Introduction
It is important to know what the Founders meant – where it can be ascertained – by the language they used in drafting the Constitution. Those meanings may help to inform us as to what they had in mind with regard to various matters that vex the law. But there is no requirement to remain frozen in the 18th Century in our understanding of the law and meaning of the Constitution. The Constitution is ours now, not theirs. Intentions of the authors – to the extent they are made known by writings that directly address matters – may inform us as to what they had in mind, and that may impact how we apply the law. But there is no reason for us to be bound by 18th, 19th, or 20th Century predilections, prejudices, and ways of life. The primary point of contention in most of constitutional law is how to adapt, and how quickly to adapt, to the important forces shaping and changing our society. That single feature is largely what studying constitutional law means – it is the study of adaptation of the law to present circumstances. So as you go through the readings in this class in particular areas of law, you should think in terms of trajectories; how the courts interpret and reinterpret the Constitution with respect to the needs of the times. Sometimes these trajectories of interpretation and reinterpretation show substantial continuity with the past, sometimes they demonstrate sharp breaks with past interpretations. It is in these continuities and breaks where the story of the Constitution is found.

MAIN TEXT:  
Chemerinsky, Erwin  Constitutional Law – Fourth Edition
Text Available on class BlackBoard site at no cost

SUPPLEMENTAL READINGS:
Indicated in days’ readings. All available on class BlackBoard website or accessible through hyperlink in syllabus at no cost

All readings are to be done before the class date in which they appear in the syllabus.

Course Requirements

GRADING:
<table>
<thead>
<tr>
<th>Categories</th>
<th>Points (105 maximum possible)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation/Discussion</td>
<td>25</td>
</tr>
<tr>
<td>Case Analysis 1</td>
<td>15</td>
</tr>
<tr>
<td>Case Analysis 2</td>
<td>15</td>
</tr>
<tr>
<td>Midterm Exam</td>
<td>15</td>
</tr>
<tr>
<td>Final Exam</td>
<td>35</td>
</tr>
</tbody>
</table>

**Final Grade:**
- 90-105 points: A
- 80-89 points: B
- 70-79 points: C
- 60-69 points: D
- Less than 60: F

**Course Requirements**

1. **Participation.** This means having done the class readings, partaking in discussions, asking questions, explaining things to others, and otherwise participating in class and discussion. Participation comprises 25% of your final grade. Participation will consist of written comments on BlackBoard and direct discussion with me about the readings at set times. You should write responses on BlackBoard to most of the questions posed. Your responses should be substantial, rather than a sentence or two. **WHERE A DISCUSSION TOPIC IS LABELED “REQUIRED” THAT MEANS YOU MUST RESPOND TO THAT TOPIC.** The best score you may receive for participation is 25. Students will be required to meet with me electronically via BlackBoard Collaborate or Microsoft Teams in small groups for discussion of course material as part of the participation requirement. I will also meet with students individually (electronically) as needed.

2. **Two 8-10-page (excluding sources and notes) case analyses.** Worth up to 15 points each, comprising 30% of your grade. You will submit two written analyses, each at least ten pages in length, addressing and analyzing constitutional cases that will be assigned to you individually at random.

   **Concerning the Analyses:**
   The papers must conform to one of the standard and broadly used citation forms (Chicago Manual of Style, Modern Language Association, American Psychological Association, or the Bluebook). You must cite all quotes, all ideas that are not your own, paraphrased statements, and matters not part of common knowledge. Your reasoning for these papers should demonstrate capacity to render opinions based on your understandings of law and precedent as discussed in the main text or discovered in your research for the papers.

3. **Midterm Exam, OCTOBER 17.** Short answer/essay. Comprises 15% of your final grade. The best score you can receive on this assignment is 15. This exam will be made available for the entire 24 hours of October 17, 2020 and must be submitted before midnight of that date.
4. **Final examination. Essay/Short Answer format.** Comprises 35% of your final grade. The best score you can receive on this assignment is 35.

