Course Materials

The materials for this course are:

1. a course book: Calvin Massey, American Constitutional Law: Powers & Liberties (5th ed. 2016);
2. a course book supplement: 2017 Supplement: American Constitutional Law
3. “handouts,” which will be distributed in class and via BbLearn.

Subject Matter and Learning Outcomes of This Course

Subject matter: In this course we will examine Supreme Court case law on certain individual rights protected by the U.S. Constitution.

"Learning Outcomes": The College of Law has established "learning outcomes" to identify what you should get out of your courses and your overall law school experience. Below are the ones relevant to this course. If you ignore the jargon, they can really help you see how this course fits into the bigger picture:

LEARNING OUTCOME 1 – KNOWLEDGE OF LAW AND LEGAL INSTITUTIONS
Graduates will demonstrate knowledge and understanding of substantive and procedural law and legal institutions. Graduates will be able to:
· Demonstrate competence in the substance of U.S. Constitutional Law

LEARNING OUTCOME 2 – LEGAL ANALYSIS AND REASONING
Graduates will demonstrate the capacity to engage in sophisticated legal reasoning and analysis. Graduates will be able to:
· Identify the legal rules and principles applicable to a given context
· Identify legally relevant facts, both known and unknown, in a given legal context
· Identify nature and consequence of ambiguities in the facts in a given context
· Identify the legal rules and principles applicable to a given context
· Identify legally relevant facts, both known and unknown, in a given legal context
· Identify nature and consequence of ambiguities in the facts in a given context
· Construct and support an argument grounded in appropriate legal authority and policy considerations, while recognizing and addressing weaknesses thereof.

LEARNING OUTCOME 3 – ORAL AND WRITTEN COMMUNICATION SKILLS
Graduates will be proficient at communicating complex legal arguments, reasoning, and analysis, both in writing and in oral communication. Graduates will be able to:
• Orally communicate legal arguments effectively and nimbly.

Contacting Me Outside of Class

My office is Room 210C. Room 210C is on the second floor of the law building, down a short hallway the entrance to which is off the main hallway of faculty offices. This small spur lies between the entrance to the Idaho Law Review office and a pair of rest rooms.

My office hours this fall are:

• Tuesdays and Thursdays, 8 – 11 am

These are just the times during the week when I promise to be in the office and available to talk with students (barring unavoidable other commitments, which I will try to announce in advance). Please feel free to come by any other time you like, and, if I am not free to speak with you just then, we can set up an appointment. You may also call me at 208-885-7061; e-mail me at richard@uidaho.edu; or leave a note in the Ziploc bag on the bulletin board outside my office door. I enjoy talking with students!

Class Attendance and Participation

Class attendance: You must do your best to show up (1) for every class, (2) on time, and (3) prepared to participate. I will do my best to make it worth your while.

I will hand out an attendance sheet that you must sign to prove your attendance. You should keep track of your own absences. If you miss more than three classes, you must: (i) let me know as soon as possible; and (ii) be prepared to explain and document the reasons for all your absences. I reserve the right, if you miss more than three classes, to reduce your course grade. Equally important, if you miss more than three classes, you will miss a ton of great stuff!

Class participation: “Class participation” includes regular, punctual attendance; timely completion of any written homework assignments; being prepared to answer questions when called on at random; and compliance with the course requirements described in this syllabus (including the rules set out below about the in-class use of laptops and electronic devices). In addition, “class participation” includes your voluntary contributions to class discussion. In this regard, quality (not quantity) counts. I particularly appreciate a willingness to ask – and to listen to – what may seem to you to be “stupid” or “obvious” questions. To reinforce that listening skill, I regularly base exam questions on questions, comments, or hypotheticals posed by students in class.

I will involve students in class discussion in two main ways. First, I will call on students at random and without prior warning to answer questions that anyone who is well prepared should be able to answer. Second, I will call on volunteers. In addition, I may occasionally use panels of “experts” who will be designated in advance to prepare particularly carefully for an upcoming assignment.

