

Preliminary Syllabus – Subject to Change

CONSTITUTIONAL LAW SYLLABUS – SPRING 2024
Professor Emily Berman – Course: 5488 | Section: 11083

Class meetings: Face-to-Face M, T, Th 10:30a-11:50a

Room: TBD

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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 change has always been a constant, it has been particularly intense in recent years, with broad swaths of doctrine—particularly doctrine regarding hot-button legal issues—being rewritten, reversed, or called into question on an extremely compressed time frame. In many ways, the Constitution itself is on the front lines of the culture wars.

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 often fascinating, often maddening area of law. And although some topics—such as abortion and gun 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.

As you will see, these vexing questions may take different shapes in different generations, but at their heart they are about how to accommodate inevitable tensions between fundamental law and 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 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.

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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 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 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 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 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 ambiguity is an important skill for lawyers to develop.

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.

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 if you will not be there or be able to answer questions about the reading. 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 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 the Google Form link that my assistant, Jessica Rodriguez, will send you to sign in with your name and that day's code word.

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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. If the available technology allows, you may attend a class via Zoom if you have a legitimate reason – if you’re not feeling well, for example.

Assessment. Your grade will be based on one, ***8-hour take-home final exam***, which will be administered on ***May x from 9a-5p***. Your exam answers must be exclusively your own work, with help from no other person, internet sources, or technological system; no artificial intelligence systems may be a part of your process to generate this work product. 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. There will also be an ungraded, optional mid-term exam.

Tutors: There will be two course tutors—Sofia Winograd and Megan Kibler, 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.

- ♦ To access our web course on Canvas:
 - TBD

Additional Class Logistics & Policies

Office Hours: I will usually be available TBD, but I’m happy to set up an appointment outside of those times. Please let me know if you plan to attend office hours.

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

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.

Classroom environment: My classroom is an inclusive learning space. At UHLC, we are committed to ensuring inclusive online and classroom learning spaces, where you’ll be treated

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with respect and dignity, and where everyone is provided the equitable opportunity to participate, to contribute, and to succeed.

In this course, all students are welcome regardless of socio-economic status, age, race, ethnicity, disability, religion, national origin, veteran's status, sex, sexual orientation, gender identity, gender expression, political affiliation, marital status, and other diverse identities that we each bring to class. Our class is richer for this diversity.

Inclusive learning spaces facilitate the innovation and creative thought that enhance student success. This success arises from the participation, support, and understanding of you and your colleagues. I encourage you to speak up and to share your views, but also understand that you are doing so in a learning environment in which we're all expected to engage respectfully and with regard to the dignity of all others. We must all be particularly mindful of this in Constitutional Law, which can involve discussion of sensitive topics about which people have strongly held and widely divergent opinions.

Your suggestions are encouraged and appreciated. Please let me know ways to improve the effectiveness of this course for you personally, or for other students or student groups.

Accessibility and Accommodations. UHLC is committed to ensuring that all students enjoy equal access and full participation. If you anticipate or experience barriers based on a disability (including any chronic or temporary medical or mental health condition), please feel free to reach out to me or to student services so that we may explore options. Requests for accommodation should be made as soon as possible to allow adequate time to document and to process the request.

If you observe religious or cultural holidays that will coincide with synchronous class sessions or conferences, please let me know as soon as possible, so that we may make arrangements.

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.

Honor Code. The UHLC Honor Code applies to all aspects of my class. You are responsible for knowing all Honor Code provisions and for complying with the Honor Code. Please ask me if you have any questions regarding how the Honor Code's provisions apply to specific activities or situations related to my course.

University Policies & Resources

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 [Justin Dart, Jr. Student Accessibility Center](#). 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. Technology permitting, I may record class via Zoom and make those recordings generally available to students. Students may use these recordings for their own studying and notetaking. Instructor's recordings are not authorized to be shared with *anyone* without the prior written

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approval of the instructor. Failure to comply with these requirements may result in disciplinary action.

