

Constitutional Law I
Winter Term 2009
Professor Kris W. Kobach
Course Syllabus
(Revised 1/17/09)

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 is a basic introduction to federal constitutional law. The focus of the course is on the limitations of government power imposed by the first nine amendments to the U.S. Constitution and by the Fourteenth Amendment. My aim is to provide an understanding of current doctrine in these areas and to place pivotal decisions of the U.S. Supreme Court in historical and political context. At the same time, I seek to foster an awareness of the competing approaches to constitutional interpretation.

Grading and course requirements:

Grades will be based upon a final examination that is part multiple-choice, part essay question. A few students may also receive a slight increase in their grade for well-informed and insightful participation in class discussions. I expect all students to be prepared to discuss all assigned readings for a particular class session.

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

I. INTRODUCTION

(1) The Nature and Structure of the U.S. Constitution

Theories of constitutional democracy. Why a constitution? Who defines constitutional boundaries? Who defends constitutional boundaries? Who guards the guardians? The basic design of the U.S. Constitution.

- **GS:** [Appendix A \(The U.S. Constitution\)](#).

(2) The Drafting and Ratification of the U.S. Constitution

The Constitutional Convention of 1787 and the ratification debates.

- "A More Perfect Union: The Creation of the U.S. Constitution," National Archives Website.
- "Designing a Ship of State," *Life*.
- Samuel Adams, "The Constitution Should Be Ratified with Selected Amendments."
- Patrick Henry, speeches of 5 June 1788 and 7 June 1788.

II. JUDICIAL REVIEW

(3) The Origins of Judicial Review

The Supreme Court's assertion of the power of judicial review.

- **GS:** pp. 1-30 (*Marbury v. Madison*).
- "Supreme Court Rules Supreme Court Rules," *The Onion*.

III. THE BILL OF RIGHTS AND THE STATES

(4) The Origins and Early Meaning of the Bill of Rights

The purpose and scope of the Bill of Rights and the case of *Barron v. Baltimore*.

- Leonard W. Levy, "Why We Have a Bill of Rights," *Constitution*.
- Alfred Knight, "The Bill of Rights," *The Life of the Law*.
- Justice Antonin Scalia, "Sibley Lecture."
- Brutus, "To the Citizens of the State of New York."
- Alexander Hamilton, *The Federalist*, No. 84.
- **GS:** pp.339-41 (*Barron v. Baltimore*).

(5) The Incorporation Controversy

The drafting and ratification of the Fourteenth Amendment and the Supreme Court's first stab at interpreting it in *The Slaughter-House Cases*. Selective incorporation via the Due Process Clause.

- **GS:** pp. 341-57, 360-61 (*The Slaughter-House Cases*).
- Rep. John Bingham, speech before Congress, 28 Feb. 1866.
- Rep. James Blaine, speech in Skowhegan, Maine, 29 Aug. 1866.

IV. JUDICIAL INTERPRETATION OF THE BILL OF RIGHTS

(6) The First Amendment: The Establishment Clause

A seamless "wall of separation" or merely a prohibition against a national church? The Establishment Clause in the context of public education.

- **GS:** pp. 1305-11, 1324-70 (*Epperson v. Arkansas*, *Edwards v. Aguillard*, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, *Van Orden v. Perry*, *Everson v. Board of Education*, *Mueller v. Allen*, and *Zelman v. Simmons-Harris*).
- "One Case," *Life*.

- *Santa Fe Independent School District v. Doe.*
- *Newdow v. U.S. Congress.*

(7) The First Amendment: The Free Exercise Clause

Pushing the envelope of free exercise.

- *Wisconsin v. Yoder.*
- **GS:** pp. 1276-83 (*Employment Division, Oregon Dept. of Human Resources v. Smith*).
- **GS:** pp. 1256-64 (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, and Locke v. Davey*).

(8) The First Amendment: The Free Speech Clause—Subversive Speech

- **GS:** pp. 754-58, 785-90 (*Schenk v. U.S., Abrams v. U.S., and Brandenburg v. Ohio*).

(9) The First Amendment: The Free Speech Clause—Compelled Speech and Association

- *Wooley v. Maynard.*
- **GS:** pp. 1149-62 (*Abood v. Detroit Board of Educ., and Roberts v. U.S. Jaycees*).

(10) The Second Amendment: The Right to Bear Arms

What, exactly, does the Second Amendment protect?

- *U.S. v. Miller.*
- James Taranto, “How A Young Lawyer Saved the Second Amendment.”
- *D.C. v. Heller (excerpt).*

(11) The Fifth Amendment: The Takings Clause

The origin of the concept of regulatory takings.

- **GS:** pp. 395-400 (*Pennsylvania Coal Co. v. Mahon, and Keystone Bituminous Coal Ass’n v. DeBenedictis*).
- Kris W. Kobach, “Setting the Record Straight,” UTAH L.REV. (excerpt).

