

Constitutional Law

University of Colorado-Boulder

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Office Hours: Monday, Wednesday 10-11
(also by appointment)

I tend to be available more on Wednesdays and Thursdays.
If I am in my office, you are welcome to come in. Please visit!

socsci.colorado.edu/~bairdv

Course Objectives

The main purpose of this course is to introduce you to classical and contemporary theories of constitutional law and to examine the role of the Supreme Court in defining constitutional law in the United States such as limiting (or expanding) political power, federal power (often referred to as federalism or states' rights), judicial power and rights and liberties. In our system of separated powers, it is the duty of the Supreme Court to be the final arbiter in balancing the rights of the individual against the political institutions and other powerful actors. We will examine the inherent tension in supporting the will of the democratic majority and the principles of limited power. By the end of the course, rather than having memorized dozens of Supreme Court cases (though we will be reading many of them), you should be able to think critically about the logical foundations of the cases and the historical development of the justification for having a constitution.

By the end of the semester you should have:

- investigated the theoretical foundations of constitutional law, and the historical development of their application in the United States.
- developed a deeper understanding of the intersection between law and politics.
- improved your critical thinking skills.
- engaged in several critical analyses of important theoretical assumptions, claims, and arguments in particular aspects of civil rights or civil liberties.

Course Requirements

You are required to come to every class day, *prepared by the reading for discussion*. We will spend a great deal of time discussing these issues in a seminar format, which means that everyone is expected to have done all the reading and each person is responsible for sharing their unique understanding of the topics. Each person's contribution is highly valued and necessary for a successful seminar. For this reason, 15% of your grade will be composed of a combination of attendance, homework assignments (due Monday of every week, graded according to a check, check plus and check minus) and class participation. You can miss two classes (and one homework assignment) without any consequences for your grade. If you have

to miss more than two classes for any reason, then your attendance grade will suffer, regardless of the reason for missing class.

There is one quiz, worth 5% of your grade, a midterm and final exam worth 20% of your grade each (midterms and finals are both out of class open note, not open discussion), a 10-12 page research paper (25%) and an oral presentation of this paper, which is worth 5%. There is one other written assignment due November 3rd that is worth 10% of your grade. These papers, assignments and exams and their respective topics will be discussed during the course of the semester.

There are many resources on the website (<http://sobek.colorado.edu/~bairdv/>) that can be used in preparing exams and the final paper. There are files with grading criteria, example midterms and final papers and presentations of various hypothetical outlines for your final paper.

You are expected to keep a copy of your work in case something is lost. **Incompletes are strongly discouraged by the College and are only given for non-academic reasons.**

The Rules

In this class, we will be dealing with a great number of sensitive issues. I encourage feedback on my teaching style and the materials, both anonymously by email and otherwise, for any reason at any time, as long as it is respectful. Along those same lines, I always encourage students to disagree with anything I say at any time, again, as long as it is respectful. I expect all students to treat each other with respect as well. If I feel that you have treated me or any other student with disrespect, I will ask you to meet me in my office. If you continue at any other time to treat me or other students with disrespect, I will ask you to leave the classroom. Potentially, this kind of behavior could result in being dropped from the class. If you have any questions about my policies, or the University's policy regarding classroom behavior, do not hesitate to bring it up in class or talk to me about it in my office. The University's general Code of Conduct can be found at the following website:

<http://www.colorado.edu/studentaffairs/judicialaffairs/code.html> and its code of conduct guidelines for the classroom can be found at the following website:

<http://www.colorado.edu/policies/classbehavior.html>

Religious Observation

Campus policy regarding religious observances requires that faculty make every effort to reasonably and fairly deal with all students who, because of religious obligations, have conflicts with scheduled exams, assignments or required attendance. See full details at

http://www.colorado.edu/policies/fac_relig.html

Sexual Harassment

I am required by law to report to university officials any sexual harassment that I observe or that is reported to me. The university's sexual harassment policy can be found at the following website. <http://www.cusys.edu/~policies/Personnel/sexharass.html>