Reasonable Academic Adjustments/Auxiliary Aids: The University of Houston complies with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, pertaining to the provision of reasonable academic adjustments/auxiliary aids for disabled students. UH strives to provide reasonable academic adjustments/auxiliary aids to students who request and require them. If you believe that you have a disability requiring an academic adjustments/auxiliary aid, please contact [the Justin Dart Jr. Student Accessibility Center](#).

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/>.

Security Escorts and Cougar Ride. UHPD continually works with the University community to make the campus a safe place to learn, work, and live. Our Security escort service is designed for the community members who have safety concerns and would like to have a Security Officer walk with them, for their safety, as they make their way across campus. Based on availability either a UHPD Security Officer or Police Officer will escort students, faculty, and staff to locations beginning and ending on campus. If you feel that you need a Security Officer to walk with you for your safety please call 713-743-3333. Arrangements may be made for special needs.

Parking and Transportation Services also offers a late-night, on-demand shuttle service called Cougar Ride that provides rides to and from all on-campus shuttle stops, as well as the MD Anderson Library, Cougar Village/Moody Towers and the UH Technology Bridge. Rides can be requested through the UH Go app. Days and hours of operation can be found at <https://uh.edu/af-university-services/parking/cougar-ride/>.

CAPS: The University’s 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.

Other mental health services can be found at **Coogs Care:** <https://uh.edu/dsa/coogscare/> and the **Student Health Center:** <https://www.uh.edu/healthcenter/>

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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.

Reading Materials:

- **Case book:** The casebook is Paul Brest 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 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.

CLASS ASSIGNMENTS

Abbreviations

“PCD”: PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (8th ed. 2022).

“HANDOUT”: SUPPLEMENTAL MATERIAL will be posted on the class’s BlackBoard page

INTRODUCTION & THE FOUNDING

1. Constitutional Inflection Points

Tuesday, January 16

- Class Syllabus – yes, this document. I will presume you are familiar with its contents.
- The U.S. Constitution [PCD TBD]
- Background to the U.S. Constitution [PCD TBD]
- HANDOUT 1: FDR’s Fireside Chat About Court-packing
- HANDOUT 2: PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES FINAL REPORT 2021
 - **Required:** Only the Introduction (pages 12-28 (starts at page 18 of the PDF)).
- **Optional (suggested, at least the first half of it):** Radiolab podcast (22:58), *Sex, Ducks, and the Founding Feud*: <http://www.radiolab.org/story/sex-ducks-and-founding-feud/>

2. Fundamental Debate #1: Where Do We Look to Find Constitutional Meaning?

Thursday, January 18

- *McCulloch v. Maryland* I [PCD TBD]
- Methods of Constitutional Interpretation [PCD TBD]
- HANDOUT 3: Using (or Choosing?) History
 - Excerpts of *Dobbs v. Jackson Women’s Health Org.* (2022)
 - Baude, *Of Course the Supreme Court Needs to Use History*
- HANDOUT 4: **Optional** – Ian Bartrum, *The Modalities of Constitutional Argument*

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3. **Fundamental Debate #2: Who Decides?**

Monday, January 22

- **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 TBD]
- **HANDOUT 5:** Notes on Judicial Supremacy:
 - *Cooper v. Aaron*, 358 U.S. 1 (1958)
 - Andrew Jackson’s Veto Message (1832)
 - Abraham Lincoln’s first Inaugural Address (1861)
- Notes on Departmentalism, Constitutional Protestantism, & Popular Constitutionalism [PCD TBD (notes 3, 4, 5, & 6)]
- The Virginia & Kentucky Resolutions [PCD TBD]
- **HANDOUT 6:** Testimony of Nikolas Bowie, pp. 2-11, Presidential Commission on SCOTUS
- **Optional:** **HANDOUT 6.1:** Jeanie Suk Gerson, *The Conservative Who Wants to Bring Down the Supreme Court*

