

Antonin Scalia Law School at George Mason University

CONSTITUTIONAL LAW II

Spring 2024 Course Syllabus (1.9.24)

Mondays and Wednesdays: 6:05 – 7:30 p.m.

3 credits

Professor: JoAnn Koob: jkoob@gmu.edu

Office Hours: Tuesdays 4:30 – 5:30 p.m.; Wednesdays 4 – 5 p.m.; and by appointment; Room 433K; Zoom appointments available

Casebook and Readings: Our primary class material will be *Constitutional Rights: Cases in Context* (4th ed.) by Randy E. Barnett and Josh Blackman (Barnett). **You will need a hard copy of the book.** You do not need to purchase the supplement, as I will provide links or PDFs (via Blackboard) of all supplement materials that we cover. Note that substantively, the casebook is essentially the second half of the larger Barnett/Blackman Constitutional Law hardcover casebook, so you are able to use that book, though you will need to figure out the pagination. There will be videos assigned, which are available on Casebook Connect (included with purchase of book (new)).

Readings not found in the casebook will be provided via a link or on Blackboard.

Attendance: The course follows the Law School's attendance policy. If a student is absent for any reason more than 20% of the course, then the student is not eligible for credit. A student who misses more than 25% of a class session will be counted as absent from that class session.

Unexpected Cancellations: If the law school has an unexpected closure (e.g., a snow day), class will still be held on the regular schedule using Zoom (in that case, I will send out a Zoom link to your email).

Electronic Devices Policy: **Generally, when class is in person I prohibit the use of computers or other electronic devices**, with two exceptions: 1) if you have a job or personal circumstances that require you to have your phone out during class, you can clear it with me in advance, and 2) occasionally I use online polls during class which will require the use of your phone. In either case you may use your phone solely for that purpose. I have this policy because this will be a discussion-intensive class and I'd like you to be focused on our discussions. In addition, studies have shown that students who use computers during class do not learn as well.

However, there are a handful of classes where the majority of the assigned readings are not in the casebook, but rather have been post to Blackboard as PDFs. For those classes **I will let you know in advance** that you can use an electronic device solely for the purpose of accessing the assigned readings. By choosing to use your computer during those class sessions, you are agreeing to limit your use to this purpose.

Obviously, prohibiting electronics is not possible if class is held online. You should simulate a no-computer environment the best you can by taking handwritten notes and avoiding online distractions. I require your camera to be on during class when and if class is held online.

Recording Policy: Recording class sessions (video or audio) is prohibited. This is both to protect the privacy of class discussions as well as certain intellectual property.

Academic Integrity: Scalia Law School has adopted an honor code, which is available on the [Honor Committee's website](#). Students are prohibited from lying, cheating, or stealing, being an accomplice or accessory to someone else who is cheating, bringing a prohibited material or device to an exam, or failing to report an honor code violation if the person has reasonable cause to believe that a violation has occurred. You may not access the internet during the exam and the use of artificial intelligence on the exam is prohibited.

Assessment and Grades:

- **Final Exam:** The final exam will comprise 90% of your final grade. It will be open-book, closed-internet.
- **Class Participation:** Class participation will comprise 10% of your grade. This class will involve quite a bit of discussion (e.g., small group breakout discussions, class “debates” of court decisions, etc.). Your participation grade includes your participation in breakout discussions. In addition, there will be cold-calling during class. You have two “passes” you may use during the semester, which can be used by emailing me at least four hours before class starts. Using these passes will in no way affect your grade. Other than your two approved passes, failure to be prepared may affect your grade.

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

- Be well versed in the principal features of the 14th Amendment;
- Have solid knowledge of the doctrines underlying the privileges or immunities Clause, due process clause, and equal protection clause;
- Be skilled at reading and analyzing Supreme Court constitutional opinions; and
- Be able to debate the legal rationale for Supreme Court constitutional opinions.

Assigned Readings: The syllabus may be updated during the semester. When updated, I will send an email and update the syllabus on Blackboard. Occasionally the assigned readings include specific items to consider or be prepared to discuss; this does not imply you do not otherwise need to be prepared to discuss everything covered in the assignments, but rather, is to give you notice to plan for a robust discussion on those issues noted. For the Barnett readings you should refer to the page numbers; the cases are listed solely for reference.