If you are not well prepared for a particular class and therefore wish not to be called on, you may, before class begins, give me advance written or email notice that you need to pass. You may exercise this “pass” option no more than three times during the semester. I do not take “passes”
into account in grading. Indeed, I encourage you to use this option, if needed, so neither of us has to worry about calling on you when you are not prepared.

Our class will generally meet at its regularly scheduled times. Right now, though, I know of three classes that I need to reschedule because of other commitments: We DON’T HAVE CLASS ON:

- Wednesday, October 3, when I'll be traveling to New York with a moot court team (Wish us luck!)
- Friday, October 5, when I'll still be in New York with the team
- Friday, October 12, when I travel to a relative’s wedding

We will make up these classes during designated make-up times. I'll announce the make-ups and post them on BbLearn as soon as possible. I'll also give as much advance notice as possible if I need to reschedule any other classes. Because I know make-ups are a challenge, I will record them, and you need not count it as an absence if you must miss a make-up.

Grades and Course Requirements

Overview: Your grade will be based on (1) a midterm, worth up to 25% of your grade; and (2) a 4-hour final exam, worth at least 75% of your grade. I also reserve the right to take class participation into account.

Below are the specific rules for what you can, and cannot, use during the midterm and final exam. If any issue is not expressly covered by these rules and a reasonable person would be dubious about it, please check with me before you do it. I apologize for the rules’ intricacy. Their intricacy reflects that vague rules or standards for open-book-type exams heighten the risk of Honor Code complaints and student concerns about other students’ use of exam-room materials.

Quiz and Exam Room Rules

A. GENERAL RULE: You may bring into the room, for use during the quizzes and final exam, only:

1. the U.S. Constitution, the course book, the course book supplement, and any other assigned material;

2. any other material distributed to the class -- either in class or electronically;

3. your class notes; and

4. any material that you have participated in preparing, such as an outline, flow charts, check lists, etc. You can bring this material into the exam room as long as (a) you had a substantial role in creating the material; and (b) it contains no more than a truly minor amount of material from sources other than from items A.1-A.3 or from a current classmate. This provision, A.4, is designed to allow you to bring in material you made yourself or as part of a study group, with no more than minor material from elsewhere outside the class (e.g., a commercial study aid).
B. RULE ABOUT CUTTING AND PASTING: The material you bring into the exam room cannot contain material that you have physically or electronically cut and pasted from anywhere other than the items described in A.1 through A.4. Thus, for example, if you want to include in your outline material from a commercial study aid, you must handwrite it or hand keyboard it into your outline. And, even then, under the “General Rule” above, this outside material can be no more than a truly minor amount.

C. RULE ABOUT MATERIAL FROM PAST YEARS: With one exception described in the next sentence, you may not bring, into the exam room, material from prior years, including outlines from prior years, other material prepared by prior students, material that I have distributed to the class in prior years, or material in the law library’s exam archives. You may, however, bring in material from prior years if I distribute it to the entire class in the current year.

Whew! The basic idea behind these rules is to allow you to bring into the exam all of the assigned reading material, your class notes, handouts, and an outline, including a typical group outline – but nothing else. Please let me know if you have questions about these rules.

Use of Laptop and Other Electronics in Class

Learning suffers when students use computers and other electronic devices during class for anything unrelated to class. Accordingly, I restrict their use in this class. Specifically, you may use laptops during class only to take notes for this class and view websites to which I direct you during class. You will be breaking the rules, and acting unprofessionally, if you use laptops or other electronic devices to read or write email, view websites to which I’ve not directed you, or send text messages. I reserve the right to lower your course grade, and take disciplinary measures, for any of this conduct. I’m a bear about this because I care about your learning.

I strongly encourage you to consider taking handwritten notes instead of using a computer to take notes. Recent studies consistently show that handwriting your notes helps you learn more and remember what you learn better than keyboarding your notes.

