

SPRING SEMESTER 2023 Constitutional Law II

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Class time: MWF 9 am

Online

Administrative Assistant: Mattie Chadwick

Course Overview:

Last semester in Constitutional Law I we examined the branches of government: the Judiciary, the Executive, and the Legislature. In that examination we took a look at the continuing controversy over the Patient Protection and Affordable Care Act, questions on the role of a President, and democratic norms, specifically, Presidential authority to effectuate policy by executive action, the proper role of a President during criminal and civil matters relating to that president's interests, the distinction between constitutional requirements of presidential actions and traditional expectations of Presidential behavior and the impact of such behavior on dissemination of justice and on separation of powers, not to mention the power of Congress as seen by the expansive and, as of late, downsized Commerce power.

This semester in Constitutional Law II we continue our exploration of the Constitution which will be focused heavily at the beginning on the role of the states of the United States, beginning with the states and their economic regulatory power through the materials on the Dormant Commerce Clause, and how the notion of a national economy affects the regulatory power of individual states.

Following that we will delve into individual rights, where our focus on the states continues. One of the primary issues with regard to individual rights, has to do with the role of the states in protecting nationally recognized civil rights, and civil liberties. Though protection of civil rights and liberties is the responsibility of both the national and state governments, the state role has been particularly controversial, particularly during the states' rights opposition to the Civil Rights Movement of the 1950s and 60s, an issue that still pops up today. We will look into the constitutional interpretations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and briefly examine the principles of the Thirteenth and Fifteenth Amendment, the three together being called "The Civil War Amendments" as they were added to the Constitution following the war.

Next we examine the particular role that the First Amendment has in articulating and enforcing the key liberties of speech, assembly, religion, and press (the course in Criminal Procedure will complete your basic Constitutional Law education in examining the remaining Constitutional

Amendments in the "Bill of Rights" as they affect the rights of the accused in criminal prosecutions). This area of individual rights law is particularly fascinating because, arguably, the First Amendment is the reason the United States was born. Political and religious liberty were the hallmarks of the early revolutionary movement and remain the core of civil liberties today. But can a society tolerate all speech, all religious practices, any and every political statement of opinion? These are the questions raised, and in some cases (after all this is a Constitutional Law course) answered. The key to understanding these movements of speech, religion and politics is not in learning answers, but understanding the principles of articulation in formulating solutions to the problems. Are these solutions truth? Let's find out.

In-class presentation and discussions are crucial and hopefully compelling and challenging. Additional articles and suggested readings will also serve so as to supplement both. Web Summaries, when assigned in the syllabus, may substitute for materials in the text. It is extremely important that students make a good faith effort to stay on top of the complex issues raised in the course.

In addition, a class wide project is also included for you to study as we proceed through the materials. The fact pattern will require you to engage in semester long research and reflection on the problem while using class materials and discussion to prepare your arguments.

As you might well assume by now the course as presently structured will carry a substantial reading load for the student, and it is expected that this will be handled in a professional manner. Cases to which particular attention should be paid are noted by name in each section, but you will be responsible for all materials assigned.

Constitutional law cannot be learned through memorization, cramming, outlines, and other shortcuts. Such "shortcuts" can, at best, supplement proper study and preparation as the concepts are far too complicated, and the assessment in the course is based upon problem solving and not reproducing lists of concepts from the course. Regular and on time attendance enhances understanding of these issues and prepares one for the discipline required for successful legal practice and policy leadership.

Constitutional Law is not easy. But it may be the most important course in American law schools. It is definitely the most rewarding. Let's get started!

Policies and Procedures:

Class Attendance: The Student Rules and Regulations allow 5 absences in three hour courses.

An absence is defined as failure to attend class or failure to be present in class at the commencement of class. See Article III Section 9 Student Rules and Regulations. Students absent in excess of 5 classes will be subject to having their grades reduced up to two letter grades.

Class Preparation: Briefing of opinions and reading of all assigned materials as well as written summaries of supplementary materials when assigned is required for each class. All material

must be based upon student's independent work, and should not be the product of commercial briefing materials, or other briefing materials not the product of the student's own work. Failure to meet this requirement is considered lack of preparation, moreover, turning in materials that are not the independent work of a student will be subject to the Honor Code process [NOTE: PLEASE SEE HONOR PLEDGE BELOW. IT SHOULD ACCOMPANY ALL TURNED IN MATERIALS AND SIGNED ELECTRONICALLY AS APPLICABLE AND TURNED IN WITH THE ASSIGNMENT

This work is the product of my efforts alone. No one has assisted me in the preparation of this document and it was not obtained through any source including sources on the internet or other means. I understand that violation of this pledge is subject to the rules of the Honor system at Thurgood Marshall School of Law.

