

Fall, 2014

SYLLABUS: Part 1

Read this document with care when you receive it. You are responsible for the contents.

Course Objectives

The goals of this course are to teach you to:

- A. Craft constitutional law arguments of the highest quality by the standards of the legal profession, with the aim of persuading judicial decisionmakers. As in your other courses, this will require you to (1) master the relevant policy, text, history, and precedent and (2) integrate those elements into an intellectually satisfying whole; and
- B. Provide appropriate advice to clients whose problems involve constitutional law issues.

Communications

My office is in room 212, ext. 35167, LAWEMF@Hofstra.edu. My assistant is Joyce Cox, ext. 36339, Joyce.A.Cox@hofstra.edu. You will find her helpful on all administrative matters relating to the course and are encouraged to contact her in the first instance regarding them. I sometimes hand out course materials and announcements during class sessions; Joyce will be able to provide extra copies if you need them. Joyce is also closely aware of my schedule, including the best way to contact me at any particular time, so you should make appointments through her.

I have created a page for this course on the TWEN service. Please register for it as promptly as possible. Go to Lawschool.Westlaw.com, click on TWEN, choose Drop/Add Course, and pick this course. Once you have registered, you will have access to syllabi, course materials, and announcements, as well as the ability to have discussions with other class members. (I will monitor these as a matter of interest, but not feel any strong obligation to intervene). All technical questions regarding computer communications should be addressed to the Help Desk, lawhelp@hofstra.edu, x34192.

You are responsible for the contents of notifications distributed by any of the foregoing methods, as well as the information contained in this and subsequent parts of the course syllabus.

Examinations and Grading

This is a one semester, 3-credit course (although many of you will also have me for the further 3-credit course, Constitutional Law II, in the spring and will be expected to remember then what you learn now). Constitutional Law I will be graded by a closed-book examination at the end of the first semester. I may or may not circulate the fact pattern a few days in advance. I will advise you of my intentions in that regard at the end of the semester.

You are also required to take two of the three Review Exercises that will be administered this semester. There is a fuller description in the handout entitled AReview Exercises@ at the beginning of the Appendix. **Read it now. You will find me notably unsympathetic later to any crises arising from your failure to do so.**

Attendance Policy

I will announce and implement a system for verifying your class attendance. Any attempt to subvert the accurate recording of student attendance during each class hour, by falsification of sign-in sheets or otherwise, is a violation of the Code of Academic Conduct.

You may miss no more than six class hours this semester.

Accommodations may be made for students who must be absent for religious reasons and in cases of truly compelling hardship. In the event that you believe yourself to be in such circumstances, you should communicate with Joyce. I will do nothing respecting these issues until late in the semester. At that point I will review the file of anyone with more than the prescribed number of absences and determine whether to grant any excuses that may have been sought or instead to forward the file to the Office of Student Affairs with a view to denying you credit for the course.

Course Materials

The course materials referred to in the assignments are:

Stone, Seidman, Sunstein, Tushnet, Constitutional Law (Little Brown, 7th ed. 2013) ("Case Book"), along with the current Supplement ("Supp.").

Farber & Sherry, A History of the American Constitution (West, 2d ed. 2005) ("Fa&Sh")

Additional readings are contained in an Appendix that will be distributed in several volumes over the course of the semester (abbreviated herein as AApp.@). We will begin using these materials immediately, so you should obtain them as soon as they are available.

Additional Resources

There are extensive supplemental materials for this course, only some of which are described specifically below. You are encouraged to browse and to review the materials summarized at the end of the Appendix handout entitled The Constitution in Historical Perspective.

Books are available at the reserve desk of the library. The other supplemental materials cited in this and other handouts may be accessed online either through the hyperlink provided or, if none is, as a .pdf file at the course TWEN site.

For those of you who feel in need of some remedial civics, I have placed on reserve Magruder's American Government.

