

Constitutional Law Spring 2020

Professor Matthew Lindsay

Course Overview

This course provides an introduction to United States constitutional law and constitutional theory. Topics include judicial review and the scope of the federal judicial power; the constitutional allocation of powers among the legislative, executive, and judicial branches of the federal government; the relationship between the federal government and the states; and constitutional rights, including equal protection and due process of law.

Class Meetings: Wednesday & Friday, 10:00–11:50, in AL 603

Required Materials

- Noah Feldman and Kathleen Sullivan, Constitutional Law (20th ed. 2019).
- Linda Greenhouse, A Very Short Introduction to the U.S. Supreme Court (2012).
- A series of supplemental readings, which will be posted on TWEN throughout the semester.
- *Supplemental Materials:* In addition to the assigned reading, I encourage you to acquire Erwin Chemerinsky, Constitutional Law: Principles and Policies (6th ed. 2019). This is a widely used constitutional law treatise/hornbook, and a helpful source of clear, accurate, readable explanations of constitutional doctrine. It is available for purchase at the Campus Bookstore, as well as on amazon.com and other online booksellers.

Instructors

Professor Matthew Lindsay

Office: AL 513

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Office Hours: Wednesday, 3:00–5:00 p.m. & 7:00–8:00 p.m., and by appointment.

Law Scholar Curtis Paul

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Law Scholar Section Meeting: Time and location TBA.

Course Objectives—At the conclusion of this course, students will be equipped to:

- Understand the fundamental premises and structure of the Constitution of the United States;
- Identify the principles, doctrines, and policies governing select subfields of U.S. constitutional law, and apply them to varied factual situations;
- Recognize, define, and analyze latent constitutional issues;
- Think critically about the principles, doctrines, and policies that inform U.S. constitutional law;
- Recognize and evaluate extra-legal influences on constitutional argument and interpretation, including political, economic, ideological, religious, cultural, or moral influences.

Constitutional Law (Law 650—319)—Lindsay (Initial Syllabus)

Course Website: This course has a TWEN page, where I will post updated versions of the course syllabus, assignments, and other course materials. I will also use the TWEN email function to communicate important course information.

Course Grades: Grades will be based on the following *four assessment items*:

- (1) A three-hour, open-book, in-class **Final Examination** will count for *either 100% or 80%* of your final course grade. (See #2, below.) All of the assigned readings and anything that we discuss in class is eligible to be included on the Final Exam. I will distribute practice exam questions throughout the semester.
- (2) An in-class **Midterm Examination** administered on Friday, February 28, will count for *either 20% or 0%* of your final course grade. The Midterm Exam is **redeemable**. This means that if the weighted average of your Midterm and Final Examination scores is lower than your Final Examination score standing alone, your Midterm score will not count toward your course grade.

For example: If you receive a 90 on the Midterm and an 80 on the Final, your combined score for the course will be an 82 (i.e. the average of the two scores, with the Midterm weighted .2 and the Final .8). If you receive a 78, 68, or 58 on the Midterm and an 80 on the Final, your combined score for the course will be an 80.

- (3) An **Assignment** consisting of 30 questions designed to compel you to read the Constitution carefully. You can find the assignment under the “Assignments” link on the course TWEN page. The assignment does not require any research beyond carefully reading the Constitution itself. You may work individually or in groups of up to four people. Written (i.e. typed) answers to the questions should be submitted in class by Wednesday, January 29. Only hardcopies (i.e. no email) will be accepted. The Assignment will be graded on a pass/fail basis but you must complete the assignment to be eligible for a grade in the course.
- (4) **Participation** in class discussion is mandatory. Excellent class participation—regular attendance plus contributions to class discussions that reflect careful preparation—may result in a third-of-a-grade increase (e.g., from a B+ to an A-). Poor class participation—frequent absences and/or lack of informed participation—may result in a third-of-a-grade reduction (e.g., from an A- to a B+).

