurisprudential debates and develop persuasive arguments about the law. Students will be expected to participate actively in class discussions and activities. Readings are subject to change, and students will be alerted to which readings become recommended (or else skim-worthy) rather than required.

Course Requirements:

- Four short papers on fact patterns (approximately 5 page, double-spaced, 12-point font, submitted through Canvas by the start of class): 15% each
 1. Religious freedom
 2. Freedom of speech
 3. Search and seizure
 4. Voting rights
- Final Exam: 25%
 - Students will have 72 hours to do a take-home (open-book, open-note) final exam comprised of a set of short essay questions and one longer essay question.
- Attendance and participation in class: 15%

Final Course Grading: The final grade for the course will be assigned based on the following scale:

A: 93+%	A-: 90-92%	B+: 87-89%
B: 83-86%	B-: 80-82%	C+: 77-79%
C: 73-76%	C-: 70-72%	D+: 67-69%
D: 63-66%	D-: 60-62%	F: > 60%

Policy Regarding Late Assignments: It is imperative that students turn in work at the specified deadlines. Failure to do so will result in a third letter grade reduction per day late unless you have received an extension in advance. Work will not be accepted at all more than one week late unless said extension was granted in advance. All students take the final exam at the assigned day and time, with the only exception of university-approved absences. If you have concerns regarding your ability to complete your work on time due to physical or mental health reasons, you are encouraged to seek appropriate treatment from campus services and to discuss with me *in advance* whether an extension is needed.

All members of the academic community should be able to engage fully in the academic opportunities and services provided, regardless of disability status, and to that end accommodations to this course can be made if necessary. Please feel free to discuss with me any concerns you may have.

Statement on Academic Integrity: It is expected that all students will work in accordance with the student honor code. Thus, plagiarism, cheating, and receiving unauthorized assistance with the work in this course will not be tolerated. Should a student violate academic integrity in this class, the matter will be reported to the university administration. If you have questions about citations of sources, ask prior to submitting the given assignment. Students are encouraged to consult Writing Support services for additional assistance on writing and citation so as to avoid plagiarism.

Textbooks

The following textbooks are required:

- *Constitutional Law and Politics: Civil Rights and Liberties, 11th edition*, by David O'Brien and Gordon Silverstein.
- Driver, Justin. 2018. *The Schoolhouse Gate: Public Education, The Supreme Court, and the Battle for the American Mind*. Pantheon Books.
- Segall, Eric. 2018. *Originalism as Faith*. Cambridge University Press.

The following textbooks are recommended:

- Chafetz, Josh. 2018. *Congress's Constitution: Legislative Authority and the Separation of Powers*. Yale University Press.
- Silverstein, Gordon. 2009. *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics*. Cambridge University Press

- Tribe, Laurence and Joshua Matz. 2014. *Uncertain Justice: The Roberts Court and the Constitution*. Henry Holt and Co.
- Whittington, Keith. 2001. *Constitutional Construction: Divided Powers and Constitutional Meaning*. Harvard University Press.

You may use different editions to the constitutional law casebook, but page numbers correspond to the editions listed on the syllabus. All other readings will be made available online. Students will be expected to come to class having read the material and being prepared to engage in the arguments that they present. Students will be alerted in advance to what readings are recommended rather than required, or are skim-worthy. It is imperative that students check their email regularly, as that is how class announcements will be made.