Class Session – Date	Readings	Notes, Information, and Other Assignments
1 – 1/17	Background: <ul style="list-style-type: none"> • Barnett, 3-12; 46-51; 82-87 <ul style="list-style-type: none"> ○ <i>Barron v. Baltimore</i> • The 13th, 14th, and 15th Amdts. (available at Barnett pp. xliii-xliv) 	What phrases stand out to you in the Declaration of Independence (whether mentioned by the book authors in pp. 7-12 or not)? We will discuss. Be prepared to argue the case both for and against

		the adoption of a Bill of Rights.
2 - 1/22	<p>Slavery and the Due Process of Law:</p> <ul style="list-style-type: none"> • Barnett, 121-127 • Casebook Connect Video (p. 128 in ebook): “<i>Dred Scott v. Sandford</i>” • Barnett, 154-157 <p>The Reconstruction Amendments:</p> <ul style="list-style-type: none"> • Barnett, 159-169 <p>Privileges or Immunities Clause:</p> <ul style="list-style-type: none"> • Barnett, 170-195 <ul style="list-style-type: none"> ○ <i>Slaughterhouse Cases</i> ○ <i>Bradwell v. Illinois</i> 	What are the best and worst legal arguments made in each of the four Slaughter-House Cases opinions excerpted?
3 – 1/24	<p>Privileges or Immunities Clause (cont.):</p> <ul style="list-style-type: none"> • Barnett, 196-202 <ul style="list-style-type: none"> ○ <i>U.S. v. Cruikshank</i> <p>Enforcement Powers:</p> <ul style="list-style-type: none"> ○ Barnett, 219-247 <ul style="list-style-type: none"> ○ <i>Strauder v. West Virginia</i> ○ <i>The Civil Rights Cases</i> 	Consider the arguments for and against the Court’s interpretation of the Privileges or Immunities Clause
4 – 1/29	<p>Enforcement Powers (cont.)</p> <ul style="list-style-type: none"> • Barnett, 247-254 <ul style="list-style-type: none"> ○ <i>Katzenbach v. Morgan</i> ○ <i>United States v. Morrison</i> <p>Defining the Due Process and Equal Protection Clauses:</p> <ul style="list-style-type: none"> • Barnett, 254-274 <ul style="list-style-type: none"> ○ <i>Yick Wo v. Hopkins</i> ○ <i>Plessy v. Ferguson</i> 	Be prepared to continue our discussion of <i>The Civil Rights Cases</i> during the first part of class.
5 – 1/31	<p>Due Process in the Progressive Era:</p> <ul style="list-style-type: none"> • Barnett, 275-296 <ul style="list-style-type: none"> ○ <i>Chicago, Burlington & Quincy RR v. Chicago</i> ○ <i>Lochner v. NY</i> 	Optional Reading: <i>Lochner v. NY: A Centennial Retrospective</i> , pp. 1505-25, by D. Bernstein (available on Blackboard).
6 – 2/5	<p>Due Process in the Progressive Era (cont.):</p> <ul style="list-style-type: none"> • <i>Bailey v. Alabama</i>, 219 U.S. 219 (1911)* • Barnett, 296-305 <ul style="list-style-type: none"> ○ <i>Muller v. Oregon</i> 	Be prepared to continue our discussion of <i>Lochner</i> during the first part of class.

