

CONSTITUTIONAL LAW

PROFESSOR THOMAS B. BENNETT

FALL 2021

Greetings, and welcome back. I look forward to our shared study of U.S. constitutional law this semester.

GOALS AND EXPECTATIONS

What You Will Learn

This course focuses on our most fundamental law, the United States Constitution. Our primary focus will be on the decisional law and doctrine applied by courts to resolve disputes today. But to understand that body of law, we must understand the Constitution's text and history, as well as the interpretive tools used to understand the Constitution. We will also explore theoretical issues relevant to constitutional democracy, including the inherent tension between self-governance and judicial review, the nature and role of stare decisis, and the permeable barrier between constitutional law and politics.

Constitutional law is a vast subject. Unlike the subjects you have studied so far in law school, this course is not defined by its subject matter. Instead, constitutional law is identified by its source: the United States Constitution, including its amendments.

For practical reasons, therefore, our study will be selective. Even though the text of the constitution is not very long, there is far too much constitutional law to cover in one four-credit introductory course. Entire areas of constitutional law must therefore be left for other courses. The First Amendment is covered in (among other places) Freedom of Speech and Association; the Second Amendment is treated primarily in Firearms Law; the Fourth, Fifth, and Sixth Amendments are covered in Criminal Procedure; the Eighth Amendment is covered (among other places) in Death Penalty Law. Important questions about the constitutional separation of powers and due process are covered in Administrative Law. Detailed examination of constitutional bases of federal court jurisdiction and judicial federalism is left for the course in Federal Courts. Other constitutional issues form important parts of courses in Evidence, Election Law, Family Law, Immigration Law, and Wrongful Convictions. Indeed, nearly every course in the law school's course catalog involves questions of constitutional law, including such unlikely suspects as Bankruptcy, Patents, Copyrights, Property, and Income Taxation.

This course focuses on the constitutional structure of U.S. government and certain individual rights secured by the Fifth and Fourteenth Amendments. However, in studying these topics, we will pay special attention to constitutional history, interpretation, argumentation, politics, and theory. These skills ought to give you the tools you need to approach and master many other areas of constitutional law that we will not have time to cover.

Preparing for Class

There will be assigned reading for every class. You should do the reading and be prepared to talk about it in class. Sometimes, when the material is dense or difficult, you will have to read it more than once. Thorough preparation for every class is essential to learning this material. For that reason, class participation will factor into your final grade (see below).

I will call on students without advance warning during class. I understand that there may be times when you cannot prepare for class. In those cases, you should email me no later than noon on the day of class. If you do so, I will not call on you that day. If you are unprepared for class and have not emailed me in advance, I will be cross.

COURSE MATERIALS

The casebook for this course is RICHARD D. FRIEDMAN & JULIAN DAVIS MORTENSON, *CONSTITUTIONAL LAW*. It is available through the bookstore and various online booksellers. Unfortunately, it is brand new, meaning that used copies are unlikely to be available. Unless otherwise noted, the assigned readings can be found in the casebook. Other readings will be posted to the course Canvas page.

If you would like to consult a hornbook (though you are not required to do so), I recommend ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*. The current edition is the Sixth Edition, which is available through the library. Alternatively, you could save money by finding a used copy of an earlier edition, so long as you are aware of cases we read that postdate your edition's print date.

COMMUNICATION AND ACCOMMODATION

Class Meetings

Our class meets Mondays, Wednesdays, and Fridays in Room 7 from 2:00pm to 3:10pm. Please be on time. If you need to enter or leave the room while class is in session, please do so as quietly and unobtrusively as possible. During the first

class, I will pass around a seating chart. Once you have chosen a seat, please continue to sit there for the remainder of the semester.

If I need to cancel a class session for any reason, we will schedule a make-up session as soon as possible.

Illness

I cannot stress this enough: if you are not feeling well or have any symptoms of illness, do not come to class. Alternative modes of attendance and participation are described below. Please be considerate of those around you and comply with all local and University regulations regarding public health.

