CONSTITUTIONAL LAW

Spring 2009, University of Colorado Law School
Professor Scott Moss: Office 452; (303) 735-5374; scott.moss@colorado.edu

I. READ THIS SYLLABUS (I MEAN IT)

Reading the syllabus is part of the assignment for the first class. In my experience, a lot of students don’t actually read the syllabus (even though I specifically assign it as reading) and then look inattentive in asking questions the syllabus covered. E.g.: “by when do we have to sign up on TWEN?” (see Part IV); “what can I pick as a response paper topic?” (see Part VI). As lawyers, you will have to get used to reading, in advance, the rules of any court, judge, or private forum in which you have a case; consider this a set of such “local rules” you have to read in advance of your “legal work” in this course.

II. COURSE DESCRIPTION & SCOPE

This course covers various issues in constitutional law, including:

• Separation of Powers – how the constitution, by allocating different powers to the three branches of the federal government, limits the courts’ power to hear certain cases (e.g., foreign policy disputes), Congressional power to pass certain legislation (e.g., the line-item veto), and Presidential power to undertake certain executive actions (e.g., detentions of persons on grounds of national security)

• Federalism – how the constitution limits Congressional power to legislate on insufficiently “federal” matters (e.g., legislation on school safety) and also limits states’ powers over “federal” issues such as interstate commerce (e.g., regulations affecting transportation)

• Individual Rights – how constitutional amendments have limited the power of the government by guaranteeing certain rights to equality, due process, individual liberty, and economic liberty

The constitution affects so many areas of law that this course cannot cover all constitutional topics, leaving some for other courses focusing on specific fields. This course seeks to cover:

• Different methods of interpreting the constitution – and of interpreting legal texts more generally, because constitutional law has more than its share of the classic debates on how to interpret laws

• Important historical developments in constitutional law and their effects on modern law

• Current controversies in constitutional law, such as abortion, affirmative action, homosexuality, and constitutional limits on the federal government’s ability to legislate on certain topics, such as gun possession, medical marijuana, and expansions of individual rights

III. CONTACTING ME

Email is the most reliable way to reach me promptly, but also feel free to call. I generally am in my office most weekdays, and you can stop by any time – but contacting me in advance is preferable to make sure I am available at your preferred time.

IV. TWEN – MANDATORY TO SIGN UP

By Friday, January 16th, you must sign up on the course’s TWEN page (on Westlaw); the page will be live no later than Tuesday, January 13th. TWEN will have class reading assignments (possibly posted on the calendar, possibly emailed to the address you register on TWEN), will have posted files available for downloading, will be where you turn in response papers (described below), and will be where I hold discussions (at least in the days leading up to the final exam).

1 E.g., the Fifth Amendment “Takings” clause often is covered in the 1L Property course; the wide range of different rights falling under First Amendment are covered in upper-level constitutional law electives and seminars; constitutional criminal procedure rights also are covered in various upper-level courses.
V. CLASS PARTICIPATION & READING

A. Doing the Reading

Doing the reading, and being prepared to discuss it, is essential to this class for several reasons. First, this is one of those classes that will include cold-calling and lots of discussion. Second, much of the material is “cumulative,” so if you skip topics, you will not understand later topics as well. Third, some of this stuff is complicated, and even the best teaching cannot easily make up for a lack of reading.

B. Participating in Class – and Being Unprepared

Because doing the reading and participating in class matter, I like to mix cold-calling (especially if I haven’t heard from you in class in a while) with calling on volunteers. If you are unprepared when called on, (1) just say that you are not prepared (I don’t expect you to make something up, and please don’t waste everyone’s time by trying to do so), and (2) expect to be called on in one of the next few classes – a policy I like because it gives you a chance to “recover.” If you have a reasonable excuse for being unprepared, feel free to let me know in advance by email so that I don’t call on you that day.

VI. RESPONSE PAPER

You will write, and submit into the TWEN drop box by 12 p.m. the day before the class for which it is assigned,\(^2\) a “response paper” (the paper rules are listed below in the footnote\(^3\)) on the reading for that class or something related. I want not a summary, but your thoughts, and the assignment is open-ended: argue for or against an assigned case; apply the reading to a real-world situation; respond to a question in the reading; compare a reading to something you learned elsewhere; or write on any related topic you like.

