

S YLLABUS
Constitutional Law II
Professor Garrett Epps
Spring 2017

Students are required to read and understand this entire syllabus

Class Schedule: Monday/Wednesday 7:45-8:35, ALC 402

Instructor Contact info:

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Office: ALC506

Office hours: To be determined by class survey

Texts: SULLIVAN & FELDMAN, CONSTITUTIONAL LAW (19th ed. 2016), or, SULLIVAN & FELDMAN, FIRST AMENDMENT LAW (6TH ed. 2016)*

Collateral Reading (at student's option): Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES (5th ed.); EMANUEL'S CONSTITUTIONAL LAW (latest ed.)

Class attendance and participation:

(1) Attendance in this class is required.

a. Students with more than two unexcused absences may be denied permission to take the examination. That's my policy.

b. Under a separate law school policy, five or more absences for any reason require withdrawal.

c. Obviously sometimes things happen and students cannot attend. If that happens, please notify me—beforehand if possible, if not, then as soon as possible after the class. The point of my “excused absence” rule is to keep me, or the administration, from having to chase you to find out whether you are still enrolled in the class and still keeping up with the work.

d. The five-absence rule is not mine, and it is not about excuses. It is designed to keep you from failing the class or not mastering the basic concepts you will need later.

e. The law school five-absence rule does not mean you “get” five absences. As far as I'm concerned, you don't “get” any absences; if you have a scheduled class, you are expected to attend. Instead, it warns that if you miss five classes for any reason, regardless of my own inclination, you must withdraw. (One issue in interpreting the Constitution is learning to understand the difference between a grant of permission and a warning of penalty.)

(2) Class participation is (a) in small assigned groups that will consider specific problems and (b) in the larger class in which we will discuss the problems you have worked through in your small groups. Neither the small-group nor the full class participation is optional. Students who are unprepared on a specific day should notify me

* These are the same book; the FIRST AMENDMENT LAW book has only the First Amendment related materials. You may buy either, you needn't and shouldn't buy both. You may not use earlier editions of either.

in a written note on the lectern before class begins (oral warnings are subject to being forgotten by the instructor in the heat of class); these students will not be called on during that class, but very likely may be called on at the next class session. If a student has not notified me in advance, I will assume the student is prepared. Students who are stumped by a question from the instructor may pass the question to other members of their small group. However, I expect first an attempt to answer the question. I will not accept an answer of “pass.” That means that if I call on you, I expect you to try to answer my questions or leave the class.

Grading: Student grades will be given as follows: (1) one-third will be based on the two multiple choice quizzes; (2) two-thirds will be based on the final exam.

There will be two quizzes during the semester, consisting of multiple-choice questions. The quizzes will be administered on TWEN. The two quizzes are based in format on the Multistate Bar exam. They will have between six and fifteen questions; each question will offer a brief fact pattern and then a choice of four possible answers to a specific constitutional question.

The final examination will be three hours and consist of one question. The examination will be a traditional law-school essay exam, offering a fact pattern and then asking a specific legal question which the student is to assess and answer in the specified format (e.g., Supreme Court opinion, legal memo, District Court opinion, etc.). It is important to note that (1) the quizzes do not test on case names; instead, they emphasize doctrine and constitutional arguments; (2) case names and holdings are extremely relevant on the examination, and students will be expected to know them and cite them where appropriate. Failure to attribute rules of law to the appropriate cases on the exam will reduce in a reduction of credit for correct answers by as much as one-half.

Both the quizzes and the final exam will be closed-book. However, students may, if they wish, bring an unannotated copy of the text of the Constitution to the final examination only for reference.

An important point: Shortly after Con Law I begins, I am usually besieged with complaints from students demanding to know why I am not telling the class the “answers” to my questions and hypotheticals. The reason is that in this class there are very few “answers.” Even in the best of times, Constitutional Law consists of questions. At present, with a Supreme Court equally split between deeply conservative and center-left factions, “answers” about where the law will evolve are even scarcer than usual. A student who concentrates on learning what the law is now will find that knowledge obsolete even by the time he or she sits for the Bar.

