

HAMLIN UNIVERSITY SCHOOL OF LAW

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

*Section 2 – Three Credits
Spring 2010*

SYLLABUS

Tuesday & Thursday
1:00 p.m. -- 2:15 p.m.
Room 101W

Office Hours: Tuesday - Thursday 2:30 p.m. – 4:00 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. Our study will focus on gaining an understanding of the *doctrinal principles* related to *federalism* and *constitutional rights* as a limit on governmental power. Within this scope, our study of constitutional rights will place emphasis 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: Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers 2009). This volume takes up Constitutional Law doctrine *thematically* with attention to *historical context* surrounding the development of Constitutional Law doctrine. It does so by gathering three types of materials: major case opinions, excerpts from secondary cases, and short essays by the author that provide important information on the context of the cases and the development of Constitutional Law doctrine over time.

Classroom Activity: The major focus of our study is to gain grounding and develop skill in *constitutional interpretation* as the practice of a *rhetorical art*. 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. To accomplish this, the course will be taught through *extended class discussion of the materials in the casebook, and the Instructor’s*

Supplement with occasional extended commentary by the instructor. These readings include (1) the text of the United States Constitution, (2) opinions of the United States Supreme Court, and (3) essays and other documents that offer contextual information on the Constitutional text and cases under discussion. 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 made by members of the Court from time to time.

The value of a 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 new 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.

Thus, 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.

As the first reading assignment for the course (an essay by the instructor entitled *The Craft of Constitutional Argument & the Creation of Meaning: Reflections on the Study and Practice of American Constitutional Law as a Rhetorical Art*), should make clear, 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 underlying theme, and its implications for the lawyer's professional identity and responsibility, will be explored throughout the course. A major purpose of that exploration will be to critically examine and reconsider conventional categories such as "conservative," "liberal," "strict constructionist," and "interventionist" that are used today to classify the way particular judges approach the task of constitutional decision making. 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 to 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— Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers 2009); and
- (2) a course supplement prepared by the instructor—Howard J. Vogel, *The Craft of Constitutional Argument: Study Guide & Casebook Supplement for Constitutional Law I* (Duplicated Spring 2010 Edition).

The reading assignments for the course are set out in weekly segments in the “Order of Reading & Discussion Assignments” found on pages 6-8 of this syllabus.

Class Discussion Focus: The specific focus of class discussion for our class sessions will be posted each week on the website of the course. (see “2. Web Pages” below) By posting this each week, the focus can be tailored to follow the actual flow of class discussion. Major adjustments to the published syllabus, as needed, if any, will be posted on the website for the course.

Highly Recommended Collateral Reading—For an excellent aid in preparing generally for law school examinations see the study guide by Richard Michael Fischl & Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* (Carolina Academic Press 1999).

Recommended Optional Study Aid—For a doctrinal summary 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.

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) posting each week of the “Class Discussion Focus” for upcoming class sessions (see 1. “Required Reading” above), (2) on-line distribution of study aids and case study hypotheticals, (3) discussion with the instructor and other members of the course on topics and themes of the course, (4) an “Assignment Drop Box” for submission of the self-reported certificate of attendance noted in “3. Class Discussion Preparation & Attendance” below, and (5) 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 the weekly “*Class Discussion Focus*,” 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, including the *Class Discussion Focus* posted each week at the website for the course, 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 twenty-eight times, for 1-1/4 hours, twice each week, during the semester. The class will not meet on Tuesday & Thursday, March 30 & April 1 which are set aside for a Spring Break Week. The first session of the course will be held Tuesday, January 19th and the last will be held Thursday, April 29th.

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, ***students are required to keep a daily record of their attendance*** in Constitutional Law I. Students shall report of their attendance on the "Certificate of Attendance" for available under the Supplemental Course Materials" link at the website for the course. This certificate shall be filed electronically at the "Assignment Drop Box" link at the website for the course on the following dates: March 1st, April 1st, and May 1st.

Students are expected to take responsibility for notifying the instructor if and when the number of absences, if any, reaches six semester hours. (For purposes of this report, each session of the class is the equivalent of 1-1/4 semester hours.) If the number reaches SIX SEMESTER HOURS (two 1-1/4 hour sessions) of absences, students 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 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.

ORDER OF READING & DISCUSSION ASSIGNMENTS

A Note on Course Organization, Reading Assignments and Class Discussion:

The organization of the course generally follows the structure of the primary text for the course: Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers 2009) as augmented by the Course Supplement prepared by the Instructor for the course.

Reading assignments for each session of the course are set out below. Our classroom discussion will focus primarily on the cases collected in the primary text for the course. To prepare for class discussion students should brief the cases found in the reading materials assigned for each session. In addition to our discussion of the cases, from time to time throughout the course, our discussion will also include analysis and argument on legal issues raised by hypothetical problems, called “Case Study Problems”, that we shall take up in class. The majority of these problems will be distributed in advance of class discussion in written form through the TWEN website for the course. A few, however, maybe distributed in class on the day on which they will be discussed.

