

CONSTITUTIONAL LAW SYLLABUS— FALL 2017

Professor Emily Berman – Course: 5488 | Section: 16691

Class meetings:
M, T, Th 6p-7:20p
Room: TUII-240

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Office Hours: T 4p-6p; W 2p-4p, or by appt.

Course Description

There is no denying the importance and significance of constitutional law as a topic of study. At the same time, many of the topics and doctrines we will study this semester are complicated, convoluted, and, at times, entirely incoherent. And although some topics—like abortion and affirmative action—will doubtless evoke strong feelings in many of you, other fundamental issues—such as the scope of Congress’s Commerce Clause power or the limits on the federal government imposed by the Tenth Amendment—are no less important simply because their implications for our daily lives may be less obvious. Further complicating things, the Supreme Court is perhaps even more unpredictable (and, arguably, more political) when it comes to constitutional doctrine than it is in any other area, which gives rise to additional, equally challenging, questions about the nature and role of the Court as an institution within our constitutional system—questions about its power, and, ultimately, its legitimacy.

Our goal this semester is to consider all of these issues (and more), and to gain an understanding not just of the individual constitutional doctrines we study, but more importantly, of the structure of the constitutional system in which those doctrines develop and operate, the forces that influence and determine constitutional meaning, the implications of particular interpretations, and the tools lawyers employ in analyzing, discussing, and arguing about these matters.

The course’s focus will be both historical and doctrinal, studying how many of our most important constitutional provisions and principles have evolved over time. Because of the breadth of the topic and our limited time, we simply cannot cover every topic (so, for instance, we will ignore the Bill of Rights almost entirely). And there will be some topics that we do cover, but in very little depth. Thus, this class is truly a *survey* of American constitutional law, and one that will hopefully leave you wanting to pursue any number of advanced topics in the field—such as the First Amendment, Criminal Procedure, or Federal Courts—during the rest of your legal studies.

As fun, interesting, and important as I hope you will find this class to be, I harbor no illusions as to the challenges it presents. It will likely be one of the most challenging classes you take in law school, and (if I’m doing my job right) easily the hardest course of your first year. The reasons are (at least) threefold: *First*, there is a *lot* of material. Though I’ve done my best to pare down the readings, a lot of reading is inevitable (probably more than your other classes – sorry!). *Second*, some areas can be complicated or conceptually difficult. We will spend our class time going over the most challenging and important points of the reading. As a result, class discussion will be far less valuable to you if you are not staying on top of the assignments. If you are having trouble keeping up, please come see me sooner rather than later to discuss.

Third, some students find frustrating or disconcerting the fact that many of the questions we will discuss this semester do not lend themselves to definitive answers. Many of you will wonder, at some point (or at many points) in the semester, “If the law is uncertain and any outcome is possible given the available arguments, what are we supposed to be learning, and what do we need to know (for the exam)?” Usually, the answer to this question is that, rather than memorizing the answers to questions such as “what is the black-letter rule?”, the relevant questions will be “what are the various possible outcomes of this dispute?”, “what is riding on those outcomes (the stakes)?”, and “what are the most effective arguments to deploy to advocate for any of those outcomes?” Some of you will find this ultimately unsatisfying—both the lack of definitive answers and the relatively abstract nature of the material that you should be taking away from the readings and class discussions. But I encourage you to embrace this feature of the class—ambiguity in the law is what provides space for lawyers to be creative, and learning to analyze legal questions in the face of this ambiguity is an important skill for lawyers to develop.

Expectations & Evaluation

In class, I will use a combination of cold calling—both to allow everyone an equal opportunity to participate and to assure that you come to class prepared—and volunteers. Participation in class discussion is necessary both for your own understanding of the material and for the benefit of your classmates.

With that in mind, a word about attendance: I expect you to attend every class prepared to discuss the assigned material; at the same time I’d rather you come to class unprepared than not come to class. If for some reason you are either unable to attend or to prepare for a particular class, ask me for a “pass” via email at least one hour before class, and I will refrain from calling on you that day. My presumption is that no student will need to avail him- or herself of this option more than 3 times during the semester. If you exceed 3 passes, whether due to absences or lack of preparation, you will not be eligible for the class participation grade adjustment (see below). If you fail to attend at least 80% of class meetings you will be in violation of ABA and Law Center policy and may be dropped from the course. I will keep track of attendance by passing around a sign-in sheet. It is an honor code violation to sign in for another student or to sign yourself in for a day when you did not attend.

Full class participation also includes completing several ungraded essay questions. These exercises are designed to allow you to practice and develop skills that will help you prepare for the exam.