4. **Constraints on the Judiciary & The Countermajoritarian Difficulty**

Tuesday, January 23

- **HANDOUT 7: Optional** – Excerpt of Alexander Bickel, *The Least Dangerous Branch*
- Article III Limits on Judicial Power [PCD TBD]
- The Countermajoritarian Difficulty [PCD TBD]
- **HANDOUT 8:** Adam Liptak, *An ‘Imperial Supreme Court’ Asserts Its Power, Alarming Scholars*, N.Y. Times, Dec. 19, 2022.
- **HANDOUT 8.1:** Testimony of Sam Moyn, pp. 2-5; 10-22, Presidential Commission on SCOTUS

HISTORICAL PERSPECTIVE – THE CIVIL WAR & ITS AFTERMATH

5. **The Road to Civil War**

Thursday, January 25

- Slavery & *Dred Scott* [PCD TBD (**only** notes 1, 2, & 8)]
- Is the Constitution a Pro- or Anti-Slavery Document? [PCD TBD]
- **Optional:** More Perfect podcast, *American Pendulum II*, <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/american-pendulum-ii-dred-scott>

Practice Question 1

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

Monday, January 29

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

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

Tuesday, January 30

- *The Slaughterhouse Cases* [PCD 359-77 (through end of note 2)]
- Selective Incorporation of the Bill of Rights [PCD TBD]

8. **Post-Civil War: The Fourteenth Amendment – Who Are “We the People”?**

Thursday, February 1

- Women & the 14A [PCD TBD (begin with *Bradwell v. Illinois*)]
- Native Americans & Citizenship [PCD TBD]
- The Constitution in the Territories [PCD TBD]
- The Chinese Exclusion Cases [PCD TBD (through note 2)]

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

Monday, February 5

- *Strauder, The Civil Rights Cases, & Plessy* [PCD TBD (through note 2)]
- **Optional:** HANDOUT 9: Louis Menand, *The Supreme Court Case that Enshrined White Supremacy in Law*, THE NEW YORKER, Feb. 4, 2019.

10. **Post-Civil War: The Fifteenth Amendment – Race**

Tuesday, February 6

- Choose one (or more) of the following sources providing background on the Colfax Massacre, which is the factual basis for *United States v. Cruikshank*:
 - Video: Black History, The Colfax Massacre (1:50):
<https://www.youtube.com/watch?v=LzR2XUmaFuw>
 - Blog Post: Danny Lewis, *The 1873 Colfax Massacre Crippled the Reconstruction Era*, Smithsonian Mag., Apr. 13, 2016, <https://www.smithsonianmag.com/smart-news/1873-colfax-massacre-crippled-reconstruction-180958746/>
 - Podcast: Southern Hollows, *Fire & Bones* (17:45) (trigger warning: the background music is really annoying):
<http://www.southernhollows.com/episodes/fireandbones>
 - Podcast: This Day in History Class, *Colfax Massacre – April 13, 1873* (7:00 – start at 2:00): <https://www.iheart.com/podcast/105-this-day-in-history-class-29520957/episode/colfax-massacre-april-13-1873-30820877/>
- HANDOUT 9.1: *United States v. Cruikshank* (1876)
- HANDOUT 10: *Giles v. Harris* (1903)

HISTORICAL PERSPECTIVE – THE PROGRESSIVE ERA

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

Thursday, February 8

- The Rise of Economic Substantive Due Process [PCD TBD]
- *Lochner v. New York* [PCD TBD]

12. **The Progressive Era: The Commerce Power**

Monday, February 12

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

HISTORICAL PERSPECTIVE – THE NEW DEAL

13. The New Deal: The Evolution of Due Process

Tuesday, February 13

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

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

Thursday, February 15

- *Schechter*, *Carter Coal*, *Butler* [PCD TBD]
- *NLRB v. Jones & Laughlin Steel Corp.*, *FDR Constitution Day Speech*; *United States v. Darby*, *Wickard v. Filburn*, [PCD TBD]
- Note on Constitutional Revolution [PCD TBD]