**Special Situations**

**Americans with Disabilities Act**
The University and its employees are required under the ADA to make reasonable accommodation for many types of disabilities. I am thoroughly committed to the ADA and the reasoning that brought it into law. If you believe you have a disability – or if you already have a documented disability – you must 1) Contact me in a timely manner and explain what your disability is and what sorts of accommodation you will need, 2) Notify and consult with the Center for Accommodations and Support Services as soon as possible (747-5148; Union East, Room 106).

**Other Civil Rights Matters**
I will maintain a class environment that conforms to all requirements found in the various applicable state and federal civil rights and criminal statutes and in the UTEP Handbook of Operating Procedures. Specifically, we will maintain an environment free from sexual harassment, undue intimidation, discrimination based on protected characteristics, and threats of violence or crime. This does not mean that you cannot hold and express, even vehemently, controversial or unpopular opinions. Indeed, the First Amendment protects us in the unpopular opinions we hold, otherwise it would be a useless gesture. But all members of the class should feel equally safe and able to express their opinions.

**Academic Dishonesty**

**Examinations and Cheating**
Unless I indicate otherwise, you may not use any notes or aids during examinations or quizzes, nor may you discuss exams during exam period with other students. You may not copy off another student’s exam or otherwise submit writing or answers that are not original to you. **I am required to report to the Dean of Students instances where I reasonably believe a student has cheated on an examination or otherwise engaged in scholastic dishonesty.**

**Plagiarism**
The Handbook of Operating Procedure for UTEP (Student Conduct and Discipline – Scholastic Dishonesty Section II, paragraph 1.2.2) states the following:

“Scholastic dishonesty includes but is not limited to cheating, plagiarism, collusion, the submission for credit of any work or materials that are attributable in whole or in part to another person, taking an examination for another person, any act designed to give unfair advantage to a student or the attempt to commit such acts.”

**I am required to report to the Dean of Students instances where I reasonably believe a student has plagiarized his or her work or otherwise engaged in scholastic dishonesty.**

**Class Schedule**

**NOTE** that all readings assigned for the week should be read in full by Monday of each
WEEK ONE (August 24-28)

Course Introduction – Discussion and explanation of syllabus.

FOUNDATIONS

READINGS (WEEK ONE):

FOUNDATIONAL DOCUMENTS (BB):
1. Magna Carta
2. The Mayflower Compact
3. The Declaration of Independence
4. The Articles of Confederation
5. The Treaty of Paris

MAGNA CARTA
Marilyn and Robert Aitken (BB-WEEK ONE ADDITIONAL READINGS)

JOHN MARSHALL
(BB-WEEK ONE ADDITIONAL READINGS)

FREDERICK DOUGLASS
“What to the Slave is the Fourth of July?” (BB-WEEK ONE ADDITIONAL READINGS)

MEDIA
Audio Interview (June, 1949) - Fountain Hughes, former Slave in Charlottesville, VA: https://www.loc.gov/item/afc1950037 afs09990a/ (29 Minutes – Listen to all of it)


LYNCHING IN AMERICA
Explore the Map: https://lynchinginamerica.eji.org/explore

DISCUSSION:
1. Slavery is the greatest crime and travesty of justice committed by the
United States, and was one wholly supported by law and the Constitution. How are we to address and make restitution for these enormous crimes perpetrated on African Americans? (REQUIRED RESPONSE)

2. What role did lynching play in subjugation of African-Americans after the Civil War? Provide examples and reasoning from the EJI website that documents lynching in the United States. (REQUIRED RESPONSE)

3. What are the chief weaknesses of the Articles of Confederation?

4. How do you square the language of the Foundational Documents with the speech of Frederick Douglass in “What to the Slave is the Fourth of July?”