For overall chronological orientation as the course proceeds, I recommend Urofsky & Finkelman's two-volume work, A March of Liberty: A Constitutional History of the United States (on reserve). Written on the level of a college textbook, this proceeds one step at a time from the Magna Charta through the present. As you will see, in discussing cases I will frequently refer to what was happening in the country at the time. If those references cause you to feel a need to brush up on your American history, this is a good place to start.

A reliable scholarly summary of the founding period is Wood, Empire of Liberty, A History of the Early Republic 1789-1815 (2009) (on reserve)

The legal treatise that is most likely to be in harmony with my approach to any particular issue is Tribe, American Constitutional Law (on reserve). Among the many hornbooks available, my choice is Chemerinsky, Constitutional Law: Principles and Policies (Aspen). If you must have a study aid, try McGreal & Eads, Questions and Answers: Constitutional Law (Lexis-Nexis).

For those who wish to dig further, Making of Modern Law. U.S. Supreme Court: Records & Briefs, 1832-1978 is available on the law library website under Online Resources - Federal Information-Judiciary. Records and briefs for more recent cases are on Westlaw and in many cases also held by the law library in microform. In addition, a very large number of Supreme Court oral arguments since 1957 may be heard at the Oyez website, www.oyez.org. A listing of these arguments is on reserve in the library. Your casebook also offers online recorded interviews with the players in some of our cases. Access directions are contained on a card at the front of the book.

Information About Assignments

The materials for each assignment are listed in the order in which you should read them.

Except as otherwise indicated, you are responsible for all the material in the assigned pages, whether or not specifically discussed in class. This includes (a) the notes and problems, (b) all of the terminology appearing in the cases, and (c) the constitutional, statutory and other materials referred to in the assigned pages. And, of course, you need to know the basis (constitutional and statutory) of subject matter jurisdiction in each case that we read. On this point, as on many others, you may find that much confusion disappears (and new insights emerge) if you take the time to read the unedited version of the case.

Unless otherwise instructed in class or below, you may assume that we will cover one assignment per class hour. This means that on days when we meet for two class hours, two assignments are due.

Coverage Schedule for this Installment of Syllabus

Because of the Labor Day holiday, the coverage plan for the first month is a bit less regular than usual. (It also gives you some extra reading time; take advantage).

August 25 -- First hour, coverage of Asst. 1
Second hour, first of two hours of coverage of Asst. 2.

August 27 – Second of two hours of coverage of Asst. 2.

[No class on Monday, September 1]

September 3 – Showing of videotape (likely to run a few minutes beyond end of period).

September 8 – Both hours devoted to Assignment 3.

September 10 – Assignment 4.

September 15 – First hour, coverage of Assignment 5.
Second hour, first of two hours of coverage of Assignment 6.

September 17 – Second of two hours of coverage of Assignment 6.

September 22 – First hour, coverage of Assignment 7.
Second hour, to be announced. (There will be a second installment of syllabus in circulation by then).

Reading Assignments

I. The Historical Context

Asst. 1. Read App. Pg. 1 (“Review Exercises”), App. Pg. 2-3 (“Where We Are Going”) and, with care, the Constitution through the 12th Amendment for the first class hour. Pay attention to the dates of adoption of the provisions you are reading. Then read App. Pg. 4, which is an outline of the subjects I intend to cover during the first hour on August 25.

Note: I encourage you to start early on the next assignment, which (a) some of you may find fairly heavy going, and (b) is well worth reading more than once; it introduces a number of themes that will recur throughout the course.

Asst. 2. Skim App. Pg. 5-14; Read Fa&Sh xvii-25; Case Book 7-25; App. Pg. 15-16 (Scalia, AHow Democracy Swept the World@), App. Pg. 17 (Goldberg, AA Device for the Extermination of Moths@). If you want to amuse yourself with a more modern example of this latter idea try <http://www.youtube.com/watch?v=g2VCfOC69jc> Those of you with enough spare time to explore the background of that clip will find Rube Goldberg cited at 4:42 of <http://www.youtube.com/watch?v=Kh4zWeUDW-E>

And for a local version of the same concept there is

<http://video.nytimes.com/video/2012/01/06/nyregion/100000001266018/brooklyn-rube-goldberg.html?ref=nyregion>

Notes: As indicated above we will cover this material in two class hours: the second hour of August 25 and the hour of August 27. I have outlined these two hours for you in sections (A) and (B) respectively of App. Pg. 18-19.

