

UConn–HUGS Summer Program
Constitutional Law – Syllabus
Professor David Thaw
Summer 2022

Contact Information:
• email: dbthaw@gmail.com

Final Version (21 June 2022)

This course is organized into nine Parts, each of which is divided into several Units (1.1, 1.2, etc.).

The textbook for this class is referred to as the “Casebook” (CB) in the teaching materials:

- Casebook (CB): Erwin Chemerinsky, Constitutional Law (6th ed., 2020)

Readings in the casebook ("CB") are required.

Students should plan on completing the Casebook (CB) reading in advance of the class period for which they are assigned (exception may be made for the first class as students may register up until the first class). For example, for the **16 May 2022 (Monday)** class period, the students should read pages 1-2, 2-9, 119-121, 121-130, 130-133, 155, 155-156, 156-159, 159-162, and 173-175 in the Casebook.

The page numbers in the assign readings generally refer to a section or case which starts and ends on the pages in question.¹ For example, the case *Marbury v. Madison* begins on page 2 of the CB and ends on page 9. Each page range should correspond to section(s) or a case. (Some “case” readings include the Casebook author’s commentary afterwards.) Single pages generally mean to read the section or case which appears entirely on a single page (common for introductory sections).

Some readings for cases are marked with the comment “*note case*” – this generally means that the textbook author has chosen to summarize the case, possibly with a few quotations, instead of providing a full edited version. In some instances, I assign “note cases” because I believe they are important to understanding a given topic. In some instances, I will provide a link to the full text of the case for your reference (usually in a footnote). The full text is not required reading, but you may find it helpful.

The dates/times listed on the syllabus (e.g., 08 May 2022 (Sunday – Pre-Recorded Session)) refer to U.S. Eastern Time (the “official” time of the class in UConn’s course listing). Korea Standard Time (KST) is 13 hours ahead. So, for example, a class listed as “16 May 2022 (Monday – Morning Session)” will start in the *evening* KST.

¹ For reasons passing my understanding, this is not made explicit at some law schools and students often are left to figure it out for themselves. I prefer not to place that burden on students, hence this footnote.

Thoughts on Learning Constitutional Law as a non-U.S. student:

My job with this course is to help you understand U.S. Constitutional Law. It is a very challenging subject for non-U.S. students, as most doctrines emerge from court cases rather than from formal, express rules. The reading of cases is essential both to understanding the law, and (for those interested) to successfully passing the bar examination in the United States. This is because passing the bar requires applying doctrines to "new" fact patterns – something learned from "practicing" by reading and understanding cases.

*Accordingly, I strongly encourage all students to come to me with questions – both during class and at other times. You may ask questions about subjects from a previous class during subsequent classes. The material expected to be covered in each class is broken out by session and listed in **bold underline** below. As this is a highly-compressed class, these dates are subject to change if we fall behind. Extra time is planned in the syllabus in case we fall behind, and for review.*

Special note for Summer 2022: As some students may be aware, a draft of the U.S. Supreme Court's Opinion in the case *Dobbs v. Jackson Women's Health Organization*, a case involving the Constitutional protections for abortion currently pending before the Court, was "leaked" to the media in early May 2022. You are not responsible for the draft opinion and it will not be tested in class.

However, given the history of the Court's timing of the release of opinions, it is quite possible the Court's official opinion (and therefore ruling) may be released during our class. I have planned time in class to address this if it occurs, however please note that this could alter the schedule as well, both for logistical (time) reasons and for substantive reasons (if the Court's Opinion has substantive implications for other cases currently part of the syllabus).

CLASS SCHEDULE

08 May 2022 (Sunday – Pre-Recorded Session)

This session will focus on an introduction to the course, overview of the syllabus and course plan, and a brief introduction to the U.S. system of government.

