

CONSTITUTIONAL LAW  
SPRING TERM 2023  
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. Yet we also will pay close attention to Court's recent—and revolutionary—jurisprudence to appreciate where the Court stands today on a wide range of hotly debated issues. 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.

**IMPORTANT NOTICE:**

This semester, I have broken the course into two sections, Section 1 (REQ.7112.03), which meets on T/R/F at 11:20, and Section 2 (REQ.7112.02), which meets on T/R/F at 2:10. Both sections meet in Oakes 012. You must attend class at the time for your section—you cannot attend class at the time assigned for the other section. I will enforce this rule strictly to preserve the balance between sections.

**REQUIRED MATERIALS:**

1. Erwin Chemerinsky, *Constitutional Law* (6th ed. 2020)
2. Course Materials on TWEN

**RECOMMENDED MATERIALS:**

Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (6th ed. 2019).

**OFFICE HOURS** (masks are required in my office at this time):

Tuesday, 3:45 pm – 5:00 pm

Wednesday, 8:30-10:00 am

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

## TEACHING ASSISTANTS:

- Section 1: Asfar Basha, [AsfarBasha@vermontlaw.edu](mailto:AsfarBasha@vermontlaw.edu)  
Office Hours: Tuesday, 1:30-2:30 pm, Chase Center, on Teams, or by appt.
- Phoebe Howe, [PhoebeHowe@vermontlaw.edu](mailto:PhoebeHowe@vermontlaw.edu)  
Office Hours: Thursday, 1:30-2:30 pm, Chase Center, on Teams, or by appt.
- Section 2: Chase Ford, [ChaseFord@vermontlaw.edu](mailto:ChaseFord@vermontlaw.edu)  
Office Hours: Thursday, 12:45-2:00 pm, Chase Center Loft, on Teams, or by appt.
- Amy Vedder, [AmyVedder@vermontlaw.edu](mailto:AmyVedder@vermontlaw.edu)  
Office Hours: Wednesday/Thursday, 8:30-9:30 am, ASP Office (Old Schoolhouse), on Teams, or by appt.

## GRADES:

Grades will be computed as follows:

- |                                      |     |
|--------------------------------------|-----|
| (1) Midterm Exam (Thursday, March 2) | 20% |
| (2) Final Exam                       | 80% |

## QUIZZES:

I have created four optional, ungraded quizzes for this course. The quizzes cover Judicial Review; Separation of Powers; Equal Protection; and Fundamental Rights. Each quiz contains four MBE multiple-choice questions and six short-answer questions. The quizzes are a way for you to assess your understanding of the material covered in the course. I see the quizzes as a precursor to your outline. I will post the answers to the MBE questions on Canvas after you have had an opportunity to take the quizzes. I may also post sample answers to the short-answer questions. I will not comment on individual quiz responses, but I am happy to meet with you to answer any questions you might have about the quizzes after you have taken them.

## PODCASTS

Podcasts on the Supreme Court have proliferated in recent years. I have listened to many of them and enjoy each for different reasons. But I still think the best are the More Perfect podcasts from WNYC Studios. These podcasts humanize the cases we read by telling the stories of the people behind them. The podcasts are entertaining, educational, and often revealing. I have noted these podcasts throughout this Syllabus, aligned with the subject matter we cover. They are, of course, optional. But if you are feeling the cases we study are a bit dry, check out the podcasts to see the human side of the Court's jurisprudence.

## 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 defined and enumerated powers; separation of powers among the three branches of the federal government and between the federal and state governments; federalism and the limits on state powers; and individual rights found in the Constitution and its Amendments.
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.

## READING ASSIGNMENTS BY CLASS:

### **Unit 1: The Federal Judicial Power**

#### WEEK ONE: JANUARY 16 – 20

##### Tuesday, January 17

The Birth of Con Law: *Marbury v. Madison*

Textbook, pp. 1-9

Amy Coney Barrett, *Originalism and Stare Decisis* (2017) (on Canvas)

*Marbury v. Madison* (1803)

##### Thursday, January 19

An Introduction to Originalism

Textbook, pp. 11-32

*Kanter v. Barr* (7th Circuit, Judge Barrett in dissent) (2019) (on Canvas)

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)

Friday, January 20

Limits on Judicial Review, Part 1: Advisory Opinions and Standing  
Textbook, pp. 39-42, 44-52, 58-63  
*Transunion v. Ramirez* (2021) (on Canvas)

