

Constitutional Law

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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 Equal Protection Clause imply a preclusion of affirmative action policies? What is the proper scope of federal versus state regulation under the Interstate Commerce Clause? What power does the president have in wartime? 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.

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: 25%
- Four short papers (4-page, double-spaced, 12-point font, submitted online by the start of class): 10% each
 - Fact pattern 1: Religious freedom
 - Fact pattern 2: Freedom of speech
 - Fact pattern 3: Affirmative action
 - Fact pattern 4: Commerce
- Final Exam: 35%
 - Students will be provided one week in advance a list of IDs and essay questions from which the exam questions will be drawn.

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 must sit for the final exam at the assigned day and time, with the only exception of university-approved absences.

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.

Textbooks

The following textbooks are required:

- *Constitutional Law and Politics: Civil Rights and Liberties, 10th edition*, by David O'Brien. Abbreviated on syllabus as O'Brien I.
- *Constitutional Law and Politics: Struggles for Power and Governmental Accountability, 8th edition*, by David O'Brien. Abbreviated on syllabus as O'Brien II.

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 resources on law and the Supreme Court:

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

- <http://electionlawblog.org/>
- <https://abovethelaw.com/>

Course Outline:

Unit 1: Introduction to American Politics and Constitutional Interpretation

1. Course introduction: What is constitutional law, how does the Supreme Court work, and how is the US separation-of-powers system organized?
 - United States Constitution
 - Introduction to Separation of Powers
 - *Federalist 10*
 - *Federalist 51*
 - *Federalist 78*
 - *Marbury v. Madison* (1803)
 - Segal, Jeffrey A. and Harold J. Spaeth. “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices.” *American Journal of Political Science* 40(4).
 - Baum, Lawrence. 2015. *The Supreme Court, 12th ed.*, Ch. 3-4.
2. 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*.
 - Ackerman, Bruce. 2007. “The Living Constitution.” *Harvard Law Review* 120(7).
 - Hollis-Brusky, Amanda. 2016. “Here’s why originalism won’t be buried with Scalia.” *The Washington Post Monkey Cage*.

Unit 2: First Amendment

1. 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
2. The Establishment Clause
 - O’Brien I, pp 698-717, “The (Dis)Establishment of Religion”
 - O’Brien I, pp. 723-727: *Engel v. Vitale* (1962)
 - O’Brien I, pp. 727-730: *Abington School District v. Schempp* (1963)
 - O’Brien I, pp. 730-735: *Lemon v. Kurtzman* (1971)

- O'Brien I, pp. 745-749: *Lee v. Weissman* (1984)
- Trump v. Hawaii (2018) (excerpt online)
- “Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations.” 2009. *Pew Research Center*.
- Kritzer, Herbert and Mark Richards. 2003. “Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases.” *Law & Society Review* 37(4).

3. Free Exercise Clause

- O'Brien I, pp. 787-797, 801-804, “Free Exercise of Religion”
- O'Brien, pp. 804-807: *Wisconsin v. Yoder* (1972)
- O'Brien I, pp. 808-815: *Employment Division v. Smith* (1990)
- O'Brien I, pp. 815-821: *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993)
- Religious Freedom and Restoration Act
 - *Burwell v. Hobby Lobby Stores, Inc.* (2014)
 - *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
 - Luchenitser, Alex. 2015. “A New Era of Inequality: *Hobby Lobby* and Religious Exemptions from Anti-Discrimination Laws ” *Harvard Law and Policy Review*. 9(63).

4. Speech

- O'Brien I, pp. 634-638, 662-663, “Symbolic Speech and Speech-Plus-Contact”
- O'Brien I, pp. 454-460, “Obscenity, Pornography, and Offensive Speech”
- O'Brien I, pp. 495-503: “Fighting Words and Offensive Speech”
- O'Brien I, pp. 426-428: *Schenck v. United States* (1919) (optional)
- O'Brien I, pp. 645-649: *Tinker v. Des Moines* (1969)
- O'Brien I, pp. 443-453: *Brandenburg v. Ohio* (1969)
- O'Brien I, pp. 468-472: *Miller v. California* (1973) (optional)
- O'Brien I, pp. 653-659: *Texas v. Johnson* (1989)
- O'Brien II, pp. 968-79: *Citizens United v. FEC* (2010)
- *Citizens United v. FEC*, in Plain English, SCOTUSBlog
- Levitt, Justin. 2010. “Confronting the Impact of *Citizens United*.” *Yale Law & Policy Review* 29(1).
- Lind, Dara. 2017. “Why the ACLU is adjusting its approach to ‘free speech’ after Charlottesville.” *Vox*.
- Lewis, Nicole. “The NFL and the First Amendment: A Guide to the Debate.” *The Washington Post*.
- Sunstein, Cass. 1986. “Pornography and the First Amendment.” *Duke Law Journal*.
- Balkin, Jack M. 2004. “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society.” *NYU Law Review*.