1. The American Federalist Republic
 - 1.1. The Constitution and the Structure of Government
 - 1.1.1. Background
 - 1.1.2. The United States Constitution (CB xxxix–lv – *I recommend skimming the structure to become familiar with it, as we will repeatedly reference it throughout the course*)
 - 1.2. Mechanics of the United States Government

16 May 2022 (Monday)

- 1.3. Constitutional Authority – The Text and Judicial Review
 - 1.3.1. Background (CB 1-2)
 - 1.3.2. *Marbury v. Madison* (CB 2-9)
- 2. Federal Legislative Power (U.S. Congress)
 - 2.1. The Scope of Congressional Power – The Necessary and Proper Clause
 - 2.1.1. Introduction (CB 119-121)
 - 2.1.2. *McCullough v. Maryland* (CB 121-130)
 - 2.1.3. Introduction to the Relationship Between State and Federal Power (CB 130-133)
 - 2.1.4. Commentary on the Necessary and Proper Clause (CB 155)
 - 2.1.5. *United States v. Comstock* (CB 155)
 - 2.2. The Scope of Congressional Power – Introduction to the Commerce Clause
 - 2.2.1. Introduction (CB 155–156)
 - 2.2.2. *Gibbons v. Ogden* (CB 156–159)

23 May 2022 (Monday)

- 2.3. The Commerce Clause – Scope, or "What is Commerce"?
 - 2.3.1. Introduction (CB 159-162)
 - 2.3.2. *Wickard v. Filburn* (CB 173-175)
- 2.4. Commerce "Among the States"
 - 2.4.1. Introduction (CB 162-164, 175)
 - 2.4.2. *Heart of Atlanta Motel, Inc. v. United States* (CB 175-178)
 - 2.4.3. *United States v. Lopez* (CB 190–194)
- 2.5. Tenth Amendment Limitations on Commerce Power and the Role of State Sovereignty
 - 2.5.1. Introduction (CB 164-166, 187, 216)
 - 2.5.2. *Gonzales v. Raich* (CB 207-215)
 - 2.5.3. *Printz v. United States* (CB 226-234)

25 May 2022 (Wednesday)

- 2.6. Dormant Commerce Clause
 - 2.6.1. Introduction (CB 444-446, 452-455, 457-458, 461-462, 471, 475, 480-481, 483)
 - 2.6.2. *Southern Pacific Co v. Arizona* (CB 456-457 note case)
 - 2.6.3. *Philadelphia v. New Jersey* (CB 458-461)
- 2.7. Taxing and Spending Power
 - 2.7.1. Introduction (CB 240-241)
 - 2.7.2. *South Dakota v. Dole* (CB 245-248)
 - 2.7.3. *National Federation of Independent Businesses v. Sebelius* (CB 133-136, 138-140: Parts I, II, III–B and III-C)²

² *NFIB v. Sebelius* is often cited for the proposition that five Justices agreed that the Commerce Clause does not afford Congress the power to implement the Affordable Care Act's so-called "individual mandate." While it is true that five

26 May 2022 (Thursday)

- 2.8. Post–Civil War Amendments (13th, 14th, and 15th Amendments)
 - 2.8.1. Introduction and *The Civil Rights Cases* (CB 248-250, 253)
 - 2.8.2. *Katzenbach v. Morgan & Morgan* (CB 254-257)
 - 2.8.3. *City of Boerne v. Flores* (CB 258-263)
- 3. Federal Executive Power (The Presidency and Federal Agencies)
 - 3.1. Presidential Power
 - 3.1.1. Introduction (CB 275-276)
 - 3.1.2. *Youngstown Sheet & Tube Co. v. Sawyer* (CB 276-284)
 - 3.1.3. Executive Privilege (CB 285-286)
 - 3.1.4. *United States v. Nixon* (CB 286-289)

