

PSCI 4241-001: Constitutional Law

Constitutional Law

University of Colorado, Boulder

Professor Vanessa A. Baird

Office hours 2-5 Wednesdays*

Ketchum 114E

(across from the main political science office)

* If I am in my office, you are welcome even if it is not my designated office hours. Come talk to me about anything: advice about your future career, graduate school, law school, an honors thesis (whether I am an advisor or not), questions about participating in actual hands-on research, other coursework, political science, questions about the law, a legal story you read about, or something in the news, etc. It does not have to be about the class material. I am also available by appointment. In other words, please visit me!

Course notables

Many constitutional law courses provide an overview of the most important constitutional law cases. This course does not do that. Instead, it introduces students to the foundations of legal logic, brick by brick, to teach you to think like a lawyer.

Exams and quizzes do not require memorizing information. Instead, exams test your ability to identify mistakes in someone else's logic. For example, I write an essay with intentional mistakes; your job is to identify its mistakes. To test your understanding of judicial politics, I present applications of the underlying logic of the readings, rather than testing your knowledge of details. Or, I present hypotheticals of case facts; you identify the likely legal outcome.

There is no required textbook, though there is a text from which we will read a number of chapters; it is available in the main bookstore. Readings are linked to this syllabus in the course outline. The main cost will be that I will want you to print a hard copy of some of the week's readings, particularly the readings with the main Supreme Court cases.

Please also bring blank pieces of paper to class every day for in-class work.

I will assign groups, for the purposes of in-class work, graded on a \surd , $\surd+$ basis; full credit is a \surd . Each group member will hand in a "grade" of each of the other group members at the end of the semester, to indicate the quality of each person's participation. I will also give extra credit for group work outside of class.

I never require or look at doctor's notes or any other documentation; it does not matter to me the reason you are not in class and I tend to err on the side of respecting your privacy. I can't answer questions like "what did I miss" because I won't know what is salient to you. Makeup exams and quizzes are offered and are much more difficult assignments. Emails to me should have "4241" in the subject line. Come to class for announcements about exact dates of assignments, quizzes, and exams. These will sometimes change.

Course outline, by learning objectives and themes

Week 1-2

Think logically.

- Learn appropriate evidence for different types of arguments.
- Identify logical fallacies.
- Learn the basic logic and important facts of our constitutional and judicial system.

Week 3-6

Think causally.

- Evaluate alternatives about what causes...
 - ... courts to have power
 - ... judicial outcomes
 - ... ordinary people to support rights and liberties, or other facets of constitutional law?
- Given your beliefs about what causes these outcomes, draw a descriptive inference: is the stable rule of law possible?

Week 7-11

Think legally.

- Evaluate alternative legal interpretations
 - exercise and establishment
 - federalism
 - equal protection and targeting
- Given the underlying logic of those cases, make a legal judgment: are the Blaine Amendments constitutional?

Week 12-15

Think philosophically.

- Evaluate alternatives about what the law should be
 - Philosophical first principles
 - Logical fallacies in normative arguments
- Specific application: speech and campaign finance
- Given stated assumptions about the relative weight of first principles, the logic of causality, and underlying logic of relevant case law, what should the legal standard be, for a particular area of the law?

Grade breakdown

15% Combination of assignments, pop quizzes, in-class exercises, class and group participation

- 15%** Three open note quizzes
- 40%** Two midterm exams (open note, book, internet)
- 15%** Open note quiz on the logic of philosophy, free speech, and campaign finance
- 10%** Final paper: defend a particular legal standard.
- 5%** Oral presentation of final paper: defend your argument against alternatives.

We are meeting during the final exam period for oral presentations. There is no final exam.

Textbook

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

Course outline

Part II The nature of logic: arguments and evidence

Part I introduces the system of logic: 1) which kinds of evidence is appropriate for which kinds of arguments and 2) logical fallacies. It also introduces some knowledge about the constitutional and judicial system that is required to understand the rest of the course.

