

**CONSTITUTIONAL LAW I:
JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION
POLITICAL SCIENCE 307
SPRING 2024**

INTRODUCTION: THE PROBLEM OF CONSTITUTIONAL INTERPRETATION

- 1-10 Receive syllabus; judicial review and the least dangerous branch; get acquainted
Hamilton, *Federalist* #78
- 1-15 NO CLASS: Martin Luther King Day (Sunstein, *How to Interpret the Constitution*, 1-19)
- 1-17 **SPECIAL EVENT:** Martin Luther King Jr. Day Teach-in 20th Anniversary edition
1pm: Cedric Taylor, Central Michigan University, Environmental Racism
2pm: Chris Cooper, University of Tennessee Extension, Sustainability and Community
3pm: Chloe Bell, Greater Chicago Legal Clinic, Redlining in Chicago
- 1-22 The many theories of constitutional interpretation
Sunstein, *How to Interpret the Constitution*, 20-60
- 1-29 There will be discretion and choice: then what?
Sunstein, *How to Interpret the Constitution*, 61-100; 101-131
- 1-31 Overturning *Roe* as an act of substantive due process and naked judicial power
Course Pack: *Dobbs v. Jackson* (2022) (court opinion), 1- 44
- 2-5 *Stare decisis* and *Roe*'s egregious error
Course Pack: *Dobbs v. Jackson* (2022), (court opinion), 44-79
Sunstein, *How to Interpret the Constitution*, 132-165
- 2-7 **CLASS DEBATE: Does the 14th Amendment protect a right of privacy?**
Course Pack: *Dobbs v. Jackson* (2022) (dissent), 1- 60
- 2-9 MICRO-ESSAY #1 DUE AS A GOOGLE DOC BY 4 PM

PART ONE: WHAT IS A CONSTITUTION?

- 2-12 SPECIAL CLASS VISIT: Elizabeth Rochford, Associate Justice, Illinois Supreme Court
- 2-14 Bobbitt's six modes of constitutional interpretation
Bobbitt, *Constitutional Interpretation*, 11-30
- 2-19 Enforcing the principles of "free republican governments" or the rules as written?
Course Pack: *Calder v. Bull*, 3 US 385-394 (1798)
Six modes analysis on Chase's opinion due in class for students #1 & 2
- 2-21 **CLASS DEBATE: Who has the better understanding of the Constitution, Iredell or Chase?**
Course Pack: *Calder v. Bull*, 3 US 394-400 (1798)
- 2-23 MICRO-ESSAY #2 DUE AS A GOOGLE DOC BY 4 PM

PART TWO: WHO CAN AUTHORITATIVELY INTERPRET THE CONSTITUTION?

- 2-26 The first exercise of declaring a federal law unconstitutional: *Marbury v. Madison*
Dorf, *Constitutional Law Stories*, 13-31
Course Pack: *Marbury v. Madison*, 5 US 152-169 (1803)
- 2-28 Marbury in context: Marshall's version of judicial review
Course Pack: *Marbury v. Madison*, 5 US 169-180 (1803)
Kramer, "Marbury and the Retreat from Judicial Supremacy," 205-230
Murphy, *American Constitutional Interpretation*, 377-384
Six modes analysis on Marshall's opinion due in class for students #3 &4
- 3-4 The idea of judicial review as a procedural corrector of the abuses of false majorities
Course Pack: *US v. Carolene Products*, 304 US 145-155 (1938)
Hart Ely, *Democracy and Distrust*, 73-88
Chemmerinsky, *The Case Against the Supreme Court*, 21-53
- 3-6 **CLASS DEBATE: *Is Ely's theory of a procedural Constitution and judicial review tenable?***
Hart Ely, *Democracy and Distrust*, 88-104
Chemmerinsky, *Interpreting the Constitution*, 1-13; 107-128
- 3-8 MICRO-ESSAY #3 DUE AS A GOOGLE DOC BY 4 PM
- 3-9/3-17 **SPRING BREAK**

PART THREE: INTERPRETING A LIVING CONSTITUTION

A. THE EVANGELICALS, THE CONTRACTS CLAUSE, AND THE NEW DEAL

- 3-18 The unexpected roots of the living constitution tradition
Compton, *The Evangelical Origins of the Living Constitution*, 1-51
- 3-20 The contracts clause and economic due process: the old order
Compton, *The Evangelical Origins of the Living Constitution*, 91-132
- 3-25 Holmes and the new openness
Course pack: *Missouri v Holland*, 252 US 430-435 (1919)
Six modes analysis on Holmes's opinion due in class for students #5 &6
- 3-27 **CLASS DEBATE: *More a structural or a prudential opinion?***
Masters of Constitutional Interpretation I; Holmes
Bobbitt, *Constitutional Interpretation*, 48-63
- 3-29 MICRO-ESSAY #4 DUE AS A GOOGLE DOC BY 4 PM
- 4-1 A different take on the 'switch in time'
Compton, *The Evangelical Origins of the Living Constitution*, 133-182
- 4-3 **CLASS DEBATE: *Is the conception of a living constitution coherent?***
Rehnquist, "The Notion of a Living Constitution," 163-168 in Murphy
Dworkin, *Taking Rights Seriously*, 168-180 in Murphy

