

LAW 509A-002 – Constitutional Law: Powers of Government  
Fall 2021  
Professor Benjamin Bricker

TR 11a to 12:15p  
Lesar Law Building 102

Office: Faner Hall 3128 and Lesar 242  
Office hours: Tues. & Thurs., 8:30a to 10:30a; Thursday, 2 to 4p.  
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### **Course Description**

The course focuses on the U.S. Constitution and the Supreme Court's interpretation of that document. It is difficult to overstate the importance of constitutional law to our everyday lives, and to our democratic system of government. The Supreme Court, through the exercise of judicial review, actively defines both the structure of government and the relationship between the different institutions of government. Through the exercise of judicial review the Supreme Court also helps to determine the content of policy – becoming, much like the Congress and the President, a “national policy-maker.”

In the first part of this class, we will pay close attention to the decisions of the U.S. Supreme Court that have shaped the power of judicial review before moving to the concepts of jurisdiction and justiciability. Later, we explore the commerce clause, the dormant commerce clause, the power to tax and spend, and the concept of federalism. We then will pay close attention to the decisions of the U.S. Supreme Court that have shaped the relationship between major actors in federal government (the president, the congress, the courts). The separation of powers shapes our democratic form of government and helps determine domestic policy, foreign affairs, and war powers.

Over the life of the term, we will also touch on several larger questions, as well: How did the Court, a group of unelected judges, come wield such great power in our democracy? Is the Court the best protector of constitutional order, or could other actors (the president, or state governments, perhaps) also help determine the meaning of the constitution? How should the Court demarcate the line between federal power and state power? These questions, discussed by Thomas Jefferson, James Madison, John Marshall, Alexander Hamilton and others during our country's founding era, are still with us today.

### **Textbook**

There is one required textbook:

- Calvin Massey and Brannon Denning. 2019. *American Constitutional Law: Powers and Liberties*, 6<sup>th</sup> edition. Wolters Kluwer. (hereinafter **MD**).

In addition, I will post some additional readings (noted below in the syllabus) on our TWEN page. Please go to our TWEN course page to obtain those readings.

## Other Helpful Resources

There are quite a few secondary materials to consult to help understand difficult aspects of constitutional law. Here are a few suggestions:

Chemerinsky's *Constitutional Law* (Aspen 6th ed., 2019)

Rotunda and Nowak's *Principles of Constitutional Law* (West, 2016)

Also: [scotusblog.com](http://scotusblog.com) does a good job of keeping us up to date on the Court today.

## Grading

There will be a midterm and a final exam. We also will have a few smaller assignments that will serve as a preview of bar exam materials you may see (noted as Prep. assignments below). More details will be provided on those assignments a few classes before they will take place. But, one will take place in lieu of our November 11<sup>th</sup> class, and another will correspond with Constitution Day, which will serve as another makeup class.

Midterm 25%

Final 40%

Participation 20%

Prep. assignments 15%

**During the semester, we will on occasion work in teams. Working in groups is an invaluable skill to have as an attorney, as it is in nearly every profession. I will on occasion pose hypothetical questions in which we will break into groups and try to work out the problem. I will try to navigate space and other considerations in doing this. These exercises will factor in to your participation grade.**

## TWEN (The West Education Network)

You should register for this course on TWEN no later than the first week of classes. The syllabus and additional reading assignments will be posted on TWEN. I will likely also send class-related e-mails to the address you list on TWEN, so be sure you list an e-mail address that you check regularly.

## Attendance Policy

You are expected to attend class regularly and to be on time. In accordance with the law school rules, you may be absent up to six times without a grade or other penalty by the professor.

However, if you do not attend regularly, it will be negatively reflected in your final grade.

Attendance will be taken each day of class. Absences in excess of the allowable number will be dealt with in accordance with the law school rules. **However**, if you are feeling sick or were in close contact with someone who has COVID-19, do not attend class! Follow the university's policies and guidance. Do not worry about those classes counting against the attendance policy. We will work out an alternative arrangement – I can speak to students individually or in small groups to go over materials. Please take of yourself – and others – at this time.

