

FALL SEMESTER 2021 Constitutional Law I

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Class time: 10:00 am MWF room 208

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Course Overview:

Constitutional Law is one of the core courses in American law schools. That is because it essentially explains how the American legal system works. While you have taken core Common Law courses already and Civil Procedure (partially a form of Constitutional Law), the course you are taking now pulls all of this together as well as subjects you will take this year and in your third year. What that means is that our Constitution defines the rules of how the American legal system works. It defines the roles of the states (whose courts define, for the most part, the common law rules you studied last year, and whose legislatures have broad powers, known as police powers, to make and to enforce law governing a wide array of civic activities under our federal system) it defines the role of the national government which is a government of specific defined powers, and it describes the powers branches of the federal government and how they interact with each other.

In addition the Constitution lays out a body of civil rights and liberties that must be respected by all levels of government as part of the social compact entered into between the people of the United States and their government when the Constitution was ratified in 1789 and the later Amendments, most notably the Amendments following the Civil War.

This semester, in Constitutional Law I, we will begin our study with a case study of how the Constitution works, the role of Congress and the federal courts by taking a look at the issue of the summer—voting rights. To do that we will begin with the seminal case of Marbury v. Madison which established the doctrine of judicial review. Following that we will look at several of the key voting rights cases of the Supreme Court applying the tools of judicial review and also look to the mechanism of law making and constitutional authority through the lens of the Voting Rights Act of 1965.

After that case study we address the issues of state and national power, and the interaction and powers of the three branches of the federal government (the judiciary, Congress, and the President). Next semester, the second course in our learning, Constitutional Law II, will

continue our discussion of the powers of the federal government, but this time we will address the relation of those powers to the state's police powers. In addition we take a deep dive into the rights accorded persons within the United States under the Fourteenth Amendment and continue with an overview of the First Amendment, the most important of the Amendments to our democracy.

Speaking of the Supreme Court, our course will be driven by the decisions of that body. Supreme Court decisions are the interstitial fabric of what we call "the law of the Constitution". Put another way, what the Constitution means is what the Supreme Court says it means." Learning to read SCOTUS [Supreme Court of the United States] opinions is basic to getting the most out of this course.

So to get the most out of the course, understanding the Court, its opinions, and the personalities of the Justices over the years, students will have to devote a significant amount of time and effort to pour over materials designed for advanced and sophisticated practitioners, judges, and scholars of this body of law. For now, consider yourselves scholars of Constitutional Law. Dive in, because unless you have been in cave over the last several years, in particular over the last few years, with a constitutional crisis a real possibility, Constitutional Law is not only important, it is crucial.

Text: Levy Jackson Constitutional Law Cases and Materials SECOND EDITION. We will use this text during the first semester Con Law I course. The text will also be used during the first part of the Con Law II second semester course before we go to the Sullivan and Friedman First Amendment course book. More on that later.

Unless otherwise indicated, each reading assignment includes cases and related materials following the case. Classes will cover approximately 20 pages per session.

In-class presentation and discussions are crucial and hopefully compelling and challenging. Additional articles and suggested readings will also serve so as to supplement both. It is extremely important that students make a good faith effort to stay on top of the complex issues raised in the course.

As you might well assume by now the course as presently structured will carry a substantial reading load for the student, and it is expected that this will be handled in a professional manner. This is especially true for our distance learning format. Cases to which particular attention should be paid are noted by name in each section, but you will be responsible for all materials assigned.

Constitutional law cannot be learned through memorization, cramming, outlines, and other shortcuts. Such "shortcuts" can, at best, supplement proper study and preparation as the concepts are far too complicated, and the assessment in the course is based upon problem solving and not reproducing lists of concepts from the course.

Constitutional Law is not easy. But it may be the most important course in American law schools. It is definitely the most rewarding. Let's get started!

Policies and Procedures:

Class Attendance: The Student Rules and Regulations allow 5 absences in three hour courses.

An absence is defined as failure to attend class or failure to be present in class at the commencement of class. See Article III Section 9 Student Rules and Regulations. Students absent in excess of 5 classes will be subject to having their grades reduced up to two letter grades.