School of Law and Class Policies

Attendance: Class attendance is a primary obligation of each student. A student’s right to be enrolled in the course and to take the final examination is conditioned upon a record of attendance satisfactory to the professor. A student who exceeds the maximum allowed absences (generally 20% of class sessions) may be compelled to withdraw from the course or barred from sitting for the final exam. Students who are forced to withdraw for exceeding the allowed number of absences may receive a grade of FA (failure due to excessive absence). This policy is consistent with American Bar Association Standards for Law Schools.

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An attendance sheet will be circulated at the beginning of every class. Students who sign in will be considered “present and prepared” (and thus eligible to be called on); students who do not sign in will be counted absent. Arriving late to class can be disruptive and distracting for other students. At my discretion, persistent late arrival to class may be counted as an absence and may factor into your participation grade.

Class Cancellation: If I need to cancel a class, notice will be sent to students via email and posted on the classroom door. If there is inclement weather, students should visit the University of Baltimore website or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should assume that classes are running on the normal schedule.

Computers: Students are permitted to use laptops for note-taking and encouraged to use them for exams. However, computer use must be respectful of others and should not impede your engagement in class. Using your computer in class for purposes other than note-taking and class-related research is highly distracting—to you and, more importantly, to your classmates—and is prohibited. I reserve the right to ban the use of the internet, or to ban laptops entirely, in the event that computer use becomes disruptive.

Professionalism: Because unprofessional or uncivil behavior inhibits learning, I expect your conduct in class to conform to basic norms of professionalism. This includes arriving to class on time and prepared to participate; not leaving the room in the middle of class; turning off your cell phone; and avoiding computer use that is unrelated to class. While I encourage you to voice reasoned disagreement with each other and/or with me, it is essential that you do so with courtesy and respect.

Time Expectations: American Bar Association Standards for Law Schools establish guidelines for the amount of time that students should expect to devote to law classes. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work per week for each credit earned in a class.

Academic Integrity: Students must refrain from acts that they know or have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter (including attendance) and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at http://law.ubalt.edu/academics/policiesandprocedures/honor_code/.

Disability Policy: If you are a student with a documented disability who requires an accommodation for academic programs, exams, or access to the University's facilities, please contact the Office of Academic Affairs, at ublawacadaff@ubalt.edu or (410) 837-4468.

Title IX Sexual Misconduct and Nondiscrimination Policy: University of Baltimore's Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees, and staff members report to the university any known, learned, or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

Syllabus

The syllabus and other course materials will be posted on the course TWEN website. Please consult the posted syllabus regularly, as I expect to update reading and other assignments throughout the term.

Reading Assignments: I will generally assign ten to twenty pages of reading per class. Sometimes it will be less and sometimes more. Because the material is often dense and challenging, please allow yourself sufficient time to read it carefully. (As a rough guideline, if I were reading this material for the first time in preparation for class, I would expect to spend, on average, between five and eight minutes per page.) Reading case excerpts “carefully” includes the following:

- Note the key *facts* of the case. I will often begin our discussion of a case by asking a student to summarize the facts. This includes both the “background” facts that gave rise to the lawsuit as well as the legally important facts—often called “material” or “determinative” facts—that bear on the court’s analysis of the legal issue(s) under consideration.
- Identify the legal *issue* that the case addresses. Sometimes the court will announce the issue explicitly, but sometimes it will not. If the case excerpt describes the dispositions of the lower (i.e., trial and intermediate appellate) courts that have heard this case, make a note of those. If the case excerpt describes the parties’ legal arguments on appeal, make a note of those, too.
- Identify the *rule of law* that the court applies in the case. This includes the court’s explanation of what the rule means and how it applies.
- Identify the *holding* of the case. What is the court’s legal conclusion, based on how the rule of law applies to the specific facts of this case?
- Understand the court’s *reasoning*. How does the applicable rule of law apply to the facts? Are there other values or considerations—e.g., fairness, justice, judicial administrability, economic efficiency, public policy, etc.—that inform the court’s analysis?
- Identify the *disposition* of the case: What did the court do? Affirm the lower court, reverse it, vacate its decision and remand the case for further proceedings?

