

CONSTITUTIONAL LAW
SPRING TERM 2021
Professor Johnson

Syllabus

Welcome to Constitutional Law! In this class, you will learn key principles in the four areas of Constitutional Law tested on the Bar: Judicial Review; Separation of Powers; Federalism; and Individual Rights. We will study multiple-choice questions after every major topic to acculturate you to the Bar's MBE test. This course requires careful and critical reading because the doctrines in Constitutional Law can be subtle and hard to define over time and through multiple cases. Yet this can be done if you give yourself time to prepare for each class. Throughout the course, we will examine different approaches to interpreting the Constitution. We will also have abundant opportunities to study the history of the Constitution as different doctrines come into and out of vogue. Finally, we will focus on select Justices—giants of the Judiciary—to help us understand diverse jurisprudential philosophies at play in the Court's decision-making. You will be enlightened, hopefully entertained, and prepared for the Bar by the end of this course.

REQUIRED MATERIALS:

1. Erwin Chemerinsky, *Constitutional Law* (5th ed. 2017)
2. Erwin Chemerinsky, *Constitutional Law*, 2019 Supplement
3. Course Materials on TWEN

RECOMMENDED MATERIALS:

Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (5th ed. 2017 or 6th ed. 2019). Either one of these will work well as a supplement to the textbook.

OPEN OFFICE HOURS ON TEAMS:

Tuesday, 9:30 am – 11 am

Thursday, 1 pm – 3 pm

And by appointment (email me at: gjohnson@vermontlaw.edu)

TEACHING ASSISTANTS:

Heather Francis, HeatherFrancis@vermontlaw.edu

Office Hours: Friday, 12:45 pm – 2 pm, or by appointment

James Mulhall, JamesMulhall@vermontlaw.edu

Office Hours: Tuesday, 2:30 pm – 4 pm, or by appointment

GRADES:

Grades will be computed as follows:

- | | |
|--|-----|
| (1) Midterm Exam (Friday, February 26) | 20% |
| (2) Final Exam | 80% |

You will take four quizzes this semester. These quizzes are **not** graded. I have marked in bold on the syllabus the times of these quizzes. Your quizzes are due on TWEN on the following dates:

- Sunday, January 24 (by 10 pm on TWEN)
- Sunday, February 14 (by 10 pm on TWEN)
- Thursday, April 1 (by 10 pm on TWEN)
- Tuesday, April 13 (by 10 pm on TWEN)

LEARNING OUTCOMES:

By the end of this course, you will:

1. Demonstrate an understanding of the central features of American Constitutional Law: A federal government of limited powers; separation of powers; federalism; and individual rights.
2. Become conversant in the basic approach to multiple-choice questions on the Multistate Bar Exam.
3. Gain competency in the competing approaches to constitutional interpretation.
4. Apply precedent to fact patterns to suggest likely outcomes.
5. Learn of the great epochs in the Supreme Court's history, including the Marshall Court; the laissez-faire Court of the 1870s–1930s; the New Deal Court; the Warren Court; and the Court in modern times.
6. Understand the jurisprudence of some of the more noteworthy members of the Supreme Court in its 230-year history.

Part I: Judicial Review

WEEK ONE: JANUARY 11 – 15

Monday, January 11

The Birth of Con Law and Judicial Review: *Marbury v. Madison*
Textbook, pp. 1-9
Amy Coney Barrett, *Originalism and Stare Decisis* (2017) (TWEN)

Marbury v. Madison (1803)

Wednesday, January 13

Limits on Judicial Review
Textbook, pp. 11-32
Recommended: More Perfect Podcast—The Gun Show (Season 2)

District of Columbia v. Heller (2008)
Kanter v. Barr (7th Circuit, Judge Barrett in dissent) (2019) (on TWEN)

Friday, January 15

Justiciability Limits on Judicial Review, Part 1: Advisory Opinions and Standing
Textbook, pp. 40-42, 45-61

Opinion of the Justices
Hayburn's Case (1792)
Allen v. Wright (1984)
Massachusetts v. EPA (2007)
City of Los Angeles v. Lyons (1983)

WEEK TWO: JANUARY 18 – 22

Monday, January 18

NO CLASS – MLK DAY

Wednesday, January 20

Justiciability, Part 2: Taxpayer Standing, Ripeness, and Mootness
Textbook, pp. 75-90