Class Preparation: Briefing of opinions and reading of all assigned materials as well as written summaries of supplementary materials when assigned is required for each class. All material must be based upon student's independent work, and should not be the product of commercial briefing materials, or other briefing materials not the product of the student's own work. Failure to meet this requirement is considered lack of preparation. Moreover, turning in materials that are not the independent work of a student will be subject to the Honor Code process [NOTE: PLEASE SEE HONOR PLEDGE BELOW. IT SHOULD ACCOMPANY ALL TURNED IN MATERIALS AND SIGNED ELECTRONICALLY AS APPLICABLE AND TURNED IN WITH THE ASSIGNMENT

This work is the product of my efforts alone. No one has assisted me in the preparation of this document and it was not obtained through any source including sources on the internet or other means. I understand that violation of this pledge is subject to the rules of the Honor system at Thurgood Marshall School of Law.

Signature.]

Students who are not prepared will be marked absent and such absence will be used to count total number of absences allowed under the Student Rules and Regulations.

[Addendum on briefing: Proper briefing generally conforms to the standards recognized in American law schools. In essence, a proper brief includes the issue, rule of law, facts and a

rationale. *Each feature of a proper brief must be thorough and designed to and succeeds in fully articulating the case and resolution by the examining court.*]

Briefing: Students will be periodically required to upload their briefs on TWEN under “Assignments Briefs and Quizzes” within 5 minute after the end of class. Briefs will be evaluated for compliance with the briefing responsibilities listed above. **In order to upload briefs in a timely manner for credit, students should plan on typing their briefs into their laptops for uploading.** Failure to turn in assigned briefs will result in that brief not being counted toward the brief total for the final grade.

Obviously, one cannot turn in a brief if one is not present. However, unless an absence is excused by the Law School Administration, a later submission will not be allowed.

Electronics: Because we are returning to in person classes students will be expected to refrain from use of electronic devices such as laptops, tablets an smart phones during classes. You should produce a hard copy of briefs for use during classes and be prepared to electronically submit your briefs when called upon following class.

Inside the classroom: Students should prepare to remain in class during the full 50 minutes of class and any additional time the professor may need to complete points raised in class. An assumption will be made that students leaving the classroom during class are attending to an emergency or a health problem. It will also be assumed that such emergency or health matters will require students’ attention for at least the remainder of the class period. **A “no return” policy, which means that students leaving class will not be allowed back into the classroom, will be enforced if needed to limit excessive class departures. In such case, leaving class will result in a student being considered absent for that period. Any concerns regarding this requirement may be discussed with the professor following the class period.**

Academic Requirements

Required Texts: Martin Levy, Craig Jackson CONSTITUTIONAL LAW, (2016) SECOND EDITION and supplement. Wolters Kluwer. **All students must have a personal copy of this book—no sharing. This book is available at the book store and online new, and used copies are available online, but make sure to order the Second Edition. Some venders may have rentals available as well.**

Examinations: There will be a midterm and a final exam. The first fall exam will be during the midterm period in October and will be a multiple choice examination. The final will be an essay and may include multiple choice questions as well. Instructions for electronic testing will be provided prior to the exam.

The first exam of will be worth 25% of that semester's preliminary grade and the final will be

worth 60%. 15% of the grade involves class projects such as quizzes, practice exams, essays, briefs and group work which may from time to time be assigned.

Quizzes, Essays, Briefs and other Projects etc.: As noted above, these will be a part of the final grade to the tune of 15% combined.

Quizzes will be pop up and in class. Like briefs, one cannot take a quiz if one is not in attendance and like briefs, absences must be excused by the Dean of Students Dean Mouton before a re-quiz will be administered.

Other projects: Reading assignments, practice exams and an occasional video will also make up a portion of the 15%.

Questions or Problems of the Week: At the beginning of each weekly Power Point will be a question or problem for students to consider and work on related to the materials to be covered that week. The questions or problems will be the focus of discussion at the end of the week or, if necessary at the beginning of the following week. Occasionally students will be required to upload their work and instructions for uploading will be provided at that time. These “other projects” will make up a portion of the 15%.

