

# Constitutional Law and Development

"It is scarcely possible to enslave a Republic where the Body of the People are Civilians, well instructed in their Laws, Rights, and Liberties."

-- Ezra Stiles, President of Yale College, 1777

Marquette University  
Fall 2009

Mondays & Wednesdays, 2—3:15 PM  
William Wehr Building Room 138

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Office Hours: Mondays & Wednesdays (4—5:30 PM), Tuesdays (10 AM—Noon), and by appointment

Class lunches: alternate Wednesdays, Noon-1 PM

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## Course Description:

This course is an introduction to constitutional law. Together we will examine the main themes of the United States' constitutional structure—popular sovereignty, separation of powers, federalism, and the development and maintenance of rights—as well as some basic and contested techniques of constitutional interpretation.

Through this course you will gain exposure to some of the critical cases that have characterized American constitutional development since the Founding and explore a range of controversies: What are the boundaries of power between the federal government and the sovereignty of the several states? Which branch has the authority to interpret the Constitution? How is the Constitution interpreted? What is the role of an unelected judge in a democratic republic? What does it mean to be a citizen of the United States, and what rights, liberties, and responsibilities does that entail? What are the determinants of suffrage, and how have they changed over time?

As this course is part of a broader curriculum in political science, the emphasis will not only be on case law and its interpretation, but it will also highlight various methods and concepts used throughout political science, e.g., problems of collective action, inter-branch relations, principal-agent delegation, the use of litigation to bring social change.

## Course Texts:

There are two primary texts to be used in this class:

1. Brest, Levinson, Balkin, Amar, and Siegel, Processes of Constitutional Decisionmaking, 5<sup>th</sup> ed. New York: Aspen Publishers, 2006. (BLBAS)

2. Akhil R. Amar, America's Constitution: A Biography. New York: Random House, 2005. (ACAB)

Students must also choose to read and critically review **ONE** of the following:

1. Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review. New York: Oxford University Press, 2004.

2. Keith Whittington, The Political Foundations of Judicial Supremacy. Princeton: Princeton University Press, 2007.

3. Gerald Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? Chicago: University of Chicago Press, 1991.

All books are available for purchase at BookMarq.

Additional short readings will be accessible on the class's D2L site.

**Reading Case Law:**

Reading court decisions is, for most of you, a new experience. And, sometimes, to be fair, it is not often (at least initially) an altogether pleasant experience! Figuring out what to make of the cases will be easier if you keep in mind the following questions:

SUBSTANCE: What is the "law" after the case was decided? What is the holding of the judges in the case? Is it consistent with prior cases? How does the case fit into the "doctrine" on this subject matter?

ASSUMPTIONS: What assumptions does the opinion make to support its argument? What does it assume about the Constitution, human nature, or the Framers? Are these assumptions consistent with the rest of the argument? Where is the reasoning deficient, unsupported, or implausible?

HISTORY: Judicial opinions can be read as political artifacts, as reflecting values of a given period that may have long since fallen out of favor. Is history a relevant source of constitutional meaning?

JUDICIAL ROLES: In almost every significant case, judges must come to terms with questions about the proper role of the judiciary in a constitutional democracy. Questions about relative institutional competencies are central to a complete understanding of the constitutional order. And, this is not only a substantive and sincere concern, but potentially a strategic one to maintain comity among the branches and between the federal and state governments. Is such strategy a legitimate concern?

POLITICAL THEORY: Case reasoning often reflects a judge's conception of the American political system. Is that conception--whether explicit or implicit--consistent with the result in the case? Is it coherent? Is it desirable?

**Course Requirements:**

Participation (10%): Students will be expected to attend class and to have read all materials to be discussed in class. For each session at least 2 students will be “on-call”, meaning that I will primarily turn to them to be able to explain the issues at stake in the cases or other materials read; however, I reserve the right to call on any student during class.

Legal Brief (10%): Students who are “on-call” will submit no more than a 1-page single-spaced brief of a specific case to be covered the day that they are “on-call.” The brief should be a summary of the case, which identifies the controversy, states the facts and arguments of both sides, states the court’s holding, and assesses the potential implications of that holding as well as how it fits or does not fit with precedent. These briefs will be submitted to the D2L site 24 hours before class so that all students may review them.

Critical Book Review (20%): Each student must draft a 5 to 6-page (double-spaced) critical review of one of the books listed above, i.e., Kramer, Whittington, or Rosenberg. Students will be provided with expectations about what this review should include at the beginning of the semester. Reviews will be due at different times to allow students the flexibility to self-schedule their workload.

Midterm Exam (25%): The exam will be in two-parts. The in-class exam will be closed-book and will consist of multiple-choice and/or short answer questions that test retention of basic concepts, e.g., define the state action doctrine. Students will then complete a 24-hour take-home essay (answering one of two options, and the essay will not take nearly 24 hours to draft!) that will be both open-note and open-book.

Comprehensive Final Exam (35%): The exam will be in two-parts. The in-class exam will be closed-book and will consist of multiple-choice and/or short answer questions that test retention of basic concepts, e.g., define the difference between substantive due process and procedural due process. Students will then complete a 48-hour take-home essay (answering two of three options, and the essay will not take nearly 48 hours to draft!) that will be both open-note and open-book.

**Academic Honesty:**

Academic honesty is expected. Plagiarism of any kind will not be tolerated. If you have questions, please see Professor Engel or refer to (<http://www.marquette.edu/wac/plagiarism/AvoidingPlagiarism2.shtml>),

**Late Policy:**

Each day an assignment is turned in late, it will be marked down 1/3 of a letter grade if permission of instructor for an extension has not been attained before hand.

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M, 8/31:

Welcome and Course Overview

## I. Constitutional Interpretation: A Case Study on the National Bank of the United States

W, 9/2

McCulloch v. Maryland (Reading Case Law/Interpreting the Constitution Part 1)  
Federalist 8 **(D2L)**  
BLBAS, xxxxi-xxxvi, 19-66  
ACAB, Preface, Chapters 1 and 2

M, 9/7

No Class (Labor Day Holiday)

W, 9/9

McCulloch v. Maryland (Reading Case Law/Interpreting the Constitution Part 2)  
BLBAS, 67-95  
ACAB, Chapters 3 and 8

## II. Constitutional Structure

### Constitutional Structure: Separation of Powers

M, 9/14

Judicial Power: Judicial Review  
BLBAS, 97-140  
Federalist 78 **(D2L)**  
ACAB, Chapter 6

W, 9/16

Judicial Power: Self-Imposed Restrictions on Judicial Review: Standing, Mootness, Political Questions, and Justiciability  
Erwin Chemerinsky, Constitutional Law: Principle and Policies, 3<sup>rd</sup> ed. New York: Aspen Publishers, 2006, pp. 49-58, 60-66, 70-91, 98-99, 103-116, 129-149. **(D2L)**

M, 9/21

Legislative Power: Congressional Power to Restrict Federal Jurisdiction and to define Constitutional Rights  
BLBAS, 570-600 and 629-649  
Erwin Chemerinsky, Constitutional Law: Principle and Policies, 3<sup>rd</sup> ed. New York: Aspen Publishers, 2006, pp. 149-180. **(D2L)**

W, 9/23

Executive Power 1: Express or Inherent? Appointment, Removal, and Veto Power  
BLBAS, 761-819

M, 9/28

Executive Power 2: Prosecution, Pardon, and Privileges  
BLBAS, 736-61 and 881-85

W, 9/30

Executive Power 3: The Sword  
BLBAS, 261-91 and 819-41  
ACAB, Chapters 4 and 5  
Lincoln's First Inaugural (March 4, 1861)  
[http://avalon.law.yale.edu/19th\\_century/lincoln1.asp](http://avalon.law.yale.edu/19th_century/lincoln1.asp) (D2L)  
Lincoln's Message to Congress (July 4, 1861)  
<http://www.presidency.ucsb.edu/ws/index.php?pid=69802> (D2L)  
The Emancipation Proclamation  
[http://avalon.law.yale.edu/19th\\_century/emancipa.asp](http://avalon.law.yale.edu/19th_century/emancipa.asp) (D2L)