Flast v. Cohen (1968)
Hein v. Freedom From Religion Foundation (2007)
Arizona School Tuition Organization v. Winn (2011)
Poe v. Ullman (1961)
Abbott Laboratories v. Gardner (1967)
Friends of the Earth, Inc. v. Laidlaw Environmental Services (2000)

Friday, January 22

Justiciability, Part 3: Mootness (cont'd); The Political Question Doctrine
Textbook, pp. 91-96

Supplement, pp. 1-20

Recommended: More Perfect Podcast—The Political Thicket (Season 1)

New York Rifle and Pistol Assoc. v. City of New York (2020) (on TWEN)

Baker v. Carr (1962)

Rucho v. Common Cause (2019)

MBE Questions on Judicial Review

The First Quiz of the semester (Judicial Review) must be uploaded to TWEN (under Assignments) by Sunday, January 24, at 10 pm.

Part II: Separation of Powers

WEEK THREE: JANUARY 25 – 29

Monday, January 25

Congress's Plenary Power under Article I

Textbook, pp. 115-29

Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913) (Chapter I) (TWEN)

McCulloch v. Maryland (1819)

Wednesday, January 27

Congress's Treaty Power and

Congress's Commerce Clause Power, Part 1: The first two Eras

Textbook, pp. 156-66

McGirt v. Oklahoma (2020) (on TWEN)

Gibbons v. Ogden (1824)

Friday, January 29

The Commerce Clause Power, Part 2: The expansive Third Era

Textbook, pp. 166-80

NLRB v. Jones and Laughlin Steel Corp. (1937)

United States v. Darby (1941)

Wickard v. Filburn (1942)

Heart of Atlanta Motel, Inc. v. United States (1964)

Katzenbach v. McClurg, Sr. & McClurg, Jr. (1964)

WEEK FOUR: FEBRUARY 1 – 5

Monday, February 1

The Commerce Clause Power, Part 3: Retraction in the Modern Era
Textbook, pp. 188-216

United States v. Lopez (1995)
United States v. Morrison (2000)
Gonzales v. Raich (2005)

Wednesday, February 3

The Tenth Amendment as a Limitation on Congress's Power
Textbook, pp. 217-37
Supplement, pp. 21-28

New York v. United States (1992)
Printz v. United States (1997)
Reno v. Condon (2000)
Murphy v. NCAA (2018)

Friday, February 5

Congress's Taxing and Spending Power
Textbook, pp. 237-45, 129-50

United States v. Butler (1936)
Sabri v. United States (2004)
South Dakota v. Dole (1987)
National Federation of Independent Business v. Sibelius (2012)

WEEK FIVE: FEBRUARY 8 – 12

Monday, February 8

Congress's Enforcement Powers
Textbook, pp. 245-71

United States v. Morrison (2000) (Reprise)
Katzenbach v. Morgan & Morgan (1966)
City of Boerne v. Flores (1997)
Shelby County, Alabama v. Holder (2013)

Wednesday, February 10

The Eleventh Amendment

Textbook, pp. 272-80, 285-307

Fitzpatrick v. Bitzer (1976)

Seminole Tribe of Florida v. Florida (1996)

Kimel v. Florida Board of Regents (2000)

Board of Trustees, University of Alabama v. Garrett (2001)

Nevada Department of Human Resources v. Hibbs (2003)

Tennessee v. Lane (2004)

Friday, February 12

The Executive Power

Textbook, pp. 321-30, 381-85

Supplement, pp. 29-43

Youngstown Steel & Tube Co. v. Sawyer (1952)

United States v. Curtiss-Wright Export Corp. (1936)

Trump v. Hawaii (2018)

MBE Questions on Separation of Powers

The Second Quiz of the semester (Separation of Powers) must be uploaded to TWEN (under Assignments) by Sunday, February 14, at 10 pm.

Part III: Federalism

WEEK SIX: FEBRUARY 15 – 19

Monday, February 15

Preemption of State Law

Textbook, pp. 451-67

Lorillard Tobacco Co. v. Reilly (2001)

Florida Lime and Avocado Growers v. Paul (1963)

*Pacific Gas & Electric Co. v. State Energy Resources Conservation
and Development Commission* (1983)

Virginia Uranium v. Warren (2019) (on TWEN)

Wednesday, February 17

The Dormant Commerce Clause, Part 1
Textbook, pp. 476-82, 492-98, 503-06, 511-14

H.P. Hood & Sons, Inc. v. Du Mond (1949)
Hunt v. Washington State Apple Advertising Commission (1977)
Exxon Corp. v. Governor of Maryland (1978)
Dean Milk Co. v. City of Madison, Wisconsin (1951)
Maine v. Taylor & United States (1986)
Consolidated Freightways Corp. v. Kassel (1981)

