

Constitutional Process I
Fall 2007
Prof. David Franklin

The Basics

Class meetings: Tuesdays and Fridays, 10:30 – 11:45 a.m. in Room 905

My office: Room 717

My office hours: Tuesdays and Wednesdays, 3 to 4 p.m.

My phone number: 312-362-5226

My email address: DFRANKL2@depaul.edu

Course Requirements

You are required to

- (a) do the reading carefully and on time,
- (b) show up to class on time and participate thoughtfully in class discussion,
- (c) hand in the group assignment by Friday, September 7, and
- (d) take the final exam.

The casebook for this course is Stone, Seidman, Sunstein, Tushnet, and Karlan, *Constitutional Law* (5th ed. 2005). Unless otherwise indicated, page numbers in the syllabus refer to pages in the casebook. There is also a photocopied handout. Reading assignments from the handout are marked with an “H”.

The attached Syllabus Version 1.0 lists the reading assignments for the first eight weeks of the course, which deal with the structure and powers of the federal government. We will read one Arabic-numbered assignment (1, 2, 3...) per class session. The reading assignments vary in length, so pace yourself. Sometime around the middle of the semester I will hand out a Version 2.0 that will take us through the remainder of the semester, during which we will begin our exploration of the individual rights provisions of the Constitution.

You should be aware that I call on students in class by name, at random, and without warning. If you are unprepared to participate thoughtfully in a given class, you must tell me beforehand, preferably by email. It is a bad idea to be unprepared.

Two notes on in-class decorum: 1) Please arrive for class on time. A steady stream of late-arriving students during the first ten minutes of class is extremely distracting. 2) Please do not use your laptop computer during class for things other than taking notes. This too is extremely distracting.

Grading Policy

Your grade will be determined largely on the basis of the final exam. In addition, I reserve the right to add or subtract one grade step (e.g., from a B to a B+ or vice versa) based on classroom participation. Classroom participation will be measured by the quality and not the quantity of your contributions. It is possible to have high quality participation without ever volunteering to speak, so long as your contributions are good when I call on you. Being unprepared to discuss assigned material when called upon is a form of low-quality participation. Asking good questions is a form of high-quality participation, but it does not relieve you of the obligation to answer the questions I ask.

Recommended Reading

I recommend the following books, which I have asked the library to place on reserve. The first two (Chemerinsky and May & Ides) are aimed at summarizing constitutional law for the non-specialist reader. The other two (Fisher & Devins and Farber & Sherry) are constitutional history books that place important constitutional cases and moments in historical context.

- Erwin Chemerinsky, *Constitutional Law: Principles and Policies*
- Christopher N. May & Allan Ides, *Constitutional Law: National Power and Federalism—Examples & Explanations*
- Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law*
- Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution*

The Exam

Anything we cover in the reading is fair game for the exam, even if we don't end up discussing it in class. You will hear more about the exam around the middle of the course. I will not talk about the exam before then, so please do not ask.

A note on Notes: You will soon discover that the casebook includes *lots* of non-primary-case material labeled “Notes,” including excerpts from cases and law review articles, questions for further thought, and other such things. You can expect the exam to focus primarily on the ideas and doctrines articulated in the primary cases rather than on the Notes (unless we discuss a particular Note at length in class)—but the Notes are still important. So read them.

Group Assignment

On pages 2-4 of the handout you will find a list of 30 questions designed to make you actually read the Constitution. No research is necessary for this assignment outside of the text of the Constitution itself. You may work on this assignment individually or in groups of up to six people. Written answers to these questions are to be handed in to me by Friday, September 7.

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Syllabus (Version 1.0)

I. Introduction: The Constitution and Constitutional Law

1. *Background: the United States Constitution* (xliii-lix); 1-29; H 1-5

II. The Role of the Federal Courts in the Constitutional Order

2. *Marbury and the invention of judicial review: U.S. Const., Art. III; H 6; 29-36*
3. *The “countermajoritarian difficulty”*: 42-51; H 7
4. *Tools and methods of constitutional interpretation*: 61-70; H 8-11; 70-74
5. *Justiciability I—advisory opinions, standing, ripeness, mootness*: 89-117, 158-59
6. *Justiciability II—political questions*: 119-25; 126-27 (*Powell*); 137-52

III. Federalism and the Powers of Congress

7. *Commerce power I—an introduction: U.S. Const., Art. I; 163-75, 185-91*
8. *Commerce power II—from “nine old men” to a “switch in time”*: 191-200; H 12-17; 200-06; 175-77
9. *Commerce power III—from the civil rights era to today*: 208-24; H 18-27
10. *The spending, taxing, and treaty powers*: 280-93 (through note 2), 330-33
11. *The copyright power*: H 28-40
12. *Implied limits on congressional power—the “traditional governmental functions” doctrine and the anti-commandeering principle*: H 41; 333-36, 180-82 (note 3), 336-56

V. The Structure of the Federal Government

13. *The question of inherent presidential power: U.S. Const., Art. II; 357-75*
14. *Control over foreign affairs and war*: 375-78, 128-30 (*Goldwater*), 383-401
15. *The legislative power—formalism and functionalism*: 417-33
16. *The administrative state—a “headless fourth branch”?*: 433-45