

CONSTITUTIONAL LAW (§ 1)
Law 5501-14281
University of Florida Levin College of Law
Spring 2023

Professor Merritt McAlister
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Syllabus

1. Overview. This course examines core concepts in constitutional law. We will focus our attention on three areas: separation of powers, federalism, and individual rights. “Separation of powers” refers to our system of divided federal government and the corresponding checks and balances among the three branches of government (executive, legislative, and judicial). “Federalism” refers to the balance of power between state and federal governments. “Individual rights” refers to the individual liberties the constitution protects against state or federal governmental interference or intrusion.

This is a foundational course. There’s much more to constitutional law than we will be able to cover this semester, but this course will provide you with a foundation for further study as your law school career progresses. For example, we will not explore the First Amendment or constitutional criminal procedure provisions. Those are the subject of other, more specialized courses.

Our course will also ground you in the process of common-law judicial decisionmaking, as we explore how doctrine evolves and changes over time. We will consider different interpretive choices by different jurist—principally, “originalism” and living or common-law constitutionalism—and how those frameworks apply in context. We will consider, also, and more provocatively, whether judicial review on constitutional questions involves neutral or objective decisionmaking by jurists or whether jurists’ personal policy preferences drive judicial decisions.

2. Required and Optional Materials. Our casebook is NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* (21st ed. 2022).

Although it is not required, you may find Professor Erwin Chemerinsky’s treatise, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (6th ed. 2019), a useful resource for this course.

3. Class Meetings. Our class meets on Mondays, Tuesdays, and Wednesdays from 1:45 pm to 3:00 pm in HH 355B. Please do not attend class if you are feeling ill; in such case, you will have access to a video recording of class.

4. Contact Information. My e-mail address is mcalister@law.ufl.edu. E-mail is usually the best way to reach me, and please do not hesitate to contact me regularly throughout the semester. My office is HH 329, and the phone is 352.273.0981.

5. Drop-In Hours. I will be available for drop-in visits in my office in HH 329 on Wednesdays from 3:00 pm to 5:00 pm. You should also feel free to stop by to visit or ask a question any other

time that I have my door open. If those times do not work for you, or you'd prefer to schedule a time, I am happy to meet at other times as well. Please email me to arrange either an in-person or virtual appointment. If my availability changes for any reason, I will make an announcement in class.

6. Canvas. I will use Canvas to communicate all relevant class information, including to make any additional material like classroom hypothetical problems available to students.

7. Course Objectives and Student Learning Outcomes. By the end of this course, you should be able to: (1) describe the core constitutional concepts of separation of powers and federalism; (2) explain the framework for substantive due process and equal protection; (3) articulate the basic limits on and extent of judicial review; (4) explain differing views of judicial decisionmaking and constitutional interpretive methodologies; and (5) describe core congressional and executive powers and the limits thereon.

8. Course Reading Map. At the end of this syllabus, you will find a Course Reading Map, which is a list of assignments by subject matter. The Reading Map itself may provide you with a useful organizational tool. Each assignment corresponds to one class period, as indicated. Some of our material may spillover into the next class hour; some material is interconnected. Know that part of your preparation includes reviewing your notes from the prior class. I reserve the right to remove assignments from our planned reading map depending on how quickly we move through the material.

9. Class Preparation, Participation, and Experience. Consistent with the American Bar Association Standard 310, you should expect to spend at least **eight hours** per week preparing for this four-hour course.

I have high expectations for the learning environment we create together. I rely heavily on classroom discussion to explicate cases and concepts and apply those frameworks to new problems. I expect each of you to attend class prepared. Preparation includes completing the assigned reading, reviewing notes and/or reading material from the prior class, and considering any practice problems posted on Canvas. Please note that I will make use of practice problems occasionally in class, and I will make these available on Canvas prior to class, even though they do not appear on the reading map. Other times I may distribute questions in class.

I have an on-call policy that may be more rigorous than other courses. I will use a list randomizer to identify those who are “on-call,” and I will call on students from that list in that order. I will strive to call on multiple students each class—and sometimes many students—but, admittedly, I will occasionally have a longer dialogue with a single student when I believe it is important to work a particular dialogue to completion. Once I have completed the on-call list, I will re-run it. Thus, once you have been called on, you will not be called on again until I re-run the list, and I'll announce in class when we have completed the list.