Center for Disability Access and Resources (CDAR) Reasonable Accommodations Statement:

Reasonable accommodations are available for students who have documented temporary or permanent disabilities. Ideally, students in Moscow and Boise should meet with CDAR by the end of the first week of class to assess if any accommodations are needed for courses and/or examinations. All accommodation requests are then submitted by CDAR to Dean Dodge for final approval. CDAR serves as the sole evaluator of medical documentation and determines reasonable accommodations on a per semester basis. The College of Law does not have the authority to evaluate or grant disability accommodations without CDAR first submitting a recommendation. You may contact CDAR by:

- Calling 208-885-6307
- Emailing cdar@uidaho.edu

It is ultimately the student’s responsibility to seek a disability accommodation, and until an accommodation is approved by CDAR and Dean Dodge, no student will be entitled to receive any
accommodations. To learn more about CDAR, visit its website at http://www.uidaho.edu/current-students/cdar. Moscow students may also visit CDAR in suite 127 of the Pitman Center. Please review the College of Law Catalog and Student Handbook for more information on the disability accommodation process.

Recording Class Sessions:

Students may not electronically record classes unless they have the express consent of the instructor, except where the Dean of Students has allowed recording as a disability accommodation pursuant to a recommendation by CDAR. Recording classes without the instructor’s express consent violates the Honor Code. Students recording classes as a disability accommodation must follow procedures set down by CDAR. Students who are unable to attend class for reasons of illness or other exigencies must receive permission from the instructor before classes are recorded on their behalf. Contact the Law Library for recording equipment and information on recording procedures.

University Civility Statement

In any environment in which people gather to learn, it is essential that all members feel as free and safe as possible in their participation. To this end, it is expected that everyone in this course will be treated with mutual respect and civility, with an understanding that all of us (students, instructors, professors, guests, and teaching assistants) will be respectful and civil to one another in discussion, in action, in teaching, and in learning.

Should you feel our classroom interactions do not reflect an environment of civility and respect, you are encouraged to meet with your instructor during office hours to discuss your concern. Additional resources for expression of concern or requesting support include the Dean of Students office and staff (885-6757), the UI Counseling & Testing Center’s confidential services (885-6716), or the UI Office of Human Rights, Access, & Inclusion (885-4285).

Credit Hours for Coursework

In accordance with ABA Standard 310, the College of Law awards one credit hour for experiences that are reasonably designed to involve 50 minutes of classroom or direct faculty instruction and two hours of out-of-class student work per week, or at least the equivalent amount of work for academic activities including simulation, field placement, clinical, and other academic work leading to the award of credit hours.

The Course requirements outlined above with respect to materials and assignments, in my professional judgement, are complex enough in nature that it is expected that the amount of out-of-class time it will take students to complete the assignments will meet the rule.

Assignments

The first list of assignments begins on the next page. The assignment for each class is indicated by a numeral in brackets. We will try to cover one assignment per class. If we do not finish an assignment during one class, you should still read all of the next assignment before the next class,
unless I tell you otherwise. These assignments are tentative; they may be changed by prior announcement in class, by email, or on BbLearn. In addition, the assignments will be supplemented by in-class handouts. Therefore, if you miss a class, you should find out whether I modified an assignment or handed out anything in that class.

First List of Assignments

Due Process
[1] Please read pp. 451-472 (up to, but not including, the paragraph on p. 472 that begins, "Barron v. Baltimore, 32 U.S. 243 (1833) . . ."
[2] Please read casebook pp. 480-505 (from Note 3 on p. 480 up to "Notes" on p. 505).
[6] Please read pp. 558-567 (up to "g. Other Asserted Privacy or Autonomy Interests"); Note on Pavan v. Smith in casebook supplement, pp. 23-24; and Syllabus of Sessions v. Dimaya (available on BbLearn).

Takings and Contract Clauses
[8] Please read pp. 600-617 (up to "3. Conditional Regulatory Takings").

