

Constitutional Law I Syllabus– Spring 2019

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- 1. Syllabus:** Reading assignments are set forth in this syllabus. The class-by-class breakdowns and dates represent approximations. During the semester, there will be alterations, deletions and additions. Any changes will be announced in class.
- 2. Course Objectives:** The goals of this course are: (A) to develop and cultivate the ability to craft constitutional law arguments of the highest quality by the standards of the legal profession, with the aim of persuading judicial and other 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; (B) increase the capacity to provide appropriate advice to clients whose problems involve constitutional law issues; and (C) to cultivate your knowledge of matters of constitutional law so that, in turn, you may individually and collectively raise the level of our local, state, and national discourse on important matters of constitutional law.
- 3. Texts: Required materials:** Chemerinsky, Constitutional Law 5th Edition, Aspen Casebook Series (referenced as Casebook and/or CB within)
- 4. Preparation & Participation:** You are expected to read and think about the assigned material before each class. Likewise, you are expected to contribute to the classroom discussions on both a voluntary and involuntary basis. I will call on you. Your participation may impact your grade at the margins.
- 5. TWEN:** There is (or will be) a TWEN page for this course. To register (1) go to lawschool.westlaw.com (2) click on TWEN (3) choose “add course” and add this course. Once you have registered you will have the ability to engage in substantive discussions with your fellow students. I will also use TWEN to post course materials. I encourage you to use the TWEN list serve to discuss substantive matters relating to the course. I may monitor these discussions as a matter of interest, but will not be intervening as a matter of course.
- 6. Attendance:** Regular, on-time attendance is the expectation. Accommodations will be made for compelling circumstances.
- 7. Amount of Time Spent for Credit:** The American Bar Association requires that you spend at least six hours per week, on average, outside of class studying for this 3-credit course. This is in addition to the four hours a week we spend in class. (The ABA has a formula for determining the requirement. In other courses, the required number of out-of-class hours may be different.)

8. **Exams:** Your grade will turn primarily on a final exam at the end of the semester. More will be said this in due course. I will be covering matters in class that are not part of the readings, and your readings will cover matters that are not covered in class. All of it is fair game for the exam. You will develop a good sense of the relative import of the material as the semester develops, but I will also give some additional guidance on this in the days leading up to the exam.
9. **Laptops:** As you know, some professors in the school have banned laptops. Personally, I think they are doing you a favor. I have decided, however, that you are allowed to use your laptops in our class for note-taking purposes. Using laptops for other purposes (chatting, emailing, surfing, gaming) is prohibited, mostly because it is distracting for both you and those around you. A compelling articulation of the view that handwritten note-taking promotes greater overall learning may be found at *Dorf on Law*, http://michaeldorf.org/2006_11_01_archive.html
10. **Office:** My office (463-7236) is in Room 215. You are welcome to drop by at any time; if I'm in and can't meet with you right away, we'll find a time to do so. My "formal" office hours will be determined early in the semester and I will attempt to coordinate these with your schedules to the extent feasible. You may also make an appointment to meet with me by emailing me.

Read Assignments 1 & 2 in advance of 1st Class.

I. Introduction: Course Themes

1. U.S. Constitution. The Constitution is reprinted in the front of the Casebook (xii-lvii). It's an incredibly short document. And you need to read it in its entirety. I'm serious. Really, really, really serious. Read it. All of it. Carefully. It is the Constitution. This is not an assignment to gloss.

