

Constitutional Law II

Fall Term 2009
Professor Kris W. Kobach

Required texts:

Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law*, 16th Ed. (Westbury, N.Y.: Foundation Press, 2007) (“GS” below).

Additional readings indicated below ([available on TWEN](#)) can be downloaded from the course website on Westlaw’s TWEN (The West Education Network) system. Please go to www.lawschool.westlaw.com and register yourself for the course, or it is available in Roo Prints in the law library.

Course objectives:

This course concerns the structure of the American constitutional system, the powers allocated to the three branches of the federal government, and the relationship between the federal government and the states. The course provides students with an understanding of current doctrine in these areas and places pivotal Supreme Court decisions in historical and political context. Accordingly, the course presents constitutional law not as a static list of rules, but as an evolving body of caselaw. At the same time, it seeks to foster a solid understanding of essential constitutional principles.

Grading and course requirements:

Grades will be based upon a final examination that is part multiple-choice, part essay questions. Class participation may also count toward a student’s grade, but only positively. (That is, a few students will receive a slight “bump” in their grade for participation.) All students should be prepared to discuss the readings on the topic covered in a particular class session.

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The topic numbers that follow will not correlate exactly with class sessions. Some class session will deal with more than one topic. Others will only partially cover a topic. The cases that are mentioned specifically below are those on which class discussions will focus. Students are, however, also expected to be familiar with other cases included in the assigned readings.

I. THE ROLE OF THE COURTS

(1) Introduction

Theories of constitutional democracy. The premise of delegated powers. Policing the boundaries between the branches of government and between state and federal power. Review of *Marbury v. Madison* and Ch.J. Marshall's assertion of the power of judicial review.

- GS 1-15, 19-27.

(2) Congressional definition of federal judicial power

Ex Parte McCardle and congressional control over federal jurisdiction.

- GS 27-30.
- Excerpt from *Felker v. Turpin*;
- Excerpt from *Hamdan v. Rumsfeld*.

(3) Supreme Court authority to review state court judgments

Martin v. Hunter's Lessee.

- GS 15-19.

(4) The standing requirement

The 1793 refusal to issue advisory opinions, *Lujan v. Defenders of Wildlife*, and *Raines v. Byrd*.

- GS 32-47.
- Excerpt from *Warth v. Seldin*.

II. THE POWERS OF CONGRESS

(5) The sources and nature of the national legislative power

Federalist 10, *McCulloch v. Maryland*, the Necessary and Proper Clause, and the bank controversy.

- GS 60-81.
- *Federalist 10*.

(6) Early commerce power doctrine

Gibbons v. Ogden and the era of the steamboat. *U.S. v. E.C. Knight*, *Champion v. Ames*, and the early expansion of the commerce clause with the exclusion of "harmful" goods and persons.

- GS 82-89.

- (7) **The child labor saga—a constitutional struggle in microcosm**
Hammer v. Dagenhart, and *Bailey v. Drexel Furniture Co.*
- GS 89-91, 150-153.
- (8) **The court-packing showdown and the “switch in time”**
Schechter Poultry Corp. v. U.S., *Carter v. Carter Coal Co.*, *NLRB v. Jones and Laughlin Steel Corp.*, *Wickard v. Filburn*, and *U.S. v. Darby*.
- GS 91-103.
 - FDR’s Fireside Chat of 4 March 1937.
- (9) **The broad scope of the modern commerce power**
Perez v. U.S., *Heart of Atlanta Motel v. U.S.*, and *Katzenbach v. McClung*.
- GS 103-06.
- (10) **Has the revolution arrived?**
United States v. Lopez, *United States v. Morrison* and *Gonzales v. Raich*.
- GS 106-26.
- (11) **The taxing power and the spending power**
U.S. v. Kahriger, *U.S. v. Butler*, and *South Dakota v. Dole*.
- GS 152-66.

III. THE POWERS OF THE EXECUTIVE

- (12) **Lincoln’s suspension of the writ of habeas corpus**
- The case of the copperhead conspirator. *Ex parte Milligan*.
 - GS 262-68.
- (13) **Military Tribunals**
Ex parte Quirin, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*.
- GS 268-91.
 - *Federal Register*, “Dentention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism;”
 - Excerpt from *Boumediene v. Bush*.
- (14) **Implied executive authority**
 When can the president act without explicit constitutional or statutory authority?
Youngstown Sheet & Tube Co. v. Sawyer.
- GS 244-53.
- (15) **Executive privilege and immunities**
U.S. v. Nixon, *Nixon v. Fitzgerald*, and *Clinton v. Jones*.
- GS 320-38.

IV. THE SEPARATION OF POWERS

(16) The conflict between legislative and executive powers

Federalist 51, *INS v. Chadha*, *Bowsher v. Synar*, and *Morrison v. Olson*.

- GS 291-300, 307-20.
- *Federalist 51*.

(17) Congressional concession of power to the executive

The line-item veto. *Clinton v. New York*.

- GS 301-06.

(18) Justiciability

Political questions—who decides? *Baker v. Carr*, *Powell v. McCormack* and *Nixon v. U.S.*

- GS 49-59.

V. STATE REGULATION

(19) The dormant commerce clause—early conceptions

The unexercised commerce power of Congress as a barrier to action by the states.

Willson v. Blackbird Creek Marsh Co., *Cooley v. Board of Wardens of the Port of Philadelphia*, and *Gibbons v. Ogden*.

- GS 174-84.

(20) The modern dormant commerce clause—facial discrimination against out-of-staters

Philadelphia v. New Jersey, and *Dean Milk Co. v. Madison*.

- GS 184-96.

(21) The modern dormant commerce clause—protectionist purpose and effect

Limiting access to markets and imposing burdens on transportation. *Southern Pacific Co v. Arizona*, and *Kassel v. Consolidated Freightways Corp.*

- GS 196-202, 206-22.

(22) The “market participant” exception

South—Central Timber Dev. v. Wunnicke.

- GS 202-06.
- *Reeves v. Stake*.

(23) The Privileges and Immunities Clause of Article IV

United Bldg. & Constr. Trades v. Camden and *Supreme Court of New Hampshire v. Piper*.

- GS 222-29.

(24) Congressional Preemption of State Regulation

Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Development Comm'n.

- GS 229-40.
- *DeCanas v. Bica.*

VI. THE TENTH AMENDMENT

(25) Mere truism or real restriction?

How exactly does the Tenth Amendment protect federalism in our constitutional framework? Supreme Court vacillation in *National League of Cities v. Usery* and *Garcia v. San Antonio Metropolitan Transit Authority*.

- GS 127-34.

(26) Commandeering state governments

New York v. United States, Printz v. United States, and Reno v. Condon.

- GS 134-49.