

Constitutional Law

PBPL 28871

Professor Douglas Spencer
University of Chicago

Spring 2018

Classroom

Keller 0023
Monday & Wednesdays
1:30–2:50 p.m.

Contact

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“It is emphatically the province and duty of the judicial department to say what the law is. If two laws conflict with each other, the courts must decide on the operation of each.”

– *Marbury v. Madison* (1803)

Course Description

This course is designed to provide a broad introduction to American constitutional law and the checks and balances of American government. After a brief introduction to the nation’s founding principles and the role of the Supreme Court, students will be introduced to the following dimensions of constitutional law jurisprudence: speech, religion, privacy, equal protection, Commerce Clause, and presidential powers. We will discuss such questions as, What are the limits of free speech? Does the Equal Protection Clause imply a preclusion of affirmative action policies? What is the proper scope of federal versus state regulation under the Interstate Commerce Clause? Landmark Supreme Court case excerpts will be supplemented with contemporary examples of case application and constitutional debates. Class debates and fact pattern response papers will help students to sharpen their understanding of the complex jurisprudential debates and develop persuasive arguments about the law. Students will be expected to participate actively in class discussions and activities. Readings will include cases decided by the Supreme Court (including cases from recent terms), and also contemporary scholarship on judicial politics and decisionmaking.

Course Objectives

1. To familiarize you with the fundamental premises and design of the constitutional system and government of the United States.
2. To expose you to the guiding principles and applicable doctrines of select subfields of constitutional law.
3. To cultivate your ability to identify latent constitutional issues.
4. To equip you with the intellectual tools necessary to properly conceptualize and analyze constitutional issues.
5. To foster an informed perspective on the nature and limits of constitutional judicial decision-making.

Class Attendance

I expect that you will do your best to attend every class and show up on time. If you need to miss a class due to an emergency, it is your responsibility to obtain missed notes and course announcements from another student. Any lecture slides presented in class will be posted on the course Canvas site.

Grading

Your grade in this class will comprise class participation, three short papers, and a final exam

- 25% - Attendance and participation in class
- Short papers (4-page, double-spaced, 12-point font, submitted online by the start of each class):
 - 20% - Assignment #1 (due April 17, by 1:30p CDT)
 - 20% - Assignment #2 (due May 15, by 1:30p CDT)
 - 20% - Assignment #3 (due June 5, by 1:30p CDT)
- 15% Final Exam

The final grade for the course will be based on the following scale:

A: 93+	A-: 90-92	B+: 87-89
B: 83-86	B-: 80-82	C+: 77-79
C: 73-76	C-: 70-72	D+: 67-69
D: 63-66	D-: 60-62	F: < 60

Required Texts

The required text for this course is:

- Fallon, Richard H. 2004. *The Dynamic Constitution: An Introduction to American Constitutional Law*. (2d. ed) New York, NY: Cambridge University Press.

All Supreme Court cases are publicly accessible online, but they are mostly in unedited formats. I will post edited versions of the cases to the course Canvas website, as available. I will post copies of articles to the Canvas site, but all students have access via the University's library subscriptions.

Academic Integrity

I encourage you to discuss the course readings and assignments with your fellow students. However, all written work, unless otherwise specified, must be done independently and not in collaboration with others. All class activities must be performed in accordance with the University's Academic Policies & Requirements (available at: <https://studentmanual.uchicago.edu/Policies>). Your reputation is the most important thing you have, especially at this stage of your career; please do not tarnish it.

Paper Extension Policy

Papers must be submitted online through the course website by the due date and time (before class begins on the Thursday due date). Attempting to turn a paper in late is extremely unfair to your colleagues. For all papers, extensions will be granted only in case of (1) a death in the family or (2) a unforeseen medical emergency. In case of such an emergency, please let me know as soon as possible; in most cases, I will require supporting documentation (e.g., a doctor's note) out of fairness to the other students. Also in the interest of fairness, (1) unsubstantiated requests for extensions will be denied summarily and (2) retroactive extensions (e.g., extensions requested after the paper is submitted) will never be granted.

