

**UNIVERSITY OF MIAMI
School of Law**

Spring 2020

CONSTITUTIONAL LAW II (217B)

**PROFESSOR D. MARVIN JONES
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Syllabus

The textbook we will be using this semester will be Stone, Seidman, Sunstein and Tushnet, and Karlen, Constitutional Law (8th Edition 2017). This includes the 2019 supplement. Unless otherwise stated all assignments will be to the text and/or the supplement. The text and supplement are published by Wolters, Kluwer.

Course Description

Constitutional Law II (hereinafter Con Law II) is a course in which we explore the meaning of two great constitutional norms: equal protection and freedom of speech. We will examine both the historical development of these two pillars of our jurisprudence as well as their contemporary formulation. Con Law II is equally a course about theories of interpretation. We will provide you with the heuristic tools to discover the meaning of constitutional guarantees formally, functionally, and contextually.

We begin with an exploration of the classic constitutional dilemmas: the tension between a notion of moral principle v. formal legal rules; the social contract v. pragmatic considerations. Cross-cutting this discussion is the tension between constitutional interpretation as a function of “original intent” and constitutional interpretation anchored in a normative vision of a democratic society. The vehicle for this introductory discussion will be cases concerning slavery.

We then quickly move to the post-reconstruction era and the critical cases construing the Fourteenth Amendment equal protection clause during this formative period.

Armed with this ‘sense of history’ we then consider the methodology of modern equal protection review. We will consider the various standards of equal protection scrutiny and the various contexts in which those standards have been applied. The constitutional issues of race, gender and sexual orientation are in our line of march here.

Next and for the remainder of the course, we will review the doctrinal development of First Amendment Law. We will study the development of the “clear and present danger standard,” time, place and manner regulations, the law with respect of obscenity, and problems related to hate speech.

Throughout the course, while understanding the doctrinal holdings of the cases is important, it is important only in an interlocutory sense. Our threshold challenge is to glean underlying principles from the holdings of the cases viewed as a body of law. The “black letter law” of this area is constantly changing. Therefore, to know what a particular case held is of dubious value. Rather, principles which define the Court’s approach must be distilled from the case law.

Finally, as Karl Llewellyn notes, Constitutional Law exists to articulate for us a concept of justice.

By the end of the course we should have a grasp of something more than cold, dry legalisms, more even than a grasp of the legal principles. Ultimately, using constitutional history and doctrine as a lens, we should have a deeper understanding of the pitfalls and potential of using the law to attain the dream of social justice.

Course Requirements

Final grades will generally be based on performance on a final exam. The final exam will be open book (canned outlines excluded). There will be no automatic increment for class participation. However, where students have made outstanding contributions or demonstrated outstanding growth in their understanding of the material, the final grade will be adjusted to reflect this outstanding performance.

The final exam will consist of an objective portion (e.g. true/false) and an essay portion. There is a thesis or paper option with respect to the essay section. Students who do a paper on an approved topic may submit the paper in lieu of the essay portion of the test. Paper topics will be distributed early in the course.

Class Attendance

Regular attendance is required. Students are expected to be present and on time for each class. Five (5) **unexcused** absences are allowed. Students who are unprepared are considered absent. Students who have missed classes in excess of unexcused absences must submit a doctor’s note or documentation as to the specific reason why the absence should be excused. Only genuinely unavoidable circumstances will suffice to excuse the sixth or greater absence. If you must be absent, *the Law School rules require that you notify the Dean of Students of your absence by completing the on-line form which can be found at <https://www.law.miami.edu/students/dean-of-students>.*

Office Hours:	Mondays 11:30am-12:30pm & Wednesdays 12:00pm-1:30pm
Office Room Number:	G475
Office Telephone:	305-284-6314
Assistant/Telephone:	Alina Hernandez/305-284-4438

Assignments

Session 1:

For your first assignment, pick one of the questions listed below and write a reflection paper. A reflection paper must explain what the issue is, what the competing principles or policies are, and how you think the case or issue should be resolved. The format could be that of a court opinion, in which you take the role of a judge, or, if you choose, a lawyer writing an editorial for a newspaper, or a scholar writing an abstract on the topic involved. Reflection papers may be from 300 to 1,000 words. The reflection papers must be typed and double-spaced. Standard citation practices apply. Because the essays are very short, you need not restate the facts nor focus on procedural issues. Your job is to frame the issues substantively, distill the competing principles, and succinctly state your position. Students may only write on one of these questions.

Please be sure to print and hand in your reflection paper to Professor Jones on the first day of class, Tuesday, January 14th.

Question 1

The original Constitution contains several clauses which recognized the legitimacy of slavery or protected the "property rights" of slave masters to their slaves.

Question: Would you sign the original Constitution?

In answering this question, discuss the dichotomy of law v. morality, or natural law v. positive law, or competing theories of interpretation (or a combination of all three).

