

CONSTITUTIONAL LAW
Professor Emily Berman

Spring 2015 | Room TBA
Tuesdays & Thursdays 10:30 am - 11:50 am;
Wednesdays 1:00 pm - 2:20 pm
Final exam: 4-hour in-class limited open book

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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 the Commerce Clause 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 perhaps more importantly, of the structure of the constitutional system in which those doctrines develop and operate, the forces that influence and determine constitutional meaning, and the tools lawyers employ in analyzing and discussing 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 will not be able to cover every topic (so, for instance, we will basically ignore the Bill of Rights). 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 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 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, let me know 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 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. Late arrivals may be treated as absences.

Formally, your grade will be based on one final exam. 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 your 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: Wednesdays after class, from 2:30p-4:30p and Thursdays from 2p-4p. I am always happy to talk with students, so if that time is not convenient for you please feel free to email me to set up an appointment.

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

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.

Supplemental Resources: While the assigned readings and class discussions should provide you with everything you need to be successful in the class, some students find ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (4th ed. 2011) helpful in understanding some of the issues in Constitutional Law. Please do not take this as a suggestion to go out and buy this book; I provide this information solely for those of you who find supplemental materials helpful. You are not responsible for any of the contents of this book for the purposes of the exam. And your time and energy will be much better spent focusing on the assigned readings. Please note also that the Supreme Court has been changing the landscape of constitutional law in a variety of areas central to this course for a number of years. Being a brand new edition, our casebook is updated, but there have been new and important decisions since the publication of Chemerinsky’s hornbook. It is therefore dangerous to rely on it (or any other secondary source) for statements of what the law “is.”

Sensitive Topics: More than any other course in the first year of law school, Constitutional Law at times deals with sensitive topics about which people have strongly held and widely divergent opinions. At the same time, 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, consider all statements made in class to be begin with a silent “one could argue that . . .” Outside of the classroom, you may not attribute any statements made in class to any of your classmates; do not assume that an argument made in class reflects its speaker’s views.

Laptop policy: You may use a laptop for taking notes in class. I urge you, however, to consider taking notes by hand. I do so 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). In addition to Professor Cole’s arguments, you may find another 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. In addition, 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.

SYLLABUS

“PCD”: PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (6th ed. 2014)

“HANDOUT”: SUPPLEMENTAL MATERIAL AVAILABLE ON THE COURSE WEBSITE:
[HTTP://WWW.LAW.UH.EDU/FACULTY/EBERMAN/](http://www.law.uh.edu/faculty/ebberman/)

INTRODUCTION:

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

- Class Syllabus
- 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 (22:48), *Sex, Ducks, and the Founding Feud*: <http://www.radiolab.org/story/sex-ducks-and-founding-feud/>

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

- *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: A Primer*

HISTORICAL PERSPECTIVE – THE EARLY CONSTITUTION

3. The Founding: The Marshall Court and Judicial Review

- *Marbury v. Madison* [PCD 121–36 (through note 2)]

4. The Founding: Judicial Review & Limits on Judicial Power

- The Countermajoritarian Difficulty [PCD 140–52]
- HANDOUT: **Optional** – Excerpt of Alexander Bickel, *The Least Dangerous Branch*
- Article III Limits on Judicial Power [PCD 1086–91]
- *Boumediene v. Bush* [PCD 1066–68]

5. The Founding: Does Judicial Review Mean Judicial Supremacy?

- Andrew Jackson's Veto Message [PCD 77-82]
- Walter Dellinger's Memo [PCD 82-85]
- The Sedition Act and the Virginia & Kentucky Resolutions [PCD 95-106]
- Lincoln-Douglas Debates [PCD 297-300 (stop at "discussion")]
- HANDOUT: Parker, *Alabama Justices Surrender to Judicial Activism*, Jan. 1, 2006

6. The Road to Civil War

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

7. The Civil War: The "New Birth of Freedom"

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

8. Post-Civil War: The Fourteenth Amendment – "Privileges or Immunities"

- Adoption of the 14A [PCD 347-58, 63 (the note about what the 14A did not say)]
- *The Slaughterhouse Cases* [PCD 372-87 (through end of note 3)]

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

- Selective Incorporation [PCD 554-62]
- Women & the 14A [PCD 391-400 (begin with *Bradwell v. Illinois*)]

10. Post-Civil War: The Fourteenth Amendment – Creating An American Nation

- The Constitution in the Territories [PCD 444-55]
- The Chinese Exclusion Cases [PCD 457-64 (through note 2)]

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

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

12. The “Lochner Era” – Lochner

- The Rise of Substantive Due Process [PCD 476-79; skip Eminent Domain Clause note]
- *Lochner v. New York* [PCD 483-97]