5. What do the foundational documents mean to women? To African-Americans? To First Nations People?

6. Why do we revere the Declaration of Independence?

FEDERAL JUDICIAL POWER

WEEK TWO (August 31-September 4)

JUDICIAL REVIEW

READINGS (WEEK TWO):

CHEMERINSKY:
Pages 54-128 (Pay special attention to the body of the Constitution and the first ten amendments (Beginning on page 56 of Chemerinsky))

HERMAN MELVILLE:
Billy Budd (BB-ADDITIONAL READINGS)
Billy Budd as an indictment of slavery:
https://www.newstatesman.com/culture/books/2017/07/herman-melvilles-mystery-was-billy-budd-black

THOMAS J. BROWN:
“Thomas’ Sims Case After 150 Years” (BB-WEEK TWO ADDITIONAL READINGS)

FREDERICK DOUGLASS:
“What the Black Man Wants” (BB-WEEK TWO ADDITIONAL READINGS)

DISCUSSION:

1. Billy Budd presents us with the dilemma of textualism (adhering to the law as written) and justice (which sometimes requires deviation from written
prescriptions). Was it unjust for Vere to follow the law? (REQUIRED RESPONSE)

2. Despite Billy Budd being described as blond-haired and blue-eyed, there is significant evidence that his character represents the position of the black man in society at the time. See the New Statesman article Herman Melville’s Mystery article. Discuss the novella from the allegory of race.

3. How would Frederick Douglass assess the political state of black citizens in present day America?

4. Has the Constitution been more a source of hope or one of disappointment when it comes to racial equality?

5. Does the Constitution “guarantee” racism? (REQUIRED RESPONSE)

WEEK THREE (September 7-11)

LIMITS ON JUSTICIABILITY

READINGS (WEEK THREE):

CHEMERINSKY:
Pages 128-189

FRANKFURTER:
“A Note on Advisory Opinions” (BB-WEEK THREE ADDITIONAL READINGS)

DISCUSSION:
1. Nothing in the Constitution requires the court to limit the cases it hears through application of the Justiciability Doctrine, so why did the Court adopt such a limitation on its powers? (REQUIRED RESPONSE)

2. What dangers do you see if the Court had not adopted its “advisory opinion” doctrine?

3. What dangers do you see in the State Secrets Privilege and how could those dangers be circumvented? (REQUIRED RESPONSE)

WEEK FOUR (September 14-18)

LIMITS ON JUSTICIABILITY (CONTINUED)

READINGS (WEEK FOUR):

CHEMERINSKY
Pages 189-238
DALEHITE V. U.S.
(BB-WEEK FOURT ADDITIONAL READINGS)

WEAVER AND LONGORIA:
“Bureaucracy that Kills” (BB-WEEK FOUR ADDITIONAL READINGS)

DISCUSSION:
1. Weaver and Longoria discuss how the federal government immunizes itself from monetary liability for its negligent, and even intentional, acts that often result in great harm and death. Should the federal government have the extensive immunity to liability that Weaver and Longoria describe?
2. Considering the state of the facts and legal history concerning the case in Poe v. Ullman, explain if you would you side with Justice Frankfurter or Justice Douglas and why? (REQUIRED RESPONSE)

FEDERAL LEGISLATIVE POWER
WEEK FIVE (September 21-25)

COURT AND CONGRESS

READINGS (WEEK FIVE):

CHEMERINSKY:
Pages 239-326

LIGHTNER
“Are They not the Lord’s Enemies?” (BB-WEEK FIVE ADDITIONAL READINGS)

DISCUSSION:
1. McCulloch is one of the most important cases the Court has ever decided. Explain what the Republic might be like if the case had been decided in Maryland’s favor? (REQUIRED RESPONSE)
2. CJ Roberts writes in National Federation v. Sebelius that “Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast
domain to congressional authority” and that such a power exceeds constitutional grants of authority to the federal government. Are Roberts’ fears theoretical horrors or do they represent a real danger to individual freedom? Even assuming such dangers are extensive, are they counterbalanced by the common good that is achieved by the aims of the statute in question? (REQUIRED RESPONSE)

3. What danger of abuses of power does United States v. Comstock present? Do you think arbitrary exercise of discretion by federal employees might yield differing results concerning criminals of similar characters and potential future danger? If so, then when should courts step in to investigate and correct such abuses under the principles discussed in the Comstock opinion?

