

HAMLIN UNIVERSITY SCHOOL OF LAW

**CONSTITUTIONAL LAW I:
The Craft of Constitutional Argument**

*Weekend Section – Three Credits
Fall 2010*

SYLLABUS

Saturday
1:15 p.m. -- 4:15 p.m.
Room 103
Office Hours: Saturdays, Noon -- 1:00 p.m.

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Purpose and Scope: This course is designed to provide an introduction to the craft of American constitutional argument and the possibilities of American constitutional law for securing the vision of justice within “a more perfect union” declared in the Preamble to the United States Constitution. This involves development of expertise in the *practical skill of composing and performing constitutional argument* in a way that is grounded in a rich contextual understanding of the history and theory of constitutional argument and adjudication. The major focus of our study is to gain grounding and develop skill in *constitutional interpretation* as the practice of a *rhetorical art*.¹ Throughout the course, students will be encouraged to develop their own critical understanding of American constitutional interpretation as a particular expression of the quest to secure the meaning of justice under the constitution.

The course will be taught through *extended class discussion of the materials in the casebook, and Instructor’s Study Guide and Casebook Supplement*, around a set of readings that include the text of the United States Constitution, opinions of the United States Supreme Court, and non-judicial public officials, along with documents and notes related to these sources, as well as to American constitutional history. Written hypothetical case study problems will provide an opportunity to develop skill in applying the principles and rules of constitutional doctrine in concrete everyday settings likely to arise in the courts. Beyond discussion of the *rules of Constitutional Law* that emerge from the cases, class discussion will be devoted to critical engagement with the *interpretive issues* that arise in the performance of constitutional argument so that students can gain expertise in performance of such argument themselves. In our discussion we shall take context seriously as we explore the range of choices of interpretive strategy that might be made in approaching the text, including the choices made by members of the Court from time to time.

¹ For an extended discussion of constitutional law as a rhetorical art, illustrated through the development of substantive due process cases decided by the Court in the 20th and early 21st centuries, see Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 Albany L. Rev. 1473 (2007).

The doctrinal concerns of the course range over a wide variety of principles related to federalism and constitutional rights as limits on governmental power with on due process under the Fifth and Fourteenth Amendments. Extended treatment of constitutional rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment are taken up in Constitutional Law II.

Course Organization and Method: The organization of the course generally follows the structure of the primary text for the course: Paul Brest, Sanford Levinson, J. M. Balkin, Akhil Reed Amar & Reva Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials* (5th ed. Aspen L. & Bus. 2006) as set forth on pages xxix-xxxiv; 1-95; 136-471; 485-736; 795-887; 893-915; 1339-1592. The structure of this volume takes up various themes in the development of constitutional doctrine in *historical perspective*. This means that students should expect that their understanding of various key themes of constitutional doctrine will develop over time since our study will roughly follow the development of these themes in American constitutional history, rather than taking them up thematically without reference to historical development. This approach has great value and poses a distinct challenge.

The value of this historically conceptualized and contextually-sensitive approach is found in the fact that *constitutional doctrines are dynamic*, despite the presence of enduring features that will soon become apparent. In other words, the development of American constitutional doctrine is always open to evolving further and taking new and surprising turns in that development. The future shape and content of constitutional doctrine will, no doubt, reflect the past, but it may also embark on variant pathways not always anticipated by those who participated in the cases we shall study. Indeed, the students of today may well become the agents of such change in the future.

The challenge posed by an historically conceptualized approach to doctrine means that students will need to be attentive to the task of *synthesizing the development of constitutional doctrine* into a comprehensive statement of what these principles have come to mean today, realizing that they may develop further in the years ahead. This is what lawyers do when they read cases in everyday practice, but it is not how many casebooks are organized. Many typical case books for law study are organized thematically, with little, if any attention, to the historical development of these themes. The casebook for this course is not organized in that manner, although, as you will see there are some exceptions to this, especially as we read cases decided in recent years.

Finally, as the first reading assignment for the course should make clear (an essay by the instructor entitled *Constitutional Argument & the Creation of Meaning: Reflections on the Study and Practice of American Constitutional Law*), the approach taken by the instructor to these materials proceeds from an understanding of the activity of constitutional argument as one in which *constitutional lawyers participate in the creation of meaning within American political society* whether they think they do or not. This theoretical theme will be explored throughout the course. One of the purposes of that exploration will be to critically examine and reconsider conventional categories such as “conservative”, “liberal”, “strict constructionist”, and “activist”

that are used today to classify the way particular judges approach the task of constitutional decisionmaking. In the process we shall ask whether there might be different categories for characterizing how judges approach their task, and whether such ways might be more useful in our work as constitutional lawyers.

