

Tentative Syllabus – Subject to Change

CONSTITUTIONAL LAW SYLLABUS – SPRING 2023
Professor Emily Berman – Course: 5488 | Section: 11105

Class meetings: M, T, Th 9a-10:30a
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Office Hours: TBD
Exam: TBD

Course Description

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 the constancy of change has always been there, however, it is particularly true in the contemporary United States, where broad swaths of doctrine have been rewritten, reversed, or called into question in an extremely compressed time frame. In many ways, the Constitution itself is on the front lines of the culture wars.

It is our task this semester to shed light, rather than heat, on this often fascinating, often maddening area of law. And although some topics—such as abortion and voting 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. 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. As we have seen in recent years, this role of the Supreme Court 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. 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 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 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 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

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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, in addition to knowing the answer to the question “what is the black-letter rule?” where such a thing exists, it is important to know when there *is* no answer. In those cases, the relevant questions will be “what are the various possible outcomes of this dispute?”, “what is riding on those outcomes (what are the stakes)?”, 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 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. As a result, 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. 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.

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. If you know ahead of time that you will be unable to attend a particular class—due to religious holidays, medical procedures, family care responsibilities, etc.—please let me know and I will arrange to record that class session.

Go to the Google Form link that my assistant, Jessica Rodrigues will send you to sign in with your name and that day's code word.

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Class Meetings: I will teach each class session from the classroom. My expectation is that you will attend in person. If the available technology allows, you may attend via Zoom if you have a legitimate reason – if you’re not feeling well, for example.

Assessment. Your grade will be based on one, *three-hour final exam*, which will be administered on *TBD*. 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. Full class participation will include completing 2-3 *ungraded* practice essay questions. These exercises are designed to help you develop skills that will help you prepare for the exam. There will also be an ungraded, optional mid-term exam.

Additional Logistics

Office Hours: I will usually be available *TBD*, 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 CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (6th ed. 2019) 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 use she/her/hers as my pronouns. I will gladly honor requests to use nicknames, alternate names, or preferred gender pronouns—including non-binary ones such as they/them/theirs. Advise me how you would like to be addressed early in the semester so that I may make appropriate changes to my records. Please feel free to reach out to me 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. I will insist that we show respect for all perspectives and encourage students to articulate arguments on all sides of an issue, including arguments with which they disagree.

UH Policy on Student Recordings of Class: Students may not record, livestream, or make/distribute screen captures of all or part of class without the instructor’s advanced written consent. If you have or think you may have a disability such that you need to record class-related activities, please contact the Center for Students with DisABILITIES. If you have an accommodation to record classes, those recordings may not be shared with any other person, including other students in this class, without the prior written approval of the instructor. Failure to comply with these requirements may result in disciplinary action. Technology permitting, I may record class via Zoom and make those recordings generally available to students.

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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). Use of laptops or other electronic devices is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

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

- ♦ To access our web course on Blackboard:
 - Log into [Access UH](#).
 - In the “University Services” box, click the “Blackboard Learn 9” icon.
 - On the Blackboard site, click on the link for Constitutional Law.
 - You will be automatically enrolled in our web course.
 - The site should be available to you 24 hours before class starts.
- ♦ Below are some links to useful information about Blackboard:
 - [Information for new Blackboard and CougarNet users](#)
 - [Blackboard help and resources for students](#)
 - [Blackboard support](#)

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.

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.

Reading Materials:

- **Case book:** The casebook is Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* (7th ed. 2018).
- **Handouts:** Any assigned reading that is not in the 7th edition of *Processes of Constitutional Decisionmaking* will be posted on Blackboard in the Handouts folder.
- **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.
- **Tutors:** There will be two course tutors—names TBD, each of whom will hold weekly office hours and be available to answer questions. They will also periodically hold review sessions.

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TENTATIVE CLASS ASSIGNMENTS

INTRODUCTION

1. **The Purpose(s) and Meaning(s) of the Constitution**
2. **Introduction to Constitutional Interpretation: *McCulloch v. Maryland***

HISTORICAL PERSPECTIVE – THE FOUNDING

3. **The Founding: The Marshall Court and Judicial Review**
4. **The Founding: Judicial Review & Judicial Supremacy**

HISTORICAL PERSPECTIVE – THE CIVIL WAR & ITS AFTERMATH

5. **The Road to Civil War**
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**

HISTORICAL PERSPECTIVE – THE PROGRESSIVE ERA

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

HISTORICAL PERSPECTIVE – THE NEW DEAL

12. **The New Deal: The Evolution of Due Process**
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 Enforcement Power**

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16. **Congressional Power: The Commerce Power**
17. **Congressional Power: The Taxing & Spending Powers**
18. **Congressional Power: The Tenth Amendment**

THE MODERN CONSTITUTION – STRUCTURE: EXECUTIVE POWER

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

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: EQUAL PROTECTION

25. **Equal Protection: Desegregation – *Brown v. Board of Education* & Its Progeny**
26. **Equal Protection: The Emergence of Strict Scrutiny**
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?**

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: SUBSTANTIVE DUE PROCESS

32. **Substantive Due Process: Implied Fundamental Rights**
33. **Substantive Due Process: Abortion**
34. **Substantive Due Process: Marriage Equality**

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: THE FIRST AMENDMENT

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35. **The First Amendment: Introduction & Incitement**

36. **The First Amendment: Offensive Speech**

37. **The First Amendment: Free Exercise of Religion**

38. **The First Amendment: The Establishment Clause**

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: THE SECOND AMENDMENT

39. **The Second Amendment**