This Syllabus designates specific readings for specific dates. Because the pace at which we cover various topics is influenced by the particular needs of and dynamics within the class, there will probably be times when we fall behind the schedule indicated on the Syllabus. When this happens, I will adjust the reading schedule accordingly and inform the class.

The Syllabus uses the following abbreviations:

- F & S = Sullivan and Feldman, Constitutional Law
- Greenhouse = Greenhouse, A Very Short Introduction to the U.S. Supreme Court
- Supp. = Supplemental readings posted on TWEN.
- t, m, & b = top, middle, and bottom (of the page in your casebook)
- **Highlighted readings** will be discussed in short audio-lectures posted on TWEN rather than in class.

WEEK 1

Wednesday, January 15

- I. Introduction to the American Constitutional System
 - A. Introduction to the U.S. Constitution
 1. Major Themes of the U.S. Constitution—Supp. #1.
 2. A Brief History of the Adoption of the U.S. Constitution—Supp. #2.
 - B. The U.S. Constitution
 1. The Constitution of the United States—F & S, pp. lix–lxxiii.
 2. Constitutional Map—Supp. #3.

Friday, January 17

- II. The Federal Judicial Power
 - A. The Concept of Judicial Review
 1. The Federal Judiciary—U.S. Constitution, Art. III, p. lxv.
 2. Origins of Article III Courts and of the Judicial Power—Greenhouse, pp. 1–12.
 - B. The Establishment of Judicial Review
 1. Review of Federal Actions
 - a. Primer on *Marbury v. Madison*—Supp. #4.
 - b. *Marbury v. Madison* (incl. Introduction)—F & S, pp. 1–9.

WEEK 2

Wednesday, January 22

2. Review of State Actions
 - a. *Fletcher v. Peck*—Supp. #5.
 - b. *Martin v. Hunter's Lessee* (incl. Introduction)—F & S, pp. 16–18.
 - c. *Cobens v. Virginia*—F & S, p. 19 (n. 1)
 - d. *Cooper v. Aaron* (incl. Introduction)—F & S, pp. 20m–22m.

Friday, January 24

- C. Limitations on the Federal Judicial Power
 1. Overview—Greenhouse, 48–58.
 2. *Certiorari*—Supp. #6.
 3. Justiciability
 - a. General—F & S, 34b–35t.
 - b. Advisory Opinions—F & S, pp. 35t–36b (nn. 1–3).
 - c. Mootness and Ripeness
 - (i) General—58t–59m (nn. 1, 2).
 - (ii) *DeFunis v. Odegaard*—Supp. #7

WEEK 3

Wednesday, January 29

- d. Standing
 - (i) Constitutional Standing—The Injury Requirement
 - General Principles—F & S, pp. 47m–48m.
 - *Lujan v. Defenders of Wildlife*—F & S, pp. 38–43.
 - *Clapper v. Amnesty Intl. USA*—F & S, pp. 48m–49b.
 - *Massachusetts v. EPA*—F & S, pp. 43–47.
 - *City of Los Angeles v. Lyon*—Supp. #8.

Friday, January 30

- (ii) Causation; Redressability; Generalized Grievances—F & S, pp. 49b–53m.
(nn. 2–6).
 - *Duke Power v. Carolina Environmental Study Group*—Supp. #9.
- (iii) Statutory Standing—F & S, pp. 53b–54b (n. 8).
- (iv) Procedural violations, separation of powers, legislator standing—F & S, pp. 54b–56m (nn. 9–11).

WEEK 4

Wednesday, February 5

4. Political Question Doctrine
 - a. General—F & S, pp. 59m–60m.
 - b. *Baker v. Carr*—F & S, pp. 60–66.
 - c. *Powell v. McCormack*; *Goldwater v. Carter*; *Nixon v. U.S.*—F & S. 66b–69t (nn. 1–3)
 - d. *Bush v. Gore*—F & S, pp. 69b–73m (n. 5).
5. Political Constraints
 - a. General Overview—Greenhouse, pp. 25–37.
 - b. Appointment and Removal, Jurisdiction Stripping, and Amendment—F & S, pp. 30m–34m (nn. 1–5).