Course Requirements: The requirements for this course include (1) reading, (2) regular visits to the course website, (3) class discussion preparation & attendance, (4) observance of the technology policy for the course, and (5) a final examination. Details for each of these five requirements are set forth below.

1. **Required Reading:** Students are expected to *prepare the required reading materials for discussion in advance of the class session for which they are scheduled*. Required reading assignments will be drawn from two sources which are available for purchase in the law school bookstore: **(1)** a casebook on American constitutional law— Paul Brest, Sanford Levinson, J. M. Balkin, Akil Amar & Reva Siegel, *Processes of Constitutional Decisionmaking – Cases and Materials, 5th Edition* (Aspen Publishers 2006); and **(2)** a study guide and casebook supplement prepared by the instructor—Howard J. Vogel, *The Craft of Constitutional Argument: A Study Guide for Constructing a “Working Synthesis” for the Practice of Legal Analysis and Argument as Rhetorical Art -- with Casebook Supplement for Constitutional Law I* (Duplicated Fall 2010 Edition).

The *Weekly Reading Assignments* for the course are set out on pages 6-7 of this syllabus.

Highly Recommended Optional Reading Materials ON RESERVE in the Law School Library -- (1) For an excellent comprehensive, beautifully written study of the Constitution employing the resources of law, history and political science see Akil Reed Amar, *America’s Constitution: A Biography* (Random House 2005); and **(2)** For an *extended doctrinal discussion* of all of the major constitutional law doctrines studied in Constitutional Law I & II, the one-volume text by Erwin Chemerinsky, *Constitutional Law: Principles and Policies, Third Edition* (Aspen Publishers 2006) is the best choice.

Recommended Collateral Reading for Additional Historical Perspective -- (1) For the standard oft-cited reference on the proceedings of the constitutional convention of 1787 *see* Max Farrand, editor, *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 3 Vols., plus supplement edited by James H. Hutson 1911, 1987); and **(2)** For an excellent anthology of the public debate carried on in the so-called “Federalist Papers” and responses to them *see* Bernard Bailyn, ed., *The Debate on the Constitution*, 2 volumes (Library of America 1993).

2. **Web Pages/On-Line Virtual Classroom:** A special website on the internet, using the TWEN technology of the West Group, has been established for this course. The website is open 24 hours a day, seven days a week. This site has been set up for the following purposes: (1) on-line distribution of study aids and case study hypotheticals, (2) discussion with the instructor and

other members of the course on topics and themes of the course, and (3) announcements regarding any changes to the calendar or assignments required for the course

STUDENTS IN THIS COURSE ARE REQUIRED TO LOG ON AND REGISTER AT THE WEB ADDRESS FOR THE COURSE. Students should register for the website by going to <http://lawschool.westlaw.com> with their Westlaw password. If you have not already received your Westlaw password, or have forgotten it, please contact the Computer Services/Reference Librarian at the Hamline Law Library. There is also a password for the course site that will be sent to each student by the instructor via e-mail.

It is particularly important for students to *check the website frequently and no less than weekly*, to receive additional course materials (study aids and case study hypothetical problems), and any updates needed to the reading and discussion schedule for the course, as well as to monitor the on-line discussion at the website which provides a forum for conversation about themes that emerge in the classroom throughout the semester.

3. Class Discussion Preparation & Attendance: Students are expected to *prepare for and actively participate in class discussion*. “Preparation,” in the context of this course, means that the student has read the reading assigned for the day, in advance of class, and is ready to actively participate in class discussion on that reading when called upon in class to do so. *Students who are unprepared to actively participate in class discussion when called upon shall be required to submit to the instructor a written memo of 1-3 pages in length in which they discuss their constructive response to the issues raised by the reading assignment for the day.*

The course will meet thirteen times, for 3 hours, once each week, over a seventeen week period. One 15 minute break will be given during each weekly session. The class will not meet on the following Saturdays: September 4th; October 16th; October 23rd; and November 27th. The first session of the course will be held Saturday, August 14th and the last will be held Saturday December 4th, which is a make-up class.

Students are expected to attend the full session of each class session scheduled for the course. Students should review the full text of the Attendance Policy as set forth in Rule AR-108 of the Hamline University School of Law Academic Rules posted on the Registrar’s page of the Hamline University School of Law website. In compliance with that policy, the instructor will maintain a weekly record of attendance.

Students who accumulate absences totaling SIX SEMESTER HOURS (e.g. two Saturday 3 hour sessions of class time) are expected to MEET WITH THE INSTRUCTOR to discuss problems in attending class. Note that in this course MORE THAN SIX SEMESTER HOUR ABSENCES are considered EXCESSIVE and constitute grounds for withdrawal from the course, unless extenuating circumstances exist and arrangements are made with the instructor to address the missed work.