	<ul style="list-style-type: none"> ○ <i>Buchanan v. Warley</i> 	*Shortened version available on Blackboard.
7 – 2/7	<p>Due Process in the Progressive Era (cont.):</p> <ul style="list-style-type: none"> ● Barnett, 305-326 <ul style="list-style-type: none"> ○ <i>Adkins v. Children’s Hospital</i> ○ <i>Meyer v. Nebraska</i> ○ <i>Pierce v. Society of Sisters</i> ○ <i>Buck v. Bell</i> 	Note Holmes’ opinion in <i>Bartels v. Iowa</i> on 316-317
8 – 2/12	<p>Due Process in the Progressive Era (cont.):</p> <ul style="list-style-type: none"> ● <i>Gitlow v. New York</i>, 268 U.S. 652 (1925)* <p>Due Process & the Presumption of Constitutionality:</p> <ul style="list-style-type: none"> ● Barnett, 326-345 <ul style="list-style-type: none"> ○ <i>O’Gorman & Young</i> ○ <i>Nebbia v. New York</i> ○ <i>West Coast Hotel v. Parrish</i> 	*Available on Blackboard
9 – 2/14	<p>Presumption of Constitutionality (cont.):</p> <ul style="list-style-type: none"> ● Barnett, 346-365 (including subsection 3) <ul style="list-style-type: none"> ○ <i>U.S. v. Carolene Products*</i> ○ <i>Lee Optical v. Williams</i> ○ <i>Williams v. Lee Optical</i> 	*Pay particular attention to footnote 4
10 – 2/19	<p>The Milnut Saga (cont.):</p> <ul style="list-style-type: none"> ● Barnett, 365-369 <ul style="list-style-type: none"> ○ <i>Milnot v. Richardson</i> <p>The Ninth Amendment:</p> <ul style="list-style-type: none"> ● Barnett, 60-64; 369-373 <ul style="list-style-type: none"> ○ <i>United Public Workers v. Mitchell</i> ● <i>The Ninth Amendment: It Means What it Says</i>, 85 Tex. L. Rev. 1 (2006): Section IV* 	*Available on Blackboard (pp. 10-21)
11 – 2/21	<p>Equal Protection – Pre-Brown:</p> <ul style="list-style-type: none"> ● <i>Skinner v. Oklahoma</i>, 316 U.S. 535 (1942)** ● <i>Kotch v. Board of River Port Pilot Commissioners</i>, 330 U.S. 552 (1947)** ● <i>Shelley v. Kraemer</i>, 334 U. S. 1 (1948)** <p>Equal Protection – Race:</p> <ul style="list-style-type: none"> ● Barnett, 377-385 <ul style="list-style-type: none"> ○ <i>Brown I</i> 	*Available on Blackboard
12 – 2/26	<p>Equal Protection – Race (cont.):</p> <ul style="list-style-type: none"> ● Barnett, 385-413 	

	<ul style="list-style-type: none"> ○ <i>Bolling v. Sharpe</i> ○ <i>Brown II</i> ○ <i>Cooper v. Aaron</i> 	
13 – 2/28	<p>Equal Protection – Race (cont.):</p> <ul style="list-style-type: none"> ● <i>Reynolds v. Sims</i>, 377 U.S. 533 (1964)*; ● Barnett, 413-422 <ul style="list-style-type: none"> ○ <i>Loving v. Virginia</i> ○ <i>Washington v. Davis</i> 	*Shortened version available on Blackboard (note it is in two parts)
14 – 3/11	<p>Equal Protection – Race (cont.):</p> <ul style="list-style-type: none"> ● Barnett, 422-451 <ul style="list-style-type: none"> ○ <i>Bakke</i> ○ <i>Grutter</i> ○ <i>Gratz</i> ● Casebook Connect Video (p. 456 in ebook): “<i>Fisher v. University of Texas at Austin (Fisher II)</i>” 	
15 – 3/13	<p>Equal Protection – Race (cont.):</p> <ul style="list-style-type: none"> ● <i>Students for Fair Admissions v. Harvard</i>* ● <i>United States v. Paradise</i>, 480 U.S. 149 (1987), pp. 149-151 (Syllabus), 166-186, and pp. 196-201 (from O’Connor’s opinion)** 	<p>*Shortened version available on Blackboard</p> <p>**Available on Blackboard</p> <p>We may continue are discussion of the <i>Fisher</i> cases today</p> <p>We may have a guest speaker today</p>
16 – 3/18	<p>Equal Protection – Race (cont.):</p> <ul style="list-style-type: none"> ● <i>City of Richmond v. Croson</i>, 488 U.S. 469 (1989)* ● Barnett, 464-473 <ul style="list-style-type: none"> ○ <i>Adarand Constructors v. Pena (1995)</i> ● <i>Parents Involved v. Seattle School District No. 1</i>, 551 U.S. 701 (2007), Read the first two paragraphs of the Syllabus (p. 701), Part III of Roberts opinion (pp. 720-735), and Part III of Breyer’s dissent (pp. 838-852)** 	<p>*Shortened version available on Blackboard</p> <p>**Available on Blackboard</p>
17 – 3/20	<p>Equal Protection – Race & Other:</p> <ul style="list-style-type: none"> ● <i>San Antonio v. Rodriguez</i>, 411 U.S. 1 (1973)* ● <i>Village of Arlington Heights v. Metropolitan Housing Development Corporation</i>, 429 U.S. 252 (1977)* 	*Shortened version available on Blackboard