4. Gibbons v. Ogden is a foundational case and rested for a great deal of time without a lot of legal modification. Discuss the changes in society and Congress’ exercises of power that led to great tension between state and federal power concerning commercial activity – especially labor matters.

5. Often the Court faces tragic events and circumstances and is asked to ameliorate the often horrible effects of business and labor environments. Hammer v. Dagenhart represents a low point in these matters. Do you think the court reached the right decision considering the state of Constitutional law at the time? (REQUIRED RESPONSE)

WEEK SIX (September 28-October 2)

COURT AND CONGRESS (CONTINUED)

READINGS (WEEK SIX):

CHEMERINSKY:
Pages 326-415

DISCUSSION:
1. In Heart of Atlanta Hotel we see that the entire framework of support for the 1964 Civil Rights Act rests on an interpretation and application of the Commerce Clause to private actions taken in matters normally governed by state law. The Civil Rights Act was an enormous reach for power against the states. What would the nation look like if the Supreme Court had struck down the Act? (REQUIRED RESPONSE)

2. Justice Douglas indicates his discomfort in loading too much weight on the Commerce Clause. Discuss how Douglas’ concurrence indicates another way - the 14th Amendment - of justifying regulation of private acts by the Constitution.

3. After the ruling in Katzenbach v. McClung can you think of any business that would not be in some way involved in interstate commerce? Was the
decision in Katzenbach the Court’s way of essentially saying that all business activity is subject to the strictures of the Civil Rights Act of 1964? The answers to these questions partially comes from U.S. v. Lopez, but is that response clear?

4. As the site Lynching in America shows in tragic and horrific detail, hatred and violent racism was and is widespread – even in areas of the country where it might be unexpected. What can we do to address this awful legacy of hate in present times?

WEEK SEVEN (October 5-October 9)

COURT AND CONGRESS (CONTINUED)

READINGS (WEEK SEVEN):

CHEMERINSKY:
Pages 416-526

DISCUSSION:

1. The Court is usually extremely reluctant to find statutes unconstitutional and will look for other means to achieve their ends. Why do you think the court displays such reluctance? (REQUIRED RESPONSE)

2. In South Dakota v. Dole the Court upheld a statute that essentially forced a national standard (21 years old) defining the age citizens could purchase and drink alcohol. Historically, ages of consent have been the province of state governments. Do you think Dole was an unconstitutional overreach by the Court and Congress?

3. Do you think that Justice Rehnquist’s opinion in U.S. v. Morrison is well founded?

4. You will notice that the Court discusses standards of scrutiny that vary by the facts of a case – 1) Rational basis test; 2) Heightened scrutiny; 3) Strict scrutiny. Each of these standards has an effect on whether or not a particular statute meets constitutional requirements. Why does the Court adopt this scheme when analyzing the constitutionality of a statute? (REQUIRED RESPONSE)

FEDERAL EXECUTIVE POWER

WEEK EIGHT (October 12-October 16)

EXECUTIVE POWER
READINGS (WEEK EIGHT):

CHEMERINSKY:
Pages 527-609

CHEMERINSKY:
Pages 610-688

WEAVER AND PALLITTO:
“State Secrets and Executive Power” (BB-WEEK EIGHT ADDITIONAL READINGS)

WEAVER
“Trump, Defamation and Incitement” (BB-WEEK EIGHT ADDITIONAL READINGS)

DISCUSSION:
1. Has the power of the presidency grown over time to such a point that Congress and the courts have lost the capacity to delimit it when it is abused? (REQUIRED RESPONSE)
2. Is the power given to the Executive branch by the state secrets privilege a practical requirement of government or an unchecked grant of power to the executive branch (or both)? (REQUIRED RESPONSE)
3. What can Congress do to curb the proclivities of presidents to engage in military actions that remain undeclared wars?
4. The public has virtually no access to the activities of intelligence agencies, and these agencies can be – and have been – used for illegal and intrusive activities. Congress is historically weak in curbing abuse by the intelligence community. What might be done to change these shortcomings?