Unit 3: Privacy

1. Search and Seizure

- O'Brien I, pp. 832-841, "The Fourth Amendment Guarantee"
- O'Brien I, pp. 858-58: "Exceptions to the Warrant Requirement"
- O'Brien I, pp. 972-976, "The USA Patriot Act"
- O'Brien I, pp. 978-983, "The Exclusionary Rule"
- O'Brien I, pp. 983-991: *Mapp v. Ohio* (1961)
- O'Brien I, 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*.
- Bomboy, Scott. 2014. "A legal victory for drones warrants a Fourth Amendment discussion." The Constitution Center.

2. Reproductive Rights

- O'Brien I, pp. 1228-1239, 1254-1258, "Privacy and Reproductive Freedom"
- O'Brien I, pp. 341-352: *Griswold v. Connecticut* (1965)
- O'Brien I, pp. 1242-1250: *Roe v. Wade* (1973)
- O'Brien I, pp. 1261-1273: *Planned Parenthood v. Casey* (1992)
- O'Brien I, pp. 1282-88: *Whole Woman's Health v. Hellerstedt* (2016)
- Franklin, Charles and Liane Kosaki. 1989. "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion." *American Political Science Review* 83(3).

3. Same-Sex Relations

- O'Brien I, pp. 1293-96: "Vote Switching in *Bowers v. Hardwick* and Justice Powell's April 8, 1986 Memorandum"
- *Bowers v. Hardwick* (excerpt online)
- O'Brien I, pp. 1296-1307: *Lawrence v. Texas* (2003)
- Tribe, Laurence H. 2004. "*Lawrence v. Texas*: The Fundamental Right that Dare Night Speak Its Name." 117 *Harvard Law Review*

Unit 4: Equal Protection

1. Segregation 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)

- O'Brien I, pp. 1378-1389, "Racial Discrimination in Education"
- O'Brien I, 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)
- Kruse, Kevin M. *White Flight*, Ch.5: "The 'Second Battle of Atlanta': Massive Resistance and the Divided Middle Class."

2. Affirmative Action

- O'Brien I, pp. 1434-1442, "Affirmative Action and Reverse Discrimination."
- O'Brien I, pp. 1443-1455: *Regents of the University of California v. Bakke* (1978)
- O'Brien I, pp. 1467-72: *Gratz v. Bollinger* (2003)
- O'Brien I, pp. 1472-1480: *Grutter v. Bollinger* (2003)
- O'Brien I, pp. 1492-1496: *Fisher v. Texas* (2016)
- Bybee, Keith. 2000. "The Political Significance of Legal Ambiguity: The Case of Affirmative Action." *Law & Society Review* 34(2).

3. Voting Rights

- O'Brien II, pp. 856-65: "Voting Rights and the Reapportionment Revolution"
- O'Brien I, pp. 157-167: *Baker v. Carr* (1962)
- *Shelby County v. Holder* (2012)
- 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.
- Elmendorf, Christopher S. and Douglas M. Spencer. 2015. "Administering Section 2 of the Voting Rights Act After *Shelby County*." *Columbia Law Review* 115(8).

4. Gender

- O'Brien I, pp. 1496-1501: "Gender-Based Discrimination."
- O'Brien I, pp. 1502-1506: *Frontiero v. Richardson* (1973)
- O'Brien I, pp. 1506-10: *Craig v. Boren* (1976)
- O'Brien I, pp. United States v. Virginia: *United States v. Virginia* (1996)
- "How Ruth Bader Ginsburg Became a Trailblazer for Gender Equality." *The Economist*

5. Marriage

- O'Brien I, pp. 1525-1527: "Discrimination Against the LGBTQ Community"
- O'Brien I, pp. 1528-38: *Romer v. Evans* (1996)
- O'Brien I, pp. 1538-46: *United States v. Windsor* (2013)
- O'Brien I, pp. 1546-70: *Obergefell v. Hodges* (2015)

- Stoutenborough, James, Donald Haider-Markel, and Mahalley Allen. 2006. “Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases.” *Political Research Quarterly*.
- Rosen, Jeffrey. “The Dangers of a Constitutional ‘Right to Dignity.’” *The Atlantic*, April 29, 2015.