27 May 2022 (Friday – Review Video)

1 June 2022 (Wednesday)

- 3.2. Ability of Congress to Increase Executive Power
 - 3.2.1. Introduction (CB 290)
 - 3.2.2. *Clinton v. City of New York* (CB 291 *note case*³)
- 3.3. Federal Agencies, The Executive, and other Problems of the Administrative State
 - 3.3.1. Introduction to the Administrative State (CB 292-293)
 - 3.3.2. The Nondelegation Doctrine (295)
 - 3.3.3. *INS v. Chadha* – the Legislative Veto (CB 304-312)
 - 3.3.4. Modern Legislative Checks Against the Executive (CB 312-313)
 - 3.3.5. *Morrison v. Olson* – Appointment Power (CB 313-319)
- 3.4. Separation of Powers and Foreign Policy
 - 3.4.1. Introduction (CB 339-340)
 - 3.4.2. *United States v. Curtiss–Wright Export Corp.* (CB 340-343)
 - 3.4.3. *Zivotofsky v. Kerry* (CB 343-351)

2 June 2022 (Thursday)

- 3.5. Presidential War Powers and Terrorism
 - 3.5.1. Introduction (CB 354-355)
 - 3.5.2. The War Powers Act (CB 355-358)
 - 3.5.3. Presidential Power to Address Terrorism and Non-State Actors (CB 358-359)
 - 3.5.4. *Hamdi v. Rumsfeld* (CB 359-370)

Justices agreed as to this point, there *were not five votes for III-A*. Accordingly, I encourage students not to “over-read” the implications of Section III-A, particularly because several of the Justices comprising that “five” no longer are on the Court. For this same reason, we do not consider *Sebelius* beyond its implications for Congress’s Taxing and Spending powers.

³ <https://www.law.cornell.edu/supct/html/97-1374.ZS.html>

4. Federal Judicial Power (Article III Courts)

(You may wish to review Section 1.3 of the course at this point.)

4.1. Scope and Interpretive Limits

4.1.1. Introduction to the Scope of the Federal Judicial Power (CB 1-2, 8-9)

4.1.1.1. Authority for Federal Judicial Review of State Court Judgments (CB 10)

4.1.1.2. *Martin v. Hunter's Lessee* (CB 10 note case)

4.1.1.3. *Cohens v. Virginia* (CB 10-11 note case)

4.1.2. Introduction to Interpretive Limits (CB 11-13)

4.1.2.1. *District of Columbia v. Heller* (CB 13-32, focus on the majority opinion)

4.2. Congressional Limits

4.2.1. Introduction (CB 32-34)

4.2.2. *Ex Parte McCardle* – Exceptions and Regulations Clause (CB 34-36)

4.2.3. *United States v. Klein* – Separation of Powers (CB 36-38)

3 June 2022 (Friday – Review Video)

6 June 2022 (Monday)

4.3. Justiciability – No Advisory Opinions

4.3.1. Introduction to Justiciability (CB 39-41)

4.3.2. Prohibition of Advisory Opinions (CB 41-42)

4.3.3. *Plaut v. Spendthrift Farm* (CB 42-43)

4.3.4. Notes on Advisory Opinions and Availability of Declaratory Relief (CB 44)

4.4. Justiciability – Standing

4.4.1. Introduction (CB 44-45)

4.4.2. *Allen v. Wright* (CB 45-52)

4.4.3. Notes on Injury, Causation, and Redressability (CB 58, 64-65)

4.4.4. Prudential Standing: Prohibition of Third-Party and Generalized Grievances (CB 66-67, 70-71)

4.4.5. *United States v. Richardson* (CB 71-74)

8 June 2022 (Wednesday) – No Class

9 June 2022 (Thursday)

4.5. Justiciability – Ripeness

4.5.1. Introduction (CB 79-80)

4.5.2. *Abbott Laboratories v. Gardner* (CB 82-83)

4.5.3. Notes on Ripeness and cases after *Abbott Labs* (CB 84-85)

4.6. Justiciability – Mootness

4.6.1. Introduction (CB 85-87)

4.6.2. *Friends of the Earth, Inc. v. Laidlaw* (CB 88)