M, 10/5

Executive Power 4: War Power since Lincoln  
9/30 readings continued  
Louis Fisher, "Lost Constitutional Moorings: Recovering the War Power,"  
*Indiana Law Journal* 81 (Fall 2006) 1199-1254. (D2L)

W, 10/7 (Critical Review of Kramer, People Themselves Due)

Executive Power 5: Presidential Selection and Succession  
BLBAS, 885-87  
ACAB, Chapter 9 (332-47)  
Bush v. Gore, 531 U.S. 98 (2000)  
<http://supreme.justia.com/us/531/98/case.html> (D2L)

Constitutional Structure: Federalism

M, 10/12

Limiting Congressional Power (Part 1)  
BLBAS, 549-70, 600-27, 649-692

W, 10/14

Limiting Congressional Power (Part 2)  
BLBAS, 693-729  
ACAB, Chapter 7

M, 10/19

Spill-Over and Midterm Exam Review

W, 10/21

Midterm Exam (in-class) (Take-home section due in HARD COPY to Professor Engel's office by 4 PM on Thursday, October 22)

### III. Constitutional Rights

M, 10/26

The Bill of Rights and the Debate about and Process of Incorporation  
ACAB, Chapter 9 (315-32)  
BLBAS, 485-97

W, 10/28

Property Rights 1: Natural Law Tradition, Contracts, and Substantive Due Process  
BLBAS, 140-56, 319-337, and 412-31

M, 11/2

Property Rights 2: The New Deal (1)—The Inter-branch Battle  
BLBAS, 499-548  
William Leuchtenberg, The Supreme Court Reborn. New York: Oxford University Press, 1996, (Chapters 4 and 5) **(D2L)**

W, 11/4

Property Rights 3: The New Deal (2)—The Court's New Role  
BLBAS, 499-548  
William Leuchtenberg, The Supreme Court Reborn. New York: Oxford University Press, (Chapters 6 and 8) **(D2L)**

M, 11/9

Slavery and Race 1: The Constitution's Stain  
Joseph Ellis, Founding Brothers. New York: Vintage, 2003, 81-119. **(D2L)**  
BLBAS, 212-60

W, 11/11

Slavery and Race 2: Reconstruction and the Jim Crow Regime  
BLBAS, 301-18, 351-85  
ACAB, Chapter 10

M, 11/16 (Critical Review of Kramer, Political Foundations Due)

Slavery and Race 3: De-Segregation and Suspect Class Designation  
BLBAS, 893-927, 956-1039, 1048-55

W, 11/18

Slavery and Race 4: Affirmative Action  
BLBAS, 1077-1155  
Ricci et. al. v. DeStefano et. al. (2009) **(D2L)**

M, 11/23

Voting Rights  
BLBA, 3<sup>rd</sup> Edition. "Chapter 10: Representation Within a Republican Polity," 1053-1109 **(D2L)**  
ACAB, Chapters 11 and 12

Richard Hasen, "Hold the Line: The Texas Redistricting Case is Not a Winner for Democrats," *Slate*, 19 December 2005. **(D2L)**

Richard Hasen, "Sordid Business: Will the Supreme Court Kill the Voting Rights Act?" *Slate*, 27 April 2009 **(D2L)**

Dahlia Lithwick, "How Can Rights Feel So Wrong?" *Slate*, 29 April 2009 **(D2L)**

Editors, *The New York Times*, "Room for Debate: The Battle Not the War on Voting Rights," Online Blog June 22-23, 2009 **(D2L)**

W, 11/25

NO CLASS (THANKSGIVING BREAK)

M, 11/30

Privacy and Sex 1: Sex Equality  
BLBAS, 1179-1276

W, 12/2

Privacy and Sex 2: The Modern Privacy (Autonomy?) Doctrine  
BLBAS, 1339-70, 1387-1465

M, 12/7

Privacy and Sex 3: Sexual Orientation  
BLBAS, 1465-1536

William N. Eskridge, Jr. and Darren Spedale, "Sit Down, Ted Olson and David Boies: Let the States Experiment with Gay Marriage—It's not Time Yet for a Federal Lawsuit," *Slate*, 29 May 2009. **(D2L)**

W, 12/9 (Critical Review of Rosenberg, [The Hollow Hope](#) Due)

Final Exam Review Session