CONSTITUTIONAL STRUCTURES OF GOVERNMENT

Spring 2015 | Law A507D | M/W/F 1:30-3:20
Professor Clark Lombardi
Office Location: Gates Hall 319
Office Phone: (206) 543-4939 | Email: lombardi@uw.edu
Group Office Hours in law school cafe: Wednesdays 3:30-4:20
In office hours: Tuesday 2:00-3:00

COURSE OVERVIEW

1. Course Description
   This course is an examination of the structures of government that derive from the United States Constitution. Major themes of the course include federalism, separation of powers, the role of the courts, and Reconstruction. Topics of particular focus include judicial review, the executive and legislative powers, interstate commerce, state sovereign immunity, federal preemption, and the Fourteenth Amendment. We also will address certain individual constitutional rights. This course is an important but nevertheless introductory part of the larger project of exploring and understanding the United States Constitution. Of necessity, we will address only in passing certain subjects, such as substantive due process, that tend to be covered more thoroughly in semester-based Constitutional Law courses. I strongly encourage students to take upper-level classes that more fully explore these subjects and to consider enrolling in other advanced courses in constitutional law.

2. Required Texts
   The casebook required for this course is Charles Shanor’s American Constitutional Law: Structure and Reconstruction (5th ed. 2013). Be sure to obtain the Fifth Edition. There is no need to obtain the casebook supplement. We will be supplementing the casebook with various readings that will be made available through Westlaw, Lexis, the Internet, or Canvas. Occasionally I will email you; please check your UW email regularly during the quarter.

3. Additional Resources
   Constitutional law is difficult to summarize and simplify, and coverage of cases and other materials tends to vary significantly from class to class. I would thus advise caution with respect to commercial outlines. At the same time, I understand that some of you may wish to get some supplementary material. Case-method and Socratic dialogue give you priceless practice in analyzing cases in depth, and can teach you to look for the nuances in doctrine. It can also leave you feeling sometimes that you missed the forest for the trees. For those wishing to consult a supplementary source, I recommend Erwin Chemerinsky’s Constitutional Law: Principles and Policies (4th ed. 2011).

4. Study Groups
   Students in the past have found study groups extremely helpful—even when they are informal. The experience of talking through cases with your colleagues is the best possible way to prepare for a class in which you will be expected to talk through cases in front of you classmates. Regular meetings are also a great way to review material informally and to make sure that you understand how cases you are currently reading connect to other cases. I urge each of you right at the start of the quarter to form a study group.

(Continued)
5. **Office Hours**

I encourage you to talk with me outside of class if you have questions or comments or otherwise wish to meet. I am always happy to discuss the course and its materials. In addition, I have worked as a clerk at the appellate level, as an associate at a large New York law firm and as a consultant on constitutional and law reform projects around the world. I am happy to discuss any of these experiences with you or more generally to discuss the legal profession. Once a week, I hold group office hours—which are times in which I meet in the law school café and discuss with any students who wish to come by, issues that they want to discuss. Many students find the informal quality of these discussions useful—and they find that they learn as much from listening to their classmates as they do asking their own questions. At times, students have issues that they would like to discuss in a non-group setting. I have an hour of scheduled office hours for this purpose.

6. **Disability-Related Needs**

To request academic accommodations due to a disability, contact Disability Resources for Students (DRS), 448 Schmitz, (206) 543-8924 (V), (206) 543-8925 (TTY). If you have a letter from DRS, please present the letter to me so we can discuss the accommodations you might need in this class.

7. **Classroom Policies**

*Preparation.* It is critical that you come to class prepared. At a minimum, this requires that you have completed the reading, that you have thought about the implicated issues, and that you arrive to each class ready to discuss the materials on a substantive level.

*Class Participation.* I will call on people randomly and without prior notice, and I encourage students to participate voluntarily. Please note that the purpose of “cold calling” is not to intimidate or otherwise impose on students; to the contrary, it is a means of ensuring that everyone is included in the discussion and can benefit both from the insights of peers and from actively engaging with the material. Please remember too that learning to handle a “cold call” is a crucial part of your training. No matter what type of law you practice, you will regularly be “cold called” about legal issues. It is not only appellate litigators who need to demonstrate command of doctrine and caselaw and an ability to think on their feet about the implications of doctrine or about how it would be applied to new circumstances. Transactional lawyers and consultants have to do the same. Clients ask you suddenly to explain the law in a particular area and its implications. So do counterparties during negotiations. Lawyers are simply expected regularly to grapple with complex issues orally in front of strangers. Sad but true. Luckily, practice makes perfect.

*Attendance.* Attendance is important, and it is required. Our School’s policy reads, “[a]t any time after the fifth week of a course . . . , a student who has been determined by the instructor to have attended fewer than 80 percent of the class sessions in any course will be required to drop the course from his or her registration upon the instructor’s so indicating to the Academic Services Office.”

