

## Constitutional Law I Autumn 2009

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### COURSE INFORMATION

**Casebook:** Brest, Levinson, Balkin, Amar & Siegel, *Processes of Constitutional Decisionmaking* (Fifth Edition 2006) (“BLBAS”).

**Required supplemental readings:** Some edited cases are available on the website for the casebook ([www.conlaw.net](http://www.conlaw.net)) under supplementary materials. Other articles or cases listed on the syllabus are readily available on Westlaw and are linked from the syllabus on TWEN.

**Optional readings:** Articles relevant to the course that might be of interest will be listed on TWEN. These are not required for the course, but may be helpful in understanding the material.

**Grade:** Based on final examination as well as class participation.

**Class participation:** Participation is an important component of this course. Class will proceed primarily through the Socratic method and students should be prepared to discuss the readings in each class.

If you are unprepared for class, please notify me in advance either by email or in person before class begins. Final grades may be raised or lowered to reflect the quality of contribution to class discussions.

### READING ASSIGNMENTS

**August 20 – Introduction and *McCulloch v. Maryland* case study**  
The Constitution of the United States, BLBAS 1-15  
Historical Background, BLBAS 19-26  
*McCulloch v. Maryland*, BLBAS 27-53

**August 25 – *McCulloch* and constitutional interpretation**  
*McCulloch v. Maryland*, BLBAS 53-64, 67-95

**August 27 – Theories of constitutional interpretation**

Philip Bobbitt, *Constitutional Fate*, 58 Tex. L. Rev. 695, 698-726 (1980)

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989)

Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997)

Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73

Cornell L. Rev. 422 (1988)

**September 1 – Establishment of judicial review**

*Stuart v. Laird* and *Marbury v. Madison*, BLBAS 97-124

**September 3 – Scope and legitimacy of judicial review**

BLBAS 124-136

*The Federalist* 78

Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L. J. 217, 219-257 (1994)

**September 8 – Fourteenth Amendment**

Historical background BLBAS 301-310

Debates over incorporation BLBAS 485-493

*Lochner v. New York*, BLBAS 412-431

***Congressional powers and limitations***

**September 10 – Commerce, taxing and spending powers**

BLBAS 435-456

BLBAS 564-570

BLBAS 627-629

Dormant Commerce Clause BLBAS 730-734

**September 15 – Treaty power; reconstruction power**

*Missouri v. Holland*, BLBAS 456-460

BLBAS 570-572

*City of Boerne v. Flores*, BLBAS 629-649

**September 17 – Decline of judicial intervention**

BLBAS 499-527

BLBAS 549-558

**September 22 – Judicial limits**

*United States v. Lopez*, BLBAS 600-627

*Gonzales v. Raich* (www.conlaw.net)

**September 24 – Federalism constraints**

*Garcia v. San Antonio Met. Transit Auth.*, BLBAS 649-665

*Gregory v. Ashcroft*, BLBAS 665-674

*New York v. United States*, BLBAS 674-692

**September 29 – continued**

*Printz v. United States*, BLBAS 693-705

*U.S. Term Limits, Inc. v. Thornton*, BLBAS 711-730

**October 1 – Eleventh Amendment limitations**

BLBAS 705-711

*Kimel, Garrett, and Hibbs* (www.conlaw.net)

*Separation of powers and the President in wartime*

**October 6**

*Youngstown Sheet & Tube Co. v. Sawyer*, BLBAS 819-840

The Federalist 48

**October 8 – Executive detention**

*Hamdi v. Rumsfeld*, BLBAS 840-871

BLBAS 460-468

**October 13 – No class**

**October 15 – Military tribunals and habeas corpus**

Military tribunals, BLBAS 871-878

*Ex parte Merryman*, BLBAS 276-279

BLBAS 138-140

*Boumediene v. Bush* and *Munaf v. Geren*

Use excerpt at: [www.lexisnexis.com/lawschool/study/texts/pdf/002-03018-sup01.pdf](http://www.lexisnexis.com/lawschool/study/texts/pdf/002-03018-sup01.pdf) (pages 37-68)

**October 20 – Scope of emergency powers**

BLBAS 878-881

BLBAS 469-471

Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004)

Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 Notre Dame L. Rev. 1299 (2004)

## *Presidential powers*

### **October 22 – Executive privileges and immunities**

*United States v. Nixon*, BLBAS 749-761

BLBAS 881-885

*Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (747-758, 764-771, 779-785)

### **October 27 – The appointment power**

*Bowsher v. Synar*, 478 U.S. 714, 721-733 (1986) (skim the facts and read sections II-IV)

*Morrison v. Olson*, BLBAS 761-792

*Edmond v. United States*, BLBAS 792-795

### **October 29 – The veto power**

*INS v. Chadha*, BLBAS 795-817

### **November 3 – Non-delegation doctrine**

BLBAS 817-819

*Clinton v. City of New York*, 524 U.S. 417, 436-end (1998) (skim facts)

Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315-333 (2000)

### **November 5 – Constitutional interpretation in the executive branch**

Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1990)

OLC Memo, Presidential Authority to Decline to Executive

Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 1994 WL 813349

Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 Const. Comment. 307, 308-312, 334-347 (2006)

OLC Memo, The Legal Significance of Presidential Signing Statements, [www.usdoj.gov/olc/signing.htm](http://www.usdoj.gov/olc/signing.htm)

## *Limitations on judicial review*

### **November 10 – Jurisdiction stripping**

BLBAS 887-889

Articles

### **November 12 – Advisory opinions and standing**

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)

*Massachusetts v. EPA*, 127 S.Ct. 1438, 1452-1459 (2007) (skim facts)

**November 17 – Political question doctrine**

BLBAS 890-892

*Baker v. Carr*, 369 U.S. 186, 209-227 (1962)

*Nixon v. United States*, 506 U.S. 224 (1993) (majority opinion only)

*Goldwater v. Carter*, 444 U.S. 996 (1979)

***Constitution and the welfare state***

**November 19 – Affirmative constitutional rights**

BLBAS 1613-1623

BLBAS 1648-1667

**November 24 – Unconstitutional conditions**

BLBAS 1688-1699

BLBAS 1702-1725

**December 1 – Religion and the welfare state**

BLBAS 1759-1800

**Date TBD – Review Session**

**December 14 – Final Exam**