4.7. Justiciability – Political Questions

- 4.7.1. Introduction (CB 90-92)
- 4.7.2. *Baker v. Carr* (CB 92-95)
- 4.7.3. *Rucho v. Common Cause* (CB 95-109)
- 4.7.4. Notes re: Political Questions in Foreign Policy (CB 111-112)
- 4.7.5. Notes re: Political Questions in Impeachment (CB 115)

10 June 2022 (Friday – Review Video)

13 June 2022 (Monday)

5. Civil Rights and Civil Liberties

5.1. Application of the Bill of Rights to the States

- 5.1.1. Introduction (CB 503-505)
- 5.1.2. *Barron v. Mayor & City Council of Baltimore* (CB 505-506)
- 5.1.3. Comments on the Privileges and Immunities Clause (CB 506-507)
- 5.1.4. *Slaughter-House Cases* (CB 507-514)
- 5.1.5. Incorporation of Federal Rights via the (14th Amdt.) Due Process Clause (CB 516-521)
- 5.1.6. *Duncan v. Louisiana* (CB 522-523)
- 5.1.7. Comments on Incorporation (CB 531-532)

15 June 2022 (Wednesday)

5.2. Application of the Bill of Rights and the Constitution to Private Conduct

- 5.2.1. Introduction (CB 532-533)
- 5.2.2. *Civil Rights Cases (U.S. v. Stanley)* – State Action Doctrine (CB 533-535)
- 5.2.3. Comments on the State Action Doctrine (CB 535-536)
- 5.2.4. Exceptions to the State Action Doctrine (CB 536-537)
- 5.2.5. Public Function Exception (CB 538)
 - 5.2.5.1. *Jackson v. Metropolitan Edison* (CB 540-543)
 - 5.2.5.2. *Manhattan Community Access Corp. v. Halleck* (CB 546-551)
 - 5.2.5.3. Comments on the Public Function Exception (CB 551-552)
- 5.2.6. Entanglement Exception (CB 553)
 - 5.2.6.1. *Shelley v. Kraemer* (CB 553-556)
 - 5.2.6.2. *Lugar v. Edmondson Oil* (CB 557-559)
 - 5.2.6.3. Comments on “Entwinement” vs. Entanglement (CB 571-572)

6. Equal Protection

6.1. Introduction to Equal Protection

- 6.1.1. Framework for Equal Protection (CB 683-688)
 - 6.1.1.1. Question 1: Protected Classification
 - 6.1.1.2. Question 2: Level of Scrutiny of Government Action
 - 6.1.1.3. Question 3: Does the Government Action Satisfy the Requisite Scrutiny

- 6.1.2. Comments on Equal Protection and “Fundamental Rights” (CB 688-689, *see also* § 7)
- 6.2. Rational Basis Test
 - 6.2.1. Introduction (CB 689-691)
 - 6.2.2. *Romer v. Evans* (CB 691-698)
 - 6.2.3. *City of Cleburne, Texas v. Cleburne Living Center* (CB 707-711)

16 June 2022 (Thursday)

- 6.3. Strict Scrutiny – Classification Based on Race and National Origin
 - 6.3.1. Introduction (CB 711-712, 717-719, 724-725)⁴
 - 6.3.1.1. (optional) – History of Racial and National Origin Classifications (CB 712-713)
 - 6.3.1.2. (optional) – *Dred Scott v. Sandford* (CB 713-717)
 - 6.3.2. *Loving v. Virginia* (CB 725-726)⁵
 - 6.3.2.1. (optional) – Comments on Post-Civil War Segregation Laws (CB 728-729)
 - 6.3.2.2. (optional) – *Plessy v. Ferguson* (CB 729-732)
 - 6.3.3. *Brown v. Board of Education* (CB 732-736)
 - 6.3.4. Comments on Post-*Brown* Invalidity of Other Segregation (CB 736-738)
 - 6.3.5. Introduction to Discriminatory Impact (CB 738)
 - 6.3.6. *Washington v. Davis* (CB 738-742)
 - 6.3.7. Comments on Discriminatory Impact (CB 747-748, 751-752)
- 6.4. Gender Classifications – “Intermediate Scrutiny”
 - 6.4.1. Introduction (CB 836-840)
 - 6.4.2. *Craig v. Boren* (CB 843-846)

