

Syllabus – Subject to Change

CONSTITUTIONAL LAW SYLLABUS – FALL 2026 Professor Emily Berman – Course: 5488 | Section: 11905

Class meetings: Face-to-Face M, W 5:30p-7:15p

Room: TBD

Email: eberman@uh.edu

Office: 431G | (713) 743-2507

Office Hours: M, W 4p-5p, or by appt.

Exam: In-class, Time/date TBD

Required Book: Sandy Levinson et al.,
*Processes of Constitutional
Decisionmaking: Cases and Materials*
(8th ed. 2022).

Course Description & Learning Objectives

There is no denying the importance and significance of constitutional law as a topic of study. At the same time, under the best of circumstances, it is a challenging area of law. The meaning of the Constitution has continuously evolved over the course of the nation's history, resulting in doctrine that is often ambiguous, convoluted, and, at times, downright incoherent. While change has always been a constant, it has been particularly intense in recent years, with broad swaths of doctrine—particularly doctrine regarding hot-button issues—being rewritten, reversed, or called into question on an extremely compressed time frame. Further complicating things, the Supreme Court often appears (accurately or not) more political when it comes to constitutional doctrine than it does in any other area.

At the same time, we are studying law, not politics. So, it is our task this semester to shed light, rather than heat, on this always fascinating, often maddening, and increasingly consequential area of law. And although some topics—such as abortion and LGBTQ+ rights—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 Appointments Clause—are no less important simply because their implications for our daily lives may be less obvious. And as we have seen in recent months and years, the role of the Supreme Court in shaping constitutional meaning gives rise to additional, equally challenging, questions about the nature and role of the Court (and the courts) as an institution within our constitutional system—questions about its power, and, ultimately, its legitimacy.

As you will see, these vexing questions may take different forms in different generations, but at their heart they are always about a fundamental paradox known as “the countermajoritarian difficulty”: how do we reconcile immutable constitutional dictates defined by the only unelected branch of government with our commitment to democratic governance? Our goal this semester is to explore all of these issues (and more), and to gain an understanding not only 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. Because constitutional doctrine is always in flux—perhaps now more than at in time since the 1960s—it is important to consider the mechanisms through which such evolution takes place, and to consider the role that lawyers can and should have in driving the development of constitutional meaning.

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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 everything (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 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 in your 1L 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 of law 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) during the semester, “If the law is uncertain and any outcome is possible given the available arguments, what are we supposed to be learning (for the exam)?” Usually, the answer to this question is that, in addition to knowing the answer to the question “what is the black-letter rule?” where such a thing exists, it is important to recognize when the law *does not provide a clear answer*. In those cases, the relevant questions become “what are the various possible outcomes of this dispute?”, “what is riding on those outcomes (what are the stakes or the implications)?”, and “what are the most effective arguments to deploy to advocate for any given outcome?”

Some of you will find this ultimately unsatisfying—both the lack of definitive answers and the relatively abstract nature of some of the material that you should be taking away from the readings and class discussions. But I encourage you to embrace this feature of constitutional law—ambiguity in the law is what provides space for lawyers to be creative (i.e., the reason lawyers have jobs!). As a result, learning to analyze legal questions in the face of ambiguity is an important skill for lawyers to develop, regardless of the area of practice you expect to pursue.

Learning Outcomes

Upon successful completion of the course, a student will be able to identify, explain, and accurately apply key topics within each of the following constitutional doctrines: the Judicial Power, Federal Legislative Power, Federal Executive Power, Separation of Powers, Federalism, Constitutional History and Development, Methods and Theories of Interpretation, Equal Protection, Due Process, First Amendment, and Second Amendment. A student will be able to demonstrate this mastery through performance on the instructor's chosen assessment format: an objective portion of the final examination, and coherent, rule-driven analysis in essay responses.

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Students will also be able to:

- **Analyze novel fact patterns:** detect constitutional issues in new scenarios, predict likely outcomes, identify areas of indeterminacy.
- **Develop and articulate persuasive constitutional arguments:** recognition of doctrine, interpretive method, anticipation of counterarguments.
- **Contextualize constitutional controversies:** Relate contemporary legal disputes or news items to historical precedent and doctrinal frameworks.

Expectations & Evaluation

In class, I will use a combination of cold calling and volunteers—both to allow everyone an equal opportunity to participate and to assure that you come to class prepared. Participation in class discussion is necessary both for your own understanding of the material and for the benefit of your classmates. I will inform you of who is on call that day *at the beginning of each class*, hopefully reducing anxiety at least a little bit for those of you who aren't on call.