II. Judicial Review and Justiciability

2. Judicial Review: For the **first class** session, please also read Madison's 1786 Memorandum (follows syllabus below beginning within this document). Finally, read CB pages 1-11 (*Marbury v. Madison*; excerpts from *Martin v. Hunter's Lessee* & *Cohens v. Virginia*).
3. Case or Controversy Requirements:
 - a. Intro to Justiciability Limits CB 40-42
 - i. Prohibition of Advisory Opinions & *Hayburn's Case* excerpt CB 42
 - ii. Intro to Standing CB 45-46
 - iii. *Mass v. EPA* CB 53-59
 - iv. *City of Los Angeles v. Lyons* Excerpt CB 59-61
 - v. *Lujan v. Defenders of Wildlife* CB 61-64
 - vi. Intro Political Question Doctrine CB 91-93
 - vii. *Baker v. Carr* CB 93-96

- b. NB: The remainder of the primary justiciability doctrines (e.g., mootness; ripeness; generalized grievances etc... will be briefly covered within class lectures. Readings on these issues that may be found within Chapter 1 of the CB are optional)
- c. Political Control of Supreme Court CB 33-36 including *McCardle* excerpt

III. Federalism and the Scope of Congressional Power

4. The Scope of National Legislative Power
 - i. Intro: Congress & The States CB 115-117
 - ii. *McCulloch v. Maryland* CB 117- 126
 - iii. *NFIB v. Sebellius* CB 129-150
 - iv. Note on Necessary & Proper Clause CB 150-151
5. Doctrinal Fundamentals: Early Commerce Clause
 - i. Intro CB 156-157
 - ii. *Gibbons v. Ogden* CB 157-160
 - iii. State Sovereignty & Congressional Power CB 165- 166 including *Hammer v. Dagenhart* /aka Child Labor excerpt (*Schechter Poultry* primarily via lecture)
 - iv. Note CB 166-167 (“Switch in time that saved nine.”)
6. Key Decisions Changing Commerce Clause Doctrine
 - i. *NLRB v. Jones* CB 168-171 (skimming is sufficient)
 - ii. *United States v. Darby* CB 171-173 (skimming is sufficient)
 - iii. *Wickard v. Filburn* CB 173-175
 - iv. *Heart of Atlanta Motel* CB 176-178
 - v. *Katzenbach v. McClung* CB 178-180
7. Evolution of Commerce Clause (Again)
 - i. Intro CB 188
 - ii. *United States v. Lopez* CB 188-200
 - iii. *United States v. Morrison* CB 200- 205
 - iv. *Gonzales v. Raich* CB 208-216(*Sebellius*)
8. Tenth Amendment as Limit on Congressional Authority
 - i. Intro CB 217
 - ii. *Missouri v. Holland* (CB mentions 206-207 but primarily via lecture)
 - iii. *New York v. U.S* CB 217-226
 - iv. *Printz v. U.S.* CB 227-235
9. Spending Power and Taxing Power
 - i. Intro CB 237-238
 - ii. *United States v. Butler* CB 238-239
 - iii. Note-Conditions on Grants to State Governments CB 242
 - iv. *South Dakota v. Dole* CB 242-245
10. Quickie Congressional Powers under Post-Civil War Amendments
 - i. Intro CB 245
 - ii. Note Whom May Congress Regulate - Post-Civil War Amend. CB 246-248
 - iii. Note Scope of Congress’s Power – Post-Civil War Amend CB 250-251
11. Quickie Dormant Commerce Clause
 - i. Note CB 476-477
 - ii. Note Dormant Commerce Clause Before 1938 CB 482
 - iii. Note Contemporary Test Dormant Commerce Clause CB 484
 - iv. Note CB Middle of 488 (if not balancing, what instead?)
 - v. Note Determining Whether a Law is Discriminatory CB 489

