

Course # | American Constitutional Law

Description

American constitutional law is an argumentative practice. Lawyers and judges notoriously argue about how particular cases should be resolved—for example, about whether there are or should be protected rights to abortion, to gay marriage, and to possession of certain kinds of weapons for self-defense. In this course, we will look closely at contemporary constitutional law and the historical processes through which it has emerged. We will, for example, study currently recognized rights to freedom of speech, bodily self-determination, and the equal protection of the laws. But our principal perspective will be normative, concerned with what courts ought to do, along several dimensions.

One recurring theme will involve how, methodologically, courts ought to interpret the Constitution. For example, what significance should they accord to the “original understanding” or “original public meaning” of constitutional language, and why? Should courts strive self-consciously to develop the morally best interpretation of the Constitution, or is it unfair for judges and Justices to impose their moral views when those views diverge from those of political majorities of the American public? A second theme will involve how lawyers do and ought to argue about contentious moral issues, and how courts ought to resolve them, to the extent that such issues are indissolubly interconnected with legal issues. For example, if it is impossible to judge whether affirmative action is constitutional without also considering whether it is unfair or violates moral norms of fair treatment, then what are the pertinent moral arguments, and how should they be appraised? A third theme will involve the relationship between legal norms and moral norms. Sometimes moral norms may appropriately influence interpretive judgments about the constitutional rights that people have. But sometimes it may be morally right, or at least arguable, that judges should do what the law requires even when its requirements diverge from their moral beliefs. And occasionally it is argued that judges have compelling moral reasons to take actions that could not be justified strictly as a matter of law.

The course’s themes will not be wholly concerned with ethical reasoning—far from it. This is a course about law, and a concern will involve the distinction between legal and moral argument and the respects in which the requirements of distinctively legal argument constrain, transform, and sometimes even exclude purely moral argument. But even when constitutional argument diverges most from purely moral and ethical argument, the relationship between the two will never be far from sight.

Assignments

- (1) *Analytical Paper*. A paper of 1,500 to 2,000 words in length, due [date]. The paper will analyze a hypothetical case and evaluate it according to current constitutional precedent.
- (2) *Argumentative Paper*. A paper of 1,500 to 2,000 words in length, due [date]. The paper will analyze a hypothetical case and evaluate it according to current constitutional precedent.
- (3) Students will also write a 3 page paper, due January 31st, which counts for 10% of the final course grade; a "moot court" take-home midterm, due March 6th, which counts for 35% of the final course grade; and a final exam on May 5th, which counts for 45% of the final course grade. Students are also encouraged, but not required, to submit brief one or two paragraph responses to each week's readings, e-mailed to their TA and to Professor Smith. Those who submit 10 satisfactory responses can write a 10-12 page paper in place of the final exam if they so choose. The professor or T.A. must approve all paper topics. Final papers are also due on May 5th

Required Texts

- (1) Jesse H. Choper et al., *Constitutional Law* (12th ed. 2015) (hereinafter “CB”).
- (2) Richard H. Fallon, Jr., *The Dynamic Constitution* (2d. ed. 2013) (hereinafter “Fallon”)

Course Schedule

A General Introduction to Constitutional Law

Foundations

01.
 - U.S. Constitution, CB App. B 1813-29
 - Fallon xix-xxx, 1-12, 24-36
 - Antonin Scalia, “Originalism: The Lesser Evil,” 57 *U. Cin. L. Rev.* 849-65 (1989)
 - Ronald Dworkin, *Freedom’s Law*, 1-15 (1996)
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Substantive Introduction and Methodological Prelude: Race and the Constitution

Historical and Doctrinal Background

02.
 - CB 1351-76; Fallon 152-55
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The Modern Era

03.
 - Fallon, 159-69; CB 1376-93
 - Cass R. Sunstein, “Black on *Brown*,” 90 *Va. L. Rev.* 1649-65 (2004)
-

Brown’s Aftermath and Legacy

04.
 - CB 1393-1411
 - David R. Bernstein & Ilya Somin, “Judicial Power and Civil Rights Reconsidered,” 114 *Yale L.J.* 591, 593-98, 645-57 (2004)
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Historical Foundations of Judicial and Congressional Power