If you do not have an extension, and you turn in a paper late, you will be docked one third of one letter grade for every 24 hours that the paper is late, with late penalties accruing from the time the paper is due. For example, if your paper earned a B+, but you turned it in a few hours past the time it was due, you will receive a B; if you turned it in 30 hours past the time it was due, you will receive a B-.

Schedule and Readings

Note: This schedule subject to change, depending on how far we get in each class meeting.

UNIT 1: INTRODUCTION TO THE LEGAL SYSTEM

April 1: Course Introduction

- Martin Shapiro. 1994. “Judges as Liars,” *Harvard Journal of Law & Public Policy* 17(1): 155-156.
- Text of John Roberts’ opening statement before the Senate Judiciary Committee (Aug. 12, 2005)
- Recommended: Orin Kerr. 2007. “How to Read a Legal Opinion: A Guide for New Law Students,” *Green Bag Law Journal* 11(1): 51-63.
- Recommended: ELKINS, ZACHARY, TOM GINSBURG, AND JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) ch. 1

April 3: Introduction to Constitutional Law

- Case excerpts: *Marbury v. Madison* (1803)
- Federalist 10
- Federalist 51
- Federalist 78
- RICHARD FALLON, *THE DYNAMIC CONSTITUTION* (2004), pp. 275-297.
- Segal, Jeffrey A. and Harold J. Spaeth. 1996. “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices,” *American Journal of Political Science* 40(4): 971-1003.

April 8: Doctrines of Justiciability

- Case excerpts: · *Allen v. Wright* (1983)
 - *City of Los Angeles v. Lyons* (1983)
 - *Hollingsworth v. Perry* (2013)
 - *Gill v. Whitford* (2018)
- Epstein & Walker, “Justiciability,” in *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* (4th ed.), pp. 78-86
- ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (2016), ch. 1.
- Recommended: Antonin Scalia. 1983. “Standing as an Essential Element of the Separation of Powers,” *Suffolk Law Review* 17(3): 881-899.

April 10: The Commerce Clause Today

- Case excerpts: · *United States v. Lopez* (1995)
 - *United States v. Morrison* (2000)
 - *Nat'l Federation of Indep. Business v. Sebelius* (2012) (part I)
- RICHARD FALLON, *THE DYNAMIC CONSTITUTION* (2004), pp. 227-251.
- Epstein & Walker, "The Commerce Power," in *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* (4th ed.), pp. 214-251
- The Heritage Foundation. 2011. "Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause."
- Recommended: John Dinan. 2002. "Congressional Responses to the Rehnquist Court's Federalism Decisions," *Journal of Federalism* 32(1):1-24.

April 15: Taxing & Spending

Assignment #1 due by 1:30p

- Case excerpts: · *U.S. v. Butler* (1936)
 - *Sabri v. U.S.* (2004)
 - *South Dakota v. Dole* (1987)
 - *Nat'l Federation of Indep. Business v. Sebelius* (2012) (part II)
- Donald J. Trump, "Enhancing Public Safety in the Interior of the United States," *Executive Order No. 13768*, January 25, 2017.
- Darla Cameron, "How sanctuary cities work, and how Trump's blocked executive order could have affected them," *Washington Post*, November 21, 2017.
- Recommended: Thomas R. McCoy and Barry Friedman, "Conditional Spending: Federalism's Trojan Horse," *The Supreme Court Review* (1988): 85-127.

April 17: Federal vs. State Power

- Case excerpts: · *Florida Lime & Avocado Growers v. Paul* (1963)
 - *Arizona v. U.S.* (2012)
 - *Printz v. U.S.* (1997)
 - *Murphy v. NCAA* (2018)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 301-314.
- Ilya Somin, "Why Trump's Executive Order on Sanctuary Cities is Unconstitutional," *Washington Post: Volokh Conspiracy* (Jan. 26, 2017).
- Herbert Weschler, "The Political Safeguards of Federalism," *Columbia Law Review* 54(4): 543-560.

