

LAW 509A-002 – Constitutional Law: Powers of Government
Fall 2022

Prof. Benjamin Bricker, Associate Dean of the College of Liberal Arts

MW 9a to 10:15a
Lesar Law Building 102

Office: Faner 2427 and Lesar 242

Office hours: Tues. & Thurs., 9a to 10:30a (in Faner 2427), and right after class in Lesar 242 (10:15a to 11:15a), or by appt.

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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*, 6th 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 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 writing assignment that focuses on the Colorado River basin, and the possible limits of how the federal government can respond. The issue involves several topics in this class, including the Commerce Clause, the "Anti-Commandeering" doctrine, the 11th Amendment, the Treaty power, the Spending Clause, and general principles of federalism. The assignment will be due toward the end of the semester. Further details will be provided early in the Fall semester.

Midterm 30%

Final 40%

Participation 15%

Writing assignment 15%

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, follow the university's policies and guidance. Do not worry about those classes counting against the attendance policy.

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 the Labor Day holiday and other pre-scheduled absences. Beginning to examine the Colorado River basin project will serve as the make-up assignment for the first week of classes. The Labor Day class will be made up through attending the Constitution Day program.

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. You may request accommodations at any time, but timely requests help to ensure 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.

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, <https://salukicare.siu.edu/>. Assistant Dean Judi Ray is available at the School of Law to help students access university resources. Please email her at judiray@siu.edu, or call 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.

Course Schedule¹

Week 1

I will be at a conference at the University of Innsbruck, Austria during the first week of classes. No classes this week.

¹ 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.

Instead, we will start thinking about a writing assignment that will be due toward the end of the semester. The assignment focuses on the Colorado River basin, and the role of the federal government and state governments in managing and planning the river levels. The issue involves several topics in this class, including the Commerce Clause, the “Anti-Commandeering” doctrine, the 11th Amendment, the Treaty power, the Spending Clause, and general principles of federalism. This week, please start reading the articles in the Colorado River folder in our TWEN page.

Week 2

Monday, August 29th. Introduction – Read: MD, pp. xlii-lx (The Constitution, Articles I to VII plus the 10th and 11th amendments), and MD pages 1 to 5.

Wednesday, August 31st. Beginnings: Marbury v. Madison and the establishment of judicial review. Read: MD, pp. 6-35. (Marbury, Hunter’s Lessee, Long).

Week 3

Monday, September 5th – Labor Day – No Class! **We will attend the special Constitution Day event on Sept. 13th in place of this class.**

Wednesday, September 7th. Methods of Interpretation. Read: MD, pp. 36-52, and King, Letter from Birmingham Jail (on TWEN – focus on pages 1-4).

Week 4

Monday, September 12th. Justiciability and Jurisdiction: Overview. Read: MD, pp. 53-73.

Wednesday, September 14th. Justiciability and Jurisdiction: Advisory Opinions and Standing. Read MD, pp. 73-105.

Plus: Tuesday, September 13th. please attend the Constitution Day program on Tuesday. This will serve as a makeup for the class on Labor Day. More details (like the time and place) TBA.

Week 5

Monday, September 19th. 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).

Wednesday, September 21st. The 11th Amendment. Read: Alden v. Maine and other materials (on TWEN).

Week 6

Monday, September 26th. 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 Wednesday).

Wednesday, September 28th. Finish Federalism – Dred Scott v. Sandford and Term Limits.

Week 7

Monday, October 3rd. Commerce. What is “Commerce”? Read: Gibbons v. Ogden (1824), pp. 156-169.

Wednesday, October 5th. 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 (on TWEN).

Week 8

Monday, October 10th. The Commerce “Counter-Revolution”. Lopez, Morrison, Rauch, and Sebelius. Read: MD, pp. 175-200.

Wednesday, October 12th. Principles of State Autonomy: Anti-Commandeering. Read MD, pp. 200-217. Read also New York v. United States excerpt (on TWEN).

Week 9

Monday, October 17th. Taxing and Spending. Read MD, pp. 218-241.

- And midterm review

Wednesday, October 19th Midterm Exam.

Week 10

Monday, October 24th. Treaties and Foreign Affairs. MD, pp. 241-252.

Wednesday, October 26th. The Dormant Commerce Clause. Read: MD, pp. 253-282.

Week 11

Monday, October 31st. The Dormant Commerce Clause. Read: MD, pp. 283-308.

Wednesday, November 2nd. Privileges and Immunities Clause and Preemption. Read: pp. 312-332, plus: Arizona v. US (2012) (on TWEN).

Week 12

Monday, November 7th to Wednesday, November 9th. Separation of Powers. Appointment and Removal power, and the Steel Seizure case. Read: MD, pp. 333-360. Plus: Noel Canning and Humphreys Executor (on TWEN).

Week 13

Monday, November 14th. Separation of Powers. Foreign Affairs. Read: MD, pp. 360-82.

Wednesday, November 16th. Separation of Powers. War powers, treaties, and executive agreements. Read: MD, pp. 382-399.

Also: Please submit your Colorado River basin paper on Wednesday, Nov. 16th.

Thanksgiving Holiday, November 19th through 27th. No classes.

Week 14

Monday, November 28th. 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 30th. Conflicts: pp. 428-438. **Please read Nixon first, then Clinton.

Reading Day and Final Exams Week from Monday, December 5th through Friday, December 16th.

Our Final Exam: Data and Time TBA soon.