Unit 5: Commerce Clause

1. Introduction to Federalism and the Commerce Clause

- Schiller, Reuel E. 2007. “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law.” *Michigan Law Review* 106(3).
- O’Brien II, pp. 573-79: “From Legal Formalism to the New Deal Crisis”
- O’Brien II, pp. 589-93: “From the New Deal Crisis to the Administrative State”
- O’Brien II, pp. 692-97, 714-31: “States’ Power Over Commerce and Regulation”
- O’Brien II, pp. 595-601: *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937)
- O’Brien II, pp. 602-05: *US v. Darby* (1941)
- O’Brien II, pp. 606-09: *Wickard v. Filburn* (1942)

2. Commerce Clause and Civil Rights

- O’Brien II, pp. 609-14: *Heart of Atlanta Motel, Inc. v. United States* (1964)
- O’Brien II, pp. 614-18: *Katzenbach v. McClung* (1964)
- “Civil Rights Act of 1964: Enduring and Revolutionary.” *American Bar Foundation*.
- Melnick, Shep. 1996. “Federalism and the New Rights.” *Yale Law & Policy Review* 14(2).

3. Commerce Clause and New Federalism

- The Heritage Foundation. 2011. “Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause.”
- Dinan, John. 2009. “The Rehnquist Court’s Federalism Decisions in Perspective.” *Journal of Law and Politics* 15: 127-94.
- Cross, Frank and Emerson Tiller. 2000. “The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence.” *Southern California Law Review* 73(741).
- O’Brien II, pp. 618-30: *United States v. Lopez* (1995)
- O’Brien II, pp. 644-56: *United States v. Morrison* (2000)
- O’Brien II, pp. 656-65: *Gonzales v. Raich* (2005)
- Rosenbaum, Sara. 2005. “*Gonzales v. Raich*: Implications for Public Health Policy.” *Public Health Reports* 120(6).
- *National Federation of Independent Business v. Sebelius* (2012)

- Kaiser Family Foundation Resource on *King v. Burwell*: <http://kff.org/king-v-burwell-resources-on-the-u-s-supreme-court-case/>

Unit 6: Presidential Powers

1. National Security and Emergency Powers

- O'Brien II, pp. 346-51: "The President as Chief Executive in Domestic Affairs"
- O'Brien II, pp. 353-68: *Youngstown Sheet & Tube Co. v. Sawyer* (1952)
- O'Brien II, pp. 368-77: *New York Times v. United States* (1971)
- O'Brien II, pp. 378-79: "The National Security Agency's Warrantless Electronic Surveillance"
- Fisher, Louis. 2005. "Judicial Review of the War Power." *Presidential Studies Quarterly* 35(3).

2. Presidential Powers and Immunity in the Separation of Powers System

- O'Brien II, p. 468-79: *United States v. Nixon* (1974)
- O'Brien II, pp. 408-25: *Morrison v. Olson* (1989)
- O'Brien II, pp. 482-86: *Clinton v. Jones* (1997)
- O'Brien II, pp. 452-63: *Clinton v. City of New York* (1998)
- Vladeck, Steve. 2018. "Kavanaugh, Mueller and Efforts to Have it Both Ways on Morrison." *Lawfare Blog*

3. War-Making and Emergency Powers

- O'Brien II, pp. 273-78, 280-89: "War-Making and Emergency Powers"
- O'Brien II, pp. 292-98: *Ex parte Milligan* (1866)
- O'Brien II, pp. 298-307: *Korematsu v. United States* (1944)
- O'Brien II, pp. 312-30: *Boumediene v. Bush* (2008)
- O'Brien II, pp. 331-36: "War Powers Resolution"
- O'Brien II, pp. 337-45: "The Development of Law: The USA PATRIOT Act of 2001, Wiretaps, and the Foreign Intelligence Surveillance Court"
- Tushnet, Mark. 2007. "The Political Consequences of Emergency Powers: Some Lessons from *Hamdan*." *Minnesota Law Review*.
- Silverstein, Gordon. 2009. "The Law: Bush, Cheney, and the Separation of Powers: A Lasting Legal Legacy?" *Presidential Studies Quarterly*.