

CONSTITUTIONAL LAW II

WINTER 2019 SYLLABUS
Version 1.0 (dated 12.19.18)

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Class Times: Tuesdays and Thursdays from 10:30 a.m. to 12:20 p.m. in Room 117
Office Hours: Tuesdays from 12:30 p.m. to 1:30 p.m., Thursdays from 1:30 p.m. to 2:30 p.m., or by appointment.

COURSE OVERVIEW

1. Course Description

This course examines individual constitutional rights, primarily those involving the guarantees of due process and equal protection found in the Fifth and Fourteenth Amendments. It will also provide you with some exposure to the rights guaranteed by the Thirteenth Amendment. The course focuses on the constitutionality of laws that classify people on the basis of race, sex, sexual orientation, gender identity, and other bases, as well as laws that restrict abortion, contraception, sexual activity, marriage, and other individual freedoms.

2. Learning Objectives and Outcomes

Upon completion of this course, you should:

- Be familiar with the text, structure, and history of the Reconstruction Amendments, particularly the Fourteenth Amendment;
- Understand the formal, established levels of equal protection scrutiny and be able to apply each of those levels of scrutiny;
- Understand the concept of “substantive due process” and the formal, established levels of due process scrutiny, and be able to apply each of those levels of scrutiny;
- Recognize and be able to explain and apply informal levels of equal protection and due process scrutiny;
- Understand the ways in which equal protection and due process guarantees sometimes work in tandem with one another;
- Have a working knowledge of the Thirteenth Amendment, and in particular, the ways in which it is similar to and different from the Fourteenth Amendment;
- Understand the concept of “state action,” and when it applies;
- Understand the scope of congressional power to enforce the Reconstruction Amendments;

- Understand the major cases that have shaped our nation's rights-based constitutional history; and
- Be able to apply any of the constitutional doctrines we have studied in a scenario for which you lack specific binding precedent, such as a novel statute restricting abortion, or a law that classifies people on a basis that the Supreme Court has not yet identified as one subject to heightened equal protection scrutiny.

3. **Required Texts**

There are two required texts: (1) Peter Nicolas, The Reconstruction Amendments (available at RAMS Copy Center, 4144 University Way NE (206-632-6630)); and (2) a pocket copy of the U.S. Constitution (available at the UW bookstore or from online book stores such as Amazon). I don't have a preference as to which particular pocket version of the U.S. Constitution you purchase; just be sure it contains a complete reproduction of the U.S. Constitution, including amendments to the Constitution. Something like this version (available via Amazon) is what you are looking for: https://www.amazon.com/Constitution-United-States-Declaration-Independence/dp/1631581481/ref=pd_lpo_sbs_14_img_1?encoding=UTF8&psc=1&refRID=M7H9WFG9N8E0232WTS5

Occasionally, I may assign readings that are not contained within the two required texts mentioned above. When that is the case, the readings will be made available via Canvas.

I may email you with important details or occasional additional readings during the quarter (such as news articles that touch on issues we have covered in class). As a result, please make sure that you check your UW email regularly during the quarter.

4. **Course Website**

I will maintain a website for the course via Canvas. PowerPoint presentations used during class will be made available via Canvas. Any in-class handouts, writing assignments, and hypos also will be made available through Canvas.

5. **Additional Optional Resources**

For those wishing to consult an optional, supplementary source, I recommend Erwin Chemerinsky's Constitutional Law: Principles and Policies (5th ed. 2015).

In addition, Oyez (<https://www.oyez.org>) provides an excellent online resource that contains details about the various Supreme Court cases we will be reading this quarter. Through Oyez, you can: look up which justices were on the Court when a given case was decided; read a summary of the Court's decision in a given case; see who argued different cases before the Court; and listen to recordings of oral arguments before the Court.

6. **Office Hours**

I encourage you to come see me in my office if you have questions or comments or otherwise wish to meet. To set up an appointment with me, please contact me by email, and we can

determine a mutually available time. In addition to office hours by appointment, I have set aside scheduled, drop-in office hours on Tuesdays from 12:30 p.m. to 1:30 p.m. and Thursdays from 1:30 p.m. to 2:30 p.m. No appointment is necessary for these regularly scheduled drop-in office hours; however, should you wish to meet with me outside of these pre-scheduled hours, please email me to set up an appointment.

I am always happy to discuss the course and its materials during office hours. In addition, I have worked as a law clerk at both the federal appellate and U.S. Supreme Court levels, as an associate at a large Chicago law firm, and as a summer associate at two different law firms (including a firm in Portland, Oregon). I am happy to discuss any of these experiences with you or more generally to discuss the legal profession during my office hours.