Week 1 Arguments, evidence: “Wait, what?”

In-class: what are the most surprising or notable aspects of this course, as suggested by the syllabus?

[Statements PowerPoint lecture](#)  (This is a flipped lecture, so play slideshow if you want to listen along. Quiz 1 is partially based on your understanding of this lecture.)

Please watch the following YouTube videos about logical fallacies. I will be testing your understanding of these fallacies throughout the semester.

[Five Fallacies | Idea Channel | PBS Digital Studios](https://www.youtube.com/watch?v=8qb-h0sXkH4&t=351s) [\(https://www.youtube.com/watch?v=8qb-h0sXkH4&t=351s\)](https://www.youtube.com/watch?v=8qb-h0sXkH4&t=351s)



[\(https://www.youtube.com/watch?v=8qb-h0sXkH4&t=351s\)](https://www.youtube.com/watch?v=8qb-h0sXkH4&t=351s)

[Even More Fallacies! | Idea Channel | PBS Digital Studios](https://www.youtube.com/watch?v=ybOvddwpJAg&t=290s) [\(https://www.youtube.com/watch?v=ybOvddwpJAg&t=290s\)](https://www.youtube.com/watch?v=ybOvddwpJAg&t=290s)



(<https://www.youtube.com/watch?v=ybOvddwpJAg&t=290s>)

[Fitzgerald and Baird, Taking a Step Back](#)

[Barnett, Natural Law versus Natural Right](#)

Week 2 Constitutionalism

Friday, January 24th Quiz I Statements and evidence; readings from week one, examples of logical fallacies

In-class exercise Write a sentence that violates the Ninth Amendment. Hint: You need to "construe to deny;" the sentence must be a complex sentence with a word like "therefore."

Ninth Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[Hardin, Why a Constitution?](#)

[Part I Epstein and Walker](#)

[Part II Epstein and Walker](#)

Part II The nature of judicial power

Critical thinking goal: we will learn to think causally. There are two kinds of causal thinking in legal thought. One is causal process thinking. For example, someone spilled oil on the grocery floor, which caused someone to fall. We will not be working with that kind of argument. Instead, we will be thinking about causal thinking in a way that leads to hypothesis tests that give us some general sense of how certain attributes of time, places and people lead to other attributes of time, places and people and how this tells us something general about principles of how the politics of courts work. Specifically, we will look into the mechanisms by which courts protect minorities from the overreaches of government power.

We will deal with the following questions: what enables human beings to have a constitution (how this is different from government) and support a constitutional order? What allows us to maintain a rule of law that dictates how political institutions operate? This part of class will be focused on making and understanding

causal arguments to reach a final descriptive inference about whether the Supreme Court can protect minorities.

Rights and liberties are, in one manner of thinking, inherently anti-democratic. When the Supreme Court declares a right or liberty, by definition, it limits some majority (e.g. a state legislature, elected sheriff or prosecutor, city council, Congress, the President). The counter to that characterization is that majorities can be anti-democratic, and the constitution (in the form of the U.S. Supreme Court) needs to be there to curb those instincts. Thus, constitutional democracies form the end of history (Fukuyama 1998).

All that being said, care should probably be taken when we limit majorities. The constitution ought to give guidelines. It does a poor job of that. Here is some evidence: The Ninth Amendment.

The SC sometimes construes to affirm. When it does, there is sometimes backlash. The SC has no police, no budget, as [Andrew Jackson's despicable temper tantrum revealed, in one of U.S. history's darkest moments.](https://turtletalk.wordpress.com/2017/03/18/a-little-history-on-andrew-jackson-and-the-supreme-court-for-mike-huckabee/) [\(https://turtletalk.wordpress.com/2017/03/18/a-little-history-on-andrew-jackson-and-the-supreme-court-for-mike-huckabee/\)](https://turtletalk.wordpress.com/2017/03/18/a-little-history-on-andrew-jackson-and-the-supreme-court-for-mike-huckabee/)

The question we are getting at is: what is the nature of judicial power? When does it work to protect minorities, or to restrict institutional or government overreach, and what is the nature of the limits to those powers?

