

CONSTITUTIONAL LAW
Syllabus – Spring 2017
Section A
Professor Renee Knake
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Course Description: This course is an introduction to American constitutional law. The first half of the course is a study of the United States Supreme Court and judicial review from 1789 to the present era. Combining historical and analytical approaches, we will examine the Court's landmark constitutional decisions, explore the theory and techniques of judicial review, and relate the Court's authority to the wider political-societal context of American government. We will consider both structural and individual rights issues as illustrations of the development of judicial review. We also will touch upon individual rights guaranteed by the Constitution, including rights to free speech and religious freedom under the first amendment, as well as rights such as due process and equal protection created or incorporated by the 14th amendment. The second half of the course focuses on the structural aspects of the Constitution—federalism and separation of powers. Although we will hardly ignore history, the emphasis will be on current doctrine in these areas. These areas have seen extensive and exciting developments in recent years, from the Rehnquist Court's revival of judicially-enforceable federalism limits on national power to the Roberts Court's grappling with the War on Terror and the scope of Executive action under the Bush and Obama administrations. One of the themes of this course is to show how the issues of 1789 and 1868 are still very much with us today.

Constitutional law, as a legal discipline and field of study, is exceptionally important, especially today. From health care to immigration to transgender discrimination to drones to education and beyond, constitutional law is at the heart of American public policy, not to mention the newspaper headlines. Many of the topics and doctrines covered are complicated and, frankly, convoluted at times. In this course we will explore some of the most sensitive topics, such as abortion, affirmative action, antidiscrimination, gun rights, and privacy, as well as some of the seemingly most dry, such as the Commerce Clause, the limits on the federal government under the Tenth Amendment, and the separation of powers—though these are equally important. At the same time, the breadth of constitutional law means that even in a four-credit course such as this there will be entire topics that go largely if not entirely unexplored. Many class topics could be entire courses, such as the first amendment. This class is a survey of American constitutional law and I encourage you to explore the areas you will sample here more fully during your second and third years of law school.

My hope is that you will find this course fun—yes, we will have fun!—interesting, and important. Nevertheless, without a doubt, you will also find it among the most difficult of your first year, if not your entire law school career. This is due to at least a couple of reasons. First, we will cover a great deal of dense material, with substantial reading assignments for each class, and we meet three days in a row. You will need to set aside a minimum of 2-3 hours on Monday, Tuesday, and Wednesday to prepare for classes the following day, so please plan accordingly to not only read, but also to reflect upon and

internalize the reading assignments. Second, the material can be very complicated, at times, especially because for many of you, this is your first exposure to constitutional law doctrine and cases. The good news is that we are in this together, and I believe you will find our time to be intellectually rigorous and rewarding.

Class Hours: Tuesdays and Thursdays, 9-10:30AM Wednesdays 1-2:30PM

Office Hours: Thursdays 10:30-noon and by appointment. My office is located in BLB 116.

Required Materials: The primary text for this course is ERNEST A. YOUNG, *THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE* (Foundation 2012). There is also a recent Supplement; I will post required excerpts on TWEN along with readings that are not contained in the casebook. You are required to register for TWEN and check it each time you prepare for class. You are responsible for all materials posted to TWEN.

Exam: Your grade will be based primarily on a take-home final exam. The test will be open book. All answers must be exclusively your own work. You may not consult with others about the exam once the exam period has started. Please review the Honor Code. The overall word limit will be 3000 words, and it will be strictly enforced. You must type the exam.

Class Participation: Your grade will also be influenced by class participation. Each session will be a mix of traditional lecture and Socratic questioning. It is very important that you have read the material and be prepared to discuss it in class. I could call at random. If you are unprepared, you will be expected to call on co-counsel (so speak to a classmate in advance—consider this the first of many networking opportunities you should be engaging in with your colleagues) and please anticipate being called upon at the next class. I do this not to torture you or cause anxiety, but because I believe one of the most important skills for successful lawyering is the ability to think and speak in the moment. Our class is a safe space for you to practice and hone this skill, one that will set you apart from others. Also, I believe each of you has an important voice to share—you would not have been admitted to this law school otherwise—and we want to hear from you. That said, due to the sensitive nature of some topics, if there is a subject matter about which you do not wish to discuss in class, please notify me at least 24 hours in advance by email.

Attendance: You are expected to attend all class sessions. If you fail to attend at least 80% of class meetings you will be in violation of ABA and Law Center policy and may be dropped from the course. I will keep track of attendance by passing around a sign-in sheet. It is an honor code violation to sign in for another student. Late arrivals may be treated as absences. I understand that almost everyone has to miss class from time to time so there is no need to contact me unless you will exceed the allowable number of absences. But I want to stress that you will almost certainly find this course much more difficult if you do not attend regularly, and in any event you will be in default of your obligations to contribute to class discussion for the benefit of your classmates. If you

have special circumstances requiring a more extended absence, please do not hesitate to speak with me about it. You are responsible for keeping track of your own absences.

