The course will use two texts: (1) zeroxed materials prepared for this course some of which are taken from Paul Brest, *Processes of Constitutional Decision-Making* (1975 edition, not the more recent edition) (hereinafter "Brest"), (2) the Gunther and Sullivan casebook, *Constitutional Law* (15th edition, 2004) (hereinafter "Gunther"), and (3) the latest supplement to this casebook. Any assignment to the Gunther casebook includes as well corresponding sections in the latest supplement; students accordingly must read the supplement as they read Gunther; they are responsible for both; mandatory reading assignments, in Brest or in Gunther, as the case may be, are always in italics and underlined on the course outline below.

Students are responsible for these readings and for anything discussed or lectured on in class; rows of students will be regularly primarily responsible for class discussion, and their participation in such discussion is a minimum educational responsibility of students taking this course (any such student unable to attend class should inform the instructor prior to that class to arrange participation at a later time; failure to do so will be reflected negatively in grades). Class discussions will follow this outline; students should consult this outline frequently, since it often does not follow the order of discussion in the texts for the course.

The final examination will be a 12-hour take-home to be given at a scheduled time within the exam period under procedures to be announced well prior to the exam; exams must be typed.

Occasional reference is made in this outline and will be made in class to optional background readings, e.g., Dworkin, *Taking Rights Seriously* (hereinafter, "Dworkin"), Dworkin, *Law's Empire* (hereinafter "LE"), Richards, *The Moral Criticism of Law* (hereinafter "MC"), Richards, *Toleration and the Constitution* (hereinafter "Tol"), Richards, *Foundations of American Constitutionalism* (hereinafter "Foundations"), Richards, *Conscience and the Constitution* (hereinafter "Conscience"), Richards, *Women, Gays, and the Constitution: the Grounds for Feminism and Gay Rights in Culture and Law* ("Women, Gays"), and many others. All background readings are optional, but students will be responsible for any aspect of these readings lectured on and discussed in class. Regular classroom attendance is, for this reason, essential to the educational responsibilities of students who take this course.

Office hours are held prior to each class in Room 421, or may be arranged by e-mail at: david.richards@nyu.edu.
NUMBER
OF
HOURS       SUBJECT MATTER                          ASSIGNMENT
1-1/2  American constitutionalism in historical
       perspective: a lecture, including reference
       to optional background readings:

1. Michael Walzer, The Revolution of the Saints
   Cambridge, Mass.: Harvard University Press, 1965
2. A.S.P. Woodhouse, ed., Puritanism and Liberty
   London: Dent, 1938
   American Revolution Cambridge, Mass.: Harvard
   University Press, 1967
5. Douglass Adair, Fame and the Founding Fathers
   New York: Norton, 1974
6. David Richards, Toleration and the Constitution
   (New York: Oxford University Press, 1986)
7. David Richards, Foundations of American
8. David Richards, Conscience and the Constitution
9. David Richards, Women, Gays, and the Constitution
   (Chicago: University of Chicago Press, 1998)

I. CONSTITUTIONAL INTERPRETATION

1-1/2 Constitutional Interpretation by Judiciary  Gunther, 2-31

3  Judicial Supremacy and the Democratic
   Objection Brest, 1-137
   Optional:
   Tol., 3-19
   Foundations, 3-17
   Conscience, ch. 1

   a lecture series on texts on political theory and constitutionalism, including reference to optional
   background readings:

1. Learned Hand, The Bill of Rights.
5.  John Stuart Mill, Utilitarianism Indianapolis: Bobbs-Merrill, 1957 (originally published, 1861)

3 Historiography, Political Theory, and Interpretation Brest, 139-208
Optional:
Tol., 20-64
Foundations, 18-171
Optional background readings:
1. Federalist Papers (originally published, 1787-88); see, especially,
   No. 1 (Hamilton), No. 6 (Hamilton),
   No. 7 (Hamilton), No. 9 (Hamilton),
   No. 10 (Madison), No. 37 (Madison),
   No. 47 (Madison), No. 48 (Madison),
   No. 49 (Madison), No. 50 (Madison),
   No. 51 (Madison), No. 78 (Hamilton),
   No. 84 (Hamilton)
2. John Locke, The Second Treatise of Government (originally published, 1690)

II. FEDERALISM

3 Federalist No. 10 and McCulloch, Brest,209-217
   Gunther,89-111

Optional background readings:
1. Charles Beard, An Economic Interpretation of the Constitution of the United States
   New York: Free Press, 1941 (originally published, 1913)
2. Robert Dahl, A Preface to Democratic Theory
   Chicago: University of Chicago Press, 1956
3. Douglass Adair, Fame and the Founding Fathers
   New York: Norton, 1974
4. Gary Wills, Explaining America: The Federalist
   Garden City, N.Y.: Doubleday, 1981
5. David Epstein, The Political Theory of the Federalist
   Chicago: University of Chicago Press, 1984
6. Morton White, Philosophy, The Federalist, and the
7. David Richards, Foundations of American

1-1/2 Commerce Clause: Congressional Power  Gunther, 123-149, 153-178

1/2 Enforcement of Civil Rights and Commerce Clause  Gunther, 150-153

3 Commerce Clause: State Power (the Negative Commerce Clause)  Gunther, 244-255
  316-324
  287-303
  256-287
  324-338

III. SEPARATION OF POWERS

1-1/2 The Rule of Law and Control of Executive Power (Impeachment)  Brest, 219-284