Week 3 Establishing judicial power

In-class exercise Answer the following two questions. 1) If the Supreme Court and Congress were two friends, how would you describe their friendship? 2) Smithey talks about courts outside the U.S. What does her evidence have to say about judicial power in general? (She may not say this outright, so you will have to make the inference).

[Marbury, Dahl, Casper](#) 

[Smithey, Transitions](#)

[Epstein and Knight. On the Struggle for Judicial Supremacy](#) 

Week 4 Testing judicial power: minorities and limits of majority power

In-class exercise What are the two most inconsistent arguments, findings, suggestions, etc. from the various readings?

[Rosenberg. The Hollow Hope.](#) 

[Hall Judicial Review as a limit on government domination](#)

[McGuire 11: Interinstitutional conflict](#) 

[McGuire 13: The Supreme Court versus the \(religious\) public](#) 

[Baird Jacobi How the dissent becomes the majority](#) 

Week 5 Quiz and review for exam; exact dates TBA

Quiz II The nature of judicial power and constraints.

Week 6 Midterm exam; exact dates TBA

Part III Religious exercise, establishment, and the Blaine Amendments

Critical thinking goal: we will learn how to make an argument based on interpreting the meaning of the words in the text (in this case, we are talking about "case law" or previous decisions of the Supreme Court). The most important part of legal thinking involves interpretation: making arguments about what the specific words in Supreme Court cases mean; sometimes the most important word in a Supreme Court case is "and." Your job is to determine what the law is, from the meaning of the words. So, your job here is not to be a judge, but instead, a lawyer, working from past Supreme Court cases to come to a conclusion, specifically, about whether the Blaine Amendments are constitutional, given exercise protections. We will read a professional article written by a law professor and your job is to use his analysis to come to some conclusion about whether you buy his argument. There is no right answer to this question, as is usually the case with legal interpretations. But some interpretations are more wrong than others.

Part III 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 the establishment of religion. This is a way to strengthen your capacity to make legal arguments, thinking about the best rebuttals to arguments. This is a difficult (and arcane) area of the law. We will read a law professor's perspectives and think about how best to defend or reject his arguments. We will pay careful attention to what is likely a verifiable interpretation that is close to a fact. For example, disallowing a person to say a Christian or Muslim prayer is an obvious violation of free exercise. A state's decision not to pay for a blind man to become a Baptist minister is not an obvious violation. This part of the class prepares you to make an argument in front of the Supreme Court.

The Blaine Amendments are state constitutional provisions (not all states have them; Colorado does) that limit money for religious purposes.

We will note that there are two provisions regarding religious freedoms in the First Amendment: exercise and establishment. Exercise is what the government cannot prevent you from doing (this is often about deviant behavior: animal sacrifices, peyote, etc.). Establishment law refers to the limits on what the government can do on the basis of supporting religion (this is often about Christmas trees, and state funding for religious schools).

These provisions are at times at odds: can the state provide funding that is available generally to people with disabilities, to a blind person, who wants to become a minister? More to the point, can the state Supreme Court use the state Blaines to prevent such funding, or does this violate the U.S. Constitution and free exercise?

Week 7 Religious Exercise and Establishment

In-class exercise Learning how to interpret case law: Provide two alternative, logically distinct yet plausible interpretations.

[Cantwell, Sherbert, Yoder, Lukumi](#)

[Smith, Boerne, Everson](#) 

[Edwards](#) 

[Lemon](#) 

[Hobby Lobby](#) 

Week 8 Review of free exercise and establishment, introduction to the Blaine amendments

In-class exercise Provide two logically distinct but plausible interpretations of a text.

