



Professor Mark Tunick
HC 104, 561-799-8670
tunick@fau.edu

POS 4603: Honors Constitutional Law I

Fall 2023, 3 credits

Office Hours: TR 11-2, 2-3 in HC 104 or by arrangement via zoom. See Canvas for details

Class meets: TR 3:30-4:50pm, WB 105

Description: We will read important Supreme Court opinions on topics including federalism, separation of powers, property rights and economic regulations, criminal due process, and the right to make decisions about marriage and abortion. Special attention will be given to theories of how the constitution's text is to be interpreted, to the role the Court has played in the political and economic development of the United States, and to political theories addressing the proper role of government and courts in a democratic society. Students will participate in an in-class moot court. There are no prerequisites.

Requirements: Class will consist primarily of interactive discussion. Students will be expected to explain the facts of the assigned cases and discuss the readings. It is important for students to come to class prepared to discuss the cases scheduled for that meeting. You should outline the cases--you will be permitted to use the outlines you authored on exams. Grades are based on a midterm (20 points), final exam (40 points), moot court brief/opinion (15 points), quizzes and discussion boards (15 points) and class participation (10 points). The participation grade will be based on the overall quality of the student's contributions to class discussion. Because this is a discussion-based course, attendance is important and so the final grade will be reduced by 1.5 points for each unexcused absence beyond 2. The default grading scale is:

94-100 (A), 90<94 (A-), 87<90 (B+), 84<87 (B), 80<84 (B-), 77<80 (C+), 74<77 (C), 70<74 (C-), 67<70 (D+), 64<67 (D), 61<64 (D-), <61 (F). I may utilize a curve but only if doing so would yield a higher rather than a lower grade than what the student would earn using the default scale.

Reading: All cases are available in Canvas. Reading listed under each class is to be done prior to that class meeting. All cases are to be briefed. A sample brief is available in Canvas.

Canvas: This course makes use of Canvas: each topic has its own Module with background information and links to the reading, and in many cases quizzes to help you understand the material or graded discussion boards. Be sure to check Canvas regularly.

Office Hours: TBA: in person in HC 104 or via zoom. Additional times can be arranged by phoning 799-8670, or emailing me at tunick@fau.edu.

Honor Code: Students are expected to adhere to the honor code, available at <http://www.fau.edu/honors/academics/honor-code.php>

The following schedule of readings is subject to change: check Canvas for up to date information.

I. The Constitution and its enforcement:

A. Overview

Aug 22: Reading: Articles of Confederation (excerpts); U.S. Constitution (excerpts); sample brief (online)

Aug 24: State action.

Reading: Civil Rights Cases, 109 U.S. 3 (1883) (excerpts); Shelley v Kraemer, 334 U.S. 1 (1948)

B. Judicial Review and theories of how to interpret the Constitution

Aug 29: Marbury v. Madison, 5 U.S. 137 (1803)

Aug 31: McCulloch v. Maryland, 17 U.S. 316 (1819)

Sept 5: Theories of interpreting the Constitution

Rdg: Scalia, "Originalism: The Lesser Evil"; Brennan, "The Constitution of the U.S.: Contemporary

Ratification"; Vermuele, 'Beyond Originalism', *The Atlantic*, March 31, 2020; Chemerinsky, *We The People: A Progressive Reading of the Constitution* (Preface, 27-81)(2018)
Recommended: Adrian Vermeule, *Common Good Constitutionalism* (Polity Press, 2022); Erwin Chemerinsky, 'Even the Founders Didn't Believe in Originalism', *The Atlantic*, Sept. 6, 2022

II. Federal and state powers

A. Executive powers

Sept 7: *Youngstown Co. v. Sawyer* (Steel Seizure Case), 343 U.S. 579 (1952)

B. Congress's Delegation to the Executive and the 'Major Questions Doctrine'

Sept 12: *Biden v. Nebraska*, ___ U.S. ___ (2023)

C. Congress's power under the commerce clause

Sept 14: *Gibbons v. Ogden*, 22 U.S. 1 (1824)

Sept 19: *Champion v. Ames* (Lottery Case), 188 U.S. 321 (1903); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal*, 298 U.S. 238 (1936); *Kidd v. Pearson*, 128 U.S. 1 (1888)

Special event: Constitution Day interactive panel, SR 149, 6-7pm.

Sept. 21: Background to NLRB (BB); *NLRB v. Jones and Laughlin*, 301 U.S. 1 (1937); *U.S. v. Darby*, 312 U.S. 100 (1940); *Wickard v. Filburn*, 317 U.S. 111 (1942)

Sept 26: *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964); *United States v. Lopez*, 514 US 549 (1995); *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

D. Commerce Clause as constraining State legislative power (the dormant commerce clause)

Sept 28: *South Carolina v. Barnwell*, 303 U.S. 177 (1938); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Baldwin v. GAF Seelig*, 294 U.S. 511 (1935)

Oct 3: *Dean Milk v. Madison*, 340 U.S. 349 (1951); *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Maine v. Taylor*, 477 U.S. 131 (1986)

Oct. 5: *Natl Pork Producers Council v. Ross*, 598 US ___ (2023); and review for Midterm

Oct. 10 Mid-term

III. Constitutional Limits on Government powers

A. Substantive Due process

(1) Economic Substantive Due Process, or 'The Constitution and Capitalism'

Oct. 12: *Slaughterhouse Cases*, 83 U.S. 36 (1873); *Lochner v. New York*, 198 U.S. 45 (1905)

(2) Non-Economic Substantive Due Process and the right to liberty/autonomy/privacy/dignity

(a) Paving the way for *Roe v. Wade*

Oct. 17: *Nebbia v. New York*, 291 U.S. 502 (1934); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973)

(b) *Casey*; and *Obergefell* (right to same-sex marriage)

Oct. 19: *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Obergefell v. Hodges*, 576 U.S. 644 (2015)

(c) The recent demise of *Roe v. Wade*

Oct. 24: *Dobbs v. Jackson Women's Health Org*, 597 US ___ (2022)

B. The right to private property and the Takings Clause

(1) Police Powers to Regulate; the 'public use' provision

Oct. 26: Miller v. Schoene, 276 U.S. 272 (1928); Block v. Hirsh, 256 U.S. 135 (1921)

Oct. 31 Hawaii Housing Authority v. Midkiff, 465 U.S. 1097 (1984); Kelo v. City of New London, 545 U.S. 469 (2005);
“California Panel Sizes up Reparations for Black Citizens,” NYT 12/1/2022.