Why do I assign these? (1) They encourage creativity (even though you’re in law school). (2) They guarantee that one or two students give additional thought to each day’s reading. (3) They facilitate class participation for lower-key folks who find it easier to speak after having already given the topic some thought (so when you do a response paper, don’t be surprised if you are called to discuss what you wrote).

Full disclosure: in grading writing, I consider grammar and style, not just “content” – because even the most brilliant content gets obscured by sloppy writing. Most of you will do more writing than speaking in summer jobs and as new lawyers, so you have to learn to write, as well as read and speak, about the law you are learning. I see attorneys waste hard work and intelligent thought by turning in sloppy papers to supervisors or even courts – papers with errors so basic that they could result only from a lack of proofreading. You should practice avoiding such errors by engaging in the sort of meticulous self-proofreading too few lawyers undertake. I assign response papers in almost every course I teach; there always are some students who do not read or believe this paragraph, and their grades suffer as a result.

\(^2\) In the rare event of a multiple-location internet problem (e.g., at home and CU simultaneously): (A) leave a hard copy for me, (B) with a note explaining that you had an internet problem, and (C) as soon as the internet problem ends, submit your paper into the drop box and email me when you have done so.

\(^3\) Rules and guidelines for response papers:

(1) Submit the paper as a Microsoft Word, RTF, or PDF file (email me in advance if you cannot).
(2) Have the document filename include your first initial and last name.
(3) Write your papers in 12-point Times New Roman font, with 1” margins, and double-spaced.
(4) Do not exceed three pages; that is a firm page limit of the sort lawyers regularly see in court rules; if you draft too much, self-edit it to meet the page limit (as lawyers regularly do to meet court page limits).
(5) Because content and writing quality are what matters, do not assume three pages are better than two (or vice-versa); some shorter papers get better grades than longer papers (and vice-versa).
VII. GRADING

A. Final Exam, But a Merely Optional, Ungraded Midterm

Your final exam grade is your presumptive course grade, subject to the exceptions detailed below. There will be an optional midterm (basically, a practice final exam question) that is ungraded but that I will evaluate in class (and, if you wish, individually).

B. Response Papers: Grading and Lateness/Make-Up Policy

Response papers receive one of three grades: check (√), check-plus (√+), or check-minus (√-). Most papers get a check. This grade will factor into your plus/minus factor (see below).

If you do not turn in a paper on time (i.e., noon the day before the relevant class session), you can either (a) turn it in by 10 p.m. the night before the class (i.e., up to 10 hours late) or, if you cannot do that, then (b) do a “make-up” response paper for a later class that still has an open spot on the TWEN signup page. Any late or make-up paper will be graded down a notch (from √+ to √, from √ to √-, or from √- to two √- grades), both on general principle (deadlines are hugely important for lawyers) and because lateness defeats the purpose of the response papers – that you give extra thought to your assigned reading, and that I get to read papers sufficiently in advance to consider incorporating a point you make into my class preparation.

The response paper is mandatory for completion of the course. If you simply do not do your paper, and do not make it up later, you will not be allowed to take the final; you will fail the class, just as a lawyer can lose a case by not making a required court submission or not drafting a necessary document for a client.

C. Plus/Minus Factor

Your grade may rise or fall up to three points based on class participation and your response paper. That is, if your grade on the final exam is 85, your presumptive course grade is 85, but (1) it could drop as low as 82 due to a combination of poor attendance, participation, and/or preparation, and (2) it could rise as high as 88 if you do especially well in those regards. Application of the plus/minus factor is the exception, not the rule; neither frequent participation nor a good response paper guarantees a grade boost, so do not assume that the lack of a plus factor means I disliked your class participation.

D. Serious Attendance Problems

While attendance ordinarily affects only your plus/minus factor, our class discussions are critical to learning this subject, so a serious, ongoing lack of attendance will have more significant consequences, like a further grade decrease (i.e., beyond a three-point minus factor) or, in extreme cases, a failing grade. Absent special circumstances, you will receive notice and an opportunity to remedy the situation (e.g., an email urging you to attend class) before any consequences beyond a three-point minus factor.

