

POLS 4030: Constitutional Law Rights

Spring 2024

Tuesday, Thursday 1:30-2:45
LH 114

Professor Richard Price

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Office Hours: Tuesday, Thursday 10:30-11:30 [Virtual and face to face]

Appointments available by request

Course Description

While we tend to talk about constitutional *law*, the U.S. Constitution is also fundamentally a *political* document. The framers of the Constitution sought to design a government powerful enough to serve the people's needs, but not so powerful that it would trample on the rights of those people. This course explores the ways in which courts, primarily, have been deployed to protect rights from governmental abuse.

Learning Outcomes

Students should be able to demonstrate mastery of the Public and Constitutional Law subfield.

This course emphasizes the ability of students to demonstrate critical thinking skills or formulate and defend a thesis in a written or oral format.

Course Readings

All readings are provided via Canvas. Please read them thoroughly prior to class.

Course Requirements

1. Participation (10%)

This course is highly participatory in nature. We deal in contested notions of American constitutionalism that have divided people for generations and one of the best ways to work through those ideas is through active class discussion and debate. This does not mean talking X% of the time but means that you regularly offer thoughts and ideas of your own about the material.

- At the end of the semester I will require you to submit a self-evaluation of your participation with an honest assessment of your participation and a suggested grade. I will take this self-evaluation into account when assigning your grade.

2. (Semi-)Weekly Writing Assignments (15%)

For most weeks of the course you will have to do a short response to a question about the content. These will be due BEFORE we meet on Thursdays. These questions will be posted via Canvas and responses will be in the range of 150-250 words, basically a page at most. These will be graded:

Pass (100%): the answer engages clearly with the material

Low pass (75%): the answer superficially answers the question

Fail (0%): the answer fails to engage in even a mediocre way with course material

3. Midterm (15%)

There will be a midterm. Information on the exact format will be given an appropriate time before the exam.

4. Papers (2 @ 30%, 60% total)

There will be two papers of approximately 8-10 pages asking you to engage with a broad question of constitutional law.

Rewriting papers. If you wish, you may rewrite a paper. A rewrite means a substantial effort to correct the issues with the original paper and not simply adding a few lines. Rewrites will be due to me via email no later than one week after the relevant paper is returned to you. A rewritten paper may earn up to one letter grade higher than the original paper (so a C+ can become a B+).

A Note On Paper Grading Available on Canvas

Grade Scale

A = 93% or above	A- = 90 – 92 %	B+ = 87 – 89%	B = 83 – 86%
B- = 80 – 82 %	C+ = 77 – 79%	C = 73 – 76%	C- = 70 – 72 %
D+ = 67-69%	D = 63 – 66%	D- = 60 – 62%	E = 0 – 59%

Course Schedule

Below is the schedule which I reserve the right to alter with notice.

Tuesday 1/9, Introduction. Why do we argue about rights so often?

Thursday 1/11, Free Speech During Wartime (and After). Free speech meant little for the first century of the U.S. Only during World War I did the Supreme Court find itself regularly being asked to interpret the meaning of speech. What does *Schenck* provide as the baseline? How did the dissenting opinions of Justices Holmes and Brandeis begin to develop a different approach?

- *Schenck v. U.S.* (1919), *Abrams v. U.S.* (1919), *Debs v. U.S.* (1919), *Gitlow v. New York* (1925), *Whitney v. California* (1927)

Tuesday 1/16, Protecting Political Speech. During World War II, civil libertarians won some of the first real speech protections for political dissent. This culminated in *Brandenburg*; what does this decision require to punish speech?

- *W.Va. v. Barnette* (1943), *Dennis v. U.S.* (1951), *Brandenburg v. Ohio* (1969), *New York Times v. U.S.* (1971)

Thursday 1/18, Lyin' and Fightin'. Is all communication "speech"? *Chaplinsky* says no and declares certain categories of things that look like speech to not be speech. Why?

- *Chaplinsky v. New Hampshire* (1942), *New York Times v. Sullivan* (1964), *Cohen v. California* (1971), *R.A.V. v. St. Paul* (1992)

Tuesday 1/23, Obscenity. Sexually explicit speech had long been targeted as unprotected speech. If obscenity is unprotected then why does the Court spend so much time arguing over what it was?

- *Roth v. U.S.* (1957), *Jacobellis v. Ohio* (1964), *Memoirs v. Massachusetts* (1966), *Miller v. California* (1973), *Paris Adult Theater I v. Slaton* (1973)

Thursday 1/25, Free Speech in the Modern Era. How much disagreement over core elements of free speech doctrine is there today?

