Constitutional law constitutes the political system and governs government. This course surveys the Constitution of the United States, how it is interpreted, and who interprets it. Following the text of the Constitution, the course begins with the idea of popular sovereignty expressed in the Preamble. Next the course examines the vesting and limitation of legislative powers in Article I, executive power in Article II, and judicial power in Article III, as well as the relationship of the federal government to the States. Then the course examines the Bill of Rights with a focus on the First Amendment’s Religion and Speech Clauses. The course concludes by examining the Fourteenth Amendment’s Due Process and Equal Protection Clauses.

Objectives. Students should develop a practical understanding of: the basic doctrines of constitutional law; the modes of constitutional argument; the relationship between structural and rights constraints on government; and the interaction of judicial and other actors in a constitutional system. Skills emphasized: problem solving, legal analysis, legal research, communication, and litigation.

Readings. In addition to the constitutional provision(s) at issue, the text is Choper, Fallon, Kamisar and Shiffrin, Leading Cases in Constitutional Law (West 2014). The syllabus, which also serves a course outline, denotes assignments by day (including page count), “(Chapter.Section:Pages)” indicates casebook readings, and an asterisk (*) indicates readings on Moodle. Boldface indicates principal cases.

Questions. I am generally available in my office except mornings prior to class; stop by any time my door is open or email for an appointment. Otherwise, please post questions on Moodle rather than emailing so your colleagues can benefit from them.

Assessment. Your grade has three components: discussion (20%), brief (20%), and exam (60%). Discussion measures constructive engagement in class discussion: two arguments made on call, plus two volunteered comments. Brief measures the research, analysis, and writing of two 500-word briefs posted on Moodle: an opening brief arguing an issue related to a day’s topic (10%, posted within a week after the topic's day, limit four per day), and a response in opposition to a classmate’s brief from a different section (10%, posted as a reply within two weeks of the topic's day, one response per opening brief); brief day selections, made on a sign-up sheet at my office, are final (unless a classmate will swap). Exam measures a three-hour, open-book, multiple-essay exam. Grades are subject to deductions for unprofessional conduct. Bonus assignments may be provided during the course. To encourage open discussion, please do not record class sessions.

Academic Honesty. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code of the University of Montana. Law students should also be familiar with the Law School Honor Code in the Law Student Handbook.

Disabilities. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students (“DSS”). If you think you may have a disability adversely affecting your academic performance, and you have not already registered with DSS, please contact DSS in Lommasson 154. The Law School will work with you and DSS to provide an appropriate accommodation.
The syllabus is subject to change depending on course and legal developments.

THE PREAMBLE & THE SECOND AMENDMENT: INTRODUCTION

1. I. “We the People ... do ordain and establish this Constitution,” Preamble.
   Mon 8/25
   A. Judicial Review and Democracy (1.1: pp 13-16)
      1. Bickel, The Least Dangerous Branch (1962)
      2. Choper, The Supreme Court and the Political Branches (1974)
      3. Friedman, The Will of the People (2009)
      4. A “Double Standard” of Judicial Review?
   II. “[T]he right of the people to keep and bear Arms,” Amend. II.
      A. The Right to Keep and Bear Arms (6.3: pp 355-69)

ARTICLE I: NATIONAL LEGISLATIVE POWERS

   Wed 8/27
   II. “[A]ll Laws which shall be necessary and proper,” Art. I, § 8, cl. 18.
      A. Sources and Nature of Congressional Powers (2.1: pp 35-44)
         1. McCulloch v. Maryland (1819)
         2. Jackson, Veto Message (1832) (see pp 1.1: p 12)
   III. “To lay and collect Taxes,” Art. I, § 8, cl. 1.
      A. The Taxing Power (2.3.I: pp 84-87)
         1. NFIB v. Sebelius (2012)
   IV. “To ... provide for the ... general Welfare,” Art. I, § 8, cl. 1.
      A. The “Spending” Power (2.3.II: pp 87-96)
         1. United States v. Butler (1936)
         2. Charles C. Steward Machine Co. v. Davis (1937)
         3. Helvering v. Davis (1937)

3. V. “To regulate Commerce ... among the several States,” Art. I, § 8, cl. 3.
   Wed 9/3
   A. Foundations of Commerce Regulation (2.2.I: pp 44-50)
      1. Gibbons v. Ogden (1824)
      2. Champion v. Ames (Lottery Case) (1903)
      3. Houston, E & W Texas Ry. v. U.S. (Shreveport Case) (1914)
   B. Limitations on Commerce Power (2.2.II.A: pp 50-53)
      1. Hammer v. Dagenhart (1918)
      2. A.L.A. Schechter Poultry Corp. v. United States (1935)
      3. Carter v. Carter Coal (1936)