The Constitution in the Era of John Marshall

05.
 - Fallon 12-24
 - CB 1-9, 71-78, 164-165 (*McCulloch*), 361-6
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Introduction to Congress’s Commerce Power

06.
 - Fallon 227-38
 - CB 87-104 (*Wickard*), 106-10
 - Lawrence B. Solum, “District of Columbia v. Heller and Originalism,” 103 *Nw. U. L. Rev.* 923, 927-30, 933-37 (2009)
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More Recent Doctrine and Issues

07.
 - CB 110-27, 132-39
 - Fallon 238-45
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More Recent Developments, Including National Health Insurance

08.
 - CB 139-45, 152-60
 - Fallon 245-51
 - Randy E. Barnett, “No Small Feat: Who Won the Health Care Case (And Why Did So Many Law Professors Miss the Boat?),” 65 *Fla. L. Rev.* 1331-50 (2013)
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The Equal Protection of the Laws

Historical Background

09. ▪ Fallon 108-17
 ▪ CB 361-68 (excerpt from Laurence Tribe), 371 (note 3)-83, 387-97

“Rational Basis” Review

10. ▪ Fallon 149-59, 169-71
 ▪ CB 1331-43, 1348-50 (Logan), 1411-21
 ▪ Thomas B. Colby & Peter J. Smith, “The Return of Lochner,” 100 Cornell L. Rev. 527, 527-533, 558-78

Interlude—The Second Amendment Right to Keep and Bear Arms

11. ▪ CB 575-95
 ▪ Fallon 143-47
 ▪ Richard A. Posner, “In Defense of Looseness: The Supreme Court and Gun Control,” *The New Republic*, Aug. 27, 2008

Affirmative Action, Part I

12. ▪ Fallon 171-79
 ▪ CB 1432-38
 ▪ *Grutter v. Bollinger* and *Fisher v. University of Texas*

Affirmative Action, Part II

13. ▪ CB 1462-64 (note 3), 1469-71
 ▪ Dan M. Kahan, “Neutral Principles, Motivated Reasoning, and Some Problems for Constitutional Law,” 125 Harv. L. Rev. 1, 4-9, 19-30, 72-77 (2011)

Gender, Part I

14. ▪ Fallon 179-84
 ▪ CB 1476-1495

Gender, Part II

15. ▪ CB 1495-1506
 ▪ *Sessions v. Morales-Santana*
 ▪ CB 1506-13

Freedom of Speech

Foundational Cases: The Advocacy of Illegal Action

16. ▪ CB 637-62
 ▪ Fallon 41-54

The Emergence of Modern Law and “The Persuasion Principle”

17. ▪ CB 680-87 (note 7); 775-78; 782-88
 ▪ David A. Strauss, “Persuasion, Autonomy, and Freedom of Expression,” 91Colum. L. Rev. 334, 334-43, 353-63 (1991)

Obscenity and Pornography

18. ▪ CB 750-55
 ▪ Fallon 59-62

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- CB 759-71; 800-15
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19. **Hate Speech and Content Neutrality**

- CB 815-16; 778-82; 817-33; 687-88 (note 8)
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Fundamental Rights

Foundational Cases on Rights of Privacy (or Sexual Autonomy?)

- 20.
- Fallon 191-96, 207-14
 - CB 427-59
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Post-Roe Developments

- 21.
- CB 468-91
 - *Whole Woman's Health v. Hellerstedt*
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Gay Rights, Part I

- 22.
- CB 537-47, 1513-22, 547-64 (note 9)
 - Fallon 184-88
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Gay Rights, Part II, and the *Carolene Products* Footnote

- 23.
- *Obergefell v. Hodges*
 - CB 1538-51
 - Fallon 188-89
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Concluding Themes

Judicial Review in a Democracy, Revisited

- 24.
- Fallon 275-97, 353-62
 - Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 Yale L.J. 1346, 1346-86 (2006)
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