

# Constitutional Law

**Government 307** Spring 2017

**Location** Hepburn 105

**Time** 1:00-4:00pm M

**Final Exam** May 12 F, 8:30-11:30am, Hepburn 105

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**Office Hours** 1:30-4:30pm T, 9:30am-12:30pm R, and by appointment

## Overview

The course title “Constitutional Law” is somewhat (not entirely, but somewhat) misleading. In contrast to a traditional law school course, which focuses on “what the law is” through the recitation of holdings in landmark cases, this course has three goals. First, you will learn “what the law is,” primarily by reading cases closely to understand *what* the Supreme Court decided. The primary topics for this course are the balances of power between 1) the three branches of government and 2) the states and national government, as well as civil liberties and civil rights, with a concentration on the First Amendment and equal protection issues. Second, you will become familiar with the historical development of the law and how context can influence the Court’s behavior. For example, you will discover how changing interpretations of the commerce clause track changes in American society and the economy at large. Third, you will be able to discuss not just the Constitution and constitutional law, but also the idea of *constitutionalism*. What does it mean to have a written constitution? What is the proper role of the Supreme Court in American democracy? How do the three branches of the national government, the states, and the people interact to produce what seems to be a paradox: an ever-changing and contested constitutional settlement.

## Textbook and course readings

There is no textbook for this course. Some non-case course readings will be delivered via the course Sakai site.

## Course format

Because this is a small seminar course, my role is not to talk at you. Instead, my role is to facilitate discussion of the cases and controversies we will encounter over the course of the semester. Coincidentally, you have the same role. It is imperative, then, that every member of the class comes prepared (i.e., having read the cases and text carefully and critically) to discuss the day’s topic. The success of the class depends on your dedication to preparation and engagement. A short observation here: The readings are extensive and will take some time to get through. They are not impossible, though. If you are a slow reader like the instructor, plan for hours of preparation for each class.

Ask questions. Argue. Challenge. Probe. Do all of these honestly (see below), and we will have a successful semester.

Attendance and participation are mandatory. (Note: It is not possible to do well on the latter if you do not do well on the former.) Please let me know **before class** if you must miss. There is no acceptable number of unexcused absences. After *one* unexcused absence, each subsequent unexcused absence will lower your final letter grade by a step (e.g., a 3.25 becomes a 3.0 at two unexcused absences, a 2.75 at three, etc.). Regardless of the reason for your absence, **you are responsible for all material covered in class that day.**

### Course requirements and grading

Midterm exam (25%), final exam (25%), attendance and participation (15%), hypotheticals (20% - 2 @ 10% each), and case briefs (15% - 6 @ 2.5% each).

Barring clerical error (e.g., I added up the points incorrectly), all grades are final. I am always willing to talk with you about exam and written assignment grades and suggest ways to improve. But, I will not bargain over grades or points, nor will there be extra credit opportunities.

I will employ a standard grading scale:

4.0 (100-97)	3.25 (90-87)	2.5 (80-77)	1.75 (70-67)	1.0 (61-60)
3.75 (97-93)	3.0 (87-83)	2.25 (77-73)	1.5 (67-63)	0.0 (below 60)
3.5 (93-90)	2.75 (83-80)	2.0 (73-70)	1.25 (63-61)	

I will not round grades as a matter of course; however, your *exceptional* effort in one or more elements of the final grade may be considered a plus factor if your grade is on the borderline. There is no curve in this course, though I reserve the right to adjust grade cutoffs if necessary. The adjustments will only work neutrally or in your favor, if applied.

### Exams

We will have one midterm exam on **March 13**. The **final will be comprehensive** with an emphasis on the last half of the course. The exams will have a combination of multiple choice, short answer, and essay questions.

### Hypothetical

For these assignments, you will use legal principles and cases covered in the course to analyze fictional cases in six to eight pages. Imagine you are a lawyer for a client involved in a constitutional case. You will need to prepare a document that explains to the court the important issues in the case, the relevant precedents, and why your client should win. You should raise counter-arguments to your position and address them forthrightly as well.

The first hypothetical will be assigned **February 13** and due **February 27**. The second hypothetical will be assigned **April 10** and due **April 24**. Both will be due in hard copy at the start of class.