vi. Quick illustrative case *City of Philadelphia v. NJ* CB 489-492

IV. Federal Executive Power

12. The Federal Executive Power
 - i. Intro Note CB 321
 - ii. Inherent Presidential Power CB 321-322
 - iii. *Youngstown Sheet & Tube Co (Steel Seizure)* CB 322-330
 - iv. Note The Issue of Executive Privilege CB 331-332
 - v. *United States v. Richard M. Nixon* CB 332-335
13. The Authority of Congress to Increase Exec. Power
 - i. Intro Note CB 336-337
 - ii. *William J. Clinton v. City of NY* CB 337-341
14. Constitutional Problem of the Administrative State
 - i. Intro Note CB 341-342
 - ii. Nondelegation Doctrine (& demise) CB 342-345 incl *Shecter & Panama Ref.*
15. Legislative Veto (& demise)
 - i. Intro Note CB 347
 - ii. *INS v. Chadha* CB 347-355
16. The Appointment Power
 - i. Intro Note CB 356
 - ii. *Morrison v. Olson* CB 356-361
17. Separation of Powers in Foreign Affairs:
 - i. Intro Note CB 381-382
 - ii. Note on Treaties and Executive Agreements CB 395-395
 - iii. Note on War Powers CB 397-398
 - iv. Presidential Power and War on Terrorism CB 401-402
 - v. *Hamdi v. Rumsfeld* CB 402-413
 - vi. *Boumediene v. Bush* CB 413-430

V. Limited Transition to Individual Rights

18. Structure of Constitution & Civil Rights and Liberties
 - i. Intro Note CB 537-539
 - ii. Note on “A False Start” CB 540-542
 - iii. *Slaughterhouse Cases* CB 542-548 (Skim *Saenz v. Roe* CB 548-550)
 - iv. Note on Due Process and Incorporation CB 550-552; Note middle 565-566
 - v. [*Civil Rights Cases & State Action if time allows; otherwise ConLawII*]
19. Protection of Economic Interests & The Question of Redistribution
 - i. Intro CB 611-616
 - ii. *Lochner v. New York* CB 621-625
 - iii. *Nebbia v. People of New York* CB 633-635
 - iv. Pressures for Change CB 635
 - v. *West Coast Hotel* (the [temporary?] demise of Lochnerism) CB 636-638
 - vi. *U.S. v. Carolene Products* CB 638-639 (esp Note at top of 638)
 - vii. Economic Substantive Due Process Since 1937 CB 639-640
 - viii. *Williamson v. Lee Optical of Oklahoma* CB 640-642

Madison's Memorandum – Supplemental Reading for Class 1

[The following memo was prepared in the spring of 1786 by James Madison, many months before he knew there would be a convention at Philadelphia, and is commonly thought to reflect his views on the appropriate structure of a new national government. It is framed as a series of critiques of the Articles of Confederation system. I have edited for length, but not changed Madison's grammar, style, etc.].

1. Failure of the States to comply with the Constitutional requisitions.

This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

2. Encroachments by the States on the federal authority.

Examples of this are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation. Among these examples are the wars and Treaties of Georgia with the Indians--The unlicensed compacts between Virginia and Maryland, and between Penna. & N. Jersey--the troops raised and to be kept up by Masss.

3. Violations of the law of nations and of treaties.

From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace--the treaty with France--the treaty with Holland have each been violated. The causes of these irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.

4. Trespasses of the States on the rights of each other.

These are alarming symptoms, and may be daily apprehended as we are admonished by daily experience. See the law of Virginia restricting foreign vessels to certain ports--of Maryland in favor of vessels belonging to her own citizens--of N. York in favor of the same.

Paper money, instalments of debts, occlusion of Courts, making property a legal tender, may likewise be deemed aggressions on the rights of other States. As the Citizens of every State aggregately taken stand more or less in the relation of Creditors or debtors, to the Citizens of every other States, Acts of the debtor State in favor of debtors, affect the Creditor State, in the same manner, as they do its own citizens who are relatively creditors towards other citizens. This remark may be extended to foreign nations. If the exclusive regulation of the value and alloy of coin was properly delegated to the federal authority, the policy of it equally requires a controul

on the States in the cases above mentioned. It must have been meant 1. to preserve uniformity in the circulating medium throughout the nation. 2. to prevent those frauds on the citizens of other States, and the subjects of foreign powers, which might disturb the tranquility at home, or involve the Union in foreign contests.

The practice of many States in restricting the commercial intercourse with other States, and putting their productions and manufactures on the same footing with those of foreign nations, though not contrary to the federal articles, is certainly adverse to the spirit of the Union, and tends to beget retaliating regulations, not less expensive & vexatious in themselves, than they are destructive of the general harmony.