7. Disability-Related Needs

Your experience in this class is important to me. If you have already established accommodations with Disability Resources for Students (DRS), please communicate your approved accommodations to me at your earliest convenience so we can discuss your needs.

If you have not yet established services through DRS, but have a temporary health condition or permanent disability that requires accommodations (conditions include but are not limited to: mental health, attention-related, learning, vision, hearing, physical or health impacts), you are welcome to contact DRS at 011 Mary Gates Hall, via phone at 206-543-8924, via email at uwdrs@uw.edu, or via the web at disability.uw.edu. DRS offers resources and coordinates reasonable accommodations for students with disabilities or temporary health conditions. Reasonable accommodations are established through an interactive process between you, your instructors, and DRS. It is the policy and practice of the University of Washington to create inclusive and accessible learning environments consistent with federal and state law.

8. Class Format

Although I will sometimes teach using straight lectures, I frequently conduct class in a Q&A format using the “soft” Socratic method. When I use the soft Socratic method, I will call on students randomly by name without warning. I emphasize class discussion and student participation because speaking skills are important in the practice of law whether those skills are used in court, in presenting to clients, or in negotiating with others. I also find that calling on students randomly helps to ensure that all students stay engaged and that we hear from a variety of viewpoints in class.

9. Class Preparation & Attendance

- a. Class Preparation & Out-of-Class Work:** I expect you to treat class like you would treat a job—meaning that I expect you to show up to class on time prepared to participate in a professional manner. At a minimum, this requires that you have completed the reading, that you have thought about the implicated issues, and that you arrive to each class ready to discuss the materials on a substantive level.

Per ABA Standard 310, students are expected to devote at least two hours to out-of-class work for each 50 minutes of in-class time. Since we will generally meet each week for 200 minutes of in-class time, this means that you are expected to devote at least 8 hours of out-of-class work to the course each week. Out-of-class work may include such activities as reading,

reviewing, outlining, studying, or otherwise working on materials and assignments for the course.

- b. Attendance:** If you will be absent from class on a given day, you must email me to notify me of the absence (just as you would email your employer if you were going to be absent from work). You are not required to provide me with details surrounding the specific reasons for your absence, but you are required to notify me of the absence. Under ABA Accreditation Standard 304, a law school must require regular and punctual attendance. At any time after the fifth week of a course, a student who has been determined by the instructor to have attended fewer than 80 percent of the class sessions in any course will be required to drop the course from his or her registration.

10. Class Recordings

You are not allowed to make your own audio or video recordings of class sessions. However, I have authorized Law Media to audio Podcast all of my lectures subject to the following conditions: (1) students who access the audio Podcasts agree to use the recordings only for their studies in this winter quarter class; and (2) students who access the Podcasts agree not to distribute the Podcasts to anyone outside of our class. Listening to the audio Podcasts is not a substitute for class attendance and participation. As a result, if at any point during the quarter I feel that class participation or attendance has been low, I reserve the right to cancel Podcasting of additional classes.

11. Grades

Your grade for the course will be determined by your score on the final exam with the caveat that your class participation and your performance on various class assignments may impact your grade, as described below:

- a. The Exam:** The exam will be a four-hour exam and will be subject to the law school's rules and honor code. Computers may be used on the exam, and the exam will be OPEN book. This means that there is no limit on what books, outlines, or written materials you may bring into the exam with you. There also is no limit on which online sources, such as Westlaw or other web-based sources, you may consult during the exam. You, however, may not consult with any other individuals during the exam (whether electronically, in writing, or in person).

For the exam, students may bring only one computer/electronic device with them, and all computers must have the requisite exam software designated by Academic Services installed. When taking the exam, you may use the Control "F" function to search materials that are on your computer or are accessible via the Internet. You, however, may not use the cut and paste functions to paste materials into your exam answer. All material that appears in your exam answer must be typed into your answer without the use of any pasting functions.

- b. Class Participation:** Throughout the quarter, students are expected to engage in class participation in four different ways. First, I may sometimes ask you to break into small groups during class and to discuss cases and hypotheticals. Second, students are welcome and strongly encouraged to voluntarily participate in class discussion. Third, I will call on students at random to answer questions about the assigned reading. Fourth, I will occasionally ask you to complete in-class or out-of-class writing assignments (described in

more detail below).

A student whose class participation consistently demonstrates extraordinary preparation and mastery may receive an upward adjustment in her final grade if her final examination grade ends up close to the line between two letter grades. Conversely, a student who is repeatedly absent for the small group breakout exercises, or, who when called upon to answer a question, is repeatedly absent, passes, or answers the question in a way that does not demonstrate that she prepared for class, may receive a downward adjustment in her final grade for class participation, even if her grade does not straddle the line between two letter grades.