If for some reason you are not prepared, please email me (mcalister@law.ufl.edu) at least 10 minutes before class. Please do not abuse that policy. **If I call on you and you are not prepared for class and you have not notified me of your lack of preparation in advance, I reserve the right to reduce your grade by one-third of a point (e.g., from an A- to a B+).** Do not tempt fate; notify me in advance of your lack of preparation.

10. Class Attendance. I record attendance using the law school's online course attendance system. **If you are not present more than seven times during the semester, I will lower your final grade by at least one-third of a point (e.g., from a B+ to a B).** I also reserve the right to refuse to let any student take the final exam if he, she, or they miss more than 9 of our scheduled classes.

You do not need to tell me why you are absent. If, however, you expect to be absent from class more than six times due to a family emergency or medical situation, please notify me. Observance of a University-recognized religious holiday does not count as an absence. Accordingly, please notify me of such absences.

11. Electronic Devices. A computer and/or smartphone is necessary to complete this course. It is necessary both for class participation and to record your attendance. I will use interactive polling software during class, and I will expect you to participate in these polls. Do not use your computer for any non-class related purpose during class. I reserve the right to amend my electronic device policy if I observe students using computers for non-classroom related purposes.

12. Evaluation. Your final grade in this course is based on a closed-book midterm (20%) and a closed-book final (80%). Both exams will be in-class exams. The mid-term exam will be on Wednesday, March 8 from 1:00 pm to 3:00 pm; our final exam will be a four-hour exam held on Friday, May 1. The exams will contain a combination of short answer, multiple-choice, and essay questions. I will provide sample exams from past years and mock questions throughout the semester.

Exceptional participation will be considered to set the curve and, rarely, to adjust final grades by no more than 1/3 of a point if I determine that your exam grade does not reflect your classroom contributions and engagement with our course. Grade adjustments based on participation are the exception, not the norm.

13. UF Law Standard Syllabus Policies. Other information about UF Levin College of Law policies, including compliance with the UF Honor Code, Grading, Accommodations, Class Recordings, and Course Evaluations may be found here:
<https://ufl.instructure.com/courses/427635/files/74674656?wrap=1>.

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Spring 2023

I. Judicial Power

A. Judicial Review and Judicial Supremacy

1. **Tuesday, January 17.** The Power of Judicial Review: U.S. Const., Art. III, pp. lxvii-lxviii & *Marbury v. Madison*, pp. 1-16
2. **Wednesday, January 18.** Judicial Exclusivity in Constitutional Interpretation: *Cooper v. Aaron* & notes, pp. 20-35; *Dred Scott* & notes, pp. 463-67

B. Judicial Self-Restraints and Separation of Powers

3. **Monday, January 23.** Standing and “Case or Controversy,” *Lujan & Mass v. EPA*, pp. 39-47
4. **Tuesday, January 24.** Political Question Doctrine, *Baker v. Carr* & notes, pp. 61-76

II. Federalism & Article I

A. Federalism and Necessary and Proper Clause

5. **Wednesday, January 25.** Enumerated Powers & *McCulloch v. Maryland*, pp. 77-93 & U.S. Const. art. I, pp. lxi-lxv
6. **Monday, January 30.** The Limits of the Necessary and Proper Clause and Location of Sovereignty, pp. 93-109 (*Comstock & Term Limits*)

B. Article I Powers and Federalism Limits

7. **Tuesday, January 31.** Commerce Power Before and During the New Deal, pp. 115-130 (*Hammer & Schechter Poultry*)
8. **Friday, February 3 from 1:00 pm to 2:15 pm [MAKE-UP CLASS; NO CLASS ON WED, FEB 1].** The Commerce Power after the New Deal, pp. 130-141 (*Jones & Laughlin Steel, Darby, & Wickard*)
9. **Monday, February 6.** The Contemporary Commerce Power, pp. 141-159 (*Lopez, Morrison, & Gonzales v. Raich*)
10. **Tuesday, February 7.** Commerce Clause Leading up to the Affordable Care Act, & *NFIB*, pp. 159-169

C. The Tenth Amendment

11. **Wednesday, February 8.** The Tenth Amendment as an External Constraint & Anticommandeering, pp. 170-185 (*New York & Printz*)

D. The Spending Power

12. **Monday, February 13.** The Spending Power After the New Deal, *Dole & NFIB*, pp. 209-221