Friday, February 19

The Dormant Commerce Clause, Part 2
Textbook, pp. 517-23
Supplement, pp. 77-85

Tennessee Wine and Spirits v. Thomas (2019)
Reeves v. William Stake (1980)
*South-Central Timber Development, Inc. v.
Dep't of Natural Resources of Alaska* (1984)

WEEK SEVEN: FEBRUARY 22 – 26

Monday, February 22

The Privileges and Immunities Clause of Article IV, § 2
Textbook, pp. 523-35

Toomer v. Witsell (1948)
*United Building & Construction Trades Council of Camden County
v. Mayor & Council of the City of Camden* (1984)
Baldwin v. Fish & Game Commission of Montana (1978)
Supreme Court of New Hampshire v. Piper (1985)

Wednesday, February 24

Q and A Before Mid-Term Examination

MBE Questions on Federalism

Friday, February 26

Mid-Term Examination

WEEK EIGHT: MARCH 1 – 5

NO CLASS – SPRING BREAK

Part IV: Individual Rights

WEEK NINE: MARCH 8 – 12

Monday, March 8

“Incorporation”: The Application of the Bill of Rights to the States

Textbook, pp. 538-52

Supplement, pp. 97-101

Ilya Shapiro and Josh Blackman, *The Once and Future Privileges and Immunities Clause* (on TWEN)

Barron v. Mayor & City Council of Baltimore (1833)

The Slaughterhouse Cases (1872)

Saenz v. Roe (1999)

Timbs v. Indiana (2019)

Wednesday, March 10

“State Action”

Textbook, pp. 574-77, 591-600

Supplement, pp. 101-11

Jackson v. Metropolitan Edison Company (1974)

Moose Lodge No. 107 v. Irvis (1972)

Burton v. Wilmington Parking Authority (1961)

Norwood v. Harrison (1973)

Rendell-Baker v. Kohn (1982)

Manhattan Community Access Corp. Halleck (2019)

Friday, March 12

Economic Substantive Due Process

Textbook, 613-18, 621-30, 635-39, 653-58

Lochner v. New York (1905)

Muller v. Oregon (1908)

West Coast Hotel Co. v. Parrish (1937)

United States v. Carolene Products Co. (1938)

Phillip Morris U.S.A. v. Williams (2007)

WEEK TEN: MARCH 15 – 19

Monday, March 15

Equal Protection, Part 1: The Rational Basis Test
Textbook, pp. 725-40, 747-54

Romer v. Evans (1996)
U.S. Department of Agriculture v. Moreno (1973)
City of Cleburne, Texas v. Cleburne Living Center, Inc. (1985)

Wednesday, March 17

Equal Protection, Part 2: Classifications Based on Race and National Origin
Textbook, pp. 754-67
Supplement, pp. 135-44
Recommended: More Perfect Podcast—American Pendulum I
(*Korematsu*) and American Pendulum II (*Dred Scott*) (Both in Season 2)

Dred Scott v. Sandford (1857)
Korematsu v. United States (1944)
Pena-Rodriguez v. Colorado (2018)

Friday, March 19

Equal Protection, Part 3: Segregation and Its Aftermath
Textbook, pp. 771-81, 818-33

Plessy v. Ferguson (1896)
Brown v. Board of Education (1954)
Parents Involved in Community Schools v. Seattle School District No. 1 (2007)

WEEK ELEVEN: MARCH 22 – 26

Monday, March 22

Equal Protection, Part 4: Facially Neutral Laws with Discriminatory Impact
Textbook, pp. 781-97
William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction* (2001) (on TWEN)

Washington v. Davis (1976)
McCleskey v. Kemp (1987)
City of Mobile v. Bolden (1980)
Palmer v. Thompson (1971)

Wednesday, March 24

Equal Protection, Part 5: Laws Benefitting Minorities
Textbook, pp. 833-47, 870-78

Recommended: More Perfect Podcast—The Architect (Season 2)

Richmond v. J.A. Croson Co. (1989)

Fisher v. University of Texas, Austin (2016)

Friday, March 26

Equal Protection Part 6: Alienage Classifications
Textbook, pp. 922-38

Graham v. Richardson (1971)

Foley v. Connelie (1978)

Ambach v. Norwick (1979)

Plyler v. Doe (1982)