Computer Policy: Use of laptops or other electronic devices is permitted for class-related purposes only. A significant number of professors at this and other law schools have chosen to ban laptop computers from the classroom. Two different reasons are generally given: Many students use their laptops to surf, hone their Solitaire skills, chat online, etc. during class. Equally important, students taking notes on a laptop tend to attempt to transcribe the class rather than writing down the most significant points. I believe both these concerns are significant. At this time, I am not banning laptops from our classroom. But I do want to stress two things:

1. Using your laptop for non-class activities during class time is rude and disrespectful to the faculty, and it is distracting to your fellow students. To the extent that it keeps you from participating in class discussion, it deprives your classmates of the vibrant class experience that they (and you) are paying for.
2. Georgetown Professor David Cole has a very powerful and thorough explanation for why in a Washington Post op-ed, *Laptops v. Learning* (Apr. 7, 2007, at A13), which I encourage you to read. I have a simpler one: The class discussions are integral to your understanding of the course material, and are the frequent subject of my exam questions. As such, it's much more important that you digest and absorb the class discussion than that you transcribe it word-for-word.

My aim is simply to bring these matters to your attention, without imposing a policy. If you are willing to use your laptops for note-taking, and you have made a considered judgment about what is the most effective note-taking technique for you, then you are welcome to use them. But make sure you have thought through this decision carefully.

Sensitive Topics: More than any other course in the first year of law school, Constitutional Law deals with sensitive topics about which people have strongly held and widely divergent opinions. I find that class discussion is the most productive when students feel free to try out positions with which they (or others) may not agree and to test the assumptions underlying their own (or others') views. For this reason, class discussion is strictly "off the record." Outside of the classroom, you may not attribute any statements made in class to any of your classmates. And any audio or visual recording of class is prohibited. The only exception to this policy is that I will arrange to record any make-up classes that might become necessary. Please also refer to "Class Participation" above, if you wish to not be called on about a particularly sensitive topic.

ADA Accommodations: The Law Center is committed to meeting the needs of students with physical, learning and other disabilities and provides appropriate accommodations and services tailored to each person's specific requirements. Please do not inform me about your disability as it may compromise the integrity of anonymous grading. Please contact the Center For Students With Disabilities at (713) 743-5400 for more information.

Reading Assignments: The topics listed below are numbered but not dated. Some of them will take more than one day to complete, but it will usually help if you read the whole thing ahead of time. Please stay a reasonable distance ahead of wherever we get to in the preceding day's class. This will enable me to catch up occasionally without leaving anyone behind.

The notes following the cases in the casebook should generally reflect the questions upon which we will focus, so pay attention to them. Depending on your learning style, you might prefer to skip ahead and read the notes first, then go back and read the other material.

I will always announce at the end of class how far you should read, at a minimum, to be prepared for the next day. If you are absent, please contact a classmate for this information—consider this yet another networking opportunity to engage in with your colleagues.

Special Note About Meeting Times: Our class schedule allows for us to not meet on certain days. This is designed specifically to accommodate weather issues, as well as at least one occasion where I will be out of town for a speaking engagement. I will announce these times in class, when possible, and always via an email through TWEN. Please also note we will not meet on March 23 at our regularly scheduled time. Instead, please plan to attend the annual Yale L. Rosenberg Lecture at 6:30PM that day, where I will be speaking about nominees to the US Supreme Court. If you have a conflict, please let me know. Otherwise, please RSVP for the YLR Memorial Lecture here: <http://www.law.uh.edu/alumni/rsvp/> (There will be food, and we want an accurate count!)

Part One – The Constitution and Judicial Review

Topic 1 – The Constitution and the Dead Hand

1-56 The Constitution of the United States; Raz, *On the Authority and Interpretation of Constitutions*; Note on Constitutional Functions; *District of Columbia v. Heller*; McConnell, *Textualism and the Dead Hand of the Past*; Note on *Heller* and the Dead Hand

TWEN Phillip Bobbitt, *The Modalities of Constitutional Argument*

Topic 2 – *Marbury* and the Case for Judicial Review

57-79 Federalist No. 78 (Hamilton); Note on Hamilton's Argument for Judicial Review; *Marbury v. Madison*; Note on *Marbury* and the Legitimacy of Judicial Review

Topic 3 – Cases and Controversies

79-99 *Correspondence of the Justices*; Note on Advisory Opinions; *Warth v. Seldin*; Note on the Justiciability Doctrines

