

CONSTITUTIONAL LAW I EPPS

**UNIVERSITY OF BALTIMORE SCHOOL OF LAW
SEMESTER YEAR**

Course: CONSTITUTIONAL LAW I
LAW2002
650-339

Instructor: Professor Garrett Epps
AL 506 gepps@ubalt.edu
Office Hours: MW 4-5 pm

Days/Time: M/W 1:30-3:20pm

Location: Check the Law School class schedule for the room assignment

Course Description:

An introduction to the structure of the U.S. Constitution and the powers, rights, and liberties it defines. Topics include judicial review; limitations on judicial power; nature of and separation of powers; federalism, including the Commerce Clause and the 10th Amendment; state action; procedural and substantive due process; and equal protection.

Course Materials:

Texts: SULLIVAN & GUNTHER, CONSTITUTIONAL LAW (19th ed. 2016).¹
Collateral Reading (at student's option): Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES (5th ed.); EMANUEL'S CONSTITUTIONAL LAW (latest ed.)²

Student Learning Outcomes:

The section headings in the Assignments section below provide a detailed summary of the learning outcomes needed to succeed in this course.

Grades:

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 multiple-choice questions. The quizzes will be administered on TWEN. 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 three hours and consist of one question. The examination will be a traditional law-school essay exam, offering a fact pattern and then asking a

¹ Please note that you may not substitute an earlier edition.

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

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 result in a reduction of credit for correct answers by as much as one-half.³

Both the quizzes and the final exam will be closed-book. However, students may, if they wish, bring an unannotated⁴ copy of the text of the Constitution to the *final examination only* for reference.⁵

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.

³ 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.

⁴ 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.

⁵ I am not necessarily recommending you do this, and it is not required, but you may.

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. It also means that you should not ask me which of the reading is “really important.” It all is “really important.” If it weren’t I wouldn’t have assigned it.

Key dates:

First multiple-choice quiz Wednesday, March 15

Second multiple-choice quiz Monday, April 24⁶

Course Expectations:

American Bar Association Accreditation Standards establish guidelines for the amount of work students should expect to complete for each credit earned. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work per week for each credit earned in a class, or an equivalent amount of work for other academic activities, such as simulations, externships, clinical supervision, co-curricular activities, and other academic work leading to the award of credit hours.

ARTICULATE ANY ADDITIONAL EXPECTATIONS FOR CLASS PREPARATION, PARTICIPATION, AND PROFESSIONALISM.

(e.g., You are expected to complete all reading assignments and to consistently participate in class discussion in order to demonstrate that you have read and reflected on the issues raised in the assignment).

Attendance:

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.
 - c. Obviously sometimes things happen and students cannot attend. If that happens, please notify me—beforehand if possible, if not, then 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.

⁶ Unless a makeup day is needed.

- 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.
- 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.⁷)

(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 me 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.***

Class attendance is a primary obligation of each student whose right to continued enrollment in the course and to take the examination is conditioned upon a record of attendance satisfactory to the professor. A student who exceeds the maximum allowed absences (generally 20% of class sessions) as illustrated below may be compelled to withdraw from the course, or may be barred from sitting for the final exam. Students who are forced to withdraw for exceeding the allowed absences may receive a grade of FA (failure due to excessive absence). This policy is consistent with American Bar Association Standards for Law Schools.

Regular Semester Hours		
Credit Hours	Meetings Per Week	
	1	2
2	2 absences	5 absences

⁷ 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?

3	2 absences	5 absences
4	--	5 absences

Course Web Site:

This course has a TWEN page that links to this syllabus, announcements, the class assignments, and other class materials. You are responsible for self-enrolling in the TWEN page (Constitutional Law I Spring 2017) and for checking it regularly for course information.

Computers:

Students may/may not use laptop computers for class related purposes.

Class Cancellation:

If the instructor must cancel a class, notices will be sent to students via email and posted on the classroom door. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.