	<ul style="list-style-type: none"> • Bernal v. Fainter, 467 U.S. 216 (1984)* • Plyler v. Doe, 457 U.S. 202 (1982)* 	
18 – 3/25	<p>Equal Protection – Other (cont.):</p> <ul style="list-style-type: none"> • Barnett, 475, 500-517 <ul style="list-style-type: none"> ○ <i>Cleburne v. Cleburne Living Center</i> ○ <i>Romer v. Evans</i> <p>Equal Protection –Sex:</p> <ul style="list-style-type: none"> • Goeseart v. Cleary, 335 US 464 (1948)* 	*Available on Blackboard
19 – 3/27	<p>Equal Protection –Sex (cont):</p> <ul style="list-style-type: none"> • Reed v. Reed, 404 U.S. 71 (1971)* • Barnett, 476-499 <ul style="list-style-type: none"> ○ <i>Frontiero v. Richardson</i> ○ <i>Craig v. Boren</i> ○ <i>United States v. Virginia</i> 	*Available on Blackboard
20 – 4/1	<p>Substantive Due Process – Privacy → Liberty + Dignity</p> <ul style="list-style-type: none"> • Barnett, 521-51, 566-584 <ul style="list-style-type: none"> ○ <i>Griswold v. Connecticut</i> (skip Justices White’s and Stewart’s opinions) ○ <i>Roe v. Wade</i> ○ <i>Planned Parenthood v. Casey</i> (Skip Blackmun’s and Rhenquist’s opinions) • Casebook Connect Video (p. 568 in ebook): “<i>Planned Parenthood v. Casey</i>” 	Think about which <i>Griswold</i> opinion you think is the most correct, from a legal perspective
21 – 4/3	<p>Substantive Due Process – Fundamental Rights</p> <ul style="list-style-type: none"> • Barnett, 551-566 <ul style="list-style-type: none"> ○ <i>Bowers v. Hardwick</i> (skip Justices Burger’s and Powell’s opinions) ○ <i>Washington v. Glucksburg</i> ○ <i>Troxel v. Granville</i> 	We may continue our discussion of <i>Planned Parenthood v. Casey</i> today
22 - 4/8	<p>Substantive Due Process – Liberty + Dignity</p> <ul style="list-style-type: none"> • Barnett, reread bottom of 566, 599-616 <ul style="list-style-type: none"> ○ <i>Lawrence v. Texas</i> • U.S. v. Windsor, 570 U.S. 744 (2013)* • Barnett, 619-641 <ul style="list-style-type: none"> ○ <i>Obergefell v. Hodges</i>: (Kennedy’s, Roberts,’ and Scalia’s opinions only) 	*Shortened version available on Blackboard Note the use of the equal protection clause in <i>Windsor</i> and <i>Obergefell</i>
23 – 4/10	<p>Substantive Due Process – Recent Developments</p> <ul style="list-style-type: none"> • Barnett, 589-599 <ul style="list-style-type: none"> ○ <i>Whole Women’s Health v. Hellerstedt</i> (Skip Alito’s opinion) 	*Shortened version available on Blackboard

	<ul style="list-style-type: none"> • <i>June Medical v. Russo</i>, 591 U.S. __ (2020) (excerpts from pages 4 – 30 only)* • <i>Dobbs v. Jackson Women’s Health</i>, 597 US _ (2022)* 	Optional reading: edited version of <i>Gonzales v. Carhart</i> (2007), in Barnett, 586-89; warning that this case is graphic
24 – 4/15	Revisiting the P/I Clause <ul style="list-style-type: none"> • Barnett, 203-219 <ul style="list-style-type: none"> ○ <i>McDonald v. City of Chicago</i> • <i>Timbs v. Indiana</i>, 139 S.Ct. 682 (2019)* • <i>Ramos v. Louisiana</i>, 140 S.Ct. 1390 (2020)* (note: you will read part of each of Justice Gorsuch’s and Thomas’ opinions only) 	*Shortened version available on Blackboard
25 – 4/17	Right to Travel: <ul style="list-style-type: none"> • <i>Crandall v. Nevada</i>, 73 U.S. 35 (1868)* • <i>Shapiro v. Thompson</i>, 394 U.S. 618 (1969)* • <i>Saenz v. Roe</i>, 526 U.S. 489 (1999)* Section 3 of the 14th Amendment: <ul style="list-style-type: none"> • <i>Reading TBD</i> 	*Shortened version available on Blackboard
26 – 4/22	Review and Questions	We will discuss the final exam and any questions you have about it. The rest of the class will be devoted to a review of materials covered.