

**Constitutional Law II:
The Fourteenth Amendment
Scalia Law School | George Mason University
Spring 2023
LAW 158 Sec 002 CRN 11744 | 3 credit hours
Tuesdays & Thursdays 6:05 p.m. - 7:30 p.m.**

Instructor: Distinguished Visiting Professor Daniel W. Hamilton

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Office Hours: Tuesdays and Thursdays from 2-4 pm or by appointment. My office is located in Hazel Hall, Room 311.

Course Overview: This course is a continuation of Constitutional Law I: Structure of Government, and explores judicial interpretations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The goal of this course is to understand the evolution of debates and application surrounding due process and equal protection jurisprudence, and other parts of the Fourteenth Amendment. Students will also learn current Supreme Court doctrine in interpreting the Fourteenth Amendment.

Learning objectives for the course include:

- Learning the legal doctrine of the Fourteenth Amendment.
- Studying how the Fourteenth Amendment has evolved over time.
- Understanding the competing perspectives on various contentious issues decided by court decisions interpreting the Fourteenth Amendment.

Required Text: The following is a required textbook for the course:

Brest, Levinson, Balkin, Amar, Siegel, and Rodriguez, Processes of Constitutional Decision-making: Cases and Materials, Eighth Edition (Frederick, MD: Aspen Publishing, 8th ed. 2022)

I will also post supplemental readings on TWEN. Please be sure to check the course page on TWEN at least once a week.

Class Format: The class meets on the Arlington Campus from 6:05 to 7:30 p.m. on

Tuesdays and Thursdays. Please read all of the assigned material and be prepared for active class discussion.

Communication Policy: In addition to office hours, I'm also glad to respond to student emails within 24 hours. You should also feel free to email me on nights and weekends.

Attendance: Students are expected to attend class. Per the law school's attendance policy, a student is not eligible to receive credit for a class if they miss more than 20 percent of the class sessions. A student who misses more than 25% of a class session will be counted as absent from that class session.

Students are permitted to use laptops in class and have the option to record classes, using audio equipment of their choice, so long as the resulting video or audio is not used for commercial purposes.

Grading: Grades will be based on a combination of the final exam and class participation.

- The final exam will consist of two "issue spotter" questions. We will discuss the final exam later in the semester and a review session will be held.

We will try to stay on track according to the outline below but there may be times when we have extended discussion and fall behind. We will begin the following class with the next case on the syllabus and also cover that day's originally assigned readings.

Helpful Resources: This course does not assume knowledge of American history or government. It may be helpful to consult supplements or study aids from time to time. Here are a few aids to consider:

- **Examples & Explanations for Constitutional Law: National Power and Federalism, Ninth Edition**, Christopher N. May, Allan Ides, Simona Grossi
- **Examples & Explanations for Constitutional Law, Individual Rights, Ninth Edition**, Allan Ides, Christopher N. May, Simona Grossi
- **The Glannon Guide to Constitutional Law: Powers and Liberties: Learning Constitutional Law Through Multiple-Choice Questions and Analysis, Third Edition**, Brannon Padgett Denning
- **Friedman's Practice Series for Constitutional Law, Second Edition**, Joel W. Friedman

Student with Disabilities: Students with disabilities may request academic accommodations as provided by federal law. Please contact George Mason University's

Office of Disability Services (ODS) to request services (ods@gmu.edu, 703-993-2474).

Campus Closure or Emergency Class Cancellation/Adjustment Policy: If the campus closes, or if a class meeting needs to be canceled or adjusted due to weather or other concern, students will be contacted by email for updates on how to continue learning and for information about any changes to events or assignments.

COURSE OUTLINE

1. Jan. 17 — Introduction – The Reconstruction Constitution and Early Interpretation of the Fourteenth Amendment
2. Jan. 19 — Limitations on the Fourteenth Amendment
3. Jan. 24 — Race and Equal Protection
4. Jan. 26 — Race and Equal Protection: Brown and Its Legacy
5. Jan. 31 — Brown II
6. Feb. 2 — Suspect Classifications and Disparate Impact
7. Feb. 7 — Suspect Classifications and Disparate Impact (continued)
8. Feb. 9 — Affirmative Action I: Government Contracting
9. Feb. 14 — Affirmative Action II: Education
10. Feb. 16 — Affirmative Action in Education (continued)
11. Feb. 21 — Gender Equality
12. Feb. 23 — Gender Equality (continued)
13. Feb. 28 — Other Suspect Classifications
14. March 2 — Substantive Due Process I: Economic Liberties
15. March 7 — Substantive Due Process I: Economic Liberties (continued)
16. March 9 — Substantive Due Process II: The Right to Privacy/Abortion