You will find valuable additional insights on the topics of this assignment in the following, all of which are available as a .pdf on the TWEN site: Jones, Our Uncommon Common Law, 42 Tenn. L.Rev. 443, especially 452-63 (1975); Freedman, Note, The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?, 88 Yale L.J. 142 (1978); Freedman, AArticles of Confederation@ in Oxford International Encyclopedia of Legal History; Freedman, Book Review of Hendrickson, Peace Pact: The Lost World of the American Founding, 6/20/2003 NYLJ 2, (col. 3); Kirk, The Rights of Man vs. The Bill of Rights, 20 Pres. Stud. Q. 493 (1990), and Justice Marshall's Bicentennial comments on the defects of the original Constitution.

II. The Problem of Judicial Review

Asst. 3. Case Book 25-48; App. Pg. 20-21 (an outline of what I will say in class about Marbury; now that you have seen this you might go back to the case and see whether you and I read it the same way); App. Pg. 22-55 (Beckerman, Great Ironies of History: The Peculiar Historic Fable of Marbury v. Madison). (This is a revision of a student paper written for my

Legal History course. May that fact inspire you.); App. Pg. 56 (the statute at issue in Martin v. Hunter=s Lessee); App. Pg. 57-59 (Freedman, Book Review of May=s Presidential Defiance of AUnconstitutional@ Laws, 44 Am. J. Legal Hist. 226 (2000)).

Notes: As indicated above, I expect that we will cover this Assignment in the two class hours of September 8. Marbury is traditionally the first case read in any constitutional law course. It is traditionally taught as though the class had never heard of it before. I will not be making that assumption. I expect you to be fully familiar with the background of the case, whether through your prior study of American history or through additional reading. I encourage you to read the procedural history reported at 5 U.S. 137, 153.

As an optional resource for those interested, there is a comprehensive and scholarly historical account of the background to judicial review in Treanor, Judicial Review Before Marbury, 58 Stanford L.Rev. 455 (2005).

After you feel reasonably comfortable with the area, you may find it helpful to take a look at Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U.Chi. L.Rev. 443 (1989), a clear and comprehensive distillation of modern legal thinking on the case. It is too long for me to suggest that you read it in full, but if you dip into it I hope you will discover an encouraging fact: Provided that you remember what you learned in Civil Procedure about the subject matter jurisdiction of the federal courts (cf. the note before Assignment 6 below), you should be able to understand everything that is said here.

Asst. 4. Case Book 53-69; App. Pg. 60; App. Pg. 61-69; The Comstock case is not included for its intrinsic importance but so that you can see a recent example of the Court addressing the Necessary & Proper Clause. (You will see an even more recent one later in the semester.) In my view the most persuasive opinion in Comstock is that of Justice Thomas. Why?

Notes: Two recent comprehensive treatments of McCulloch are the books by Killenbeck, M=Culloch v. Maryland (2006) and Ellis, Aggressive Nationalism (2007) (both on reserve).

On the general subject of judicial review, there is much good sense to be found in Eisgruber, Constitutional Self-Government (2001)(on reserve), and if you browse through it you might be encouraged to find that it sounds some notes that are already familiar to you.

Stop. Think. Review. Synthesize. At this point, we have covered a unified segment of the course. What have you learned about the purpose of our enterprise? What sorts of arguments can you identify respecting constitutional law issues? Which of these have you seen in other fields of law? Which are unique to this field? What follows?

III. Limitations on Judicial Review

A. External Limits

Asst. 5. Case Book 69-82; App. Pg. 70 (an outline of my class coverage of this topic)

Note: If you wish to delve further into the problems associated with

jurisdiction-stripping as a means of control over judicial review, you might take a look at Rossi, Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail, 50 Buff. L.Rev. 483 (2002).

B. Internal Limits

Notes: This section of the syllabus is not a long one in terms of the class time we spend on it, but, as the length of these Notes indicates, and as you will hear in class, I consider it a very important one. Be warned.

The techniques discussed in this section are of substantial practical importance. Standing and ripeness have, for example, have recently been central issues in challenges to health care reform, surveillance programs, and gay marriage prohibitions while the political question doctrine has received attention in connection with a possible increase in the national debt ceiling by unilateral Presidential action as well as challenges to drone strikes. The various justiciability doctrines we study are used daily by both the federal courts applying Article III and the state courts applying their own law. They are also of substantial theoretical importance. When we leave this unit, you should be able to articulate the connection between the doctrines covered in these three assignments and the concerns discussed in Part II of this syllabus.

One important doctrine not mentioned in the text is that a court should ground its decision on non-constitutional grounds if that course is reasonably available. What is the rationale for this rule? What case do you know of that failed to follow it?

There is a full explication of this doctrine and various related guidelines in the famous concurring opinion of Justice Brandeis in Ashwander v. TVA, 297 U.S. 288 (1936), which is still in the consciousness of all educated lawyers, see Bond v. U.S., 134 S. Ct. 2077, 2087 (2014),¹ and which I strongly urge you to read. (The part you are looking for is the one marked "Third").

Please remember also that your legal education is designed to have a progressive structure. You are not supposed to forget what you have learned in prior courses; you are supposed to build on it. Specifically, there is at least one doctrine of judicial self-limitation that some of you covered in Civil Procedure that is highly relevant here but not mentioned in the text. What is it? How might it work in constitutional law litigation? See Younger v. Harris, 401 U.S. 37 (1971).

1. Knowing this, a person looking for a safe bet would wager that the petitioner in Elonis v. U.S., No. 13-983, http://www.scotusblog.com/case-files/cases/elonis-v-united-states/?wpmp_switcher=desktop, now awaiting decision in the Supreme Court, will win his case as a matter of statutory construction.

As the foregoing cases suggest, other restraints on judicial action that you have previously studied apply in the constitutional law context just as they do in any other. Recall, for example, the limitations on courts' grants of equitable relief, e.g. injunctions. What relevance might those have here? (For more on this last point, you might want to take a look at the opinion in City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (Case Book 110 n. c), which supports its Article III holding by deploying various maxims of equity).

Asst. 6. Case Book 97-117 n.4; App. Pg. 71-79. Review App. Pg. 32-34. Case Book 121-37; App. Pg. 80.

Notes: As indicated in the entry for September 17 above, we will take two class hours to cover this Assignment.

As a reassurance that you are better equipped to participate in professional dialogue than you were just a few weeks ago, take a look at App. Pg. 81-83 (Proto, ARoberts Took Narrow View of Power to Decide@).

If you are interested in a fuller treatment of the origins of the prohibition on advisory opinions (Case Book 83-84), try Casto, The Early Supreme Court Justices= Most Significant Opinion, 29 Ohio N.U.L.Rev. 173 (2002).

For a proposal to overhaul current justiciability doctrines, see Driesen, Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication, 89 Cornell L.Rev. 808 (2004). For a critique of present standing doctrine, see Hessick, Standing, Injury in Fact, and Private Rights, 93 Cornell L.Rev. 275 (2008).

For a recent Supreme Court standing decision that has become the subject of considerable second-guessing in light of revelations regarding NSA surveillance, see Clapper v. Amnesty International, 133 S.Ct. 1138 (2013) and compare Liptak, AA Secret Surveillance Program Proves Challengeable in Theory Only,@ <http://www.nytimes.com/2013/07/16/us/double-secret-surveillance.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C{%22%22%3A%22RI%3A17%22}>

Asst. 7. Case Book 121-37; 153-55.