

CONSTITUTIONAL LAW

Spring 2012, University of Colorado Law School
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I. READ THIS SYLLABUS (I MEAN IT)

Reading the syllabus is part of the assignment for the first class. In my experience, some students don't actually read the syllabus (even after I specifically assign reading it), and then look inattentive in asking questions the syllabus covered, *e.g.*, "by when do we have to sign up on TWEN?" (Part IV below), or "what can I pick as a response paper topic?" (Part VI) – or, worse, miss a response paper deadline by not noting the specific time or method prescribed for submission (*id.*). As lawyers, you will have to get used to reading, in advance, the rules of any court, judge, or private forum adjudicating your case; consider this a set of such "local rules" you must read in advance of your "legal work" in this course.

II. COURSE DESCRIPTION & SCOPE

This course covers various issues in constitutional law, including:

- ***Separation of powers*** – how the Constitution, by allocating different powers to the three branches of the federal government, limits courts' power to hear certain cases (*e.g.*, foreign policy disputes), Congressional power to pass certain legislation (*e.g.*, the line-item veto), and Presidential power to undertake certain executive actions (*e.g.*, detentions of persons on grounds of national security)
- ***Federalism*** – how the Constitution limits Congressional power to legislate on insufficiently "federal" matters (*e.g.*, legislation on school safety) and also limits states' powers over "federal" issues such as interstate commerce (*e.g.*, regulations affecting transportation)
- ***Individual rights*** – how constitutional amendments have limited the power of the government by guaranteeing certain rights to equality, due process, individual liberty, and economic liberty

The Constitution affects so many areas of law that this course cannot cover *all* constitutional topics, leaving some for other courses focusing on specific fields.¹ This course seeks to cover:

- ***Different methods of interpreting*** the Constitution – and of interpreting legal texts more generally, because constitutional law has more than its share of the classic debates on how to interpret laws
- ***Important historical developments*** in constitutional law and their effects on modern law
- ***Current controversies*** in constitutional law, such as abortion, affirmative action, homosexuality, and constitutional limits on the federal government's ability to legislate on certain topics, such as gun possession, medical marijuana, and expansions of individual rights

More broadly, this course aims not only to teach the subject matter of Constitutional Law, but also to use often exciting and tricky constitutional doctrines to teach you *how legal claims get litigated* and, more broadly, *how to be a lawyer*. Constitutional cases are disproportionately litigated by the best lawyers and decided by the smartest judges, so you can learn a lot both from what the cases say and from analyzing the tactical choices by the lawyers and judges. Even if you never litigate, part of the legal education that will serve you well in business, government, etc., is understanding how and when a case might get litigated against or by your business or government – and how the Constitution and other laws restrict government, grant rights, and give lawyers leverage to protect and advocate for their clients' interests.

III. CONTACTING ME

Email is the best way to reach me promptly, but also feel free to call. I am in my office most weekdays, and you can stop by any time – but by contacting me in advance you can make sure I am available.

¹ *E.g.*, the Fifth Amendment "Takings" clause often is covered in the 1L Property course; the wide range of different rights falling under First Amendment are covered in upper-level constitutional law electives and seminars; constitutional criminal procedure rights also are covered in various upper-level courses.

IV. TWEN – MANDATORY TO SIGN UP

By **Wednesday, January 18th**, you must sign up on the course's TWEN (Westlaw) page and choose a response paper due date (see Part VI below). TWEN will have class reading assignments (possibly posted on the calendar, possibly emailed to the address you register on TWEN), will have posted files available for downloading, will be where you turn in response papers, and will be where I hold discussions (at least in the days leading up to the final exam).

V. CLASS PARTICIPATION & READING

A. Doing the Reading

Doing the reading, and being prepared to discuss it, is essential to this class for several reasons. First, this is one of those classes that will include cold-calling and lots of discussion. Second, much of the material is “cumulative,” so if you skip topics, you will not understand later topics as well. Third, some of this stuff is complicated, and even the best teaching cannot easily make up for a lack of reading.