*Recordings.* Class attendance is mandatory. Classes will not be podcast. You are not allowed to make your own video or audio recordings of class sessions.

8. **Grades**

Class participation is worth 10% of your grade. The rest of your grade for the course will be determined by your score on an exam. The exam will be open book and four hours long. You may not bring commercial outlines, treatises, or other commercial resources into the exam. You may bring with you only the following: the required casebook, copies of the required reading, your class notes, any material posted to Canvas, and any outlines you personally have prepared or have worked with a
group to prepare. If using a computer for the exam, you must use Extegrity’s Exam4 software. You may use the setting that permits access to electronic documents stored on a hard drive.

10. **Reading Assignments**

Below find the syllabus and reading assignments for the course. We will tackle an average of approximately one assignment per class period. If necessary, I will circulate a revised version of the Course Overview and Syllabus. Each version of the Syllabus is marked at the bottom of the page.
### Overview of Semester

(subject to modification)

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### IX. Enforcing the Reconstruction Amendments

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### X. Wrap Up

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READING ASSIGNMENTS
(Subject to modification)
“CB” refers to the required casebook.

Pre-Course Stretching:

Many of you may have heard that in constitutional law more than most areas of the law, students benefit from coming in with some background about American history. That is probably true. The U.S. constitution was drafted a long time ago and constitutional disputes generally appear at moments of economic, political or social tension. Simply to understand what the people are arguing about in the cases that we read, why the issues matter so much and what the implications are of the Court’s answer, it often helps to understand the broader historical context. I understand that people come in with different undergraduate degrees and different backgrounds. For those you who feel you might benefit from a refresher on U.S. history, and are looking for a book, I have ordered at the bookstore, a book entitled Don’t Know Much about History. I apologize for the title, which I admit is off-putting. Setting that aside, the book is engagingly written and provides, I think, an appropriate level of detail. Other books, of course, provide similar background.

INTRODUCTION

Assignment 1
Introduction to the Constitutional Structures of Government

- The U.S. Constitution and Amendments (CB pp. xxv-xli)
- A Brief Outline of the Constitution’s Text and of Its Interpretation (CB 1-9)
- Overview of the Casebook & Introduction (CB 16-17)

Assignment 2
Sources, Methods, and Mechanics of Judicial Decisions [revise]

Required:
- 7 page Excerpt from Treatise discussing Marbury v. Madison (on Canvas)
- Introduction to Interpretative Issues; Casey; Roper (CB 39-50)

Strongly Recommended
- Interpretative Choices: the Second Amendment; Heller (CB 50-64)
Assignment 3
Limits on the Judicial Power: Standing and Mootness

- Introduction to Limits on the Judicial Power (CB 64-65)
- Congressional Limits: *McCardle* (CB 65-69)
- The “Case or Controversy” Limit (CB 85-86)
- Standing and Mootness; *Laidlaw* (CB 86-98)

Assignment 4
Limits on the Judicial Power: Political Questions

- Political Questions; *Baker* and *Vieth* (CB 102-113)
- Listen to oral argument from the *Vieth* case, available at [http://tinyurl.com/7kvf2hm](http://tinyurl.com/7kvf2hm)

EXECUTIVE AND LEGISLATIVE POWERS

Assignment 5
Introduction to Distribution of National Powers; Executive Powers

- Introduction to the Distribution of National Powers (CB 114-117)
- The Framework; *Youngstown* (CB 117-126)
- Introduction to Executive Powers (CB 126)
- Domestic Affairs; *Clinton v. City of New York* (CB 126-135)
- Foreign Affairs; *Curtiss-Wright; Dames & Moore* (CB 135-141)

Assignment 6
Legislative Powers

- Introduction to Legislative Authority (CB 160-161)
- *Chadha* (CB 161-169)
- *Morrison v. Olson* (CB 177-188)
**CONGRESS’S ARTICLE I POWERS AND THEIR LIMITS**

**Assignment 7**  
The Necessary and Proper Clause; the Classical View of the Commerce Power

- Introduction to Congress’s Article I Powers (CB 207)  
- Basic Framework; *McCulloch* (CB 207-220)  
- Introduction to the Commerce Clause Power (CB 224) and the  
- Classical View; *Gibbons* (CB 225-233)

**Assignment 8**  
The Commerce Clause During and After the New Deal

- *Wickard* (CB 233-237)  
- *Heart of Atlanta Motel* (CB 238-242)

**Assignment 9 [Combined class w/Professor Manheim’s]**  
Modern Scope of the Commerce Clause

- *Lopez* (CB 243-251)  
- *United States v. Morrison* (CB 251-256)

**Assignment 10**  
Modern Scope of the Commerce Clause, con’t

- *Raich* (CB 256-261)  
- *NFIB* (CB 261-268)