April 22: Equal Protection Under the Laws

- Case excerpts: · *City of Cleburne v. Cleburne Living Center* (1985)
 - *Korematsu v. U.S.* (1944)
 - *Washington v. Davis* (1976)
 - *Arlington Heights v. Metro. Housing Dev. Corp.* (1977)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 149-168.
- Recommended: William Eskridge. 1991. “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” *California Law Review* 79(2): 613-684.
- Recommended: Kenji Yoshino, “The New Equal Protection,” *Harvard Law Review* 124(3): 747-803.

April 24: Affirmative Action

- Case excerpts: · *Grutter v. Bollinger* (2003)
 - *Gratz v. Bollinger* (2003)
 - *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 171-179.
- Gelman, Andrew, Sharad Goel, and Daniel Ho. 2019. “What Statistics Can’t Tell Us in the Fight over Affirmative Action at Harvard,” *Boston Review*.
- Recommended: Goodwin Liu, “The Causation Fallacy: *Bakke* and the Basic Arithmetic of Selective Admissions,” *Michigan Law Review* 100(5): 1045-1107.
- Recommended: Daniel E. Ho, “Why Affirmative Action Does Not Cause Black Students To Fail the Bar. A Reply,” *Yale Law Journal* 114(6): 1997-2004.

April 29: Gender Discrimination

- Case excerpts: · *Craig v. Boren* (1976)
 - *U.S. v. Virginia* (1996)
 - *Alex Morgan et al. v. U.S. Soccer Federation, Inc.* (2019)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 179-184.
- Matt Stevens, “Transgender Student in Bathroom Dispute Wins Court Ruling,” *New York Times*, May 22, 2018.

May 1: LGBT Rights and Same-Sex Marriage

- Case excerpts: · *Romer v. Evans* (1996)
 - *Lawrence v. Texas* (2003)
 - *Obergefell v. Hodges* (2016)
- RICHARD FALLON, DYNAMIC CONSTITUTION (2004), pp. 184-189.
- Scott Sommerdorf, “Polygamy remains a crime as U.S. Supreme Court won’t hear case from ‘Sister Wives’,” *Salt Lake Tribune*, Aug. 3, 2017.
- Recommended: Michael Dorf and Sidney Tarrow. 2014. “Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena,” *Law & Social Inquiry* 39(2): 449-473.

May 6: Voting Rights & Political Questions

- Case excerpts: · *Shelby County v. Holder* (2013)
 - *Walter Nixon v. United States* (1993)
 - *U.S. Term Limits, Inc. v. Thornton* (1995)
 - *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n* (2015)
- RICHARD FALLON, DYNAMIC CONSTITUTION (2004), pp. 191-207.
- New Jersey Senate Bill 119, “An Act Concerning the Disclosure of Federal Income Tax Returns by Candidates for President and Vice President of the United States” (2019).
- Recommended: *Vieth v. Jubelirer* (2004).
- Recommended: Christopher Elmendorf & Douglas Spencer, “Administering Section 2 of the VRA After Shelby County,” *Columbia Law Review* 115(8): 2143-2218.

May 8: Reproductive Rights

- Case excerpts: · *Roe v. Wade* (1973)
 - *Planned Parenthood v. Casey* (1992)
 - *Whole Woman’s Health v. Hellerstedt* (2016)
- RICHARD FALLON, DYNAMIC CONSTITUTION (2004), pp. 207-223.
- Sarah Mervosh, “Judge Blocks Kentucky Fetal Heartbeat Law That Bans Abortion After 6 Weeks,” *New York Times*, March 16, 2019.
- Overview of Abortion Laws, *Guttmacher Institute*, March 1, 2019.
- Recommended: JEFFREY TOOBIN, THE NINE (2007), pp. 36-59.
- Recommended: Zakiya Luna and Kristin Luker. 2013. “Reproductive Justice,” *Annual Review of Law & Social Science* 9(2): 327-352.

