

LEGAL ISSUES IN A GLOBAL PANDEMIC

Fall 2021

Justin Walker

jwalke38@gmu.edu

Office hours by appointment

All classes are in person. Recording is prohibited.

Schedule:

- Saturday, September 18, 2021: 9AM to 5PM, with a lunch break
- Sunday, September 19, 2021: 9AM to 5PM, with a lunch break
- Saturday, November 13, 2021: 9AM to 5PM, with a lunch break
- Sunday, September 14, 2021: 9AM to 5PM, with a lunch break

Course Overview:

One purpose of this class is to learn about ten important legal doctrines that the COVID-19 pandemic has tested and illuminated:

1. Delegation of legislative powers;
2. Deference to administrative agencies;
3. Rights of criminal defendants;
4. Federalism;
5. Religious liberty;
6. Right to travel;
7. State action doctrine;
8. Equal protection;
9. Abortion rights;
10. Gun rights.

Another purpose of this class is to explore how different judges do their job.

This is not a lecture course. Class participation is a requirement. Although I will sometimes ask for volunteers to answer a question, I will also cold call. When questioned, you may look at the reading and your notes to find relevant details from the required reading, but you should know the basic holding and basic reasoning of each required case without needing to re-read the case.

When reading, consider the following themes of the class:

- Is the author of the opinion applying neutral principles?
- How does the enumerated right at issue protect liberty?
- What are the limits of that right?
- How has the understanding of that right changed over time?
- Should constitutional rights change in an emergency?
- When, if ever, should judges defer to the political branches?
- When, if ever, should judges apply political policy considerations?
- When, if ever, should judges apply practical considerations?
- When, if ever, should judges apply institutional considerations?
- When, if ever, should a precedent be overruled?
- Should judges be textualists?
- Should judges be originalists?
- How broadly should a precedent be read?
- What are the advantages and disadvantages of a written constitution?
- How does the separation of powers protect liberty?

Learning Outcomes:

This course incorporates the general learning outcomes listed at <https://www.law.gmu.edu/academics/degrees/jd/>. In particular, by the end of the course, each student should better understand the meaning of United States Constitution, how courts' understanding of its principles have changed over time, and how courts should apply those principles during and after the COVID-19 pandemic.

Casebook and Readings:

This class has no textbook. It does, however, require lengthy readings.

Begin by reading the United States Constitution, including its amendments.

Beyond that, at the end of this syllabus, I have listed the required reading for each day. If a reading is not in brackets, it is required reading for every student. There are 42 required cases, as well as several required articles. I recommend reading the required readings in the order I've listed them because sometimes a later case will refer to an earlier case.

The opinions are unabridged. Unless otherwise noted, read all opinions in the assigned case (majority, plurality, concurrences, dissents). Although it is fine to skim an opinion to see which parts of it are important, read the important parts of each opinion closely.

Around 10 of the cases are in brackets. Before class, I will assign each bracketed case to one or two particular students. Those particular students should read the case and be prepared to answer questions about the case. If you have not been assigned the bracketed case, you are not required to read it, and I will not cold call you on that bracketed case.

Bring to class the version of the opinions and articles provided through the web links in this syllabus, so that we can all refer to the same page numbers in class. You may bring a paper or electronic version of the case. In class, you are not permitted to use laptops or tablets for anything other than referring to cases.

Many of the cases were decided before the COVID-19 pandemic. That's because we can't understand the COVID cases without understanding the pre-COVID precedents that inform them. In other words, we can't know how to apply a constitution principle during a pandemic if we don't know the constitutional principle.

Attendance:

Scalia Law School's attendance policy applies. Any student absent for more than 20% of the course is not eligible for credit, even if the absence is for good cause. In addition, because there are only four days of classes, unexcused absences will result in a significant grade decrease.

Assessment:

In the syllabus, 25 cases have *** before them. Those 25 cases, including the key precedents and legal principles discussed in them, will be tested in an exam at the end of the semester. The date of the exam is available on Scalia Law's website.

Your grade will be based on that exam. In addition, I will raise your final grade by up to 2 partial grade bumps (ex: B to B+ is a partial-grade bump; B to B+ to A- is a 2 partial-grade bump). I will lower your final grade by a partial-grade level if, during class discussion, it is apparent you have not read an assigned reading. There is no cap on the number of partial-grade level reductions.

Additional Policies and Resources:

Adhere to the Honor Code and the school's Academic Regulations.

Support and health resources, including mental health resources, are available at <https://caps.gmu.edu>, <https://shs.gmu.edu>, and <https://ularlington.gmu.edu>.