## Workload Expectations:

The American Bar Association (ABA) standards for accrediting law schools contain a formula for calculating the amount of work required to earn one hour of law school credit. Pursuant to these

standards, each credit hour should reasonably approximate one hour of in-class instruction and two hours of out-of-class work per week for fifteen weeks. Accordingly, for this three-credit-hour class, you should spend three hours per week in class and at least six hours per week preparing for class or engaging in other class-related activities.

### **Make-up Classes**

To ensure compliance with ABA Standard 304, this class is required to hold an additional class session or engage in an out-of-class assignment to make up for Veteran's Day holiday (Thursday, November 11th). We will also need to hold a make-up day for Thursday, September 30<sup>th</sup>, which will be the Constitution Day program on Friday, September 17<sup>th</sup>. More information regarding make-up sessions will be provided in class.

**Emergency Procedures:** We ask that you become familiar with **Emergency Preparedness @ SIU**. Emergency response information is available on posters in buildings on campus, on the Emergency Preparedness @ SIU website, and through text and email alerts. To register for alerts, visit: <http://emergency.siu.edu/>.

**Disability Policy.** SIU Carbondale is committed to providing an inclusive and accessible experience for all students with disabilities. Disability Support Services coordinates the implementation of accommodations. If you think you may be eligible for accommodations but have not yet obtained approval please contact DSS immediately at 618-453-5738 or [disabilityservices.siu.edu](http://disabilityservices.siu.edu). You may request accommodations at any time, but timely requests help to insure accommodations are in place when needed. Accommodations and services are determined through an interactive process with students and may involve consideration of specific course design and learning objectives in consultation with faculty. Upon completion of a Disability Accommodation Agreement with DSS, students should bring the agreements for each course to the School of Law Registrar's Office to ensure the School of Law provides the proper classroom and examination accommodations. Accommodation [request](#) and [renewal](#) forms can be found here:

**Saluki Cares.** The purpose of Saluki Cares is to develop, facilitate and coordinate a university-wide program of care and support for students in any type of distress—physical, emotional, financial, or personal. By working closely with faculty, staff, students and their families, SIU will continue to display a culture of care and demonstrate to our students and their families that they are an important part of the community. For Information on Saluki Cares: (618) 453-2461, or [siucares@siu.edu](mailto:siucares@siu.edu), <https://salukicare.siu.edu/>. At the School of Law, Assistant Dean Judi Ray is also available to help students access university resources. Her email is [judiray@siu.edu](mailto:judiray@siu.edu), and her phone number is 618- 453-3135.

**COVID-19.** SIUC's policy on face masks and social distancing is consistent with the guidance from the Centers for Disease Control and Prevention and the Illinois Department of Public Health. For up-to-date information, students, faculty, and staff should visit SIUC's COVID website (<https://siu.edu/coronavirus>), which includes the Saluki Safety Plan. People can also send email to [pandemicinfor@siu.edu](mailto:pandemicinfor@siu.edu).

## Course Schedule<sup>1</sup>

### Week 1

Tuesday, August 17<sup>th</sup>. Introduction – Read: MD, pp. xlii-lx (The Constitution, Articles I to VII plus the 10<sup>th</sup> and 11<sup>th</sup> amendments), and MD pages 1 to 5.

Thursday, August 19<sup>th</sup>. Beginnings: Marbury v. Madison and the establishment of judicial review. Read: MD, pp. 6-35. (Marbury, Hunter’s Lessee, Long).

### Week 2

Tuesday August 24<sup>th</sup>. Methods of Interpretation.

Read: MD, pp. 36-52, and King, Letter from Birmingham Jail (on TWEN – focus on pages 1-4).

Thursday, August 26<sup>th</sup>. Justiciability and Jurisdiction: Overview. Read: MD, pp. 53-73.

### Week 3

Tuesday, August 31<sup>st</sup>. Justiciability and Jurisdiction: Advisory Opinions and Standing. Read MD, pp. 73-105.

Thursday, September 2<sup>nd</sup>. Justiciability and Jurisdiction: Ripeness, Mootness, Political Questions. Read: MD, pp. 107-122. Also read Barnes and Marimow, “Supreme Court ends lawsuits alleging that Trump illegally profited from business interests,” Washington Post (on TWEN).

### Week 4

Tuesday, September 7<sup>th</sup>. The 11<sup>th</sup> Amendment.