(continued)
C. Expansion of Commerce Power (2.2.II.B: pp 53-60)
   1. NLRB v. Jones & Laughlin Steel Corp. (1937)
   2. United States v. Darby (1941)
   4. Scarborough v. United States (1977)
   5. Wickard v. Filburn (1942)
   6. Maryland v. Wirtz (1968)
   7. Perez v. United States (1971)

D. Noncommercial Interests & Commerce Regulation (2.2.III: pp 60-64)
   1. Heart of Atlanta Motel, Inc. v. United States (1964)
   2. Katzenbach v. McClung (1964)

E. Renewed Limits on Commerce Regulation (2.2.IV: pp 64-84)
   2. [United States v. Lopez (1995)]
   5. NFIB v. Sebelius (Health Care Cases) (2012)

FEDERAL SUPREMACY & STATE RESERVED POWERS

   A. Federal Preemption (4.0: pp 171-73)
      2. Gibbons v. Ogden (1824)
   B. The “Dormant” Commerce Clause (4.2:175-76, 180-83)
      1. [Wyoming v. Oklahoma (1992)]
      2. [Pike v. Bruce Church, Inc. (1970)]

VI. “The powers not delegated ... are reserved,” Amend. X.
   A. Intergovernmental Immunities (2.5: pp 98-105)
      1. McCulloch v. Maryland (1819)
      2. Maryland v. Wirtz (1968)
   B. Reserved Powers (2.5: pp 105-113)
      1. Printz v. United States (1997)
      2. (New York v. United States (1992))
ARTICLE II: THE EXECUTIVE POWER

I. “The executive Power shall be vested in a President,” Art. II, § 1, cl. 1.
   A. Domestic Lawmaking (3.1.I: pp 115-24)
      1. Youngstown S&T Co. v. Sawyer (Steel Seizure Case) (1952)

II. “The President shall be Commander in Chief,” Art. II, § 2, cl. 1.

III. “He shall have Power [with] the Senate, to make Treaties,” Art. II, § 2, cl. 2.
   A. Foreign Affairs and War (3.1.II: pp 124-26)
      1. United States v. Curtiss-Wright Export Corp. (1936)

IV. “The Congress shall have Power … To declare War,” Art. I, § 8, cl. 11.

V. “[T]he Writ of Habeas Corpus shall not be suspended,” Art. I, § 9, cl. 2.

VI. “[D]ue process of law,” Amend. V.
   A. War and Individual Rights (3.1.III: pp 126-37)

VII. “[T]ake Care that the Laws be faithfully executed,” Art. II, § 3.
   A. Delegation of Rulemaking Power (3.2.I: pp 138-39)
      1. Yakus v. United States (1944)

   A. Appointment and Removal of Officers (3.2.III: pp 145-63)
      1. Myers v. United States (1926)
      2. Humphrey’s Executor v. United States (1935)

ARTICLE III: THE JUDICIAL POWER

I. “The judicial Power … shall be vested in one supreme Court,” Art. III, § 1.
   A. Nature and Scope of Judicial Review (1.1: pp 1-12)
      1. Marbury v. Madison (1803)
      3. Warren, The Supreme Court in United States History (1922)

(continued)
B. Political Questions (1.2: pp 21-33)
   1. Pacific States Tel. & T. Co. v. Oregon (1912)
   2. [Luther v. Borden (1849)]

       A. Standing (12.1.II: pp 1071-86)
          5. Regents of the University of California v. Bakke (1978)
       B. Mootness (12.2.I: pp 1086-90)
       C. Ripeness (12.2.II: pp 1090-93)
          1. United Public Workers v. Mitchell (1947)

THE FIRST AMENDMENT: THE RELIGION CLAUSES

       A. Aid to Religion (8.1.II: pp 729-36)
          1. Everson v. Board of Education (1947)
       B. Acknowledgement of Religion (8.IV: pp 769-81)
          1. McCreary County v. ACLU (2005)
II. “[N]o law ... prohibiting the free exercise [of religion],” Amend. I, cl. 1.

A. The Free Exercise Clause (8.2.I: pp 784-801)
1. Reynolds v. United States (1878)
2. Cantwell v. Connecticut (1940)
7. Gillette v. United States (1971)

B. Intersection of Establishment and Exercise (8.4: pp 803-807; 810-11)

[Browning Symposium: The Future of Federalism]

12. Attend at least one keynote at least one panel. There will be a Moodle discussion forum to discuss each keynote and panel. Post a short response (250 words or so) to the speakers or your classmates’ responses on each of the relevant forums by Monday, October 6. The two responses will count toward a portion (5 pts.) of your class discussion grade. (If you ask a good question during Symposium Q & A sessions, you only need one response.)