- SPRING BREAK – No classes on March 14 and March 16.***

17. March 21 — Substantive Due Process II: The Right to Privacy/Abortion (continued)

18. March 23 — Substantive Due Process II: The Right to Privacy/Abortion
(continued)
19. March 28 — Substantive Due Process III: Sexual Privacy and LGBTQ Rights
20. March 30 — LGBTQ Rights (continued) – Same-Sex Marriage
21. April 4 — Substantive Due Process IV
22. April 6 — Equal Protection and the Right to Education
23. April 11 — Procedural Due Process
24. April 13 — Congressional Power Under Section 5/Affirmative Action I:
Government Contracting
25. April 18 — Rethinking State Action
26. April 20 — Review/Discussion

CLASS 1: Jan. 17

Introduction – The Reconstruction Constitution and Early Interpretation of the Fourteenth Amendment

- The Reconstruction Constitution, pp. 347-350
- The Civil Rights Act, pp. 350-354
- The Fourteenth Amendment of the Constitution of the United States, pp. liv-lv
- The Slaughterhouse Cases, pp. 382-392, Discussion pp. 392-398
- United States v. Cuikshank, pp. 398-399, Discussion p. 399

CLASS 2: Jan. 19

Limitations on the Fourteenth Amendment

- Bradwell v. Illinois, pp. 399-401, Discussion pp. 401-402
- Minor v. Happersett, pp. 405-407, Discussion pp. 407-408
- Strauder v. West Virginia, pp. 413-417, Discussion pp. 417-420

CLASS 3: Jan. 24

Race and Equal Protection

- The Civil Rights Cases, pp. 421-432, Discussion pp. 432-436
- Plessy v. Ferguson, pp.436-443, Discussion pp. 443-449
- Buchanan v. Warley 245 U.S. 60 (1917), pp. 451-452, Discussion pp.452-453, Note pp. 453-454

CLASS 4: Jan. 26

Race and Equal Protection: Brown and Its Legacy

- Brown v. Board of Education and the Constitutional Struggle over Desegregation, pp. 1099-1105
- Brown v. Board of Education, I pp. 1105-1108
- Bolling v. Sharpe, pp. 1108-1109, Discussion pp. 1109-1112

CLASS 5: Jan. 31

Brown II

- Brown v. Board of Education (Brown II), pp. 1121-1122
- Massive resistance and the political and judicial response, pp. 1122-1131

CLASS 6: Feb. 2

Suspect Classifications and Disparate Impact

- Korematsu v. United States, pp. 1136-1141, Discussion pp.1141-1143
- Loving v. Virginia, pp. 1146-1149, Discussion pp.1149-1157
- Yick Wo v. Hopkins 118 U.S. 356, pp. 1166-1167

CLASS 7: Feb. 7

Suspect Classifications and Disparate Impact (continued)

- Washington v. Davis, pp. 1175-1179
- Village of Arlington Heights v. Metropolitan Housing Development Corp., pp. 1179-1180

CLASS 8: Feb. 9

Affirmative Action I: Government Contracting

- City of Richmond v. Croson, pp. 1225-1236, Discussion pp. 1236-1240
- Adarand Construction v. Peña, pp. 1240-1242, Note pp. 1242-1247

CLASS 9: Feb. 14

Affirmative Action II: Education

- Regents of the University of California v. Bakke, pp. 1217-1222
- Grutter v. Bollinger, pp. 1248-1266
- Gratz v. Bollinger, pp. 1266-1269, Discussion pp. 1269-1273

CLASS 10: Feb. 16

Affirmative Action in Education (continued)

- Parents Involved in Community Schools v. Seattle School District No. 1, pp. 1273-1300, Discussion pp. 1300-1303
- Fisher v. University of Texas II, pp. 1303-1304, Discussion 1304-1305