Academic Integrity:

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or the School of Law. Violations of academic integrity include, but are not limited to: cheating; plagiarism; misuse of library materials; use of another's book or study materials without consent; unapproved multiple submissions; material misrepresentation of one's academic history or standing; misrepresentation of any academic matter; intentionally giving another student false or inaccurate information about class requirements; inappropriate discussion of exams; and misrepresenting or falsifying class attendance reports.

[Reference to School of Law Honor Code,

https://law.ubalt.edu/academics/policiesandprocedures/honor_code/index.cfm]

Title IX Sexual Harassment and Sexual Misconduct Policy:

The University of Baltimore's Sexual Harassment and Sexual Misconduct policies are compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the University any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

Disability Policy:

If you are a student with a documented disability who requires an academic accommodation, please contact Leslie Metzger, Director of Student Services at 410-837-5623 or via email at lmetzger@ubalt.edu.

ASSIGNMENTS

Readings⁸:

- I. *Obergefell v. Hodges*, Casebook 591-90.. (Learning outcome: by reading of party briefs and oral argument in a high-profile current case, to understand Constitutional Law not as a progression of inevitable doctrinal change but as at least in part the product of specific litigation decisions).
- 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”? (Learning outcome: Characterize the ways in which Constitutional Law differs from other areas of 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? (Learning outcome: understand the role of facts and analysis in producing legal outcomes from caselaw that can be cited in Court.)
 - b. Judicial Exclusivity: 16-34
 - c. Standing, Constitutional and Prudential: 34-58
 - d. Mootness, Ripeness, and Political Questions: 58-76 (Learning outcome for b.c. & d.: Understand the limitations of judicial review as an engine of constitutional doctrine and the reasons why constitutional jurisdiction is to be strictly construed).
- V. Theories of Federalism (Learning outcome: understanding of proper and improper federalism argumentation)
 - a. Who is Sovereign, the People or the States? 77-101
 - b. Necessary and Proper. 101-09.
 - c. Values of Federalism: 109-14.
- VI. The Commerce Power of Congress: Extent and Limitations (Learning outcome: a general outcome of limits on and pressures to expand enumerated powers)
 - a. The Contemporary Commerce Power: 142-71.
 - b. The Vexed History of the Commerce Power: 115-42.
 - c. The Tenth Amendments: 171-86.
 - d. The Eleventh Amendment. 187-94.
- VII. The Taxing and Spending Powers: 195-225 (Learning outcome: true structure of present-day government.)
- VIII. The “Dormant” Commerce Clause as a Limit on States: 227-45; 267-69.

⁸ 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.

- IX. Preemption: 285-97.*
- X. The Civil War-era Revolution in Rights and Federal Power: 441-82 (Learning Outcome; mastery of concepts and caselaw concerning “incorporation” of Bill of Rights against the states).
- XI. Due Process Rights Under the Fourteenth Amendment (Understanding nature of rights, limits on the concept)
 - a. The Rise and Fall of Economic Substantive Due Process: 483-508
 - b. Privacy and Abortion: *Whole Woman’s Health v. Texas*;⁹ 509-44
 - c. Marriage: 544-90; revisit *Obergefell*
 - d. The Takings Clause and the Contracts Clause: 609-41*
- XII. The “Equal Protection of the Laws” (same)
 - a. Rational Basis: 643-58
 - b. Segregation: 656-78
 - c. Intentional Discrimination: 678-93
 - d. Affirmative Action: *Fisher v. University of Texas at Austin*;¹⁰692-735
 - e. School Desegregation in the post-Civil Rights Era: 688-709*
 - f. Sex: 756-793
 - g. Sexual Orientation & Other Suspect Classifications 793-805
- XIII. Reread *Obergefell* and briefs*¹¹

⁹ Handout.

¹⁰ Handout.

¹¹ Items marked with “*” may be skipped depending on the pace of the class.