May 13: Regulating Gun Rights

Assignment #2 due by 1:30p

- Case excerpts: · *D.C. v. Heller* (2008)
· *McDonald v. City of Chicago* (2010)
- Adam Liptak, “Supreme Court Will Review New York City Gun Law,” *NY Times* (Jan. 22, 2019).
- Brad Reid. 2016. “Fourteen Ways to Interpret the Constitution.” *Huffington Post*.
- David Fahrenthold & Jonathan O’Connell, “What is the Emoluments Clause? Does it Apply to President Trump?” *Washington Post*, (Jan. 23, 2017).
- Recommended: Norman L. Eisen, Richard W. Painter and Laurence Tribe, “The Emoluments Clause: Its text, meaning, and application to Donald J. Trump”

May 15: Congressional Checks on Executive Authority

- Case excerpts: · *Youngstown Sheet & Tube Co. v. Sawyer* (1952)
· *I.N.S. v. Chadha* (1983)
· *Clinton v. City of New York* (1998)
- RICHARD FALLON, DYNAMIC CONSTITUTION (2004), pp. 253-274.
- Paul Kahn & Kiel Brennan-Marquez, “National Emergency Funding of Border Wall is Unconstitutional,” *The Hill* (March 13, 2019).
- Robert Kagan, “The Strongmen Strike Back,” *Washington Post* (March 14, 2019).

May 20: First Amendment: Establishment Clause

- Case excerpts: · *Engel v. Vitale* (1962)
· *Abington School Dist. v. Schempp* (1963)
· *Lemon v. Kurtzman* (1971)
· *Lee v. Weisman* (1984)
· *Trump v. Hawaii* (2018)
- RICHARD FALLON, DYNAMIC CONSTITUTION (2004), pp. 77-92.
- “Shifting Boundaries: The Establishment Clause and Government Funding of Religious Schools and Other Faith-Based Organizations.” 2009. Pew Research Center.
- Noah Feldman, “A Church-State Solution,” *New York Magazine* (July 17, 2005)
- Recommended: James Madison, “A Memorial and Remonstrance,” June 20, 1785.
- Recommended: Herbert Kritzer & Mark Richards. 2003. “Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases.” *Law & Society Review* 37(4).

May 22: First Amendment: Free Exercise Clause

- Case excerpts: · *Wisconsin v. Yoder* (1972)
 - *Employment Division v. Smith* (1990)
 - *Church of the Lukumi Babalu v. City of Hialeah* (1993)
 - *Burwell v. Hobby Lobby Stores, Inc.* (2014)
 - *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 92-99.

May 27: NO CLASS (Memorial Day)

May 29: First Amendment: Free Speech

- Case excerpts: · *Tinker v. Des Moines Indep. Comm. Sch. Dist.* (1969)
 - *Brandenburg v. Ohio* (1969)
 - *Miller v. California* (1973)
 - *Texas v. Johnson* (1989)
- RICHARD FALLON, *DYNAMIC CONSTITUTION* (2004), pp. 41-76.
- Dara Lind, “Why the ACLU is adjusting its approach to “free speech” after Charlottesville,” *Vox* (Aug. 21, 2017).
- Nicole Lewis, “The NFL and the First Amendment: A Guide to the Debate,” *Washington Post* (Oct. 5, 2017).
- Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities, Mar. 21, 2019.

June 3: First Amendment: Money in Politics

Assignment #3 due by 1:30p

- Case excerpts: · *Buckley v. Valeo* (1946)
 - *Citizens United* (2010)
- Justin Levitt. 2010. “Confronting the Impact of *Citizens United*,” *Yale Law & Policy Review* 29(1): 217-234.
- Recommended: Douglas M. Spencer & Abby K. Wood. 2014. “*Citizens United*, States Divided: An Empirical Analysis of Independent Political Spending,” *Indiana Law Journal* 89(1): 315-372.
- Recommended: Michael D. Gilbert & Brian Barnes. 2016. “The Coordination Fallacy,” *Florida State University Law Review* 43(2): 399-426.

June 5: Courts as Agents of Social Change

- GERALD ROSENBERG, *THE HOLLOW HOPE* (1991) ch. 2.
- ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2018) ch. 1.
- TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990) ch. 1 and 4.
- Marc Galanter. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9(1): 95-160.
- Richard H. Pildes, "Romanticizing Democracy, Political Fragmentation, and the Decline of American Government," *Yale Law Journal* 124(4): 804-852.

June 10-14: Finals Week