15. Congressional Power After the New Deal – The Source of Civil Rights Powers

Monday, February 19

- *Heart of Atlanta Motel*, *Katzenbach v. McClung* [PCD TBD (only note 1)]
- *South Carolina v. Katzenbach*, *Katzenbach v. Morgan* [PCD TBD (only notes 2, 3, 4)]

THE MODERN CONSTITUTION – STRUCTURE: CONGRESSIONAL POWER

16. Congressional Power: The Enforcement Power

Tuesday, February 20

- Introduction to Chapter 6 [PCD TBD]
- *City of Boerne v. Flores*, *United States v. Morrison* [PCD TBD (through note 2)]

17. Congressional Power: The Commerce Power

Thursday, February 22

- Spillover from class 16: [HANDOUT 11: *Shelby County v. Holder*]
- *United States v. Lopez* [PCD TBD (thru note 3)]
- *United States v. Morrison*, *Raich v. Gonzales* [PCD TBD (notes 7, 8 & 9)]
- **Optional:** More Perfect podcast (54:31), “One Nation, Under Money,”
<https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/one-nation-under-money>

18. Congressional Power: The Taxing & Spending Powers

Monday, February 26

- Spillover from class 17: [*NFIB v. Sebelius*—The Commerce Power [PCD TBD (through note 5)]]
- Taxing: *NFIB v. Sebelius* [PCD TBD]
- Spending: *South Dakota v. Dole* & *NFIB v. Sebelius* [PCD TBD]

19. Congressional Power: The Tenth Amendment

Tuesday, February 27

- *New York v. United States* [PCD TBD]
- *Printz v. United States* [PCD TBD (notes 1 & 3)]

Optional: Practice Mid-term

THE MODERN CONSTITUTION – STRUCTURE: EXECUTIVE POWER

20. Executive Power: The “Non”-Prosecution Power & The Pardon Power

Thursday, February 29

- *United States v. Cox* [PCD TBD]
- HANDOUTS 12 & 13: Cole memo 2013; Sessions memo 2018
- **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>
- HANDOUT 14: The Pardon Power

21. Executive Power: The Appointment Power

Monday, March 4

- *Morrison v. Olson* [TBD (only notes 2, 3, 7, & 9)]
- *Free Enterprise Fund v. PCAOB* [PCD TBD (note 2)]
- HANDOUT 15: *Seila Law v. Consumer Financial Protection Board*

22. Executive Power: Presidential Privileges & Immunities

Tuesday, March 5

- *United States v. Nixon, President of the United States* [PCD TBD]
- Presidential Immunity [PCD TBD]

23. Executive Power: Congressional Oversight of Executive Power

Thursday, March 7

- HANDOUT 16: Congressional Access to Executive Branch Information
- HANDOUT 17: Impeachment

*****Spring Break*****

24. Executive Power: The Scope of the President’s “Emergency Powers”

Monday, March 18

- *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case) [PCD TBD]
- HANDOUT 18: Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border

Practice Question 2 – Executive Power

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: EQUAL PROTECTION

25. Equal Protection: Desegregation – *Brown v. Board of Education* & Its Progeny

Tuesday, March 19

- *Brown v. Board of Education* [PCD TBD]
- *Green, Swann, Keyes, Milliken I & II, Jenkins, Parents Involved* [PCD TBD]

26. Equal Protection: The Emergence of Strict Scrutiny

Thursday, March 21

- Implied Association Bias Test: <https://implicit.harvard.edu/implicit/takeatest.html> (pick one related to race/ethnicity/national origin or gender)
- The Suspect Class Doctrine
 - *Korematsu v. United States* [PCD TBD]
 - *Loving v. Virginia* [PCD TBD (thru note 6)]
- **Optional:** More Perfect Podcast, *American Pendulum I*, <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/american-pendulum-fred>