Office Hours: MW 11-12; 1-2. Friday 11-12; 1-4

Monday and Wednesday I will generally be available to discuss issues raised in class for up to 30 minutes following each class session. On line regular office hour visits will be online and students can reserve time during these periods by email at cjackson@tmslaw.tsu.edu. I will set up an online room for these meetings. **USE THESE OPPORTUNITIES TO GET CLARIFICATION AND UNDERSTANDING OF PRINCIPLES DISCUSSED IN CLASS.**

TITLE IX STATEMENT: Texas Southern University is committed to fostering a safe learning environment. As professor, one of my responsibilities is to help create a safe learning environment in class. Texas Southern University and Federal Regulations (Title IX) policy prohibit discrimination based on sex and this includes sexual harassment, sexual violence and misconduct, dating violence, domestic violence, and stalking. Texas Southern University understands that these incidents can undermine a student’s academic success, so Texas Southern University encourages students who have experienced sexual conduct prohibited by university policy to report these incidents when they happen to the University’s Title IX Coordinator or University Confidential Resource so that the student can get the help they may need.

It is my goal that you feel able to share information related to your life experiences in classroom discussions, in your written work, and in one-to-one meetings. I will seek to keep information you share private to the greatest extent possible. However, I also have a

mandatory responsibility to notify the University's Title IX Coordinator when I become aware of incidents of prohibited conduct that violate the university's Title IX policy.

Students may speak confidentially to the University Counseling Center. Please feel free to visit their website www.tsu.edu/ucc for more information about their services. Also, students may speak with the University's Title IX Coordinator by calling 713.313.1371 or emailing titleix@tsu.edu.

Campus Carry: As you know, the State of Texas has passed legislation permitting you to carry a concealed firearm on campus if you have a concealed license permit recognized by the State of Texas, subject to the rules and regulations of Texas Southern University's ("TSU's) Campus Carry Policy. Under TSU's Campus Carry Policy, I have the right to designate my office as a gun-free zone. I have elected to make my office a firearm-free space. Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun. (Conforme a la secció 30.06 Del Còdigo Penal (traspasar portando armas de fuego con licencia), personas con licencia bajo del sub-capitulo 411, Còdigo Del Gobierno (ley de portar armas), no deben entrar a esta propiedad portando un arma de fuego ocultada.). For a complete list of the gun-free zones on this campus and the rules governing campus carry at our institution, please visit Texas Southern University's website at <http://www.tsu.edu/>. Please note that entering a gun-free zone on campus with a firearm, including inside my office, could not only lead to criminal prosecution but suspension or expulsion from school.

THE COURSE. IMPORTANT NOTE REGARDING ASSIGNMENTS BELOW. WHERE ONLY THE SECTION IS LISTED, PLEASE READ THE ENTIRE SECTION. WHERE CASES ARE LISTED PLEASE READ THE ASSIGNED CASES AND THE MATERIAL FOLLOWING THE CASES UNLESS OTHERWISE INSTRUCTED.

Chapter 1. The Supreme Court and Judicial Review part 1

Week 1

Skills and Competencies Developed:

- An understanding of the three basic structural issues in Constitutional jurisprudence: Federalism, Separation of Powers, and Judicial Review.
- An understanding of the process, meaning, and criticisms of Judicial Review--the Supreme Court authority to review acts of other branches of the federal government and the states and the ability to recognize cases involving judicial review.
- An understanding of federal Judicial Power over other matters
- An understanding of the rules of standing and justiciability governing the use of Judicial

Power and the ability to spot issues and identify relevant factors that deal with standing and justiciability.

Before we start:

READ FOR MORE IN DEPTH UNDERSTANDING:

Rehnquist: Notion of a living Constitution (Course Materials on Web Page)

Jackson: Judicial Restraint and the Health Care Litigation (Course Materials on Webpage)

Klarman: How Great were those Marshall Court Opinions? (Course Materials) on Web Page.