LIMITS ON STATE REGULATION AND TAXATION

WEEK NINE (October 19-October 23)

READINGS (WEEK NINE):

CHEMERINSKY:
Pages 689-757
BURNS
“The Cigarette” (BB – WEEK NINE ADDITIONAL READINGS)

CHEMERINSKY:
Pages 757-807

DISCUSSION:
1. Explain “field” and “conflict” preemption and why the Court adopted such an approach. (REQUIRED RESPONSE)
2. Justice Robert Jackson led a fascinating life and was at heart an utter pragmatist. Characterize Justice Jackson’s opinion in Hood & Sons v. Dumond. Is Jackson’s pragmatism on display in this opinion?
3. What is the nature of the Dormant Commerce Clause?
4. Chemerinsky writes that “In sum, neither of the Court’s proffered theoretical justifications—exclusivity or pre-emption-by-silence—currently supports our negative [dormant] Commerce Clause jurisprudence, if either ever did. Despite the collapse of its theoretical foundation, I suspect we have nonetheless adhered to the negative Commerce Clause because we believed it necessary to check state measures contrary to the perceived spirit, if not the actual letter, of the Constitution.” Does Chemerinsky sound like Justice Jackson? Explain why or why not. (REQUIRED RESPONSE)
5. How would you describe the decision and accommodation reached by the Court in Cooley v. Board of Wardens? What does this decision mean for the relationship between the states and the federal government?

STATES AND THE BILL OF RIGHTS

WEEK TEN: (October 26-30)

READINGS (WEEK TEN):

CHEMERINSKY:
Pages 811-852

FRANKFURTER
“Memorandum on ‘Incorporation’ of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment” (BB – WEEK TEN ADDITIONAL READINGS)

CHEMERINSKY:
Pages 853-924
FREUND
“The ‘State Action’ Problem” (BB – WEEK TEN ADDITIONAL READINGS)

VIEW:
“Remembering Thurgood Marshall”
https://www.youtube.com/watch?v=kAZdZFa3OkI

VIEW/PERUSE:
“The Jewish Justices of the Supreme Court, from Brandeis to Kagan – Their Lives and Legacies” https://www.youtube.com/watch?v=OkbngnV4Pml (over 90 minutes, but well-worth at least picking through it)

DISCUSSION:
1. The Constitution evinces much more faith in state governments than a federal government. This faith is now often reversed – with people expecting the national government to prevent state abuse of power. What do you think led to this change of perspective and faith?
2. John Marshall Harlan seems incensed by the Court’s decision in the Civil Rights Cases. What is the basis of his disagreement with the decision of the majority? (REQUIRED RESPONSE)
3. Marsh v. Alabama is a case that is little read and considered nowadays, but it is an important case. Explain the importance of the decision. (REQUIRED RESPONSE)
4. Jewish lawyers and jurists have played instrumental roles in the formulation of constitutional law, but the Supreme Court has not been very diverse. Eight justices have been Jewish, two have been African Americans (Thurgood Marshall and Clarence Thomas), and only one a Latino/a (Sonia Sotomayor). No member of the Court is known to have been gay or lesbian, though there has been speculation surrounding Benjamin Cardozo. Should a conscious effort be made to make the Court more diverse? (REQUIRED RESPONSE)

WEEK ELEVEN: (November 2-6)

READINGS (WEEK ELEVEN):

CHEMERINSKY:
Pages 929-994

SUNSTEIN:
“Lochner’s Legacy” (BB – WEEK ELEVEN ADDITIONAL READINGS)
STRAUSS:
“Why was Lochner Wrong?” (BB – WEEK ELEVEN ADDITIONAL READINGS)

SCOTT:
“Obligation of Contract” (BB – WEEK ELEVEN ADDITIONAL READINGS)

HARRISON:
“Substantive Due Process and the Constitutional Text” (BB – WEEK ELEVEN READINGS)

CHEMERINSKY:
Pages 994-1077

BAUM:
“Takings” (BB – WEEK ELEVEN ADDITIONAL READINGS)

DISCUSSION:
1. In United States Trust Co. v. New Jersey is the court engaging in judicial activism that usurps legislative power?
2. Loretto v. Teleprompter Manhattan CATV Corp. represents the vindication of a strong version of property rights protection. Notice, though, that the costs of this protection will be borne by consumers and customers of service-providing companies who must encroach on property to deliver their services. Is the Court being myopic? Should an exception to the takings clause be carved out for service-providing companies?
3. The Lochner decision is chiefly seen as a great mistake. Forget the legalistic and theoretical views. Is there something just innately wrong with the court’s decision?