- 7. Due Process and “Fundamental Rights”
 - 7.1. Introduction (CB 903-906)
 - 7.2. Framework for Analyzing Fundamental Rights (CB 906-909)
 - 7.3. Constitutional Protection for Reproductive Autonomy
 - 7.3.1. Introduction (CB 952-953, 961)
 - 7.3.2. *Griswold v. Connecticut* (CB 953-959)
 - 7.3.3. *Roe v. Wade* (CB 961-970)
 - 7.3.4. *Planned Parenthood v. Casey* (CB 970-981)

17 June 2022 (Friday – Review Video)

- Part 1: Lecture on IRAC/How to Write U.S. Law School/Bar Examination Essay Questions
- Part 2: Review of Answers to Practice Mid-Term (to be posted the following week after the midterm)

⁴ The readings here are required. Those in the subsections below (§§ 6.3.1.1 and 6.3.1.2) represent important history of the United States, but have been overruled (by Constitutional Amendment) and are no longer “good law.” For this reason, they are not tested on your final exam, generally are not tested on the bar exam, and are optional readings for class.

⁵ As with the Introduction above, the historical readings in the subsections below (§§ 6.3.2.1 and 6.3.2.2) represent important history and are included as optional readings for context, but are not tested on your exam and are unlikely to be on the bar.

20 June 2022 (Monday)

- 7.4. Constitutional Protection for Marriage, Sexual Orientation and Sexual Activity
 - 7.4.1. Introduction (CB 909-910)
 - 7.4.2. *Lawrence v. Texas* (CB 1031-1042)
 - 7.4.3. *Obergefell v. Hodges* (CB 915-929)
- 7.5. Procedural Due Process
 - 7.5.1. Introduction (CB 1128-1130)
 - 7.5.1.1. What is a “Deprivation”? (CB 1130, 1131, 1134, 1139-1140)
 - 7.5.1.2. What constitutes “Life, Liberty, or Property”? (CB 1140-1141, 1145-1146, 1151, 1156)
 - 7.5.2. *Goldberg v. Kelley* (CB 1141-1145)
 - 7.5.3. *Matthews v. Eldridge* (CB 1163-1167)
- 8. First Amendment: Freedom of Expression
 - 8.1. Free Speech Methodology
 - 8.1.1. Introduction (CB 1177-1185)
 - 8.1.2. Analysis of Speech Restrictions (CB 1186-1187, 1201-1202, 1210-1211)
 - 8.1.3. *Turner Broadcasting System Inc. v. Federal Communication Commission* (CB 1186 note case)
 - 8.1.4. *City of Renton v. Playtime Theatres, Inc.* (CB 1211-1215)
 - 8.2. Prior Restraint
 - 8.2.1. Introduction (CB 1237-1240)
 - 8.2.2. *Near v. Minnesota* – Prior Restraint (CB 1240-1242)
 - 8.2.3. National Security and Prior Restraint (CB 1242-1243)
 - 8.2.4. *New York Times v. United States (a.k.a. The Pentagon Papers Case)* (CB 1243-1249)
 - 8.3. Types of Unprotected and Less Protected Speech
 - 8.3.1. Introduction (CB 1308-1310)
 - 8.3.2. Clear and Present Danger (CB 1310-1311)
 - 8.3.2.1. *Schenck v. United States* (CB 1311-1312)
 - 8.3.3. Fighting Words (CB 1341)
 - 8.3.3.1. *Chaplinsky v. New Hampshire* (CB 1341-1344)

