

**U. of Minnesota Law School**  
**Constitutional Law II, fall '09**  
**Prof. Heidi Kitrosser**  
**Thursdays & Fridays: 8:35am – 10:00am, rm. 20**

**Course Overview:** Constitutional Law I focused on the structuring of power among the three federal branches and between the federal and state governments. Constitutional Law II is an introduction to the Constitution's individual rights protections.

Here is an example of the connection and differences between structure (the emphasis of Con. Law I) and individual rights (the emphasis of Con. Law II): Suppose that the President decides, without statutory authority, to imprison all members of a particular racial group because she perceives that group to pose a special threat to national security. There are at least two constitutional bases on which group members may sue: (1) The "structural" ground that the President is operating without statutory authority and (2) The "individual rights" ground that the President is discriminating on the basis of race in violation of equal protection principles.

As an introduction to constitutional individual rights, Con. Law II focuses on the 14<sup>th</sup> Amendment. In studying the 14<sup>th</sup> Amendment we will not only consider the substantive protections said to stem from that clause, but will continue the dialogue in which you likely engaged during Con. Law I about methods of constitutional interpretation. How does one interpret the relatively scant, open-ended language of the 14<sup>th</sup> Amendment's clauses? Does one consider "original understanding?" If so, whose original understanding matters? That of the framers? That of the 14<sup>th</sup> Amendment's ratifying generation? And what type of original understanding matters? The original expected application? Or original principles, to be applied in light of modern-day circumstances and cultural norms? Or is original understanding of little or no relevance? If so, to what else should we look to interpret the relevant provisions?

We will focus predominantly on the Fourteenth Amendment's due process and equal protection clauses. In studying due process, we will consider, among many other things, whether that clause "incorporates" the protections of the Constitution's first eight amendments against the states. Toward the end of the semester, we also will study the state action doctrine and Congress' enumerated powers to pass civil rights legislation.

**Course Materials:**

- \* Casebook: Sullivan and Gunther, Constitutional Law, 16<sup>th</sup> edition.
- \* Casebook supplement: Sullivan & Gunther, 2009 supplement

In addition to the casebook, I will occasionally provide supplemental materials, most or all of which will be posted in advance on the course's TWEN site. Please be sure to keep track of any supplemental materials that I provide as they are considered part of your course materials.

***Be sure to enroll yourself in the TWEN course for this class.***

**Office Hours and Related Issues:**

My office is room # 334. My scheduled office hours for the fall semester '09 are on Wednesdays from 12:30pm – 2pm. If you are unable to drop by during that time and would like to talk to me, please contact me by e-mail to make an appointment.

Generally, I prefer that you ask me substantive questions in person rather than by e-mail. If you have a question that you feel can efficiently be answered by e-mail, go ahead and send it to me, but if I feel that it is too unwieldy for an e-mail response I will suggest that you come by to discuss it with me in person.

**Class Discussions / Participation:**

Discussion between students and between the professor and students are an important part of class. *The presumption every day is that you will be present and prepared to be called on “cold.” If an extraordinary circumstance arises that causes you to be unprepared for a class that you attend, you must let me know in advance – ideally by e-mail prior to class but at minimum in person right before the beginning of class.* As indicated below under “Grading,” I retain the discretion to adjust your grade downward for excessive absence or lack of preparation, and to adjust your grade upward for extraordinary participation.

**Grading:**

Your grade will be based on an exam at the end of the semester. However, as noted above, I may revise your grade (up or down) based on class attendance and participation.

The exam will be an 8-hour, open-book and open-note essay exam that you must take on computer. There will be a word limit. I will determine the specific word limit when I write the exam. If you exceed the word limit you will receive no credit for any words that go beyond the limit. Trust me, this policy is enforced and can substantially impact your grade. You will be required to write the number of words in your exam on the front page of the exam.

**Last day of class / pre-exam Q & A session:**

There will be *no class* on Wednesday, 12/9, which would otherwise have been our last class session for the semester (Wednesday, 12/9 is an “administrative Friday” which is why we would otherwise have had class that day – see the law school academic calendar if you’d like further clarification). In lieu of that last class, I will schedule a Q & A session for sometime shortly before your final exam, date and time TBA.

**Assignments:**

The following is the planned list of assignments for the course. It is possible that I will amend certain assignments as the semester progresses. Should I do so, I will notify the class in advance via e-mail.

