

Constitutional Law Section 339  
Professor Meyerson  
Spring 2020

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## COURSE INFORMATION AND SYLLABUS

Meeting Times: Tuesdays and Thursdays, 10:30am - 12:20pm

Location: Room assignments are available through MyUB.

Class Attendance, Preparation, and Participation: You are required to attend class regularly and be prepared for class; adequate class attendance, preparation, and participation are also essential if you wish to understand the material.

You are entitled to 3 absences per semester. A student with more than 3 unexcused absences will not be permitted to take the final.

Unless told otherwise, for each class, you are responsible for: 1) any unfinished material from the preceding assignment: **PLUS** 2) the assignment following the one discussed in the preceding class. If you miss a class, you must obtain the class notes from the missed class *before* attending the next class.

Class participation is an essential part of process of becoming a lawyer. All students are expected to be prepared to participate in each class session, as I will call on students randomly and solicit volunteers. If you are not prepared to discuss the day's reading and the questions for the day's assignment, please give me a note prior to class. This will avoid embarrassment for both of us.

You must prepare case briefs for every case assigned. Details on how your briefs will be handed in will be provided in class.

### **Use of the Internet during class (This is huge.)**

Repeated studies, as well as my own experience, prove that using the Internet or texting during class lowers class performance and exam grades. The fact that this may not have occurred in college for you is not relevant at all. I will ask you all to turn off your access to wireless Internet and put away your cell phone before the start of class. We will discuss this more on the first day. Suffice to say-- texting or internet use during class will be prima facie evidence of unsatisfactory class participation.

I reserve the right to decrease a grade for unsatisfactory class participation or preparation.

## Materials

Stone, Seidman, Sunstein, and Tushnet, **Constitutional Law** (8<sup>th</sup> ed. 2018)

Throughout the semester, required material will be posted on the course TWEN site. Please make sure you are enrolled before class begins.

## Course Website

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 and for checking it regularly for course information.

## Grading

Your grade will be determined as followed:

10%: Submitted case briefs

10%: Closed-book midterm examination

80%: Closed-book final examination.

As stated above, I reserve the right to lower grades for inadequate class attendance, preparation, and participation.

## Course Expectations

American Bar Association Standards for Law Schools 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 for each credit earned in a class in order to obtain a *minimum* passing grade. Far more time is needed for a good or excellent grade.

You are also expected to complete all reading and written assignments before class, to participate consistently in class discussion, to work collaboratively on all group assignments, and to be able to demonstrate that you have read and reflected on the issues raised in each assignment.

### Student Learning Outcomes

Students will learn the rules of constitutional interpretation, separation of powers, federalism, due process, and equal protection. They will also learn how to structure legal arguments in a logical sequence; they will learn how to be precise with legal language; and how to work collaboratively to solve legal problems.

### Office Hours

My scheduled Office Hours for Spring, 2020 are:

Tuesdays and Thursdays: 12:30- 1:20, 3:00 – 3:45 (except for faculty meetings)

**IMPORTANT:** If you cannot find a convenient time, *please* let me know and we will find a mutually convenient time to meet or talk on the phone. You should be assertive in making appointments.

### Class Cancellation:

If I must cancel a class, I will either let you know ahead of time or, if need be, notify you via email. 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 School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at [http://law.ubalt.edu/academics/policiesandprocedures/honor\\_code/](http://law.ubalt.edu/academics/policiesandprocedures/honor_code/).

If you have even the slightest doubt about whether certain actions might possibly violate the Honor Code, please contact me or Associate Dean Dionne Koller.

Title IX Sexual Misconduct and Nondiscrimination Policy:

The University of Baltimore's Sexual Misconduct and Nondiscrimination policy is 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 Ms. Karyn Schulz, Director, Center of Educational Access, Office of Disability and Access Services, at 410-837-4141 or [kschulz@ubalt.edu](mailto:kschulz@ubalt.edu).

## CLASS RULES

You are required to attend class regularly and be prepared for class; adequate class attendance, preparation, and participation are essential if you wish to succeed. You are entitled to **3 absences per semester**. A student with more than 3 unexcused absences will not be permitted to take the final.

**If you miss a class, you must obtain the class notes from the missed class before attending the next class, and write me to let me know: 1) that you have received the notes; 2) from whom you received the notes; and 3) if you have any questions about what you missed.**

Class participation is an essential part of process of becoming a lawyer. All students are expected to be prepared to participate in each class session. Unless told otherwise, for each class, you are responsible for: **1) any unfinished material from the preceding assignment: PLUS 2) the assignment for that day's class. I will call on students randomly and solicit volunteers.** If you are not prepared to discuss the day's reading and the questions for the day's assignment, you must **give me a note prior to class**. This will avoid embarrassment for both of us.

## INTERNET and CELL-PHONES

Texting or Internet use during class will be prima facie evidence of unsatisfactory class participation.