- *U.S. v. O'Brien* (1968), *Texas v. Johnson* (1989), *Snyder v. Phelps* (2011), *Janus v. American Federation of State, County, and Municipal Employees* (2018)

Tuesday 1/30, Campaign Finance. Arguably the most controversial element of modern free speech law is over whether campaign finance limitations violate expression rights. How does *Citizens United* come down on this? What about unusual institutions like elected judges, is there a stronger interest in restricting judicial fundraising?

- *Buckley v. Valeo* (1976), *Citizens United v. FEC* (2010), *Republican Party v. White* (2002), *Williams-Yulee v. Florida Bar* (2015)

Thursday 2/1, NO CLASS: Paper 1 Due Sunday Feb. 4, uploaded to Canvas

Tuesday 2/6, The Separation of Church and State. As you read *Engel v. Vitale* and the other cases for today, consider what they actually require. Does it surprise you to learn that *Engel* was one of the most denounced decisions of its era?

- *Engel v. Vitale* (1961), *School Dist. Of Abington Township v. Schempp* (1963), *Epperson v. Arkansas* (1967), *Lemon v. Kurtzman* (1971)

Thursday 2/8, A Freedom of Religious Action? What exactly does free exercise of religion entail? Does it protect my right to take religiously motivated actions even when prohibited by law?

- *Reynolds v. U.S.* (1878), *Braunfeld v. Brown* (1961), *Sherbert v. Verner* (1963), *Wisconsin v. Yoder* (1972)

Tuesday 2/13, Does the Wall of Separation Still Exist? While the 1960s separation cases were issued by large majorities, the conservative turn in American politics in the 1980s and '90s led to attacks on the separation of church and state. Is there an easy answer to whether this doctrine still exists?

- *Lee v. Weisman* (1992), *Zelman v. Simmons-Harris* (2002), *Town of Greece v. Galloway* (2014), *Kennedy v. Bremerton School District* (2022)

Thursday 2/15, The Demise (and maybe Rebirth) of Free Exercise. Many would argue that *Smith* was a massive reduction in free exercise protections. Today, there is a movement to

reassert a more powerful vision of free exercise. Consider *Masterpiece Cake*; to what extent should a business have a free exercise right to discriminate against clientele?

- *Employment Division v. Smith* (1990), *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2017), *Carson v. Makin* (2022)

Tuesday 2/20, MIDTERM

Thursday 2/22 MIDTERM

Tuesday 2/27, Slavery, Equality, and Hypocrisy. While the Declaration of Independence famously invoked a vision of human equality, no similar provision was included in the Constitution when drafted. This represented a fundamental strain that the framers of the Constitution desperately tried to avoid: the hypocrisy of slavery. As you read the material for today, consider the understanding not only of slavery but race itself in the image of constitutional citizenship.

- *Somerset v. Stewart* (1772), *Commonwealth v. Jennison* (1783), *Amy v. Smith* (KY 1822), *Commonwealth v. Aves* (Mass. 1836), *Dred Scott v. Sanford* (1857)

Thursday 2/29, A New Constitutional Freedom? The Reconstruction Amendments – the 13th, 14th, and 15th Amendments – were sold as a new declaration of human freedom and equality. But to many this was abandoned quickly to the politics of white supremacy. How does *Plessy v. Ferguson* envision racial equality?

- *Slaughter-House Cases* (1873), *Civil Rights Cases* (1883), *Plessy v. Ferguson* (1896); *U.S. v. Bhagat Singh Thind* (1923)

3/4 – 3/8 Spring Break

Tuesday 3/12, Desegregation. *Korematsu* declared that we should strictly scrutinize any racial classification in the law. Why?

- *Korematsu v. U.S.* (1944), *Brown v. Board of Education I* (1954) and *II* (1955), *Green v. County School Board of New Kent County* (1968), *Loving v. Virginia* (1967)

Thursday 3/14, Abandoning Desegregation? *Brown* went from deeply disputed in the 1950s to universally accepted as constitutional cannon by the 1990s. But do we agree with what *Brown* actually required?

- *Swann v. Charlotte-Mecklenburg Board of Education* (1970), *Miliken v. Bradley* (1974), *Freeman v. Pitts* (1992), *Parents Involved in Community Schools v. Seattle School District No. 1* (2007)

Tuesday 3/19, Affirmative Action. Affirmative action proved to be the most divisive issues of race and equal protection of the late 20th Century. How does the dispute over the meaning of *Brown* play into these debates?