Academic Honesty

All the work you do in this course is expected to be your own. Absolutely no cheating or plagiarism (using someone else's words or ideas without proper citation) will be tolerated. Any time that you consult outside sources, you MUST cite those sources. If you consult outside sources without citation, even if you are not citing the sources directly, this constitutes cheating. Failure to put quotation marks around direct quotations constitutes plagiarism and will always result in an F for the class. Misattribution of sources (citing certain quotations or ideas as coming from a source other than the one that they come from) will result in a lower grade. Any cases of cheating or plagiarism will be reported to the Office of the Dean of Students. **If you cheat, you will fail the course.** Please review the University's policy regarding academic integrity: <http://www.colorado.edu/policies/acadinteg.html>

Disabilities Accommodation

The Americans with Disabilities Act of 1990 (ADA) provides protection from illegal discrimination for qualified individuals with disabilities. Students requesting instructional accommodations due to disabilities must arrange for such accommodation. Please review the University's services for such accommodations: <http://www.colorado.edu/disabilityservices/>

Required Texts

McGuire, Kevin. *New Directions in Judicial Politics*.

Course Outline

This course has three main parts. Part I deals with the theory of constitutional law. We will deal with the following questions: what enables human beings to have a constitution (how this is different from government) and support one? Why should we have a law, under which all political institutions operate? We will deal with commerce clause and federalism cases in this section, beginning our understanding of the cases in constitutional law, but in the larger perspective of political science. Part II is the case study on the Blaine Amendments, which are a nice vehicle through which to understand the conflict between exercise protections and protections against establishment of religion. Part III is a case study on campaign finance reform.

Note: You should come to class each Monday with a short reflection of the week's readings.

Week	Topics	Assignments
Week 1 (August 25)	Argumentation and Proper Evidence	Arguments: Summary, Interpretation, Causal, and Normative; Falsifiability Fitzgerald and Baird, Taking a Step Back
Week 2 (September 1)	Theories of Constitutionalism: Limiting Political Power	Hardin, Why a Constitution? Weingast, The Rule of Law Barnett, Natural Law versus Natural Right Michener, Bridge at Andau
Week 3 (September 8)	Introduction to the Supreme Court and the Judicial System	Epstein and Walker Chapters 1 and 2
Week 4 (September 15)	Establishing Judicial Power	Marbury, Dahl, Casper (Judicial Power) Smithey, Transitions Epstein and Knight. On the Struggle for Judicial Supremacy
Week 5 (September 22)	Testing Judicial Power	Caldeira. Court Packing and FDR Rosenberg. The Hollow Hope. McGuire 11, 12 Epstein and Knight. Strategic Behavior

Week 6 (September 29)	Judicial Decisionmaking	McGuire, chapter 7, 9, 10
Week 7 (October 6)	Constitutional Litigation	Baird chapter 5, 6 McGuire chapter 5, 8

Midterm exam October 17th

Case Studies I: Blaine Amendments

Week 8 (October 13)	Religious Exercise I	(Cantwell, Sherbert, Yoder, Hialeah, Smith, Boerne, Hobby Lobby)
Week 9 (October 20)	Religious Establishment: The Lemon Test	(Everson, Lemon, Zelman, Edwards) Pfaff The Religious Divide: Why Religion is Thriving in the US and Waning in Europe
Week 10 (October 27)	Exercise versus establishment: The Blaine Amendments	Duncan, The Blaine Amendments

Please write a single page paper making an argument along with the strongest counterarguments and their refutation answering the following question: In what manner and to what extent are the Blaine Amendments constitutional? Explain how the answer matters – what difference does it make that they are, or are not, constitutional?

Due November 3.

Course Outline, continued

Week 11 (November 3)	Freedom of Speech: War Time	(Schenck, Abrams, Gitlow Dennis, Brandenburg) Discussion of final paper
Week 12 (November 10)	Freedom of Speech: Symbolic Speech	(O'Brien, Tinker and Texas v Johnson, Chaplinsky, Cohen)
Week 13 (November 17)	The Balancing Act	(Hill, RAV, Wisconsin v Mitchell; Boy Scouts v Dale, Pentagon Papers, Ashcroft) Paper topic, argument, outline of counterarguments and bibliography due October 20th 9am by email.
Week 14 (December 1)	Campaign finance	(Buckley, Citizens' United) Page and Gilens Oligarchy? McConnell: Why Citizen's United Was Correctly Decided Bramlett, Lee and Gimpel, Big Donor Neighborhoods
Week 15 (December 8)	Final Paper Presentations	Oral presentations Each student will give a three minute oral presentation on their final paper, laying out the basic arguments and counterarguments in their analysis.