**Assignment 11**  
Other Article I Powers

- The Taxing Power (CB 269)  
- *NFIB* (CB 269-275)  
- The Spending Powers; *Dole* (CB 276-281)  
- *NFIB* (CB 281-287)  
- The Treaty and War Powers (CB 288-289)

**Assignment 12**  
Federalism as a Limit: The Tenth Amendment

- Introduction to Federalism Limits on Article I Powers (CB 289)  
- The Tenth Amendment; *Garcia* (CB 289-296)  
- *New York v. United States* (CB 296-304)  
- *Printz* (CB 304-311)

(Continued)
Assignment 13
Federalism as a Limit: The Eleventh Amendment

- Introduction to the Eleventh Amendment and State Sovereign Immunity (CB 311-312)
- *Seminole Tribe* (CB 312-319)
- *Alden* (CB 319-325)

**FEDERALISM AS A LIMIT ON STATE POWER**

Assignment 14
Federalism as a Limit on State Power (Federal Preemption)

- Introduction to Federalism’s Limits on the States (CB 330)
- Introduction to Federal Preemption of State Law (CB 351-352)
- *Geier* (CB 352-356)
- *Garamendi* (CB 356-363)
- “Supplementary Materials Re: Preemption” (handout will be made available on Canvas)

Assignment 15
Reflection and Review

**JUDICIAL PROTECTION OF INTERSTATE COMMERCE**

Assignment 16
The Dormant Commerce Clause

- Introduction to Judicial Protection of Interstate Commerce (CB 364-365)
- Introduction to Origins of the Dormant Commerce Clause; *Willson* (CB 365-367)
- Discrimination and Burdens on Commerce; *Philadelphia v. New Jersey* (CB 367-373)
- *Kassel* (CB 377-386)

Assignment 17
The Dormant Commerce Clause, con’t; State Privileges and Immunities

- The Market Participant Exception; *South-Central Timber* (CB 386-392)
- *United Haulers* (CB 392-399)
- Introduction to State Privileges and Immunities (CB 399)
- *Camden* (CB 400-406)

**INTRODUCTION TO THE RECONSTRUCTION AMENDMENTS**

Assignments 18-19
Introduction to the Reconstruction Amendments; the State-Actor Doctrine;
State Privileges and Immunities

- Introduction to Reconstruction of Federal-State Relations (CB 407-408)
- Introduction to Origins of the Reconstruction Amendments (CB 408)
- “Overview of Dred Scott” (handout will be made available on Canvas)
- State Action; The Civil Rights Cases (CB 418-426)
- Shelley (CB 426-430); Leesville Concrete (CB 430-438); DeShaney (CB 439-445)
- Federal Privileges and Immunities; Slaughter-House Cases (CB 445-453)

EQUAL PROTECTION

Assignment 20
Introduction to Equal Protection; Traditional Rational-Basis Review; “Separate But Equal”

- “Overview of Substantive Due Process” (handout will be made available on Canvas)
- Introduction to Equal Protection (CB 593-595)
- Introduction to Traditional Rational Basis Review (CB 595)
- Railway Express & Armour (CB 595-603); Beazer (CB 603-607)
- Introduction to Race and the Equal Protection Clause (CB 607)
- Plessy (CB 607-612) & Brown (CB 612-617)

Assignment 21
Strict Scrutiny

- Introduction to Invidious Race Discrimination (CB 617)
- Strauder (CB 617-619);
- Yick Wo (CB 619-620); Korematsu (CB 621-627); Loving (CB 627-630)
- Johnson (CB 630-632); Washington (CB 632-637)

Assignment 22
Intermediate Scrutiny; Fundamental Interests; Non-Traditional Rational-Basis Review

- Introduction to Gender and Equal Protection (CB 678-679)
- Craig (CB 679-685)
- Virginia (CB 685-693)
- Introduction to Fundamental Interests and the Equal Protection Clause (CB 703)
- Zablocki (CB 709-713)
- Introduction to Rational Basis and Hybrid Review, (CB 743-750)

Assignment 23
Reflection and Review
ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS

Assignment 24
Framework for Enforcing the Fourteenth Amendment

- Introduction to the Power To Enforce the Reconstruction Amendments (CB 779-780)
- Introduction to Framework; Katzenbach (CB 780-786)
- City of Boerne (CB 786-793)

Assignment 25
Applications of Congress’s Section 5 Power

- Garrett (CB 794-801)
- Hibbs (CB 801-806)
- Coleman (CB 806-810)
- Shelby County (handout will be made available on Canvas)

WRAPPING UP

Assignment 26
Wrap-up

- Assignment to be announced.

Assignment 27
Review for Final Exam

- Every student must, by Sunday at noon, send in two questions you have about the material we have studied along with an attempt to answer it as best you can. (Please note, good faith compliance with this will be counted as part of your class participation.)