

Constitutional Law I: Structure of Government (Law 121-R1)

Spring 2023

Prof. Eugene Kontorovich

Class information, policies, and first readings

Class schedule: *This is mixed online/in person course that meets 6:05-8:05pm Tuesdays and Thursdays. Tuesdays will be online, via [Zoom at this link](#), Thursdays will be in person. NB: You will need a gmu.edu email to account to sign in. The class session will be open roughly 15 minutes beforehand (and I will try to sign on 10 min before) to allow you to get set up, interact with other students, ask questions, and check your equipment.*

A few Thursday classes will also be by zoom: Feb 9th, March 9.

Scheduling notes: NO CLASS ON April 11th due to observance of Jewish holidays. A recorded lecture will be provided instead.

Office hours/being in touch: I encourage all of you to come to meet me in my office, but to ask any questions you have, and to get to know you. Given your varied work and life schedules, office meetings will largely be by appointment, which you should feel free to make. We will also discuss on the first day if there are any generally convenient times for in-person office hours.

You can also contact me any time at ekontoro@gmu.edu with questions or to schedule a virtual meeting at another time. I endeavor to respond to non-urgent emails in 24 hours during the work week. Students must use their MasonLive email account for communications related to this class.

Required texts: FELDMAN & SULLIVAN, CONSTITUTIONAL LAW (21st edition) (2022) [F&L for short]). It will be also very useful to have a printed copy of the United States Constitution with you throughout the class for easy reference. Additional materials will occasionally be assigned and made available via Blackboard.

Course description: The course is a basic introduction to U.S. constitutional law and Supreme Court constitutional jurisprudence, focusing on the “structural constitution” – the first three Articles. We will conclude with individual rights, examining some of the most fundamental and far-reaching rights secured by the 14th Amendment. The cases we read often involve extremely divisive or emotional subjects. To become constitutional lawyers, we must learn to separate between law and policy, and between understanding the current state of the law and thoughtfully critiquing it.

Learning outcomes: By the end of the semester, students should:

1. Be well versed in the structure and principal features of the U.S. constitution.

2. Be well versed in the foundational concepts of the U.S. Constitutional system – judicial review, federalism, separation of powers, process of amendment and elections, and a basic understanding role of individual rights.
3. Be skilled at reading and analyzing Supreme Court constitutional opinions, and being able to engage in principled constitutional argumentation.
4. Be able to persuasively discuss nationally significant constitutional questions from a legal, not a political or personal perspective.

Basis of evaluation & assessments

- Evaluation will be based primarily a traditional three-hour, essay-style, final exam, along with a possible adjustment for class participation.
- **Class participation:** Class participation, in terms of quality and quantity, as determined holistically y by the instructor, can be the basis for an upward or downward departure of 1/3 a letter grade from the final exam score. Normal class participation – being prepared when called on – will not affect the grade either way.

All students are expected to participate in class. To facilitate this in the online setting, I will assign each week “panels” of students on call, who will play the principal role in discussing the readings for that week. This does not reduce the obligation of other students the be prepared, and does not mean they cannot opt to join the conversation or choose to answer questions, nor does it mean I will never randomly call on someone, though this will be the exception, not the rule.

Expectations.

Students are expected to be prepared for every class, whether they expect to be called on or not. To really get the most out of the class, it is recommended to read over the materials twice (once fast, once slow). Please reflect before class on difficulties raised by the principal case and how it might interact with the note cases.

Attendance: Regular and punctual attendance are required to earn academic credit. Attendance requirements for academic credit will follow the policies set forth in Academic Regulation 4-1. Attendance in Zoom classes is tracked by Zoom. Should circumstances occur where you anticipate the possibility of missing a substantial number of class sessions (e.g. a serious illness), you should immediately contact the Assistant Dean, Student Academic Affairs. *You need not and should not contact me about one-off absences – this is an adult work environment, and absences that will not conflict with the Academic Regulations are your own business.*

ONLINE COURSE TIPS:

- Join the class with your camera on and microphone off. Keep your camera on throughout the class, and microphone off unless speaking. Please have your online profiles updated with your full name and recognizable picture for when your camera might be turned off (i.e. before a class).
- Please use a headset, it results in much less feedback and better overall audio quality.
- Calling in: please do not call into the class without video except in the most exigent circumstances, and notify me in advance.
- Please dress and conduct yourself during the class as you would it were at the law school, and try to maintain a background/setting that is not distracting for the class. If you have to step away, please exit the session entirely and then sign back in so I don't call you on you by accident.
- There is no perfect way to ask for the floor in online classes; if you want to be called on, please raise your physical and electronic hand AND message me through the chat function.
- Please only use the chat function *during* class for the above purpose unless I request otherwise, or to ask simple clarifying questions that can be easily answered by your classmates.
- Don't worry if your child/pet/whoever runs into the frame. Indeed, children under 16 are free to audit the course free of charge.

CLASS RECORDINGS PROHIBITED: Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. However, I will be recording most of the course sessions as a backup that could be available for students under the express direction of the Assistant Dean for Student Academic Affairs to accommodate a student for classes missed due to illness.

Readings/syllabus: Readings will almost always come from the casebook, unless otherwise indicated – I will sometimes supplement with additional material that will be made available on **Blackboard** [not TWEN]. Readings are almost always Supreme Court opinions – the first few classes will examine why that is so.

The syllabus is by assignments, not days, but each assignment should correspond with roughly a single class session. Unless otherwise announced, please read the next assignment for the next class. We will start the semester at a somewhat slower pace of reading, because the materials we are covering are foundational to all of constitutional law, and involve some “old” and thus somewhat harder to read cases. Relatively few pages are assigned, but they bear very close reading.

Unit I: The Judicial Power and its Limits

Assignment One: *Introduction to U.S. Constitution & the Basis of Judicial Review.* F & L, 1-16. Also, please read the Constitution of the United States of America,

Arts. I-VII, which can be found at the front of the book. You'll should revisit it regularly.

Assignment Two: *Judicial Review con't.*, F &S 16-35.

Blackboard: Federalist Paper # 78 (Hamilton).

Assignments Three-Four: *Justiciability Doctrines.* 34-76. Blackboard: excerpt from DE TOCQUEVILLE, DEMOCRACY IN AMERICA

Unit II: Legislative Powers (Congress)

Assignment Five: *The Necessary & Proper Clause; The Idea of Federalism.* 75-112

Assignment Six: : *The Commerce Clause Expands.* 115-41

Assignment 7: *The Commerce Clause today.* 142-169

Blackboard: COVID Commerce & NonDelegation cases

Assignment 8: *Federalism principles in 10th & 11th Amendments.* 170-92

Assignment 9: *Taxing & Spending powers.* 193-221

Assignment 10: *Dormant Commerce Clause* 221-41; 250-72

Assignment 11: 273-289

Dormant Commerce cont; Art. IV Privilege & Immunities; misc.

Unit III: Separation of Powers (the President)

Assignment 12: Executive Assertions of Power 299-334

Assignment 13: War & Treaties 325-49.

Blackboard: Eviction moratorium cases

Assignment 14: Congressional control of executive functions: 392-426

Assignment 15: Sep. of powers con't; executive privileges. 426-457.

Unit IV: Individual Rights

Assignment 16-17: *Privileges and immunities & Incorporation Doctrine* 459-505

Assignment 17: *Substantive Due Process I: The Lochner Doctrine.* 507-42

Assignment 18: *Substantive Due Process & Bodily Autonomy Issues* (Roe v Wade etc) 543-78

Assignment 19-20: *Bodily/Sexual Autonomy con't* 578-88, 594-635
Blackboard: *Jacobson & vaccine mandate cases*.

Assignment 22: *The Takings & Contract Clauses*. 636-40, 642-674
(skip n. 7 at pp 666)

Assignment 23-24: *Racial Discrimination*
Equal Protection/Race Discrimination fundamentals: 667-68, 668-721
Affirmative Action cases: 723-67 (skim *Adarand*0)

Assignment 25: *Equal Protection & Sex Classifications*. EP as applied to classifications on the basis of sex: pg 787-820