Reading Materials: The required casebook is Sandy Levinson et al., *Processes of Constitutional Decisionmaking* (8th ed. 2022).

- **A note on electronic case books:** Be aware that the exam is open book, but it will use Electronic Bluebook in a mode that precludes access to all other material on your computer. If you want to be able to access your casebook, therefore, you must acquire a hard copy or print out the portions you would like to have with you for the exam.
- Any assignments that are not found in the casebook will be posted on Canvas in the Handouts folder or directly linked in the specific assignments for each class.

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, simply ask me for a “pass” via email ***at least one hour before class***, and I will refrain from calling on you that day. Please, I beg you, do not fail to let me know in advance. My presumption is that no student will need to avail themselves 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 upward 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. If you are unable to limit yourself to three absences/passes due to unforeseen circumstances—family emergencies, medical procedures, etc.—please let me know and we will figure out how to handle that.

To register your attendance for class each day, go to this **[link tbd]** (also provided on Canvas) to sign in with your name and that day's “code” word, which I will give you at the beginning of class.

Class Meetings: I will teach the vast majority of class sessions from the classroom (there may be a few classes that I teach via Zoom due to unavoidable travel conflicts). My expectation is that you will attend in person as well. I know, however, that many of you have a lot going on in your lives at the moment. So, if your available technology allows, you may attend a class via Zoom up to 3 times for any reason at all. After that, Zoom will be an option if you have a legitimate reason – if

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you're not feeling well, for example. Please let me know about such occasions as far in advance as possible.

Assessment.

- **Formative Assessment (midterm):** We will have an *in-class midterm* on TBD consisting of multiple choice, short answer, and essay questions. *The midterm will be graded on a pass/fail basis, and it will count as 10% of your grade for the semester.*
- **Summative Assessment (final):** We will have an *in-class final exam* on TBD which will consist of multiple choice, short-answer, and essay questions. *The final will count as 90% of your grade for the semester.*
- **Exam Logistics:** The exams will be open book—you may refer to your class notes, any assigned reading material, and any study guides or outlines that you participated in generating. The exams will be administered via Electronic Bluebook. During the exams, you will not have access to anything on your computer other than the exam software. You must therefore plan to bring hard copies of any materials that you would like to refer to during the exam.
- **Class participation:** 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.

Tutors: There will be two course tutors—TBD, each of whom will hold weekly office hours and be available to answer questions. They will also periodically hold review sessions.

Canvas Website. All class-related materials, including Handouts, PowerPoint slides, reading questions, and the syllabus will be posted on Canvas.

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. To access this email, [login](#) to your Microsoft 365 account with your CougarNet credentials.

Additional Class Logistics & Policies

Office Hours: I will usually be available Mondays and Wednesdays from 4p-5p, but I’m happy to set up an appointment outside of those times.

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 (7th ed. 2023) 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.

Use of AI: This syllabus policy covers the textual output of what are known as generative “large language models” (LLMs), such as ChatGPT and Claude (AI-Generated Work Product). Because

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AI-Generated Work Product can often mimic human intelligence, it could potentially be used as a substitute for a student’s own work product. Such use is potentially problematic to the extent that it becomes a substitute for internalized student understanding of the material or creates a dependency on AI-Generated Work Product, which may be strictly prohibited in settings that include the bar examination.

- **Prohibition:** Subject to the exceptions immediately below, your continuing enrollment in this course constitutes your pledge not to generate or to use any AI-Generated Work Product—whether from yourself or others—in relation to any assessment in this course. The term “assessment” means any graded or ungraded work product for this course that is submitted to the instructor, presented in a class session, or used in an oral or written graded assessment for this course.
- **Exceptions:** The following AI-Generated Work Product uses are not prohibited. The exceptions’ intent is to allow the generation and use of AI-Generated Work Product for specific, narrowly defined activities related to this course.
 - You may generate and use AI-Generated Work Product for class preparation, although you must disclose the full extent of that use if your instructor asks. You may generate and use AI-Generated Work Product for study supplements to aid with general understanding of course content. This could take different forms that include (but are not limited to) creating examples or explanations of a concept, generation of diagrams and flow charts, “gamification” of course content, flash cards for study, or sample questions and answers.
 - You may generate and use AI-Generated Work Product for an outline that summarizes the course content.
 - You may use AI-Generated Work Product to check your originally drafted text for misspellings, grammar and punctuation errors, strength and clarity of prose, verbosity, effective transitional language and thesis sentences, word choice, excessive passive voice, and like things.
 - You may use AI-Generated Work Product for the purpose of language translation.