22 June 2022 (Wednesday)

- 8.3.4. Obscenity (CB 1365)
 - 8.3.4.1. *Miller v. California* (CB 1370-1372)
 - 8.3.4.2. Comments on Obscenity as Protected Speech (CB 1372-1375)
 - 8.3.4.3. Child Pornography (CB 1375-1376)
- 8.3.5. Commercial Speech (CB 1419-1420, 1425)
 - 8.3.5.1. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (CB 1434-1436)

- 8.3.5.2. Comments on “Least Restrictive Alternative” (CB 1437-1438)
- 8.3.5.3. False and Deceptive Commercial Speech (CB 1439-1442)
- 8.3.6. Defamation and Other “Privacy Torts” (CB 1454-1455, 1468-1469)
 - 8.3.6.1. *New York Times Co. v. Sullivan* – Defamation (CB 1455-1461)
- 8.3.7. Conduct That Communicates / Conduct-as-Speech (CB 1482)
 - 8.3.7.1. *United States v. O’Brien* (CB 1482-1486)
- 8.4. Places Available for Speech ("Time, Place and Manner Regulation")
 - 8.4.1. Introduction (CB 1531-1532, 1535-1536, 1537)
 - 8.4.2. Government Property (CB 1535-1536)
 - 8.4.3. Public Forums (1537)
 - 8.4.4. “Time, Place, and Manner” Restrictions (CB 1539-1540)
 - 8.4.5. *Hill v. Colorado* (CB 1540-1545)
 - 8.4.6. Designated Public Forums (CB 1558-1559)
 - 8.4.7. Limited Public Forums (CB 1559)
 - 8.4.8. Nonpublic Forums (CB 1570-1574)
 - 8.4.9. Private Property and Speech (CB 1574-1575)
- 8.5. Freedom of Association
 - 8.5.1. Introduction (CB 1605-1608)
 - 8.5.2. *NAACP v. State of Alabama* (CB 1608-1609)
 - 8.5.3. Compelled Association (CB 1610-1611)
- 8.6. Freedom of the Press
 - 8.6.1. Introduction – Is “Press Freedom” Different From “Free Speech”? (CB 1635-1636)
 - 8.6.2. Freedom of the Press as a Shield: Taxes on the Press (CB 1636, 1640-1641)
 - 8.6.3. Generally-Applicable Laws (CB 1641-1642)
 - 8.6.4. Confidential Sources (CB 1644, 1650-1651)
 - 8.6.5. *Red Lion Broadcasting Co. v. Federal Communications Commission* (CB 1651-1652)
- 9. First Amendment: Religion
 - 9.1. Introduction (CB 1665-1669)
 - 9.2. Free Exercise Clause
 - 9.2.1. Introduction (CB 1675-1681)
 - 9.2.2. *Employment Division, Dep’t of Human Resources of Oregon v. Smith* (CB 1681-1689)
 - 9.2.3. Comments on *Smith* (CB 1689-1690)
 - 9.2.4. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____ (2020),
https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf
 - 9.3. Establishment Clause
 - 9.3.1. Introduction (CB 1717-1723)
 - 9.3.2. *Lemon v. Kurtzman* (CB 1729-1732)

(if additional time remains after covering the primary class material on Wednesday, June 22, the remainder will be devoted to the review session and/or Special Topics in American Law, at the discretion of the students)

24 June 2022 (Friday – Exam Review Video)

This video will comprise my “traditional lecture” portion of the exam review. Students will also be provided the opportunity to submit questions to be covered in this video in advance (if insufficient time is available for student questions during the 22 June (Wednesday) class.

Again, please do not hesitate to ask questions at any time during the course!

FINAL EXAM INFORMATION

The final examination will be administered as a **self-scheduled** examination during the period from **Friday July 1 – Sunday July 3**.

TENTATIVE exam structure (*this is subject to change*):

- one "traditional" U.S. law school essay question (issue spotting, analysis)
- 2-5 "short answer" questions (brief answers, generally a few sentences or a paragraph, as appropriate)
- multiple choice section – "traditional" U.S. multiple choice questions, simulating the constitutional law questions on the D.C. Bar Examination (number to be determined)