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Office Hours: Monday 11:20-1:20, or by
appointment.

Constitutional Law I

Fall 2023

Course Time and Location

Monday and Wednesday: 1:50-3:50 PM
Office hours:
Monday 11:45-1:45

Reading Materials

Textbook: Brest, Levinson, Balkin, Amar, Siegel, and Rodriguez, *Processes of Constitutional Decisionmaking* (8th Ed. 2022) (BLBAS). Available at GMU Book Store. Purchase of the 2023 supplement to the BLBAS textbook is optional.

Some cases are available at a website put together by the Book's authors (listed as BLBAS Website). The website address is:

<http://jackbalkin.yale.edu/constitutional-law/supplementary-materials>

Some materials are available in files in the "Course Materials" section of the class TWEN page (CM/TWEN). Please look in the "Course Readings" folder there. Some cases and other materials not in the textbook are available directly through links on the syllabus on the class TWEN site. These are labeled as "TWEN" or "Westlaw/TWEN"

Grading

Grades will be based on a combination of the final exam and class participation. Specifically, the course grade will be the final exam grade plus a bonus for good class participation as high as approximately 1/2 of a letter grade (e.g. – a B+ might become an A-). Details of the final exam will be announced later in the semester. Class participation will be assessed on a combination of quantity and quality.

Recording

I hereby authorize students enrolled in the class to make audio or visual recordings of the class sessions, so long as they are solely for private, noncommercial uses, and the recording process does not disrupt the class.

Contingency Plans

In the event that either state or university public health guidelines prevent this class from meeting in-person, it will be held online utilizing Zoom or other similar platform. Should this prove necessary, I will inform the class of relevant procedures online. But, to the extent possible, we will observe the same rules and procedures as during in-person sessions.

In the event that class is cancelled due to weather issues, I will consult with the class as to whether we prefer to hold class online at the pre-set time, or in person at a makeup time.

Learning Outcomes

The principal goals of the class are for students to acquire a solid working knowledge of competing approaches to constitutional interpretation (e.g. – originalism and living constitutionalism), the Supreme Court’s jurisprudence on major issues of federalism and separation of powers, and how the relevant legal doctrines have developed over time.

Assignments

Although I will try to stick to the schedule, we may occasionally fall behind. In such an unfortunate case, we will begin the next class with the next case or other reading on the syllabus, unless I say otherwise.

Note: In a few cases, I may have included a complete case or article in the packet, but the syllabus indicates specific pages for you to read. You are only responsible for the pages noted in the syllabus, though you may wish to skim the rest. Pages noted in the syllabus refer to page numbers in the US reports or Supreme Court reports (for cases) or journal (for articles), NOT to other page numbers that may be present.

August 21: Introduction

Constitution of the United States BLBAS xlii-lix

Declaration of Independence available at <http://www.ushistory.org/declaration/document/>

Articles of Confederation, available at http://avalon.law.yale.edu/18th_century/artconf.asp

Frederick Douglass, “What to the Slave is the Fourth of July?” available at <https://www.blackpast.org/african-american-history/speeches-african-american-history/1852-frederick-douglass-what-slave-fourth-july/>

August 23: Modes of Constitutional Interpretation: McCulloch v. Maryland and the Bank of the United States

McCulloch v. Maryland BLBAS 11-43

Philip Bobbitt, “Modalities of Constitutional Argument” (CM/TWEN)

August 28: McCulloch v. Maryland and the Necessary and Proper Clause (continued)/Madison on Federalism

McCulloch (continued) BLBAS 54-72

Constitutionality of the Louisiana Purchase BLBAS 148-51

Federalist 10, available at http://avalon.law.yale.edu/18th_century/fed10.asp

Federalist 39, available at http://avalon.law.yale.edu/18th_century/fed39.asp

Federalist 45, available at http://avalon.law.yale.edu/18th_century/fed45.asp

August 30: The Power of Judicial Review

Marbury v. Madison BLBAS 111-31

Cooper v. Aaron 358 U.S. 1 (1958) (TWEN)

Federalist 78, available at http://avalon.law.yale.edu/18th_century/fed78.asp

September 6: Theories of Constitutional Interpretation

John Hart Ely, “Representation-Reinforcement” (from *Democracy and Distrust*) (CM/TWEN)