Although class participation plays only a minor role in determining your final grade in the course, it is considered a requirement for successful completion of this course. Thus, a failure to participate in good faith—such as by passing every time called upon, failing to complete assignments, or failing to be in class during the small group breakout exercises or when called upon—may result in a grade of incomplete in the course that can only be rectified by sitting through the entire course in a future quarter and satisfactorily participating in class discussion.

Note that when I assess students' class participation, I tend to weight the quality of a student's participation much more heavily than the quantity of a given student's participation.

- c. **In-class and out-of-class assignments:** I will occasionally ask you to complete in-class or out-of-class assignments. Completion of all assignments is required to complete the course; your failure to complete and to turn in all assignments (including both in-class and out-of-class assignments) may result in an "incomplete" in the course. As a result, if you are absent from a particular class, you are responsible for completing and submitting any in-class assignments that were conducted in class that day.

Please be aware that particularly poor or particularly exceptional performance on your assignments, including but not limited to a failure to submit the assignments in a timely manner, may be factored into my assessment of your overall class participation.

12. Class schedule changes

Our class will not meet Tues., Feb. 19 or Thurs., Feb. 21 (the week of the President's Day holiday). I also will not be holding my regular office hours that week. As noted in the reading assignments listed below, I am asking you to complete an out-of-class assignment that week in lieu of our two cancelled class sessions.

If any additional class sessions are cancelled during the quarter, make-up classes will be scheduled.

13. Course Outline and Reading Assignments

Below please find (a) a general course outline and (b) the specific reading assignments for the course. We may at times move more quickly or more slowly, so adjustments may be made. If

any significant adjustments are made, I will circulate a revised version of the reading assignments.

COURSE OUTLINE

The following outline provides you with a roadmap for the six main units that we will complete this quarter:

I. AN INTRODUCTION: THE HISTORY AND STRUCTURE OF THE CONSTITUTION'S PROTECTION OF RIGHTS AND LIBERTIES

Classes #1 through #3

II. ECONOMIC LIBERTIES

Class # 4

III. EQUAL PROTECTION

Classes #5 through #11

IV. FUNDAMENTAL RIGHTS UNDER DUE PROCESS AND EQUAL PROTECTION

Classes #12 through #17

V. CONGRESSIONAL POWER TO "ENFORCE" THE RECONSTRUCTION AMENDMENTS

Class # 18

VI. REVIEW AND REFLECTION

Class # 19

READING ASSIGNMENTS

“CB” refers to the required Nicolas course pack available for sale via the RAMS Copy Center.

Note: We may at times move more quickly or more slowly than anticipated, so the dates and reading assignments provided below are all subject to change. If major changes must be made to this reading list, I will circulate a revised version to the class.

I. AN INTRODUCTION: THE HISTORY AND STRUCTURE OF THE CONSTITUTION’S PROTECTION OF RIGHTS AND LIBERTIES

Class #1 (Tues., Jan. 8):

Pre-Reconstruction (1789-1865) & Reconstruction and the Gilded Age (1865-1896)

- Print and complete “Student Info Sheet” (available via Canvas). Please post your completed response to Canvas in the Assignments folder labeled “Student Info Sheet.”
- Read CB pp. 1-4 (Calder; Barron) and CB pp. 10-19 (Dred Scott) on Pre-Reconstruction. These cases will provide you with a snapshot of the U.S. Constitution prior to Reconstruction. In particular, they will illustrate two main points: (1) the limited extent to which the original constitution regulated the conduct of *state* governments as opposed to the *federal* government; and (2) the extent to which the original constitution countenanced racial discrimination.
- Using your pocket copy of the U.S. Constitution, please read the Bill of Rights. The Bill of Rights, which were ratified in 1791, consist of the first 10 amendments in the U.S. Constitution. Then please read the 13th, 14th and 15th Amendments to the U.S. Constitution (known as the “Reconstruction Amendments”).
- Read CB pp. 20-36 (The Slaughter-House Cases); read CB pp. 39-47 (Cruikshank; Strauder; Pace); and read CB pp. 61-68 (Yick Wo; Plessy v. Ferguson). As you read these cases, please consider whether or not the Reconstruction Amendments seem to have altered the Supreme Court’s views on: (1) the extent to which the constitution regulates the conduct of *state* governments; and (2) the extent to which the constitution countenances racial discrimination.