Required Reading:

- I. State Emergency Powers → Day 1
 - a. **Governors' Emergency Powers (Background: State Emergency Powers)**

- i. (1) ****Jacobson v. Massachusetts*, 197 U.S. 11 (1905), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep197/usrep197011/usrep197011.pdf>.
- ii. (2) *Moyer v. Peabody*, 212 U.S. 78 (1909), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep212/usrep212078/usrep212078.pdf>.

b. Governors' Emergency Powers (COVID / Michigan Governor)

- i. (3) ****In re Certified Questions from United States District Court*, 958 N.W.2d 1 (Mich. Oct. 2, 2020), http://publicdocs.courts.mi.gov/sct/public/orders/161492_52_01.pdf.

II. Federal Emergency Powers → Day 1

a. CDC Emergency Powers (Background: Delegation)

- i. (4) ****A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep295/usrep295495/usrep295495.pdf>.
- ii. (5) ****Gundy v. United States*, 139 S. Ct. 2116 (2019), https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf.

b. CDC Emergency Powers (Background: Deference)

- i. (6) ****Chevron v. NRDC*, 467 U.S. 837 (1984), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep467/usrep467837/usrep467837.pdf>.
- ii. (7) Brett M. Kavanaugh, “Fixing Statutory Interpretation,” 129 Harv. L. Rev. 2118 (2016), only pages 2134-159, <https://harvardlawreview.org/wp-content/uploads/2016/06/2118-2163-Online.pdf>.
- iii. (8) [[[*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring), <https://www.ca10.uscourts.gov/sites/ca10/files/opinions/01019676408.pdf>.]]]

c. CDC Emergency Powers (COVID / Pre-August 2021 CDC Eviction Moratorium — Merits)

- i. (9) ****Alabama Association of Realtors v. Dep't of Health & Hum. Servs.*, 2021 WL 1779282 (D.D.C. May 5, 2021), <https://www.courthousenews.com/wp-content/uploads/2021/05/Alabama-Realtors-HHS.pdf>.

d. CDC Emergency Powers (COVID / Pre-August 2021 CDC Eviction Moratorium — Stay Factors)

- i. (10) [[[*Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320 (2021), https://www.supremecourt.gov/opinions/20pdf/20a169_4f15.pdf]]]

- e. **CDC Emergency Powers (COVID / Pre-August 2021 CDC Eviction Moratorium — Non-Delegation Doctrine; Departmentalism)**
 - i. (11) *Tiger Lily, LLC v. HUD*, No. 21-5256, 2021 WL 3121373 (6th Cir. July 23, 2021), <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0166p-06.pdf>.
 - ii. (12) “CDC Rebuffs Biden Bid to Reinstate COVID-19 Eviction Moratorium,” *Reuters* (August 2, 2021) <https://www.reuters.com/world/us/pelosi-urges-white-house-reinstate-expired-covid-19-eviction-moratorium-2021-08-02/>.
 - iii. (13) “CDC Announces Limited, Targeted Eviction Moratorium Until Early October,” *CNN* (August 3, 2021) <https://www.cnn.com/2021/08/03/politics/eviction-moratorium-high-covid-spread/index.html>.

III. Crime (Speedy Trials and Compassionate Release) → Day 1

a. COVID / Speedy Trial Right

- i. (14) ****United States v. Olsen*, 995 F.3d 683 (9th Cir. 2021) (speedy trial), <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/04/23/20-50329.pdf>.

b. COVID-based Compassionate Release

- i. (15) ****United States v. Somerville*, 463 F. Supp. 3d 585 (W.D. Pa. May 29, 2020) (so that we all use the same page numbers, use the PDF of the original F. Supp. 3d that is available on Westlaw).

IV. Federalism (Coercion and Commandeering) → Day 2

a. COVID Relief Act’s Tax Mandate (Background: Duel Sovereignty, Coercion)

- i. (16) *Federalist 10*, https://liberalarts.utexas.edu/coretexts/_files/resources/texts/c/1787%20Federalist%20No%2010.pdf.
- ii. (17) *Federalist 51*, <https://www.csus.edu/indiv/f/friedman/sp2020/govt1/schedule/B/FED%2051.pdf>.
- iii. (18) *United States Term Limits v. Thornton*, 514 U.S. 779, 838-46 (1995) (Kennedy, J., concurring), <https://supreme.justia.com/cases/federal/us/514/779/case.pdf>.

b. COVID Relief Act’s Tax Mandate (Background: Commandeering)

- i. (19) [[[*Printz v. United States*, 521 U.S. 898 (1997), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep521/usrep521898/usrep521898.pdf>.]]]

c. COVID Relief Act’s Tax Mandate (Background: Coercion)

- i. (20) *** *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) → read only the Medicaid expansion parts of Roberts Opinion (pp. 1-11, 45-59), Ginsburg Opinion (pp. 38-61), and Joint Dissent (pp. 28-48), <https://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>.

d. COVID Relief Act's Tax Mandate (COVID Tax Mandate Litigation)

- i. (21) *** *Ohio v. Yellen*, No. 1:21-CV-181, 2021 WL 2712220, at *1 (S.D. Ohio July 1, 2021), <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Tax-Mandate.aspx>.