WEEK TWELVE: MARCH 29 – APRIL 2

Monday, March 29

Equal Protection, Part 7: Gender Classifications
Textbook, pp. 882-86, 889-97, 901-05

Recommended: More Perfect Podcast—Sex Appeal (Season 2)

Craig v. Boren (1976)

United States v. Virginia (1996)

Orr v. Orr (1979)

Mississippi University for Women v. Hogan (1982)

Wednesday, March 31

Equal Protection, Part 8: Gender Classifications (continued)
Textbook, pp. 905-12, 914-22

Michael M. v. Superior Court of Sonoma County (1981)

Rostker v. Goldberg (1981)

Nguyen v. Immigration & Naturalization Service (2001)

The Third Quiz of the semester (Equal Protection) must be uploaded to TWEN (under Assignments) by Thursday, April 1, at 10 pm.

Friday, April 2

Fundamental Rights, Part 1: The Right to Marry
Textbook, pp. 949-56, 967-81
Supplement, pp. 155-58

Loving v. Virginia (1967)
Obergefell v. Hodges (2015)
Pavan v. Smith (2017)

WEEK THIRTEEN: APRIL 5 – 9

Monday, April 5

Fundamental Rights, Part 2: The Right to Custody and Control of One's Children
Textbook, pp. 981-93, 997-1002

Stanley v. Illinois (1972)
Michael H. v. Gerald D. (1989)
Moore v. City of East Cleveland (1977)
Troxel v. Granville (2000)

Wednesday, April 7

Fundamental Rights, Part 3: The Right to Abortion
Textbook, pp. 1014-35
Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?* 40 Harv. J. L. & Pub. Pol'y 539 (2017)

Roe v. Wade (1973)
Planned Parenthood v. Casey (1992)

Friday, April 9

Fundamental Rights, Part 4: Government Regulation of Abortion
Textbook, pp. 1058-65, 1035-41

Planned Parenthood v. Danforth (1976)
Planned Parenthood v. Casey (1992)
Whole Women's Health v. Hellerstedt (2016)

WEEK FOURTEEN: APRIL 12 – 16

Monday, April 12

Fundamental Rights, Part 5: The Right to Physician-Assisted Suicide and the Right to Sexual Liberty

Textbook, pp. 1077-82, 1084-97

Recommended: More Perfect Podcast—The Imperfect Plaintiffs (Season 1)

Rachel Aviv, *The Death Treatment*, The New Yorker (2015) (TWEN)

Washington v. Glucksberg (1997)

Lawrence v. Texas (2003)

The Fourth Quiz of the semester (Fundamental Rights) must be uploaded to TWEN (under Assignments) by Tuesday, April 13, at 10 pm.

Wednesday, April 14

The Free Exercise Clause, Part 1

Textbook, pp. 1731-41, 1748-54

Supplement, pp. 223-36

Employment Division v. Smith (1990)

Burwell v. Hobby Lobby (2014)

Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission (2018)

Friday, April 16

The Free Exercise Clause, Part 2: Government Funding

Supplement, pp. 173-87

Trinity Lutheran Church v. Pauley (2017)

Espinoza v. Montana (2020) (on TWEN)

WEEK FIFTEEN: APRIL 19 – 23

Monday, April 19

The Establishment Clause, Part 1: The *Lemon* Test

Textbook, pp. 1759-74

Supplement, pp. 251-61

Liam Stack, *Satan is in the Illinois Capitol. Because It's the Holidays!*, NY Times (2018) (TWEN)

Lemon v. Kurtzman (1971)

County of Allegheny v. ACLU (1989)

American Legion v. American Humanist Association (2019)

Wednesday, April 21

Class Evaluations

The Establishment Clause, Part 2: Prayers at Football Games
and City Council Meetings

Textbook, pp. 1774-82, 1818-27

Santa Fe Independent School District v. Doe (2000)

Town of Greece v. Galloway (2014)

Friday, April 23

Constitutional Law in the Time of the Pandemic

Josh Blackman, *What Rights are “Essential”? The 1st, 2nd, and 14th Amendments
in the Time of Pandemic* (2020) (on TWEN), pages 11-39 Second Amendment
and Abortion

Roman Catholic Diocese of Brooklyn v. Cuomo (2020) (on TWEN)

WEEK SIXTEEN: APRIL 26 – 30

Monday, April 26

Review Class Q and A

MBE Questions on the First Amendment Religion Clauses

END OF THE SEMESTER