*Opinion of the Justices*  
*Hayburn's Case* (1792)  
*Allen v. Wright* (1984)  
*City of Los Angeles v. Lyons* (1983)  
*Lujan v. Defenders of Wildlife* (1992)  
*Transunion v. Ramirez* (2021)

WEEK TWO: JANUARY 23 – 27

Tuesday, January 24

Limits on Judicial Review, Part 2: Standing (cont'd), Ripeness, and Mootness  
Textbook, pp. 79-83, 85-88  
*Uzuegbunam v. Preczewski* (2021) (on Canvas)

*Uzuegbunam v. Preczewski* (2021)  
*Poe v. Ullman* (1961)  
*Abbott Laboratories v. Gardner* (1967)  
*Roe v. Wade* (1971)  
*DeFunis v. Odegaard* (1974)  
*Friends of the Earth, Inc. v. Laidlaw Environmental Services* (2000)

Thursday, January 26

Limits on Judicial Review, Part 3: The Political Question Doctrine  
Textbook, pp. 90-109, 111-14  
Recommended: More Perfect Podcast—The Political Thicket (Season 1)

*Baker v. Carr* (1962)  
*Rucho v. Common Cause* (2019)  
*Goldwater v. Carter* (1979)

**MBE Questions on Judicial Review**

Quiz 1 available on Canvas (optional)

## Unit 2: Separation of Powers

### Friday, January 27

Congress's Powers under Article I

Textbook, pp. 119-32

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

*McCulloch v. Maryland* (1819)

### WEEK THREE: JANUARY 30 – February 3

### Tuesday, January 31

Congress's Treaty Power and

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

Textbook, pp. 155-66

*McGirt v. Oklahoma* (2020) (on Canvas)

*McGirt v. Oklahoma* (2020)

*Gibbons v. Ogden* (1824)

*United States v. E.C. Knight* (1895)

*Carter v. Carter Coal Co.* (1936)

*A.L.A. Schechter Poultry Corp. v. United States* (1935)

*The Child Labor Case (Hammer v. Dagenhart)* (1918)

*The Lottery Case (Champion v. Ames)* (1903)

### Thursday, February 2

Congress's Commerce Clause Power, Part 2: The expansive Third Era

Textbook, pp. 166-79

Recommended: More Perfect Podcast—One Nation, Under Money (Season 3)

*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)

### Friday, February 3

Congress's Commerce Clause Power, Part 3: Retraction in the Modern Era

Textbook, pp. 187-204, 207-15

*United States v. Lopez* (1995)

*United States v. Morrison* (2000)

*Gonzales v. Raich* (2005)

WEEK FOUR: FEBRUARY 6 – 10

Tuesday, February 7

The Tenth Amendment as a Limit on Congress's Powers  
Textbook, pp. 216-40

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

Thursday, February 9

Congress's Taxing and Spending Power  
Textbook, pp. 240-42, 245-48, 133-54

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

Friday, February 10

Congress's Enforcement Powers  
Textbook, pp. 248-74

*The Civil Rights Cases* (1883)  
*United States v. Morrison* (2000) (Reprise)  
*Katzenbach v. Morgan & Morgan* (1966)  
*City of Boerne v. Flores* (1997)  
*Shelby County, Alabama v. Holder* (2013)

WEEK FIVE: FEBRUARY 13 – 17

Tuesday, February 14

The Eleventh Amendment as a Limit on Congress's Power  
Eleventh Amendment Readings (on Canvas)

*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)

Thursday, February 16

The Executive Power  
Textbook, pp. 275-84, 395-406

*Youngstown Steel & Tube Co. v. Sawyer* (1952)  
*Trump v. Hawaii* (2018)

**MBE Questions on Separation of Powers**

Quiz 2 available on Canvas (optional)

**Unit 3: Federalism**

Friday, February 17

Preemption of State Law  
Textbook, pp. 419-35  
*Virginia Uranium v. Warren* (2019) (on Canvas)

*Lorillard Tobacco Co. v. Reilly* (2001)  
*Florida Lime and Avocado Growers v. Paul* (1963)  
*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm.* (1983)  
*Virginia Uranium v. Warren* (2019)

WEEK SIX: FEBRUARY 20 – 24

Tuesday, February 21

The Dormant Commerce Clause, Part 1  
Textbook, pp. 444-52, 458-67, 471-77

*H.P. Hood & Sons, Inc. v. Du Mond* (1949)  
*Tennessee Wine and Spirits v. Thomas* (2019)  
*City of Philadelphia v. New Jersey* (1978)  
*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)  
*Loren J. Pike v. Bruce Church, Inc.* (1970)