13. The “Lochner Era” – Commerce

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

14. The New Deal: The New Deal and the Emergence of Modern Judicial Scrutiny

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

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

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

16. Congressional Power After the New Deal – The Commerce Power as Civil Rights Power

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

17. Congressional Power After the New Deal – The (Section Five) Enforcement Power

- Reconstruction power in the Civil Rights Era [PCD 660-66]
- *South Carolina v. Katzenbach, Katzenbach v. Morgan* [PCD 667-82 (thru n.5)]

THE MODERN CONSTITUTION – CONGRESSIONAL POWER

18. Congressional Power and the Modern Court – The (Section Five) Enforcement Power Revisited

- *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)]

19. & 21. Congressional Power and the Modern Court – The Commerce Power & The Spending Power

- *United States v. Lopez, United States v. Morrison, Raich v. Gonzales* [PCD 697-724]
- *South Carolina v. Dole* [PCD 761-63]

22. Congressional Power and the Modern Court – Commerce, Taxing, & Spending Powers

- *NFIB v. Sebelius*—the commerce power [PCD 724-748]
- *NFIB v. Sebelius*—the taxing power [PCD 752-61]
- *NFIB v. Sebelius*—the spending power [PCD 763-76]

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

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

THE MODERN CONSTITUTION – EXECUTIVE POWER

24. Executive Power: The “Non”-Prosecution Power

- *United States v. Cox* [PCD 912-26]
- **HANDOUT:** DOJ Guidance Regarding Marijuana Related Financial Crimes
- **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>

25. Executive Power: Executive Privilege & Immunity

- *United States v. Nixon, President of the United States* [PCD 926-37]
- Presidential Immunity [PCD 1079-83]

26. Executive Power: The Veto Power

- The Legislative Veto & The Line Item Veto [983-1007]

27. Executive Power: War and Emergency Powers I

- *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case) [PCD 1010-22; 1024-27 (notes 4-8)]
- *Korematsu v. United States* [PCD 1132-36 (thru n.1)]

28. Executive Power: War & Emergency Powers II

- *Hamdi v. Rumsfeld* [PCD 1037-64]
- HANDOUT: Noah Feldman, *Whose War Powers?*

29. Executive Power: War & Emergency Powers III

- HANDOUT: Bybee Memo 8-1-2002 [Intro; Part V]
- HANDOUT: DOJ White Paper on Targeted Killing
- HANDOUT: OLC Memo on Lethal Operations against Anwar al-Aulaqi [Part VI]

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS

30. & 31. Equal Protection: Desegregation

- *Brown v. Board of Education* [PCD 1093-1108]
- *Green, Swann, Keyes, Milligan I&II, Jenkins, Parents Involved* [PCD 1113-28]
- The Courts and Social Change [PCD 1128-31]

31. Equal Protection: Antidiscrimination and the Suspect Classification Doctrine

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

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

- Implied Association Bias Test: <https://implicit.harvard.edu/implicit/takeatest.html> (pick one to take that is related to race/ethnicity/national origin or gender)
- Typology of race-dependent decisions [PCD 1160–63]
- *Washington v. Davis* [PCD 1168-73]
- *Ricci* [PCD 1186-93]
- *Seattle School Dist. 1* [PCD 1193-1197]

33. & 34. Equal Protection: Race-Based Affirmative Action: Past and Present

- *Adarand* [PCD 1255-60]
- *Grutter* [PCD 1266-87; 93-95 (notes 1- 3)]
- *Parents Involved* [PCD 1296-1332]

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

- The Emergence of Intermediate Scrutiny [PCD 1376-88]

- The VMI Case [PCD 1411-33]

36. Equal Protection: What Constitutes “Sex-Based” Discrimination?

- *Feeney* [PCD 1453-62]
- *Aiello* [PCD 1463-65]
- *Hibbs* [PCD 1469-77]

37. Equal Protection: Other Suspect Classes Under the Equal Protection Clause?

- Rational Basis with Bite: *Cleburne* [PCD 1487-1503]

38. Substantive Due Process: Implied Fundamental Rights

- *Griswold v. Connecticut* [PCD 1511-29 (thru n.4)]
- *Roe v. Wade* [TBD]

39. Substantive Due Process: Abortion After *Roe*

- *Casey* [TBD]
- *Gonzales v. Carhart* (Carhart II) [PCD 1613-22 (thru n.1)]

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

- *Romer v. Evans* [PCD 1648–58]
- *Lawrence v. Texas* [TBD]

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

- *United States v. Windsor* [PCD 1690-1716]

42. Makeup/Spillover/Review Session