B. Participating in Class – and Being Unprepared

Because doing the reading and participating in class matter, I like to mix cold-calling (especially if I haven't heard from you in class in a while) with calling on volunteers. If you are unprepared when called on, (1) just say that you are not prepared (I don't expect you to make something up, and please don't waste everyone's time by trying to do so), and (2) expect to be called on in one of the next few classes – a policy I like because it gives you a chance to “recover.” If you have a reasonable excuse for being unprepared, feel free to let me know in advance by email so that I don't call on you that day.

VI. RESPONSE PAPER

You will write, and submit into the TWEN drop box by **2 p.m. the day before the class** for which it is assigned,² a “response paper” (the paper rules are listed below in this footnote³) on the reading for that class or anything related. I want not a summary but your thoughts, and the assignment is open-ended: argue for or against an assigned case; apply the reading to a real-world situation; respond to a question in the reading; compare a reading to something you learned elsewhere; or any related topic you like. I assign these for several reasons. First, they encourage creativity. Second, they guarantee that one or two students give additional thought to each day's reading. Third, they facilitate class participation for lower-key folks who find it easier to speak after having already given the topic some thought – so when you do a response paper, don't be surprised if you are called to discuss what you wrote.

Full disclosure: **in grading writing, I consider grammar and style, not just “content,”** because even the most brilliant content gets obscured by sloppy writing. Most of you will do more writing than speaking in summer jobs and as new lawyers, so you have to learn to write, not just read and speak, about the law. I see many attorneys waste hard work and intelligent thought by submitting, to supervisors or courts, sloppy papers with errors so basic that they clearly reflect a lack of proofreading. Practice avoiding such errors by engaging in the sort of meticulous self-proofreading too few lawyers undertake.

² In the rare event of a multiple-location internet problem (*e.g.*, at home and CU simultaneously): (A) leave a hard copy for me, (B) with a note explaining that you had an internet problem, and (C) as soon as the internet problem ends, submit your paper into the drop box and email me when you have done so.

³ **Rules and guidelines for response papers:**

- (1) Submit the paper as a **Microsoft Word, RTF, or PDF** file (email me in advance if you cannot).
- (2) Have the document **filename include your first initial and last name**.
- (3) Write your papers in **12-point Times New Roman** font, with **1” margins**, and **double-spaced**.
- (4) Do **not exceed three pages**; that is a firm page limit of the sort lawyers regularly see in court rules; if you draft too much, self-edit it to meet the page limit (as lawyers regularly do to meet court page limits).
- (5) Because **content and writing quality are what matters, do not assume three pages are better than two** (or vice-versa); some shorter papers get better grades than longer papers (and vice-versa).

VII. GRADING

A. Final Exam, But a Merely Optional, Ungraded Midterm

Your final exam grade is your presumptive course grade, with the below exceptions. An optional ungraded midterm (a practice final exam question) will be reviewed in class and, if you wish, individually.

B. Response Papers: Grading and Lateness/Make-Up Policy

Response papers receive one of **three grades: check(√), check-plus(√+), or check-minus(√-)**. Most papers get a check. This grade will factor into your plus/minus factor (see below).

If you do not turn in a paper on time (*i.e.*, 2 p.m. the day before the relevant class), you can either **(a) turn it in by 10 p.m.** the night before the class (*i.e.*, up to 8 hours late) or, if you cannot do that, then **(b) do a “make-up” response paper for a later class** that still has an open spot on the TWEN signup page. **Any late or make-up paper will be graded down a notch** (from √+ to √, from √ to √-, or from √- to two √- grades), both on general principle (deadlines are hugely important for lawyers) and because lateness defeats the purpose of the response papers – that you give extra thought to your assigned reading, and that I get to read papers sufficiently in advance to consider incorporating a point you make into my class preparation.