Beyond the cases and hypothetical problems we shall discuss, students should be prepared to discuss any themes or subjects found in the reading assignments, including especially the contextual essays prepared by the casebook author found throughout the materials in the casebook. *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.*

Calendar Note: The course will meet twenty-eight times, for 1-1/4 hours, twice each week, during the semester. The class will not meet on Tuesday & Thursday, March 30 & April 1 which are set aside for a Spring Break Week. The first session of the course will be held Tuesday, January 19th and the last will be held Thursday, April 29th.

Key to Abbreviations: Pages assigned from the primary text for the course are indicated by the initials “CB”. Pages assigned from the *Study Guide & Casebook Supplement* prepared by the Instructor are indicated by the initials “SG”.

I. THE POWER & LIMITS OF GOVERNMENT: Foundations of the Craft of Constitutional Argument -- McCulloch v. Maryland

WEEK 1—JANUARY 19 & 21-READ: CB xli-xlix (Original Constitution of 1787) to “Amendment I [1791]”; CB l (5th Amendment of 1791); CB lii (14th Amendment of 1868); CB 127-141 to “B. The Commerce Power”; SG 4-43

II. JUDICIAL POWER & LIMITS: Judicial Review, Jurisdiction, & Justiciability

WEEK 2—JANUARY 26 & 28-REVIEW: SG 24-43; READ: CB 1-34 to “2. Congressional Limits;” [OPTIONAL READING as background for Instructor’s Extended Comment on “Jurisdiction & Justiciability,” CB 34-125]

III. CONGRESSIONAL POWER & LIMITS: Commerce, Tenth Amendment; Taxation, Spending & Reconstruction of the Union

WEEK 3—FEBRUARY 2 & 4-READ: CB 141-216 to “b. Does the Tenth Amendment Limit Congress’s Authority?”

NO CLASS SEPTEMBER 5 – Labor Day Holiday

WEEK 4—FEBRUARY 9 & 10-READ: CB 216-263 to the end of Justice Souter’s dissent; SG 44-83

IV. PRESIDENTIAL POWER & LIMITS: War Powers; Executive Privilege; Non-Delegation; Appointment & Legislative Veto

WEEK 5—FEBRUARY 16 & 18-READ: 317-334 to “B. The Authority of Congress to Increase Executive Power”; CB 377 from “3. War Powers” - 420 to “F. Checks on the President;” [OPTIONAL READING as background for Instructor’s extended comment on “Presidential Power & the Checks on the President,” CB 334-377; 420-431]

V. FEDERALISM -- THE CLASH OF STATE & FEDERAL POWER: Preemption; Dormant Commerce Clause; Privileges & Immunities under Article IV

WEEK 6—FEBRUARY 23 & 25 – READ: CB 433- 459 to “3. The Contemporary Test for the Dormant Commerce Clause”

WEEK 7—MARCH 2 & 4 – READ: CB 459-501 to “e. Exceptions to the Dormant Commerce Clause”

WEEK 8—MARCH 9 & 11 – READ: CB 501 -511; SG 84-87; CB 512-521

VI. FUNDAMENTAL & OTHER RIGHTS UNDER DUE PROCESS AS A LIMIT ON GOVERNMENT POWER: The Problem of the Color Line; Incorporation of the Bill of Rights; State Action, Economic Liberty; Contract Clause; Takings; Non-Economic Liberty

WEEK 9—MARCH 16 & 18--REVIEW: SG 84-87; READ: CB 523-526 to “A False Start in Applying the Bill of Rights to the States; SG 88-91; CB 749-753;” SG 92-99; CB 754-755; CB lii-liii (13th, 14th & 15th Amendments of 1865, 1868 & 1870); SG 100-106; CB 526-536 to “3. The Incorporation of the Bill of Rights and the Due Process

Clause of the 14th Amendment;” CB 765 from “Laws Requiring the Separation of the Races” - 773 to “The Invalidation of Segregation in Other Contexts”

WEEK 10—MARCH 23 & 25 – READ: CB 536-549 to “Palko v. Connecticut;” SG 107-112; CB 540 from “Adamson v. California”-552 to “2. The Exceptions to the State Action Doctrine;” [OPTIONAL READING as background for Instructor’s extended comment on “Applying the State Action Doctrine to ‘Private’ Conduct,” CB 552-599]

NO CLASS—MARCH 30 & APRIL 1-SPRING BREAK

WEEK 11—APRIL 6 & 8 – READ CB 601-663 to “D. The Takings Clause;” [OPTIONAL READING as background for Instructor’s extended comment on “Takings,” CB 663 - 715]

WEEK 12—APRIL 13 & 15 – REVIEW: United States v. Carolene Products as found at CB 626-628. READ: CB 943 – 983 to “Justice Harlan, concurring in the judgment”; SG 113-114; CB 983-988 to “3. The Right to Abortion”

WEEK 13—APRIL 20 & 22 – READ: CB 988-1040 to “E. Constitutional Protection for Medical Decisions”

WEEK 14—APRIL 27 & 29 – READ: CB 1040-1079 to “Restrictions on Foreign Travel”

FINAL EXAMINATION—DATE & TIME TO BE ANNOUNCED BY THE REGISTRAR