Thursday, February 23

The Dormant Commerce Clause, Part 2  
Textbook, pp. 483-89  
*Northeast Patients Group v. Maine* (1st Cir. 2022) (on Canvas)

*Northeast Patients Group v. Maine* (1st Cir. 2022)  
*Reeves v. William Stake* (1980)  
*White v. Massachusetts Council of Constr. Employers* (1983)

*South-Central Timber Development, Inc. v.  
Dep't of Natural Resources of Alaska* (1984)

Friday, February 24

The Privileges and Immunities Clause of Article IV, § 2  
Textbook, pp. 489-501

*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)

**MBE Questions on Federalism**

WEEK SEVEN: FEBRUARY 27 – March 3

Tuesday, February 28

Q and A before Midterm Examination

Thursday, March 2

Midterm Examination (One Hour)

**Unit 4: Individual Rights**

Friday, March 3

“Incorporation”: The Application of the Bill of Rights to the States  
Textbook, pp. 504-06, 516-21

*Timbs v. Indiana* (2019) (on Canvas)

*Ramos v. Louisiana* (2020) (on Canvas)

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

*Palko v. Connecticut* (1937)

*Adamson c. California* (1947)

*Timbs v. Indiana* (2019)

*Ramos v. Louisiana* (2020)



WEEK EIGHT: MARCH 6 – 10

NO CLASS – SPRING BREAK

WEEK NINE: MARCH 13 - 17

Tuesday, March 14

“State Action”

Textbook, pp. 532-37 540-43, 546-51, 561-66, 568-71

*The Civil Rights Cases* (1883)

*Jackson v. Metropolitan Edison Company* (1974)

*Manhattan Community Access Corp. Halleck* (2019)

*Burton v. Wilmington Parking Authority* (1961)

*Moose Lodge No. 107 v. Irvis* (1972)

*Norwood v. Harrison* (1973)

*Rendell-Baker v. Kohn* (1982)

Thursday, March 16

Substantive Due Process (Origins)

Textbook, 581-84, 586-95, 599-606

*Lochner v. New York* (1905)

*Muller v. Oregon* (1908)

*West Coast Hotel Co. v. Parrish* (1937)

*United States v. Carolene Products Co.* (1938)

*Williamson v. Lee Optical* (1955)

Friday, March 17

Equal Protection, Part 1: The Rational Basis Test

Textbook, pp. 683-98, 705-11

*Romer v. Evans* (1996)

*U.S. Department of Agriculture v. Moreno* (1973)

*City of Cleburne, Texas v. Cleburne Living Center, Inc.* (1985)

WEEK TEN: MARCH 20 – 24

Tuesday, March 21

Equal Protection, Part 2: Classifications Based on Race and National Origin

Textbook, pp. 711-28

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)  
*Loving v. Virginia* (1967)  
*Palmore v. Sidoti* (1984)

Thursday, March 23

Equal Protection, Part 3: Segregation and Its Aftermath  
Textbook, pp. 728-38, 775-90

*Plessy v. Ferguson* (1896)  
*Brown v. Board of Education* (1954)  
*Johnson v. California* (2005)  
*Parents Involved in Community Schools v. Seattle School District No. 1* (2007)

Friday, March 24

Equal Protection, Part 4: Facially Neutral Laws with Discriminatory Impact  
Textbook, pp. 738-47, 752-57

*Palmer v. Thompson* (1971)  
*Washington v. Davis* (1976)  
*McCleskey v. Kemp* (1987)  
*Personnel Administrator v. Feeney* (1979)  
*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977)

WEEK ELEVEN: MARCH 27 – 31

Tuesday, March 28

Equal Protection, Part 5: Laws Benefitting Minorities  
Textbook, pp. 790-803, 825-32  
*Justice Thomas's Equality Canon* (2017) (on Canvas)

*Richmond v. J.A. Croson Co.* (1989)  
*Adarand Constructors, Inc. v. Peña* (1995)  
*Fisher v. University of Texas, Austin* (2016)

Thursday, March 30

Equal Protection Part 6: Laws that Discriminate Against Non-Citizens  
Textbook, pp. 876-91

*Graham v. Richardson* (1971)  
*Foley v. Connelie* (1978)  
*Ambach v. Norwick* (1979)  
*Matthews v. Diaz* (1976) and *Hampton v. Wong* (1976)  
*Plyler v. Doe* (1982)

Friday, March 31

Equal Protection, Part 7: Gender Classifications

Textbook, pp. 836-50, 854-59

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

*Frontiero v. Richardson* (1973)