[Duncan, The Blaine Amendments](#)

Week 9 Blaine Amendments, continued

Quiz III Blaine Amendments, exercise, and establishment. Exact date TBA

[How to think like a lawyer: a legal writing guide](#)

Week 10 Mock Supreme Court oral argument

[Mock Supreme Court oral argument](#) : Are the Blaine amendments constitutional? **Exact date TBA**

Week 11 Second midterm; Exact date TBA

Part IV The logic of legal philosophy, free speech and campaign finance reform

Critical thinking goal: we will learn how to make normative arguments. You will learn how to make careful normative arguments from first principles. So, your final project will be a paper in which you take a specific proposition and argue that it can be defended with a nonobvious first principle from philosophy. There may be legal interpretation and causal thinking in this paper.

Part IV is a case study on speech and campaign finance reform, which is a good way to explore how to construct a carefully written normative essay. We will be looking at how to carefully construct normative arguments that are non-obvious and that rely on nonobvious first principles. This part of the class teaches you how to be a Supreme Court justice.

The Supreme Court refused to allow the McCain-Feinstein law limiting campaign finance to stand, on the basis of “money as speech.” If you were the fifth vote on a case about the appropriate limits of money in politics, how would you characterize the appropriate limits, given normative considerations (first principles), the case law of speech, and campaign finance? You will write the opinion of the Court.

Week 12 Making normative arguments, constitutional speech protections

[Regan, on how to make careful, principled, normative arguments](#)

[O'Brien, Tinker, Texas v Johnson, Chaplinsky, Cohen, Hill](#) 

[RAV, Phelps](#) 

Week 13 Campaign finance

In-class exercise Please write two sentences: 1) sentence describing your specific normative argument, 2) sentence describing how your first principle can be used to defend your argument

[Citizens United, McCutcheon](#) 

[McConnell Why Citizen's United Was Correctly Decided](#)

The purpose of the McConnell essay is to show how to make a careful normative legal argument that considers both issues of constitutional interpretation and normative considerations.

[Hellman Defining Corruption: Constitutionalizing Democracy](#)

The purpose of the Hellman essay is to show how constitutional interpretation has implications for normative arguments, making them more complicated and constrained.

Week 14 Review and quiz

Quiz IV Freedom of speech, press, campaign finance. **Exact date TBA**

Remember that since there is no exam, this quiz is worth more and is more difficult than the other exams.

Week 15 Final paper discussions

Final exam period: oral presentations

Due May 5th [Final paper](#) , by email, 5pm

Rules and Regulations

Accommodation for Disabilities

If you qualify for accommodations because of a disability, please submit your accommodation letter from Disability Services to your faculty member in a timely manner so that your needs can be addressed. Disability Services determines accommodations based on documented disabilities in the academic environment. Information on requesting accommodations is located on the [Disability Services website \(http://www.colorado.edu/disabilityservices/students\)](http://www.colorado.edu/disabilityservices/students). Contact Disability Services at 303-492-8671 or [dsinfo@colorado.edu \(mailto:dsinfo@colorado.edu\)](mailto:dsinfo@colorado.edu) for further assistance. If you have a temporary medical condition or injury, see [Temporary Medical Conditions \(http://www.colorado.edu/disabilityservices/students/temporary-medical-conditions\)](http://www.colorado.edu/disabilityservices/students/temporary-medical-conditions) under the Students tab on the Disability Services website.

Classroom Behavior

Students and faculty each have responsibility for maintaining an appropriate learning environment. Those who fail to adhere to such behavioral standards may be subject to discipline. Professional courtesy and sensitivity are especially important with respect to individuals and topics dealing with race, color, national origin, sex, pregnancy, age, disability, creed, religion, sexual orientation, gender identity, gender expression, veteran status, political affiliation or political philosophy. For more information, see the policies on [classroom behavior \(http://www.colorado.edu/policies/student-classroom-and-course-related-behavior\)](http://www.colorado.edu/policies/student-classroom-and-course-related-behavior) and the [Student Code of Conduct \(http://www.colorado.edu/osccr/\)](http://www.colorado.edu/osccr/).