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

Monday, March 25

- When is a decision made “on the basis of” race? [PCD TBD]
- *Washington v. Davis*, *Arlington Heights* & *Feeney* [PCD TBD (only notes 1, 3, 4, 5, & 8)]

28. Equal Protection: Race-Based Affirmative Action

Tuesday, March 26

- **Skim** HANDOUT 18.1: Affirmative Action; pay the most attention to *Grutter v. Bollinger*
- *SFFA v. North Carolina* & *SFFA v. Harvard*

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

Thursday, March 28

- The Emergence of Intermediate Scrutiny [PCD TBD]
- The VMI Case [PCD TBD (only notes 1 & 2)]
- **Optional:** More Perfect Podcast, *Sex Appeal*, <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/sex-appeal>

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

Monday, April 1

- Biological differences [PCD TBD]
- *Feeney* [PCD TBD]
- Abortion [PCD TBD]

31. Equal Protection: Other Suspect Classes?

Tuesday, April 2

- *Cleburne* [PCD TBD]
- *Romer v. Evans* [PCD TBD]

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: SUBSTANTIVE DUE PROCESS

32. Substantive Due Process: Implied Fundamental Rights

Thursday, April 4

- HANDOUT 19: *Griswold v. Connecticut* & *Roe v. Wade*
- Discussion Notes [PCD TBD (only notes 1, 2, 4); TBD]
- Did Roe Cause the Abortion Conflict? [PCD TBD]

33. Substantive Due Process: Abortion

Monday, April 8

- HANDOUT 19.1: *Planned Parenthood v. Casey* (1992)
- HANDOUT 19.2: *Dobbs v. Jackson Women's Health* (2022)
- **Optional**: *Dobbs & the Rule of Law* [panel discussion](#)

34. Substantive Due Process: Sexual Orientation

Tuesday, April 9

- *Lawrence v. Texas* [PCD TBD (Kennedy, J.'s opinion); TBD (Scalia, J.'s dissent); TBD (**only** notes 1, 2, & 3)]
- Notes on liberty, equality, and dignity in *Lawrence* [PCD TBD]
- HANDOUT 20: *Obergefell v. Hodges*
- Discussion Notes [PCD TBD (**only** notes 3, 4, 5, 7, 10, 12, 13)]
- Note on Judicial Backlash and Social Movements [PCD TBD]

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: THE FIRST AMENDMENT

35. The First Amendment: Introduction & Incitement

Thursday, April 11

- HANDOUT 21: Introduction to Freedom of Speech – why protect speech? & Incitement

36. The First Amendment: Offensive Speech

Monday, April 15

- HANDOUT 22: Fighting Words & Racist Speech & Profanity
- **Optional**: More Perfect Podcast: *The Hate Debate*,
<https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/hate-debate>

37. The First Amendment: Free Exercise of Religion

Tuesday, April 16

- HANDOUT 22.1: *Employment Division v. Smith* (1990); *South Bay Pentecostal Church* (2020); *Roman Catholic Diocese v. Cuomo* (2020); *Tandon v. Newsome* (2021)

38. The First Amendment: The Establishment Clause

Thursday, April 18

- HANDOUT 22.2: *Engel v. Vitale* (1962); *Santa Fe v. Doe* (2000); *Kennedy v. Bremerton School District* (2022)

THE MODERN CONSTITUTION – INDIVIDUAL RIGHTS: THE SECOND AMENDMENT

39. The Second Amendment

Monday, April 22

- *District of Columbia v. Heller* [PCD TBD]
- *McDonald v. City of Chicago* [PCD TBD]
- HANDOUT 23: *N.Y. State Rifle & Pistol Ass'n v. Bruen* (2022)
- **Optional**: More Perfect Podcast, *The Gun Show*,
<https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/gun-show>

TUESDAY, APRIL 23 – NO CLASS

40. **Review Session**

Thursday, April 25

Exam
TBD