*Craig v. Boren* (1976)

*United States v. Virginia* (1996)

*Orr v. Orr* (1979)

*Mississippi University for Women v. Hogan* (1982)

WEEK TWELVE: APRIL 3 – 7

Tuesday, April 4

Equal Protection, Part 8: Gender Classifications (continued)

Textbook, pp. 859-66, 867-75

Recommended: OLC Opinion on the Equal Rights Amendment (2020) & Opinion of Chair Maloney on ERA Ratification (2021) (both on Canvas)

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

*Rostker v. Goldberg* (1981)

*Nguyen v. Immigration & Naturalization Service* (2001)

**MBE Questions on Equal Protection**

Unit 3 Quiz available on Canvas (optional)

Thursday, April 6

Substantive Due Process (Reprise)

Fundamental Rights, Part 1: The Right to Marry

Textbook, pp. 903-10, 915-29

*Kim Davis* Statement by Justices Thomas and Alito (2020 (on Canvas)

*Loving v. Virginia* (1967)

*Obergefell v. Hodges* (2015)

*Kim Davis* Statement by Justices Thomas and Alito (2020)

Friday, April 7

Fundamental Rights, Part 2: The Right to Custody and Control of One's Children

Textbook, pp. 929-50

*Meyer v. Nebraska* (1923)

*Pierce v. Soc. of the Sisters of the Holy Names of Jesus and Mary* (1925)

*Stanley v. Illinois* (1972)

*Michael H. v. Gerald D.* (1989)

*Moore v. City of East Cleveland* (1977)  
*Village of Belle Terre v. Boraas* (1974)  
*Troxel v. Granville* (2000)

WEEK THIRTEEN: APRIL 10 – 14

Tuesday, April 11

Fundamental Rights, Part 3: The Right to Procreate and the Right to Reproductive Autonomy  
Textbook, pp. 950-52, 961-68, 970-81

*Buck v. Bell* (1927)  
*Skinner v. Oklahoma* (1942)  
*Roe v. Wade* (1973)  
*Planned Parenthood v. Casey* (1992)

Thursday, April 13

Fundamental Rights, Part 4: *Dobbs*: Its Meaning and Its Implications

*Dobbs v. Jackson Women's Health Organization* (2022) (on Canvas)  
*Planned Parenthood v. South Carolina* (South Carolina Supreme Court 2023) (on Canvas)

Friday, April 14

Fundamental Rights, Part 5: The Right to Physician-Assisted Suicide (Death with Dignity) and the Right to Sexual Liberty  
Textbook, pp. 1023-28, 1030-42

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

*Washington v. Glucksberg* (1997)  
*Lawrence v. Texas* (2003)

**MBE Questions on Fundamental Rights**

Unit 4 Quiz available on Canvas (optional)

## The First Amendment: The Religion Clauses

### WEEK FOURTEEN: APRIL 17 – 21

#### Tuesday, April 18

The Free Exercise Clause, Part 1  
Textbook, pp. 1675-77, 1681-99

*Sherbert v. Verner* (1963)  
*Employment Division v. Smith* (1990)  
*Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993)  
*Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission* (2018)

#### Thursday, April 20

The Free Exercise Clause in the Time of the Pandemic  
*Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) (on Canvas)  
*Dr. A. v. Hochul* (2021) (on Canvas)

*Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)  
*Dr. A. v. Hochul* (2021)

#### Friday, April 21

The Establishment Clause, Part 1  
Textbook, pp. 1717-29, 1782-90  
Liam Stack, *Satan is in the Illinois Capitol. Because It's the Holidays!*  
NY Times (2018) (on Canvas)

*Lemon v. Kurtzman* (1971) (case ends after fourth paragraph on page 1729)  
*County of Allegheny v. ACLU* (1989)  
*American Legion v. American Humanist Association* (2019)

### WEEK FIFTEEN: APRIL 24 – 28

#### Tuesday, April 25

The Establishment Clause, Part 2: Prayer in Public Places  
Textbook, pp. 1747-62

*Santa Fe Independent School District v. Doe* (2000)  
*Marsh v. Chambers* (1983)  
*Town of Greece v. Galloway* (2014)

Thursday, April 27

Class Evaluations

The Free Exercise and Establishment Clauses Today

*Kennedy v. Bremerton School District* (2022) (on Canvas)

Friday, April 28

Q and A Before Final Examination

**MBE Questions on the First Amendment Religion Clauses**

END OF THE SEMESTER