Last day to turn in draft of final paper to get early comments: November 21st; 5:00pm by email.

Final Paper Due: December 10th; 9:00am by email.

Civil Liberties Paper Assignment

Pick any topic within the area of civil liberties or civil rights. Here is a list of topics.

Criminal Justice	HIV/AIDS	Racial Equality
Death Penalty	Immigrants Rights	Religious Liberty
Disability Rights	Int'l Civil Liberties	Reproductive Rights
Drug Policy	Lesbian & Gay Rights	Rights of the Poor

Free Speech	National Security	Student Rights
Women's Rights	Prisons	Voting Rights
Safe and Free: Patriot Act	Privacy & Technology	

Then, do research on Lexis Nexus. Go to the CU Library website → article access → Lexis Nexus (Academic Universe) → Legal Research → Law Reviews to come up with a more specific topic and argument within your topic. Responding to arguments in these law review articles is an essential part of the paper. Never treat their arguments as if they are automatically true. Generally, that means that you cannot end a paragraph with a quotation from these articles – you must always evaluate them. They are going to cite court cases as evidence – use those citations as clues about which cases are likely to be relevant for your argument. Do you agree or disagree with their interpretation of the logic in the case? Is there an alternative interpretation? Take a stand on the most persuasive interpretation. Then, think about what consequences that has for your main argument. **You must have five outside sources, including legal articles and amicus briefs.**

Your argument will most likely deal with whether something in particular – could be a hypothetical policy or law or future Supreme Court decision or scenario would be consistent with the constitution and the Supreme Court’s precedent in this area.

Every paper starts out as follows.

I.A.1 Your first sentence is your argument. ____ is inconsistent/consistent with ____.

I.A You may need to spend the first paragraph defining terms (probably terms just used in your thesis statement or statement of argument). You might also spend the first paragraph summarizing the kind of evidence or arguments will be used to defend your argument.

Alternatively, you may need to spend the first paragraph listing the potential counterarguments that you will need to consider. Take care to avoid causal statements, normative statements and all irrelevant statements.

Pretend that you are a lawyer who is about to make this argument in front of the Supreme Court. Only use evidence that you believe would be relevant for Supreme Court justices. They don’t care what you think about your topic. They don’t care about your values. They care about making legal arguments when it comes down to writing an opinion in the case – help prepare the reader (a Supreme Court justice) to write a majority opinion on this case. Try to use evidence that might persuade someone like O’Connor – or perhaps a justice that you think may be unsympathetic to your argument – prove to them why they are wrong about what they think is consistent with previous Supreme Court decisions. Your other goal is to teach them that if they look at these cases more profoundly, they will reach your conclusion. Remember not to pick argument for which there is no other side to the argument. You must pick an argument for which there exists a counterargument. **The grade of your paper is directly correlated with the strength of your counterarguments and your ability to refute good strong counterarguments.**

There are several potential outlines that could emanate from an argument.

Potential Paper Outline 1: You could outline your entire paper around counterarguments.

Section Heading 1

- II.A. Counterargument 1
- II.B. Refutation of Counterargument 1

Section Heading 2

- III.A. Counterargument 2
- III.B. Refutation of Counterargument 1

And so on...

Potential Paper Outline 2: Or you may need to lay out arguments before you lay out counterarguments:

Section Heading 1

- II.A. Argument 1
- II.B. Counterargument 1
- II.C. Refutation of Counterargument 1

Section Heading 2

- III.A. Argument 2
- III.B. Counterargument 2
- III.C. Refutation of Counterargument 2

And so on.

Potential Paper Outline 3: Or, if your arguments need some space, you may need to outline your arguments first and then outline your counterarguments and then the refutations.

Section Heading 1

II Argument 1

Section Heading 2

III. Argument 2

Section Heading 3

IV. Counterargument 1

Section Heading 4

V. Counterargument 2

Section Heading 5

VI. Refutation of Counterargument 1

Section Heading 6

VII. Refutation of Counterargument 2