E. Federal Limits on State Regulation

13. **Tuesday, February 14.** The Dormant Commerce Clause, pp. 223-232 (*Gibbons*)

III. Separation of Powers and Article II

A. Executive Assertions of Power

14. **Wednesday, February 15.** Article II and Executive Power, pp. 299-310 (*Steel Seizure Case*); read U.S. Const., art. II, pp. lxv-lxvii
15. **Monday, February 20.** Contemporary Executive Power Issues, pp. 311-319 & 325-334 (*Zivotofsky & Trump v. Hawaii*)

B. Congressional Authority to Restrain and Enable the Executive

16. **Tuesday, February 21.** Congressional Control over Executive Action, pp. 392-408 (*Chadha & Clinton*)
17. **Wednesday, February 22.** Congressional Constraints on Appointment and Removal of Executive Officers, pp. 408-422 (*Bousher & Morrison v. Olson*)
18. **Monday, February 27.** The Aftermath of *Morrison*, pp. 422-434 (read note cases carefully)

IV. The Fourteenth Amendment

A. The Post-Civil War Amendments & Incorporation

19. **Tuesday, February 28.** The Post-Civil War Amendments, pp. 467-480 (*Slaughter-House Cases & Saenz*); read 13A-15A, p. lxxi
20. **Wednesday March 1.** Incorporation through the Due Process Clause, pp. 481-498 (*Duncan & McDonald*); read 1A-10A, pp. lxix-lxx

OPTIONAL REVIEW SESSION FRIDAY, MARCH 3 FROM 1:00 PM to 3:00 PM

B. Due Process Clause & Economic Liberty

21. **Monday, March 6.** The Meaning & Implications of *Lochner*, pp. 507-526 (*Lochner & Nebbia*)
22. **Tuesday, March 7.** Minimum Rationality Review of Economic Legislation, pp. 526-531 (*Williamson* & Punitive Damages Note 2)

IN-CLASS MID-TERM ON WEDNESDAY MARCH 8 FROM 1:00 PM to 3:00 PM.

C. Substantive Due Process and Privacy and Autonomy

23. **Monday, March 20.** Substantive Due Process, Childbearing, and Contraception, pp. 531-542 (*Griswold*)
24. **Tuesday, March 21.** Substantive Due Process & Abortion, pp. 542-548 & 552-561 (*Roe & Casey*)
25. **Wednesday, March 22.** *Roe & Casey* Overturned, pp. 561-578 (*Dobbs*)
26. **Monday, March 27.** Substantive Due Process and Rights over the Timing and Circumstances of One's Death, pp. 624-635 (*Glucksberg*)

D. Equal Protection

A. Minimum Rationality

27. **Tuesday, March 28.** Economic Regulation, pp. 677-688 (*Railway Express*)

B. Race Discrimination

28. **Wednesday, March 29.** The Unconstitutionality of Racial Segregation, pp. 688-708 (*Brown & Loving*)
29. **Monday, April 3.** Facial Discrimination and Racially Discriminatory Purpose and Effect, pp. 708-723 (*Korematsu & Washington v. Davis*)
30. **Tuesday, April 4.** Affirmative Action and Race Preferences, pp. 723-730, 742-753 (*Bakke, Grutter, & Gratz*)
31. **Wednesday, April 5.** Affirmative Action and Race Preferences, Cont'd, pp. 760-776 (*Fisher & Parents Involved*)

C. Discrimination on the Basis of Sex

32. **Monday, April 10.** Sex and Intermediate Scrutiny, pp. 793-807 (*Craig & VMI*)

D. Discrimination Based on Other Potentially "Suspect" Classifications

- 33. **Tuesday, April 11.** Sexuality and Hybrid EP and SDP, pp. 825, 585-606 (*Romer & Lawrence*)
- 34. **Wednesday, April 12.** Same-Sex Relationships/Marriage, pp. 606-626 (*Windsor & Obergefell*)
- 35. **Monday, April 17.** Alienage, Disability, Age, & Poverty, pp. 825-36 (*Cleburne*)

E. Congress's Enforcement Power

- 36. **Tuesday, April 18.** State Action Requirement, pp. 892-905 (*Civil Rights Cases & Shelley*)
- 37. **Monday, April 19.** Section 5 Power, pp. 937-949, 954-955 (*City of Boerne, Shelby County, & Fla. Prepaid*)

REVIEW SESSION IN CLASS ON MONDAY, APRIL 24