Study Questions

Class #1  Introduction to the Constitution; mini-course on constitutional rights

Readings:
Preview the course by skimming this Addendum pp. 2-3 (class schedule); casebook pp. v-xx (Table of Contents); Appendices A (Supreme Court Justices) and B (Constitution) (back of casebook pp. 1-27.

Find and briefly review the recent Maryland case, Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007).

Introductory Note:
1. American constitutional documents include:
a. Colonial charters, e.g., the Charter of Maryland (1632).
b. Declaration of Independence (1776), this Addendum pp. 8-9.
c. State constitutions adopted beginning immediately after independence, e.g., Maryland constitutions of 1776, 1851, 1864, 1867.
d. Articles of Confederation, adopted by Congress in 1777 and approved by the states in 1781.
e. Northwest Ordinance of 1787, an act of Congress providing for governance of the territories not yet states.
f. United States Constitution (1787), amended by:
i. Bill of Rights (1791);
ii. Civil War Amendments (13th, 14th, 15th), adopted 1865-70.

2. The course in Constitutional Law is different than the study of the Constitution in certain respects:
a. Some portions of the Constitution are studied in courses other than Constitutional Law, e.g., 4th, 5th, 6th, and 8th Amendments in Criminal Procedure; 5th and 14th Amendment due process (jurisdiction, notice, and hearing) and 7th Amendment in Civil Procedure.
b. Most of the course is devoted to nine short provisions of the Constitution—judicial review, case-or-controversy doctrine, federalism, commerce clause, separation of powers, due process, equal protection, free speech, and religious freedoms.

3. Constitutional Law has been shaped by legal argument, a characteristic of which is the use of any argument that supports one’s position. For example, the Declaration of Independence, which has been called "a brief for revolution," invoked rights under Natural Law (self-evident truths), but also relied on rights under English law. Later, advocates on both sides of the slavery issue used Natural Law arguments. In our own time both pro-choice and pro-life advocates have used Natural Law arguments on the abortion issue. This characteristic is a theme of all eras of Constitutional Law.
4. The mini-course in individual rights (state action, due process, equal protection, speech, and religion) is placed near the beginning of the course for the following reasons. First, studying any one topic of constitutional law—judicial review, federalism, separation of powers, and individual rights—in isolation is difficult, because of overlaps and conflicts. Second, an early overview may assist students in other courses and extracurricular activities. Third, the mini-course helps redress the imbalance of casebook materials traditionally covered in the first (pp. 1-153, 844-61 = 171) and second (pp. 154-843 = 700) halves of the course.

Understand:

1. Match the three important aspects of the Constitution with provisions that illustrate those provisions:
   - Charter of government for the U.S.: Amendments I - X
   - Charter of federalism: Articles I, II, III
   - Charter of individual rights: Article VI, clause 2; Amendment X

2. In Conaway:
   a. Make a short outline of the majority opinion. Next to each point tell how the dissents disagreed with each point.
   b. What positions have other states taken about same-sex marriage? Has the federal (national) government taken a position?

Test yourself:
   Addendum pp. 22(8), 29(38), 36(5), 67(12).

For class discussion:
1. What did you learn about the American (United States) constitutional system in Conaway? How does the American system differ from that of your own country?

2. In Conaway what did the Court of Appeals of Maryland do after it identified the possible rights that plaintiffs might have?

3. Is same-sex marriage coming to Maryland? Your law firm represents Madam and Eve, who have recently returned home to Maryland after their marriage in California. (They were married after California law, describing marriage as a personal relation arising out of a civil contract between a man and a woman, was struck down as failing strict scrutiny under the state Constitution’s Equal Protection Clause, sexual orientation being a suspect class and family privacy a fundamental right. They were married before an initiative, Proposition 8, restoring the traditional view of marriage, was approved by California voters several months ago.) While the U.S. Constitution, Article IV, Section 1 requires a state to give full faith and credit to the acts of every other state, the federal Defense of Marriage Act (1996) defines marriage in a traditional way and provides that no state shall be required to give effect to an act of another state respecting a same-sex marriage. What obstacles do Madam and Eve face to a
Maryland court giving effect to their California marriage?