Friday, February 7

III. Federal Legislative Power

A. American Federalism: An Introduction

1. U.S. Constitution, Art. I, §§ 8–10.
2. Historical Background
 - a. The National Bank Controversy—Supp. #10.
 - b. *McCulloch v. Maryland* (incl. Introduction)—F & S, pp. 75–89.
3. The Necessary and Proper Clause
 - a. General—F & S, pp. 90t–91b.
 - b. *United States v. Comstock* (incl. Introduction)—S & P, pp. 91b–94.
 - c. Federalism Limits—F & S, pp. 94m–97b (nn. 1 & 2).

WEEK 5

Wednesday, February 12

B. Enumerated Powers

1. The Commerce Power

a. The Commerce Power Before 1937

- (i) *Gibbons v. Ogden* (incl. Introduction)—F & S, pp. 113–15.
- (ii) Regulating Commerce in Industrial America—F & S, pp. 116t–120 (nn. 1–4).
- (iii) *Hammer v. Dagenhart*—F & S, pp. 120–22.
- (iv) The Early New Deal—F & S, pp. 122b–128b (nn. 1–3)

Friday, February 14

b. The Commerce Power After 1937

- (i) *NLRB v. Jones and Laughlin Steel Corp.* (incl. Introduction)—F & S, pp. 128b–31.
 - (ii) *United States v. Darby*—F & S, pp. 131–33.
 - (iii) *Wickard v. Filburn*—F & S, pp. 134–35.
- c. The Commerce Power and Civil Rights—F & S, pp. 136m–139t (n. 6).
- d. The Commerce Power and Criminal Law—F & S, p. 139 (n. 7).

WEEK 6

Wednesday, February 19

e. The Contemporary Commerce Power

- (i) *United States v. Lopez*—F & S, pp. 140–47t.
- (ii) *United States v. Morrison*—F & S, pp. 148–51m.
- (iii) *Gonzales v. Raich* (incl. Introduction)—F & S, pp. 151m–57.

Friday, February 21

- (iv) The Commerce Clause & the Affordable Care Act—F & S, pp. 157b–60. (nn. 1–6).
- (v) *NFIB v. Sebelius*—F & S, pp. 160–66t.

WEEK 7

Class 13: Wednesday, February 26

2. Taxing Power

- a. *Child Labor Tax Case* (incl. Introduction)—F & S, pp. 191–93.
- b. Federal Excise and License Taxes—F & S, pp. 194b–96t (n. 3).
- c. *NFIB v. Sebelius*—F & S, pp. 196–99.

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3. Spending Power

- a. *United States v. Butler* (incl. Introduction)—F & S, pp. 200m–204t.
- b. *Steward Machine Co. v. Davis*—F & S, pp. 204–206m.
- c. *South Dakota v. Dole*—F & S, pp. 207–10.

C. Tenth Amendment Limits on Congressional Authority

1. *New York v. United States*—F & S, pp. 173–177.
2. *Prinz v. United States*—F & S, pp. 178m–81m (n. 2).

D. Federal Preemption of State Law

1. The Dormant Commerce Clause—F & S, pp. 221t–225m; 228t–30b.
2. Modes of Preemption Analysis—F & S, pp. 283m–86m (n. 1).
3. Preemption and Foreign Affairs—F & S, pp. 286m–87m (n. 2).

Friday, February 28: MIDTERM EXAM

WEEK 8

Wednesday, March 4

IV. Executive Power

A. Introduction

1. Separation of Powers—Overview—F & S, pp. 297–98t.
2. U.S. Constitution, Article II.
3. *Youngstown Sheet & Tube Co. v. Sawyer* (incl. Introduction)—F & S, pp. 298–306.
4. Note on *Youngstown*—F & S, pp. 307b–08b (n. 4).

B. Executive Authority over Foreign Affairs and National Security

1. *Zivotofsky v. Kerry*—F & S, pp. 309–15.
2. *Dames & Moore v. Regan*—F & S, pp. 317–21t.