(12) The Fifth Amendment: the Takings Clause

The modern Court’s approach to regulatory takings.

- **GS:** pp. 400-08 (*Penn Central Trans. Co. v. New York City, Lucas v. South Carolina Coastal Council, Nollan v. California Coastal Comm’n, and Dolan v. City of Tigard*).
- **GS:** pp. 384-92 (*KELO v. City of New London, Connecticut*).

V. SLAVERY

(13) The Thirteenth Amendment

The *Dred Scott* decision and the adoption and meaning of the Thirteenth Amendment.

- *Dred Scott v. Sandford.*
- Farber and Sherry, “The Thirteenth Amendment,” A History of the American Constitution.
- *Memphis v. Greene.*

VI. THE FOURTEENTH AMENDMENT: THE REIGN OF SUBSTANTIVE DUE PROCESS

(14) The Rise and the Decline of the Liberty to Contract

The *Lochner* era.

- **GS:** pp. 362-75 (*Lochner v. New York*).

The end of the *Lochner* era and the modern Court's double standard.

- **GS:** pp. 375-84 (*Nebbia v. New York*, *West Coast Hotel v. Parrish*, *United States v. Carolene Products Co.*, and *Williamson v. Lee Optical Co.*).

(15) The Creation of the Right to Privacy

Probing the penumbras of the Bill of Rights.

- **GS:** pp. 413-21 (*Griswold v. Connecticut*).

(16) The Finding of a Constitutional Right to Abortion

- **GS:** pp. 421-27 (*Roe v. Wade*).

(17) Limiting the Abortion Right

- **GS:** pp. 434-50 (*Planned Parenthood of Pennsylvania v. Casey*, *Stenberg v. Carhart*, and *Gonzales v. Carhart*).

(18) Private Sexual and Lifestyle Choices

- **GS:** pp. 450-69 (*Zablocki v. Redhail*, *Michael H. v. Gerald D.*, *Bowers v. Hardwick*, and *Lawrence v. TX*).

VII. THE FOURTEENTH AMENDMENT: THE EQUAL PROTECTION CLAUSE

(19) Introduction to Equal Protection Doctrine

The nature of equal protection arguments and the rationality standard.

- **GS:** pp. 625-32 (*Railway Express Agency v. New York*).

(20) Early Judicial Approaches to Racial Discrimination

The "separate but equal" doctrine of *Plessy* and the internment of Japanese-Americans during WWII.

- **GS:** pp. 486-91, 505-507 (*Plessy v. Ferguson* and *Korematsu v. U.S.*).

(21) The *Brown* Revolution

The end of statutory racial segregation in public schools.

- **GS:** pp. 491-505 (*Brown v. Board of Education* (I and II) and *Loving v. Virginia*).
- Harry S. Ashmore, "Brown v. Board," *Constitution*.

(22) Affirmative Action in Education

- **GS:** pp. 517-24, 533-52 (*Regents of Univ. of California v. Bakke*, *Grutter v. Bollinger*, and *Gratz v. Bollinger*).

(23) Gender Discrimination: Level of Scrutiny

- **GS:** pp. 571-80, 590-97 (*Frontiero v. Richardson*, *Craig v. Boren*, *Michael M. v. Superior Court*, and *Geduldig v. Aiello*).

(24) Gender Discrimination in Education

- **GS:** pp. 580-89 (*Mississippi Univ. for Women v. Hogan*, and *U.S. v. Virginia*).
- Jeffrey Rosen, "Like Race, Like Gender?" *The New Republic*.

(25) Heightened Scrutiny for Other Classifications?

Alienage, illegitimacy, mental disability, and homosexuality.

- **GS:** pp. 604-25 (*Cleburne v. Cleburne Living Center, Inc., Romer v. Evans, and Goodridge v. Dept. of Public Health (Mass. 2003)*).
- (26) The “Fundamental Rights” Strand of Equal Protection: Education and Voting**
- **GS:** pp. 664-73 (*San Antonio Sch. Dist. v. Rodriguez, and Plyler v. Doe*).
- **GS:** pp. 638-51 (*Harper v. Virginia Bd. of Elections, Kramer v. Union Free Sch. Dist. No. 15, Reynolds v. Sims, and Davis v. Bandemer*).
- *Bush v. Gore*.

VIII. THE REQUIREMENT OF STATE ACTION

(27) State Action: The "Public Function" Strand

- **GS:** pp. 677-83, 690-92 (*The Civil Rights Cases, Marsh v. Alabama, Evans v. Newton, Jackson v. Metropolitan Edison Co., and Terry v. Adams*).

(28) State Action: The "State Involvement," "State Encouragement," and "State Authorization" Strands

- **GS:** pp. 683-90, 692-97 (*Shelley v. Kramer, Burton v. Wilmington Parking Authority, Moose Lodge No. 107 v. Irvis, Reitman v. Mulkey, and DeShaney v. Winnebago County Soc. Servs. Dept.*).