Marbury v. Madison and the case of the Missing Commissions

1 Sections covered in chapter 1:

WEEK 1

I. Development of Judicial Review

A. Origins

Marbury v. Madison

Dred Scott v. Sandford (text page 657).

Cooper v. Aaron

BRIEF OR SUMMARIZE THE FOLLOWING CASES OR MATERIALS: Jackson Judicial Restraint article (under Web Links), Marbury v. Madison, Cooper v. Aaron, Dred Scott v. Sandford (text page 657).

Chapter 6 Case Study: Voting Rights and the Constitution

Skills and Competencies Developed:

To apply the doctrine of judicial review to one of the most important civil rights issues in current events, voting rights.

Students will have the opportunity to think critically about voting rights issues from the national and state level using constitutional law principles.

Students will also have the opportunity to critique the use of Congressional authority to enforce voting rights through the Fourteenth and Fifteenth Amendments.

WEEK 2

IV. Enforcement Legislation

A. Post-Reconstruction Civil Rights Laws

1. Enforcing the Civil War Amendments

B. Reach of the Enforcement Power

1. The Right to Vote and the Fourteenth and Fifteenth Amendments

South Carolina v. Katzenbach

Rome v. United States

City of Boerne v. Flores

United States v. Morrison

Tennessee v. Lane

2. Congressional Protection of Voting Rights

Northwest Austin Municipal Utility District Number One v. Holder

Shelby County v. Holder

Brnovich v. Democratic National Committee (in 2021 supplement)

BRIEF THE FOLLOWING CASES: *Shelby County*, *Brnovich v. Democratic National Committee*

Chapter 1 Judicial Review Part 2

WEEK 3

D. Supremacy and State Courts

1. State Supreme Court decisions-federal matters

2. State Supreme Court Decisions--Adequate and Independent Grounds

BRIEF OR SUMMARIZE THE FOLLOWING CASES OR MATERIALS *Martin v. Hunter's Lease*, *Michigan v. Long*

WEEK 4

II. Jurisdictional Limitations on the Scope of Judicial Power

C. Discretionary Abstention

2. Political Questions (Pages 210-227 in Chapter 1 and *Common Cause v. Rucho* in Supplement);

BRIEF OR SUMMARIZE THE FOLLOWING CASES OR MATERIALS: *Baker v. Carr*, *Common Cause v. Rucho* (2019 decision in Supplement), *Powell v. McCormack*, *Nixon v. United States*..

Chapter 3. The President, Executive Authority, and Separation of Powers

WEEKS 5-6

Skills and Competencies Developed:

- The ability to analyze conflicts between the President and Congress to use authority where the specific authority of either branch is not clearly stated, or where the division of power between the two branches over a specific subject is not clear in the Constitution. Of particular importance are the application of these skills to the following areas

- Foreign Policy
- The War on Terror
- The use of the armed forces
- An understanding of the concept of Separation of Powers under the Constitution and in particular the veto power.
- An understanding of the role of the Executive to “take care that the laws are faithfully executed.”
- The appropriate ways in which executive privilege can be used under the Constitution
- Discretionary Abstention

WEEK 5

- **Presidential Power: Foreign and Domestic Affairs**

United States v. Curtiss-Wright Corp

Youngstown Sheet & Tube v. Sawyer (The Steel Seizure Case)

Dames & Moore v. Regan

BRIEF THE FOLLOWING CASE: *Youngstown Sheet and Tube v. Sawyer*.

- **Presidential Power: Military Affairs: The President and Use of Armed Forces** (note materials pages 565-572)

WEEK 6

- **Presidential Power: Separation of Powers**

Legislative Veto

INS v. Chadha

Executive Officers

Bowsher v. Synar

Morrison v. Olson

Free Enterprise Fund v. Public Company Accounting Oversight Board

NLRB v. Noel Canning

Watergate and Executive Privilege

United States v. Nixon

Clinton v. Jones

Cheney v. U.S. District Court

BRIEF THE FOLLOWING CASES: *Free Enterprise Fund v. Public Company Accounting Oversight Board*, *NLRB v. Noel Canning*.