Preferred Forms of Address: I will gladly honor requests to use alternate names or pronouns. Please advise me of your preference early in the semester so that I may make appropriate changes to my records.

Computer Policy: Use of computers or other electronic devices is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

Honor Code: The UHLC Honor Code applies to all aspects of this course. You are responsible for knowing all Honor Code provisions and for complying with the Honor Code. Please inquire if you have any questions regarding how the Honor Code’s provisions apply to specific activities or situations related to this course. Your continuing enrollment in this course is deemed to be a pledge by you under the Honor Code to comply with the Honor Code in relation to this course and to comply with the instructions in the course syllabus.

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Reading Assignments

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.

- **Casebook:** The required casebook is Levinson et al. *Processes of Constitutional Decisionmaking: Cases and Materials* (8th ed. 2022).
- **Handouts:** Any assigned reading that is not in the 8th edition of *Processes of Constitutional Decisionmaking* will be posted on Canvas in the Handouts module.
- **Reading questions:** For each class, there will be a list of reading questions. You do not need to formally answer these in any way. They are simply meant to help focus your reading energies on the most important elements of the assigned materials. These, too, will be posted on Canvas, in the Reading Questions module.

“PCD”: SANDY LEVINSON ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (8th ed. 2022).

“HANDOUT”: Supplemental material that will be posted on the Canvas website.

INTRODUCTION

Week 1

1. **Introduction to Constitutional Law**
Monday, August 24
2. **Fundamental Debate #1: Where Do We Look to Find Constitutional Meaning?**
Wednesday August 26

HISTORICAL PERSPECTIVE – THE FOUNDING

Week 2

3. **Fundamental Debate #2: Who Decides What the Constitution Means?**
Monday, August 31
4. **Constraints on the Judiciary & The Countermajoritarian Difficulty**
Wednesday, September 2

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HISTORICAL PERSPECTIVE – THE CIVIL WAR & ITS AFTERMATH

Week 3

5. The Road to Civil War
Wednesday, September 9

Week 4

6. The Civil War: The “New Birth of Freedom”
Monday, September 14
7. Post-Civil War: The Fourteenth Amendment – “Privileges or Immunities”
Wednesday, September 16

Week 5

8. Post-Civil War: The Fourteenth Amendment – Who Are “We the People”?
Monday, September 21
- Add birthright citizenship case

Practice Question #1 – Judicial Review

9. Post-Civil War: The Fourteenth & Fifteenth Amendments – Race
Wednesday, September 23

HISTORICAL PERSPECTIVE – THE PROGRESSIVE/LOCHNER ERA

Week 6

10. Progressive/Lochner Era Due Process and the Commerce Clause
Monday, September 28

HISTORICAL PERSPECTIVE – THE NEW DEAL

11. The New Deal: The Emergence of Modern Judicial Scrutiny
Wednesday, September 30

Week 7

12. Congressional Power After the New Deal: The Source of Civil Rights Powers
Monday, October 5

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THE MODERN CONSTITUTION – STRUCTURE: CONGRESSIONAL POWER

13. **Congressional Power & the Modern Court: The Enforcement Power**
Wednesday, October 7, 2024

Week 8

14. **Congressional Power & the Modern Court: The Commerce Power**
Monday, October 12
15. **Congressional Power and the Modern Court: The Taxing & Spending Powers and the Tenth Amendment**
Wednesday, October 14

THE MODERN CONSTITUTION – STRUCTURE: EXECUTIVE POWER

Week 9

16. **Midterm**
Monday, October 19
17. **Executive Power: War & Emergency Powers**
Wednesday, October 21

Week 10

18. **Executive Power: The Appointment Power**
Monday, October 26
19. **Executive Power: Presidential Privileges and Immunities**
Wednesday, October 28

Week 11

20. **Executive Power: Congressional Oversight of the Executive Power**
Monday, November 2

Practice Question #2 – Executive Power

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: EQUAL PROTECTION

21. **Equal Protection: Desegregation – *Brown v. Board of Education* & its Progeny**
Wednesday, November 4