Useful websites on law and the Supreme Court:

- <https://www.oyez.org/>
- <https://www.supremecourt.gov/>
- <http://www.scotusblog.com>
- <https://www.lawfareblog.com/>
- <http://electionlawblog.org/>
- <https://abovethelaw.com/>
- <https://constitutioncenter.org/>

Useful podcasts on law and the Supreme Court: What Trump Can Teach Us About Con Law, First Mondays, We the People, At Liberty, Amicus

Course Outline:

Monday, October 4: Course Introduction

- United States Constitution

Wednesday, October 6: Introduction to American Politics and Separation of Powers and Judicial Review

- *Federalist 51, 78*
- O'Brien, pp. 49-58: *Marbury v. Madison* (1803)
- Murrill, Brandon J. 2018. CRS Report: The Supreme Court's Overruling of Constitutional Precedent

Friday, October 8: Theories of Constitutional Interpretation

- Segall, Eric. *Originalism As Faith*, Ch. 1, 4
- Hollis-Brusky, Amanda. 2016. “Here’s why originalism won’t be buried with Scalia.” *The Washington Post Monkey Cage*.
- Reid, Brad. 2016. “Fourteen Ways to Interpret the Constitution.” *Huffington Post*.
- Optional Reading:
 - McGinnis, John and Michael B. Rappaport. 2019. “Unifying Original Intent and Original Public Meaning.” *Northwestern University Law Review*.

Monday, October 11: Theories of Constitutional Interpretation (continued)

- Segall, Eric. *Originalism As Faith*, Ch. 5, 6, 9
- Roosevelt, Kermit. 2007. “Originalism and the Living Constitution: Reconciliation.” *American Constitution Society for Law and Policy*.

Wednesday, October 13: Establishment Clause and School Prayer

- O’Brien, pp. 702-20, “The (Dis)Establishment of Religion”
- O’Brien, pp. 728-31: *Engel v. Vitale* (1962)
- O’Brien, pp. 732-34: *Abington School District v. Schempp* (1963)
- Driver, Justin. *The Schoolhouse Gate*, p. 364-88
- Optional reading:
 - Madison, James. “Memorial and Remonstrance” (1785)

Friday, October 15: Establishment Clause and School Prayer (continued)

- O’Brien, pp. 749-753: *Lee v. Weissman* (1984)
- O’Brien, pp. 740-49: *Wallace v. Jaffree* (1985)

Monday, October 18: Establishment Clause

- O’Brien, pp. 734-39: *Lemon v. Kurtzman* (1971)
- *Trump v. Hawaii* (2018) (excerpt online)
- “Symposium: What might *Trump v. Hawaii* portend for states in establishment clause cases?” *SCOTUSBlog*
- Optional readings:
 - O’Brien, pp. 763-71: *McCreary v. American Civil Liberties Union of Kentucky* (2003)
 - O’Brien, pp. 829-837: *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017)

- Kritzer, Herbert & Mark Richards. 2003. “Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases.” *Law & Society Review* 37(4)

Wednesday, October 20: Establishment Clause and Vouchers

- *Zelman v. Simmons-Harris* (2002) (excerpt online)
- Driver, Justin. *The Schoolhouse Gate*, p. 410-20
- “Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations.” 2009. *Pew Research Center*.

Friday, October 22: Free Exercise Clause

- O’Brien, pp. 785-95, “Free Exercise of Religion”
- O’Brien, pp. 803-05: *Wisconsin v. Yoder* (1972)
- Driver, Justin. *The Schoolhouse Gate*, p. 400-10
- Optional reading:
 - O’Brien I, pp. 819-25: *City of Boerne v. Flores* (1997)

Monday, October 25: Free Exercise Clause

- O’Brien, pp. 806-12: *Employment Division v. Smith* (1990)
- O’Brien, pp. 813-18: *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993)

Wednesday, October 27: Free Exercise Clause and the Religious Freedom Restoration Act

- *Burwell v. Hobby Lobby Stores, Inc.* (2014) (excerpt online)
- O’Brien, pp. 1558-70: *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
- Optional reading:
 - Luchenitser, Alex. 2015. “A New Era of Inequality: *Hobby Lobby* and Religious Exemptions from Anti-Discrimination Laws ” *Harvard Law and Policy Review*. 9(63).
 - Chemerinsky, Erwin & Michele Goodwin. 2016. “Compulsory Vaccinations Are Constitutional.” *Northwestern University Law Review*