Equal Protection
[10] Please read pp. 639-661 (up to "3. Enhanced Minimal Scrutiny . . .").
[14] Please read excerpt of Schuette v. Coalition to Defend Affirmative Action (on BbLearn); and pp. 727-735 (from Parents Involved up to "5. Race and the Political Process").
[15] Please read pp. 751-775 (from "D. Strict Scrutiny and Suspect Classifications..." up to Notes).

[More great assignments to come!]
Objectives for Assignments [1] through [15]

Objectives for Assignment [1]:

- Begin to learn how to learn the course material in a way that enables you to apply it thoughtfully.
- Be able to explain in your own words the general differences between procedural and substantive due process.
- Be able to explain in your own words the two steps used in procedural due process analysis.
- Be able to identify when a hypothetical law or other government action arguably deprives, or threatens to deprive, someone of a liberty or property interest.
- If the hypothetical law does so, be able to explain how to analyze the law under the *Mathews v. Eldridge* framework and under the two general rules about the timing and elaborateness of procedures required for due process.
- Be able to explain in your own words how the incorporation doctrine relates to the doctrine of substantive due process.

Objectives for Assignment [2]:

- Be able to explain in your own words the terms “selective incorporation” and “jot-for-jot approach”; to recall the three so-far-unincorporated provisions in the 1st 8 Amendments; and to identify the Court’s standard for determining whether a right should be incorporated.
- Be able to recall the main reason why *Lochner v. United States* matters today.
- Be able to identify when a law is subject to analysis under the Court’s modern case law on the substantive due process analysis for economic, commercial, or business regulations and, when so, to perform that analysis.
- Be able to recall the source of the privacy rights recognized in *Griswold*.

Objectives for Assignments [3] & [4]:

- Be able to recall the source of the privacy rights recognized in *Roe v. Wade* and its progeny.
- Be familiar enough with the assigned cases on abortion restrictions that you can analyze a hypothetical law or other government regulation of abortions to determine its constitutionality.
Objectives for Assignment [5]:

- Be able to recognize when a law or other government action arguably violates substantive due process rights connected with family relationships or child-rearing and, when so, to analyze whether the law or other action does indeed violate those rights.
- Be able to recognize when a law or other government action arguably violates the substantive due process right of a competent person to refuse unwanted medical treatment and, when so, to analyze whether the law or other action does indeed violate that right.
- Be able to recall that the Court has rejected a “right to die” and to distinguish between laws that restrict this rejected right and laws that implicate the right to refuse unwanted medical treatment.
- Be able to recall the holding in Lawrence v. Texas and to discuss its applicability in cases involving laws or other governmental actions regulating sexual conduct.

Objective for Assignment [6]:

- Be able to recall and apply in an appropriate case the Court’s case law recognizing a “fundamental right” to marry.

Objectives for Assignments [7] & [8]:

- Be able to determine whether a governmental taking of private property satisfies the Just Compensation Clause’s “public use” requirement.
- Be able to explain in your own words the concept of a “regulatory taking.”
- Be able to recognize when a government law or other action arguably constitutes a “regulatory taking” and, when so, to analyze whether it does indeed constitute a taking.

Objectives for Assignment [9]:

- Be able to recognize when a government law or other action arguably constitutes a “conditional regulatory taking” and when so, to analyze whether it does indeed constitute such a taking.
- Be able to recall and apply in an appropriate case the Court’s standard for determining when a law or other governmental action affecting the government’s own contracts with private parties violates the Contracts Clause.
• Be able to recall and apply in an appropriate case the Court’s framework for determining when a law or other governmental action affecting private contracts violates the Contracts Clause.

Objectives for Assignment [10]:

• Beginning with this assignment, develop an ability to analyze a law or other government action to determine whether it violates equal protection under the appropriate level of scrutiny.
• Be able to identify when a law challenged on equal protection grounds should be analyzed under minimal equal protection scrutiny.
• Be able to apply minimal equal protection scrutiny in an appropriate case.