(2) The 'Takings Clause': Regulations vs. Takings

Nov 2: Penna. Coal Co. v. Mahon, 260 U.S. 393 (1922); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Penn Central v. New York City, 438 U.S. 104 (1978)

Nov 7: Agins v. City of Tiburon, 447 U.S. 255 (1980); Lucas v. S. Carolina Coastal Council, 505 U.S. 1003 (1992)

(3) The Takings Clause and the Nexus Test

Nov 9: Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994);
Levin v. City of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014)

Nov. 14 and Nov. 16: Moot Court

Two opposing parties will present their arguments and the rest of the class will serve as Supreme Court Justices. Justices will question the attorneys, and after deliberation, announce a decision. Attorneys will turn in a brief, Justices, an opinion. The oral arguments will take place on day 1 and the deliberations on day 2.

C. The 4th, 5th and 6th Amendment limits on government: Pre-revolution, Due Process Revolution, and Retreat

Nov. 21: Brown v. Mississippi, 297 U.S. 278 (1936); McNabb v. U.S., 318 U.S. 332 (1943); Betts v. Brady, 316 U.S. 455 (1942)

Nov. 23 Thanksgiving

Nov. 28: Miranda v. Arizona, 384 U.S. 436 (1966); Brewer v. Williams (Williams I), 430 U.S. 387 (1977); Nix v. Williams (Williams II), 467 U.S. 431 (1984)

Moot Court paper Due

Nov. 30: The Exclusionary Rule

Rdg: Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); Herring v. US, 555 US 135 (2009)

Voluntary Review session will be scheduled during reading day

Final exam: Tuesday, Dec. 7, 1:15-3:45pm

Additional notes:

Attendance Policy: Students are expected to attend all of their scheduled University classes and to satisfy all academic objectives as outlined by the instructor. The effect of absences upon grades is determined by the instructor, and the University reserves the right to deal at any time with individual cases of non-attendance. Students are responsible for arranging to make up work missed because of legitimate class absence, such as illness, family emergencies, military obligation, court-imposed legal obligations or participation in University-approved activities. Examples of University-approved reasons for absences include participating on an athletic or scholastic team, musical and theatrical performances and debate activities. It is the student's responsibility to give the instructor notice prior to any anticipated absences and within a reasonable amount of time after an unanticipated absence, ordinarily by the next scheduled class meeting. Instructors must allow each student who is absent for a University-approved reason the opportunity to make up work missed without any reduction in the student's final course grade as a direct result of such absence.

Policy on Accommodations In compliance with the Americans with Disabilities Act Amendments Act (ADAAA), students who require reasonable accommodations due to a disability to properly execute coursework must register with Student Accessibility Services (SAS) and follow all SAS procedures. SAS has offices across three of FAU's campuses -- Boca Raton, SU 131 (561-297-3880); in Davie, LA 131 (954-236-1222); in Jupiter and all Northern Campuses, SR 111F (561-799-8585). Disability services are available for students on all campuses. For more information, please visit SAS website at www.fau.edu/sas/.

Counseling and Psychological Services (CAPS) Center Life as a university student can be challenging physically, mentally and emotionally. Students who find stress negatively affecting their ability to achieve academic or personal goals may wish to consider utilizing FAU's Counseling and Psychological Services (CAPS) Center. CAPS provides FAU students a range of services – individual counseling, support

meetings, and psychiatric services, to name a few – offered to help improve and maintain emotional well-being. For more information, go to <http://www.fau.edu/counseling/>

Academic Integrity Policy: Students at Florida Atlantic University are expected to maintain the highest ethical standards. Academic dishonesty is considered a serious breach of these ethical standards, because it interferes with the university mission to provide a high quality education in which no student enjoys an unfair advantage over any other. Academic dishonesty is also destructive of the university community, which is grounded in a system of mutual trust and places high value on personal integrity and individual responsibility. Harsh penalties are associated with academic dishonesty. For more information, see University Regulation 4.001 and <http://www.fau.edu/divdept/honcol/students/honorcode.html>

Classroom Etiquette Policy: In order to enhance and maintain a productive atmosphere for education, personal communication devices, such as cellular telephones and pagers, are to be disabled in class sessions.

Policy on Recording in Class: by state law, audio or video recordings of class *lectures* is permitted only for personal educational use and may NOT be published. Publication, which refers to circulating, sharing, or distributing with anyone (including classmates) or on social media or other media formats is by law subject to penalties up to \$200,000. In addition, failure to adhere to this policy may constitute a violation of the honor code. Recording of class *discussions* is not permitted unless the student has an accommodation granted by Student Accessibility Services. Students who request recording of class lectures or discussions under the Americans with Disabilities Act must contact Student Accessibility Services to obtain such permission or accommodation, and must otherwise comply with the requirements of SAS. Information for the SAS is available at <http://www.fau.edu/sas/>.

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