Your grade will be based on one final exam, which will be administered on December 12, 6p-10p. I also reserve the right to “adjust” your final grade up or down one “iteration” (e.g., B+ to A- or to B) based upon class participation.

Assignments & Syllabus

The goal is to cover each numbered topic on the syllabus in one class session. I will not, however, rush through material or interrupt fruitful class discussion for the purpose of following this schedule to the letter. Moreover, as every class moves at its own, unpredictable pace, I reserve the right to modify the syllabus. When/if modifications occur, I will send an email, make an announcement in class, and post the updated syllabus online.

Additional Logistics

Office Hours: Please email me to set up an appointment whenever you would like to meet.

Required Casebook: PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (6th ed. 2014). I will also distribute additional required reading materials – listed as “Handout” on the syllabus – from time to time.

Required Supplement: PAUL BREST ET AL., 2017 SUPPLEMENT, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2016).

Supplemental Resources: While the assigned readings and class discussions should provide you with everything you need to be successful in the class, students seeking supplemental resources often find ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES helpful. The Fifth Edition (2015) has recently been published. *Please do not take this as a suggestion to buy this book*; I provide this information solely for those of you who think you would benefit from an additional source of information. Note that the Supreme Court has changed the landscape of constitutional law in a variety of areas over the past several years, and there have been many new and important decisions recently. It is therefore dangerous to rely solely on Chemerinsky (or any other secondary source) for definitive statements of the law.

E-mail: I will use your “@uh.edu” e-mail address for all class-related communication. It is your responsibility to check that account regularly.

Sensitive Topics: Constitutional Law can involve sensitive topics about which people have strongly held and widely divergent opinions. It is important for students to feel free to articulate positions with which they (or others) may not agree and to test the assumptions underlying their own (or others’) views. For this reason, I will insist that we show respect for all perspectives and encourage students to articulate arguments on all sides of an issue.

Laptop policy: You may use a laptop for taking notes in class. I urge you, however, to consider taking notes by hand both for many of the reasons set out by Georgetown law school Professor David Cole in his *Washington Post* op-ed, *Laptops v. Learning* (Apr. 7, 2007) and for another reason you may find more compelling: Class discussions often provide inspiration for exam questions. It is thus more important that you digest the class discussion than that you transcribe it word for word. Use of laptops or other electronic devices is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

Accommodation: If you have a disability and require an accommodation, please contact the Center for Students with Disabilities.

University Resources: The Provost has requested that we ensure you are aware that Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the “Let’s Talk” program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html.

- “PCD”:** PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (6th ed. 2014)
- “2017 Supp.”:** PAUL BREST ET AL., 2016 SUPPLEMENT, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2016)
- “HANDOUT”:** SUPPLEMENTAL MATERIAL NOT IN YOUR CASEBOOK OR THE SUPPLEMENT

INTRODUCTION

1. The Purpose(s) and Meaning(s) of the Constitution

August 21, 2017

- Class Syllabus – I will presume familiarity with the policies laid out above
- The U.S. Constitution [PCD 1–15]
- Background to the U.S. Constitution [PCD 17–28]
- HANDOUT: Jeffrey Toobin, *Our Broken Constitution*
- *Optional (suggested)*: Radiolab podcast (22:58), *Sex, Ducks, and the Founding Feud*: <http://www.radiolab.org/story/sex-ducks-and-founding-feud/>

2. Introduction to Constitutional Interpretation: *McCulloch v. Maryland*

August 22, 2017

- *McCulloch v. Maryland* I [PCD 40–57]
- Methods of Constitutional Interpretation [PCD 57–63]
- *McCulloch v. Maryland* II [PCD 67–72]
- HANDOUT: *Optional* – Ian Bartram, *The Modalities of Constitutional Argument*

HISTORICAL PERSPECTIVE – THE FOUNDING

3. The Founding: The Marshall Court and Judicial Review

August 24, 2017

- *Marbury v. Madison* [PCD 121–36 (through note 2)]
- *Optional*: More Perfect podcast (36:44), *Kittens Kick the Giggly Blue Robot All Summer* <http://www.wnyc.org/story/giggly-blue-robot>

4. The Founding: Judicial Review & Judicial Supremacy

August 28, 2017

- The Countermajoritarian Difficulty [PCD 140–52]
- HANDOUT: *Optional* – Excerpt of Alexander Bickel, *The Least Dangerous Branch*
- A “Dissent” from *Brown v. Board of Education* [PCD 1106–08]
- HANDOUT: Judge Roy Moore, Administrative Order of the Chief Justice of the Alabama Supreme Court, Jan. 6, 2016.

