

# CONSTITUTIONAL LAW

## Syllabus – Spring 2019

### Professor D. Theodore Rave

**Class Hours:** Mondays 1-2:30pm, Tuesdays 9-10:30am, Thursdays 9-10:30am, room 240 TU2.

**Office Hours:** Thursdays from 2:30-4pm. I am always happy to talk with students, so if that time is not convenient for you please feel free to email me to set up an appointment. My office is 142 BLB. My email address is [dtrave@central.uh.edu](mailto:dtrave@central.uh.edu). My assistant is Lillian White.

**Required Casebook:** SULLIVAN & FELDMAN, CONSTITUTIONAL LAW (18th ed. 2013). Note that this is not the latest edition of the casebook. I will also post required reading materials on the Blackboard website from time to time.

**Supplemental Resources:** You may find the following text helpful throughout the course, but please do not take this as a suggestion to go out and buy it. Except for excerpts that I assign and post on Blackboard, you are not responsible for supplemental readings for the purposes of the exam. And your time and energy will be much better spent focusing on the assigned readings. I provide suggestions only because there are many commercial study aids of varying quality out there. This one is at least good. Please note that the Supreme Court is constantly changing the landscape of constitutional law, and there have been important new decisions since the supplement's publication. I will update the casebook in class or with handouts, but I will not update secondary sources. For this reason, it is dangerous to rely on secondary sources (listed below or others) as stating what the law "is."

- ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (5th ed. 2015) (on reserve in library)

**Learning Outcomes:** Learn about the constitutional law of the United States and learn to think like a lawyer.

**Assessment:** Your grade will be based primarily on a take-home final exam. The test will be open book. All answers must be exclusively your own work. You may not consult with others about the exam once the exam period has started. Please review the Honor Code. Final grades may be modified up or down by one level (e.g., B+ to A- or A- to B+) based on class participation.

**Class Participation:** Participation in class discussion is required. I expect you to be prepared for every class. If, for any reason, you are not prepared for a class I ask that you let me know in advance (either by email or by leaving a note on the lectern in class) and I will not call on you that day. If you are unprepared more than twice during the semester, it will affect your grade.

**Practice Problems:** There will be several practice problems throughout the semester. You will be required to complete and turn in answers. These will not be graded, but will count towards class participation. Students that make a good faith effort to complete the practice problems will satisfy this requirement for class participation purposes. Please keep in mind that your grade can be modified up or down for class participation.

**Attendance:** You are expected to attend all class sessions. If you fail to attend at least 80% of class meetings you will be in violation of ABA and Law Center policy and may be dropped from the course. I will track of attendance with a sign-in sheet. It is an honor code violation to sign in for another student. Late arrivals may be treated as absences.

**Computer Policy:** Use of laptops or other electronic devices is permitted for class-related purposes only. Violations of this policy will be treated as unpreparedness.

**Sensitive Topics:** More than any other course in the first year of law school, Constitutional Law deals with sensitive topics about which people have strongly held and widely divergent opinions. I find that class discussion is the most productive when students feel free to try out positions with which they (or others) may not agree and to test the assumptions underlying their own (or others') views. For this reason, class discussion is strictly "off the record." Outside of the classroom, you may not attribute any statements made in class to any of your classmates. And any audio or visual recording of class is prohibited. The only exception to this policy is that I will arrange for the law school to record any make-up classes that might become necessary.

**Accommodation:** If you have a disability and require an accommodation, please contact the Center for Students with Disabilities.

**Counseling:** Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS ([www.uh.edu/caps](http://www.uh.edu/caps)) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus.  
[http://www.uh.edu/caps/outreach/lets\\_talk.html](http://www.uh.edu/caps/outreach/lets_talk.html)

**Reading Assignments:** Reading assignments will be announced in class or emailed to all class members. I will provide you with a course outline and reading assignments in installments as the semester goes on. Unless otherwise noted, page numbers refer to the Sullivan & Feldman casebook. (BB) refers to supplemental readings posted on Blackboard.

**First Assignment:** Please read the Constitution of the United States of America and the Bobbitt excerpt, which is posted on Blackboard; the Stewart excerpt is optional.