Friday, October 29: Freedom of Speech

- O’Brien, pp. 640-44, “Symbolic Speech and Speech-Plus-Contact”
- O’Brien, pp. 503-509, “Fighting Words and Offensive Speech”
- O’Brien, pp. 434-35: *Schenck v. United States* (1919)

Monday, November 1: Freedom of Speech

- O'Brien, pp. 436-40: *Gitlow v. New York* (1925)
- O'Brien, pp. 441-50: *Dennis v. United States* (1951)

Wednesday, November 3: Freedom of Speech in School Settings

- Driver, Justin. *The Schoolhouse Gate*, Ch. 2
- O'Brien, pp. 651-53: *Tinker v. Des Moines* (1969)
- Mahanoy Area School District v. B.L. (2021) (excerpt online)

Friday, November 5: Freedom of Speech in School Settings (continued)

- O'Brien, pp. 523-26: *Bethel School District v. Fraser* (1986)
- O'Brien, pp. 656-58: *Morse v. Frederick* (2007)
- Fernandez Campbell, Alexis. "Students have a right to protest gun violence, but they can't disrupt class." *Vox*, March 14, 2018

Monday, November 8: Freedom of Speech

- O'Brien, pp. 451-55: *Brandenburg v. Ohio* (1969)
- Lind, Dara. 2017. "Why the ACLU is adjusting its approach to 'free speech' after Charlottesville." *Vox*.

Wednesday, November 10: Freedom of Speech

- O'Brien, pp. 659-665: *Texas v. Johnson* (1989)
- Lewis, Nicole. 2017. "The NFL and the First Amendment: A Guide to the Debate." *The Washington Post*.

Friday, November 12: Freedom of Speech and Obscenity

- O'Brien, pp. 462-63, "Obscenity, Pornography, and Offensive Speech"
- O'Brien, pp. 470-73: *Roth v. United States* (1957)
- O'Brien, pp. 476-79: *Miller v. California* (1973)
- Optional readings:
 - Sunstein, Cass. 1986. "Pornography and the First Amendment." *Duke Law Journal* 589.
 - *United States v. O'Brien* (1968)
 - *United States v. Stevens* (2010)
 - *FCC v. Pacifica Foundation* (1978)

Monday, November 15: Freedom of Speech and Obscenity (continued)

- O'Brien, pp. 499-503: *Ashcroft v. Free Speech Coalition* (2002)
- O'Brien, pp. 490-497: *Reno v. ACLU* (1997)

Wednesday, November 17: Money and Speech

- *Buckley v. Valeo* (1976) (excerpt online)
- *McCannell v. Federal Election Commission* (2003) (excerpt online)
- *Federal Election Commission v. Wisconsin Right to Life* (2007) (excerpt online)
- Optional readings:
 - *Austin v. Michigan Chamber of Commerce* (1990)

Friday, November 19: Money and Speech: *Citizens United*

- *Citizens United v. FEC* (2010) (excerpt online)
- *Citizens United v. FEC*, in Plain English, SCOTUSBlog
- Abdul-Razzak, Nour, Carlo Prato, and Stephane Wolton. “How *Citizens United* gave Republicans a bonanza of seats in U.S. state legislatures.” *The Washington Post, Monkey Cage*, February 24, 2017.
- Optional:
 - Levitt, Justin. 2010. “Confronting the Impact of *Citizens United*.” *Yale Law & Policy Review* 29(1).

THANKSGIVING BREAK

Monday, November 29: Fourth Amendment

- O'Brien, pp. 838-47, “The Fourth Amendment Guarantee”
- O'Brien, pp. 995-999, “The Exclusionary Rule”
- O'Brien, pp. 1000-1007: *Mapp v. Ohio* (1961)
- Optional readings:
 - Bomboy, Scott. 2014. “A legal victory for drones warrants a Fourth Amendment discussion.” The Constitution Center.
 - *Olmstead v. United States* (1928)
 - *United States v. Jones* (2012)

Wednesday, December 1: Fourth Amendment (continued)

- O'Brien, pp. 990-995, "The USA Patriot Act"
- O'Brien, pp. 978-89: *Carpenter v. United States* (2018)
- Rozenshtein, Alan Z. "Fourth Amendment Reasonableness After *Carpenter v. United States*." *Lawfare blog*, December 27, 2018
- Optional reading:
 - Posner, Richard. 2008. "Privacy, Surveillance, and Law." 75 *University of Chicago Law Review* 245.

