The Supreme Court and the Constitution in American Politics

This seminar will deal with major areas of constitutional law, including judicial review, national powers, separation of powers, state powers, and fundamental rights and liberties. We will approach constitutional law from historical, doctrinal, and theoretical perspectives. The objective of the course is to inform students of the basic nature of constitutional law, and to impress students with the various factors (often contested) that go into constitutional lawmaking and interpretation, including interpretive techniques and political, historical, and institutional factors. We will deal with the Constitution as a text, as well as the Supreme Court as a political institution. Given the creative and contested nature of this process, all educated viewpoints will be welcomed and encouraged.

The main book for the course will be the casebook, Constitutional Law, by Choper, Fallon, Kamisar, and Shiffrin (CFKS). If you do not want to purchase this book (it is expensive), it would be okay to purchase another casebook on constitutional law you can find, so long as it covers the major areas of constitutional doctrine. The key is to be familiar with the major cases we will be considering.

I have also ordered the following paperback books: Robert McClosky’s classic book, The American Supreme Court, for historical perspective, and two books that deal with theoretical, institutional, and political aspects: and Cornell W. Clayton and Howard Gillman, Supreme Court Decision-Making: New Institutionalist Approaches; Daniel A. Farber and Suzanna Sherry, Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations.

The course grade will be based on a term research paper dealing with a topic of direct relevance to constitutional law, and class participation, which will be both open ended and directed as we proceed. As we proceed, I will also assign some short papers due the following week, and ask certain students to be in charge of presenting a viewpoint. I will keep you informed of the pace of the course as we proceed.

The syllabus includes the basic assigned readings as well as bibliographies of some recommended readings that were selected because they highlight issues we will be discussing. The casebook contains numerous secondary selections and bibliographic notes (this is one reason that I assigned it), making it the primary bibliographic source in the course.

I. Judicial Review

CFK&S, Chapter 1. Look at Chapter 12, but it is not assigned.
McClosky, The American Supreme Court, 1-35.
Clayton and Gillman, Supreme Court Decision-Making, pp. 1-87.

Recommended Readings:

II. Theories of Constitutional Interpretation

Ely, Democracy and Distrust, pp. 1-71. (Reserve)
Perry, The Constitution, the Courts, and Human Rights, pp. 9-36. (Reserve)
Farber and Sherry, Desperately Seeking Certainty.
Clayton and Gillman, Supreme Court Decision-Making, pp. 91-198.

Recommended Readings:


II. National Legislative Power

CFK&S, Chapter 2, pp. 55-125.
McClosky, The American Supreme Court, pp. 36-66; 174-205.

Recommended Readings:


IV. Substantive Due Process, Economic Regulation, and Economic Liberty

CFK&S, Ch. 5, pp. 292-353.
McClosky, The American Supreme Court, pp. 67-120.
Clayton and Gillman, Supreme Court Decision-Making, pp. 201-300.

Recommended Readings:


V. Privacy and the New Substantive Due Process

CFK&S, Ch. 6, (We will focus on only a portion of this section because of time constraints; I will assign the cases in class).

Perry, The Constitution, the Courts, and Human Rights, Ch. 4.
McClosky, The American Supreme Court, pp. 121-173.

Recommended Readings:

VI. Presidential Power and Separation of Powers

CFK&S, Ch. 3.
Henkin, “Constitutional Issues in Foreign Policy” (reserve)

Recommended Readings:


VII. Incorporation and the Bill of Rights

CFK&S, Ch. 6, pp. 361-376.

VIII. First Amendment: The Bare Essentials of Freedom of Speech and Religion

A. Free Speech: Core Doctrine, Obscenity, and Hate Speech.


Recommended Readings:

- J. Weinstein, *Hate Speech, Pornography, and the Radical Assault on Free Speech Doctrine* (1999);
- N. Wolfson, *Hate Speech, Sex Speech, Free Speech* (1997);
- Samuel Walker, *Hate Speech: The History of an American Controversy* (1994);
- Meiklejohn, “Free Speech and Its Relationship to Self-Government,” (1948: also in Political Freedom, 1960);
- D. Rabban, “The Emergence of the Modern Doctrine of Speech,” 50 University of Chicago Law Review (1983);
- D. Rabban, *Free Speech in Its Forgotten Years* (1997);
- L. Levy, *Legacy of Suppression* (1960);
- W. Berns, *Freedom, Virtue, and the First Amendment* (1957);
- F. Haiman, *Speech and Law in a Free Society* (1981);
- Z. Chafee, *Free Speech in the United States* (1942);
- M. Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966);
- M. Graber, *Transforming Free Speech: The Uncertain Legacy of Civil Liberty* (1991);
- C. MacKinnon, *Feminism Unmodified* (1987);
- C. MacKinnon, *Only Words* (1993);
- C. MacKinnon and A. Dworkin, *The Pornography Dialogues* (1997);
- R. Smolla, *Free Speech in an Open Society* (1993);
- C. E. Baker, *Human Liberty and Freedom of Speech* (1989);
- K. Greenawalt, *Speech, Crime, and Law* (1989);
- K. Greenawalt, *Fighting Words* (1994);
- C. Sunstein, *Democracy and the Problem of Free Speech* (1993);
- S. Walker, *Hate Speech: The History of an American Controversy* (1994);
- J. Rauch, *Kindly Inquisitors* (1994);
- S. Fish, *There Is No Such Thing As Free Speech and It’s a Good Thing Too...* (1994);
- E. Cleary, *Beyond the Burning Cross: A Landmark Case of Race, Censorship, and the First Amendment* (1994);
- D. Farber and S. Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997);
- J. Jacobs and K. Poetter, *Hate Crimes: Criminal Law and Identity Politics* (1998);
- C. Kors and H. Silverglate, *The Shadow University: The Betrayal of Liberty on America’s Campuses* (1998);
- D. Downs, *Nazis in Skokie: freedom, Community, and the First Amendment* (1985);
- D. Downs, *The New Politics of Pornography* (1989);
- D. Downs, *Restoring Free Speech and Liberty on Campus* (2005);
- S. Shiffrin, *The First Amendment and Romance* (1990);

B. Religion: Establishment Clause and Free Exercise

CFK&S, Cases to be Assigned from Chapter 8.

Recommended Readings:


IX. Death Penalty and Punishment

CFK&S, Ch. 6, pp. 525-555.

Recommended Readings:


X. Fourteenth Amendment and Affirmative Action

CFK&S, Ch. 9, pp. 1194-1298.
Ely, Democracy and Distrust, Ch. 6.

Recommended Readings: