

HAMLIN UNIVERSITY SCHOOL OF LAW

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

*Weekend Section – Three Credits
Fall 2011*

S Y L L A B U S

Preliminary Draft June 7, 2011

Saturdays

1:15 p.m. -- 4:15 p.m.

Room 103

Office Hours: Sat. 11:30 a.m. -- 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 within the context of the specific doctrinal concerns of the course. These specific doctrinal concerns focus on a wide variety of principles related to federalism and constitutional rights as limits on governmental power with 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.

There is no prerequisite for the course.

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

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) available at the TWEN site for the course at the link entitled “Further Reading”.

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 paper-bound printed sources, as well as digitized sources on-line at the TWEN site for the course

The paper-bound materials are available for purchase in the law school bookstore. They are: **(1)** a casebook on American constitutional law— Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers 2009); and **(2)** *2011 Supplement to Erwin Chemerinsky, Constitutional Law* (Aspen Publishers 2009). **NOTE!:** At the time this syllabus was prepared, the 2011 supplement had not yet been published. When it is published, this syllabus will be amended to incorporate material, as needed from that supplement.

The on-line sources are available at the TWEN site for the course. They are: **(1)** An on-line set of supplementary materials prepared by the instructor will be distributed at the “*Instructor’s Course Supplement*” link; **(2)** An on-line set of study aids, including a guide for the practice of constitutional analysis and argument prepared by the instructor that we shall devote time to virtually every session, will be distributed under the “*Study Guide*” link; and **(3)** A series of hypothetical case study problems to be taken up from time to time in class discussion will be distributed at the “*Case Study Problems*” link. Students will need to log on to the TWEN site for the course at least weekly to gain access to these materials as they are distributed from time to time during the course of the semester.

The schedule of *Weekly Reading Assignments & Course Outline of Discussion Themes* for the course are set out on pages 6-8 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 Akhil 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, Fourth Edition* (Aspen Publishers 2011) 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 The Debate on the Constitution*, 2 volumes (Bernard Bailyn, ed., 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 additional course materials, including 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, 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 3rd (Labor Day Holiday); October 22nd (Fall Break); and November 26th (Thanksgiving Holiday). The first session of the course will be held Saturday, August 13th and the last will be held Saturday November 19th.

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 three-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.

Examination & Grade Reports: 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 and historical development of both doctrine and theory. Further details on the examination will be announced in class later in the semester. Grade Reports are released to students only by the Registrar.

WEEKLY READING ASSIGNMENTS & COURSE OUTLINE OF DISCUSSION THEMES

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. Some of these problems will be distributed in advance of class in written form through the TWEN website for the course.

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 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 3rd (Labor Day Holiday); October 22nd (Fall Break); and November 26th (Thanksgiving Holiday). The first session of the course will be held Saturday, August 13th and the last will be held Saturday November 19th.

Key to Abbreviations

- (1) Pages assigned from the primary text for the course, Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers 2009), are indicated by the initials “**CB**”.
- (2) Pages assigned from the casebook author’s supplement for the casebook, *2011 Supplement to Erwin Chemerinsky, Constitutional Law* (Aspen Publishers 2009), will be added later and indicated by the initials “**CB Supp**”. **NOTE!:** At the time this syllabus was prepared, the 2011 supplement had not yet been published. When it is published, this syllabus will be amended to incorporate material, as needed from that supplement.
- (3) Assignments from the on-line set of supplementary materials prepared by the instructor will be posted from time to time at the “*Instructor’s Course*”

Supplement” link of the TWEN site for the course and are indicated below by the initials “**TWEN Supp**”.

- (4) Assignments from the on-line set of study aids prepared by the Instructor will be posted from time to time at the “*Study Guide*” link of the TWEN site for the course and are indicated below by the initials “**TWEN SG**”.

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

WEEK 1—AUGUST 13-READ: CB xli-xlix (Original Constitution of 1787) to “Amendment I [1791]”; CB l (5th Amendment of 1791); CB lii (14th Amendment of 1868); TWEN Supp Tab A; CB 127-141 to “B. The Commerce Power”; TWEN SG 4-13

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

WEEK 2—AUGUST 20- REVIEW: TWEN SG 14-17; READ: CB 1-34 to “2. Congressional Limits;” CB 103-125 [OPTIONAL READING as background for Instructor’s Extended Comment on “Jurisdiction & Justiciability,” CB 34-103]

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

WEEK 3—AUGUST 27-READ: CB 141-216 to “b. Does the Tenth Amendment Limit Congress’s Authority?”

NO CLASS SEPTEMBER 3 –Labor Day Holiday

WEEK 4—SEPTEMBER 10-READ: CB 216-263 to the end of Justice Souter’s dissent

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

WEEK 5—SEPTEMBER 17-READ: CB 317-334 to “B. The Authority of Congress to Increase Executive Power”; CB 340-354; 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 334-339; 355-77; 420-431]

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

WEEK 6—SEPTEMBER 24 – READ: CB 433- 459 to “3. The Contemporary Test for the Dormant Commerce Clause”

WEEK 7—OCTOBER 1 – READ: CB 459--511; TWEN Supp Tab B; 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 8—OCTOBER 8--REVIEW: TWEN Supp Tab B; READ: CB 523-526 to “A False Start in Applying the Bill of Rights to the States; TWEN Supp Tab C; CB 749-753;” TWEN Supp Tab D; CB 754-755; CB lii-liii (13th, 14th & 15th Amendments of 1865, 1868 & 1870); TWEN Supp Tab E; 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”; TWEN Supp Tab F

WEEK 9—OCTOBER 15 – READ: CB 536-539 to “Palko v. Connecticut;” TWEN Supp Tab G; 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 OCTOBER 22-Fall Break

WEEK 10—OCTOBER 29 – READ CB 601-663 to “D. The Takings Clause;” [OPTIONAL READING as background for Instructor’s extended comment on “Takings,” CB 663 - 715]

WEEK 11—NOVEMBER 5 – REVIEW: United States v. Carolene Products as found at CB 626-628. READ: CB 943 – 983 to “Justice Harlan, concurring in the judgment”; TWEN Supp H; CB 983-988 to “3. The Right to Abortion”

WEEK 12—NOVEMBER 12 – READ: CB 988-1040 to “E. Constitutional Protection for Medical Decisions”

WEEK 13—NOVEMBER 19 – READ: CB 1040-1079 to “Restrictions on Foreign Travel”

NO CLASS NOVEMBER 26-Thanksgiving Holiday

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