Friday, December 3: Search and Seizure in Schools

- *New Jersey v. T.L.O* (1984) (except online)
- O'Brien, pp. 934-938. *Pottawatomie v. Earls* (2002)
- Driver, Justin. *The Schoolhouse Gate*, Ch. 4

Monday, December 6: Privacy and Reproductive Rights

- O'Brien, pp. 1232-44, "Privacy and Reproductive Freedom"
- O'Brien, pp. 350-60: *Griswold v. Connecticut* (1965)
- Murray, Melissa. 2015. "Overlooking Equality on the Road to *Griswold*." *Yale Law Journal* 124.
- Optional reading:
 - O'Brien, pp. 1245-47: *Buck v. Bell* (1927) 120(8).

Wednesday, December 8: Privacy and Reproductive Rights: *Roe* and Beyond

- O'Brien, pp. 1247-56: *Roe v. Wade* (1973)
- O'Brien, pp. 1267-79: *Planned Parenthood v. Casey* (1992)
- Greenhouse, Linda and Reva Siegel. 2011. "Before (and After) *Roe v. Wade*: New Questions About Backlash." *The Yale Law Journal*

Friday, December 10: Privacy and Reproductive Rights Since *Roe*

- O'Brien, pp. 1280-86: *Whole Woman's Health v. Hellerstedt* (2016)
- North, Anna. 2018. "How Trump helped inspire a wave of strict new abortion laws." *Vox*.
- Rebouche, Rachel. "Abortion Services After *June Medical Services*." *The Regulatory Review*, August 4, 2020.
- Optional readings:

- Wharton, Linda, Susan Frietsche, and Katherine Kolbert. 2006. “Preserving the Core of *Roe*: Reflections on *Planned Parenthood v. Casey*.” 18 *Yale Journal of Law and Feminism*.
- *Webster v. Reproductive Health Services* (1989)
- *Rust v. Sullivan* (1991)
- *Gonzales v. Carhart* (2007)

Monday, December 13: Equal Protection and Desegregation

- O’Brien I, pp. 1322-1331, “Equal Protection of the Laws”
- O’Brien I, pp. 1332-1346, “Racial Discrimination and State Action”
- O’Brien I, pp. 1361-67: *Civil Rights Cases* (1883)
- O’Brien I, pp. 1368-1372: *Plessy v. Ferguson* (1896)

Wednesday, December 15: Equal Protection and De Jure Segregation in Education

- O’Brien, pp. 1376-89, “Racial Discrimination in Education”
- Southern Manifesto
- O’Brien, pp. 1389-1400: *Brown v. Board of Education* (1954)
- O’Brien, pp. 1400-01: *Bolling v. Sharpe* (1954)
- Driver, Justin. *The Schoolhouse Gate*, Ch. 5
- Optional reading:
 - Rosenberg, Gerald. “Substituting Symbol for Substance: What Did *Brown* Really Accomplish?” *PS*, April 2004.
 - O’Brien, pp. 1405-09: *Cooper v. Aaron* (1958)

Monday, December 20: Equal Protection and De Facto Segregation in America

- *Swann v. Charlotte-Mecklenburg Board of Education* (1970)
- O’Brien, pp. 1409-13: *Milliken v. Bradley* (1974)
- O’Brien, pp. 1417-29: *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)
- Driver, Justin. *The Schoolhouse Gate*, Ch. 6
- Optional reading:
 - Chen, Michelle. “Millennials Have Lived Through a Doubling of School Segregation.” *The Nation* (June 15, 2016)