4-5 MICRO-ESSAY #5 DUE AS A GOOGLE DOC BY 4 PM

B. THE AGES OF THE COMMERCE CLAUSE

- 4-8 Masters of constitutional interpretation II: Marshall
Course pack: *McCulloch v. Maryland* 17 US 400-424 (1819)
Six modes analysis on Marshall's opinion due in class for students #7 &8
- 4-10 *McCulloch* part two
Course pack: *McCulloch v. Maryland* 17 US 424-435 (1819)
Hart Ely, *Democracy and Distrust*, 77-87
Six modes analysis on Marshall's opinion due in class for students #9 &10
- 4-15 The transformation of the commerce power: From *Gibbons* to *Wickhard*
Fisher, *American Constitutional Law*, 404-442
Six modes analysis on Marshall's/Jackson's opinions due for students #11 &12
- 4-17 The commerce power today
Course pack: *US v. Lopez* 514 US 551-583; 615-631 (1995); *US v. Morrison* 529 US 601-666 (2000)
Six modes analysis on Rehnquist's opinions due in class for students #13 &14
- 4-22 Did Obamacare violate the commerce clause?
Course pack: *NFIB v. Sebelius* (2012 slip) 1-59; 1-61
Six modes analysis on Robert's/Ginsberg's opinions due in class for students #15 &16
- 4-24 **CLASS DEBATE: *Who uses doctrinal and prudential arguments more convincingly, Roberts or Ginsberg?***
- 4-26 MICRO-ESSAY #6 DUE AS A GOOGLE DOC BY 4 PM
- 4-29 Final Exam 10:15-12:15 (bring blue books)

Course requirements

A course pack, available at the IWU Bookstore, is a required text. It contains selections from many of the Supreme Court cases to be read for this class.

The following texts are required of all students in this class. They are on sale at the IWU bookstore.

Compton, John. *The Evangelical Origins of the Living Constitution* (Cambridge, Ma.: Harvard University Press, 2014)

Sunstein, Cass. R. *How to Interpret the Constitution* (Princeton: Princeton University Press, 2023)

Selections from the following texts can be found on our Canvas page under Modules.

Bobbitt, Philip, *Constitutional Interpretation* (Oxford: Blackwell, 1991)

Chemerinsky, Erwin, *Interpreting the Constitution* (New York: Praeger, 1987)

Chemerinsky, Erwin, *The Case Against the Supreme Court* ((New York: Penguin, 2014)

Dorf, Michael. *Constitutional Law Stories*. (Mineola, N.Y.: The Foundation Press, 2009)
Fisher, Louis, *American Constitutional Law*, (New York: McGraw-Hill, 1995)
Hamilton, Alexander, James Madison, and John Jay. *The Federalist* (New York: Modern Library, 1962)
Hart Ely, John. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Ma.: Harvard University Press, 1980)
Murphy, Paul et al., *American Constitutional Interpretation* (Mineola, N.Y.: The Foundation Press, 1986)

Social contract

Students are required to complete six micro-essays, the final exam, and to participate in class discussion voluntarily or when called upon.

60% micro-essays (10% each)
25% final exam
15% class participation (5% in class modes assignment)

Use of artificial intelligence tools like ChatGBT or other large language models to assist with class assignments is prohibited, unless specifically approved ahead of time by me.

Class participation is essential for this class. This is a discussion-oriented, flipped classroom. You are expected to have read the reading for the class session in which it appears on the syllabus. Attendance is important to build an intellectual community and sustain the dialog needed to make sense of the issues presented. Students may take as many as three absences, excused or unexcused, without impacting their class participation grade. However, there is a limit to the number of absences you may have and still pass; no student who misses as many as **eight** class sessions, for whatever reasons, shall receive a passing grade.

Students have the opportunity to revise the first four micro-essays. *Students must visit me during office hours with their essay, and then visit me again with a draft of their revision before handing in their final version along with the original.* Revision grades will be averaged with the original grade for the final grade on the assignment. All such revisions must be handed in to me on or before the final class session (April 24).

Illinois Wesleyan University strives to make all learning experiences as accessible as possible. If you anticipate or experience academic barriers based on a disability (including mental health and chronic or temporary medical conditions), it is your responsibility to register with Disability Services. Please note that accommodations are not retroactive and accommodations cannot be provided until I receive an email from Disability Services. Once the email is sent, please make arrangements with me as soon as possible to discuss your accommodations confidentially so they may be implemented in a timely fashion. For more information contact Disability Services by visiting 110 Holmes Hall, calling [309-556-3231](tel:309-556-3231), or emailing jhowe@iwu.edu.

Office hours

Jim Simeone
CLA 251 556-3126
TTh 4-5; W 9-11; 1-2; or by apt.
Assignments page: <https://sun.iwu.edu/~jsimeone/assignments.html>