## TWEN Assignments

You must **prepare case briefs for every case assigned**. You must place your case briefs for each class assignment in the appropriate drop box on TWEN. Answers must be submitted by 11:00 PM on the evening before class. For **each assigned case**, please submit a case brief, following the class template. No case brief should exceed one page, and many will be shorter. [When you have completed your briefs, you should be able to answer all of the questions I placed with the assignments.] After you have read the assignment and attempted to write your brief, you are permitted to discuss your answer with others in the class. Whatever you hand in, though, must be your own work and with your own language. If you copy language from either a classmate, an on-line resource, or any other outside source, you will get 0% for the *entire* TWEN part of your grade

I do not mind wrong answers; I am deeply offended by a lack of a good faith effort. You may "pass" on any three assignments of your choice. If you want to pass on a particular day, you must nonetheless submit a page to your drop box, stating both the assignment number and how many passes you have used [ie Assignment 11, pass 1]

These assignments are worth 10% of your grade. To get the full 10%, you must **complete** the required number of assignments and make a **good faith effort** on them all.

I will also ask you occasionally to show me your course packet. You **should mark up every case** as you read it, noting in the margins what are important definitions, rules, policy arguments, and key facts.

**GROUP WORK:** We will do a lot of work in small groups. This is an essential part of class. Accordingly, no one will be permitted to leave the room during group work.

## **Template for Case Briefs for Constitutional Law**

*Case Name, Court, Year*

*Rule[s] of Law* : Describe in short grammatical sentences the rules of law given by the court. A good rule statement can be understood by both an intelligent ninth grader and a judge deciding future similar cases. Since a rule of law can be used in future cases, your statement of a rule will not contain the names of the parties to the case you are reading. Often you will need to give more than one rule. If we have discussed a rule in class, and you read a case that gives an exception or example of that rule, you do not need to repeat the original rule. Note that you will often need extra sentences to define the legal terms you use in your rules.

*Reason for rule* [if given]

*Legally Significant Facts*: Describe in simple sentences the “story” of the case, ie what happened to the parties, that is either legally significant (used to decide the case) or bizarrely interesting.

*Application of Law to Fact*: Why did whoever win win? (To do this, you need to apply the facts to at least one of the rules you describe above)

*Dissent* (if any): What is the specific disagreement the dissent has with the majority opinion?

SYLLABUS (Note that the syllabus is subject to change throughout the semester)

## 1. Constitutional Theory

Please read the entire Constitution and pages 1 to the end of page 6

Be able to discuss the following:

- A) Identify at least three important differences between the Constitution and the Articles of Confederation.
- B) What explains the numbering used in the original (unamended) Constitution?
- C) What is the process for amending the Constitution?

## 2. Democracy & Factions

Pp 9-13, 16-18, 25-34

In *Federalist* 10:

- A) What is a “faction,” why are they dangerous, and do we have any today?
- B) How does Madison say that the Constitution deals with the dangers of factions?

In *Federalist* 51:

- C) How does the Constitution prevent abuse of power?

In *Marbury*: Read the story of the case first [in "background" at end of case]

- D) Is the Supreme Court “undemocratic”? Why or why not?

## 3. How to Read a Constitution

In *McCulloch*: Read the story of the case first [in "background" at end of case]

- E) What are the holdings in *McCulloch*?

F) What are the different techniques used by the Court in interpreting the Constitution to find Congressional power?

[If I say it is NECESSARY to answer this question in order to pass the course, what happens if you don't?]

## 5. Introduction to the Separation of Powers

A) This section is called “‘CASE OR CONTROVERSY’ REQUIREMENTS AND THE PASSIVE VIRTUES.” What is meant by the term “passive virtues”?

B) What are the rules for determining whether a plaintiff has “standing”?

C) Should taxpayers have standing to challenge unconstitutional expenditures?

D) How do the cases involving jurisdictional issues of standing relate to issues of separation of power?

E) What is the difference between "constitutional" and "prudential" standing considerations?

F) Define Political Question; What did the Court in *Marbury* say about political questions? If you are going to lose in the Supreme Court, would you rather lose on grounds of standing or political question? Why?

G) After reading *Federalist 47& 48*: What's the difference between “Separation of Power” and “Checks and Balances”?

*Youngstown*: [Read Background at back of case first]

H) What did President Truman do that led to the lawsuit?

I) Why did the majority say his action was unconstitutional?

J) Why did Frankfurter agree?

K) What is Jackson's framework?

L) What was the key argument made by the dissent?

## 5. Separation of Powers and the War on Terror



- A) Why did President win in *Dames & Moore* and lose in *Medellin*?
- B) Did Pres. Bush need a Congressional declaration of war before invading Afghanistan? How about Iraq?
- C) In *Hamdi*, what does **each** opinion see as a) the major constitutional question; and b) the role of the Court in times of war?
- D) What issues are raised in *Hamdan* that are different than in *Hamdi*?
- E) What issue is raised in the *Boumediene* case?