Chapter 1 [Continued] weeks 7-9

WEEK 7

II. Jurisdictional limitations on the Scope of Judicial Power

A. Congressional/Statutory

B. Article III “Case or Controversy”.

1. The Constitutional Requirements
2. Advisory Opinions
3. Measuring Controversy/Adversity
4. Standing: Citizen and Taxpayer suits
5. Measuring Adversity
6. Standing: Citizen and Taxpayer Suits

WEEK 7

7. In House Rules and Contemporary Judicial Self Governance (through *Arizona State Legislature v. Arizona Independent Redistricting Commission et al*)

WEEK 8

7. (cont'd) In House Rules and Contemporary Judicial Self-Governance (*begin with Alabama Legislative Black Caucus et al v. Alabama et al*)

8. Standing and Federalism (and Supplement at pages 6-7)

9. Article III Minimums: How minimum is minimum (and *Trump v. Hawaii* at Supplement pages 7-8).

10. Article III Minimums: Can Congress “Create” Standing?

11. Article III Minimums: “Injury in Fact”.

C. Discretionary Abstention/The Power to decline Jurisdiction

BRIEF THE FOLLOWING *Ex Parte McCardle*, *Warth v. Seldin*, *Hein v. Freedom From Religion Foundation*, *Allen v. Wright*, *Daimler Chrysler v. Cuno*, *Clapper v. Amnesty International*, *Hollingsworth v. Perry*, *Lujan v. Defenders of Wildlife*,.

Chapter 2. Congress and Federal Authority

Weeks 9 --14

Skills and Competencies Developed:

- An understanding of the constitutional derivation of Congressional and federal authority through the Tenth Amendment and the impact of that amendment on the states

- An understanding of the tensions between state authority and federal authority and the method of line drawing between those two spheres of authority and the positions of various members of the Court, both past and present
 - The ability to use the case development of the Commerce Clause to define the proper role of Congress in regulating commerce in contrast to state authority over internal matters
 - Comprehension of the Taxing and Spending, Treaty and Foreign Affairs powers from a federalist perspective.
 - Competency in the use of state power to regulate internal matters having to do with commerce.
- Authority to Legislate: National Powers in Federal Union
 - Lesson in Nation Building
 - McCulloch v. Maryland
 - Other Aspects
 - MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (page 8 supplement)
- C. The Modern Anti-federalist Revival

CASES TO BRIEF: *McCulloch v. Maryland*, *Murphy v. National Collegiate Athletic Association* (page 8 supplement), *US Term Limits v. Thornton*

II. The Commerce Power

WEEK 9

B. the Indirect-Direct Test: Laissez-Faire and Limitation of National Power.

C. Substantial Effect: Expansion of Federal Authority

WEEK 10

E. Drawing on the expansive Commerce Power to Protect Civil Rights

F. Limits on the Commerce Power in the Modern Era

[Also Read: Jackson, *The Limiting Principle Strategy and the New Deal Commerce Clause*, 15 J. Const. Law 1 (2012) (Course Materials).]

WEEK 11

G. State Autonomy; Federalism and the 10th Amendment

H. The Rehnquist Court fetish—Dual Sovereignty

BRIEF THE FOLLOWING CASES: *United States v. Knight*, *Schechter v. Dagenhart*; *NLRB v. Jones and Laughlin Steel*, *Wickard v. Filburn*, *Heart of Atlanta Motel v. United States*, *United States v. Lopez*, *United States v. Morrison*, *Rapanos v. U.S. Army Corps of Engineers* (Supplement). *National League of Cities*, *Garcia v. San Antonio Metropolitan Transit Authority*, *New York v. United States*, *Printz v. United States*, *Central Virginia Community College v. Katz*, *National Federation of Independent Business v. Sebelius* (page 350).

WEEK 12

III. Other National Powers

A. The Taxing and Spending Powers

1. The Taxing Power
2. The Spending Power
3. Conditional Spending

WEEK 13

B. The War and Treaty Powers