The mention of the Bar underlines something even more important. The aim of this class, as (one hopes) any other law course, is not to cram buzzwords into your head to be regurgitated a few years hence on the Bar. It is to equip you for practice. Constitutional law requires a very specific set of analytical and argumentative skills to apply to the existing and future body of caselaw. Your aim as a student in this class is to begin the self-education process of acquiring those skills; if you do so, you will be able to understand constitutional issues at a high level of sophistication even 40 years hence

(when a number of you will still be in practice). In fact, the first three class sessions will be largely devoted to discussing how to study and analyze Constitutional Law cases instead of actually doing so.

That means you are expected to read the assigned material carefully and come to class prepared to discuss it. A small number of students seem to believe they are fulfilling the assignments by sliding their eyes over assigned material, highlighting a few key phrases, and then waiting for the instructor to “explain” what the case means. If called upon, they read a phrase verbatim from the case or from a canned legal brief they have purchased. I have even had students tell me that they don’t read the “note cases” in the casebook.

Read them. Carefully.

I am perfectly capable of quizzing you on material we have not analyzed carefully in class. Please understand that now to avoid confusion later. Class discussion and lecture is intended to supplement your own process of self-instruction from the material, not substitute for it. Students in this class will succeed by taking responsibility for their own education. This means, among other things, not relying on commercial supplements and canned legal briefs, which are to legal education what crack cocaine is to pain relief. It also means that you should not ask me which of the reading is “really important.” It all is “really important.” If it weren’t I wouldn’t have assigned it.

Learning Outcomes:

In order to perform well in this class, a student must master the following.

1. The underlying theory of American freedom of speech and press, as enunciated in the line of cases beginning with *Schenck* and culminating in *Brandenburg*.
2. The ability to apply the underlying theory to a wide variety of new areas and unfamiliar fact patterns.
3. The specific tests evolved by the Court to govern specific subject-matter areas (e.g., defamation or obscenity).
4. The ability to discern the proper area for each test, recite each test accurately, and apply it to fact patterns in a lawyerlike and analytical manner.

Key dates:

First multiple-choice quiz Wednesday, March 15

Second multiple-choice quiz Monday, April 24

Readings:[†]

- 1) *Bible Believers v. Wayne County*: to be posted on TWEN; Overview of Freedom of Speech: 931-46; 1-15
- 2) Incitement:
 - a. 978-86; 48-55
 - b. 946-86; 16-47 (note you are reading *Brandenburg* again)
- 3) A Quick Introduction to Key Doctrines Time, Place, and Manner, 1224-28; 394-98; Content basis: 1111-21; 181-91; 1175-80; 245-50; Substantial Overbreadth; Vagueness; Prior Restraint: ; 1167-1170; 237-30..
- 4) “Fighting Words”
 - a. 987-99; 57-69.
 - b. 999-1003; 69-73
- 5) Defamation and “Seditious Libel”: 1004-22; 74-92
- 6) Privacy, Emotional Distress: 1022-35; 92-105
- 7) “Hate Speech”: 1035-1057. 105-127
- 8) *Bible Believers* revisited
- 9) Obscenity: 1057-77. 127-47.
- 10) “Indecency” and Pornography, 1077-97; 147-67
- 11) Child Pornography: 1097-1102.; 167-72.
- 12) New Media: 1103-1133. 173-203.
- 13) Commercial Speech: 1133-59. 203-29.
- 14) Content Basis and Content Neutrality.
 - a. 1161-87; 231-27.
 - b. 1187-1213; 257-83
- 15) Overbreadth, Vagueness, Prior Restraint. 1346-85
- 16) Campaign Finance regulation: 1454-1506
- 17) Content-basis and content-neutrality and the problem of expressive conduct: 1111-56; 227-271
- 18) The Public Forum. 1156-1190; 272-306
- 19) Overbreadth and Vagueness: 1277-95; 393-411
- 20) Prior Restraint: 1295-1318; 411-434

[†] The first set of page numbers are those in CONSTITUTIONAL LAW; the second set are for the same material in FIRST AMENDMENT LAW.