Friday, March 6

3. The “War on Terrorism”

- a. Introduction and Background—F & S, pp. 341b–45m.
 - b. Note on “Emergency Constitutionalism”—F & S, pp. 345m–50b.
 - c. *Johnson v. Eisentrager* and the Executive Response to the 9/11 Attacks—F & S, 356m–59.
 - d. Detention of Enemy Combatants: *Hamdi, Padilla, Rasul, and Boumediene*—Supp. #11
4. Executive Power, Immigration, and National Security: *Trump v. Hawaii* (incl. Introduction)—F & S, pp. 324–33.

WEEK 9

Wednesday, March 11

- C. Executive Privileges and Immunities, and Congress' Power of Impeachment
 - 1. Introduction—F & S, pp. 424m–25t.
 - 2. *United States v. Nixon*—F & S, pp. 425–27.
 - 3. The Scope and Limits of Executive Privilege—F & S, pp. 427m–29b; Supp. #12
 - 4. *Clinton v. Jones*—F & S, pp. 429b–35m
 - 5. The Trump Litigation—Supp. #13
 - 6. Criminal Indictment of a Sitting President—F & S, pp. 436t–37m (n. 3).

Friday, March 13

- 7. Impeachment—F & S, pp. 437m–41.
- 8. The Trump Impeachment—Supp. #14
- 9. The Pardon Power—Supp. #15

WEEK 10

Wednesday, March 15

V. Individual Rights

A. Introduction to Individual Rights and the Fourteenth Amendment

- 1. Introduction—F & S, p. 443.
- 2. *Baron v. City of Baltimore* (incl. Introduction)—F & S, pp. 444–46b.
- 3. *Dred Scott v. Sanford*—F & S, pp. 446b–49.
- 4. The Reconstruction Amendments and the *Slaughterhouse Cases*—F & S, pp. 451t–55b.

B. Incorporation (no readings)

C. The State Action Requirement

- 1. *Civil Rights Cases*—F & S, pp. 856–59.
- 2. “Public Function” as State Action—F & S, 860m–63t (n. 2).
- 3. *Shelley v. Kraemer*—F & S, pp. 863–65.
- 4. What counts as “state action”?—F & S, 866m–67m (n. 3); 868m–69m (n. 5) 872m–77m (nn. 1–4).

Friday, March 27

D. Equal Protection

- 1. Overview of Equal Protection Analysis—Tiers of Review—Supp. #16.
- 2. Racial Discrimination
 - a. Facially Discriminatory Laws
 - (i) *Strauder v. West Virginia*—F & S, pp. 656b–57m (n. 1).
 - (ii) *Korematsu v. United States*—F & S, pp. 676t–79m (n. 1).

WEEK 11

Wednesday, April 1

- b. “Separate but Equal”?
 - (i) Introduction, including *Plessy v. Ferguson*—F & S, pp. 657m–59b (n. 2).
 - (ii) Segregation in Public Education—F & S, pp. 659b–60b (n. 3).
 - (iii) *Brown v. Board of Education (Brown I)*—F & S, pp. 661–63.
 - (iv) Notes on the *Brown I*—F & S, pp. 663m– 67t (nn. 1–8).

Friday, April 3

- (v) *Brown v. Board of Education [Brown II]*—F & S, p. 667t–68m (n. 1).
- (vi) Notes on Desegregation—F & S, pp. 668m–71m (nn. 2–6).
- (vii) *Loving v. Virginia* (incl. Introduction)—F & S, pp. 671m–73m.
- c. Facially Neutral Laws
 - (i) *Washington v. Davis*—F & S, pp. 684–87.
 - (ii) *Arlington Heights v. Metro. Housing Corp.*—F & S, pp. 687t–89m (n. 1).
 - (iii) Note on Proving Discriminatory Purpose—F & S, pp. 689m–90b (n. 2).
 - (iv) Notes on Racially Discriminatory Purpose and Application of Facially Neutral Laws—F & S, pp. 680b–83b (nn. 1 & 2).