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Week 12

22. **Equal Protection: The Emergence of Strict Scrutiny & What Constitutes “Race-Based” Discrimination?**
Monday, November 9
23. **Equal Protection: Race-Based Affirmative Action**
Wednesday, November 11

Week 13

24. **Equal Protection: The Modern Debate Over Sex Equality**
Monday, November 16
25. **Substantive Due Process: Implied Fundamental Rights & the Abortion Debate**
Wednesday, November 18

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: SUBSTANTIVE DUE PROCESS

Week 14

26. **Sexual Orientation as a Fundamental Right? As a Protected Class?**
Monday, November 23

Thanksgiving

27. **Review Session**
Monday, November 30

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University Policies & Resources

Reasonable Academic Adjustments/Auxiliary Aids:

The University of Houston is committed to providing an academic environment and educational programs that are accessible for its students. Any student with a disability who is experiencing barriers to learning, assessment or participation is encouraged to contact the Justin Dart, Jr. Student Accessibility Center (Dart Center) to learn more about academic accommodations and support that may be available to them. Students seeking academic accommodations will need to register with the Dart Center as soon as possible to ensure timely implementation of approved accommodations. Please contact the Dart Center by visiting the website: <https://uh.edu/accessibility/> calling (713) 743-5400, or emailing jdcenter@Central.UH.EDU.

The Student Health Center offers a Psychiatry Clinic for enrolled UH students. Call 713-743-5149 during clinic hours, Monday through Friday 8 a.m. - 4:30 p.m. to schedule an appointment.

The A.D. Bruce Religion Center offers spiritual support and a variety of programs centered on well-being.

The Center for Student Advocacy and Community (CSAC) is where you can go if you need help but don't know where to start. CSAC is a "home away from home" and serves as a resource hub to help you get the resources needed to support academic and personal success. Through our Cougar Cupboard, all students can get up to 30 lbs of FREE groceries a week. Additionally, we provide 1:1 appointments to get you connected to on- and off-campus resources related to essential needs, safety and advocacy, and more. The Cougar Closet is a registered student organization advised by our office and offers free clothes to students so that all Coogs can feel good in their fit. We also host a series of cultural and community-based events that fosters social connection and helps the cougar community come closer together. Visit the CSAC homepage or follow us on Instagram: @uh_CSAC and @uhcupbrd. YOU belong here.

Recording of Class: *Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor.* If you have or think you may have a disability such that you need to record class-related activities, please contact the [Justin Dart, Jr. Student Accessibility Center](#). If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use instructor's recordings for their own studying and notetaking. ***Instructor's recordings are not authorized to be shared with anyone without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral and may result in disciplinary action.***

Women and Gender Resource Center: The mission of the WGRC is to advance the University of Houston and promote the success of all students, faculty, and staff through educating, empowering, and supporting the UH community. The WGRC suite is open to you. Stop by the office for a study space, to take a break, grab a snack, or check out one of the WGRC programs or resources. Stop by Student Center South room B12 (Basement floor near Starbucks and down the hall from Creation Station) from 9 am to 5 pm Monday through Friday.

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Title IX/Sexual Misconduct: Per the UHS Sexual Misconduct Policy, your instructor is a “responsible employee” for reporting purposes under Title IX regulations and state law and must report incidents of sexual misconduct (sexual harassment, non-consensual sexual contact, sexual assault, sexual exploitation, sexual intimidation, intimate partner violence, or stalking) about which they become aware to the Title IX office. Please know there are places on campus where you can make a report in confidence. You can find more information about resources on the Title IX website at <https://uh.edu/equal-opportunity/title-ix-sexual-misconduct/resources/>.

MENTAL HEALTH AND WELLNESS RESOURCES: The University of Houston has a number of resources to support students’ mental health and overall wellness, including CoogsCARE and the UH Go App. UH Counseling and Psychological Services (CAPS) offers 24/7 mental health support for all students, addressing various concerns like stress, college adjustment and sadness. CAPS provides individual and couples counseling, group therapy, workshops and connections to other support services on and off-campus. For assistance visit uh.edu/caps, call 713-743-5454, or visit a Let’s Talk location in-person or virtually. Let’s Talk are daily, informal confidential consultations with CAPS therapists where no appointment or paperwork is needed.

Need Support Now? - If you or someone you know is struggling or in crisis, help is available. Call CAPS crisis support 24/7 at 713-743-5454, or the National Suicide and Crisis Lifeline: call or text 988, or chat 988lifeline.org.