**CLASS #1: DUE PROCESS, PRIVILEGES & IMMUNITIES, AND THE INCORPORATION CONTROVERSY**

\* Casebook, pp. 340-48, 354-61

\* Casebook supplement, pp. 10-13

**CLASS #2: SUBSTANTIVE DUE PROCESS & ECONOMIC RIGHTS I**

Casebook, pp. 362-375

**CLASS #3: SUBSTANTIVE DUE PROCESS & ECONOMIC RIGHTS II**

Casebook, pp. 375-381

**CLASS #4: SUBSTANTIVE DUE PROCESS AND NON-ECONOMIC RIGHTS I**

\* Supplemental Reading 1 – please download from TWEN site:

Randy Barnett: *The Ninth Amendment: It Means What it Says*

\* Casebook, pp. 413-424

**CLASS #5: SUBSTANTIVE DUE PROCESS AND NON-ECONOMIC RIGHTS II**

Casebook, pp. 424-443

**CLASS #6: SUBSTANTIVE DUE PROCESS AND NON-ECONOMIC RIGHTS III**

\* Review previous day's reading, we will continue to discuss it today

\* also read casebook, pp. 443 - 450

**CLASS #7: SUBSTANTIVE DUE PROCESS AND NON-ECONOMIC RIGHTS IV**

Casebook, pp. 450 - 469

**CLASS # 8: SUBSTANTIVE DUE PROCESS AND NON-ECONOMIC RIGHTS V**

Casebook, pp. 469 - 480

**CLASS # 9: EQUAL PROTECTION: RATIONAL BASIS REVIEW FOR NON-SUSPECT CLASSIFICATIONS AND THE USE OF STRICT SCRUTINY FOR RACE CLASSIFICATIONS**

\* Casebook, pp. 486 – 87; 625 - 628; 505 – 507

\* *OPTIONAL READING: If you would like more background on the Korematsu case, optional reading is available on TWEN from Geoffrey Stone's book "Perilous Times."*

**CLASS #10: EQUAL PROTECTION: RACE-BASED CLASSIFICATIONS AND RACIAL SEGREGATION**

Casebook, pp. 487 – 496; 500 - 505

**CLASS # 11: DISCRIMINATORY PURPOSE AND EFFECT**

Casebook, pp. 507 – 517; 597 - 600

CLASS #12: DISCRIMINATORY PURPOSE AND EFFECT II; INTRODUCTION TO AFFIRMATIVE ACTION

- \* Review previous reading, we will continue to discuss it today
- \* Also read: Casebook pp. 517-24

CLASS #13: AFFIRMATIVE ACTION II

Casebook pp. 524 - 533

CLASS #14: AFFIRMATIVE ACTION III

Casebook, pp. 533-552

CLASS # 15: DESEGREGATION: CONSTITUTIONAL MANDATES AND CONSTITUTIONAL LIMITS

Casebook, pp. 496 - 500; 552 – 561

CLASS #16: RACE CONSCIOUS VOTER DISTRICTING

Casebook, pp. 561-71

CLASS #17: EQUAL PROTECTION: GENDER CLASSIFICATIONS I

Casebook, pp. 571 – 589

CLASS #18: EQUAL PROTECTION: GENDER CLASSIFICATIONS II

Casebook, pp. 590 – 597; 600 - 604

CLASS #19: EQUAL PROTECTION: CLASSIFICATIONS BASED ON ALIENAGE, DISABILITY

Casebook, pp. 604 – 614

CLASS #20: EQUAL PROTECTION: CLASSIFICATIONS BASED ON SEXUAL ORIENTATION

Casebook, pp. 614 - 625

CLASS #21: EQUAL PROTECTION: THE FUNDAMENTAL INTERESTS STRAND PART I

\* Casebook, pp. 638 – 651

\* Casebook supplement, pp. 16-18

CLASS #22: EQUAL PROTECTION: THE FUNDAMENTAL INTERESTS STRAND PART II

Casebook, pp. 661 – 673

CLASS #23: STATE ACTION DOCTRINE

Casebook, pp. 677 - 686

CLASS #24: THE STATE ACTION DOCTRINE CONTINUED

Casebook, pp. 686 (start with note 2) - 697

CLASS #25: CONGRESS' ENUMERATED CIVIL RIGHTS POWERS

\* Casebook, pp. 719 – 729

\* Casebook supplement, pp. 19-20

*A Q & A session will be scheduled for some time prior to the exam (exact date, time, place TBA toward the end of the semester).*