HISTORICAL PERSPECTIVE – THE CIVIL WAR & ITS AFTERMATH

5. The Road to Civil War

August 29, 2017

- Slavery & *Dred Scott* [PCD 268-93]
- Is the Constitution a Pro- or Anti-Slavery Document? [PCD 293–97]

6. The Civil War: The “New Birth of Freedom”

August 31, 2017

- The Prize Cases, *Ex Parte Merryman*, the Emancipation Proclamation, the Gettysburg Address, *Ex Parte Milligan* [PCD 317-37]

7. Post-Civil War: The Fourteenth Amendment – “Privileges or Immunities”

September 5, 2017

- Note: What the 14A did not say [PCD 63]
- *The Slaughterhouse Cases* [PCD 372-87] (through end of note 3)]

8. Post-Civil War: The Fourteenth Amendment – Incorporation & Equality

September 7, 2017

- Selective Incorporation [PCD 554-62]
- Women & the 14A [PCD 391-400] (begin with *Bradwell v. Illinois*)
- The Chinese Exclusion Cases [PCD 457-64] (through note 2)]

9. Post-Civil War: The Fourteenth Amendment – Race

September 11, 2017

- *Strauder*, *The Civil Rights Cases*, & *Plessy* [PCD 405-39]

Practice Question #1 – The Sedition Act of 2017

HISTORICAL PERSPECTIVE – THE PROGRESSIVE ERA

10. The Progressive Era: *Lochner* & “Substantive” Due Process

September 12, 2017

- The Rise of Substantive Due Process [PCD 476-79]
- *Lochner v. New York* [PCD 483–97]

*** NO CLASS THURSDAY SEPTEMBER 14

11. The Progressive Era: The Commerce Power

September 18, 2017

- *Champion v. Ames*, *Hammer v. Dagenhart* [PCD 503-18]

HISTORICAL PERSPECTIVE – THE NEW DEAL

12. The New Deal: The Emergence of Modern Judicial Scrutiny

September 19, 2017

- “The Switch in Time” (*Blaisdell*, *West Coast Hotel*, *Carolene Products* (pay special attention to FN4)) [PCD 563-84]

13. The New Deal: The Evolution of the Commerce Power

September 21, 2017

- *Schechter*, *Carter Coal*, *Butler* [PCD 613-25]
- *NLRB v. Jones & Laughlin Steel Corp.*, *United States v. Darby*, *Wickard v. Filburn*, [PCD 630-32; 634-40]
- Ackerman on Constitutional Change [PCD 640-42]

14. Congressional Power After the New Deal – The Commerce Power & Civil Rights

September 25, 2017

- The Civil Rights Movement [PCD 648-54]
- *Heart of Atlanta Motel v. United States*, *Katzenbach v. McClung* [PCD 654-60]

15. Congressional Power After the New Deal – The Enforcement Power

September 26, 2017

- *South Carolina v. Katzenbach*, *Katzenbach v. Morgan* [PCD 667-82 (thru n.5)]
- *Oregon v. Mitchell* [PCD 689-95]

THE MODERN CONSTITUTION – CONGRESSIONAL POWER

16. Congressional Power & the Modern Court – The Enforcement Power Revisited

September 28, 2017

- *City of Boerne v. Flores*, *United States v. Morrison* [PCD 780-90; 794-97 (note 2)]
- *Shelby County v. Holder* [PCD 801-22 (through note 6)]

17. Congressional Power & the Modern Court – The Commerce Power

October 2, 2017

- *United States v. Lopez* [PCD 697-720 (thru note 6)]
- *United States v. Morrison*, *Raich v. Gonzales* [PCD 720-724]

18. Congressional Power & the Modern Court – The Commerce Power (continued)

October 3, 2017

- *NFIB v. Sebelius*—the commerce power [PCD 724-748]

19. Congressional Power and the Modern Court – The Taxing & Spending Powers

October 5, 2017

- *NFIB v. Sebelius*—the taxing power [PCD 752-61]
- *South Carolina v. Dole* [PCD 761-63]
- *NFIB v. Sebelius*—the spending power [PCD 763-76]

20. Congressional Power and the Modern Court – The Tenth Amendment

October 9, 2017

- *New York v. United States* [PCD 850-69]
- *Printz v. United States* [PCD 869-81]

THE MODERN CONSTITUTION – EXECUTIVE POWER

21. Executive Power: The “Non”-Prosecution Power and Executive Privilege

October 10, 2017

- *United States v. Cox* [PCD 912-26]
- **Optional:** Planet Money Podcast, *Episode 420: The (Legal) Marijuana Business*, <http://www.npr.org/blogs/money/2012/12/04/166514067/episode-420-the-legal-marijuana-business>
- *United States v. Nixon, President of the United States* [PCD 926-37]

