

# CONSTITUTIONAL LAW I

Professor Garrett Epps

Fall 2017

## TENTATIVE SYLLABUS SUBJECT TO REVISION

Texts: SULLIVAN & FELDMAN, CONSTITUTIONAL LAW (19<sup>th</sup> ed. 2006).<sup>1</sup>

Collateral Reading (at student's option): Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES (5th ed.); EMANUEL'S CONSTITUTIONAL LAW (latest ed.)<sup>2</sup>

**FIRST ASSIGNMENT: Please read *County of Santa Clara, CA, v. Trump*, provided online. Read carefully. Identifying the parts you don't understand is as important as the parts you do. Come prepared to ask questions, including but not limited to questions about: 1) standing and ripeness; 2) the scope of the federal spending power; 3) the separation of powers and presidential authority to "make" or "change" "law": 4) the remedies available to a federal court reviewing a presidential order.**

**Please read the following carefully.** *Class attendance and participation:*

- (1) Attendance in this class is required.
  - a. Students with more than two **unexcused** absences may be denied permission to take the examination. That's my policy.
  - b. 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. )
  - c. 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.
    - i. *There is no need to document your excuse with, e.g., a doctor's note. You are already an apprentice lawyer; misrepresentation is an ethical violation. For that reason I assume you are telling the truth.*
    - ii. 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.
  - d. The five-absence rule is not mine, and it is not about excuses. It is designed to keep you from failing the class or not mastering the basic concepts you will need later. No matter what the reason, more than

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<sup>1</sup> Please note that you may not substitute an earlier edition.

<sup>2</sup> Be very careful about the date of the you Emanuel's as the bookstore and the company are often cagey about this.

five absences means you must confer with the academic affairs office to justify taking the examination.

- e. The law school five-absence rule does not mean you “get” five absences. As far as I’m concerned, you don’t “get” *any* absences; if you have a scheduled class, you are expected to attend. 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.<sup>3</sup>)

- (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 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); these students will not be called on during that class, but very likely 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. 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-hour in-class midterm exam; (2) two-thirds will be based on the final exam.

The midterm will be a short essay question administered in class. You will be expected to bring a laptop computer on the night of the exam. Students needing accommodation should seek it from academic affairs. I don’t make accommodations for is it my business who is given one or why.

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.). 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 result in a reduction of credit for correct answers by as much as one-half.<sup>4</sup>

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<sup>3</sup> 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? Or both? If the latter, does it thus mean that the Eighth Amendment’s prohibition against “cruel and unusual punishments” cannot be applied to the cropping of limbs?

<sup>4</sup> 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.

Both the midterm and the final exam will be closed-book. However, students may, if they wish, bring an unannotated<sup>5</sup> copy of the text of the Constitution to either for reference.<sup>6</sup>

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 equally split between deeply conservative and center left 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 (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:

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<sup>5</sup> 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.

<sup>6</sup> I am not necessarily recommending you do this, and it is not required, but you may.

Wednesday, October 21.<sup>7</sup>

Readings<sup>8</sup>:

- I. *Santa Clara Co., CA, v. Trump* (handout—come to class having read carefully, with questions).
- II. “Constitutional Argumentation: A Taxonomy” (Available online). “Summary of argument” section from *Obergefell* briefs (to be available online). Learning outcome; Understand what a “constitutional argument” is and how is it different from other modes of argument.
- III. 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”?
- 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 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: 34-58
  - d. Mootness, Ripeness, and Political Questions: 58-76
- V. Executive Power
  - a. The Basic Framework: *Youngstown Sheet & Tube*. 303-330
  - b. Executive Power and Terrorism
    - i. 330-61
    - ii. 361-80
  - c. The War and Treaty Powers. 413-20
  - d. Executive Privilege and Impeachment. 420-40
- VI. Theories of Federalism
  - a. Who is Sovereign, the People or the States? 76-100
  - b. Necessary and Proper. 101-09.
  - c. Values of Federalism: 109-14.
- VII. The Commerce Power of Congress: Extent and Limitations
  - a. The Contemporary Commerce Power: 142-71.
  - b. The Vexed History of the Commerce Power: 115-42.
  - c. The Tenth Amendments: 171-87.
  - d. The Eleventh Amendment. 187-94.
- VIII. The Taxing and Spending Powers: 195-225
- IX. The Civil War-era Revolution in Rights and Federal Power: 441-82
- X. Due Process Rights Under the Fourteenth Amendment
  - a. The Rise and Fall of Economic Substantive Due Process: 483-508

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<sup>7</sup> Unless a makeup day is needed.

<sup>8</sup> 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.

- b. Privacy and Abortion: *Whole Woman’s Health v. Texas*;<sup>9</sup> 520-44
- c. Marriage: 545-90; revisit *Obergefell*
- XI. The “Equal Protection of the Laws”
  - a. Rational Basis: 643-58
  - b. Segregation: 656-78
  - c. Intentional Discrimination: 678-93
  - d. Affirmative Action: *Fisher v. University of Texas at Austin*;<sup>10</sup>650-88
  - e. School Desegregation in the post-Civil Rights Era: 688-709\*
  - f. Sex: 709-45
  - g. Sexual Orientation: 745-56
  - h. Other Suspect Classifications: 756-67
- XII. Reread *Santa Clara* material \*<sup>11</sup>

Learning Outcomes for this course. Read carefully:

1. Working knowledge of judicial review:
  - a. The doctrines of justiciability: Standing (Article III and prudential), ripeness, mootness, and “political question,” and how they relate to the limited jurisdiction of federal courts created by Article III.
  - b. The difference in scope of judicial review of state laws v. federal laws.
  - c. The scope of remediation available to reviewing courts—understanding that relief is limited to partial or complete *invalidation* of a statute, ordinance, or regulation, and that federal courts cannot revise or amend a statute.
  - d. The political and jurisprudential arguments of the dangers of judicial review.
  - e. The role of facts and analysis in producing constitutional outcomes from caselaw.
2. Understanding of the theories of federalism and how the Supremacy Clause interfaces with the Tenth Amendment.
3. Ability to apply the concepts of separation of powers and Article II authority in a practical litigation contest.
4. Ability to apply the current Commerce Power tests, a clear understanding of how Congressional powers have expanded and contracted, and clear knowledge of the difference between Congressional assertions of the Commerce Power and limitations on state measures imposed by the “Dormant Commerce Clause.”
5. A theory of the centrality of the Fourteenth Amendment to individual rights, including a theory of “substantive due process,” and understanding of the concept of “rights” and “fundamental rights.”
6. Understanding the “tiers” of Equal Protection Review and ability to argue for change in standard of review for a given classification.

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<sup>9</sup> Handout.

<sup>10</sup> Handout.

<sup>11</sup> Items marked with “\*” may be skipped depending on the pace of the class.