Class #2 (Thurs., Jan. 10):

The Application of the Bill of Rights to the States: Incorporation via the Due Process Clause of the Fourteenth Amendment

- As we discussed during Class #1, the Slaughter-House Cases foreclosed the notion of applying the Bill of Rights to the states through the Fourteenth Amendment’s Privileges or Immunities Clause. As a result, the Supreme Court looked for an alternative means of finding that at least some of the Bill of Rights applied to the states. In particular, the Court looked to the Due Process Clause of the Fourteenth Amendment.
- Read CB pp. 80-102 on Incorporation (Twining; Palko; Adamson; McDonald; Meyer). These cases will expose you to how the Supreme Court looked to the due process clause of the Fourteenth Amendment as a means of applying the Bill of Rights to the States.

Class #3 (Tues., Jan. 15):

The Requirement of State Action

- The U.S. Constitution's protections generally apply only to governmental actors, not to private actors. This is often referred to as the "state action doctrine." In class today, we will learn about the state action doctrine, as well as various "exceptions" to the state action doctrine.
- Read CB pp. 150-154 (Marsh v. Alabama; Shelley v. Kraemer); read CB pp. 162-171 (Burton v. Wilmington Parking Authority; Bell v. Maryland); and read CB pp. 370-379 (Moose Lodge; Jackson; Edmonson v. Leesville Concrete Co.). All of these materials will explore the state action doctrine, as well as its exceptions.
- Using your pocket copy of the Constitution, please re-read the 13th Amendment of the U.S. Constitution. Does it appear to reach only state action or private conduct as well?
- After you've thought about whether the 13th Amendment regulates private conduct, please read CB pp. 47-60 (The Civil Rights Cases) and see what that case says on this point. You can stop reading right before note 2 on CB p. 60.

II. ECONOMIC LIBERTIES

Class #4 (Thurs., Jan. 17):

Economic Liberties & Traditional Rational Basis Review

- Read CB pp. 69-80 on the Economic Substantive Due Process (Lochner; West Coast Hotel Co. v. Parrish).
- Read CB pp. 104-114 (Carolene Products; Railway Express; Lee Optical; FCC v. Beach Communications). This series of cases illustrates how the courts will generally apply a very deferential standard of review known as "rational basis" review in areas of social and economic policy. This series of cases also illustrates how the Court does this without regard to whether the challenges are brought under the Due Process Clause or the Equal Protection Clause.

III. EQUAL PROTECTION

Class #5 (Tues., Jan. 22):

Race and the Rise of Equal Protection Review

- Read CB pp. 103-104 on Equal Protection Review.
- Read CB pp. 115-130 on Race and the Rise of Equal Protection Review (Hirabayashi; Korematsu; Sweatt v. Painter; Brown v. Board of Education; Bolling v. Sharpe).
- Read CB pp. 135-141 (Loving; Palmore).

Class #6 (Thurs., Jan. 24):

The "Reverse Discrimination" Cases

- Read CB pp. 487-523 (City of Richmond v. J.A. Croson; Adarand; Grutter); also read CB pp. 530-542 (Parents Involved).

Class #7 (Tues., Jan. 29):

Sex Discrimination and the Rise of Equal Protection Review

- Read CB pp. 268-286 on Sex Discrimination and the Rise of Equal Protection Review (Breedlove; Goesaert; Hoyt; Reed v. Reed; Frontiero v. Richardson; Craig v. Boren).
- After reading today's assigned cases, please go to Oyez (<https://www.oyez.org/cases/1972/71-1694>) and take a look at the visual depicting who was on the Court in 1973 when the Frontiero case was decided. Also, look at who is listed as the attorney for the ACLU and see if the name rings any bells.

Class #8 (Thurs., Jan. 31):

Sex Discrimination and the Rise of Equal Protection Review (continued)

- Read CB pp. 286-327 (Califano; Caban; Michael M.; Mississippi Univ. for Women; J.E.B. v. Alabama; U.S. v. Virginia; Nguyen; Sessions v. Morales-Santana).
- Optional video: Although not required viewing, you might enjoy watching the movie RBG (<https://www.rbgmovie.com/>) at this point in the quarter. It describes the important role Justice Ginsburg has played both as an attorney and as a Justice when it comes to fighting sex discrimination. Some of the cases we are reading are highlighted in the movie.

Class #9 (Tues., Feb. 5):

The Rise of the Discriminatory Purpose Requirement

- Read CB pp. 380-383 (Geduldig); also read CB pp. 385-394 (Washington v. Davis; Village of Arlington Heights; Personnel Administrator v. Feeney).
- Please go back and re-read CB pp. 61-63 (Yick Wo), which you read earlier for Class #1.
- Read CB pp. 396-399 (Batson) and CB pp. 404-408 (Hernandez).

