

## **CONSTITUTIONAL LAW: SPRING 2008**

**T-TH, (9:00-10:50 AM (Room 602))**

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Office Hours: Thursday 11am-1pm

### **SYLLABUS AND COURSE INFORMATION**

The most honored and fundamental principles of the American political system, and many of this country's most divisive crises, have been debated and challenged in terms of constitutional law. In this course, we will examine the nature and scope of the powers of the federal judiciary, Congress, the presidency, and the relationship between the federal government and the states, as well as the impact of the Fourteenth Amendment.

One goal of this course is to emphasize that answers to questions about the proper ways in which to organize a political system around even the most fundamental principles -- such as separation of powers, checks and balances, federalism, representative democracy, and the rule of law -- have changed throughout this country's history. The modern constitutional regime is, in complex ways, vastly different from what the Framers of the Constitution imagined. These changes raise fascinating questions about methods of constitutional interpretation, as well as judicial and political fidelity to our constitutional regime -- all of which we will consider as we review the leading cases in the constitutional law canon.

#### **Course Materials**

Unless otherwise noted, all page references are to Kathleen Sullivan and Gerald Gunther, *Constitutional Law*, 16<sup>th</sup> edition ("CB").

#### **Course Requirements and Grading**

##### **A. Course Requirements**

On the second day of class I will pass out a seating chart, so please be aware that you will be choosing your assigned seat for the remainder of the semester. I will use this chart as an aid to learn students' names, to take attendance, and to facilitate class discussion.

For class discussion, I will utilize a “present and prepared” system, which requires all students to be prepared each session to be called on in class (although volunteers are always welcomed and encouraged). There will be a sign-in sheet posted outside the door to Room 602. You must sign in before each class to indicate that you are present and prepared for class discussion. You will be ineligible for a participation bonus if you are unprepared for or miss three or more classes. The purpose of the bonus is to reward all students who are regularly prepared *and* who contribute in thought-provoking ways, through questions and responses during class and office hours.

There will also be a participation penalty assigned to students who fail to sign in to at least 50% of the classes during the semester.

If you are unable to attend class, please make arrangements with a classmate to obtain notes, new assignment announcements, etc. I will only videotape or podcast classes on religious holidays or if a student has a medical or family emergency.

Because much of our class discussion will involve review of the cases, I will ask each of you to prepare case briefs for each class. Your briefs should include the following categories:

- 1) **The facts:** What facts influenced the final outcome in this case? What is the procedural posture or status of the case (e.g., what was the lower court ruling, if any)?
- 2) **The issues:** What legal questions does the case address? (Some of these legal issues may be stated explicitly and some may be implicit. Try also to identify the latter, when possible.)
- 3) **The holding:** Who won? What is the specific legal rationale for this result? What are the consequences of the court’s opinion for the litigants?
- 4) **The opinion:** Briefly summarize the rationale for the court's holding. On what principles or theories has the court relied?
- 5) **The rule(s):** What is the ruling of the court? Try to state the rule(s) without reference to the specific facts of the case. What are the implications for other cases?
- 6) **The dissent:** Where there is a dissenting opinion, briefly summarize the views or arguments of the dissenting judges. Why did they object and what different rule do they argue controlled the case?

You should view these categories as general guidelines, and you should feel free to modify them in a way that you believe will be most helpful for your class preparation.

Although I will not be grading your briefs, they are an important component of your class participation. At a few points in the semester, I will ask you occasionally to turn in your briefs at the end of class, through the “Digital Dropbox” function on Blackboard, so it is important that you come to each class with your briefs prepared. I will offer weekly assignment memos (discussed below under “Class Communications”), to provide you with more specific guidance about the upcoming week’s class assignments.

## **B. Course Grading**

The primary component of your course grade will be based on your performance on the four-hour open book final examination, which will be scheduled by the Registrar’s Office.