**Class #2**  Mini-course on constitutional rights–state action, due process (procedural, incorporation, substantive)

**Readings:**
Study casebook pp. 809-14 (include Tarkanian), 157-58 (include III), 183-91, 195-206.

**Understand:**
1. In *Flagg Brothers*:
   a. What were the possibilities for “state action”?
   b. Was there enough?

2. Regarding procedural due process:
   a. What are its purposes?
   b. What are the elements of a facial deprivation? See the Due Process Clause of the [5th and] 14th Amendment:
   
   No state
   Shall deprive
   Any person
   Of life,
   Liberty, or
   Property
   Without due process of law.
   c. What is the test for determining whether due process has been violated, once the facial elements are satisfied? See Doehr and Note 5 (below). Cf. Mathews v. Eldridge (1976) (weighing or balancing the private and governmental interests in light of the risk of error and the value of additional safeguards).

3. Understand the following issues regarding incorporation:
   a. What constitutional provision is the basis for incorporation?
   b. What is the modern test for determining whether a provision of the Bill of Rights is incorporated? What were the earlier tests? What is the difference?
   c. Does an incorporated right apply the same way (“jot-for-jot”) against the states as it applies against the federal government, or is it “watered down”?
   d. Match the cases with their conclusions:

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<thead>
<tr>
<th>Case</th>
<th>Conclusion</th>
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<tr>
<td>Barron (1833)</td>
<td>Bill of Rights does not apply to the states</td>
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<tr>
<td>Hurtado (1884)</td>
<td>Civil jury right (7th Amendment) is not incorporated</td>
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<tr>
<td>Bombolits (1916)</td>
<td>Fundamental to the American scheme of justice</td>
</tr>
<tr>
<td>Duncan (1968)</td>
<td>Grand jury right (5th Amendment) is not incorporated</td>
</tr>
</tbody>
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4. The Constitution is brief and general. Are there unenumerated rights,
such as the right of privacy, in the Constitution? [Cf. common law and statutory rights of privacy, pp. 342-51.]

a. Commentators have suggested that the right of privacy may relate to the disclosure of private matters, autonomy of decision-making, associational relationships, or a private place. In which category would you put Griswold?

b. What protection or level of judicial scrutiny is given the right?

c. Note that rights may be asserted offensively (by plaintiff in a suit for damages, injunction, or declaratory judgment), Roe v. Wade, p. 208, or defensively (by defendant as a defense), Griswold.

5. In Griswold what different views did the justices have about whether due process includes a right of privacy? Match the following:

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Notes:

1. According to Laurence H. Tribe, procedural due process has both intrinsic [or innate] (opportunity to participate in decision-making) and instrumental [means to an end] (assure accurate decision-making) values. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 666-67 (2d ed. 1988).

2. The class of “persons,” protected by due process, is broader than “citizens” of the U.S. and includes aliens, cf. pp. 729-33 (equal protection); corporations, Santa Clara County v. Southern Pacific R.R. (1886); and juveniles, see Carey, cited in Note 6 (below).

3. The “life, liberty, or property” interests protected by procedural due process may include general notions, such as “essentials of life,” see Goldberg, cited on p. 782 n. 17; other constitutional rights, such as 4th Amendment freedom from unreasonable searches and seizures [of person or property], see Fuentes; common law rights to property or in contract; and statutory entitlements (the “new property”), such as welfare benefits, see Goldberg.

4. Goldberg also raised the question of what, besides notice and hearing before deprivation, was protected by procedural due process—statement of reasons for the government action, oral presentation of evidence and arguments, confrontation of adverse witnesses, [impartial decision-maker, determination based on evidence and law, appeal, etc.]?

5. The “extraordinary circumstances” test of Doehr was that notice and opportunity for a hearing must be given before a deprivation, except in unusual circumstances, i.e., where the taking served an important governmental interest, where there was a special need for prompt action, and where the government’s action was narrowly tailored to its interest.
6. Carey v. Piphus (1978), held that a remedy for damages (punitive, compensatory, or nominal), as well as for injunctive and declaratory relief, might be available for a violation of procedural due process.

Test yourself:
Addendum pp. 24(18), 30(46), 32(5), 36(3), 37(7 & 9).

For class discussion:
1. Why wasn’t there a violation of due process in Flagg Bros.? (Consider all the elements, tests, and justifications.)

2. A statute of the State of "Delmarva" gives adoptees over age 21 the right to their original birth certificates and other adoption information. A group of birth-mothers, who put their children up for adoption, have sued state and local officials. The birth-mothers claim that the law violates their rights. (Other states protect against disclosure of adoption information, unless both adoptees (and, if they are minors, their adopted parents) and birth-mothers consent through an adoption registry and intermediary system, or unless a court orders disclosure for good cause, such as emergency medical information.)
   a. What is the birth-mothers’ case?
   b. What is the officials’ defense?

3. One commentator has called the Due Process Clause of the 14th Amendment “the second Bill of Rights.” Why, do you suppose? Was it “the second”?