• Be able to recognize when a law or other government action arguably is subject to heightened equal-protection scrutiny under Cleburne or Plyler, and to explain whether the law or other action survives such scrutiny.
• Be able to recall what types of classifications trigger strict equal-protection scrutiny and to explain the strict-scrutiny standard.
• Be able to recall the intentional discrimination requirement for triggering intermediate and strict equal-protection scrutiny and to analyze whether a law or other governmental action meets that requirement.
• Be able to recognize when a law or other government action intentionally classifies based on race and, when so, to analyze whether the law or other action violates equal protection using the assigned cases.

Objectives for Assignment [14]:

• Be able to recall that, under Schuette, the government may, consistently with equal protection, prohibit all racial preferences in public education, employment, and contracting, except when required by the Constitution as a remedy for past discrimination.
• Be able to recall that, under Parents Involved, it is unsettled whether racial diversity is a compelling interest that would justify race-conscious pupil assignments in primary and secondary public schools.
Objectives for Assignment [15]:

- Be able to recall and apply in an appropriate case the Court’s general rules governing equal protection analysis of state and local laws that discriminate against lawful resident aliens.
- Be able to identify laws that classify based on gender and to analyze those laws under the Court’s case law applying intermediate scrutiny under the equal protection principle.
National Conference of Bar Examiners - Outline for Con Law

Constitutional Law

NOTE: The terms "Constitution," "constitutional," and "unconstitutional" refer to the federal Constitution unless indicated otherwise.

I. The nature of judicial review
   A. Organization and relationship of state and federal courts in a federal system
   B. Jurisdiction
      1. Congressional power to define and limit
      2. The Eleventh Amendment and state sovereign immunity
   C. Judicial review in operation
      1. The "case or controversy" requirement, including the prohibition on advisory opinions, standing, ripeness, and mootness
      2. The "adequate and independent state ground"
      3. Political questions and justiciability

II. The separation of powers
   A. The powers of Congress
      1. Commerce, taxing, and spending powers
      2. War, defense, and foreign affairs powers
      3. Power to enforce the 13th, 14th, and 15th Amendments
      4. Other powers
   B. The powers of the president
      1. As chief executive, including the "take care" clause
      2. As commander in chief
      3. Treaty and foreign affairs powers
      4. Appointment and removal of officials
   C. Federal interbranch relationships
      1. Congressional limits on the executive
      2. The presentment requirement and the president’s power to veto or to withhold action
      3. Nondelegation doctrine
      4. Executive, legislative, and judicial immunities

III. The relation of nation and states in a federal system
   A. Intergovernmental immunities
      1. Federal immunity from state law
      2. State immunity from federal law, including the 10th Amendment
   B. Federalism-based limits on state authority
      1. Negative implications of the commerce clause
      2. Supremacy clause and preemption
      3. Authorization of otherwise invalid state action

IV. Individual rights
   A. State action
   B. Due process
      1. Substantive due process
         a. Fundamental rights
         b. Other rights and interests
      2. Procedural due process
   C. Equal protection
      1. Fundamental rights
      2. Classifications subject to heightened scrutiny
      3. Rational basis review
   D. Takings
   E. Other protections, including the privileges and immunities clauses, the contracts clause, unconstitutional conditions, bills of attainder, and ex post facto laws
   F. First Amendment freedoms
      1. Freedom of religion and separation of church and state
         a. Free exercise
         b. Establishment
      2. Freedom of expression
         a. Content-based regulation of protected expression
         b. Content-neutral regulation of protected expression
         c. Regulation of unprotected expression
         d. Regulation of commercial speech
         e. Regulation of, or impositions upon, public school students, public employment, licensee, or benefits based upon exercise of expressive or associational rights
         f. Regulation of expressive conduct
         g. Prior restraint, vagueness, and overbreadth
      3. Freedom of the press
      4. Freedom of association