Technology

Every class will be broadcast live on Zoom. The link will be provided on Canvas. If you cannot be present in the classroom for any reason, the best alternative is to participate in the Zoom meeting for class in real time. If you are participating in the Zoom meeting, you should be prepared to be called on just as you would be if you were in the classroom. Please make your best effort to turn on your video. (It will be a pleasant surprise if pets, children, or other guests make an appearance.)

Each class will also be recorded. If you can neither attend class nor participate via Zoom, you should watch the recording as soon as possible, and certainly before the next class session. Watching the recorded class is an imperfect substitute for real-time participation. Nevertheless, the recorded classes may be useful for purposes of review.

I recommend that you consider *not* using a laptop to take notes. I encourage you to take notes by hand, particularly if you have never done so. If you decide that a laptop is best for you, you may use it. Please do not use a laptop (or any other electronic device) for any other purpose than to view materials for class or to take notes.

Office Hours

My office hours this semester are from 3:15 to 4:15 on Mondays and Wednesdays. Please also feel free to email me to schedule another time to meet outside of my normal office hours. I encourage you to attend office hours.

If you need to contact me for any reason, my email is thomas.bennett@missouri.edu. If you email me a question, I may share your question and my answer with the entire class. If you would not like me to share your question, or you would like your identity to remain anonymous, please indicate as much in your email to me.

ASSESSMENT

Your grade will be determined based on class participation and a final exam. There will also be a practice midterm, given out shortly after we complete our unit on executive power. This midterm exam will be ungraded, but there will be a review session to discuss it.

Class Participation

Class discussion is a critical part of this course. We will all be worse off if each of you does not assume responsibility for sharing in the project of learning together. For that reason, 10% of your grade will be determined by your class participation. The main thing you should do to ensure a good participation mark is to do the assigned reading and come prepared to discuss it.

Final Exam

The final exam will be comprehensive and will comprise the remaining 90% of your unadjusted grade. You may use any resources you wish during the exam (notes, outlines, casebook, hornbook, Westlaw, Wikipedia, the Hitchhiker's Guide to the Galaxy, tea leaves, ailuromancy, brute force, sheer luck, etc.), subject to the restriction that you may not discuss the exam with any other person before you have handed it in. Failure to abide by this restriction may result in a lower grade or automatic failure.

READING ASSIGNMENTS

I. Constitutional Basics

A. Before the Constitution

CB pp. 1–24 (also on **Canvas**)

B. Debating the Constitution

CB pp. 24–41 (also on **Canvas**)
U.S. Const., preamble & art. I–VII

C. The Bill of Rights

CB pp. 53–66 (also on **Canvas**)
U.S. Const., amends. I–X

II. Why & How To Do Constitutional Law

A. Why: The Countermajoritarian Difficulty

CB pp. 264–77 (also on **Canvas**)

B. How: Methodology

Selected readings on constitutional interpretation (on **Canvas**)

C. Who: Departmentalism

CB pp. 278–86 (also on **Canvas**)

III. Judicial Power

A. Judicial Review

CB pp. 66–69 (also on **Canvas**)

Marbury v. Madison (on **Canvas**)

B. Constitutional Limits: Standing, Mootness, & Ripeness

CB pp. 304–330 (Lujan v. Defenders of Wildlife; Los Angeles v. Lyons; Massachusetts v. EPA) (also on **Canvas**)

Havens Realty Corp. v. Coleman (on **Canvas**); Spokeo v. Robins (on **Canvas**)

CB pp. 330–33

C. Constitutional Limits: Political Questions

CB pp. 288–90

D. Constitutional Limits: State Action

CB pp. 333–48 (Marsh v. Alabama; Georgia v. McCollum)

IV. Legislative Power(s)

A. Enumerated Powers & The Necessary and Proper Clause

CB pp. 349–75 (McCulloch; Chae Chan Ping; Fong Yue Ting)

B. Interstate Commerce

CB pp. 375–401 – Early Cases (Gibbons; E.C. Knight; Shreveport Rate Cases; Stafford)

CB pp. 401–13 – Border Controls (Champion v. Ames; Hammer v. Dagenhart)

CB pp. 413–27 – The Four Horsemen (Schechter Poultry; Carter Coal)