CLASS 11: Feb. 21

Gender Equality

- The Sex Equality Claims Under the Fourteenth Amendment, pp. 1327-1336
- Frontiero v. Richardson, pp. 1336-1342, Discussion pp. 1342-1345, Notes pp. 1345-1349
- Intermediate Scrutiny, pp. 1357-1365

CLASS 12: Feb. 23

Gender Equality (continued)

- United States v. Virginia (The VMI Case), pp. 1366-1381, Discussion pp. 1381-1384, Notes pp. 1384-1390

CLASS 13: Feb. 28

Other Suspect Classifications

- City of Cleburne v. Cleburne Living Center, pp. 1442-1452, Discussion pp. 1452-1454, Note pp. 1454-1455

- Citizenship and Alienage Under the Equal Protection Clause, pp. 1306-1312
- Bernal v. Fainter, pp. 1312-1319, Discussion pp. 1319-1322

CLASS 14: March 2

Substantive Due Process I: Economic Liberties

- The Rise of the Modern Industrial Order and the Protection of Economic Rights, p. 472, 476-484
- Lochner v. New York, pp. 485-491
- Adkins v. Children's Hospital, p. 504

CLASS 15: March 7

Substantive Due Process I: Economic Liberties (continued)

- The New Deal and Civil Rights Era: The Decline of Judicial Intervention Against Economic Regulation, pp. 569-571
- West Coast Hotel v. Parrish, pp. 582-584
- US v. Carolene Products, pp. 584-587, Discussion pp. 587-592
- Williamson v. Lee Optical, pp. 592-595, Discussion pp. 595-600
- The Evolution of the Bill of Rights and Its "Incorporation" Against the States, pp. 558-569

CLASS 16: March 9

Substantive Due Process II: The Right to Privacy/Abortion

- Liberty, Equality and Fundamental Rights, pp. 1455-1461
- Griswold v. Connecticut, pp. 1461-1474, Discussion pp. 1474-1482
- Eisenstadt v. Baird, pp. 1482-1485, Note pp. 1485-1490

SPRING BREAK: No classes on March 14 and March 16.

CLASS 17: March 21

Substantive Due Process II: The Right to Privacy/Abortion (continued)

- Roe v. Wade, pp. 1497-15060
- Planned Parenthood of Penn. v. Casey, pp. 1528-1555, Discussion pp. 1555-1559

CLASS 18: March 23

Substantive Due Process II: Right to Privacy/Abortion (continued)

- Stenberg v. Carhart 530 U.S. 914 (2000), pp. 1559-1560
- Dobbs v. Jackson Women's Health Organization (reading to be posted on TWEN)

CLASS 19: March 28

Substantive Due Process III: Sexual Privacy and LGBTQ Rights

- Sexuality and Sexual Orientation, pp. 1582-1586
- Bowers v. Hardwick, pp. 1586-1592, Discussion pp. 1592-1595
- Romer v. Evans, pp. 1596-1602, Discussion pp. 1602-1605
- Lawrence v. Texas, pp. 1606-1623, Discussion pp. 1623-1627, Note pp. 1627-1630

CLASS 20: March 30

LGBTQ Rights (continued) – Same-Sex Marriage

- United States v. Windsor, pp. 1640-1643, Discussion pp. 1643-1645
- Obergefell v. Hodges, pp. 1645-1666, Discussion pp. 1666-1676

CLASS 21: April 4

Substantive Due Process IV

- Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990), pp. 1699-1700
- McDonald v. City of Chicago 561 U.S. 742 (2010), pp. 1727-1729, Discussion pp. 1729-1741

CLASS 22: April 6

Equal Protection and the Right to Education

- San Antonio Independent School District v. Rodriguez, pp. 1761-1775, Discussion pp. 1775-1776

CLASS 23: April 11

Procedural Due Process

- Harper v. Virginia Board of Elections, pp. 1745-1748, Note pp. 1749-1753

CLASS 24: April 13

Congressional Power Under Section 5/Affirmative Action I: Government Contracting

- City of Boerne v. Flores, pp. 748-758, Discussion, pp. 758-761

CLASS 25: April 18

Rethinking State Action

- Shelley v. Kraemer, 334 U.S. 1 (1948), p. 1796

CLASS 26: April 20

Review/Discussion of Final Exam