IV. THE SYSTEM OF FREE EXPRESSION

4 Political Speech and Subversive Advocacy,  Gunther, 984-1038
Optional:
Tol., 165-227
Foundations, 172-201
Conscience, ch. 6

Optional background readings:
2. John Stuart Mill, On Liberty, chapters 1-3 (originally published, 1859)

1/2 Overbreadth, Vagueness Doctrine Gunther, 1333-1350
1-1/2 Offensive Speech in Public Places Gunther, 1038-1054
1074-1094
2 Unprotected Speech: Libel and Privacy Gunther, 1054-1074
Optional: Tol, 195-203
1-1/2 Unprotected Speech: Obscenity Gunther, 1094-1126
Optional: MC, 56-77
1 Offensive Speech in Public Places: Nudity, Seven Bad Words Gunther, 1126-1158
1-1/2 Unprotected Speech: Advertising Gunther, 1158-1191
1-1/2 Symbolic Speech Gunther, 1203-1226
1-1/2 Public Forum: Regulations of Time, Place, and Manner Gunther, 1226-1272, 1280-1285
1-1/2 Rights of Access to the Forum Gunther, 1293-1294
1378-1386
1490-1502
1 Government and the Media: Of Censorship and Gag Orders

1 Campaign Financing: Is Money Speech? Optional:

Optional background readings:
1. John Rawls, A Theory of Justice
   Cambridge, Mass.: Harvard University Press, 1971
2. Robert Nozick, Anarchy, State, and Utopia
   New York: Basic Books, 1974
3. Charles Lindblom, Politics and Markets

1 First Amendment and Disclosure

V. RELIGIOUS AUTONOMY

1-1/2 The Free Exercise Clause

3 The Anti-Establishment Clause

Optional background readings:
1. John Milton, Areopagitica, J. Max Patrick, ed., The Prose of
2. John Locke, A Letter Concerning Toleration
   in John Locke, Treatise of Civil Government and Letter Concerning Toleration New York: Appleton-
   Century-Crofts, 1937 (originally published, 1690)

VI. DUE PROCESS

1 Due Process and the Methodology of Incorporation

Optional:
VII. SUBSTANTIVE DUE PROCESS AND EMERGING RIGHTS TO PERSONAL AUTONOMY OR PERSONHOOD

1 The Rise and Fall of Substantive Economic Due Process
   Gunther, 485-513

3 The Right of Personal Autonomy: Of Contraception, Abortion, Consensual Adult Sexuality, Death, Drugs, and Beyond
   Gunther, 544-629
   Optional:
   Tol, 231-281
   Foundations, 202-247
   Dworkin, 240-58

Optional background readings:
1. John Stuart Mill, On Liberty, chapters 4-5 (originally published, 1859)

VIII. EQUAL PROTECTION

1 Standards of Review: the Weak or Rational Basis Test
   Gunther, 640-667
   Optional:
   Dworkin, 150-83
   MC, 138-40
   Conscience,chs. 2-4

1-1/2 The Strict Test: Race as the Paradigm Case of a Suspect Classification
   Gunther, 667-671, 681-685
   Optional:
   Foundations,248-286
   Conscience,ch. 5

Optional background readings on racism (including anti-Semitism)
1. Jean-Paul Sartre, Anti-Semite and Jew George J.
Becker trans. New York: Grove, 1948

2. Gavin I. Langmuir, Toward a Definition of Antisemitism


4. N.J. Block & Gerald Dworkin, eds.,
   The IQ Controversy New York: Pantheon, 1976


6. Raoul Berger, Government By Judiciary
   Cambridge, Mass.: Harvard University Press, 1977

7. Michael Kent Curtis, No State Shall Abridge

8. William E. Nelson, The Fourteenth Amendment
   Cambridge, Mass.: Harvard University Press, 1988

9. Bruce A. Ackerman, "Beyond Carolene Products",
   98 Harv. L. Rev. 713 (1985)

10. Cass R. Sunstein, "Naked Preferences and the Constitution",
    84 Colum. L. Rev. 1689 (1984)

3 Racial Segregation
   Gunther, 671-681
   697-707
   Optional:
   Conscience, ch. 5

1 Affirmative Action (Race)
   Gunther, 707-769
   Optional:
   Dworkin, 223-239
   LE, ch. 10
   MC, 162-172

3 Gender as a Suspect Classification
   Gunther, 769-810
   Optional:
   Conscience, ch. 5
   Women, Gays, 1-287

Optional background readings:
1. Mary Wollstonecraft, A Vindication of the
   Rights of Women New York: Norton, 1967
   (originally published, 1790)

2. John Stuart Mill, The Subjection of Women
   Cambridge, Mass.: MIT Press, 1970 (originally published, 1869)

1-1/2 New Suspect Classifications:  
Alienage, Illegitimacy, Mental Retardation, Sexual Preference, Poverty  
Optional: Conscience, ch. 5  
Women, Gays, 288-457

3 The Strict Test: Fundamental Rights and Beyond (Minimal Welfare Rights)  
Optional: Conscience, chs. 6-7

IX. STATE ACTION AND THE ENFORCEMENT OF CIVIL RIGHTS

1 State Action  
Optional: Conscience, ch. 5

1 Beyond State Action:  
Congressional Enforcement Powers  
Optional:  
*Gunther, 926-946*  
*Gunther, 1415-1419*

2 Enforcement of Civil Rights and Reconstruction Amendments  
*Gunther, 946-983*