CB pp. 427–43 – The Switch in Time (Jones & Laughlin Steel; Darby; Wickard v. Filburn)

CB pp. 443–53 – The New Deal Consensus (Heart of Atlanta Motel; Katzenbach v. McClung)

CB pp. 453–75 – The Rehnquist Revolution (United States v. Lopez; Dorsey; Raich)

C. Taxing

CB pp. 475–88 (Doremus; Child Labor Tax Case; Kahrigier)

D. Spending

CB pp. 488–500 (Butler; Steward Mach.; Helvering v. Davis; South Dakota v. Dole)

E. A Unified Field Theory?

CB pp. 525–88 (NFIB v. Sebelius, served three ways)

V. Executive Power

A. Relation to Other Branches

CB pp. 695–723 (In re Neagle; Youngstown Sheet & Tube Co. v. Sawyer)

B. The Administrative State

CB pp. 723–49 (ALA Schechter Poultry; Whitman v. American Trucking; Gundy)

C. Duty To Take Care

CB pp. 749–52

D. Appointments

CB pp. 753–73 (Buckley v. Valeo; Morrison v. Olson)

E. Removal

CB pp. 773–812 (Myers; Morrison redux; PCAOB; Seila Law)

F. War Powers

CB pp. 843–65 (Korematsu; The Prize Cases; Hamdi v. Rumsfeld)

VI. State Power

A. The “Dormant” Foreign Affairs Power

CB pp. 640–49 (Zschernig v. Miller)

B. The “Dormant” Commerce Clause

CB pp. 649–77 (Philadelphia v. N.J.; Kassel v. Consolidated Freightways; Maine v. Taylor)

C. The Tenth Amendment

CB pp. 500–24 (New York; Printz)

VII. Equal Protection

A. Prelude

CB pp. 94–127 (Prigg v. Pennsylvania; Ableman v. Booth; Scott v. Sandford)

U.S. Const. amends. XIII, XIV

B. Economic

CB pp. 953–63 (Carolene Products; Railway Express; Williamson v. Lee Optical)

C. Race & Strict Scrutiny

CB pp. 967–99 (Strauder; Plessy; Korematsu redux)

Materials on Lloyd Gaines (on **Canvas**)

CB pp. 999–1019 (Brown v. Board of Education; Loving v. Virginia; Palmer v. Thompson)

CB pp. 1035–50 (Wash. v. Davis; Hunter v. Underwood; Trump v. Hi.)

CB pp. 1050–57 (Yick Wo; Gomillion)

CB pp. 1072–86 (Arlington Heights; McCrory)

CB pp. 1110–36 (Croson; Adarand)

CB pp. 1136–67 (Grutter; Gratz)

CB pp. 1167–77 (Fisher; Parents Involved)

D. Gender & Intermediate Scrutiny

CB pp. 1177–1181

CB pp. 1198–1237 (Frontiero; Craig v. Boren; U.S. v. Virginia)

CB pp. 1237–48 (Geduldig; Feeney)

E. Enforcing Reconstruction Amendments

CB pp. 608–39 (Civil Rights Cases; Heart of Atlanta Motel redux; Katzenbach v. Morgan; City of Boerne v. Flores; and United States v. Morrison)

VIII. Substantive Due Process

A. Incorporation

CB pp. 1305–32 (Calder v. Bull; McDonald; Bolling v. Sharpe)

B. Substantive Due Process & Economic Liberty

CB pp. 1333–62 (Lochner; Munn v. Illinois; Muller; W. Coast Hotel; Skrupa)

C. Substantive Due Process & Intimate Privacy

CB pp. 1365–78 (Meyer; Pierce; Loving redux; Moore)

CB pp. 1394–1428 (Griswold; Roe)

CB pp. 1428–1460 (Casey; Stenberg v. Carhart; June Medical; Whole Women’s Health)

CB pp. 1461–76 (Washington v. Glucksberg)

IX. Dignity and The Legal Double Helix

A. Sexual Orientation

CB pp. 1501–36 (Lawrence; Obergefell)

B. Sexual Identity

CB pp. 1537–44 (Evancho)