Thursday, 6:00: Keynote Address by Ilya Somin

Friday, 10:20: Cooperative and Uncooperative Federalism

Friday, 1:00: Federal and State Conflicts

Friday, 2:45: Commerce, Taxing, Spending & Coercion

Friday, 4:30: Closing Keynote Address by Roderick Hills

Mon 10/6 [No Class]

Browning Symposium responses are due today.

THE FIRST AMENDMENT: THE FREEDOM OF SPEECH & THE PRESS


A. Seditious Libel (7.II.B: pp 406-11)
1. Jefferson, Writings (1804) (1.1: p 12)

1. Schenck v. United States (1919)
2. Abrams v. United States (1919)
3. Whitney v. California (1927)

(continued)
5. Hess v. Indiana (1973)

C. Prior Restraints and National Security (7.4.II: pp 585-91)

14. D. Offensive Words and Disturbing the Peace (7.1.IV.C: pp 463-67)

15. E. Content-Based and Content-Neutral Regulation (7.2: pp 508-28)
   1. United States v. O'Brien (1968)

16. F. Government Property and The Public Forum (7.6: pp 618-35)
   1. [Hague v. CIO (1939)]
   2. Schneider v. Irvington (1939)

G. The Right Not to Speak (7.9.I: pp 683-92)
   2. Wooley v. Maynard (1977)

H. Expressive Association (7.9.II: pp 693-702)
THE FOURTEENTH AMENDMENT: INTRODUCTION

17. I. 
   “[O]ther[] [rights] retained by the people,” Amend. IX.
   A. Unenumerated Rights (5.1.I: pp 213-16)
      2. Wynehamer v. People (N.Y. 1856)
      3. Fletcher v. Peck (1810)
      4. Dred Scott v. Sandford (1857)
   B. Prelude to Reconstruction (9.2.I: pp 824-29)
      1. Dred Scott v. Sandford (1857)

II. “No State shall ...,” Amend. XIV, § 1.
   A. Incorporation of Rights Against the States (5.1.II-III: pp 216-23)
      1. Barron v. Mayor and City Council of Baltimore (1833)
      2. Slaughter-House Cases (1873)
   B. The Concept of State Action (10.1: pp 1005-1009)
      1. Civil Rights Cases (1883)

18. III. “Congress shall have the power to enforce,” Amends. XIII, XIV, & XV.
   A. Congressional Enforcement Powers (11.2: pp 1039-55, 1068-70)

THE FOURTEENTH AMENDMENT: DUE PROCESS & LIBERTY

19. IV. “No State shall ... deprive any person of ... liberty,” Amend. XIV, § 1.
   A. Economic Liberty (5.2: pp 224-30)
      1. Allgeyer v. Louisiana (1897)
      2. Lochner v. New York (1905)
      3. Muller v. Oregon (1908)
      4. Adair v. United States (1908)
      5. Coppage v. Kansas (1915)
      6. Adkins v. Children’s Hospital (1923)
   B. Transition to a Double Standard of Scrutiny (5.3: pp 231-34)
      1. Nebbia v. New York (1934)
      2. West Coast Hotel Co. v. Parrish (1937)
      3. United States v. Carolene Products Co. (1938)
   C. Family Liberty (6.2: pp 266-77)
      1. [Skinner v. Oklahoma (1942)]
      2. Griswold v. Connecticut (1965)
      3. [Poe v. Ullman (1961) (Harlan, J., dissenting)]
D. Reproductive Liberty (6.2[I]: pp 277-285, 287-303)

E. Personal Liberty (6.2[II]: pp 323-51)

**THE FOURTEENTH AMENDMENT: EQUAL PROTECTION**

V. “[T]he equal protection of the laws,” Amend. XIV, § 1, cl. 3.

A. Race and Ethnic Ancestry (9.2.II: pp 829-48)
   1. *Strauder v. West Virginia* (1880)
   2. *Plessy v. Ferguson* (1896)
   3. *Korematsu v. United States* (1944)
   7. *Cooper v. Aaron* (1858); see also id. (1.1: p 13)
   8. *Griffin v. County School Bd.* (1964)
   9. *Green v. County School Bd.* (1968)

B. De Jure vs. De Facto Discrimination (9.2.III: pp 848-53)
   1. *Yick Wo v. Hopkins* (1886)

C. Affirmative Action (9.2.IV: pp 857-61, 875-88)

D. Discrimination Based on Gender (9.3: pp 897-919)
   1. *Reed v. Reed* (1971)
   2. *Frontiero v. Richardson* (1973)

(continued)
E. Gender Differences- Real and Imagined
   2. Dothard v. Rawlinson (1977)

F. “Remedial” Gender Discrimination
   1. Califano v. Webster (1977)
   2. Orr v. Orr (1979)

G. Sexual Orientation (9.4.I: pp 919-35)

H. Regulatory & Other Classifications (9.1: pp 813-818)

   4. Reynolds v. Sims (1964)