- *Regents of the University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), *Students for Fair Admissions v. Harvard* (2022)

Thursday 3/21, Economic Justice and the Constitution. What does equal protection mean outside of the issue of race and ethnicity? Some activists pushed for the recognition of class/economic status as a suspect classification. Why does *San Antonio v. Rodriguez* reject that argument? Do you agree?

- *Shapiro v. Thompson* (1969), *Dandridge v. Williams* (1970), *San Antonio v. Rodriguez* (1973), *Southern Burlington County NAACP v. Township of Mount Laurel* (N.J. 1975)

Tuesday 3/26, Gender Equality. Does the Constitution care about women? For most of American history, the answer was pretty clearly no. Women were legal citizens of the U.S. but not constitutional citizens in the sense that the law treated them as a recognizable group. Feminists spent over a century campaigning against this reality by seeking political and economic equality. The Court only belatedly began to accept this formulation even as the Equal Rights Amendment failed to be ratified in the 1980s.

- Declaration of Sentiments (1848), *Bradwell v. Illinois* (1873), *Hoyt v. Florida* (1961), *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973)
- ERA reading

Thursday 3/28, Settling Gender and Equal Protection. *Craig v. Boren* adopted a compromise position: gender is not like race, and thus subject to strict scrutiny, but it is also not like age, subject to rational basis review. So, it created a middle ground: intermediate scrutiny. To what extent is this a legal or a political decision? Is this even a meaningful question?

- *Craig v. Boren* (1976), *Michael M. v. Superior Court of Sonoma County* (1981), *American Nurses Association v. Illinois* (7th Cir. 1986), *United States v. Virginia* (1996)

Tuesday 4/2, Is the Bill of Rights Exclusive? One of the oldest questions of constitutional law centered on whether there are enforceable rights outside of the text of the constitution. Implied rights became a major source of contest after the 14th Amendment was ratified and in the early 1900s. *Lochner* has become a dirty word in constitutional law for most judges and politicians. Why?

- *Lochner v. New York* (1905), *Muller v. Oregon* (1908), *Jacobson v. Massachusetts* (1905), *Meyer v. Nebraska* (1923), *Pierce v. Society of Sisters* (1925), *Buck v. Bell* (1927), *Williamson v. Lee Optical* (1955)

Thursday 4/4, The Rise of Privacy. While *Lochner* was denounced totally by the New Deal liberals who took power in the 1930s, the idea of unenumerated rights would slowly seep back into constitutional arguments. This was most prominent in the area of privacy and abortion. What is the justification for this right to privacy?

- *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), *Michael H. v. Gerald D.* (1989)

Tuesday 4/9, Queering the Constitution. LGBTQ Americans emerged as a public visible force after the Stonewall Riots in 1969. But gay people had been pressing for legal and constitutional recognition for more than a decade before this. How does the Court justify rejecting privacy rights for queer people in *Bowers*?

- ACLU Statement on Homosexuality (1957), *Bowers v. Hardwick* (1986), *Padula v. Webster* (1987), *Bottoms v. Bottoms* (1995), *Romer v. Evans* (1996)

Thursday 4/11, Winning LGBTQ Rights? The 21st Century saw a string of victories for LGBTQ rights from a conservative majority Court. Why is this? As you read *Dobbs* next week consider how stable these decisions are today.

- *Lawrence v. Texas* (2003), *Obergefell v. Hodges* (2015), *Bostock v. Clayton County* (2020)

Tuesday 4/16, *Dobbs*. By far *Dobbs* is the most significant rights decisions in decades. Overruling *Roe v. Wade* had been official policy of the Republican Party since 1980 and it was finally achieved. This was momentous both constitutionally and politically, obviously. It also opened a debate over the reach of the decision. If *Roe* is bad law, does anything survive of the right to privacy? How can we justify the privacy rights of gay people or of folks using contraception today?

- *Planned Parenthood v. Casey* (1992), *Dobbs v. Jackson Women's Health Organization* (2022)

Thursday 4/18, Catch-up day.

Course Policies

Attendance: Attendance is an important element to any class but especially this one. The readings and lectures will be complementary but not coextensive and you will be held responsible for all of the information from both lectures and assigned readings. While attendance alone is not sufficient for the participation element of your final grade, it is necessary.