- Alden v. Maine and other materials (on TWEN).

Thursday, September 9<sup>th</sup>. Federalism. Read: MD, pp. 131-155: McCulloch v. Maryland; Term Limits v. Thornton. Also read Dred Scott v. Sandford (1857) on TWEN (this will continue into Tuesday).

### Week 5

Tuesday, September 14<sup>th</sup>. Finish Federalism – Dred Scott v. Sandford and Term Limits.

Thursday, Sept. 16<sup>th</sup>. Commerce. What is “Commerce”? Read: Gibbons v. Ogden (1824), pp. 156-169.

**Friday, September 17<sup>th</sup>.** please attend the Constitution Day program on Friday, Sept. 17<sup>th</sup> for class credit. This will serve as a makeup for the class on Thursday, September 30<sup>th</sup>.

### Week 6

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<sup>1</sup> This is my best projection about how much we will cover in one period. We may fall behind at points, but if so we will try to catch up quickly. I reserve the right to change or modify the schedule as needed during the semester.

Tuesday, September 21<sup>st</sup>. The Development of Broad Commerce Power. NLRB v. Jones & Laughlin Steel (1937), Wickard v. Filburn (1942). Read: MD, pp. 169-175, plus Heart of Atlanta, Katzenbach v. McClung (on TWEN).

Thursday, September 23<sup>rd</sup>. The Commerce “Counter-Revolution”. Lopez, Morrison, Rauch, and Sebelius. Read: MD, pp. 175-200.

#### Week 7

Tuesday, September 28<sup>th</sup>. Principles of State Autonomy: Anti-Commandeering. Read MD, pp. 200-217. Read also New York v. United States excerpt (on TWEN).

Thursday, September 30<sup>th</sup>. No Class! I will be at the American Political Science Association conference in Seattle (maybe). **Makeup on September 17<sup>th</sup> – Constitution Day.**

#### Week 8

Tuesday, October 5<sup>th</sup>. Taxing and Spending. Read MD, pp. 218-241.

- And midterm review

**Thursday, October 7<sup>th</sup> Midterm Exam.**

#### Week 9

Tuesday, October 12<sup>th</sup>. Treaties and Foreign Affairs. MD, pp. 241-252.

Thursday, October 14<sup>th</sup>. The Dormant Commerce Clause. Read: MD, pp. 253-282.

#### Week 10

Tuesday, October 19<sup>th</sup>. The Dormant Commerce Clause. Read: MD, pp. 283-308.

Thursday, October 21<sup>st</sup>. Privileges and Immunities Clause and Preemption. Read: pp. 312-332, plus: Arizona v. US (2012) (on TWEN).

#### Week 11

Tuesday, October 26<sup>th</sup> to Thursday, October 28<sup>th</sup>. Separation of Powers. Appointment and Removal power, and the Steel Seizure case. Read: MD, pp. 333-360. Plus: Noel Canning, Humphreys Executor, Seila Law LLC (on TWEN).

#### Week 12

Tuesday, November 2<sup>nd</sup>. Separation of Powers. Foreign Affairs. Read: MD, pp. 360-82.

Thursday, November 4<sup>th</sup>. Separation of Powers. War powers, treaties, and executive agreements. Read: MD, pp. 382-399.

Week 13

Tuesday, November 9<sup>th</sup>. Separation of Powers. Nondelegation doctrine, Bicameralism clause. Read: MD, pp. 399-428. Plus: Bagely. "Most of Government is Unconstitutional." *NY Times* (on TWEN).

Thursday, November 11<sup>th</sup> Veteran's Day: no class!

■ **Makeup assignment: MBE multiple choice questions or MEE essay.**

Week 14

Tuesday, 16<sup>th</sup>. Conflicts: pp. 428-438. \*\*Please read *Nixon* first, then *Clinton*.

Thursday, November 18<sup>th</sup>: The Rise and Fall of Substantive Economic Due Process pp. 462-486

Thanksgiving Holiday, November 22<sup>nd</sup> through 26<sup>th</sup>. No classes.

Reading Day and Final Exams Week from Monday November 29<sup>th</sup> to Friday, December 3<sup>rd</sup>.

**Our Final Exam: Wednesday, December 8<sup>th</sup> at 8:15a.**