Preferred Student Names and Pronouns

CU Boulder recognizes that students' legal information doesn't always align with how they identify. Students may update their preferred names and pronouns via the student portal; those preferred names and pronouns are listed on instructors' class rosters. In the absence of such updates, the name that appears on the class roster is the student's legal name.

Honor Code

All students enrolled in a University of Colorado Boulder course are responsible for knowing and adhering to the Honor Code. Violations of the policy may include: plagiarism, cheating, fabrication, lying, bribery,

threat, unauthorized access to academic materials, clicker fraud, submitting the same or similar work in more than one course without permission from all course instructors involved, and aiding academic dishonesty. All incidents of academic misconduct will be reported to the Honor Code (honor@colorado.edu (<mailto:honor@colorado.edu>)); 303-492-5550). Students found responsible for violating the academic integrity policy will be subject to nonacademic sanctions from the Honor Code as well as academic sanctions from the faculty member. Additional information regarding the Honor Code academic integrity policy can be found at the [Honor Code Office website](https://www.colorado.edu/osccr/honor-code) (<https://www.colorado.edu/osccr/honor-code>).

Sexual Misconduct, Discrimination, Harassment and/or Related Retaliation

The University of Colorado Boulder (CU Boulder) is committed to fostering a positive and welcoming learning, working, and living environment. CU Boulder will not tolerate acts of sexual misconduct, intimate partner abuse (including dating or domestic violence), stalking, or protected-class discrimination or harassment by members of our community. Individuals who believe they have been subject to misconduct or retaliatory actions for reporting a concern should contact the Office of Institutional Equity and Compliance (OIEC) at 303-492-2127 or cureport@colorado.edu. Information about the OIEC, university policies, [anonymous reporting](https://cuboulder.qualtrics.com/jfe/form/SV_0PnqVK4kkIJZnf) (https://cuboulder.qualtrics.com/jfe/form/SV_0PnqVK4kkIJZnf), and the campus resources can be found on the [OIEC website](http://www.colorado.edu/institutionalequity/) (<http://www.colorado.edu/institutionalequity/>).

Please know that faculty and instructors have a responsibility to inform OIEC when made aware of incidents of sexual misconduct, discrimination, harassment and/or related retaliation, to ensure that individuals impacted receive information about options for reporting and support resources.

Religious Holidays

Campus policy regarding religious observances requires that faculty make every effort to deal reasonably and fairly with all students who, because of religious obligations, have conflicts with scheduled exams, assignments or required attendance. In this class, **there are no consequences for students observing religious holidays.**

See the [campus policy regarding religious observances](http://www.colorado.edu/policies/observance-religious-holidays-and-absences-classes-andor-exams) (<http://www.colorado.edu/policies/observance-religious-holidays-and-absences-classes-andor-exams>) for full details.

Course Summary:

Date	Details	
Mon Jan 13, 2020	 Week 1 (https://canvas.colorado.edu/calendar?event_id=161043&include_contexts=course_59749)	12pm