Signature.]

Students who are not prepared will be marked absent and such absence will be used to count total number of absences allowed under the Student Rules and Regulations.

[Addendum on briefing: Proper briefing generally conforms to the standards recognized in American law schools. In essence, a proper brief includes the issue, rule of law, facts and a rationale. Each feature of a proper brief must be thorough and designed to and succeeds in fully articulating the case and resolution by the examining court.]

Briefing: Briefs will be periodically uploaded and evaluated for compliance with the briefing responsibilities listed above. Briefs must be uploaded with 5 minutes of the time requested. **This means that you should be prepared to upload a requested brief for each class.** Failure to turn in assigned briefs will result in that brief not being counted toward the brief total for the final grade.

Obviously, one cannot turn in a brief if one is not present. However, unless an absence is excused by the Dean of Students, a later submission will not be allowed.

Inside the classroom: Students should prepare to remain in class during the full 50 minutes of class and any additional time the professor may need to complete points raised in class.

Academic Requirements

Required Texts: Martin Levy, Craig Jackson CONSTITUTIONAL LAW, (2023) THIRD EDITION ASPEN PUBLISHING (with connected e book)

Sullivan and Feldman FIRST AMENDMENT LAW, (2019) SEVENTH EDITION Foundation Press.

Examinations: There will be a midterm and a final exam. The first spring exam will be prior to Spring Break in March and will be a multiple choice examination. The final exam will be an essay exam.

The first exam of each will be worth 25% of that semester's preliminary grade and the final will be worth 60%. 15% of the grade is class participation (which includes briefing and, essay projects, and other projects that may from time to time be assigned).

Office Hours:

Monday, and Wednesday 10-12, 1-4 or by appointment. **USE THESE OPPORTUNITIES TO GET CLARIFICATION AND UNDERSTANDING OF PRINCIPLES DISCUSSED IN CLASS.**

Accommodations: Students can make arrangements for required accommodations with the Law School Administration.

Assignments

Week 1

Monday:

From Jackson Levy, Third Edition:

III. Other National Powers; The Taxing and Spending Powers

Tax: NFIB v. Sebelius 369-371

Wednesday-Friday:

South Dakota v. Dole 380-386

NFIB v. Sebelius 386-392

The War and Treaty Powers 393-396

Week 2

Wednesday January 18

IV. State Regulation and the National Economy: The Dormant Commerce Clause

A. Introduction 396-398

1. The American Common Market 398-401

B. The American Common Market as seen in the Constitution 401-402

C. Development of the Dormant Commerce Clause

2. Race Slavery, and the Dormant Commerce Clause 410—416

Friday January 20

D. The Modern Dormant Commerce Clause

Category 1 (a) Facial Discrimination 417-431

Category 1(a) continued 431-445

Category 1(b) Discriminatory Purpose or effect 445-449

Assignment 1: Prepare an essay addressing the fact pattern found at the Assignments link, Assignment 1. This is due Monday January 23 at 12 midnight (12 am Tuesday) by upload.

Week 3

Monday January 23

Category 2: Nondiscriminatory, yet burdensome, state legislation: Pike Balancing 449-458

Individual Rights and Liberties

JACKSON AND LEVY Chapter 4

CASES AND MATERIALS TO BRIEF: Plessy v. Ferguson; McDonald v. City of Chicago; *on webpage*: Jackson, The Second Amendment and the Myth of Neutrality, under Course Documents--optional but extremely helpful).

Skills and Competencies Developed:

- An appreciation of the role of slavery and slavery politics in United States Constitutional development
- An understanding of the Incorporation Doctrine and how it effects current issues before the Court
- An appreciation of the structure and scope of the Civil War Amendments

- I. Adoption of the Bill of Rights (skim)** 615-620
- II. The Bill of Rights and the States** 620-622
- III. III. Slavery and the Constitution; The Ignoble Compromise** 622-624
Prigg v. Pennsylvania (skim)
- IV. The Civil War and the Post Civil War Amendments** 639-644 (Read for background)

Supreme Court Trilogy

644-670

Wednesday

V. The Struggle for Incorporation

670-677; 697-715

Friday

Chapter 5. Constitutionally Protected Rights—Due Process

CASES AND MATERIALS TO BRIEF: *Lochner v. New York*, *Roe v. Wade*, *Planned Parenthood v. Casey*, *Dobbs v. Jackson Women’s Health*

Skills and Competencies Developed

- A working understanding of the centrality of rights litigation to Constitutional Theory and practice
 - Connecting current events controversies in the areas of abortion, affirmative action, equal protection, and same sex marriage to core constitutional principles.
 - An ability to apply rights cases to hypotheticals based on fact patterns commonly encountered by practicing attorneys.
 - An understanding of the theory of substantive due process and its relation to both incorporation doctrine and unenumerated rights.
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- An understanding of incorporation doctrine and the relationship between the substantive due process of the 14th Amendment and the Bill of Rights.
 - Students should understand the theoretical connection between due process and other protections such as the Contracts and Takings Clauses.

