CONSTITUTIONAL LAW I

Professor Garrett Epps

Fall 2015

SYLLABUS

Texts: SULLIVAN & GUNTHER, CONSTITUTIONAL LAW (18th ed. 2013 & current supp.).

Collateral Reading (at student's option):: Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES (3d ed.); EMANUEL’S CONSTITUTIONAL LAW (latest ed.)

Class attendance and participation:

1. Attendance in this class is required. Students with more than two unexcused absences may be denied permission to take the examination. That’s my policy. Under a separate law school policy, five or more absences for any reason require withdrawal. (A number of students have said to me over the years that “we get five absences”; this is doubly wrong. As far as I’m concerned, you don’t “get” any absences; if you have a scheduled class, you are expected to attend. Obviously sometimes things happen and students cannot attend. If that happens, please notify me—beforehand if possible, if not as soon as possible after the class. The point of my “excused absence” rule is to keep me, or the administration, from having to chase you to find out whether you are still enrolled in the class and still keeping up with the work. That covers my rules. The law school five-absence rule does not mean you “get” five absences. Instead, it warns that if you miss five classes for any reason, regardless of my own inclination, you must withdraw. (One issue in interpreting the Constitution is learning to understand the difference between a grant of permission and a warning of penalty.)

2. Class participation is (a) in small assigned groups that will consider specific problems and (b) in the larger class in which we will discuss the problems you have worked through in your small groups. Neither the small-group nor the full class participation is optional. Students who are unprepared on a specific day should notify the instructor by email or in a written note on the lectern before class begins (oral warnings are subject to being forgotten by the instructor in the heat of class); unprepared students may be called on at the next class session. If a student has not notified me in advance, I will assume the student is prepared. Students who are stumped by a question from the instructor may pass the question to other members of their small group.

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1 Please note: You may not use earlier versions of the casebook. And because the last Term of the Supreme Court was a blockbuster term, you will be lost without the current supplement.

2 Apply this analysis to the Fifth Amendment’s prohibition of “double jeopardy”: “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .” Is this a prohibition against trying a defendant twice on the same criminal charge—or a provision empowering the government to cut off the limbs of convicted criminals?

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However, I expect first an attempt to answer the question. *I will not accept an answer of “pass.”* That means that if I call on you, I expect you to try to answer my questions or leave the class.

**Grading:** Student grades will be given as follows: (1) one-third will be based on the two multiple choice quizzes; (2) two-thirds will be based on the final exam.

There will be two quizzes during the semester, consisting of multistate bar examination-style multiple-choice questions. The two quizzes are based in format on the Multistate Bar exam. They will have between six and fifteen questions; each question will offer a brief fact pattern and then a choice of four possible answers to a specific constitutional question. The final examination will be 3 hours. The examination will be a traditional law-school essay exam, offering a fact pattern and then asking a specific legal question which the student is to assess and answer in the specified format (e.g., Supreme Court opinion, legal memo, District Court opinion, etc.). It is important to note that (1) the quizzes do not test on case names; instead, they emphasize doctrine and constitutional arguments; (2) case names and holdings are extremely relevant on the examination, and students will be expected to know them and cite them where appropriate. Failure to attribute rules of law to the appropriate cases on the exam will reduce in a reduction of credit for correct answers by as much as one-half.

Both the quizzes and the final exam will be closed-book. However, students may, if they wish, bring an unannotated copy of the text of the Constitution to the final examination only for reference.

An important point: Shortly after Con Law I begins, I am usually besieged with complaints from students demanding to know why I am not telling the class the “answers” to my questions and hypotheticals. The reason is that in this class there are very few “answers.” Even in the best of times, Constitutional Law consists of questions. At present, with a Supreme Court narrowly split between far-right and center-moderate factions, “answers” about where the law will evolve are even scarcer than usual. A student who concentrates on learning what the law is now will find that knowledge obsolete even by the time he or she sits for the Bar.

The mention of the Bar underlines something even more important. The aim of this class, as (one hopes) any other law course, is not to cram buzzwords into your head to be regurgitated a few years hence on the Bar. It is to equip you for practice. Constitutional law requires a very specific set of analytical and argumentative skills to apply to the existing and future body of caselaw. Your aim as a student in this class is to begin the self-education process of acquiring those skills; if you do so, you will be able to understand constitutional issues at a high level of sophistication even 40 years hence.