Grading Policy: Barring unforeseen crises, I will return graded assignments within two weeks of the due date. If you are unsatisfied with a grade assigned you may appeal that grade to me and I will reevaluate the assignment from scratch. This means that you could receive a higher, lower, or the same grade as initially given. To appeal you must send me a short statement explaining why you believe the grade is incorrect along with the original graded copy of the assignment.

Late Assignments: Assignments are due at the time and date listed on the syllabus. Any late papers will be deducted a letter grade for every 8 hours late (e.g. A to A-, A- to B+, B+ to B, and so on). Requests for extensions must be made to me before the assignment is due and will not be granted retroactively.

Academic Integrity: As specified in PPM 6-22 IV D, cheating and plagiarism violate the Student Code. Plagiarism is "the unacknowledged (uncited) use of any other person's or group's ideas or work." Students found guilty of cheating or plagiarism are subject to failure for the specific assignment, at a minimum, or failure for the whole course at the professor's discretion. Students will also be reported to the Dean of Students.

NOTE: It is also a violation of this policy to submit work previously submitted in another course. You should speak to me if you have any concerns about where the line is for this policy.

Reasonable Accommodation: Any student requiring accommodations or services due to a disability must contact Disability Services Office at (801) 626-6413 or dsc@weber.edu. See more info at <https://www.weber.edu/disabilityservices>

Core Beliefs: According to PPM 6--22 IV, students are to “[d]etermine, before the last day to drop courses without penalty, when course requirements conflict with a student's core beliefs. If there is such a conflict, the student should consider dropping the class. A student who finds this solution impracticable may request a resolution from the instructor. This policy does not oblige the instructor to grant the request, except in those cases when a denial would be arbitrary and capricious or illegal. This request must be made to the instructor in writing and the student must deliver a copy of the request to the office of the department head. The student's request must articulate the burden the requirement would place on the student's beliefs.”

Recording Class: Video or audio recording of any portion of lectures is only permitted in this class upon authorization of the faculty member. If you would like to request authorization to record, please contact me. Unauthorized recording is a violation of the Student Code of Conduct, for which a student may be subjected to disciplinary action under PPM 6-22, Student Code. Students who seek to record for purposes of accommodating a disability should contact the Disability Services Office at (801) 626-6413 or dsc@weber.edu. See more info at <https://www.weber.edu/disabilityservices>

Emergency Closure: If the University is forced to close for any reason during the semester, please check the course Canvas page and your Weber email for updates on how this course will proceed. The University announces closures and other emergencies through its Code Purple emergency alert system. Students are encouraged to sign up for Code Purple: <http://www.weber.edu/codepurple/>

Office Hours and Communication: My regular office hours are listed above and I encourage you to avail yourself of them if you have any problems, questions, or simply want to discuss ideas. If you cannot make my office hours, I am available by appointment. If you have a quick question, please feel free to email me. Finally, I may regularly use email to contact you (in particular if I have to cancel a class meeting or change an assignment). This means that you will be responsible for regularly checking your WEBER email account and keeping it open to emails. I will not make any extra attempt to contact you if an email gets rejected because yours is full. Nor will I accept as an excuse that you do not use your Weber email account.

- Canvas Announcements: I will sometimes use Canvas to send you announcements. This has a few quirks. One is that while you will be notified via email (if you have notifications properly set up), any attachments will have to be obtained by logging into Canvas and going to the announcements section. Also, please never hit reply to such announcement notifications in your email. It is not sent to me; it is instead posted as a reply to the announcement but Canvas does not notify me of this and I will not see it. If you need to contact me, always email or message me directly.

Note on Email: Please put the name and/or number of this class in the subject of any email message so I can easily sort them. I will try to respond to all emails within 24 hours, beginning on the next business day after receipt; please note that weekends are not business days.

A Note on the Canvas Gradebook

All of your grades will be available online in the Canvas gradebook. Please note a quirk of that system is that it only estimates your final grade based on the scores recorded. If you have not yet done an assignment, thus showing "--", Canvas treats it as nonexistent. So it may state that you have an 83% when you have only done 3 of 6 required assignments but that estimate will drop rapidly if you fail to do an assignment and a "0" is entered. Also, Canvas is not perfect and you need to remember the terms of the syllabus when it comes to weighting assignments. If Canvas has an error for some reason and improperly weights assignments you need to remember that the syllabus always controls and any Canvas error will be corrected even if your grade estimate is affected. For this reason I encourage you to let me know if anything in Canvas looks odd.