22. Executive Power: Immunity & The Appointment Power

October 12, 2017

- Presidential Immunity [PCD 1079-83]
- *In re Sealed Case & Morrison v. Olson* [937-963 thru n.2; 965-66 n.4]
- TBD

23. Executive Power: War and Emergency Powers I – Constitutional Distribution of War Powers

October 16, 2017

- *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case) [PCD 1010-22; 1024-27 (notes 4-8)]

24. Executive Power: War & Emergency Powers II – Detention

October 17, 2017

- *Korematsu v. United States* [PCD 1132-36 (thru n.1)]
- *Hamdi v. Rumsfeld* [PCD 1037-64]

25. Executive Power: War & Emergency Powers III – Interrogation & Targeted Killing

October 19, 2017

- Interrogation [PCD 1073-77]
- **HANDOUT:** Excerpts from DYCUS ET AL., NATIONAL SECURITY LAW (6th ed. 2016) [993-1000; 1045-46]
- Targeted Killing [PCD 1077-79]
- **HANDOUT:** Excerpts from DYCUS ET AL., NATIONAL SECURITY LAW (6th ed. 2016) [417-420; 430-43]

Practice Question #2 – Congressional Limits on First-Use Nuclear Strikes

THE MODERN CONSTITUTION – EQUAL PROTECTION

26. Equal Protection: Desegregation – *Brown v. Board of Education*

October 23, 2017

- *Brown v. Board of Education* [PCD 1093-1108]

27. Equal Protection: Desegregation – Enforcing *Brown*

October 24, 2017

- *Green, Swann, Keyes, Milligan I&II, Jenkins, Parents Involved* [PCD 1113-28]
- The Courts and Social Change [PCD 1128-31]

28. Equal Protection: Antidiscrimination and the Suspect Classification Doctrine

October 26, 2017

- *Loving v. Virginia* [PCD 1139-52] & What is Race? [PCD 1158-60]

29. Equal Protection: What Constitutes “Race-Based” Discrimination?

October 30, 2017

- Implied Association Bias Test: <https://implicit.harvard.edu/implicit/takeatest.html> (pick one related to race/ethnicity/national origin or gender)
- Typology of race-dependent decisions [PCD 1160–63]
- *Washington v. Davis & Arlington Heights* [PCD 1168-74]
- *Feeney* [PCD 1453-62]

30. Equal Protection: Race-Based Affirmative Action: Past and Present I

October 31, 2017

- *Adarand* [PCD 1255-60]
- *Grutter* [PCD 1266-87; 1293-95 (notes 1- 3)]

*** NO CLASS THURSDAY NOVEMBER 2

31. Equal Protection: Race-Based Affirmative Action: Past and Present II

November 6, 2017

- *Fisher II* [2017 Supp. TBD]
- *Parents Involved* [PCD 1296-TBD]
- *Schuetz v. Coalition to Defend Affirmative Action* [PCD 1197-1213]

32. Equal Protection: The Modern Debate Over Gender / Sex Equality

November 7, 2017

- The Emergence of Intermediate Scrutiny [PCD 1376-88]
- The VMI Case [PCD 1411-33]

33. Equal Protection: Other Suspect Classes? a/k/a Rational Basis with Bite

November 9, 2017

- *Cleburne* [PCD 1487-1503]
- *Romer v. Evans* [PCD 1647–58]

Practice Question #3 – Discrimination Against French-Canadian Inmates

34. Substantive Due Process: Implied Fundamental Rights

November 13, 2017

- *Griswold v. Connecticut* [PCD 1511-29 (thru n.4)]
- *Roe v. Wade* [PCD 1541-57]
- Did Roe Cause the Abortion Conflict? [PCD 1560-63]

35. Substantive Due Process: Abortion After *Roe*

November 14, 2017

- *Casey* [PCD 1578-1613]
- *Whole Women's Health* [2017 Supp. TBD]

36. Substantive Due Process: Sexual Orientation as a Fundamental Right? I

November 16, 2017

- *Lawrence v. Texas* [PCD 1659-66 (Kennedy, J.'s opinion); 1669-75 (Scalia, J.'s dissent); 1675-77 (nn.1-3)]
- *United States v. Windsor* [PCD 1693-1700 (majority opinion); 1707-11 (Justice Alito's dissent, part II & III)]

37. Substantive Due Process: Sexual Orientation as a Fundamental Right? II

November 20, 2017

- *Obergefell v. Hodges* [2017 Supp. TBD]
 - (majority opinion, parts II & III)
 - (majority opinion, part V)
 - (Justice Roberts' dissent, part IV)
 - (Justice Scalia's dissent)
 - (Justice Alito's dissent, part III)
 - (notes 1, 2, 4, 5, 10, 11)