The response paper is mandatory to complete the course. If you neither do your paper nor make it up later, you will fail the course, just as lawyers lose cases by defaulting on required court submissions.

C. Plus/Minus Factor

Your grade may rise or fall up to one grade “step” based on class participation and your response paper. That is, if your grade on the final exam is B, your presumptive course grade is B, but (1) it could drop to B- due to some combination of poor attendance, participation, and/or preparation, and (2) it could rise as high as B+ if you do especially well in those regards.

D. Serious Attendance Problems

While attendance ordinarily affects only your plus/minus factor, class discussions are critical to learning this subject, so **a serious, ongoing lack of attendance will have more significant consequences**, like a further grade decrease (*i.e.*, beyond a one-step minus factor) or, in extreme cases, a failing grade. Absent special circumstances, you will receive notice and an opportunity to remedy the situation immediately (*e.g.*, an email urging you to attend class) before any consequences beyond a one-step minus factor.

VIII. COURSE MATERIALS

- Erwin Chemerinsky, *Constitutional Law* (3rd ed., 2009, Aspen Publishers / Wolters Kluwer) (ISBN# 978-0-7355-7717-6)

- Erwin Chemerinsky, *Constitutional Law, 2011 Case Supplement* (2011, Aspen Publishers / Wolters Kluwer) (ISBN13: 9780735507272)

I also support the use of various study aids (Emanuel Law Outlines, Gilbert Law Summaries, etc.), which can be useful (a) for getting a very basic sense of topics you find confusing (the short “capsule summaries” at the front can be especially good for this) and (b) for finals studying. That said, a study aid is absolutely no substitute for reading the Chemerinsky casebook for many reasons. (1) Only the actual cases show the judges’ and lawyers’ reasoning and arguments, which are as much a focus of this course as the actual case holdings. (2) The study aid is not much shorter than the casebook, so reading “only” the study aid would not save you time. (3) The study aid and the casebook do not cover all the same cases. (4) I chose the Chemerinsky casebook (among many constitutional law books on the market) because it uses shorter case excerpts and begins most chapters with helpful explanations; so while some of the topics are complex, Chemerinsky really does not “hide the ball” or include lengthier readings than necessary.

IX. READING ASSIGNMENTS

- Page numbers are for the casebook, except “Supp” denotes readings in the supplement.
- Week 1 readings are as follows; I will assign future readings via TWEN.
 - Tue 1/17/12: Read this syllabus; & read topic I(A) below.
 - Thu 1/19/12: I(B)(1) below.
 - Fri 1/20/12: I(B)(2); & 92-97 from I(B)(3) (through *Lake Carriers*).
- If you ever want to read ahead: with only rare exceptions, I cover the readings in the below order, averaging 18-20 pages a class.

FIRST HALF OF COURSE: GOVERNMENT POWER & ITS LIMITS (359 pgs)**I. The Federal Judicial Power: Limits on What Disputes the Courts Can Decide** (77 pgs)

- A. The Authority for Judicial Review** (14 pgs)
- 888-892 (just *U.S. v. Virginia*)
 - 1-9 (through the end of *Notes on Marbury v. Madison*)
- B. Justiciability: Limits on What Cases the Federal Courts Can Hear**
- 1. Prohibition on "Advisory Opinions"; Overview of the "Standing" Requirement** (20 pgs)
 - 40-60
 - 2. Causation; Redressability; 3rd-Party & Taxpayer Standing** (12 pgs)
 - 60-72 (through *Gilmore*)
 - 3. Requirement That Claim Be "Ripe" But Not "Moot"** (11 pgs)
 - 92-102 (from header “c”)
 - 4. Declining to Adjudicate "Political Questions"** (20 pgs)
 - 103-116 (from header “e” through end of *Vieth*); 118-125 (from header “iii”)