Date	Details	
Fri Jan 17, 2020	 Week 2 (https://canvas.colorado.edu/calendar?event_id=161498&include_contexts=course_59749)	12am
Wed Jan 22, 2020	 Due Wednesday Jan 22nd: Violate the Ninth Amendment (https://canvas.colorado.edu/courses/59749/assignments/629508)	due by 11:59pm
Fri Jan 24, 2020	 Week 3 (https://canvas.colorado.edu/calendar?event_id=161042&include_contexts=course_59749)	2pm
Mon Jan 27, 2020	 Due Monday January 28th: The Nature of Supreme Court Power (https://canvas.colorado.edu/courses/59749/assignments/629509)	due by 1pm
Fri Jan 31, 2020	 Week 4 (https://canvas.colorado.edu/calendar?event_id=161041&include_contexts=course_59749)	2pm
Mon Feb 3, 2020	 Due Monday February 3rd: Assess consistency of the logic of readings (https://canvas.colorado.edu/courses/59749/assignments/629495)	due by 1pm
Fri Feb 7, 2020	 Week 5 (https://canvas.colorado.edu/calendar?event_id=161040&include_contexts=course_59749)	2pm
Fri Feb 14, 2020	 Week 6 (https://canvas.colorado.edu/calendar?event_id=161039&include_contexts=course_59749)	2pm
Mon Feb 17, 2020	 Due Monday February 17th: a five sentence paper outline (https://canvas.colorado.edu/courses/59749/assignments/629501)	due by 11:59pm
Fri Feb 21, 2020	 Week 7 (https://canvas.colorado.edu/calendar?event_id=161038&include_contexts=course_59749)	2pm
Mon Feb 24, 2020	 Due Monday February 24th Pre-interpretation assignment (https://canvas.colorado.edu/courses/59749/assignments/629500)	due by 1pm
Fri Feb 28, 2020	 Week 8 (https://canvas.colorado.edu/calendar?event_id=161037&include_contexts=course_59749)	2pm
Mon Mar 2, 2020	 Due Monday March 2nd Pre-interpretation argument, second try (https://canvas.colorado.edu/courses/59749/assignments/629507)	due by 11:59pm
Tue Mar 3, 2020	 An example EXAM (not quiz) question	to do: 11:59pm
Fri Mar 6, 2020	 Week 9 (https://canvas.colorado.edu/calendar?event_id=161036&include_contexts=course_59749)	2pm

Date	Details	
Fri Mar 13, 2020	 Week 10 (https://canvas.colorado.edu/calendar?event_id=161035&include_contexts=course_59749)	2pm
	 Due Friday March 13th: Five sentence outline, a pre-paper on constitutionality of Blaine Amendments (https://canvas.colorado.edu/courses/59749/assignments/629493)	due by 11:59pm
Fri Mar 27, 2020	 Week 11 (https://canvas.colorado.edu/calendar?event_id=161034&include_contexts=course_59749)	2pm
Fri Apr 3, 2020	 Week 12 (https://canvas.colorado.edu/calendar?event_id=161033&include_contexts=course_59749)	2pm
Fri Apr 10, 2020	 Week 13 (https://canvas.colorado.edu/calendar?event_id=161032&include_contexts=course_59749)	2pm
Mon Apr 13, 2020	 Due Monday April 13th: final paper main argument and first principle (https://canvas.colorado.edu/courses/59749/assignments/629498)	due by 1pm
Fri Apr 17, 2020	 Week 14 (https://canvas.colorado.edu/calendar?event_id=161031&include_contexts=course_59749)	2pm
Fri Apr 24, 2020	 Week 15 (https://canvas.colorado.edu/calendar?event_id=161030&include_contexts=course_59749)	2pm
Tue Apr 28, 2020	 Quiz 4: The logic of philosophical arguments, free speech, and campaign finance (https://canvas.colorado.edu/courses/59749/assignments/629506)	due by 11:59pm
Tue May 5, 2020	 Final paper (https://canvas.colorado.edu/courses/59749/assignments/629497)	due by 11:59pm
	 Exam 1: The Nature of Judicial Power (https://canvas.colorado.edu/courses/59749/assignments/629496)	
	 Participation and weekly assignments (https://canvas.colorado.edu/courses/59749/assignments/629499)	
	 Quiz 1: Logic of arguments and evidence (https://canvas.colorado.edu/courses/59749/assignments/629502)	
	 Quiz 2: Readings on the Nature of Supreme Court Power (https://canvas.colorado.edu/courses/59749/assignments/629503)	
	 Quiz 3: Exercise, establishment, and the Blaine Amendments (https://canvas.colorado.edu/courses/59749/assignments/629505)	