In addition, there is a required midterm examination, at the end of February, which will offer each of you the opportunity to practice answering one or two “hypotheticals” under exam conditions, as well as a set of objective multiple choice and true-false questions, and to receive written feedback and a grade. Please note that the midterm is required, but it will only count if it raises your final course grade: If your grade on the mid-term examination is higher than the grade you earn on the final examination, the mid-term grade will count one-third and the final examination two-thirds in computing your overall grade for the course. If, however, your grade on the final examination is equal to or higher than the grade you earn on the mid-term examination, your mid-term grade will not be counted at all in computing your overall course grade.

## **Class Communications**

### **A. Office Hours & Email**

My office hours will be held on Thursdays from 11am-1pm, and also by appointment. I encourage you to come visit me! I will also provide opportunities for informal feedback about the course. Once or twice during the semester, I will ask the entire class to fill out anonymous evaluation questionnaires. For announcements, I will rely on Blackboard’s email list function. Please make the email you listed with your Blackboard registration is current, and that you regularly check mail at that address.

### **B. Weekly Discussion Memos**

In addition, on Thursday evenings of each week, I will post an announcement on Blackboard, to update the class on where we are in the syllabus, and to provide some guidance concerning the upcoming week’s readings (including review questions, discussion questions, suggested NOTES to focus on in the assigned readings, sample hypotheticals, and in-class group exercises). Please check Blackboard regularly. **These**

**memos are designed to be a key aid for your class participation and preparation for the following week's classes.**

## **Reading Assignments**

### **I. Establishing Judicial Power**

#### **Day 1**

- Overview of the course
- Read (skim through) the Constitution, Appendix A of the Sullivan & Gunther casebook ("CB")

#### **Day 2**

- The Rise of Judicial Review: CB: 1-30

#### **Day 3**

- Case or Controversy Requirements CB: 30-59

### **II. Nation and States in the Federal System**

#### **Day 4**

- The Necessary and Proper Clause CB: 60-76

#### **Day 5**

- The Rise of the Commerce Power CB: 82-96

#### **Day 6**

- The Commerce Power in the Contemporary Era CB: 96-126

#### **Day 7**

- The Tenth and Eleventh Amendments CB: 126-149
- The Spending Power CB: 155 only [skip *U.S. v. Butler*]; 161-166

### **III. Executive Power and Separation of Powers**

#### **Day 8**

- Executive Encroachment on Legislative Powers CB: 244-254 only [skip *Dames & Moore v. Regan*]; 260-270

#### **Day 9**

- Presidential Powers and the War on Terror CB: 270-291

**Day 10**

- Congressional Encroachment on Executive Powers CB: 291-320

**Day 11**

- Executive Privilege and Immunity CB: 320-338

**Day 12**

- The Bill of Rights, the Civil War Amendments, and the Incorporation Debates CB: 339-361

## **IV. Individual Rights: Due Process and Liberty**

**Day 13**

- Midterm Examination

**Day 14**

- Substantive Due Process and Economic Regulations CB: 362-384

**Days 15 & 16**

- Substantive Due Process: Privacy and Abortion CB: 413-445

**Day 17**

- Substantive Due Process: Family & Sexuality CB: 450-469

**Day 18**

- Right to Die CB: 469-480

## **V. Equal Protection**

**Day 19**

- Equal Protection & Race Discrimination CB: 486-517

**Day 20**

- Race and Affirmative Action, Part I CB: 517-534

**Day 21**

- Race and Affirmative Action, Part II CB: 534-561

**Day 22**

- Gender, Equal Protection, and “Intermediate Scrutiny” CB: 571-589

**Day 23**

- Gender, Equal Protection: “Sex Differences,” the “Purpose Requirement,” and Affirmative Action CB: 590-604

**Day 24**

- Alienage, Nonmarital Children, Age, Disability, Poverty CB: 604-614  
- Sexual Orientation CB: 614-625

**Day 25**

- Minimum Rationality Review of Economic Regulations CB: 625-638  
- Equal Protection and Fundamental Interests Analysis CB: 638, 651-673

**Days 26 & 27**

- The Fourteenth Amendment and State Action CB: 674-683  
- Congressional Enforcement of the 14<sup>th</sup> Amendment CB: 707-740