II. The Federal Legislative Power: Limits on the Scope of Congressional Authority (142 pgs)

- A. Introduction: Congress and the States** (11 pgs)
- 127-138 (through end of *McCulloch*)
- B. The "Commerce" Power**
- 1. Before 1937**
 - a. The Scope of "Commerce" and Congress's Commerce Power** (13 pgs)
 - 141-154
 - b. Does the Tenth Amendment Limit Congress's "Commerce" Power?** (4 pgs)
 - 154-157
 - 2. From 1937-1991** (18 pgs)
 - 159-174 (through the Stewart dissent in *Perez*)
 - 178-181 (just the Blackmun majority op in *Garcia*)
 - 3. From 1991-present**
 - a. The Modern Shift in the Commerce Power**
 - i. The Return of Limits to the Commerce Power: *Lopez & Morrison*** (19.5 pgs)
 - 184-203
 - ii. 2001-present: The Court Limits *Lopez & Morrison*** (12.5 pgs)
 - 203-216 (starting with *Pierce*)
 - b. Tenth Amendment Limits on Congress's Authority** (22 pgs)
 - 216-238
 - c. The Taxing & Spending Power** (8 pgs)
 - 238-248 (but on 240-242, skip the *Butler* dissent and *Chas. C. Steward Mach. Co.* on 241-242)
 - d. The Necessary & Proper Clause: The Latest Authority** (9 pgs)
 - Supp. 15-24 (just *Comstock*)
- C. Congressional Power under the Post-Civil War Amendments** (25 pgs)
- 248-262
 - Supp. 24-34 (*Northwest Austin* & the paragraph preceding it)

III. The Federal Executive Power: Limits on the President & the Executive Branch (56 pgs)

- A. **Separation of Powers & Presidential Authority: "Inherent Presidential Power"** (9 pgs)
 - 317-327 (starting with header “A” on 317, and ending with 1st 2 lines on 327)
- B. **The Authority of Congress to Increase Executive Power, and Expanded Administrative Authority** (5 pgs)
 - 335-340
- C. **Presidential Power over Foreign Policy**
 - 1. **Foreign Policy** (7.5 pgs)
 - 369-376
 - 2. **Warmaking** (4.5 pgs)
 - 377-381 (through the last paragraph before header “E”)
 - 3. **Terrorism, Detention, & Wartime Sabotage** (30 pgs)
 - 381-411 (starting with header “1” on 381)

IV. Limits on State Regulatory & Taxing Power (84 pgs)

- A. **Preemption** (34 pgs)
 - 436-449 (starting with headers “1” on 436)
 - Supp. 49-68 (just the *Chamber of Commerce* & *Wyeth* cases)
- B. **The "Dormant" Commerce Clause**
 - 1. **Overview** (4.5 pgs)
 - 452-456 (up to header “2” on 456)
 - 2. **When & Whether Laws "Discriminate" Against Out-of-Staters** (21 pgs)
 - 464-476 (starting with the “Facially Discriminatory” header, & through the Thomas op on 476)
 - 479-489 (starting with the “Facially Neutral” header on 479)
 - 3. **The Tests for Discriminatory Laws & Non-Discriminatory Laws Burdening Interstate Commerce** (11 pgs)
 - 489-5010 (through end of all *Kassel* ops)
 - 4. **Exceptions: Congressional Approval; State as Market Participant** (1.5 pgs)
 - 501-502 (starting with header “c”, up to but not including *Western & Southern Life*)
 - 503 (just the two paragraphs following the “Market Participant” header)
- C. **Article IV "Privileges & Immunities"** (12 pgs)
 - 509-521

SECOND HALF OF COURSE: CIVIL RIGHTS & CIVIL LIBERTIES (363 pgs)

V. The Structure of the Constitution's Protection of Civil Rights & Civil Liberties (29.5 pgs)

- A. **"Incorporation": Application of the Bill of Rights to the States; Due Process vs. Privileges & Immunities** (9 pgs)
 - 523-527
 - 536-538 (from header “3” up to but not including the “The Debate” header)
 - 543-545 (just all ops in *Duncan*)
- B. **The Requirement of "State Action"; Exceptions Allowing Coverage of Private Conduct** (20.5 pgs)
 - 548-560 (starting with header “1”)
 - 567-572 (starting with header “b”)
 - 593-597 (just the majority op, and the first paragraph of the dissent, in *Brentwood Academy*)

