

Constitutional Law Syllabus – Spring 2020  
**Professor Emily Berman – Course: 5488 | Section: 12394**

Class meetings:

M 1p-2:30p; T, Th 9a-10:30a

Room: TU2 – 114

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Office Hours: M 4p-5p, Th 12p-2p, 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—such as abortion and affirmative action—will doubtless evoke strong feelings in many of you, other fundamental issues—such as the limits on Congress’s Commerce Clause power or the scope of the Presidential Appointment Power—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. As we will see over the course of the semester, constitutional doctrine is always in flux—perhaps now more than at in time since the 1960s. It is therefore important to consider the mechanisms through which such evolution takes place, and to consider the role that lawyers have in driving the development of constitutional meaning.

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 most of 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—such as 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 April 28, 9a-1p. 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:** I will usually be in my office Mondays 3p-5p and Thursdays 12p-2p, but feel free to email me to set up an appointment outside of those times.

**Required Casebook:** PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (7th ed. 2018). I will also post online additional required reading materials – listed as “Handout” on the syllabus – from time to time.

**Required Supplement:** None.

**Supplemental Resources:** While there is no required supplement—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 (5th ed. 2015) helpful. 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.

**Chosen names & preferred pronouns:** I go by Professor Berman, and I use she/her/hers as my pronouns. I will gladly honor requests to use alternate names or gender pronouns—including non-binary ones such as they/them/theirs. Please advise me of your preference in this matter early in the semester so that I may make appropriate changes to my records. Also, let me know if you prefer a nickname to the one that appears on the class roster. Please feel free to reach out to me at any time if you have concerns about how I or your classmates address you.

**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 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). It is 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](http://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](http://www.uh.edu/caps/outreach/lets_talk.html).

**“PCD”:** PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (7th ed. 2018).

**“HANDOUT”:** SUPPLEMENTAL MATERIAL NOT IN YOUR CASEBOOK OR THE SUPPLEMENT.

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## INTRODUCTION

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

**Monday, January 13, 2020**

- Class Syllabus – I will presume familiarity with the policies laid out above
- The U.S. Constitution [PCD 1–16]
- Background to the U.S. Constitution [PCD 17–25]
- 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***

**Tuesday, January 14, 2020**

- *McCulloch v. Maryland* I [PCD 39–55]
- Methods of Constitutional Interpretation [PCD 55–66]
- *McCulloch v. Maryland* II [PCD 66–74]
- HANDOUT: **Optional** – Ian Bartram, *The Modalities of Constitutional Argument*

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## HISTORICAL PERSPECTIVE – THE FOUNDING

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### 3. **The Founding: The Marshall Court and Judicial Review**

**Thursday, January 16, 2020**

- **Optional**: *More Perfect* podcast (36:44), “Kittens Kick the Giggly Blue Robot All Summer,” <http://www.wnyc.org/story/giggly-blue-robot>
- *Marbury v. Madison* [PCD 120–35 (through note 3)]

### 4. **The Founding: Judicial Review & Judicial Supremacy**

**Tuesday, January 21, 2020**

- The Countermajoritarian Difficulty [PCD 144–54]
- HANDOUT: **Optional** – Excerpt of Alexander Bickel, *The Least Dangerous Branch*
- Andrew Jackson’s Veto Message [PCD 76–81]
- Notes on Departmentalism, Constitutional Protestantism, & Popular Constitutionalism [PCD 134–37]
- HANDOUT: Judge Roy Moore, Administrative Order of the Chief Justice of the Alabama Supreme Court, Jan. 6, 2016.
- Article III Limits on Judicial Power [PCD 139–44]

## HISTORICAL PERSPECTIVE – THE CIVIL WAR & ITS AFTERMATH

5. **The Road to Civil War**  
Thursday, January 21, 2020  
➤ Slavery & *Dred Scott* [PCD 260-88 (only notes 1, 2, & 8)]
6. **The Civil War: The “New Birth of Freedom”**
7. **Post-Civil War: The Fourteenth Amendment – “Privileges or Immunities”**
8. **Post-Civil War: The Fourteenth Amendment – Who Are “We the People”?**
9. **Post-Civil War: The Fourteenth Amendment – Race**

Practice Question #1 – The Sedition Act of 2017

## HISTORICAL PERSPECTIVE – THE PROGRESSIVE ERA

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

## HISTORICAL PERSPECTIVE – THE NEW DEAL

12. **The New Deal: The Evolution of Due Process & the Emergence of Modern Judicial Scrutiny**
13. **The New Deal: The Evolution of the Commerce Power**
14. **Congressional Power After the New Deal – The Source of Civil Rights Powers**

## THE MODERN CONSTITUTION – STRUCTURE: CONGRESSIONAL POWER

15. **Congressional Power & the Modern Court – The Enforcement Power**
16. **Congressional Power & the Modern Court – The Commerce Power**
17. **Congressional Power & the Modern Court – The Commerce Power (continued)**
18. **Congressional Power and the Modern Court – The Taxing & Spending Powers**
19. **Congressional Power and the Modern Court – The Tenth Amendment**

## THE MODERN CONSTITUTION – STRUCTURE: EXECUTIVE POWER

- 20. Executive Power: The “Non”-Prosecution Power & Executive Discretion
- 21. Executive Power: The Appointment Power
- 22. Executive Power: Presidential Privileges & Immunity
- 23. Executive Power: Congressional Oversight of Executive Power
- 24. Executive Power: The Scope of War and Emergency Powers

\*\*\* Spring Break \*\*\*

- 25. Executive Power: War & Emergency Powers – Detention & Targeted Killing

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

## THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: EQUAL PROTECTION

- 26. Equal Protection: Desegregation – *Brown v. Board of Education* & Its Progeny
- 27. Equal Protection: What Constitutes “Race-Based” Discrimination?
- 28. Equal Protection: Race-Based Affirmative Action: Past and Present I
- 29. Equal Protection: Race-Based Affirmative Action: Past and Present II
- 30. Equal Protection: The Modern Debate Over Gender / Sex Equality
- 31. Equal Protection: Other Suspect Classes?

Practice Question #3 – Discrimination Against French-Canadian Inmates

## THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: SUBSTANTIVE DUE PROCESS

- 32. Substantive Due Process: Implied Fundamental Rights
- 33. Substantive Due Process: Abortion After *Roe*
- 34. Substantive Due Process: Sexual Orientation as a Fundamental Right?

## THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: THE FIRST AMENDMENT

- 35. The First Amendment: Introduction & Incitement

- 36. **The First Amendment: Offensive Speech**
- 37. **The First Amendment: Offensive Speech (con't)**
- 38. **The First Amendment: Speech vs. Conduct**
- 39. **The First Amendment: Compelled Speech**
- 40. **The First Amendment: Free Exercise of Religion**
- 41. **The First Amendment: The Establishment Clause**