### Case briefs

Briefing cases is not only an essential skill for law school-bound students, but also an especially useful learning tool and study aid. On the first day of class, we will separate into an “A” group and a “B” group. You will be responsible for turning in a case brief every other week, beginning on January 30. Within your group, you should decide who will brief which cases during the weeks you are responsible. In other words, no two group members can brief the same case.

## Expectations and technology policy

I expect this class, the readings, making an argument, and getting involved to be the thing you care about most in the world during the 180 minutes we meet each week. I expect you to come to class at least having read the material for the week, even if you haven't fully understood it or have an opinion on it yet. That's why we have class - to work through those issues. But, understanding and evaluation of the material will be difficult if you have not done the first part: reading them yourself.

I expect you to bring assigned reading material to class with you. Most of the cases are available through Lexis, and the remainder of the readings will be on Sakai. For this reason, if you do not print out the readings, you should bring a laptop with which you can access them. Accessing readings and note-taking are the only regularly authorized uses of an electronic device during class. Not being fully present in class will negatively affect the attendance and participation grade.

## Disability accommodations

Please inform me during the first two weeks of classes if you need any accommodations in the curriculum, instruction, or assessments of this course to enable you to participate fully. Confidentiality of the shared information will be strictly maintained. We will work with Disability and Accessibility Services (<http://www.stlawu.edu/disability-and-accessibility-services>) if accommodations require such assistance.

## Academic honesty

I expect everyone to conduct themselves with integrity and honesty in this class. There are two facets to this expectation.

First, all of the work you do in this class will be your own. Don't cheat. Don't plagiarize. Don't take short cuts. If you commit an act of academic dishonesty, I am bound to follow the procedures outlined in the St. Lawrence University Student Handbook (available at <http://www.stlawu.edu/sites/default/files/resource/Student%20Handbook%202015-2016%20final.pdf>) The Handbook describes what constitutes academic honesty and penalties for violation on pages 93 through 95. Again, don't cheat.

As the semester goes on, you may find yourself in a situation where, due to multiple pressures on your time, you may consider taking a short cut in order to turn in an assignment or paper by the deadline. If this is the case, the thing to do is to **drop everything and contact me via email immediately regarding your situation**. I can help relieve some of the pressure related to my class in a way that is equitable for the other students in the class as well. But, I can't do anything for you once you commit an act (knowingly or negligently) of academic dishonesty.

Second, I expect everyone to be intellectually honest. This means listening attentively to other's comments and questions and responding appropriately. Some of the material in the class is controversial, and an intellectually vibrant community like St. Lawrence ought to entertain opinions on most any side of a controversy. Moreover, a liberally-educated person ought to be able to articulate fearlessly the "best case" for any legitimate proposition. So, we will not resort to *ad hominem* attacks, shut-down-by-slogan, or straw person arguments. (Ok, I might do the straw person argument sometimes, but only for effect.) Believe in the rightness of your argument; be prepared to challenge both yourself and others; and be open to changing your mind.

## Topics and readings

Please note that the **readings are subject to change**. If a reading has an asterisk (\*) beside it, I will provide it on Sakai. Otherwise, use Lexis to find the full text of the case.

### Introduction and Foundations of Judicial Power (January 23)

Kerr, "How to Read a Legal Opinion"  
The Constitution and its Amendments  
Hamilton, *The Federalist* Nos. 78 & 81  
Brutus, *The Anti-Federalist Papers*, Nos. 11-12, 15  
Whittington, "Constitutionalism," in *The Oxford Handbook of Law and Politics*  
McCloskey, *The American Supreme Court*, Chapter 1

### The Judicial Power and Its Restraints (January 30)

#### Judicial Review and Supremacy

*Marbury v. Madison* (5 U.S. 137); *Eakin v. Raub* \*; *Cooper v. Aaron* (358 U.S. 1)