V. Federalism (Elections) → Day 2

a. COVID-Based Changes to 2020 Elections (Background: Election Law)

- i. (22) *** *Purcell v. Gonzalez*, 549 U.S. 1 (2006), <https://www.supremecourt.gov/opinions/06pdf/06A375.pdf>.
- ii. (22) David Landau, Hannah J. Wiseman & Samuel Wiseman, *Federalism, Democracy, and the 2020 Election*, 99 Tex. L. Rev. Online 96 (2020-2021), https://texaslawreview.org/wp-content/uploads/2021/02/Landau.TLRO_.V99.FINAL_.pdf.
- iii. (23) *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021), https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf.

b. COVID-Based Changes to 2020 Elections (COVID / Texas Election)

- i. (24) [[[*Texas Democratic Party v. Abbott*, 461 F. Supp. 3d 406 (W.D. Tex. May 19, 2020), [https://static.texastribune.org/media/files/4001c04084c9ef0b96c175ae392c3795/vote-by-mail-injunction.pdf?_ga=2.12571636.1936596417.1595220428-245475441.1593203950.\]\]\]](https://static.texastribune.org/media/files/4001c04084c9ef0b96c175ae392c3795/vote-by-mail-injunction.pdf?_ga=2.12571636.1936596417.1595220428-245475441.1593203950.)
- ii. (25) *** *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), <https://cases.justia.com/federal/appellate-courts/ca5/20-50407/20-50407-2020-06-04.pdf?ts=1591291878>.

c. COVID-Based Changes to 2020 Elections (COVID / Wisconsin Election)

- i. (26) [[[*Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020), [- iii. \(28\) *Democratic Nat'l Comm. v. Bostelmann*, 977 F.3d 639 \(7th Cir. 2020\), <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D10-08/C:20-2835:J:PerCuriam:aut:T:op:N:2592901:S:0>.](https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf.]]]
ii. (27) [[[<i>Democratic Nat'l Comm. v. Bostelmann</i>, No. 20-cv-249-wmc, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020), <a href=)

d. COVID-Based Changes to 2020 Elections (COVID / Pennsylvania Election)

- i. (29) *Republican Party of Pennsylvania v. DeGraffenreid*, 141 S. Ct. 732 (2021), https://www.supremecourt.gov/opinions/20pdf/20-542_2c83.pdf.

VI. Crime (Confrontation Clause) → Day 2

a. COVID / Confrontation Clause (Background: Confrontation Clause)

- i. (30) *Maryland v. Craig*, 497 U.S. 836 (1990), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep497/usrep497836/usrep497836.pdf>.

b. COVID / Confrontation Clause (COVID / Confrontation Clause)

- i. (31) *United States v. Crittenden*, No. 4:20-CR-7 (CDL), 2020 WL 4917733 (M.D. Ga. Aug. 21, 2020), (so that we all use the same page numbers, and because the case is not available in F. Supp. 3d, go to Westlaw, download the case using the download function, i.e., the downward pointing arrow at top right of the page).

VII. Religion → Day 3

a. COVID-based Regulation of Religion (Background: Substantial Burden Test)

- i. (32) *Sherbert v. Verner*, 374 U.S. 398 (1963), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep374/usrep374398/usrep374398.pdf>.]]]

b. COVID-based Regulation of Religion (Background: Non-Discrimination Test)

- i. (33) *Employment Division v. Smith*, 494 U.S. 872 (1990), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep494/usrep494872/usrep494872.pdf>.
- ii. (34) *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep508/usrep508520/usrep508520.pdf>.

c. COVID-based Regulation of Religion (Background: Non-Discrimination Test Applied)

- i. (35) *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020), https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf.]]]

d. COVID-based Regulation of Religion (Background: The Future of *Smith*)

- i. (36) *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2021), https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf.

e. COVID-based Regulation of Religion (COVID / Religion — Spring/Summer 2020)

