

# Constitutional Law

## LAW 7540 SEC. 2

Professor Douglas Spencer  
TA: Jonathan Lamantia

Spring 2015

**Room:** Knight 215

**Time:** TTh 2-4p

### **Professor Contact**

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### **Office Hours**

Thursdays 4-6p

### **TA Office Hours**

Wednesdays 5-6pm

## Course Description

This course is an introduction to American constitutional law. Topics include: the role of the judiciary and other institutions in interpreting and applying the Constitution of the United States; theories of constitutional interpretation; the practice and meaning of judicial review in a political democracy; structural and individual rights approaches to constitutional limitations on government authority; and the public-private distinction in constitutional law.

The course will be divided into four major sections. The initial section will introduce you to controversies surrounding the judicial power and methods of constitutional interpretation. The next two sections will focus on what are often referred to as “structural” matters. The second section will address what is known as separation of powers – the division of authority between the three branches of the federal government. The third section explores the concept of federalism – the relationship between the federal government and the states and the constitutional limits that define the powers of each over various subject matters. The final section will focus on constitutionally guaranteed rights. This will include an introduction to the structure of constitutional protections, equal protection, and an examination of fundamental rights under the Due Process Clause.

Because constitutional law is far too large a field to cover in a single semester, we will omit enormous swaths of interesting and important doctrine, many if not all of which are covered in other courses at UConn. These include: the First Amendment (Freedom of Speech); the rights of criminal defendants (Criminal Procedure and Evidence); the jurisdiction and procedure of the federal courts (which we will discuss briefly, but which is mainly covered in Federal Courts and Civil Procedure); and the Takings Clause (Property), among others.

## Course Objectives

1. To familiarize you with the fundamental premises and design of the constitutional system and government of the United States.
2. To expose you to the guiding principles and applicable doctrines of select subfields of constitutional law.
3. To cultivate your ability to identify latent constitutional issues.
4. To equip you with the intellectual tools necessary to properly conceptualize and analyze constitutional issues.
5. To foster an informed perspective on the nature and limits of constitutional judicial decision-making.

## Required Text

ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW*, (4th ed., 2013)

## Supplemental Texts

You may find helpful as supplements one or more of the following:

- ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2011)
- LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1999) (very detailed but does not cover Equal Protection or Substantive Due Process)

## TWEN

You can find more information about the course on TWEN, including copies of the syllabus, any announcements about changes in the reading schedule, and any supplemental readings that I assign. I will also use TWEN to post announcements about the course and the material we are covering from time to time.

## Classroom Rules and Expectations

The principal expectation is that you will be prepared and participate in the class discussion. Class attendance and participation are important parts of this course and will factor into your grade.

Laptop use is permitted in the classroom. In my experience, I have found that laptops make it easier to keep and organize notes and outlines. However, please note that laptops make it very easy to get distracted (for you and those behind you), and also facilitate the common law student pitfall of transcribing class discussions rather than engaging with them. I will trust you all to make considered judgments on your use of laptops during class.

## Final Exam

The final exam will be an in-class, three-hour exam, tentatively scheduled for Monday, May 18 at 10:00 a.m. Location to be determined. The exam will be open-note, open-book. Students who will perform well on the exam will be able to:

1. Identify issues.
2. Apply doctrine or rules to the issue.
3. Make an argument that is not conclusory (every argument should include a “because” or something similar).
4. Identify and consider counter-argument(s).
5. Explain why argument is still valid in light of the counter-argument(s).

## Students With Disabilities

The University of Connecticut is committed to achieving equal educational opportunity and full participation for persons with disabilities. Assurance of equal educational opportunity rests upon legal foundations established by the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. By federal law, a person with a disability is any person who (1) has a physical or mental impairment; (2) has a record of such impairment; or (3) is regarded as having such an impairment which substantially limits one or more major life activities such as self-care, walking, seeing, hearing, speaking, breathing, or learning. All students with disabilities are entitled to a learning environment that provides for reasonable accommodation of their disabilities. Any student who requires special accommodations due to a disability should contact the Director of Student Services, Jane Thierfeld Brown, at (860) 570-5132 or [jane.brown@law.uconn.edu](mailto:jane.brown@law.uconn.edu). For more information regarding the accommodations process at UConn Law, you may also visit the Disability Services website at <https://www.law.uconn.edu/student-life-resources/student-services/disability-services>.

## Class Cancellations

Class will be cancelled only if absolutely necessary. If it becomes necessary to cancel class, students will be notified by email. A banner will also be added to the Law School's website (<http://law.uconn.edu>). If the weather is inclement, students should call the Law School hotline at (860) 570-5145. Note that the University will send general announcements via text to those who have registered for the notification service at [alert.uconn.edu](http://alert.uconn.edu). Individual students who are not comfortable driving in the existing weather conditions may exercise their discretion not to do so.