WEEK 12

Wednesday, April 8

- d. Affirmative Action
 - (i) *Regents of Univ. of California v. Bakke* (incl. Introduction)—F & S, pp. 691m–98.
 - (ii) *Adarand Constructors, Inc. v. Peña*—F & S, pp. 704b–09m.
 - (iii) *Grutter v. Bollinger*—F & S, pp. 710b–19.
 - (iv) *Gratz v. Bollinger*—F & S, pp. 719–22.
 - (v) *Fisher v. University of Texas at Austin*—F & S, pp. 729–33.

Friday, April 10

- 3. Sex Discrimination
 - a. History and Overview—F & S, pp. 755m–59t (nn. 1 & 2).
 - b. The Path to Heightened Scrutiny—F & S, pp. 759t–61m (nn. 3–5).
 - c. *Craig v. Boren*—F & S, pp. 761–64.
 - d. *United States v. Virginia*—F & S, pp. 768–75.
 - e. Pregnancy—F & S, 777m–78t (n. 3).
 - f. *Personnel Administrator of Mass. v. Feeney*—F & S, pp. 786m–89t.

4. Alienage Discrimination

- a. Heightened Scrutiny of Alienage Classifications—F & S, pp. 794t–95m (n. 1)
- b. The “Government Function” Exception—F & S, pp. 795m–96b (n. 2).
- c. *Plyler v. Doe*—F & S, pp. 849t–51b.
- d. Federal Alienage Discrimination—F & S, pp. 797t–98m (n. 4).

WEEK 13

Wednesday, April 15

5. Rational Basis Review

a. Economic Regulation

- (i) Introduction—F & S, pp. 645m–47m.
- (ii) *Railway Express Agency v. New York*—F & S, pp. 47–49.
- (iii) Deference to means-ends relationships—F & S, pp. 650 – 51m (n. 2).
- (iv) Classifications Based on “Animus”—F & S, pp. 651m–52m (n. 3); *Cleburne v. Cleburne Living Center, Inc.*—F & S, pp. 799–803.

b. Sexual Orientation

- (i) *Bowers v. Hardwick* (incl. Introduction)—F & S, pp. 553b–56m.
- (ii) *Romer v. Evans*—F & S, pp. 556–61m.
- (iii) *Lawrence v. Texas*—F & S, pp. 563–70.
- (iv) *United States v. Windsor*—F & S, pp. 575–82t.

Class 26: Friday, April 17

E. Substantive Due Process

- 1. Note on Procedural Due Process—F & S, pp. 608b–10b.
- 2. Economic Liberty and the Origins of Substantive Due Process
 - a. *Lochner v. New York*—F & S, pp. 489–94b.
 - b. *Lochner’s* Progeny—F & S pp. 496b–98m (n. 4).
 - c. The End of the “*Lochner* Era”—F & S, pp. 501m–504m (nn. 1–3).
- 3. Substantive Due Process and the Right to Privacy
 - a. Introduction—F & S, pp. 509t–10t.
 - b. Contraception and Childbearing
 - (i) Childbearing and Contraception—F & S, pp. 510t–11b.
 - (ii) *Griswold v. Connecticut*—F & S, pp. 511–18t.
 - (iii) *Eisenstadt v. Baird*—F & S, pp. 519–20 (n. 4).

WEEK 14

Wednesday, April 22

c. Abortion

- (i) *Roe v. Wade*—F & S, pp. 521–24b.
- (ii) Note on the Meaning and Implications of *Roe*—F & S, pp. 524b–31b.
- (iii) *Planned Parenthood of Southeastern Pa. v. Casey*—F & S, pp. 531b–38b.
- (iv) *Gonzales v. Carhart*—F & S, pp. 541–43.
- (v) *Whole Women’s Health v. Hellerstedt*—F & S, pp. 544–46.

Friday, April 24

d. Sexuality

- (i) Review *Bowers v. Hardwick*—F & S, pp. 553b–56m; and *Lawrence v. Texas*—F & S, pp. 563–70.
- (ii) *Obergefell v. Hodges*—F & S, pp. 583–91m.