Required Reading:

State v. Post, pgs. 467-470 in text

Suggested Readings:

D. Robinson, *SLAVERY AND THE STRUCTURE OF AMERICAN POLITICS, 1765-1820* (1971)

Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 Harv. Law Review 1 (1987)

Stanford Levinson, *The Constitution in Perspective- Pledging Faith in the Civil Religion; Or, Would You Sign the Constitution?* 29, William and Mary L. Rev. 113 (1987)

Question 2

In the Declaration of Independence Thomas Jefferson writes, "All men are created equal..." Three later Presidents - Lincoln, Kennedy, and Johnson invoked "equality" as a guiding norm of our democracy in a time of crisis. But what is equality? Is it captured by the phrase "equal opportunity?" Or does it require something more? Do blacks have substantive, moral claims against the state (i.e. a right to affirmative action) based on their unique, history and experience? Do Native Americans, women, or other groups have competing similar claims?

Assignment: Write an essay reflecting on the meaning of equal protection.

Required Reading:
Pgs. 573-604 in text

Suggested Readings:

Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher, 45 Seton Hall L. Rev. 761 (2015)

S. Cashin, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014)

Question 3

Study the case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). What should the Court have said? Write a concurring or dissenting opinion.

Suggested Reading:

Steven J. Heyman, *To Drink the Cup of Fury: Funeral Picketing, Public Discourse, and the First Amendment*, 45 Conn. L. Rev. 101 (2012)

Rosalie Berger Levinson, *Targeted Hate Speech and the First Amendment: How the Supreme Court Should Have Decided Snyder*, 46 Suffolk U. L. Rev. 45 (2013)

Session 2:

Required Reading

Pgs. 465-501

Required Essay:

Write an essay addressing one of the following issues:

1. Does Constitutional Law have a moral dimension?
2. What precisely did *Brown* require southern school systems to do?
Did it require integration or merely forbid racial classification?

Suggested length 300-1500 words (1 to 5 pages).

Suggested Reading

Strauder v. West Virginia, 100 U.S. 303 (1879)

Civil Rights Cases, 109 U.S. 3 (1883)

D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Geo. L. J. 437 (1993).

Session 3:

Required Reading

Pgs. 509-549

Suggested Reading:

Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995)

D. Marvin Jones, *The Original Meaning of Brown, Seattle, Segregation and the Rewriting of History (For Michael Lee and Dukwon)*, 63 U. Miami. L. Rev. 629 (2009)

Session 4

Required Reading

Pgs. 549-593

Session 5:

Required Reading

Pgs. 593-632

Affirmative action has been said to be a welcome mat which merely gives substantive meaning to otherwise formal abstraction of equal protection. Is it that? Or is it a keep out sign, a violation of norms of equal protection taking from innocent white victims on the basis of wrongs that took place before they were born?

Write a reflection paper on this issue.

Session 6:

Required Reading

Pgs. 632-673

Cary Franklin, *The Anti-Stereotyping Principle In Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83 (2010)

Gary J. Simson, *Separate But Equal Single Sex Schools*, 90 Cornell L. Rev. 443 (2005)

Session 7:

Required Reading

Pgs. 678-718

Session 8:

Required Reading

Pgs. 719-759

Cass Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987) (on TWEN)

Session 9:

Required Reading

Pgs. 792-833

Session 10:

Required Reading

Pgs. 836 -875

Session 11:

Required Reading

Pgs. 879-918

Session 12:

Required Reading

Pgs. 918-952

Session 13:	<u>Required Reading</u> Pgs. 1009-1049
Session 14:	<u>Required Reading</u> Pgs. 1049-1097
Session 15:	<u>Required Reading</u> Pgs. 1140-1179
Session 16:	<u>Required Reading</u> Pgs. 1179-1218
Session 17:	<u>Required Reading</u> Pgs. 1222- 1262
Session 18:	<u>Required Reading</u> Pgs. 1262 -1296
Session 19:	<u>Required Reading</u> Pgs. 1296-1333
Session 20	<u>Required Reading</u> Pgs. 1333-1372
Session 21:	<u>Required Reading</u> Pgs. 1431-1470
Session 22:	<u>Required Reading</u> Pgs. 1470- 1506
Session 23:	Role Playing Exercises
Session 24:	Role Playing Exercises
Session 25:	Review

DISABILITY SERVICES

If you have a disability, or suspect that you may have a disability, the Law School encourages you to contact Jessie Howell, Director, Accessibility & Student Inclusions at the Office of Disability Services for information about available opportunities, resources, and services. Her phone number is 305-284-9907, and her email address is jhowell@law.miami.edu. You may also visit the Office of Disability Services website at www.law.miami.edu/disability-services.

TITLE IX

The University of Miami seeks to maintain a safe learning, living, and working environment free from all types of sexual misconduct including but not limited to: Dating Violence, Domestic Violence, Sex- or Gender-Based Discrimination, Sexual Assault (including Sexual Battery), Sexual Exploitation, Sexual Harassment, and Stalking. For additional information about the University's efforts to prevent, stop, and address sexual misconduct, including resources and reporting options, please visit www.miami.edu/titleix or contact the University's Title IX Office at titleixcoordinator@miami.edu.