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3 You are responsible for knowing your blind grading number.

4 I go into such tiresome detail because a number of students have somehow understood my discussion of the quizzes as meaning that “we don’t need to know case names.” Wrong. You do, and failure to learn and use them will impact your grade.

5 This means that it may not contain any writing or notation other than the printed text. You may highlight the Constitution, or use blank tabs to guide you to a given section. No words, no arrows, no emoticons.

6 I am not necessarily recommending you do this, and it is not required, but you may.
(when a number of you will still be in practice). In fact, the first three class sessions will be largely devoted to discussing how to study and analyze Constitutional Law cases instead of actually doing so.

That means you are expected to read the assigned material carefully and come to class prepared to discuss it. A small number of students seem to believe they are fulfilling the assignments by sliding their eyes over assigned material, highlighting a few key phrases, and then waiting for the instructor to “explain” what the case means. If called upon, they read a phrase verbatim from the case or from a canned legal brief they have purchased. I have even had students tell me that they don’t read the “note cases” in the casebook.

Read them. Carefully.

I am perfectly capable of quizzing you on material we have not analyzed carefully in class. Please understand that now to avoid confusion later. Class discussion and lecture is intended to supplement your own process of self-instruction from the material, not substitute for it. Students in this class will succeed by taking responsibility for their own education. This means, among other things, not relying on commercial supplements and canned legal briefs, which are to legal education what crack cocaine is to pain relief.

Key dates:

First multiple-choice quiz Monday, October 15
Second multiple-choice quiz Monday, November 23

Readings7:

I. Obergefell v. Hodges.
II. Text, U.S. Constitution (in Casebook); “Constitutional Law: A Very Brief Introduction for Law Students” (available online); “How to Read a Constitution” (to be available online). Discussion: What is it we do in Constitutional Law? Is it “Law”?
III. “Constitutional Argumentation: A Taxonomy” (Available online). “Summary of argument” section from Obergefell briefs (to be available online). Discussion: What is a “constitutional argument” and how is it different from other modes of argument?
IV. Judicial Review: Power and Limitations
   a. The text of the Constitution; Casebook 1-16; prepare a one-sentence summary of the holding of Marbury v. Madison. Discussion: How do we

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7 You are expected to possess the Supplement and to check for supplementary material for each of the readings assigned. Please do not come to class without having read the supplementary material. “You didn’t tell us to read it” is never a satisfactory excuse; anyway, I am telling you now. Also, please note that some of the later sections may be skipped depending on the progress we make, so don’t sit down and read the entire syllabus now. You laugh; I have had students who did this.

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read a Constitutional Law case? What is “judicial review” and where did it come from?
b. Judicial Exclusivity: 16-34
c. Standing, Constitutional and Prudential: 34-53
d. Mootness, Ripeness, and Political Questions: 53-73

V. Theories of Federalism
a. Who is Sovereign, the People or the States? 73-96
b. Values of Federalism: 96-107

VI. The Commerce Power of Congress: Extent and Limitations
a. The Contemporary Commerce Power: 136-64
b. The Vexed History of the Commerce Power: 109-36
c. The Tenth and Eleventh Amendments: 164-86

VII. The Taxing and Spending Powers: 187-218

VIII. The “Dormant” Commerce Clause as a Limit on States: 219-41

IX. Preemption: 281-93*

X. The Civil War-era Revolution in Rights and Federal Power: 425-65

XI. Due Process Rights Under the Fourteenth Amendment
a. The Rise and Fall of Economic Substantive Due Process: 467-91
b. Privacy and Abortion: 492-529
c. Marriage: 529-35
d. Sexual Orientation: 535-62, revisit Obergefell
e. The Takings Clause and the Contracts Clause: 568-94*

XII. The “Equal Protection of the Laws”

a. Rational Basis: 601-16
b. Segregation: 616-36
c. Intentional Discrimination: 636-50
d. Affirmative Action: 650-88
e. School Desegregation in the post-Civil Rights Era: 688-709*
f. Sex: 709-45
g. Sexual Orientation: 745-56, revisit Obergefell
h. Other Suspect Classifications: 756-67

XIII. Reread Obergefell and briefs*8

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*8 Items marked with “*” may be skipped depending on the pace of the class.