David Strauss, “Common Law Constitutional Interpretation” (CM/TWEN)

Randy Barnett, “An Originalism for Nonoriginalists” (CM/TWEN)

Adrian Vermeule, “Beyond Originalism,” (CM/TWEN)

September 11: Federalism I: Congressional Power and Minority Rights

Dred Scott v. Sandford BLBAS 263-83 (federal powers issue only)

Prigg v. Pennsylvania BLBAS 251-61

Reynolds v. United States 98 U.S. 145 (1879) (TWEN)

September 13: Federalism I: Congressional Power and Minority Rights (continued)

Civil Rights Cases BLBAS 421-35

South Carolina v. Katzenbach BLBAS 644-47, 651-55

Katzenbach v. Morgan BLBAS 655-61.

September 18: Federalism I: Congressional Power and Minority Rights (continued)

City of Boerne v. Flores BLBAS 748-60

United States v. Morrison BLBAS Website (Read only the part about the Section 5 issue – labeled as “Reconstruction Power,” plus the first 2-3 pages of the Commerce Clause portion of the opinion, which states the facts of the case)

Shelby County v. Holder BLBAS 776-801

September 20: Federalism II: The Commerce Power

Gibbons v. Ogden BLBAS 183-96

United States v. E.C. Knight, 156 U.S. 1 (1895), (TWEN) focus on pp. 1-19 (majority opinion)

Champion v. Ames BLBAS 512-516

Hammer v. Dagenhart BLBAS 517-22

September 25: Federalism II: The Commerce Power (continued)

NLRB v. Jones & Laughlin Steel BLBAS 616-18

United States v. Darby BLBAS 621-23

Wickard v. Filburn BLBAS 623-27

Franklin D. Roosevelt, Constitution Day Address (1937) BLBAS 618-20

September 27: Federalism II: The Commerce Power (continued)

Heart of Atlanta Motel BLBAS 640

Katzenbach v. McClung BLBAS 640-643

United States v. Lopez BLBAS 673-87

October 2: The Commerce Power (continued)

United States v. Morrison BLBAS Website,

<http://jackbalkin.yale.edu/sites/default/files/files/usvmorrisoncommerceclause.pdf>

(Commerce Clause part only)

Gonzalez v. Raich BLBAS Website

NFIB v. Sebelius, BLBAS 687-711 (Commerce and Necessary and Proper Clause issue)

October 4: Federalism II: The Treaty Power/Federalism III: The Tenth Amendment - State Sovereignty as an Affirmative Limit on Federal Power

Missouri v. Holland BLBAS 531-35

Bond v. United States BLBAS 743-46

Garcia v. San Antonio Metropolitan Transit Authority BLBAS 807-12

New York v. United States BLBAS 819-32

October 10 (Tuesday observing a Monday schedule): Federalism III: The Tenth Amendment - State Sovereignty as an Affirmative Limit on Federal Power (continued)/Federalism IV: The Eleventh Amendment

Printz v. United States BLBAS 835-47
Murphy v. NCAA, 138 S.Ct. 1461 (2018) TWEN
Seminole Tribe of Florida v. Florida 517 U.S. 44 (1992) (TWEN), pp. 47-54, 64-92
Board of Trustees v. Garrett BLBAS Website

October 11: The Contract Clause/The Spending Power

Fletcher v. Peck BLBAS 154-60
Home Bldg. & Loan Association v. Blaisdell BLBAS 571-81
The debate over internal improvements BLBAS 208-14
United States v. Butler BLBAS 607-11
Steward Machine Co. v Davis, BLBAS 629-31

October 16: The Spending Power (Continued)/Federal Power Over Immigration

South Dakota v. Dole, 483 U.S. 203 (1987) (TWEN)
NFIB v. Sebelius, BLBAS (Spending Clause issue only)727-42
Alien Act of 1798 BLBAS 80-82
James Madison, "Report of 1800," available at
<https://founders.archives.gov/documents/Madison/01-17-02-0202>

October 18: Federal Power Over Immigration (Continued)/War Powers

Chae Chan Ping v. United States BLBAS 464-72
Fong Yue Ting v. United States, 149 U.S. 698 (1893) TWEN
Arizona v. United States BLBAS 197-98
Trump v. Hawaii, 138 S.Ct. 2392 (2018) (TWEN).