VIII. COURSE MATERIALS


The Emanuel study aid can be useful (a) for getting a very basic sense of topics you find confusing (the short “capsule summary” can be especially good for this) and (b) for finals studying. That said, a study aid is absolutely no substitute for reading the Case Book for many reasons. (1) Only the actual cases show the judges’ and lawyers’ reasoning and arguments, which are as much a focus of this course as the mere case holdings. (2) The study aid is not much shorter than the Case Book, so reading “only” the study aid is a dumb way to try to save time. (3) The study aid and the Case Book do not cover all the same cases. (4) I chose the Chemerinsky book (among many Con Law books on the market) because it uses shorter case excerpts and begins most chapters with helpful explanations; so while some of the topics are complex, Chemerinsky really does not “hide the ball” or include lengthier readings than necessary.
IX. **READING ASSIGNMENTS**

- Page numbers are for the Chemerinsky casebook unless labeled “Supp,” in which case they are for the 2008 Supplement to the casebook.
- For the first class, read Topic I(A) (and this syllabus).
- Each class reading assignment will be posted on TWEN. If you want to read ahead, you can roughly guess upcoming assignments from the average of 19 pages (typically 15 to 25) per class.
- Take care to note where the below page assignments specify where to stop and start reading, where to skip particular sections, cases, or even particular paragraphs, etc.

**FIRST HALF OF COURSE: GOVERNMENT POWER & ITS LIMITS** (374 pgs)

**I. The Separation of Federal Powers** (91 pgs)

A. The Authority for Judicial Review
   - 761-765 [just *U.S. v. Virginia*]
   - 1-9 [through end of “Notes on Marbury v. Madison”]

B. Justiciability: Limits on What Cases the Federal Courts Can Hear
   1. Prohibition on "Advisory Opinions"; Overview of the "Standing" Requirement
      - 30-48
      - Supp 25-33
   2. Causation; Redressability; 3rd-Party & Taxpayer Standing
      - 48-53
      - 58-64 (up to but not including the *Valley Forge* case)
      - Supp 33-42
   3. Requirement That Claim Be "Ripe" But Not "Moot"
      - 67-77
   4. Declining to Adjudicate "Political Questions"
      a. The Political Question Doctrine
         - 77-89
         - Supp 46-47 (just the text preceding the *League v. Perry* case, not the case itself)
      b. Foreign Policy
         - 91-95 [just section (iii)]

II. **The Federal Legislative Power: Limits on the Scope of Congressional Authority** (148 pgs)

A. Introduction: Congress and the States
   - 99-112

B. The "Commerce" Power
   1. Before 1937
      a. The Scope of "Commerce" and Congress's Commerce Power
         - 112-124
      b. Does the Tenth Amendment Limit Congress's "Commerce" Power?
         - 125-128
   2. From 1937-1991
      - 129-152
3. From 1991-present
   a. The Modern Shift in the Commerce Power
      i. The Return of Limits to the Commerce Power: Lopez & Morrison
         • 153-170
      ii. 2001-present: The Court Limits Lopez & Morrison
         • 170-176
         • Supp 53-66
   b. Tenth Amendment Limits on Congress's Authority
      • 176-197
   c. The Taxing & Spending Power
      • 198-207

C. Congressional Power under the Post-Civil War Amendments
   • 207-222

D. Eleventh Amendment Limits on Congress's Power to Authorize Suits vs. State Gov'ts
   • 222-231 [just through 1st paragraph of Florida Prepaid]
   • 235-239

III. The Federal Executive Power (78 pgs)

A. Separation of Powers & Presidential Authority: "Inherent Presidential Power"
   • 271-280

B. The Authority of Congress to Increase Executive Power
   • 287-292

C. Presidential Power over Foreign Policy
   1. Foreign Policy
      • 320-327
   2. Warmaking
      • 327-331
   3. Terrorism, Detention, & Wartime Sabotage
      • 654-658 [just Korematsu & the 2 paragraphs preceding it]
      • 331-343
      • 346-354
      • Supp 29-43
      • Supp 71-85