WEEK TWELVE: (November 9-13)

READINGS (WEEK TWELVE):

CHEMERINSKY:
Pages 1082-1153

ARAIZA:
“Equal Protection Before the Modern Era” (BB – WEEK TWELVE
ADDITIONAL READINGS)

FRISS:
“Blacks, Jews and the Civil Rights Movement in New York 1895-1913”

CHEMERINSKY:
Pages 1153-1236

KING:
“I Have a Dream” https://www.youtube.com/watch?v=smEqnnKfYs
“The Woman Who Inspired Martin Luther King’s ‘I Have a Dream’ Speech” https://www.vox.com/2016/1/18/10785882/martin-luther-king-dream-mahalia-jackson
Assassination of Martin Luther King: https://kinginstitute.stanford.edu/encyclopedia/assassination-martin-luther-king-jr

NACHBAR:
“The Rationality of Rational Basis Review” (BB – WEEK TWELVE
ADDITIONAL READINGS)

C.T. VIVIAN OBITUARY (BB – WEEK TWELVE
ADDITIONAL READINGS)

JOHN LEWIS OBITUARY (BB – WEEK TWELVE
ADDITIONAL READINGS)

DISCUSSION:
1. How would you describe the state of race relations in the present day United States?
2. It would have seemed at one time that Dr. King’s “dream” was progressing toward reality, but recent events and lasting disparities of wealth and opportunity founded in race differences has put our country at a crossroads once again. Should the federal courts step in and be more forceful about remedying the clear, obvious, and debilitating disparities in opportunity and wealth based in race and racism?
3. In considering the remembrances and descriptions of the battles and successes of the recently passed civil rights greats John Lewis and C.T. Vivian contained in this week’s readings, how would you sum up their impact on the Civil Rights movement? Provide specific examples of their influence.
4. Describe the relationship between the Black and Jewish communities discussed in "Blacks Jews and Civil Rights Movement in New York 1895-1913." Although the groups often had common ends, they also
diverged in many ways. Give examples of the relationship between the two groups and assess their success in efforts against bigotry in the law.

**WEEK THIRTEEN**: (November 16-20)

**READINGS (WEEK THIRTEEN):**

**CHEMERINSKY**:
Pages 1236-1289

**ROBINSON AND ROBINSON**
“Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny” (BB – WEEK THIRTEEN ADDITIONAL READINGS)

**CHEMERINSKY**:
Pages 1290-1343

**VIEW**:
Japanese Internment [https://www.history.com/topics/world-war-ii/japanese-american-relocation](https://www.history.com/topics/world-war-ii/japanese-american-relocation)

**DISCUSSION:**
1. The enslavement of black Americans, slaughter and land dispossession of Native Peoples, maltreatment and denial of rights to Latino/as, and the internment of Japanese during WWII are shameful histories for our country and are atrocities that have yet to be fully addressed by our government and the people of the United States. Continued racism is also dividing our country. Do you see a means to ending the generational cycle of racism and the habitual nature of enmity and neglect that characterizes our behavior toward minority groups of Americans?

**WEEK FOURTEEN**: (November 23-25)

**READINGS (WEEK FOURTEEN):**

**CHEMERINSKY**:
Pages 1392-1526

**WATCH**:
READ:
“When Doctors took Family Planning into their own Hands” (BB – WEEK FOURTEEN ADDITIONAL READINGS)

WEEK FIFTEEN: (November 30-December 3) REVIEW