## Course Outline (Part 1)

### I. What is a Constitution?

Constitution of the United States of America, pp. lxxv – lxxix  
Phillip Bobbitt, *The Modalities of Constitutional Argument* (BB)  
*Optional*: Jon Stewart, *America (the book)*, Ch. 2 (BB)

### II. Judicial Power

#### A. Judicial Review

“Kittens Kick The Giggly Blue Robot All Summer,” *More Perfect Podcast* (June 30, 2016), <https://www.wnyc.org/story/giggly-blue-robot>  
*Marbury v. Madison* and Notes, pp. 1-16

#### B. Judicial Supremacy and the Countermajoritarian Difficulty

*Cooper v. Aaron* and Notes 1-4, pp. 20-26  
Brest, *Process of Constitutional Decisionmaking*, pp. 140-52 (BB)

#### C. Constraints on Judicial Power

Notes on Political Restraints, pp. 29-34  
Notes on Advisory Opinions, pp. 34-36  
*Lujan v. Defenders of Wildlife*, pp. 36-41  
*Massachusetts v. EPA*, pp. 41-45 (skip notes)

### III. Federalism and Congressional Power

#### A. Principles of Federalism

Intro, pp. 73-74  
Notes 1-4, pp. 102-105  
*Federalist No. 10* (BB)  
Note on the Limits of the Necessary & Proper Clause, pp. 96-98  
*McCulloch v. Maryland* and Notes, pp. 74-90

#### B. Congressional Power

##### 1. Commerce Power

- a. The Commerce Power Before 1937  
Chemmerinsky, *Constitutional Law*, pp. 156-67 (BB)
- b. The New Deal “Settlement” and Broad Commerce Power, 1937-1995  
*NLRB v. Jones & Laughlin Steel Co.*, pp. 125-127  
*U.S. v. Darby*, pp. 127-130  
*Wickard v. Filburn*, pp. 130-131  
Notes 1-7, pp. 131-136
- c. Commerce and the “New Federalism,” 1995-present  
*U.S. v. Lopez* and Notes, pp. 136-144  
*U.S. v. Morrison* and Notes, pp. 144-148  
*Gonzales v. Raich* and Notes 1-4, pp. 149-156

##### 2. Taxing and Spending Powers

*Child Labor Tax Case* and Notes 1-4, pp. 187-192  
*U.S. v. Butler* and Notes, pp. 196-203  
*South Dakota v. Dole* and Notes, pp. 204-209

##### 3. Tenth Amendment Limits on Congress’s Power Over the States

Notes, pp. 164-170  
*New York v. U.S.* and Notes, pp. 170-179

- Note 5, pp. 105-07 (on political safeguards)
- 4. Pulling it All Together
  - NFIB v. Sebelius* (BB)
- IV. Executive Power and the Separation of Powers
  - A. The (Non)Prosecution Power
    - U.S. v. Cox* (BB)
    - DOJ Guidance Regarding Marijuana Enforcement – Cole Memo (2013) and Sessions Memo (2018) (BB)
  - B. Executive Assertions of Power
    - Youngstown Sheet & Tube Co. v. Sawyer* and Notes, pp. 298-310
    - Dames & Moore v. Regan* and Notes 1-2, pp. 310-314
  - C. Emergency and Wartime Powers
    - Notes 1-2, pp. 320-323 (on Lincoln’s suspension of Habeas Corpus) Authorization for Use of Military Force (BB)
    - Hamdi v. Rumsfeld* and Notes 1-4, pp. 335-347 (also read the paragraph preceding the case on p. 335)
    - DOJ White Paper (BB)
  - D. Appointment and Removal of Executive Officers
    - Notes 1-2, pp. 383-84
    - Bowsher v. Synar* and notes, pp. 385-91
    - Morrison v. Olson* and note 1, pp. 391-96
    - Lucia v. SEC* (BB)
  - E. Executive Privilege and Impeachment
    - Casebook pp. 405-06
    - U.S. v. Nixon* and notes, pp. 406-11
    - Clinton v. Jones* and notes, pp. 411-24
    - Charles L. Black, Jr., *Impeachment: A Handbook* Ch. 3 (BB)
- V. State Action and Incorporation
  - A. The Reconstruction Amendments
    - 1. Individual Rights before the Civil War
      - Barron v. Baltimore*, pp. 425-428
      - Dred Scott v. Sanford* and Notes, pp. 429-432
    - 2. Privileges or Immunities Clause
      - Slaughter-House Cases* and Notes, pp. 433-440
    - 3. State Action Requirement
      - Civil Rights Cases* and Note 1, pp. 814-18
  - B. Incorporation of the Bill of Rights
    - Casebook, pp. 446-450
    - Duncan v. Louisiana* and Notes, pp. 450-457
    - McDonald v. Chicago*, pp. 457-465
- VI. Substantive Due Process
  - A. Economic Liberties
    - 1. The *Lochner* Era
      - Casebook pp. 467-471
      - Lochner v. New York* and Notes, pp. 471-482
    - 2. *Lochner*’s Demise and the “Switch in Time”