4. *Classroom Technology Policy:* You may use laptop computers or other electronic devices in class to take notes and access course related materials. You should not use your laptop or electronic devices for other purposes.

In addition to the usual courtesies and respect due to your classmates, please refrain from text-messaging and email, using cell phones, pagers, or any other communication device. Refrain also from displaying wallpaper, screen savers, or other material on your computer screen that can reasonably be expected to distract your classmates.

5. *Examination & Criteria for Grading:* The entire grade for the course will be based on a *closed book* examination to be given at the end of the semester on a date and at a time to be announced by the Registrar. A copy of the United States Constitution will be provided to each student at the time of examination for use during the examination. You may not bring any materials to the examination other than writing instruments or your computer if you type the examination. The examination will test your ability to address doctrinal issues in hypothetical problems as well as issues of interpretive theory. Further details on the examination will be announced in class later in the semester.

Grade Reports: Grade Reports are released to students only by the Registrar.

WEEKLY READING ASSIGNMENTS

Modifications to the order set out below as required by the flow of class discussion, if any, will be posted as needed on the TWEN website for the course.

Key to Abbreviations: Pages assigned from the casebook for the course, Paul Brest, Sanford Levinson, J. M. Balkin, Akil Amar & Reva Siegel, *Processes of Constitutional Decisionmaking – Cases and Materials, 5th Edition* (Aspen Publishers 2006), are indicated by the initials “CB”. Pages assigned from the *Study Guide & Casebook Supplement* prepared by the Instructor are indicated by the initials “SG”.

PART ONE: THE MEANING OF CONSTITUTIONAL POWER AND CONSTITUTIONAL RIGHTS IN HISTORICAL PERSPECTIVE - 1787 - 1937

Week 1 August 14th - READ: CB xxxi - xxxvi; SG 4-45; CB 19-51 to “A, The Reaction to McCulloch”

Week 2 August 21st - READ: SG 46-53; Review and brief *McCulloch* (CB 38-51) with Study Guide briefing template (SG 50); CB 51 from “A. The Reaction to McCulloch” - 95; 136 from “IV. The ‘Marshall Court’”-168 to “VIII. Regulation etc.,” [OPTIONAL as Background for Instructor’s Comment on “The Power of the Judiciary: Judicial Review, Jurisdiction & Justiciability,” CB 124 from “C. The Precedents etc. - 136 to “IV. ‘The Marshall Court,’” and CB 887 from “VI. Some Limits etc.” - 892 to “Note: Presidential Impeachment”]

Week 3 August 28th - READ: CB 168 from “VIII. Regulation etc.”-212 to “II. Slavery”; SG Tab A; CB 212 from “II. Slavery” -225

LABOR DAY HOLIDAY - No Class - September 4th

Week 4 September 11th - READ: CB 226-299

Week 5 September 18th - READ: CB 301-385 to “II. Creating etc.”

Week 6 September 25th - READ: CB 385 from “II. Creating etc.”-471 to “VI. Constitutional etc.”; [OPTIONAL as Background for Instructor’s Comment on Amending the Constitution during the Progressive Era, CB 471 from “VI. Constitutional etc.” - 483

PART TWO: THE CONTEMPORARY DOCTRINAL MEANING OF CONSTITUTIONAL POWER AND CONSTITUTIONAL RIGHTS -- 1937 - 2010

Week 7 October 2nd - READ: CB 485-493; SG Tab B; CB 494-497; SG Tabs C & D; CB 499-570 to “3. Reconstruction etc.”

Week 8 October 9th - READ: CB 570 from “3. Reconstruction etc.”-649 to “III. Affirmative etc.”

CLASS CANCELLED - October 16th

FALL BREAK - No Class - October 23rd

Week 9 October 30th - READ: CB 649 from “III. Affirmative etc.”-736 to “V. The Executive etc.”

Week 10 November 6th - READ: CB 795 from “C. The Veto etc.” - 871 to “3. Military etc.”; SG Tab E; CB 871 from “3. Military etc.” - 878 to “Note: Torture etc.”; SG Tab F; CB 878 from “Note: Torture etc.” - 887 to “VI. Some Limits etc.”

Week 11 November 13th - READ: CB 893-915 to “3. The Fourteenth etc.”; 1339-1419 to “C. Decisions etc.”

Week 12 November 20th - READ: CB 1419 from “C. Decisions etc.”-1465 to “VI. Sexuality etc.”; SG Tab G; CB 1465 from “VI. Sexuality etc.” - 1505 to “B. Sexual etc.”

THANKSGIVING HOLIDAY - No Class - November 27th

Week 13 December 4th MAKE-UP CLASS - READ: CB 1505 from “B. Sexual etc.”-1592

EXAMINATION to be set for a scheduled date to be announced by the Registrar