TWEN *Lexmark*

Topic 4 – Political Questions

99-116 *Baker v. Carr; Nixon v. United States*; Note on the Political Question Doctrine and Other Limits on Judicial Review

Part Two – A History of Judicial Review

Topic 5 – The Marshall Court and the Federal Balance

117-55 Introductory Note on the Bank of the United States; *McCulloch v. Maryland*; Note on *McCulloch* and the Scope of National Power; *Gibbons v. Ogden*; *Willson v. Black Bird Creek Marsh Co.*; Note on the Commerce Clause as a Limit on State Power

Topic 6 – The Taney Court and Slavery

156-92 *Prigg v. Pennsylvania*; Note on *Prigg* and the Relation Between Slavery and Federalism; *Dred Scott v. Sandford*; Levinson, *Would You Sign the Constitution?*; Note on Slavery and the Constitution

Topic 7 – Reconstruction and the Fourteenth Amendment

192-229 *Barron v. Baltimore*; *Slaughterhouse Cases*; *Civil Rights Cases*; Note on the Effect and Interpretation of the Reconstruction Amendments

Topic 8 – The *Lochner* Era and Freedom of Contract

230-60 *Lochner v. New York*; Note on *Lochner* and Judicial Review of Economic Regulation; *Adkins v. Children’s Hospital*; *Nebbia v. New York*; Note on the Heyday of Economic Substantive Due Process

Topic 9 – Federalism in the *Lochner* Era

260-82 *United States v. E.C. Knight Co.*; *Hammer v. Dagenhart*; *The Shreveport Rate Cases*; *A.L.A. Schechter Poultry Corp. v. United States*; Note on Dual Federalism in the *Lochner* Era

Topic 10 – The Judicial Revolution of 1937

282-309 Roosevelt, *Fireside Chat on Reorganization of the Judiciary*; Note on Court-Packing and the “Switch in Time”; *West Coast Hotel Co. v. Parrish*; *NLRB v. Jones & Laughlin Steel Corp.*; *Wickard v. Filburn*; Note on the Constitutional Revolution of 1937

Topic 11 – Judicial Deference and the Double Standard

309-32 *United States v. Carolene Products*; *Williamson v. Lee Optical of Oklahoma, Inc.*; Ely, *Policing the Process of Representation*; Baker & Young, *Federalism and the Double Standard of Judicial Review*; Note on the “Double Standard” after 1937

Topic 12 – *Brown* and the Problem of Racial Segregation

333-63 *Plessy v. Ferguson*; Note on the Application of “Separate but Equal”; *Brown v. Board of Education (Brown I)*; *Bolling v. Sharpe*; Wechsler, *Toward Neutral Principles in Constitutional Law*; Black, *The Lawfulness of the Segregation Decisions*; Note on Neutral Principles and the Segregation Decisions

Topic 13 – Segregation Remedies and the Judicial Role

363-92 *Brown v. Board of Education (Brown II)*; Note on Desegregation Remedies; *Cooper v. Aaron*; Note on *Cooper* and the Allocation of Authority to Interpret the Constitution; Rosenberg, *The Hollow Hope*; Note on the Efficacy of Judicial Decisions

Topic 14 – Incorporation and the Nationalization of Criminal Procedure

392-426 *Adamson v. California*; *Duncan v. Louisiana*; Note on Incorporation of the Bill of Rights into the Fourteenth Amendment; *Mapp v. Ohio*; Note on Incorporation, Constitutional Common Law, and the Impact of the Warren Court

Topic 15 – The Rebirth of Substantive Due Process

427-51 *Griswold v. Connecticut*; Note on *Griswold* the Right to Privacy; Bork, *Neutral Principles and Some First Amendment Problems*; Note on Originalist Approaches to Constitutional Interpretation

Topic 16 – Abortion, Act One

452-81 *Eisenstadt v. Baird*; Note on *Eisenstadt* and the Transformation of Marital Privacy; *Roe v. Wade*; Note on *Roe v. Wade*; Grey, *Do We Have an Unwritten Constitution?*; Note on *Griswold*, *Roe*, and the Unwritten Constitution

Topic 17 – Abortion, Act Two

481-524 *Planned Parenthood of Southeastern Pennsylvania v. Casey*; Note on *Casey* and the Abortion Debate; Scalia, *Common Law Courts in a Civil-Law System*; Note on *Stare Decisis* and Common Law Development

Topic 18 – Privacy Beyond Reproduction

524-66 *Washington v. Glucksberg*; Note on *Glucksberg* and the Nature of Substantive Due Process Review; *Lawrence v. Texas*; Note on Gay Rights, Due Process, and Equal Protection