- Nebbia v. New York* and Notes, pp. 482-486
    - 3. Rational Basis Review
      - Williamson v. Lee Optical Co.* and Note 1, pp. 486-488
  - B. Privacy
    - 1. Contraception
      - Griswold v. Connecticut* and Notes, pp. 492-503
      - Note 3 (on *Michael H. v. Gerald D.*), pp. 534-35
    - 2. Abortion
      - Roe v. Wade* and Notes, pp. 503-514
      - Planned Parenthood v. Casey* and Notes 1-3, pp. 515-525
    - 3. Sexuality
      - Notes, pp. 535-537 (on *Bowers v. Hardwick*)
      - Lawrence v. Texas* and Notes, pp. 538-550
- VII. Equal Protection
  - A. Equal Protection Methodology
    - Casebook pp. 601-03
  - B. Rational Basis Review of Economic Regulation
    - Note 2, pp. 605-07 (on *Williamson v. Lee Optical* redux)
    - US Railroad Retirement Board v. Fritz* and Notes 1-2, pp. 610-615
  - C. Heighted Scrutiny of Suspect Classifications
    - 1. Race
      - a. Segregation
        - Notes pp. 616-620 (particular attention to *Strauder* and *Plessy*)
        - Brown v. Board of Education* and Notes, pp. 620-626
      - b. Facial Discrimination, Discriminatory Purpose, Discriminatory Effect
        - Notes 1-4 pp. 636-40 (on *Korematsu*)
        - Notes pp. 640-643 (on *Yick Wo* and *Gomillion*)
        - Washington v. Davis* and Notes, pp. 643-650
        - Implicit Association Test:
          - <http://www.understandingprejudice.org/iat/> (take either race or gender test, your choice)
          - Trump v. Hawaii* (BB)
      - c. Affirmative Action
        - Notes 1-6, pp. 627-631 (on *Brown II* and school desegregation)
        - Grutter v. Bollinger* (BB)
        - Gratz v. Bollinger* and Notes, pp. 677-688
        - Parents Involved v. Seattle School District* and Notes, pp. 688-698
        - Schuette v. Coalition to Defend Affirmative Action* (BB)
    - 2. Gender and Intermediate Scrutiny
      - Casebook pp. 709-713 (skim)
      - Note 4, pp. 713-15 (on *Frontiero*)
      - Craig v. Boren* and Notes, pp. 715-721
      - U.S. v. Virginia*, pp. 722-729
      - Notes 2-3, pp. 730-731 (on *Geduldig*)
      - Notes pp. 741-745 on affirmative action
    - 3. Other Classifications (Sexual Orientation, Disability, Age, Poverty)

*Cleburne v. Cleburne Living Center, Inc.*, and Notes, pp. 761-767  
*Romer v. Evans* and Notes 1-4, pp. 745-754  
Notes 3-4, pp. 607-10

D. Fundamental Interests Equal Protection

1. Voting

Casebook pp. 767-768  
*Harper v. Virginia State Board of Elections*, pp. 769-770  
*Kramer v. Union Free School District No. 15* and Notes, pp. 770-776

2. Food, Housing, and Education

Casebook pp. 797-799  
*San Antonio Independent School Dist. v. Rodriguez*, pp. 800-806  
*Plyler v. Doe*, pp. 807-809

E. Overlap with Due Process: Incoherence or a New Synthesis?

*Obergefell v. Hodges* (BB)

VIII. First Amendment

A. Freedom of Speech

1. What Is Speech and What Kind of Speech Is Not Protected?

Free Speech: An Overview, pp. 885-98 (skim)  
*Schenck v. U.S.* and note 1, pp. 899-901  
*Brandenburg v. Ohio* and notes, pp. 931-38

2. Why Protect Odious Speech?

*Cohen v. California* and notes, pp. 950-55  
*Collins v. Smith* and notes, pp. 958-62  
*R.A.V. v. City of St. Paul* and notes, pp. 962-73

3. Speech and the Political Process

*Buckley v. Valeo* and notes 1-2, pp. 1383-95  
*Citizens United v. FEC* and notes 1-2, pp. 1421-31

B. The Right Not To Speak Or Associate

Note 1, pp. 1320-23 (on *West Virginia v. Barnette*)  
*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*  
and notes, pp. 1340-44  
Notes 1-4, pp. 1366-72  
*Boys Scouts of America v. Dale* and notes, pp. 1372-76  
*Janus v. AFSCME* (BB)

C. Freedom of Religion

*Church of Lukumi Babalu Aye v. Hialeah* and notes, pp. 1489-96  
*Employment Division v. Smith* and notes 1-5, pp. 1510-23  
*Masterpiece Cakeshop v. Colorado Civil Rights Commission* (BB)

IX. Congress's Power to Enforce the Reconstruction Amendments and the Contest for Constitutional Supremacy

Casebook pp. 812-814  
Casebook pp. 846-850  
*Katzenbach v. Morgan* and Notes, pp. 850-859  
Note 6, pp. 1523-24  
*City of Boerne v. Flores* and Notes 1-4, pp. 859-867