5. want of concert in matters where common interest requires it.

This defect is strongly illustrated in the state of our commercial affairs. How much has the national dignity, interest, and revenue suffered from this cause? Instances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property; of provision for national seminaries, for grants of incorporation for national purposes, for canals and other works of general utility, wch. may at present be defeated by the perverseness of particular States whose concurrence is necessary.

6. want of guaranty to the States of their Constitutions & laws against internal violence.

The confederation is silent on this point and therefore by the second article the hands of the federal authority are tied. According to Republican Theory, Right and power being both vested in the majority, are held to be synonymous. According to fact and experience a minority may in an appeal to force, be an overmatch for the majority. 1. If the minority happen to include all such as possess the skill and habits of military life, & such as possess the great pecuniary resources, one third only may conquer the remaining two thirds. 2. One third of those who participate in the choice of the rulers, may be rendered a majority by the accession of those whose poverty excludes them from a right of suffrage, and who for obvious reasons will be more likely to join the standard of sedition than that of the established Government. 3. Where slavery exists the republican Theory becomes still more fallacious.

7. want of sanction to the laws, and of coercion in the Government of the Confederacy.

A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States. From what cause could so fatal an omission have happened in the articles of Confederation? from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals. . . . It is no longer doubted that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not be calculated on. Even during the war, when external danger supplied in some degree the defect of legal & coercive sanctions, how imperfectly did the States fulfil their obligations to the Union? In time of peace, we see already what is to be expected. How indeed could it be otherwise? In the first place,

Every general act of the Union must necessarily bear unequally hard on some particular member or members of it. Secondly the partiality of the members to their own interests and rights, a partiality which will be fostered by the Courtiers of popularity, will naturally exaggerate the inequality where it exists, and even suspect it where it has no existence. Thirdly a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all. Here are causes & pretexts which will never fail to render federal measures abortive. If the laws of the States, were merely recommendatory to their citizens, or if they were to be rejudged by County authorities, what security, what probability would exist, that they would be carried into execution? Is the security or probability greater in favor of the acts of Congs. which depending for their execution on the will of the state legislatures, wch. are tho' nominally authoritative, in fact recommendatory only.

8. Want of ratification by the people of the articles of Confederation.

In some of the States the Confederation is recognized by, and forms a part of the constitution. In others however it has received no other sanction than that of the Legislative authority. From this defect two evils result: 1. Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter is of posterior date to the former, it will be at least questionable whether the latter must not prevail; and as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State. 2. As far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution by virtue of which they are become one sovereign power, so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the confederation by any of the parties to it, absolves the other parties from their respective obligations, and gives them a right if they chuse to exert it, of dissolving the Union altogether.

9. Multiplicity of laws in the several States.

.... Among the evils then of our situation may well be ranked the multiplicity of laws from which no State is exempt. As far as laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused, their number is the price of liberty. As far as the laws exceed this limit, they are a nuisance: a nuisance of the most pestilent kind. Try the Codes of the several States by this test, and what a luxuriancy of legislation do they present. The short period of independency has filled as many pages as the century which preceded it. Every year, almost every session, adds a new volume. This may be the effect in part, but it can only be in part, of the situation in which the revolution has placed us. A review of the several codes will shew that every necessary and useful part of the least voluminous of them might be compressed into one tenth of the compass, and at the same time be rendered tenfold as perspicuous.

10. mutability of the laws of the States.

.... We daily see laws repealed or superseded, before any trial can have been made of their merits: and even before a knowledge of them can have reached the remoter districts within which they were to operate. In the regulations of trade this instability becomes a snare not only to our citizens but to foreigners also.

11. Injustice of the laws of States.

If the multiplicity and mutability of laws prove a want of wisdom, their injustice betrays a defect still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights. To what causes is this evil to be ascribed?

These causes lie 1. in the Representative bodies. 2. in the people themselves....