I. Substantive Due Process

769-784

Week 4

Monday

B. Related to Due Process: The Contract and Takings Clauses

1. Contract Clause

784; 788-802

Wednesday

2. Takings Clause (Public Use and Regulatory Takings) 802-823

Friday

2. The Takings Clause (continued) 823-834

C. Revival of Substantive Due Process Abortion

Roe v. Wade 834-850

Assignment 2: VI. The State Action Limitation (Review the cases under this section including *Manhattan Community Access v. Dee Dee Halleck* in Supplement and review the memo under Course Materials—Note this is a self-study assignment and will not be covered during lecture). Take the assigned quiz under the Assignment 2 link under Assignments. Due Monday January 30 at midnight (Tuesday morning at 12 am).

Week 5

Monday

Revival – Abortion cont'd

3. Nature of the Right

Planned Parenthood v. Casey 850-875

Thomas Dobbs v. Jackson Woman's Health Organization 876-913 (read the majority opinion and Justice Thomas' concurrence. You may skip the concurrence of the Chief Justice. You may skim the dissent of Justices Breyer, Sotomayor, and Kagan and reserve it for a fuller read at your convenience. It is a very important dissent.

Wednesday

Revival Cont'd

4. Extending Privacy Rights: Family, Marriage, Procreation, Child Bearing 913-916; 930-946

Friday

a. How far does Obergefell go Parts 1 and 2 946-948

5. Sexual Orientation 954-966

6. Right to Die—SYLLABUS SUMMARY:

Washington v. Glucksberg (1997). Physician assisted suicide. Justice Rehnquist delivered the opinion of the Court. In it, he stresses traditional notions regarding suicide to determine if a state violates an individual's fundamental rights when it prohibits physician assisted suicide. Rehnquist finds nothing in our traditions suggesting suicide as a fundamental right. Since there is no fundamental right, the analysis turns to rational basis. Yet, he find ample state interests in maintaining suicide as a prohibited act, as well as any doctor's assistance. When confronted with the Court's ruling in *Cruzan v. Director, Missouri Dept. of Health*, a decision which noted a person's right to refuse life sustaining measures, the court noted that there was a difference between refusing life sustaining measures and commission of suicide. The former has roots in our traditions.

In *Vacco v. Quill* (1997) decided on the same day, the right to out right refuse medication was recognized by the state of New York, though it did outlaw physician assisted suicide. This case was an equal protection case. The court uses equal protection fundamental interest analysis on this point. When a patient refuses life saving medication, he dies from an underlying fatal disease, and not from poison offered by an assisting physician. The right to refuse is based not on a right to death, but a right against unwanted touching. There is a difference.

II. Procedural Due Process (optional)

Week 6

Chapter 6 Constitutionally Protected Rights—Equal Protection

CASES AND MATERIALS TO BRIEF: *Hernandez v. Texas* 347 U.S. 475 (1954); *The University of California v. Bakke*, *Grutter v. Bollinger*, Jackson, *United States Supreme Court's 2006-2007 Term, Civil Rights and Civil Liberties, and a New Direction*, 36 Cap. U.L. Rev. 511 (2008) pages 551-557; *Fisher v. The University of Texas* (supplement); *SAISD v. Rodriguez*, *Plyer v. Doe*.

Monday

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|------------|--|-----------|
| I. | Overview | 998-1000 |
| II. | Discriminatory classifications | |
| | <ul style="list-style-type: none"> Rational Basis— | |
| | <ul style="list-style-type: none"> Economic Regulation etc. <i>Railway Express v. New York</i> and <i>Dandridge v. Williams</i> | 1003-1006 |
| B. | Proving up Discrimination | |
| | <ul style="list-style-type: none"> <i>Yick Wo v. Hopkins</i> | |

Wednesday

II. Discriminatory Classifications cont'd

• Race based Classifications

1. Strict Scrutiny: *Loving v. Virginia* pages 1042-1046

2. Racial Segregation—Apartheid

Hernandez v. Texas 1053-1055

Brown v. Board of Education of Topeka Kansas (1 and 2)

1055-1060

Friday

3. Affirmative Action: *Regents of the University of California v. Bakke*

1105-1129

a. *Bakke Revisited--Grutter v. Bollinger*;
1172 .

1162-

Assignment 3: Read and summarize: Jackson, "Hebert High School and the Brown Aftermath: Good Intentions and Troubled Policy" 21 Thurgood Marshall Law Review 45 (Course Materials). Due midnight Monday following this class (Tuesday morning).