#### Restraints – Jurisdiction, Standing, and Political Questions

*Sheldon v. Sill* (49 U.S. 441); *Ex Parte McCordle* (74 U.S. 506)  
*Massachusetts v. Mellon/Frothingham v. Mellon* (262 U.S. 447); *Flast v. Cohen* (392 U.S. 83); *Elk Grove School District v. Newdow* (542 U.S. 1: all of the majority opinion and Section I of Chief Justice Rehnquist's special concurrence); *Hollingsworth v. Perry* (133 S.Ct. 2652); *U.S. v. Windsor* (133 S.Ct. 2675: Sections I and II of the majority opinion, Section I of Justice Scalia's dissent, and Section I of Justice Alito's dissent)  
*Luther v. Borden* (48 U.S. 1); *Nixon v. United States* (506 U.S. 224)

### Congressional Powers I (February 6)

#### Non-legislative Powers

*Powell v. McCormack* (395 U.S. 486); *U.S. Term Limits, Inc. v. Thornton* (514 U.S. 779)

#### Legislative Powers: Early Commerce Clause

McCloskey, *The American Supreme Court*, Chapters 5-6\*  
*Gibbons v. Ogden* (22 U.S. 1); *United States v. E.C. Knight* (156 U.S. 1); *Hammer v. Dagenhart* (247 U.S. 251); *Schechter Poultry v. United States* (295 U.S. 495)

### **Hypothetical 1 assigned February 13. Due in class February 27.**

### Congressional Powers II (February 13)

#### Legislative Powers: Modern Commerce Clause, Taxing, and Spending

*NLRB v. Jones & Laughlin Steel* (301 U.S. 1); *Wickard v. Filburn* (317 U.S. 111); *Heart of Atlanta Motel v. United States* (379 U.S. 241); *Katzenbach v. McClung* (379 U.S. 294); *United States v. Lopez* (514 U.S. 549); *Gonzalez v. Raich* (545 U.S. 1)  
*Pollock v. Farmer's Loan & Trust* (157 U.S. 429); *McCray v. United States* (195 U.S. 27); *Bailey v. Drexel Furniture* (259 U.S. 20); *Steward Machine Co. v. Davis* (301 U.S. 548); *South Dakota v. Dole* (483 U.S. 203)  
*NFIB v. Sebelius* (132 S.Ct. 2566) – contains both commerce clause and taxing-and-spending clause elements

Presidency I: The Domestic Presidency (February 20)

*In re Neagle* (135 U.S. 1); *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579)  
*Myers v. United States* (272 U.S. 52); *Humphrey's Executor v. United States* (295 U.S. 602); *Morrison v. Olson* (487 U.S. 654)  
*NLRB v. Noel Canning* (134 S.Ct. 2550)

Presidency II: Executive Power in War and Foreign Affairs (February 27)

Schmitt, "Washington's Proclamation of Neutrality"\*  
War Powers Resolution \*  
Fisher, "Judicial Review of the War Power"\*  
*United States v. Curtiss-Wright Co.* (299 U.S. 304); *Missouri v. Holland* (252 U.S. 416);  
*Medellin v. Texas* (552 U.S. 491)  
*Ex parte Milligan* (71 U.S. 2); *Korematsu v. United States* (323 U.S. 214); *Hamdi v. Rumsfeld* (542 U.S. 507); *Rasul v. Bush* (542 U.S. 466)

Federalism (March 6)

*McCulloch v. Maryland* \*; *Martin v. Hunter's Lessee* (14 U.S. 304)  
*Cooley v. Board of Wardens* (53 U.S. 299); *Southern Pacific Co. v. Arizona* (325 U.S. 761); *Bibb v. Navajo Freight Lines* (359 U.S. 520); *Maine v. Taylor* (477 U.S. 131)  
*Garcia v. SAMTA* (469 U.S. 528); *New York v. United States* (505 U.S. 144); *Printz v. United States* (521 U.S. 898)

**Midterm Exam: In class, March 13**

Selective Incorporation of the Bill of Rights and Free Speech I (March 27)

*Barron v. Baltimore* \*; *Hurtado v. California* (110 U.S. 516); *Palko v. Connecticut* (302 U.S. 319); *Duncan v. Louisiana* (391 U.S. 145)  
Development of Free Speech Protections  
*Schenck v. United States* (249 U.S. 47); *Abrams v. United States* (250 U.S. 616); *Gitlow v. New York* (268 U.S. 652); *Dennis v. United States* (341 U.S. 494); *Brandenburg v. Ohio* (395 U.S. 444)