IV. Limits on State Regulatory & Taxing Power (57 pgs)

A. Preemption (14 pgs)
   • 365-378

B. The "Dormant" Commerce Clause
   1. Overview
      • 381-387 [overview to section (B); all of (B)(1)]
   2. Laws that "Discriminate" Against Out-of-Staters
      • 393-397
      • 411-414
3. Non-Discriminatory Laws that Burden Interstate Commerce (16 pgs)
   • 414-416
   • Supp 114-123
   • 418-423 [i.e., all section (d) but skip Bibb v. Navajo on 416-418]

4. Exceptions: Congressional Approval; State as Market Participant (2 pg)
   • 423-424
   • 426 [just the overview of the Market Participant exception on 426]

C. Article IV "Privileges & Immunities" (11 pgs)
   • 432-443

SECOND HALF OF COURSE: CIVIL RIGHTS & CIVIL LIBERTIES (386 pgs)

V. The Structure of the Constitution's Protection of Civil Rights & Civil Liberties (39 pgs)

A. "Incorporation": Application of the Bill of Rights to the States (18 pgs)
   • 445-449
   • 455-468

B. The Requirement of "State Action"; Exceptions Allowing Coverage of Private Conduct (21 pgs)
   • 469-480
   • 487-495 [but skip Lugar & its post-case note on 490-492]
   • 508-512

VI. Due Process & Protection of Fundamental Rights (208 pgs)

A. Due Process Protection of Economic Rights (17 pgs)
   1. The Rise of Constitutional Protection of Economic Rights: Lochner
      • 519-537 [but skip Allgeyer v. Louisiana on 524-526]
   2. The Post-1937 Fall of the Lochner Doctrine; Some Remaining "Economic Rights"?
      a. Economic Substantive Due Process from 1937 to Today (18 pgs)
         • 540-558
      b. The Contracts Clause (14 pgs)
         • 558-574 [but skip Energy Reserves Group on 562-564]

B. Modern Substantive Due Process: "Fundamental Rights" (6 pgs)
   • 815-821

1. Family Autonomy (23 pgs)
   a. The Right to Marry
      • 821-827
   b. The Right to Custody of Children
      • 827-835
   c. The Right of Parents to Control the Upbringing of Their Children
      • 839-847

2. Procreation & Contraceptives (11 pgs)
   a. The Right to Procreate
      • 847-850
   b. The Right to Contraceptives
      • 850-858
3. Abortion
   a. Recognition & Reaffirmation of the Right to Abortion
      • 858-878
   b. Regulation of Abortions
      • 878-891
      • Supp 185-201
   c. Spousal Consent/Notice Requirements
      • 895-901

4. Medical Decisions
   • 906-919

5. Sexual Orientation
   • 920-932

6. Voting Rights
   • 942-957
   • 960-982 [continue reading through the post-case note on 982]

VII. Equal Protection (139 pgs)

A. Overview: Different Levels of Scrutiny for Different Classifications
   • 617-623

B. Racial Classifications
   1. Discrimination Against Racial Minorities
      • 646-654 [& review Korematsu (previously assigned) on 654-658]
      • 659-680 [but skip Palmore v. Sidoti on 661-662]
      • Supp 157-164
      a. The Evolution of the Law on Affirmative Action
         • 706-715
      b. School Affirmative Action & Race-Based Desegregation
         • 722-747
         • Supp 165-184

C. Gender Classifications
   1. Discrimination Based on Gender
      752-761 [& review U.S. v. Virginia (previously assigned) on 761-765]
   2. Policies Aimed at Benefiting Women
      771-773, 777-780

D. Other Classifications & Discrimination
   1. The Rational Basis Test
      623-624; 630-640
   2. Various Classifications Receiving Rational Basis Review: Age; Disability; Wealth
      807-812 [but skip subsection (2), discrimination based on disability, on 810-811]
   3. Classifications Failing Rational Basis Scrutiny: Sexual Orientation & Others
      625-629; 640-646