Week 7

Monday

Fisher v. University of Texas (2016) 1176-1192 (majority opinion)

Bakke Revisited or abandoned? *Students for Fair Admissions v. Harvard College*
1st Circuit 2020 (Course Materials)

Wednesday

II. Discriminatory Classifications cont'd

D. Gender Based Classifications

Mississippi University for Women v. Hogan

1221-1225

United States v. Virginia

1226-1238

Michael M. v. Sonoma County Sup. Ct.

1238-1242

Friday

[For sections E, F, and G you are only responsible for the summaries on the website under Course Documents titled [Alienage, Non-Marital Children, Disabilities, Age, and Sexual Orientation](#)

E. Alienage and

F. Non Marital Children

G. Additional Classes

III. Discrimination in /denial of /Fundamental Rights/Interests

Strict Scrutiny Pages 1286-1302

Assignment 4: Prepare an essay addressing the fact pattern under Assignment 5. Due Monday following this class at midnight.

Week 8

Monday

First Amendment Sullivan and Feldman

Chapter 1 Freedom of Speech—Categories of Speech—Degrees of Protected Expression

CASES AND MATERIALS TO BRIEF: You will be responsible for briefing all principal cases covered within the assigned pages.

Skills and Competencies Developed

- Students should develop an understanding of the categories of speech
- Students should be familiar with the tests used by the Court to identify these categories.
- Students will need to understand protected and unprotected speech categories, the reasons for protecting some speech and not others, and which categories of speech are protected or unprotected respectively.
- In particular will have to understand the differences between

- “Clear and Present Danger”, Fighting words, hostile audiences, and hate speech
- Libel, slander, intentional infliction of emotional distress, and other speech related torts
- Obscenity, sexually explicit expression, child pornography, and the protections accorded these categories under the Court’s interpretation of the First Amendment.

Wednesday

Section 2—	39-55
Section 3—	56-72

Friday

Section 4—	72-103
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Week 9

Monday	;	
Section 4(cont’d)		103-125

Wednesday

Section 5	125-144
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Friday Midterm

Week 10—Spring Break

Week 11

Monday

Section 5 (cont’d)	144-164
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Wednesday

Section 5 (cont'd)

164-196

Friday

Chapter 2 Freedom of Speech—Modes of Regulation and Standards of Review

- Students will develop an understanding of how the Court uses different standards of review for state actions against speech based on content.
- Students should be able to articulate situations where state regulation of private speech to preserve public order exceed constitutional limitations.
- Students will examine and become competent in the application of core constitutional limits on state regulation of private speech such as vagueness, over breadth, and prior restraint.

Section 1

229-246

Section 1 (cont'd)

246-265

Week 12

Monday

Section 2

265-280

Wednesday

Section 2 (cont'd)

291-317;353-359

Section 3

Assignment 6: Prepare an essay addressing the fact pattern under Assignments, Assignment 6. Due March 28 at midnight.

Friday

Week 13

417-433

Monday

Section 3 (cont'd)

433-457

Wednesday

Chapter 3 Beyond Speaking—Compelled Speech, Association, Money and the Media

Skills and Competencies Developed:

- The chapter will explore connections between private use of public space and principles of non-discrimination and associational rights. Students should be prepared to identify circumstances where private use of public space and expressions in that space can be regulated or compelled by government.
- Similarly, students will need to develop an understanding of the principles of political regulations, particularly, the free speech aspects of campaign financing.

Section 1

484-506

Friday

Section 3

530-542; 564-572

Week 14

Monday

Chapter 4 The Religion Clauses: Free Exercise and Establishment

Skills and Competencies developed:

- With regard to the Free Exercise clause, students will have to be able to distinguish between situations where the Court has said that government has an important reason for regulating certain religious practices without violating the Freedom of Religion Clause, and where government must stand down for fear of violating that clause. This will require:
 - Having a working definition of what a religion is
 - Understanding when government policies serve compelling purposes
 - And recognizing policies of general application, that do not apply specifically to religion.
- With regard to the Establishment Clause, students will be able to discuss
 - What government accommodation to religion is

- Whether all accommodation is viewed as antithetical to the principles of the Clause

- And whether there is a practical difference between *establishing* a preferred religion (Church of England), and mere *accommodation*.

	Section 3 pages	635-663
Wednesday		
	Section 3 (cont'd)	663-685
Friday		
	Section 4	685-705
Week 14		
Monday		
		705-725
Wednesday		
	Section 4 (cont'd)	725-740
Friday		
	Section 4 (cont'd)	740-765
Week 15		
Monday		
	Section 4 (cont'd)	
Wednesday		
Make up and Review		