Free Speech II (April 3)

"Obscene" and "Offensive" Speech  
*Miller v. California* (413 U.S. 15); *New York v. Ferber* (458 U.S. 747)  
*Cohen v. California* (403 U.S. 15); *Virginia v. Black* (538 U.S. 343)  
Symbolic Speech and "Speech Plus"  
*Snyder v. Phelps* (131 S. Ct. 1207); *McCullen v. Coakley* (134 S.Ct. 2518); *Reed v. Town of Gilbert, Arizona* (135 S.Ct. 2218)  
Limitations on Freedom of Speech  
*Ward v. Rock Against Racism* (491 U.S. 781); *Pleasant Grove City v. Summum* (555 U.S. 460); *Walker v. Texas Division, Sons of Confederate Veterans* (135 S.Ct. 2239) (3/28)

**Hypothetical 2 assigned April 10. Due in class April 24.**

Religious Freedom (April 10)

Establishment Clause  
*Lee v. Weisman* (505 U.S. 577); *Agostini v. Felton* (521 U.S. 203); *Zelman v. Simmons-Harris* (536 U.S. 639); *Town of Greece, NY v. Galloway* (134 S.Ct. 1811)

Free Exercise

*Sherbert v. Verner* (374 U.S. 398); *United States v. Lee* (455 U.S. 252)  
*Employment Division v. Smith* \*; *City of Boerne v. Flores* \*; *Burwell v. Hobby Lobby Stores* (134 S.Ct. 2751); *Holt v. Hobbs* (135 S.Ct. 853)

Discrimination, Civil Rights, and Equal Protection (April 17)

Race-Based Discrimination

*Plessy v. Ferguson* (163 U.S. 537); *Missouri ex rel. Gaines v. Canada* (305 U.S. 337);  
*Sweatt v. Painter* (339 U.S. 629); *Brown v. Board of Education I & II* (347 U.S. 483  
and 349 U.S. 294)

Affirmative Action in Education

*Regents of the University of California v. Bakke* (438 U.S. 265); *PICS v. Seattle School District No. 1* (551 U.S. 701); *Schuette v. BAMN* (134 S.Ct. 1623)

Gender-Based and Sexual Orientation-Based Discrimination

*Hoyt v. Florida* (368 U.S. 57); *Reed v. Reed* (404 U.S. 71); *Craig v. Boren* (429 U.S. 190); *U.S. v. Windsor* (133 S.Ct. 2675: the non-standing related parts)

Unenumerated Rights (April 24)

Reproductive Rights and Intimate Relations

*Griswold v. Connecticut* (381 U.S. 479); *Planned Parenthood v. Casey* (505 U.S. 833);  
*Bowers v. Hardwick* (478 U.S. 186); *Lawrence v. Texas* (539 U.S. 558)

Death and Marriage

*Washington v. Glucksberg* (521 U.S. 702); *Loving v. Virginia* (388 U.S. 1); *Baker v. Nelson* (291 Minn. 310 and 409 U.S. 810) *Zablocki v. Redhail* (343 U.S. 374);  
*Obergefell v. Hodges* (135 S.Ct. 2584)

Economic Rights, and the Judicial Power Revisited (May 1)

Gillman, *The Constitution Besieged*, Chapter 1 \*

*Lochner v. New York* (198 U.S. 45); *Muller v. Oregon* (208 U.S. 412); *West Coast Hotel v. Parrish* (300 U.S. 379)

*Hawaii Housing Authority v. Midkiff* (467 U.S. 229); *Lucas v. South Carolina Coastal Council* (505 U.S. 1003 ); *Kelo v. New London* (545 U.S. 469)

Whittington, *Political Foundations of Judicial Supremacy*, Chapters 5 & 6 \*

Friedman, *The Will of the People*, “Conclusion: What History Teaches” \*

Tushnet, *Taking the Constitution Away from the Courts*, Chapters 1, 6, & 7 \*

**Final Exam: May 12 F, 8:30-11:30am** (comprehensive, with emphasis on the last half of the course)