Topic 19 – Due Process, Equal Protection, and Same-Sex Marriage

TWEN *United States v. Windsor*; *Obergefell v. Hodges*

Topic 20 – Gender, Sexual Orientation, Disability, Age, Poverty

TWEN

Topic 21—Voting, Food, Housing, Education

TWEN

Topic 22 – Individual Rights: Freedom of Speech and Religion

TWEN

Part Three – Federalism

Topic 23 – The Federal System and Dual Sovereignty

621-74 Federalist Nos. 10 & 51 (Madison); Note on the Political Theory of the Federalist; *U.S. Term Limits, Inc. v. Thornton*; Note on Sovereignty, Representation, and the *Term Limits* Case; Note on the Values of Federalism

Topic 24 – Judicial and Political Safeguards of Federalism

675-713 *Garcia v. San Antonio Metropolitan Transit Authority*; Federalist Nos. 39, 45, 46, & 62 (Madison); Note on the Political, Judicial, and Procedural Safeguards of Federalism

Topic 25 – The Commerce Clause

714-63 *United States v. Lopez*; Note on *Lopez* and the “Federalist Revival”; *Gonzales v. Raich*; Note on *Raich* and the Future of the Commerce Clause

TWEN *NFIB v. Sebelius*; *U.S. v. Windsor*

Topic 26 – Congress’s Power to Enforce the Reconstruction Amendments

763-86 *Katzenbach v. Morgan*; *City of Boerne v. Flores*; Note on the Section Five Power

Topic 27 – The Spending and Taxing Powers

786-798 *South Dakota v. Dole*; Note on the Spending Power

TWEN *NFIB v. Sebelius*

Topic 28 – Clear Statement Rules

799-825 *Jones v. United States*; *Gregory v. Ashcroft*; *Solid Waste Agency v. U.S. Army Corps of Engineers*; Note on the Clear Statement Cases

Topic 29 – The Anti-Commandeering Doctrine

825-67 *New York v. United States*; *Printz v. United States*; Note on the Anti-Commandeering Doctrine

Topic 30 – The Dormant Commerce Clause, Part 1

868-92 *Philadelphia v. New Jersey*; *Kassel v. Consolidated Freightways Corp.*; Note on the “Dormant” Commerce Clause

Topic 31 – The Dormant Commerce Clause, Part 2

892-918 *South-Central Timber Development, Inc. v. Wunnicke*; *United Bldg. & Trades Council v. City of Camden*; *Metropolitan Life Ins. Co. v. Ward*; Note on the Litigant’s Toolkit in Challenges to State Economic Regulation

Topic 32 – Federal Preemption of State Law

918-45 *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm’n*; *Lorillard Tobacco Co. v. Reilly*; Note on Federal Preemption of State Law

Part Four – Separation of Powers

Topic 33 – Introduction to Separation of Powers

946-76 Federalist Nos. 47-48 (Madison); Note on Separation of Powers and Political Theory; *Youngstown Sheet & Tube Co. v. Sawyer*; Note on the Steel Seizure Case

TWEN *Dames & Moore v. Regan*

Topic 34 – The Nondelegation Doctrine and Judicial Review of Agency Action

977-1001 *A.L.A. Schechter Poultry Corp. v. United States*; *Whitman v. American Trucking Assn's*; Note on Judicial Review of Agencies Exercising Delegated Authority

Topic 35 – Altering the Lawmaking Process

1001-38 *INS v. Chadha*; *Clinton v. City of New York*; Note on the Legislative Process Cases

Topic 36 – The Unitary Executive

1049-79 *Morrison v. Olson*; Note on the Independent Counsel and the Unitary Executive

TWEN *NLRB v. Noel Canning*

Topic 37 – Presidential Power in Foreign Affairs

1080-1108 Proclamation of Neutrality (George Washington); “Pacificus” No. 1 (Hamilton); *United States v. Curtiss-Wright Co.*; Note on Presidential Power in Foreign Affairs

TWEN *Zivotofsky v. Kerry*

Topic 38 – The Power to Use Military Force

1114-38 *Little v. Barreme*; *The Prize Cases*; *Durand v. Hollins*; National Security Council, *The National Security Strategy of the United States of America*; Ramsey, *Textualism and War Powers*; Note on the Constitutional Allocation of War Powers; War Powers Resolution; Nixon, *Veto Message on the War Powers Resolution*; Joint Resolution, Sept. 18, 2001; Joint Resolution, Oct. 16, 2002; Note on Declarations, Authorizations, and Resolutions

Topic 39 – Powers Incident to the Conduct of War

1138-75 *Ex parte Merryman*; Rehnquist, *All the Laws but One*; *Hamdan v. Rumsfeld*; Note on Presidential Power and Executive Detention and Trial

Topic 40 – Exam Review – no reading