Wednesday, December 22: Equal Protection and Affirmative Action

- O'Brien, p. 14441-48: *Regents of the University of California v. Bakke* (1978)
- O'Brien, pp. 1466-74: *Grutter v. Bollinger* (2003)
- O'Brien, pp. 1462-66: *Gratz v. Bollinger* (2003)
- O'Brien, pp. 1486-90: *Fisher v. UT Austin* (2016)
- Optional reading:
 - Estlund, Cynthia L. 2005. "Putting *Grutter* to Work: Diversity, Integration, and Affirmative Action in the Workplace." *Berkeley Journal of Employment and Labor Law* 26(1): 1.

WINTER BREAK

Monday, January 3: Voting Rights and *Shelby County v. Holder*

- Voting Rights Act of 1965
- *Shelby County v. Holder* (2012) (excerpt online)
- Tolson, Franita. 2014. "The Constitutional Structure of Voting Rights Enforcement." 89 *Washington Law Review* 379. (2014).
- Optional readings:
 - O'Brien, pp. 166-76: *Baker v. Carr* (1962)
 - *Abbott v. Perez* (2018)
 - Karlan, Pamela. 2004. "Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement." 56 *Stanford Law Review* 1147.
 - Hasen, Rick. 2018. "'Civil Right No. 1': Dr. King's Unfinished Voting Rights Revolution." *University of Memphis Law Review*.

Wednesday, January 5: Voting Rights: The Impact of *Shelby County v. Holder*

- Persily, Nathaniel and Thomas Mann. 2013. "*Shelby County v. Holder* and the Future of the Voting Rights Act." *The Brookings Institution*.
- "*Shelby County* One Year Later." The Brennan Center. 2014.
- Ford, Matt. "How the Roberts Court Caused Georgia's Election Mess." *The New Republic*, November 5, 2018.
- Hasen, Rick. "The Supreme Court Is Putting Democracy at Risk." *The New York Times*. July 1, 2021.
- Optional reading:

- Elmendorf, Christopher S. and Douglas M. Spencer. 2015. “Administering Section 2 of the Voting Rights Act After *Shelby County*.” *Columbia Law Review* 115(8).
- Hasen, Rick. 2016. “Softening Voter ID Laws Through Litigation: Is it Enough?” *Wisconsin Law Review* 100.

Friday, January 7: Equal Protection and Gender-Based Discrimination

- O’Brien, pp. 1490-96: “Gender-Based Discrimination.”
- O’Brien, pp. 1497-1500: *Frontiero v. Richardson* (1973)
- O’Brien, pp. 1500-04: *Craig v. Boren* (1976)
- Optional readings:
 - Ginsburg, Ruth Bader. 1975. “Gender and the Constitution.” *University of Cincinnati Law Review* 44(1): 1.
 - Siegel, Reva. 1992. “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection.” *Stanford Law Review* 44(2): 261.
 - Murray, Melissa. 2016. “Rights and Revolution: The Evolution of Sexual Regulation.” *Columbia Law Review*

Monday, January 10: Equal Protection, Gender, and LGBTQ Rights

- O’Brien, pp. 1508-19: *United States v. Virginia* (1996)
- O’Brien, pp. 1520-23: “Discrimination Against the LGBTQ Community”
- O’Brien, pp. 1523-34: *Romer v. Evans* (1996)
- O’Brien, pp. 1294-1305: *Lawrence v. Texas* (2003)

Wednesday, January 12: Equal Protection and LGBTQ Rights

- *United States v. Windsor* (2012)
- O’Brien, pp. 1534-58: *Obergefell v. Hodges* (2015)
- Rosen, Jeffrey. “The Dangers of a Constitutional ‘Right to Dignity.’” *Atlantic*, April 29, 2015.

Friday, January 14: Wrap-Up

72-hour take-home final exam due at end of university-designated exam period