Class #10 (Thurs., Feb. 7):

Other Classifications and the Equal Protection Clause

- Read CB pp. 328-340 on "alienage" (Graham; Mathews; Ambach; Plyler).
- Read CB pp. 345-347 on "illegitimacy" (Clark v. Jeter).
- Read CB pp. 347-352 on wealth (San Antonio Indep. School Dist. v. Rodriguez).
- Read CB pp. 352-354 on age (Mass. Bd. of Retirement v. Murgia).
- Read CB pp. 354-369 on "Second Order" Rational Basis Review (Moreno; Cleburne).

Class #11 (Tues., Feb. 12):

Sexual Orientation and the Equal Protection Clause

- Read CB pp. 543-562 (Romer; Windsor).

IV. FUNDAMENTAL RIGHTS UNDER DUE PROCESS & EQUAL PROTECTION

Class #12 (Thurs., Feb. 14):

“Fundamental Rights” Under Equal Protection and Due Process

- Read CB pp. 178-181 (Skinner), CB pp. 188-192 (Harper), and CB pp. 196-200 (Shapiro) on “Fundamental Rights” and the Rise of Equal Protection Review.
- Read CB pp. 231-267 (Griswold; Loving; Eisenstadt; Roe) on the Protection of Fundamental Rights via the Rebirth of Substantive Due Process.

Classes #13 & #14 (Tues., Feb. 19 & Thurs., Feb. 21):

- We will not meet for class on Tues., Feb. 19 or Thurs., Feb. 21. Instead of meeting for class, you are required to complete an out-of-class assignment, which will be posted to Canvas.
- Once you have completed the assignment, please post your answer to Canvas in the Assignment folder labeled “Out-of-Class Assignment for Classes #13 & 14.” Be sure that you post your answer to Canvas by no later than 10:30 a.m. on Tuesday, Feb. 26.

Class #15 (Tues., Feb. 26):

Refining “Fundamental Rights” Under the Equal Protection and Due Process Clauses

- Read CB pp. 420-433 (San Antonio Indep. School Dist. v. Rodriguez; Moore; Zablocki).
- Read CB pp. 437-462 (Bowers; Turner; Michael H).

Class #16 (Thurs., Feb. 28):

Refining “Fundamental Rights” Under the Equal Protection and Due Process Clauses (continued)

- Read CB pp. 462-486 (Planned Parenthood v. Casey; Washington v. Glucksberg; Troxel).
- Read CB pp. 607-626 (Gonzales v. Carhart; Whole Woman’s Health).

Class #17 (Tues., March 5):

The Ebb and Flow of Fundamental Rights under the Equal Protection, Due Process, and Privileges or Immunities Clauses

- Read CB pp. 563-607 (Lawrence; Windsor; Obergefell; Pavan).
- Read CB pp. 626-640 (Saenz; McDonald) on the Privileges or Immunities Clause. Note that Saenz and McDonald will bring us back full circle to where we started this class when we read the Slaughter-House Cases and discussed the Privileges or Immunities Clause as part of Class #1.

V. CONGRESSIONAL POWER TO “ENFORCE” THE RECONSTRUCTION AMENDMENTS

Class #18 (Thurs., March 7):

Congressional Power to “Enforce” the Reconstruction Amendments

- Read CB pp. 213-218 on the Rise of Congressional Power to “Enforce” the Reconstruction Amendments (Jones v. Alfred H. Mayer Co.).
- Read CB pp. 663-686 on Refining the Scope of Congressional Power to “Enforce” the Reconstruction Amendments (City of Boerne v. Flores; United States v. Morrison; Nevada v. Hibbs; Tennessee v. Lane).
- Also, go back and review CB pp. 47-59 (The Civil Rights Cases), which you read earlier for Class #3.

VI. REVIEW AND REFLECTION

Class #19 (Tues., March 12):

Review and Reflection via Flow Charting

- In class today, we will finish discussing any materials that spill over from our prior class sessions. Then we will review what we have learned this quarter by doing some flow charting.
- Prior to our final class today, please try your own hand at creating a flow chart or flow charts that visually summarize what we have learned this quarter. Please post your flow charts (prior to 10:30 a.m. today) to Canvas to the Assignments folder labeled “Class #19 Flow Charting Exercise.”
- This flow charting exercise is for your own benefit. As a result, I will not formally grade your flow charts. However, completion of this flow charting assignment is required to complete this course. In addition, I will review your flow charts, and I may take your flow charts into account in assessing your overall class participation.

Final Exam (Mon., March 18):

Four-Hour Final Exam

- Be sure to check with Academic Services to confirm the date and time of the final exam.