## 6. Executive Privilege; Separation of Powers for Purely Domestic Issues I

- A) Define “executive privilege.” Where does it come from? How much protection does it give?
  - B) After reading *Nixon v Fitzgerald* and *Clinton v Jones*: What is scope of protection for presidents against lawsuits, and WHY?
  - C) Read the short section on impeachment: Should Pres. Clinton have been impeached?
  - D) After reading *Clinton v. City of New York* and *Chadha*: Why was each law unconstitutional?
- What is argument of the concurrence and the dissent in *Chadha*?
- E) How can one tell an executive from a legislative from a judicial function?

## 7. Separation of Powers for purely domestic issues II

- A) *Chadha*, *Bowsher*, and *Free Enterprise Fund* are considered to represent a “Formalistic” approach to Separation of Powers cases, while *Morrison* and *Mistretta* are seen as representing a “Pragmatic” approach. What are advantages and disadvantages of each approach?
- B) What are the limits as to how a President hires and fires people?
- C) In *Bowsher*, what is the basis for White’s dissent?
- D) In *Morrison & Mistretta*, what is the basis for Scalia’s two dissents?
- E) What does *Washington Metropolitan Airport* add to the analysis?

## 8. Introduction to Federalism

A) Define Federalism.

What are its “values”? What are its negatives?

B) Define Enumeration.

C) Fill out the chart [On-line, in “Readings”], for the following cases:

*E.C. Knight; Hammer, A.L.A. Schechter Poultry, Wickard, Heart of Atlanta, & Katzenbach*

## 9. Modern Commerce Clause

A) In *Lopez*: The majority strikes down the law -- WHY?

When can Congress regulate under the Commerce Clause? [Hint: Use the concurrences and dissents to “count to five”... find grounds on which at least five Justices agree]

What does Thomas believe should be the proper test?

What do Kennedy and O'Connor say is permitted under commerce clause? How do they differ from Thomas?

What test would Breyer have used? How would it be applied?

B) What do *US v Morrison*, *Gonzales v Reich*, and *US v Comstock* add?

C) In sum: What can Congress regulate under the Commerce Clause today?

D) What can't Congress regulate? Is the change from the past good or bad?

## 10) Affordable Care Act

*National Federation of Independent Business v Sebelius*

a) Does *Sebelius* change the Commerce Clause Doctrine? If so, how? If not, why not?

b) What is the strongest argument for the law's constitutionality?

c) What is the strongest argument for the law's unconstitutionality?

## 11) Other Sources of Congressional Power

- A) What are the limits on Congress's powers to tax?
- B) What are the limits under the Spending Clause on Congress's powers to place conditions on those who receive federal money?
- C) Does Congress have any "war powers"? If so, what are they? If not, why not?

## 12. Regulating States

- A) What power does Congress have under the 13<sup>th</sup> and 14<sup>th</sup> Amendment?
- B) Prior to *City of Boerne v. Flores*, the Supreme Court ruled that the First Amendment was not violated by a law that had the effect of restricting a religious practice, as long as that law did not single out religious activity for adverse treatment. What did Congress try to do in *City of Boerne* and why did it fail?
- C) How does Congress attempt to avoid the problems with *Boerne* with the law discussed in *Cutter*?
- D) Why did the Federal Government lose in both *NY v US*, and *Printz*, but win in both *Garcia* and *Reno v Condon* [What did Congress try to "do" to the states in each case]?
- E) When does the 11<sup>th</sup> Amendment prevent Congress from providing monetary damages as a remedy for private individuals suing a state that violated federal law?
- F) Why did Congress lose in *Alden*, *Kimel*, *Florida Prepaid*, *Garrett* and *Coleman*, but win in *Hibbs* and *Lane*?

## 13. State Control of Commerce I

- A) Define Protectionism? Is it good or bad?
- B) States are limited by the so-called "dormant commerce clause"? What is this?  
Where in the Constitution does it come from?
- C) Can states ever discriminate against commerce emanating from other states?

## 14. State Control of Commerce II

A) What is the Market Participant Doctrine?

Is it Constitutional that out of state residents who attend this law school pay a much higher tuition than in-state residents? Why?

B) Define what is meant by the phrases “facially- neutral statutes” and “facially discriminatory statutes,” so that you can tell the difference.

C) What is the difference between how the Court treats facially-neutral vs facially discriminatory statutes?

D) Why is preemption in this chapter?

### 15. State Action

A) Why does “state action” belong in a Constitutional Law Course?

B) For what sort of Constitutional Law cases will the State Action “question” be trivially easy? What sorts of fact patterns will create a difficult state action question?