VI. Economic Rights (40 pgs)

- A. **The Rise of Constitutional Protection of Economic Rights: The *Lochner* Era** (12.5 pgs)
 - 603-604 (just section “1”) 0.1
 - 608-614 (from *Lochner* up to but not including *Coppage*) 5.0
 - 617-623
- B. **The Post-1937 Fall of the *Lochner* Doctrine** (5.5 pgs)
 - 625-630 (through end of *Williamson*)
- C. **What Economic Rights Remain?**
 - a. **Substantive Due Process Limits on Punitive Damages** (11 pgs)
 - 631-642 (starting with *BMW* and through the end of *State Farm*)
 - b. **The Contracts Clause** (11 pgs)
 - 647-658 (through end of *Allied Structural Steel*)

VII. Fundamental Rights (162.5 pgs)

A. Family Autonomy	(24 pgs)
a. The Right to Marry	(7 pgs)
• 949-956 (starting with Subsection C)	
b. The Right to Custody of Children	(8 pgs)
• 956-964	
c. The Right of Parents to Control the Upbringing of Their Children	(2.5 pgs)
• 968-970 (through end of 970)	
B. Rights to Procreation & Contraception	(11 pgs)
• 977-988	
C. Abortion	
a. Recognition & Reaffirmation of the Right to Abortion	(21 pgs)
• 989-1010	
b. Regulation of Abortions	(16 pgs)
• 1010-1026	
c. Spousal Consent/Notice Requirements	(5 pgs)
• 1031-1036 (just <i>Planned Parenthood v. Casey</i>)	
D. Medical Decisions	(16 pgs)
• 1040-1056	
E. Sexual Orientation	(13 pgs)
• 1056-1069	
F. Voting Rights	(39 pgs)
• 1080-1090	
• 1102-1107	
• 1110-1133 (through end of <i>Bush v. Gore</i>)	

VIII. Equal Protection (131 pgs)

A. Racial Classifications	
1. Discrimination Against Racial Minorities: Segregation; Intentional Harm	(30 pgs)
• 749-754 (through first paragraph on 754)	
• 756-782 (starting with <i>Korematsu</i> ; skip <i>Palmore</i> on 763-765; continue through end of 782)	
2. Policies Aimed at Benefiting Racial Minorities	
a. School Desegregation & Affirmative Action	(27 pgs)
• 802-812	
• 816-833	
b. Affirmative Action	(25 pgs)
• 847-872 (just <i>Grutter</i> and <i>Gratz</i>)	
B. Gender Classifications	
1. Discrimination Based on Gender	(7.5 pgs)
• 880-887 (through end of <i>Craig</i>)	
2. Policies Favoring Women or Disfavoring Men	(10 pgs)
• 898-908 (through end of <i>Rostker</i>)	
C. Alienage	
• 920-923 (starting just after the horizontal bar near the top of the 920)	(8 pgs)
• 927-933 (just <i>Plyer v. Doe</i>)	
D. Other Classifications & Discrimination	
1. The Rational Basis Test	(7.5 pgs)
• 733-741 (starting w/ last three lines on 733)	
2. Various Classifications Receiving Rational Basis Review: Age; Disability; Wealth	(5 pgs)
• 937-942 (from top of 937 until the just the first four lines on 942)	
3. Classifications Failing Rational Basis Scrutiny: Sexual Orientation & Others	(12 pgs)
• 725-730 (just <i>Romer</i>)	
• 741-748 (just <i>U.S. Dep't of Agriculture v. Moreno</i> and <i>City of Cleburne v. Cleburne Living Ctr.</i>)	