- i. (37) ****Roberts v. Neace*, 958 F.3d 409 (6th Cir. 2020), <https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0144p-06.pdf>.
 - ii. (38) *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). https://www.supremecourt.gov/opinions/19pdf/19a1044_pok0.pdf.
 - iii. (39) *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020), https://www.supremecourt.gov/opinions/19pdf/19a1070_0811.pdf.
- f. COVID-based Regulation of Religion (COVID / Religion — Thanksgiving 2020)**
- i. (40) ****Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), https://www.supremecourt.gov/opinions/20pdf/20a87_4g15.pdf.
- g. COVID-based Regulation of Religion (COVID / Religion — Winter 2020-21 / Spring 2021)**
- i. (41) *Danville Christian Academy, Inc. v. Beshear*, 503 F. Supp. 3d 516 (E.D. Ky. Nov. 25, 2020), https://www.supremecourt.gov/DocketPDF/20/20A96/162186/20201201110917550_Filed%20Corrected%20Appendix.pdf (the E.D. KY. opinion is at Appendix B at this link).¹
 - ii. (42) *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527 (2020), https://www.supremecourt.gov/opinions/20pdf/20a96_e29g.pdf.
 - iii. (43) [[[*Monclova Christian Academy v. Toledo-Lucas County Health Department*, 948 F.3d 477 (6th Cir. 2020), <https://www.opn.ca6.uscourts.gov/opinions.pdf/20a0392p-06.pdf>.]]]
 - iv. (44) *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), https://www.supremecourt.gov/opinions/20pdf/20a151_4g15.pdf.

VIII. Travel → Day 3

a. COVID Travel Regulation

- i. (45) ****Bayley's Campground, Inc. v. Mills*, 985 F.3d 153 (1st Cir. 2021), <https://cases.justia.com/federal/appellate-courts/ca1/20-1559/20-1559-2021-01-19.pdf?ts=1611097206>.

IX. State Action → Day 3

a. COVID-based Speech Regulation by Private Companies

- i. (46) Alexandra Ellerbeck, “The Health 202: The Pandemic Intensified the Tech Censorship Debate,” *Washington Post (Online)*, June 7, 2021, <https://www.washingtonpost.com/politics/2021/06/07/health-202-pandemic-intensified-tech-censorship-debate/>.

¹ Reversed by *Commonwealth v. Beshear*, 981 F.3d 505 (6th Cir. 2020).

- ii. (47) *DeShaney v. Winnebago County*, 489 U.S. 189 (1989), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep489/usrep489189/usrep489189.pdf>.
- iii. (48) ****Biden v. Knight First Amendment Institute*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring), https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf.

X. Race → Day 4

a. COVID-based, Race-based Regulation (Background: *Brown v. Board*)

- i. (49) [[[*Brown v. Board*, 347 U.S. 483 (1954), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep347/usrep347483/usrep347483.pdf>.]]]

b. COVID-based, Race-based Regulation (Background: Racial Preferences — Contracting)

- i. (50) ****City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep488/usrep488469/usrep488469.pdf>.

c. COVID-based, Race-based Regulation (Background: Racial Preferences — Education)

- i. (51) *Parents Involved in Community Schools v. Seattle School District*, 555 U.S. 701 (2007), <https://www.supremecourt.gov/opinions/06pdf/05-908.pdf>.

d. COVID-based, Race-based Regulation (COVID / Racial Preferences)

- i. (52) ****Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), <https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0120p-06.pdf>

XI. Abortion → Day 4

a. COVID-based Abortion Regulation (Background: Undue Burden Test)

- i. (53) ****Planned Parenthood v. Casey*, 505 U.S. 833 (1992), <https://tile.loc.gov/storage-services/service/l1/usrep/usrep505/usrep505833/usrep505833.pdf>.

b. COVID-based Abortion Regulation (Background: Undue Burden Test Applied)

- i. (54) *Gonzales v. Carhart*, 550 U.S. 124 (2007), <https://www.supremecourt.gov/opinions/06pdf/05-380.pdf>.
- ii. (55) *June Medical Services, L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), https://www.supremecourt.gov/opinions/19pdf/18-1323_c07d.pdf.

c. COVID-based Abortion Regulation (COVID / Undue Burden Test)

- i. (56) ****Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020) (clinic wins), *cert. granted, judgment vacated*, 141 S. Ct. 1262 (2021),

<https://www.courthousenews.com/wp-content/uploads/2020/04/TNabortion.pdf>.

XII. Guns → Day 4

a. COVID-based Gun Regulations (Background: Second Amendment)

- i. (57) ****Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), [https://www.cadc.uscourts.gov/internet/opinions.nsf/deca496973477c748525791f004d84f9/\\$file/10-7036-1333156.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/deca496973477c748525791f004d84f9/$file/10-7036-1333156.pdf).

b. COVID-based Gun Regulations (COVID / Second Amendment)

- i. (58) ****Connecticut Citizens Defense League v. Lamont*, 465 F. Supp. 3d 56 (D. Conn. June 8, 2020) (later vacated on mootness grounds), https://ecf.ctd.uscourts.gov/cgi-bin/show_public_doc?2020cv0646-70.