Guest Speaker:

Prof. Cristina Rodriguez, Yale Law School, co-author of *Processes of Constitutional Decisionmaking* and *The President and Immigration Law* (with Adam Cox).

October 23: Executive War Powers During the Civil War

The Debate over Secession BLBAS 301-307
Prize Cases BLBAS 313-17
Ex Parte Merryman BLBAS 319-22
The Emancipation Proclamation BLBAS 323-27

October 25: Executive War Powers (Continued)

Legal Tender Cases BLBAS 337-46
Korematsu v. United States BLBAS 1136-42
Youngstown Sheet & Tube v. Sawyer BLBAS 1019-37
The Constitutionality of Military Intervention BLBAS 1037-46

October 30: Separation of Powers I: The President and Congress

Schechter Poultry v. United States, 295 U.S. 495 (1935) TWEN
Gundy v. United States, 139 S.Ct. 2116 (2019) TWEN
West Virginia v. EPA (2022) CM/TWEN (under course materials)
Biden v. Nebraska 143 S.Ct. 2355 (2023) TWEN (skip sections on standing).

November 1: Separation of Powers I: The President and Congress (continued)

United States v. Nixon BLBAS 882-93
Bowsher v. Synar CM/TWEN
INS v. Chadha BLBAS 991-1015
Morrison v. Olson BLBAS 925-44

Guest Speaker: Prof. Steven Calabresi, Northwestern University, co-author of *The Unitary Executive* (with Christopher Yoo)

November 6: The President and Congress (Continued): Impeachment

Walter Nixon v. United States, 506 U.S. 224 (1992) (TWEN)
Charles L. Black, “The Impeachable Offense” (1974), available at <https://www.lawfareblog.com/impeachable-offense>
Materials on the second Trump Impeachment (CM/TWEN)
Trial Memorandum of House Impeachment Managers, Impeachment of Donald Trump, Jan. 2021 pp. 36-71, available at https://judiciary.house.gov/uploadedfiles/house_trial_brief_final.pdf
Trial Memorandum of Donald Trump, Impeachment of Donald Trump, Jan. 2021, pp. 13-47, available at <https://s3.documentcloud.org/documents/20474954/trump-defense-impeachment-brief.pdf>

November 8: President and Congress (Continued)/Separation of Powers III: Standing

Lucia v. SEC, 138 S.Ct. 2049 (2018) TWEN
Allen v. Wright, 468 U.S. 737 (1984), 739-46, 750-59, 783-88 (TWEN)
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1995), 558-78, 589-95 (TWEN)
Friends of the Earth v. Laidlaw 528 U.S. 167 (2000), 173-88, 198-202 (TWEN)

November 13: The Political Questions Doctrine/Control of the Electoral Process

Baker v. Carr, 369 U.S. 186 (1962), 188-92, 209-29, 277-80, 289-93 (TWEN)
Goldwater v. Carter, 444 U.S. 996 (1979) (TWEN)

Rucho v. Common Cause, 139 S.Ct. 2484 (2019) TWEN
Moore v. Harper, 143 S.Ct. 2065 (2023) TWEN

November 15: The Constitutional Amendment Process

Reread US Constitution, Article V

BLBAS (adoption of the Fourteenth Amendment) 369-78

Coleman v. Miller 307 U.S. 433 (1939) (TWEN), pp. 433-60

Jesse Wegman, “Why Can’t We Make Women’s Equality the Law of the Land?,” *NY Times*, Jan. 28, 2022, available at <https://www.nytimes.com/2022/01/28/opinion/equal-rights-amendment-ratification.html>

CM/TWEN

Bruce Ackerman, “We the People” (CM/TWEN)

Richard A. Posner, “This Magic Moment” (CM/TWEN)

November 20: Conclusion & Questions about the Final Exam

Questions about Final Exam

Thomas Jefferson, Letter to James Madison, December 1789 (CM/TWEN)

James Madison, Letter to Thomas Jefferson, February 1790 (CM/TWEN)

Summary and Conclusion