## Course Schedule

The following schedule is tentative and will be updated as we move through the course. I will announce all changes in class and on TWEN.

### **Part I: Judicial Power and its Limits**

Feb. 3: Constitutional Interpretation & Judicial Power

CB xli-lvii (The Constitution of the United States)

CB 1-11 (*Marbury v. Madison*)

Feb. 5: Limits of Federal Judicial Power

CB 11-34

Feb. 10: Article III and Justiciability (Standing)

CB 45-67

Feb. 12: Article III and Justiciability (Ripeness, Mootness, and Political Questions)

CB 81-104

### **Part II: Separation of Powers**

Feb. 17: Federal Executive Power

CB 317-338

Feb. 19: Foreign Affairs, War Powers & the War on Terror

CB 369-411 (*Hamdi* or *Boumediene*)

Feb. 24: Congressional Authority Over the President

CB 338-353 (non-delegation and legislative veto)

### **Part III: Federalism**

Feb. 26: Necessary and Proper Clause

CB 115-126 (*McCulloch*) and CB 151-158

FRIDAY MAKE-UP Feb. 27 (10a-12p): Commerce Clause I

CB 158-182

Mar. 3: Commerce Clause II

CB 190-220

Mar. 5: 10th Amendment and Limits on Congressional Power Over the States

CB 220-241 and *Shelby County v. Holder* (posted on TWEN)

Mar. 9-13: SPRING BREAK (no class)

Mar. 17: Limits on State Power (preemption, dormant commerce clause)

CB 441-468

Mar. 19: Taxing & Spending Power, Commerce Clause Review

CB 241-250 and CB 129-151 (*NFIB v. Sebelius*)

### **Part IV: Constitutional Protection of Civil Rights and Civil Liberties**

Mar. 24: Equal Protection Framework (rational basis)

CB 717-740

Mar. 26: NO CLASS

Mar. 31: History of 13th and 14th Amendment, Strict Scrutiny

CB 740-771

Apr. 2: Facially Discriminatory vs. Facially Neutral Laws

CB 771-793

Apr. 7: Remedies for Violation of Equal Protection

CB 794-824

Apr. 9: Classification Benefiting Minorities: Contracting & Education  
CB 824-861 and Supp. 57-63 (*Fisher v. UT Austin*)

Apr. 14: Gender Classifications  
CB 866-884

Apr. 16: Due Process & Economic Rights  
CB 601-613, 623-627, 630-641

Apr. 21: Reproductive Autonomy I  
CB 967-1000

Apr. 23: Reproductive Autonomy II  
CB 1000-1016, 1021-1030

Apr. 28: The Protection of Fundamental Rights in Europe  
GUEST SPEAKER: Ulrich Haltern, Martin-Flynn Global Professor Law  
Readings posted on TWEN

Apr. 30: Sexual Orientation & Sexual Activity  
CB 1046-1058 and *Bowers v. Hardwick* (on TWEN)

May 5: NO CLASS (follow Friday schedule)

May 7: Same Sex Marriage & Family Autonomy  
CB 938-946 and Supp. 63-77 (*U.S. v. Windsor*)

May 11: REVIEW SESSION

## Additional (non-required) Readings You Might Find Useful:

### Judicial Power and its Limits

1. Alexander Bickel, Foreword, The Passive Virtues, 75 HARV. L. REV. 40 (1961)
2. Gerald Gunther, The Subtle Vices of the “Passive Virtues”: A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964)

### Separation of Powers

1. Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1031 (2004)
2. H. Jefferson Powell, The President’s Authority Over Foreign Affairs: An Executive Branch Perspective, 67 GEO. WASH. L. REV. 527 (1999)
3. Robert J. Pushaw, Jr., The “Enemy Combatant” Cases in Historical Context: The Inevitability of Pragmatic Judicial Review, 82 NOTRE DAME L. REV. 1005 (2007)

### Federalism

1. Robert D. Cooter and Neil Siegel, Collective Action Federalism: A General Theory of Article I, Section 8, 63 STAN. L. REV. 115 (2010)
2. Herbert Weschler, Political Safeguards of Federalism: The Role of States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954)
3. Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 COLUM. L. REV. 215 (2000)
4. William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977)

### Equal Protection

1. Alan David Freeman, Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978)
2. Paul Brest: Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976)
3. Barbara Flag, “Was Blind But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953 (1993)
4. Charles R. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987)
5. Neil Gotanda, A Critique of Our Constitution is Color-Blind, 44 STAN. L. REV. 1 (1991)
6. Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 STAN. L. REV. 1111 (1997)
7. Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747 (2011)

### Fundamental Rights

1. Jack M. Balkin, Abortion and Original Meaning, 24 CONST. COMMENT. 291 (2007)
2. Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash, 42 HARV. C.R.-C.L. REV. 373 (2007)