C) Describe the relationship between governmental entity and private inflictor of harm in each case:

*Deshaney, Flagg, Lugar, Burton, Rendall-Baker, U.S. Olympic Committee, Moose Lodge, Jackson*

In each case, why was [or wasn't] the relationship “enough” for state action?

E) In one grammatical sentence, summarize the situations when private parties will be held to constitutional standards.

### 16. From *Dred Scot* to *Brown*

A) What did the original Constitution say about slavery?

B) Were the opinions of *Dred Scott* and *Plessy* compelled by the law or the times? What should honorable judges have done in each of those cases?

C) What is holding in *Brown I*? What is its reasoning?

D) How is the case of *Bolling v. Sharpe* different from *Brown I*?

E) What happened in *Brown II*? How did states react to *Brown* and the Court respond to the States?

### 17. Rational Review

- A) Is discrimination bad?
- B) What is the “test” for rational review?
- C) What is the difference between under-inclusiveness and over-inclusiveness?
- D) Was the law in *Beazer* under-inclusive, over-inclusiveness, both, or neither?
- E) How does the Court determine the “purpose” of a law?
- F) What was the “discrimination” in *Beazer*, *Moreno*, *Cleburne*, *Romer*, *Clover Leaf*, *Williamson* and *Armour*?
- G) Do you agree with these holdings?

### 18. Strict Scrutiny

- A) Define “strict scrutiny”.
- B) How is “strict scrutiny” SIMILAR to rational review?
- C) When do courts applied strict scrutiny?
- D) Was it applied in *Korematsu*? In *Loving*? In *Brown I*?
- E) Why did Justice Thomas in dissent think it should not be applied in *Johnson*?

### 19. “Neutral” Statutes

- A) Why did the Court use strict scrutiny in *Palmore* but not in *Washington v Davis*?
- B) What do *Arlington Heights* [on line], *Feeny* p535, and *Yick Wo* p537-48 teach about ascertaining invidious intent?
- C) Was *Palmer v Thomson* [on-line, readings] correctly decided?
- D) Were do the majority and dissent differ in *McClesky*?

## 20. Affirmative Action

- A) What is the definition of "affirmative action"?
- B) What is the "test" for the Constitutionality of affirmative action plans? Is the Court's application of the test the same as for "traditional" racial discrimination?
- C) What are the key differences between the "constitutional" affirmative action plan and the "unconstitutional" ones?
- D) List the best constitutional and policy arguments for and against the adoption of an affirmative action plan by a public law school.

## 21. Gender

- A) How does the standard for gender discrimination differ from that for racial discrimination? Why?
- B) What type of gender discrimination does the Court accept and why?
- C) How should the Court analyze affirmative action which helps women?

## 22. Alienage

- A) From Case Book readings: What is the difference between the standard for reviewing state vs federal discrimination against aliens? Why did the Court create different standards?
- B) From *Wong Kim Ark*: Why do the children of people ineligible for citizenship automatically become U.S. citizens if born here?
- C) From *Plyler v Doe*: Why do illegal aliens have the right to attend public schools?

## 23. Constitutional Interpretation and Substantive Due Process

- A) What is meant by "originalism"? What are its strengths and weaknesses?
- B) What was the holding of *Lochner*? Why is this generally considered to be one of the Supreme Court's worst decisions?
- C) In *Griswold*, what part of the constitution does the law violate according to the

majority? According to Harlan [and what is his “test”]?

D) Is *Griswold* distinguishable from *Lochner*?

#### 24. Abortion

A) Is there a constitutional right of privacy? Why or why not?

B) What is the current law of abortion? What governmental regulation is permitted?

C) Prepare to argue the positions of **BOTH** the pro-choice and pro-life sides on: What should the law on abortion be and why? Should the law require parental or spousal notice? How about a 24 hour waiting period?

#### 25. Families; Education; The Right to Travel, Vote and Die Wednesday

A) Fill in the following chart:

What Interest or Right is Involved?	Does the Court focus on Equal Protection or Due Process?	What Standard Does the Court Use?
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*Skinner*

*Harper*

*Kramer*

*Reynolds*

*Shapiro*

*Rodriguez*

*Zablocki*

*Moore*

*Belle Terre*

B) Is there a “right to die”? Why?

C) Based on *Glucksberg*, should there be a right to use medical marijuana?

## 26. Gay Rights

A) What standard of review is used for evaluating regulations based on sexual orientation under the due process say about? Why?

B) What standard of review is used for evaluating regulations based on sexual orientation under the equal protection clauses? Why?

C) Is “Don’t Ask; Don’t Tell” constitutional? Why?

D) Is a state ban on gay marriage constitutional? Why?

## 27. Procedural Due Process

A) What is the purpose of ensuring Procedural Due Process?

B) What are the “interests” for which the protections of procedural due process apply?

C) What process is required?